

Microsoft

Un Istoric al Comportamentului Anticoncurential
si al Prejudicierii Consumatorilor

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I. INTRODUCERE

La 15 Ianuarie 2009, Comisia Europeana a emis o noua Declaratie de Obiectiuni catre Microsoft, subliniind "punctul de vedere preliminar al Comisiei referitor la faptul ca vanzarea impreuna a browser-ului web Internet Explorer cu sistemul de operare dominant Windows incalca regulile Tratatului CE privind abuzul de pozitie dominanta (Articolul 82)" si "distorsioneaza competitia reala dintre browserele web concurente."¹

Recenta Declaratie de Obiectiuni a Comisiei Europene valideaza necesitatea actuala si urgenta de a adresa practicile Microsoft care afecteaza libertatea Internetului, libertatea de alegere a consumatorilor si competitia in general. Acest articol ofera un scurt istoric al comportamentului ilegal al Microsoft si demonstreaza, in lumina tacticilor anticoncurentiale continue si indelungate ale Microsoft, ca preocuparile Comisiei sunt pe deplin justificate.²

* * *

"Aceasta campanie anti-trust va fi data uitarii. Nu am schimbat deloc practicile companiei noastre."

— Bill Gates, fondator Microsoft si apoi CEO (1995) ³

Timp de peste doua decenii, Microsoft s-a angajat intr-o campanie bine planificata si foarte reusita de a-si proteja si extinde monopolul. Microsoft a facut, in mod repetat, propuneri de alocare a pietei catre competitorii sai si a utilizat un sir larg de alte tactici anticoncurentiale si nelegale pentru a elimina potentialii rivali, inclusiv clauze extrem de restrictive, design agresiv si inselaciune intentionata.

Microsoft detine mai multe produse de monopol, inclusiv sistemul de operare Windows si pachetul de aplicatii Office.⁴ Aceste monopoluri sunt extrem de profitabile: Microsoft genereaza

¹ Press Release, European Commission, Antitrust: Commission Confirms Sending a Statement of Objections to Microsoft on the Tying of Internet Explorer to Windows (Jan. 17, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/15>.

² For a similar view by Microsoft's only significant rival in the browser market, see Mitchell Baker, Chairperson, Mozilla Foundation, The European Commission and Microsoft, Mitchell's Blog, Feb. 6, 2009,

<http://blog.lizardwrangler.com/2009/02/06/the-european-commission-and-microsoft/> (reflecting on the EC's most recent Statement of Objections and noting that "Microsoft's business practices have fundamentally diminished (in fact, came very close to eliminating) competition, choice and innovation in how people access the Internet").

³ Government Exhibit 940, Handwritten Notes of Intel's Steven McGeady, *United States v. Microsoft*, 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232), available at <http://www.usdoj.gov/atr/cases/exhibits/940.pdf>; see also Transcript of the Direct Examination of Intel's Steven McGeady, Nov. 10, 1998, at 18:8–20:6, *United States v. Microsoft*, 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232), available at <http://cyber.law.harvard.edu/msdoj/trial.html> ("November 10, a.m." link) (testifying that Mr. Gates further indicated the one thing Microsoft might change was its document retention policies).

⁴ See *United States v. Microsoft Corp.*, 253 F.3d 34, 54-58 (D.C. Cir. 2001); see also Competition on the Internet: Hearing of the House Competition Policy and Antitrust Laws Task Force of the House Judiciary Committee, 110th Cong. 49 (2008) (remarks of Bradford L. Smith, Senior Vice President, General Counsel and Corporate Secretary, Microsoft Corporation) (acknowledging that as of July 2008, "we know that we have a dominant position, for example, in the market for personal computer operating systems").

peste 60 miliarde USD in fiecare an, in mare parte din vanzarile Windows si Office ⁵. Marja profitului este de 77% si 65% pentru aceste doua produse de monopol ⁶. De-a lungul anilor, Microsoft a cultivat si a extins cu atentie barierele de intrare, pentru a proteja aceste monopoluri.

Conform explicatiilor date de D.C. Circuit (Curtea de Apel US - District of Columbia) in discutiile privind barierele de intrare menite sa protejeze Windows:

*Aceasta bariera - "bariera de intrare a aplicatiilor" - este generata de doua caracteristici ale pietei software: (1) majoritatea consumatorilor prefera sistemele de operare pentru care a fost scris deja un numar mare de aplicatii; si (2) majoritatea dezvoltatorilor prefera sa scrie pentru sisteme de operare care au deja o masa substantiala de consumatori. Aceasta situatie, "oul sau gaina", asigura faptul ca aplicatiile vor continua sa fie scrise pentru deja dominantul Windows, ceea ce-i va asigura in schimb o continuare a preferintei consumatorilor in fata altor sisteme de operare."*⁷

Intr-adevar, Microsoft a castigat initial monopolul Office in scopul bine-definit de a intari bariera aplicatiilor care protejeaza Windows.

Asa cum unul din directorii Microsoft a scris intr-un document intern:

*Daca detinem "francizele" cheie, construite pe sistemul de operare, vom largi dramatic "santul" care protejeaza afacerea sistemului de operare....Speram sa facem multi bani din aceste francize, dar si mai important este ca acestea sa protejeze venitul pentru drepturi de autor per PC.... Iar succesul acelor afaceri va ajuta la cresterea oportunitatilor pentru o politica de preturi mai inteleapta in viitor."*⁸

Microsoft a recunoscut, totusi, ca nu va fi suficienta numai detinerea Office si a altor aplicatii. In special, Microsoft a vazut o posibila si serioasa amenintare sub forma asa-numitelor produse "middleware". Produsele middleware sunt produse software care, ca si Windows, expun interfete de programare a aplicatiilor ("API") care pot fi folosite de dezvoltatorii software pentru scrierea altor aplicatii. Microsoft a realizat ca, in cazul in care un produs middleware ar castiga o popularitate larga, "dezvoltatorii ar putea incepe sa se bazeze pe API expuse de produsele middleware pentru rutinele de baza, in loc sa utilizeze setul API inclus in Windows" ⁹. De aceea, Microsoft a inlaturat amenintarile produselor middleware, cum ar fi browser-ul web Netscape.

⁵ See Microsoft Corp., Annual Report (Form 10-K), at 20, 23, 26 (Jul. 31, 2008), available at <http://idea.sec.gov/Archives/edgar/data/789019/000119312508162768/d10k.htm>.

⁶ See id. at 23, 26.

⁷ United States v. Microsoft Corp., 253 F.3d 34, 55 (D.C. Cir. 2001) (internal citations omitted).

⁸ Novell, Inc. v. Microsoft Corp., No. JFM-05-1087, 2005 U.S. Dist. LEXIS 11520, at *6 (D. Md. June 10, 2005) (quoting email from Jeff Raikes at Microsoft to Warren Buffett at Berkshire Hathaway (Aug. 17, 1997)).

⁹ United States v. Microsoft Corp., 253 F.3d 34, 53 (D.C. Cir. 2001) ("If middleware were written for multiple operating systems, its impact could be even greater.... Ultimately, if developers could write applications relying exclusively on APIs exposed by middleware, their applications would run on any operating system on which the middleware was also present.").

Desi Microsoft a platit, de-a lungul anilor, multe reglementari de mai multe milioane de dolari pentru incalcarea normelor antitrust, aceste reglementari au reprezentat un pret mic pentru o sursa atat de mare de venituri. Comportamentul anterior al Microsoft demonstreaza abilitatea si intentia acestuia de a se angaja in actiuni nelegale, in detrimentul consumatorilor, iar constientizarea acestui istoric are valoare astazi, pentru a intelege practicile si strategiile actuale de afaceri ale companiei Microsoft.

II. ISTORICUL COMPORTAMENTULUI ANTICONCURRENTIAL AL MICROSOFT

In aceasta sectiune sunt trecute in revista un numar de actiuni din trecut ale companiei Microsoft menite sa stinga potentialele amenintari concurentiale. Acestea includ: a) campania Microsoft impotriva DR-DOS; b) taxele de licenta anticoncurentiale per procesor; c) represaliile impotriva IBM; d) amenintarile si represaliile impotriva Intel; e) eliminarea Word Perfect; f) programul amagitor WISE software; g) eliminarea Netscape; h) inselaciunea fata de dezvoltatorii Java; i) eliminarea media playerilor rivali si j) campania impotriva sistemelor de operare server rivale.

Desi sunt de neinteles, aceste exemple din trecut ale abaterilor Microsoft ilustreaza clar tipurile de actiuni luate de Microsoft pentru a-si proteja si extinde monopolul.

A. Campania Microsoft pentru a distruge DR-DOS

"Trebuie sa ne asiguram ca Windows 3.1 ruleaza numai pe MS DOS."

—David Cole, Microsoft Senior Vice-President¹⁰

"Abordarea noastra va fi sa detectam dr [DOS] 6 si sa refuzam incarcarea. Mesajul de eroare ar trebui sa fie ceva de genul 'Invalid device driver interface.' "

—Phillip Barrett, Microsoft Windows Development Manager¹¹

La inceputul anilor 1980, Microsoft a achizitionat o versiune de inceput a unui sistem standard de operare cu disc ("DOS"), ceea ce a devenit cunoscut ca MS-DOS¹². La acel moment, un numar de sisteme de operare rivale ofereau facilitati pe care sistemele de operare

¹⁰ Consolidated Statement of Facts in Support of Its Responses to Motions for Summary Judgment by Microsoft Corporation ¶ 246, *Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d 1295 (D. Utah 1999) (No. 2:96-CV-645 B).

¹¹ *Id.* ¶ 251.

¹² See *Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d 1295, 1298 (D. Utah 1999). The disk operating system was one of the earliest operating systems developed for computers, controlling the computer's interaction with other software through a command-based standard. See *id.* at 1297.

Microsoft nu le-au oferit decat peste cativa ani mai tarziu, cum ar fi capacitatea de a rula programe multiple in acelasi timp¹³. In acel moment, sistemele de operare abia incepusera trecerea de la interfata bazata pe linia de comanda la interfata grafica¹⁴. Microsoft a dezvoltat o interfata grafica denumita Windows¹⁵. Primele versiuni Windows nu permiteau efectiv functionarea calculatorului - erau mai mult un invelis in jurul programului de baza DOS, care determina functionarea calculatorului¹⁶. Initial, Windows a imbratisat standardele DOS, ceea ce insemna ca Windows putea sa ruleze pe orice alt sistem DOS, inclusiv DR-DOS, pricipalul rival Microsoft de pe piata DOS¹⁷.

Aceasta interoperabilitate initiala a devenit cunoscuta ca parte a de acum clasicei strategii Microsoft: "preia, extinde si elimina", utilizata ulterior cu succes de catre Microsoft in domeniul multor alte produse¹⁸. Aceasta strategie are trei faze: In prima, Microsoft "imbratiseaza" un produs concurent, prin dezvoltari software sau implementarea unor standarde care sunt compatibile cu produsul concurent¹⁹. Apoi, Microsoft isi "extinde" oferta prin crearea unor caracteristici sau standarde interoperabile numai cu tehnologiile proprietare Microsoft²⁰. In final, atunci cand produsele software sau standardele Microsoft au fost adoptate la scara larga, Microsoft a "eliminat" competitia, prin renuntarea la orice motive ramase privind compatibilitatea²¹.

In cazul DR-DOS, decizia initiala a Microsoft de a face ca Windows sa fie interoperabil, a ajutat la promovarea unei adoptari rapide a invelisului Windows. Totusi, aceasta insemna, in acelasi timp, ca multi consumatori sa aleaga superiorul DR-DOS, in defavoarea MS-DOS. Bil Gates, fondatorul Microsoft si CEO, a scris intr-un email catre vice-presedintele de atunci:

¹³ See Jon Pepper, Like MS-DOS, Only Better, SOFTWARE MAG., Oct. 1990, http://findarticles.com/p/articles/mi_m0SMG/is_n12_v10/ai_9560823.

¹⁴ See *Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d 1295, 1298 (D. Utah 1999).

¹⁵ See id.

¹⁶ See id.

¹⁷ See id. at 1303.

¹⁸ See Direct Examination of Steven McGeady, Vice President of Intel, at 53–54, *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232), available at <http://cyber.law.harvard.edu/msdoj/transcripts/1109b.doc> (testifying that a Microsoft executive used the phrase “embrace, extend and extinguish” in a 1995 meeting to describe Microsoft’s strategies towards its competitors).

¹⁹ See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34, 74–75 (D.C. Cir. 2001) (“Microsoft, too, agreed to promote the Java technologies—or so it seemed.... Microsoft made a large investment of engineering resources to develop a high-performance [Java implementation].” (internal quotations omitted)).

²⁰ See Findings of Fact ¶¶ 387–90, *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999) (98-1232) [hereinafter “Findings of Fact”], available at <http://www.usdoj.gov/atr/cases/f3800/msjudge.pdf>. Microsoft’s Thomas Reardon urged, “[W]e should just quietly grow j++ [Microsoft’s [Java] developer tool] share and assume that people will take more advantage of our classes without ever realizing they are building win32-only java app[lication]s.” Id. ¶ 394.

²¹ See id. ¶ 390 (“Far from being the unintended consequence of an attempt to help Java developers more easily develop high-performing applications, incompatibility was the intended result of Microsoft’s efforts.”).

*"Mina noastra de aur DOS se ingusteaza, iar costurile sar in aer - in primul rand datorita preturilor scazute, actiunilor IBM si DR-DOS. ... Cred ca oamenii subestimeaza impactul pe care DR-DOS l-a avut asupra noastra in termenii preturilor"*²².

Microsoft a "extins" Windows prin efectuarea de modificari, astfel incat Windows sa nu mai interopereze fara probleme cu DR-DOS²³. De exemplu, Microsoft a proiectat Windows astfel incat sa afiseze un mesaj de eroare amenintator daca ar fi fost utilizat in combinatie cu DR-DOS²⁴. Microsoft a raspandit informatii false despre DR-DOS, "astfel incat oamenii sa ia decizii impotriva acestuia, fara a cunoaste detalii sau fapte"²⁵. In anul 1994, Microsoft a inlaturat efectiv DR-DOS ca amenintare pentru sistemul propriu de operare al Microsoft²⁶.

B. Taxele anticoncurențiale de licența Microsoft per procesor

"O alta perspectiva [DR-DOS] este infranta prin acordul DOS per-procesor."

*—Un angajat Microsoft din domeniul vanzarilor, intr-un email intern*²⁷

Majoritatea sistemelor de operare sunt achizitionate de producatorii originali de echipamente ("OEM"), cum ar fi Dell si HP. Producatorii de echipamente (OEM) preinstaleaza sistemele de operare pe calculatoarele produse, inainte de a le vinde catre consumatori. La sfarsitul anilor 1980, Microsoft a inceput sa ceara OEM sa ii plateasca o "taxa de licența per procesor", pentru fiecare calculator expediat, indiferent daca avea instalat sau nu Windows pe calculator²⁸. Acest aranjament a oferit OEM un motiv puternic sa nu plateasca si sa nu instaleze sisteme de operare concurente.

²² Graham Lea, Unsealed Caldera Documents Expose MS' DR-DOS Moves, THE REGISTER UK, May 24, 1999, http://www.theregister.co.uk/1999/05/24/unsealed_caldera_documents_expose_ms/.

²³ See Caldera, Inc. v. Microsoft Corp., 72 F. Supp. 2d 1295, 1303 (D. Utah 1999). Internal discussions at Microsoft revealed a strategy to make Windows 3.1 incompatible with DR-DOS. Id. at 1313 (citing an email in which two Microsoft top executives instructed employees to "make sure [DR-DOS] has problems in the future").

²⁴ See id. at 1311. Microsoft included a "Readme" text file in Windows 3.1 that stated that "running Microsoft Windows 3.1 with an operating system other than MS-DOS could cause unexpected results or poor performance." Kenneth C. Baseman, Frederick R. Warren-Boulton, and Glenn A. Woroch, Microsoft Plays Hardball: The Use of Exclusionary Pricing and Technical Incompatibility to Maintain Monopoly Power in Markets for Operating System Software, ANTITRUST BULL., Summer 1995, at 13, available at <http://elsa.berkeley.edu/~woroch/hardball.pdf>; see also Andrew Schulman, The Caldera v. Microsoft Dossier, O'REILLY NETWORK, Feb. 7, 2000, <http://www.oreillynet.com/pub/a/network/2000/02/07/schulman.html> (Microsoft "allegedly leveraged its Windows monopoly to crush" DR-DOS by "including intentionally misleading product pre-announcements, vaporware and FUD ('fear, uncertainty, and doubt') announcements, exclusionary licensing, beta-test blacklists, building deliberate incompatibilities into Windows to hinder it from running with DR-DOS, and trying to create the misperception that DR-DOS couldn't work properly with Windows.").

²⁵ Caldera, Inc. v. Microsoft Corp., 72 F. Supp. 2d 1295, 1303 (D. Utah 1999). For example, Microsoft executives began conducting interviews with trade press to highlight the issue. Microsoft Vice President Brad Silverberg asked rhetorically in one interview: "Why take the risk with all the compatibility problems that DRDOS has had?" See Consolidated Statement of Facts in Support of Its Responses to Motions for Summary Judgment by Microsoft Corporation 383, Caldera, Inc. v. Microsoft Corp., 72 F. Supp. 2d 1295 (D. Utah 1999) (No. 2:96-CV-645 B).

²⁶ See Caldera, Inc. v. Microsoft Corp., 72 F. Supp. 2d 1295, 1304 (D. Utah 1999). Caldera, the owner of DRDOS, filed suit against Microsoft in 1996 and, after the district court denied Microsoft's motions for summary judgment, Microsoft settled the case for an undisclosed amount. See Andrew Schulman, The Caldera v. Microsoft Dossier, O'REILLY NETWORK, Feb. 7, 2000, <http://www.oreillynet.com/pub/a/network/2000/02/07/schulman.html>.

²⁷ Dan Goodin, Microsoft Defends DOS Licensing, CNET NEWS, May 27, 1999, <http://www.news.com/2100-1001-226467.html>.

²⁸ See United States v. Microsoft Corp., 56 F.3d 1448, 1451 (D.C. Cir. 1995); Complaint ¶ 26, United States v. Microsoft Corp., No. 94-1564 (D.D.C. July 15, 1994), available at <http://www.usdoj.gov/atr/cases/f0000/0046.htm>.

In anul 1994, Departamentul de Justitie al SUA ("DOJ") a intocmit un pachet antitrust impotriva conduitei provocate de Microsoft, care a avut ca rezultat un consimtamant decret prin care Microsoft a fost de acord sa inceteze utilizarea taxelor de licenta per procesor ²⁹. Dar practicile anticoncurențiale se dovediseră deja eficiente prin reducerea cotei competitorilor, în special prin asocierea cu alte acțiuni Microsoft dirijate împotriva DR-DOS ³⁰. Consimțământul Decret al Departamentului de Justitie a cautat, de asemenea, să impună o ameliorare pe viitor, prin interzicerea Microsoft de a mai include alte produse în acum-dominantul sistem de operare Windows. Decretul a inclus totuși o clauză care a permis Microsoft să dezvolte produse "integrate", iar Microsoft a luat poziție ulterior, precizând că pe baza acestui decret ar putea expedia "un sandwich cu sunca în aceeași cutie cu un PC ce conține Windows 95 preinstalat" și "să ceară OEM să ia întregul pachet" ³¹.

C. Represaliile și Discriminarea prin Pret a Microsoft față de IBM

"Atat timp cât IBM se preocupă în primul rând de ofertele competitive și preferă să concureze dur cu noi în domeniile critice, trebuie să fim onesti unii cu alții și să admitem că astfel de priorități nu vor conduce la cea mai încântătoare relație...."

—Joachim Kempin, Microsoft Senior Vice-President ³²

De asemenea, la jumătatea anilor 1990, Microsoft a făcut o serie de pași pentru a pedepsi IBM pentru promovarea unui sistem de operare concurent și a unui pachet personal cu aplicații de producție. La acel moment, în plus față de dezvoltarea unui software concurent, IBM era de asemenea un OEM major, vânzător de calculatoare personale. Ca atare, IBM era un client important al Microsoft. Microsoft a atacat IBM pentru dezvoltarea unor produse software concurente, prin practicarea unor preturi de licență mari, discriminatorii față de IBM, întârzierea negocierii licențelor cu IBM pentru Windows 95 și refuzul suportului tehnic ³³. Microsoft a informat conducerea IBM că va înceta să trateze IBM mai puțin favorabil decât pe alți OEM

²⁹ See Final Judgment, *United States v. Microsoft Corp.*, No. 94-1564, 1995 U.S. Dist. LEXIS 20533, at *8 (D.D.C. Aug. 21, 1995), available at <http://www.usdoj.gov/atr/cases/f0000/0047.htm>. Section § IV(C) of the court's order prohibits Microsoft from entering into per processor licenses. *Id.*

³⁰ See *United States v. Microsoft Corp.*, 56 F.3d 1448, 1451–52 (D.C. Cir. 1995); Complaint ¶ 36(b)-(c), *United States v. Microsoft Corp.*, No. 94-1564 (D.D.C. July 15, 1994), available at <http://www.usdoj.gov/atr/cases/f0000/0046.htm> (describing how these licensing practices deprived competitors of sales).

³¹ Reply Brief of Petitioner *United States of America* at 5, *United States v. Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998) (No. 94-1564), available at <http://www.usdoj.gov/atr/cases/f1200/1277.htm>.

³² Findings of Fact, *supra* note 20, ¶ 126.

³³ See *id.* ¶ 116. Microsoft refused to license Windows 95 to IBM under the guise of an audit of IBM's past royalty payments. *Id.* ¶ 122. Joachim Kempin, Microsoft's executive in charge of sales to OEMs, offered to close the audit if IBM agreed not to bundle its office productivity suite with its PCs. *Id.* ¶ 124. IBM refused and it was not granted a license to pre-install Windows 95 until fifteen minutes before the start of Microsoft's official product launch. *Id.* ¶ 125.

numai daca IBM va inceta sa concureze ofertele de programe Microsoft ³⁴. Aceasta a dus la o scadere cu 180 milioane \$ a veniturilor IBM³⁵ si la alte daune pe care IBM le-a imputat Microsoft, iar Microsoft a stabilit pretentiile (plata daunelor) la 775 milioane \$ ³⁶.

D. Boicotul Colectiv Organizat de Microsoft impotriva Intel

"Intel trebuie sa accepte ca atunci cand avem o solutie care ne place, aceasta este decenta si este solutia castigatoare."

—Bill Gates, fondator Microsoft si apoi CEO³⁷

Microsoft a utilizat o abordare asemanatoare in 1995, atunci cand a fortat Intel sa renunte la dezvoltarea NSP (Procesarea Semnalului Nativ), un set de instructiuni care ar fi permis procesorului unui calculator sa suporte direct semnalul audio, video si grafica 3D. Intel este un producator de microprocesoare care sunt achizitionate de OEM pentru a le utiliza in fabricarea de calculatoare. Cu NSP, Intel a sperat sa creeze o platforma pentru aplicatii multimedia care sa ruleze pe orice sistem de operare, nu numai pe Windows. Microsoft a vazut astfel in NSP o amenintare serioasa pentru monopolul Windows. Pentru a stopa NSP, Microsoft a anuntat Intel ca va crea un sistem Windows incompatibil cu chip-urile Intel, daca Intel nu va abandona aceasta tehnologie, iar Microsoft a fortat clientii OEM sa boicoteze microprocesoarele Intel³⁸. Bill Gates a raportat catre unul din directorii Microsoft: "Intel crede ca tinem toti fabricantii in asteptare cu frisonul NSP"³⁹. In cele din urma, Intel a cedat la presiunea Microsoft si a abandonat eforturile de dezvoltare a NSP ⁴⁰.

La scurt timp dupa aceea, Microsoft a pus din nou presiune pe Intel. De data aceasta, Microsoft a dorit ca Intel sa inceteze sprijinul fata de Sun Microsystems in promovarea tehnologiei Java. Intr-un email din 1997, Bill Gates scria:

³⁴ Id. ¶ 126.

³⁵ Id. ¶ 128.

³⁶ See Press Release, Microsoft, Microsoft and IBM Resolve Antitrust Issues (July 1, 2005), available at <http://www.microsoft.com/presspass/press/2005/jul05/07-01msibmsettlepr.msp>.

³⁷ Government Exhibit 276, Email from Bill Gates, United States v. Microsoft, 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232), available at <http://www.usdoj.gov/atr/cases/exhibits/276.pdf>.

³⁸ See Findings of Fact, supra note 20, ¶¶ 101–02.

³⁹ Id. ¶ 103.

⁴⁰ See id. ¶ 101. Microsoft's leverage over the OEMs forced Intel to abandon its software development ambitions. In relating the success of the OEM boycott to Microsoft executives, Gates added, "we should let OEMs know that some of the new software work Intel is doing is OK. If Intel is not sticking totally to its part of the deal let me know." Id. ¶ 103.

*"Daca Intel are o problema reala pentru ca noi sprijinim AMD (rivalul Intel in fabricatia de microprocesoare), atunci va trebui sa inceteze modul in care sprijina Java Multimedia."*⁴¹

Asa cum a descoperit mai tarziu curtea districtuala, campania Microsoft pentru a determina *"Intel sa inceteze sprijinul fata de Sun in crearea de Java Multimedia API, in special unele care ruleaza bine ... pe Windows"*, a fost una de succes.⁴²

E. Eliminarea Word Perfect de catre Microsoft

"Daca detinem 'francizele' cheie, construite pe sistemul de operare, vom largi dramatic 'santul' care protejeaza afacerea sistemului de operare....Speram sa facem multi bani din aceste francize, dar si mai important este ca acestea sa protejeze venitul pentru drepturi de autor per PC.

*—Jeff Raikes, Microsoft President*⁴³

"Am decis sa nu publicam aceste dezvoltari [Windows 95 user interface]. Trebuie sa asteptam pana vom gasi un mod de a realiza un nivel inalt de integrare, care va fi greu de atins de similarele Notes sau WordPerfect, si care va oferi un real avantaj pentru Office... Fara acesta, nu putem concura cu Lotus si WordPerfect/Novell. "

*—Bill Gates, fondator Microsoft, iar apoi CEO*⁴⁴

Incepand din 1994, Microsoft a lansat o campanie anticoncurentiala pentru a inlatura WordPerfect, o aplicatie de birou detinuta de Novell, concurenta a pachetului Microsoft Office. Aplicatiile de birou (ce includ procesarea de text, programe de calcul tabelar sau aplicatii pentru prezentare) sunt unele din cele mai importante grupuri de aplicatii si contribuie substantial la crearea barierei de intrare a aplicatiilor, necesara pentru a proteja monopolul sistemului de operare Microsoft.

Atunci cand Microsoft a inceput aceasta campanie, WordPerfect se bucura de o larga popularitate. Pentru a elimina acest competitor, a refuzat informatii tehnice cruciale despre Windows, mergand pana la extinderea interfetei de programare a aplicatiilor Windows (API) -

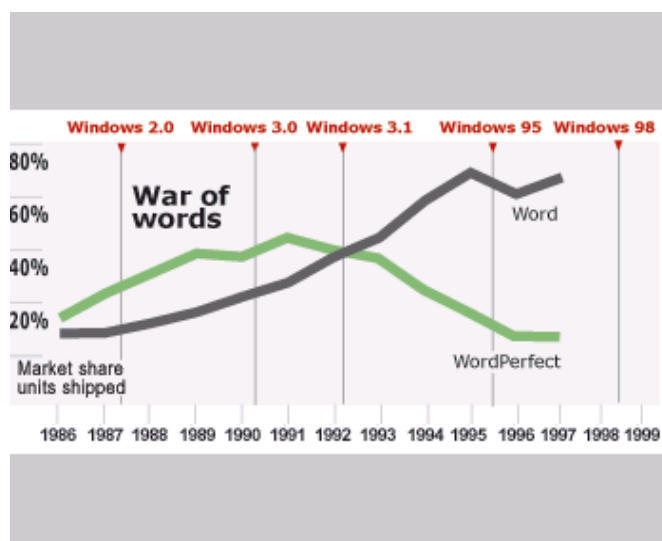
⁴¹ Id. ¶ 406.

⁴² See id. ¶ 406.

⁴³ Novell, Inc. v. Microsoft Corp., No. JFM-05-1087, 2005 U.S. Dist. LEXIS 11520, at *6 (D. Md. June 10, 2005) (quoting email from Jeff Raikes at Microsoft to Warren Buffett at Berkshire Hathaway (Aug. 17, 1997)).

⁴⁴ Transcript of the Deposition of Microsoft Chairman Bill Gates, Sept. 2, 1998 at 662:7-13, United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232), available at <http://www.washingtonpost.com/wp-srv/business/longterm/microsoft/documents/gates0902p4.htm>; see also Dave Methvin, Novell Hasn't Forgotten Microsoft's Jab At WordPerfect, INFO. WK., Mar. 19, 2008, http://www.informationweek.com/blog/main/archives/2008/03/novell_hasnt_fo.html.

setul de comenzi utilizate de un program pentru comunicarea cu sistemul de operare, pentru a se asigura ca WordPerfect nu poate lucra fara probleme cu sistemul de operare Microsoft⁴⁵. Microsoft si-a folosit puterea de monopol pentru a controla standardele din industrie, solicitand astfel WordPerfect sa implementeze tehnologii proprietare, pentru a nu risca incompatibilitatea cu sistemul Windows⁴⁶. Si a exclus WordPerfect din principalele canale de distributie pentru aplicatiile de birou⁴⁷. De exemplu, Microsoft a interzis OEM sa preinstaleze produse Novell si a oferit reduceri pentru a refuza vanzarea aplicatiilor de birou ale altor dezvoltatori⁴⁸. Ca parte a strategiei Microsoft pentru eliminarea Novell, "o persoana din conducerea de varf a Microsoft a scris ca Microsoft ar trebui sa-i 'zambeasca' firmei Novell, aratand in mod fals intentia Microsoft de a ajuta clientii comuni ai celor doua companii sa integreze variatele produse ale acestora, in timp ce, apasa de fapt pe tragaci si ucidea compania Novell⁴⁹. Tacticile Microsoft au avut, din nou, foarte mare succes, asa cum se poate vedea in graficul de mai jos⁵⁰.



Microsoft a eliminat WordPerfect si a castigat monopolul pachetelor cu aplicatii de birou, indeplinindu-si obiectivul de a "larga in mod semnificativ canalul" care protejeaza monopolul profitabil al Windows.

⁴⁵ See Complaint ¶¶ 56, 69–72, *Novell, Inc. v. Microsoft Corp.*, No. JFM-05-1087, 2005 U.S. Dist. LEXIS 11520 (D. Md. June 10, 2005).

⁴⁶ See id. ¶¶ 84–94.

⁴⁷ See id. ¶ 112.

⁴⁸ See id. ¶ 117.

⁴⁹ See id. ¶ 55.

⁵⁰ Fred Vogelstein, *Search and Destroy*, FORTUNE, May 2, 2005, at 74, available at http://money.cnn.com/magazines/fortune/fortune_archive/2005/05/02/8258478/index.htm (showing “Microsoft’s Battles” market share graphics). In 1993, WordPerfect accounted for more than 40% of word processing software sales, with annual sales of \$700 million. See Complaint ¶ 150, *Novell, Inc. v. Microsoft Corp.*, No. JFM-05-1087, 2005 U.S. Dist. LEXIS 11520 (D. Md. June 10, 2005). By 1996, WordPerfect’s share of sales had dropped to less than 10%, with annual sales of only \$200 million. See id.

F. Programul amagitor Microsoft WISE Software

"Va rog sa imi dati un bun motiv pentru care ar trebui sa luam macar in considerare [inzeestrarea tehnologiei Microsoft astfel incat sa poata lucra pe sisteme concurente]. (Sugestie: un raspuns bun trebuie sa se refere la a face mai multi bani si a ajuta la distrugerea Unix, Sybase sau Oracle)".

—James Allchin, Microsoft Senior Vice-President⁵¹

In 1994, Microsoft a adoptat un comportament inselator similar pentru a combate cresterea popularitatii sistemului de operare Unix in randul retelelor corporative. Microsoft a trebuit sa aleaga intre "sa-l iubeasca pana la moarte (sa investeasca multi bani si sa-l omoare incet) sau sa il ignore (sa nu investeasca nici un ban, in speranta ca va muri repede)" ⁵². Microsoft a ales initial "sa investeasca in interoperabilitatea" cu UNIX⁵³, prin promovarea WISE (Windows Interface Source Environment), un program menit sa permita dezvoltatorilor sa scrie programe in interfetele aplicatiilor Windows si sa ruleze programele rezultate pe sisteme Macintosh sau UNIX⁵⁴.

Planul Microsoft a avut succes. Pana in anul 1996, Microsoft a atras o cota larga din piata corporatista. Microsoft a facut atunci urmatorul pas din agenda standard "preia, extinde si elimina", si a extins interfata de programare a aplicatiilor Windows fara sa-si copieze modificarile in programul WISE. Aceasta insemna ca dezvoltatorii nu mai puteau porta cu usurinta aplicatii pe Unix sau Macintosh⁵⁵. Cu toate acestea, in public, Microsoft a continuat sa dea de inteles dezvoltatorilor ca acest program putea fi utilizat cu succes pe mai multe platforme⁵⁶. In 1997, Bill Gates a remarcat intr-un email intern ca acei dezvoltatori care au scris aplicatii pentru software-ul disponibil la acel moment fara sa realizeze ca nu va porta toate API pe UNIX si Macintosh "au fost pacaliti"⁵⁷. A avut dreptate: Microsoft a stins cu succes

⁵¹ Steve Lohr, In an Antitrust Suit, a Tiny Ex-Partner Is Taking Aim at Microsoft, N.Y. TIMES, May 31, 1999, <http://query.nytimes.com/gst/fullpage.html?res=940DE7D81530F932A05756C0A96F958260>.

⁵² Case COMP/C-3/37.792 Microsoft, Commission Decision Mar. 24, 2004, ¶ 575, available at <http://ec.europa.eu/comm/competition/antitrust/cases/decisions/37792/en.pdf> (citing Microsoft internal e-mail from Mark Ryland to Jim Allchin, dated April 18, 1996) [hereinafter "EC Decision"].

⁵³ Id.

⁵⁴ See Bristol Tech., Inc. v. Microsoft Corp., 114 F. Supp. 2d 59, 64–65 (D. Conn. 2000); John Lettice, How Microsoft Used the WISE Trojan Horse Against Unix, THE REGISTER, July 18, 1999, http://www.theregister.co.uk/1999/07/18/analysis_how_ms_used/ ("Microsoft had originally identified WISE as a mechanism which would help it get [Windows] NT established in corporate networks. In the early days of the OS Microsoft needed to accept that there would be co-existence (NT's market share was then vanishingly small), so WISE was useful. It also acted as a mechanism for controlling that coexistence. Microsoft then saw Sun-backed efforts such as WABI and PWI as real threats that could wrest control of Windows APIs from it, so it favoured WISE as an 'official,' controllable version.").

⁵⁵ See Bristol Tech., Inc. v. Microsoft Corp., 114 F. Supp. 2d 59, 73–74 (D. Conn. 2000). Internal Microsoft communications explained that "[t]he risk of going cross-platform with our server technology" – i.e., permitting developers to port application seamlessly between Windows NT and UNIX or Macintosh – "is that we might undermine the market for NT." Id. at 71.

⁵⁶ See id. at 72–74. Although Microsoft had internally decided to limit the software source code, in 1996 Bill Gates delivered a keynote address at the UNIX Expo meant to ensure confidence in the WISE program and stressing that the WISE developers had the "very latest Windows API technology." Id. at 73.

⁵⁷ Id. at 74.

amenintarea multi-platforma pentru sistemul sau de operare monopolist. Intr-un proces ulterior antitrust, Curtea Districtuala a numit aceasta miscare o tactica "bait-and-switch" clasica (momeste si schimba)⁵⁸.

G. Eliminarea Netscape de catre Microsoft

"Microsoft a propus initial companiei Netscape ca, in loc sa concureze intre ei, cele doua companii ar trebui sa formeze o conspiratie nelegala pentru a-si imparti piata. In urma refuzului venit din partea Netscape, Microsoft a utilizat apoi monopolul Windows pentru a "taia sursa de aer a companiei Netscape" - conform proprilor cuvinte ale reprezentantilor Microsoft.

—Joel Klein, Asistent Procuror General (citandu-l pe Paul Maritz, pe atunci Vice-Presedinte Microsoft pentru Grupul de Aplicatii)⁵⁹

In 1996, Microsoft a initiat o serie de pasi pentru a elimina amenintarea pe care o reprezenta browserul web Netscape pentru sistemul sau de operare. Browserele web sunt produse "middleware", ceea ce inseamna ca acestea expun API astfel incat dezvoltatorii sa le poata utiliza in scrierea altor aplicatii. Microsoft a realizat ca daca dezvoltatorii ar incepe sa utilizeze API cu browserul Netscape in loc de API cu Windows, consumatorii ar putea avea acces la aplicatiile de care au nevoie de pe orice calculator care are instalat browserul Netscape, si nu vor trebui sa se limiteze la calculatoare care ruleaza pe Windows.

Microsoft a cautat mai intai sa trateze aceasta amenintare printr-o propunere directa de alocare a pietei: Microsoft a anuntat Netscape ca, in cazul in care acesta inceteaza sa expuna API, Microsoft ii va oferi un ajutor special in dezvoltarea unor aplicatii software cu "valoare-adauga" care sa se bazeze pe tehnologii proprietare Microsoft⁶⁰. Netscape a respins propunerea Microsoft.

Microsoft a raspuns atunci luand masuri pentru "a taia sursa de aer a companiei Netscape"⁶¹. Si-a dezvoltat propriul browser web, Internet Explorer, iar apoi a legat din punct de

⁵⁸ Id. at 83. This judgment was later vacated after the parties settled and Microsoft paid an undisclosed sum. Microsoft Corp. v. Bristol Tech., Inc., 250 F.3d 152, 153–54 (2d Cir. 2001) (noting that the settlement agreement was reached in part with Bristol's promise that it would not oppose Microsoft's motion to vacate the district court's order).

⁵⁹ Press Release, Department of Justice, Statement by Assistant Attorney General Joel I. Klein: Filing of Antitrust Suit Against Microsoft at 2 (May 18, 1998), available at http://www.usdoj.gov/atr/public/press_releases/1998/1770.htm; see also Plaintiffs' Joint Proposed Findings of Fact ¶ 91.3.1, United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232), available at <http://www.usdoj.gov/atr/cases/f2600/2613-1.htm> [hereinafter "Plaintiffs' Joint Proposed Findings of Fact"].

⁶⁰ See Findings of Fact, supra note 20, ¶¶ 81–83. At a meeting between Microsoft and Netscape executives, Microsoft made it clear that if Netscape attempted to expose its own APIs rather than build off of Microsoft's platform, "Microsoft would view Netscape as a competitor, not a partner." Id. ¶ 83.

⁶¹ Plaintiffs' Joint Proposed Findings of Fact, supra note 49, ¶ 91.3.1, United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232), available at <http://www.usdoj.gov/atr/cases/f2600/2613-1.htm>.

vedere tehnologic si contractual Internet Explorer la sistemul de operare Windows⁶². Pentru a se asigura ca numai Internet Explorer functioneaza bine pe Windows, Microsoft a proiectat Windows astfel incat "incercarea de a rula oricare alt browser sa fie doar o experienta zbuciumata", asa cum a scris Vice-Presedintele Brad Chase⁶³. Pentru a asigura accesul exclusiv al Internet Explorer la cele mai importante canale de distributie ale browserelor, Microsoft a folosit, de asemenea, un set extins de contracte exclusive cu OEM, vanzatori independenti de software (ISV), Apple si altii⁶⁴.

Microsoft a dus o campanie foarte agresiva pentru a-i inchide companiei Netscape toate canalele majore de distributie. De exemplu, atunci cand Apple s-a opus distribuirii browserului web Microsoft Internet Explorer cu sistemul de operare Mac OS, Microsoft a amenintat ca va inceta sa mai furnizeze Microsoft Office pentru Mac OS⁶⁵. Asa cum a remarcat curtea districtuala, *"90% din utilizatorii sistemului Mac OS foloseau aplicatii de birou Microsoft Mac Office. In 1997, afacerea se afla intr-un declin abrupt.... Atunci cand Microsoft, pe fondul acestei atmosfere, a anuntat ca inceteaza sa mai dezvolte noi versiuni ale Mac Office, un numar mare de vanzatori independenti de software, clienti, dezvoltatori si investitori au interpretat acest anunt ca pe o notificare a decesului companiei Apple"*⁶⁶.

Importanta pachetului Office pentru Apple nu a trecut neobservata de catre Microsoft. Asa cum a explicat Ben Waldman (pe atunci manager de program), intr-un email catre Bill Gates Greg Maffei (CFO): *"Amenintarea de a renunta la Mac Office 97 este, cu siguranta, cel mai puternic punct de negociere pe care il avem, deoarece prin aceasta am prejudicia considerabil si imediat compania Apple"*⁶⁷. Ori, asa cum a scris unul din Vice-Presedintii Microsoft intr-un email catre Ben Waldman, "MacOffice este asul perfect ce poate fi utilizat" pentru a convinge Apple sa *"dezavantajeze material Netscape"*⁶⁸. Apple a capitulat si a inceput sa preinstaleze Internet Explorer ca browser implicit (si exclusiv) pe statiile Mac. Apple a fost chiar de acord sa oblige proprii angajati sa foloseasca Internet Explorer⁶⁹.

⁶² See United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001).

⁶³ Findings of Fact, supra note 20, ¶ 160. Microsoft did this by placing code specific to web browsing in the same files as code that provided operating system functionality. Id. ¶ 161. The district court found that "Microsoft's primary motivation for this action was to ensure that the deletion of any file containing browser-specific routines would also delete vital operating system routines and thus cripple Windows 95." Id. ¶ 164.

⁶⁴ The district court found that "no other distribution channel for browsing software even approaches the efficiency of OEM pre-installation and IAP bundling." Id. ¶ 145. Microsoft, with the exception of a few months in 1997, never allowed OEMs to ship Windows 95 or Windows 98 without Internet Explorer. Id. ¶ 202. By 1998, Netscape was only being shipped on four of the sixty OEM sub-channels. Id. ¶ 239.

⁶⁵ See id. ¶¶ 341-51.

⁶⁶ Id. ¶ 344.

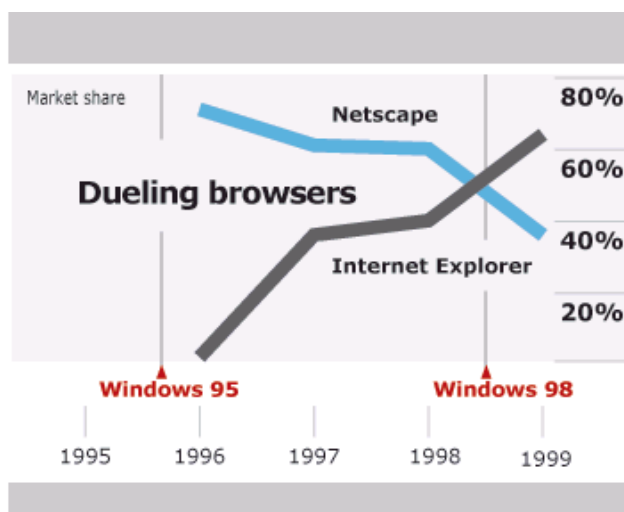
⁶⁷ Id. ¶ 346.

⁶⁸ Government Exhibit 268, Email from Don Bradford, United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232), available at <http://www.usdoj.gov/atr/cases/exhibits/268.pdf>.

⁶⁹ Findings of Fact, supra note 20, ¶ 352.

Odata ce Microsoft, prin aceste tactici, a realizat o distributie pe scara larga a propriului browser, a trecut apoi la "extinderea" standardelor (customizarea) pentru HTML (HyperText Markup Language) si CSS (Cascading StyleSheets) pentru a se asigura ca utilizatorii se vor baza pe browserul web propriu Microsoft ⁷⁰. Microsoft a introdus, de asemenea, tehnologia ActiveX, care permite rulara in cadrul browserului web a unor programe scrise mai mult in stilul programelor de calculator traditionale, dar care sa functioneze numai cu sistemul de operare Microsoft⁷¹.

Conform graficului de mai jos, campania Microsoft a avut foarte mare succes ⁷².



In anul 1998, directorii Microsoft erau increzatori ca "batalia browserelor se apropie de sfarsit" si ca au indepartat amenintarea pentru Monopolul Windows⁷³. Asa cum a explicat Kumar Mehta, de la Microsoft, *"Ne-am propus acum 2 ani, in aceasta misiune, sa nu lasam Netscape sa dicteze standardele si sa controleze browserul (API). Toate dovezile arata ca nu au reusit."* ⁷⁴ Aceasta conduita a reprezentat miezul procesului din 1998 intentat Microsoft de catre Departamentul de Justitie si 20 de state SUA⁷⁵. Curtea districtuala a considerat ca Microsoft a incalcat legile antitrust in deciziile sale de a mentine monopolul sistemului de operare impotriva amenintarii aduse de Netscape, iar Curtea de Apel a Districtului Columbia a sustinut aceasta

⁷⁰ See Paul Festa, IE 5.5 Angers Web Standards Advocates, CNET NEWS, July 13, 2000, <http://www.news.com/2100-1023-243144.html>.

⁷¹ See Java Gets a Run for Its Money, CNET NEWS, Mar. 12, 1996, <http://www.news.com/2100-1023-207269.html>.

⁷² Fred Vogelstein, Search and Destroy, FORTUNE, May 2, 2005, at 74, available at http://money.cnn.com/magazines/fortune/fortune_archive/2005/05/02/8258478/index.htm (showing "Microsoft's Battles" market share graphics).

⁷³ Findings of Fact, supra note 20, ¶ 377.

⁷⁴ Id. ¶ 377.

⁷⁵ See United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001). It also served as the basis for a private lawsuit brought by AOL Time Warner, Netscape's parent company, which Microsoft settled for \$750 million. See Press Release, Microsoft Corp., AOL Time Warner and Microsoft Agree to Collaborate on Digital Media Initiatives and Settle Pending Litigation (May 29, 2003), available at <http://www.microsoft.com/presspass/press/2003/may03/05-29msaolsettlementpr.mspx>.

concluzie⁷⁶. Insa, din pacate, asa cum au notat comentatori renumiti, cazul browserelor US s-a incheiat cu un consimtamant decret, care a fost total inefficient pentru repunerea in drepturi a competitiei, fiind in favoarea actiunilor nelegale ale Microsoft⁷⁷.

H. Incercarea Microsoft de a elimina Java

"Distrugerea multi-platformei Java prin poluarea crescuta a pietei Java."

—Microsoft VJ98 - Propuneri privind preturile si unitatea de stocare.⁷⁸

"Trebuie sa crestem in liniste cota j++ si sa speram ca oamenii vor avea mai multe avantaje din clasele noastre, fara sa realizeze macar ca acestea sunt aplicatii java construite numai pe win32."

—Thomas Reardon, Microsoft⁷⁹

In 1996, Microsoft si-a indreptat atentia catre tehnologiile Java middleware ale Sun Microsystems, considerate ca o noua amenintare in formare pentru sistemul sau de operare⁸⁰. In acea perioada, Sun Microsystems isi promova tehnologiile Java cu sloganul "Odata scris poate fi rulat oriunde", pentru a ilustra beneficiile multi-platforma ale scrierii de aplicatii Java⁸¹.

⁷⁶ See United States v. Microsoft Corp., 87 F. Supp. 2d 30, 37–51 (D.D.C. 2000); see also United States v. Microsoft Corp., 253 F.3d 34, 61–62, 64–66, 70–72, and 73–74 (D.C. Cir. 2001) (finding that Microsoft's OEM license restrictions, its tying of Internet Explorer to Windows, and its exclusive dealing contracts with Internet Access Providers ("IAPs"), Independent Software Vendors ("ISVs"), and Apple Computer were all anticompetitive actions that violated the Sherman Act).

⁷⁷ See, e.g., California Group's Report on Remedial Effectiveness at 15 (Aug. 30, 2007), New York v. Microsoft Corp., 224 F. Supp. 2d 76 (D.D.C. 2002) (No. 98-1232), available at http://www.naag.org/assets/files/pdf/antitrust.2007-08-0_Filed_CA_Group_Effectiveness_Report.pdf. ("There can be little doubt that Microsoft's market power remains undiminished and that key provisions of the Final Judgment – those relating to middleware – have had little or no competitively significant impact. One can fairly ask what impact the Final Judgment has had on Microsoft – apart from the cost of developing the still delayed Technical Documentation – that would cause it to refrain from engaging in similar conduct with respect to whatever competitive threat might arise in the future. Consequently, the California Group respectfully submits, Microsoft's commingling violation has not been effectively addressed, Microsoft remains in possession of the fruits of its violation, and the competitive conditions antedating Microsoft's anticompetitive conduct have not been restored."); Tunney Act Comments of Professor Einer Elhauge on the Proposed Settlement Between the United States and Microsoft at 7 (Jan. 27, 2002), United States v. Microsoft, 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232), available at http://www.usdoj.gov/atr/cases/ms_tuncom/major/mte-00027209.pdf (criticizing the decree and noting that it would do "nothing effective about technological foreclosure"); U.S. v. Microsoft: The Experts, The View From Outside: Assessing the Wisdom of a Breakup, NEW YORK TIMES, Apr. 30, 2000, available at <http://query.nytimes.com/gst/fullpage.html?res=9502EFDA1439F933A05757C0A9669C8B63> (quoting Steven Salop, Professor at Georgetown University Law Center and consultant to the DOJ in the first action against Microsoft, in discussing the Microsoft decree: "Conduct remedies are particularly difficult to enforce against a company bent on exploiting any loopholes"); Carl Shapiro, Microsoft: Remedial Failure, ANTITRUST LAW JOURNAL, at 18 (forthcoming), available at <http://faculty.haas.berkeley.edu/shapiro/microsoft2008.pdf> ("Unfortunately, the Final Judgment [in United States v. Microsoft] has done little, if anything, to lower the entry barriers facing these threats [to Windows].").

⁷⁸ Government Exhibit 259, United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232), available at <http://www.usdoj.gov/atr/cases/exhibits/259.pdf>.

⁷⁹ Government Exhibit 1332, United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232), available at <http://www.usdoj.gov/atr/cases/exhibits/1332.pdf>.

⁸⁰ See United States v. Microsoft Corp., 253 F.3d 34, 75–78 (D.C. Cir. 2001) (finding that Microsoft's exclusionary agreements with ISVs, its deceptive conduct as it related to Java developer tools, and its threats to Intel to stop supporting Java were all anticompetitive measures taken to protect Microsoft's operating system monopoly). Sun brought a private antitrust action against Microsoft, which Microsoft settled for \$700 million. Press Release, Microsoft, Microsoft and Sun Microsystems Enter Broad Cooperation Agreement; Settle Outstanding Litigation (Apr. 2, 2004), available at <http://www.microsoft.com/presspass/press/2004/apr04/04-02SunAgreementPR.mspx>.

⁸¹ See, e.g., JavaSoft Ships Java 1.0, AllBusiness.com, Jan. 23, 1996, available at <http://www.allbusiness.com/technology/software-services-applications/7190655-1.html>.

Microsoft a recunoscut imediat Java ca o clasa de mijloc si s-a mobilizat pentru eliminarea acestei amenintari. Ca de obicei, Microsoft a imbratisat mai intai Java prin obtinerea licentei tehnologiei de la Sun Microsystems si a investit in dezvoltarea propriilor instrumente de dezvoltare Java⁸². Microsoft si-a extins instrumentele de dezvoltare Java cu propriile tehnologii proprietare⁸³. De fapt, Microsoft a mers atat de departe incat a indus in eroare dezvoltatorii Java, facandu-i sa creada ca instrumentele Java ale Microsoft erau independente de platforma⁸⁴. Intr-un email intern, inginerul software Ben Slivka a instruit echipa Microsoft Visual Studio: *"Nu incurajati noile clase Java multi-platforma; mai ales, nu sprijiniti scrierea/rularea implementarilor Win32 pe scara larga. Nu incurajati fragmentarea spatiului Java classlib..."*⁸⁵

Microsoft a incheiat, de asemenea, acorduri exclusive pentru a promova versiunea sa "poluata" de Java si, asa cum a fost amintit anterior, Microsoft a amenintat Intel sa nu mai suporte standardele Java ale firmei Sun Microsystems⁸⁶. Asa cum a explicat mai tarziu Curtea de Apel a Districtului Columbia, *"Paul Maritz de la Microsoft i-a spus unui director de la Intel ca dezvoltarea de catre Intel a unui software compatibil cu standardele Java ale firmei Sun a fost la fel de daunatoare Microsoft, cum ar fi pentru Intel sprijinul acordat de catre Microsoft producatorilor de procesoare non-Intel. ... Microsoft a amenintat Intel ca, daca nu va inceta sprijinul acordat Sun privind interfata multimedia, atunci Microsoft va refuza sa mai distribuie tehnologiile Intel in acelasi pachet cu Windows"*.⁸⁷ Intel a capitulat si a renuntat la sprijinul acordat Java.

Intregul plan Microsoft, de a neutraliza Java ca amenintare middleware, a avut un mare succes⁸⁸. Asa cum a explicat *A Patra Curte de Apel* intr-un proces privat intentat ulterior de Sun Microsystems:

La inceput, Microsoft a "imbratisat" tehnologia Java prin licentierea de catre Sun a dreptului de a utiliza Tehnologia Java pentru a dezvolta si a distribui produse compatibile. In al doilea rand, Microsoft "a extins" platforma Java prin dezvoltarea de incompatibilitati strategice

⁸² See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34, 74–75 (D.C. Cir. 2001) ("Microsoft, too, agreed to promote the Java technologies—or so it seemed.... Microsoft made a large investment of engineering resources to develop a high-performance [Java implementation]." (internal quotations omitted)).

⁸³ See id. at 76 ("Microsoft's Java implementation included ... certain keywords and compiler directives that could only be executed properly by Microsoft's version of the Java runtime environment for Windows ... [and produced] Java applications that [ran] only on Windows." (internal quotations omitted)); id. at 76–77 ("Microsoft's ultimate objective was to thwart Java's threat to Microsoft's monopoly in the market for operating systems. One Microsoft document, for example, states as a strategic goal: 'Kill cross-platform Java by grow[ing] the polluted Java market.'").

⁸⁴ See id. at 76 (observing that "developers who relied upon Microsoft's public commitment to cooperate with Sun and who used Microsoft's tools to develop what Microsoft led them to believe were cross-platform applications ended up producing applications that would run only on the Windows operating system").

⁸⁵ Government Exhibit 518, Email from Ben Slivka, *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232), available at <http://www.usdoj.gov/atr/cases/exhibits/518.pdf>.

⁸⁶ See Findings of Fact, supra note 20, ¶¶ 396, 401.

⁸⁷ *United States v. Microsoft Corp.*, 253 F.3d 34, 77 (D.C. Cir. 2001) (quoting Findings of Fact, supra note 20, ¶¶ 404–05).

⁸⁸ See Alex Iskold, *Java: A Retrospective*, READWRITEWEB, Oct. 19, 2007, http://www.readwriteweb.com/archives/java_a_retrospective.php.

*in motorul de executie Java si instrumentele sale de dezvoltare. ... In al treilea rand, Microsoft si-a utilizat canalele de distributie pentru a inunda piata cu propria versiune de tehnologie Java, in incercarea de a "pirata Tehnologia Java si a o transforma intr-un mediu de programare si executie proprietar Microsoft."*⁸⁹

I. Eliminarea de catre Microsoft a Media Playerelor Rivale

RealNetworks "este ca si Netscape. Singura diferenta este ca noi avem sansa sa incepem lupta mai devreme in acest joc."

*—Robert Muglia, Microsoft Senior Vice-President*⁹⁰

In 1997, Microsoft a recunoscut ca ia nastere o noua amenintare pentru sistemul sau de operare monopolist si profitabil, reprezentata de media playere. Ca si browserele web, media playerele sunt produse din clasa de mijloc care expun API dezvoltatorilor de software⁹¹. Temandu-se ca media playerele ar putea suporta aplicatii multimedia pe orice sistem de operare, Microsoft a actionat pentru a elimina aceasta amenintare.

Consecvent tacticilor anterioare, Microsoft a incorporat mai intai primul software media player, proiectat de RealNetworks, anuntand un acord de colaborare in domeniul difuzarii audio/video pe web (streaming media).⁹² Acest acord a incurajat RealNetworks sa realizeze un media player dependent de Windows, in schimbul unei compensari din partea Microsoft⁹³. Asa cum Robert Muglia a informat Directorul pentru Exploatare de la RealNetworks, "toti cei care au concurat impotriva Microsoft privind sistemul de operare, au pierdut"⁹⁴. Atunci cand RealNetworks a continuat sa rivalizeze cu Microsoft⁹⁵, acesta a devenit tot mai agresiv in actiunile sale. In special, ca in cazul browserului, Microsoft a atasat propriul media player la Windows.⁹⁶

⁸⁹ In re Microsoft Corp. Antitrust Litig., 333 F.3d 517, 523 (4th Cir. 2003).

⁹⁰ Government Exhibit 1576, Email from Jim Durkin, United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232), available at <http://www.usdoj.gov/atr/cases/exhibits/1576.pdf>.

⁹¹ See Findings of Fact, supra note 20, ¶ 78. "RealNetworks' streaming software presents a set of APIs that competes for developer attention with APIs exposed by the streaming technologies in Microsoft's DirectX." Id. ¶ 111.

⁹² See EC Decision, supra note 52, ¶ 305; see also Findings of Fact, supra note 20, ¶ 111 (finding that Microsoft viewed RealNetworks' streaming software "as competitive technology that could develop into part of a middleware layer that could, in turn, become broad and widespread enough to weaken the applications barrier to entry"); id. ¶ 114 ("Still, Microsoft's intentions toward RealNetworks in 1997 ... show that decision-makers at Microsoft were willing to invest a large amount of cash and other resources into securing the agreement of other companies to halt software development that exhibited discernible potential to weaken the applications barrier").

⁹³ Id. 113.

⁹⁴ Plaintiffs' Joint Proposed Findings of Fact, supra note 49, ¶ 84.2 ii.

⁹⁵ See Findings of Fact, supra note 20, ¶ 114 (noting that RealNetworks planned to continue developing competing streaming technologies).

⁹⁶ See EC Decision, supra note 52, ¶ 844. The EC Decision noted that "[t]hrough tying [Windows media player ("WMP")] with Windows, Microsoft ensure[d] that WMP is as ubiquitous on PCs worldwide as Windows is. No other distribution mechanism or combination of

Cu toate acestea, RealPlayer nu a reprezentat singura amenintare multimedia pentru Microsoft. Microsoft a actionat separat pentru a elimina un alt competitor in spatiul multimedia, compania Burst.com Inc. ("Burst"), un dezvoltator de software video⁹⁷. Iar in anul 1997, Microsoft a tintit QuickTime, software-ul de media authoring creat de Apple, o alta amenintare pentru monopolul sistemului de operare Microsoft. La fel ca player-ul multimedia RealNetworks, tehnologia multimedia creata de Apple rula pe mai multe platforme si expunea API, spre satisfactia dezvoltatorilor⁹⁸. Microsoft a vazut produsul Apple ca pe o amenintare serioasa pentru bariera de intrare a aplicatiilor, ca urmare a expertizei Apple pe piata sistemelor de operare.⁹⁹ Microsoft a revenit astfel la strategia standard, incercand mai intai sa imparta piata cu Apple, oferindu-se sa nu intre in afacerea de authoring daca Apple opreste dezvoltarea versiunii QuickTime pentru Windows 95¹⁰⁰. Atunci cand Apple a refuzat sa participe la masinaria nelegala a Windows, acesta din urma a amenintat ca va face ca produsele sale sa fie incompatibile cu produsele Apple, daca Apple nu renunta la munca pentru noul produs QuickTime¹⁰¹. Unul din directorii Microsoft a comunicat companiei Apple ca, daca doreste sa supravietuiasca intr-o piata a software-ului multimedia mai vasta, va trebui sa renunte la propria oferta multimedia¹⁰². Din nou, Apple a refuzat oferta Microsoft¹⁰³.

Cand Microsoft a incercat pentru prima data sa includa Windows Media Player in sistemul sau de operare, Microsoft a lansat si o versiune media player pentru sistemul de operare Mac al Apple. In perioada in care Windows Media Player concura cu RealPlayer si Apple QuickTime,

distribution mechanisms attain[ed] this universal distribution." Id. The EC further found that "[t]hrough tying WMP, Microsoft thus create[d] a [network effect] reminiscent of the one that propelled Windows to its quasi-monopoly position in the client PC operating system market." Id. ¶ 882. RealNetworks later filed an antitrust suit against Microsoft, which Microsoft settled for \$761 million. Press Release, Microsoft, Microsoft and RealNetworks Resolve Antitrust Case and Announce Digital Music and Games Partnership (Oct. 11, 2005), available at <http://www.microsoft.com/presspass/press/2005/oct05/10-11MSRealPR.msp>.

⁹⁷ See Complaint, *Burst.com, Inc. v. Microsoft Corp.*, No. JFM-02-cv-2952, MDL Docket No. 1332 (D. Md. dismissed Mar. 11, 2005). Microsoft changed published Windows APIs that Burst's products were using and told third parties that Burst's products did not work well on Windows. Id. 29. It then provided Burst with a series of purported solutions to the problem Microsoft had intentionally created, knowing that those solutions were ineffective. Id. Burst brought suit, but its suit was frustrated by Microsoft's destruction of key documents. See Eriq Gardner, *First Bill, Now Steve*, IP LAW & BUS., Apr. 2006, <http://www.burst.com/new/newsevents/articles/IP%20Law&Business.htm>. Burst introduced evidence of Microsoft's spoliation of evidence, including a 1995 "do-not-save-e-mail directive" and a "30-Day E-Mail Destruction Rule" promulgated by Jim Allchin, Microsoft Group Vice President of platforms. Id. Allchin's directive told employees, "Do not archive your mail. Do not be foolish. 30 days." Id. The suit was settled for a reported \$60 million just before a hearing on Burst's spoliation claim. Id.; see also Robert Cringely, *Bursted Not Busted: Burst Really Did Win Its Case With Microsoft and Here's Why*, I, CRINGELY, Mar. 17, 2005, http://www.pbs.org/cringely/pulpit/2005/pulpit_20050317_000846.html (positing that "Microsoft's immediate motivation to settle was the spoliation hearing that could have exposed the company to older cases being reopened based on the possibility that Microsoft had deliberately destroyed evidence").

⁹⁸ See Findings of Fact, supra note 20, ¶ 78.

⁹⁹ See id. ¶ 104. The district court found that "QuickTime competes with Microsoft's own multimedia technologies, including Microsoft's multimedia APIs (called 'DirectX') and its media player. Because QuickTime is cross-platform middleware, Microsoft perceives it as a potential threat to the applications barrier to entry." Id. ¶ 104.

¹⁰⁰ See id. ¶ 105. The specific market allocation proposals discussed herein are only the ones that have come to light through subsequent litigation, and it is highly probable that Microsoft has made market allocation proposals to other nascent competitors that simply have not come to light, or at least have not come to public attention.

¹⁰¹ See id. ¶ 106.

¹⁰² Plaintiffs' Joint Proposed Findings of Fact, supra note 49, ¶ 79.2 ii.

¹⁰³ See Findings of Fact, supra note 20, ¶ 109. As the district court noted, "Microsoft's motivation was its desire to limit as much as possible the development of multimedia content that would run cross-platform." Id. 110.

Microsoft a lansat frecvent noi versiuni ale produsului sau pentru Mac. Pana in anul 2003 a devenit dominant, prin atragerea mai multor utilizatori decat RealNetworks si Apple¹⁰⁴. Dupa anul 2003, Microsoft nu a mai lansat o alta versiune pentru Mac a media player-ului sau¹⁰⁵. In schimb, Microsoft a continuat sa promita ca va lansa o noua versiune a Media Player-ului pentru Mac pana in anul 2006, cand a anuntat ca a sfarsit proiectul¹⁰⁶.

J. Campania Microsoft impotriva Sistemelor de operare Server rivale

"Sun, Oracle si Netscape incearca sa impuna un nou model de exploatare, aproape centralizata. Acestia sunt constienti ca Microsoft detine o dominatie imensa asupra platformei desktop, astfel incat toti doresc sa descopere rapid ceva cat mai valoros si sa cheltuie daca este posibil in afara zonei desktop si mai mult pentru server, unde pot stabili preturi superioare si sa impuna propriile oferte pentru platforma."

—Aaron Contorer, Microsoft C++ General Manager¹⁰⁷

"Ceea ce incercam sa facem este sa folosim propriul server de control pentru a crea noi protocoale si sa blocam mai ales Sun si Oracle."

- Bill Gates, Microsoft¹⁰⁸

De la jumatatea pana la sfarsitul anilor 1990, retelele de calculatoare au crescut in viteza, iar Microsoft a simtit amenintarea tehnologiei server-based computing, de exploatare a aplicatiilor la nivel centralizat, pentru principalul sau sistem de operare. Fiind hotarat sa preintampine orice posibila competitie, Microsoft a decis ca trebuie sa adauge sistemele de operare server la "culoarul" care inconjoara monopolul sistemului de operare Windows¹⁰⁹. Pentru a dobandi cai de acces pe aceasta piata, Microsoft a imbratisat standardele pentru file-and print sharing (partajare fisiere si tiparire), administrarea utilizatorilor si verificarea identitatii, astfel

¹⁰⁴ Kevin J. O'Brien, As EU Debated, Microsoft Took Market Share, INT'L HERALD TRIB., Sept. 16, 2007, <http://www.iht.com/articles/2007/09/16/news/msft17.php>.

¹⁰⁵ See Ina Fried, Music Stops for Mac Windows Media Player, CNET NEWS, Jan. 12, 2006, http://www.news.com/Music-stops-for-Mac-Windows-Media-Player/2100-1047_3-6026715.html?part=rss&tag=6026715&subj=news; Kevin J. O'Brien, As EU Debated, Microsoft Took Market Share, INT'L HERALD TRIB., Sept. 16, 2007, <http://www.iht.com/articles/2007/09/16/news/msft17.php>.

¹⁰⁶ See Ina Fried, Music Stops for Mac Windows Media Player, CNET NEWS, Jan. 12, 2006, http://www.news.com/Music-stops-for-Mac-Windows-Media-Player/2100-1047_3-6026715.html?part=rss&tag=6026715&subj=news.

¹⁰⁷ EC Decision, supra note 52, ¶ 771.

¹⁰⁸ EC CFI Judgment, ¶ 771

¹⁰⁹ A server operating system is an operating system for a server, a device that performs services for connected personal computers as part of a client-server architecture. In contrast, a client (or desktop) operating system serves only a personal computer.

incat produsele sale sa fie compatibile cu proeminentul sistem de operare server Unix, de la acel moment¹¹⁰. Dar, pe masura ce sistemele server Microsoft au inceput sa castige loc pe piata, Microsoft a inceput sa-si "extinda" incet suportul pentru protocoalele standard in sistemul de operare Windows, astfel incat clientii Windows sa aiba o experienta mai buna atunci cand se conecteaza la serverele Microsoft¹¹¹. In cele din urma, prin modificarea sistemelor de operare de pe calculatoarele personale, astfel incat calculatoarele Windows sa nu se poata conecta complet la alte servere care nu utilizeaza versiuni proprietare Microsoft, decat daca utilizatorii instaleaza programe speciale pe statiile lor, Microsoft a stabilit si a reintarit dominatia sa pe piata sistemelor de operare server pentru grupuri de lucru¹¹², unde Microsoft pastreaza o cota de aproximativ 77%¹¹³.

Comportamentul Microsoft a dus, in cele din urma, la o investigatie din partea Comisiei Europene, care a dezaprobat refuzul Microsoft de a publica informatii care ar permite si altor sisteme de operare server sa se conecteze la calculatoare personale ce utilizeaza sistemul de operare Microsoft Windows¹¹⁴. Intr-o decizie din anul 2004, Comisia Europeana a considerat ca in cazul in care Microsoft ar reusi sa elimine alte sisteme de operare server ca amenintari concurentiale, atunci inovatia va fi limitata drastic¹¹⁵. Si, de fapt, dupa lansarea Windows Server 2003 ca o revizie "lipsita de importanta"¹¹⁶, Microsoft nu a mai reusit sa lanseze o noua versiune a serverului Windows pana in anul 2008¹¹⁷. Chiar si atunci, multi critici au notat ca, in ciuda marketing-ului agresiv in randul utilizatorilor mici si mijlocii si a unei editii speciale a sistemului de operare server doar pentru acesti utilizatori, Microsoft a facut prea putin pentru a se adresa nevoilor acestora, ci numai a reimpachetat fundamental o versiune de pe o scara inferioara a unui produs existent la nivel de intreprindere¹¹⁸.

¹¹⁰ See Microsoft Corp., Windows NT and UNIX Interoperability, Oct. 1, 1997, <http://www.microsoft.com/technet/archive/winntas/deploy/ntunxint.msp?mfr=true>.

¹¹¹ See EC Decision, supra note 52, ¶¶ 176–301.

¹¹² See id. ¶¶ 236–301.

¹¹³ See IDC Workload Tracker 2007 (Worldwide Server Operating System Market Shares -- Based on the IDC Server Workload Models in 2000 and 2007).

¹¹⁴ See EC Decision, supra note 52, ¶¶ 781–82.

¹¹⁵ See id. ¶ 725 ("Microsoft's research and development efforts are indeed spurred by the innovative steps its competitors take in the work group server operating system market. Were such competitors to disappear, this would diminish Microsoft's incentives to innovate.").

¹¹⁶ See Gregg Keizer, Microsoft Windows Server 2003: Experts Advise Caution, CHANNELWEB NETWORK, Apr. 19, 2003, <http://www.crn.com/it-channel/18822436> (weighing the pros and cons of migrating to Windows Server 2003 and noting that many companies may want to "hold tight" rather than migrate).

¹¹⁷ See Steven Warren, Should You Upgrade to Windows Server 2008?, TECHREPUBLIC, Oct. 15, 2007, <http://blogs.techrepublic.com.com/datacenter/?p=209>.

¹¹⁸ See Jason Brooks, A Head Full of Windows Server 2008, EWEEK, Nov. 9, 2007, http://blogs.eweek.com/brooks/content/windows/a_head_full_of_windows_server_2008.html ("Microsoft's newly minted Windows Essential Business Server offers a very compelling answer to the question, 'How can a midsize business consume all the same sorts of Microsoft core server products that a large enterprise might consume?' ... [A]n excellent answer to the wrong question.").

III. MICROSOFT CONTINUA COMPORTAMENTUL ANTICONCURENTIAL

In ciuda investigatiei internationale asupra comportamentului anticoncurential al companiei Microsoft, aceasta a continuat actiuni similare nelegale pentru a elimina potentialele amenintari concurentiale. Singura diferenta reala dintre practicile Microsoft mai recente si cele anterioare a fost aceea ca, asa cum a prevazut Bill Gates, Microsoft si-a modificat acum modul de pastrare a documentelor¹¹⁹.

A. Nerespectarea de catre Microsoft a Hotararii Finale

In anul 2003, Departamentul de Justitie (DOJ) a descoperit ca Microsoft a creat o functionalitate in Windows care invoca browserul Microsoft Internet Explorer, in loc de un browser ales implicit de utilizator, contrar obligatiilor clare stabilite prin Hotarararea Finala¹²⁰. In mod similar, in anul 2004, Microsoft a incercat sa solicite detinatorilor de licente pentru ofertele sale din clasa de mijloc, .NET Framework, sa obtina consimtamantul Microsoft inainte de a publica orice rezultate ale testelor de performanta pentru acest software¹²¹. In 2005, Microsoft a cerut ca producatorii playerelor muzicale portabile sa semneze contracte exclusive daca doreau integrarea Microsoft Windows Media Player¹²². Iar in anul 2007, Microsoft a facut modificari pentru a oferi consumatorilor posibilitati limitate de alegere a produselor de cautare a fisierelor (desktop search) in Windows Vista, numai in urma unei investigatii guvernamentale de amploare si a presiunii venite din partea unui numar de State SUA. In timp ce Microsoft si-a schimbat in cele din urma comportamentul, in fiecare din aceste cazuri, toate aceste episoade demonstreaza intentia Microsoft de a utiliza mai intai agresiv produsele sale de monopol si de a face modificari mai tarziu, numai in urma confruntarilor legate de comportamentul sau. Aceasta este o perspectiva frapanta, in cadrul numarului foarte limitat de aspecte cuprinse in Hotararea

¹¹⁹ See Burst.com, Inc.'s Motion for Spoliation Instruction, Witness Preclusion, and Related Relief, In re Microsoft Antitrust Litigation, No. JFM-02-cv-2952, MDL Docket No. 1332 (D. Md. dismissed Mar. 11, 2005), available at <http://www.groklaw.net/pdf/BurstSpoliation.pdf>. Burst's motion provides extensive documentation of Microsoft's revised "short fuse" document retention policy. For example, in a January 2000 email to the Windows Division, Mr. Allchin directed employees: "Do not archive your email. Do not be foolish. 30 days." Id. at 13. As noted above, Microsoft settled with Burst on the courthouse steps just before oral argument on Burst's spoliation motion.

¹²⁰ See Interim Joint Status Report on Microsoft's Compliance with the Final Judgments at 6 (Oct. 17, 2003), United States v. Microsoft, 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232), available at <http://www.usdoj.gov/atr/cases/f201300/201386.pdf>.

¹²¹ See Interim Joint Status Report on Microsoft's Compliance with the Final Judgments at 7-8 (Oct. 8, 2004), United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232), available at <http://www.usdoj.gov/atr/cases/f205700/205751.pdf>. After plaintiffs, which included the United States and several state attorneys general, brought this complaint to Microsoft's attention, Microsoft responded that it was willing to require prior notice, rather than prior consent. See id. However, plaintiffs still believed this response was inadequate to comply with the Final Judgment and continued to demand modification of this requirement until Microsoft eventually gave in, agreeing to make "additional changes" resolving plaintiffs' concerns. See Interim Joint Status Report on Microsoft's Compliance with the Final Judgments at 6 (June 1, 2005), United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232), available at <http://www.usdoj.gov/atr/cases/f209300/209307.pdf>.

¹²² See Interim Joint Status Report on Microsoft's Compliance with the Final Judgments at 12-13, (Oct. 19, 2005), United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232). The DOJ's October 2005 Joint Status Report noted that it was "unfortunate that the draft specification contained the exclusivity provision." Id. at 13.

Finala¹²³. De fapt, curtea districtuala care a supravegheat Hotararea Finala a extins decretul pentru inca doi ani, pana in 12 Noiembrie 2009, deoarece Microsoft nu si-a respectat inca obligatiile privind protocoalele de comunicare¹²⁴.

Chiar si astazi, cand se apropie de sfarsit obligatiile prevazute in consimtamantul decret, Microsoft a inceput sa "testeze apele" si sa ia mai multe actiuni agresive pentru a limita pre-instalarea de catre OEM a programelor concurente. De exemplu, Microsoft a anuntat in 2008 ca va introduce o serie de teste de diagnostic si cerinte pentru orice alte programe non-Microsoft pe care OEM doresc sa le preinstaleze (programele echivalente ale Microsoft nu au fost supuse acestor teste)¹²⁵. Microsoft a anuntat mai departe ca, prin promovare, a permis ca OEM sa fie legati de conformitatea cu aceste teste¹²⁶. Acest anunt a creat preocupari serioase in randul producatorilor (OEM), furnizorilor (ISV) si al aparatorilor consumatorilor. Printre altele, anuntul Microsoft insemna ca va castiga din timp acces la programele concurente, iar noul program ii va oferi Microsoft un instrument simplu pentru a preveni distribuirea de catre OEM a produselor middleware concurente (de exemplu, browsere si media-playere). Steven Houck, avocat al reclamantilor din Grupul California, a transmis curtii districtuale a SUA la o conferinta din Ianuarie 2009 ca: "In mai mult de 6 ani de cand aplicam decretul, aceasta situatie speciala este una in care avem un numar mare de plangeri si am auzit multe nemulumiri legate de ceea ce face Microsoft"¹²⁷. In lumina istoricului privind comportamentul anticoncurential al Microsoft, poate ca nu mai surprinde faptul ca, numai cu cateva luni inainte de incheierea termenului pentru reglementarile SUA, Microsoft a continuat tacticile anticoncurentiale.

¹²³ The European Commission recently fined Microsoft \$1.35 billion for failure to comply with the Commission's 2004 antitrust ruling. See Peppi Kiviniemi, EU Fines Microsoft \$1.35 bn, LiveMint, Feb. 28, 2008, <http://www.livemint.com/2008/02/27210155/EU-fines-Microsoft-135-bn.html?type=tp>. A lawyer for ECIS expressed a similar regret in regards to Microsoft's conduct in the EC, observing that it is "more profitable [for Microsoft] to reap the anticompetitive benefits of non-compliance with the law and to pay the fines than to comply." *Id.*

¹²⁴ See Memorandum Opinion at 38 (Jan. 29, 2008), *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76 (D.D.C. 2002) (No. 98-1232), available at <http://www.microsoft-antitrust.gov/pdf/Jan292008MemOp.pdf> ("[I]t is abundantly clear that more than five years after the Communications Protocols and related technical documentation were required to be available to licensees under § III.E, the documentation envisioned by that Section is still not available to licensees in a complete, useable, and certifiably accurate form."). The district court extended the decree "based upon the extreme and unforeseen delay in the availability of complete, accurate, and useable technical documentation relating to the Communications Protocols that Microsoft is required to make available to licensees...." *Id.* at 3. The district court further noted that allowing the provisions of the Communications Protocols to expire jeopardized the "full procompetitive impact" of the Final Judgment. *Id.* at 4.

¹²⁵ See Stephanie Condon, Vista Marketing Draws Antitrust Complaints, CNET NEWS, Jan. 28, 2009, at http://news.cnet.com/8301-13578_3-10151757-38.html; Interim Joint Status Report on Microsoft's Compliance with the Final Judgments at 4 (Jan. 29, 2009), *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232), available at <http://www.usdoj.gov/atr/cases/f241600/241677.pdf>; see also Microsoft Presentation, "Advancing the Platform," presented at Windows Hardware and Engineering Conference, Nov. 4-7 2008, available at http://download.microsoft.com/download/5/E/6/5E66B27B-988B-4F50-AF3AC2FF1E62180F/COR-T780_WH08.pptx (describing Project Velocity tests).

¹²⁶ See Stephanie Condon, Vista Marketing Draws Antitrust Complaints, CNET NEWS, Jan. 28, 2009, at http://news.cnet.com/8301-13578_3-10151757-38.html. Microsoft denies that marketing dollars will be tied to the test results, but that remains an open issue as the program is undergoing changes. See *id.*

¹²⁷ Transcript of Status Conference at 16, Jan. 28, 2009, *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232); see also Stephanie Condon, Vista Marketing Draws Antitrust Complaints, CNET NEWS, Jan. 28, 2009, at http://news.cnet.com/8301-13578_3-10151757-38 (quoting Steven Houck).

B. Campania Microsoft de Frica, Nesiguranta si Incertitudine (FNI) impotriva Linux si a programelor Open Source

"Acesta nu este cazul unei abateri accidentale, in necunostinta de cauza. Exista un numar copleditor de patente care sunt incalcate".

*— Horacio Gutierrez - Vice-Presedinte Microsoft al Consiliului General
pentru Proprietate Intelectuala si Licentiere¹²⁸*

Sistemul de operare liber Linux este principalul rival al sistemului Microsoft Windows. Linux a fost preluat atat de clienti societati corporatiste cat si de un numar in crestere de utilizatori individuali (cu mini-laptopuri/netbook-uri). Intr-un interviu recent realizat de CNET, Steve Ballmer a considerat Linux ca fiind unul din primii doi concurenti Microsoft in segmentul de intreprindere¹²⁹.

Consecvent comportamentului sau venit ca raspuns la alte amenintari, Microsoft a utilizat tactici incorecte si anticoncurentiale pentru a incerca si a prelua incet Linux. In special, Microsoft a ridicat si continua sa ridice pretentii largi si fara substanta legate de faptul ca dezvoltatorii care distribuie Linux sau alte programe "open source", precum si clientii acestora, incalca patentele Microsoft¹³⁰. Cu toate acestea, desi Microsoft a pretins ca sunt incalcate 235 de patente¹³¹, a evitat sa precizeze despre ce patente este vorba.

Tactica Microsoft este aceea de a raspandi frica, nesiguranta si incertitudine ("FNI") pentru cazul in care dezvoltatorii si utilizatorii programelor libere ar putea fi tinta unor viitoare cazuri de incalcare a patentelor si de a tempera entuziasmul consumatorilor si cererea pentru Linux si a solutiilor "open source".

Intr-adevar, temerile nejustificate ale Microsoft au pus o asemenea presiune pe utilizatorii Linux incat unii dintre ei s-au simtit constransi sa intre intr-o licenta aducatoare de profit cu Microsoft¹³². Campania Microsoft de frica, nesiguranta si incertitudine impune o "taxa" pe utilizarea celei mai viabile alternative a sistemului Windows: deoarece au de-a face cu un partener litigios intimidant si puternic, cunoscut pentru tacticile sale crude, utilizatorii Linux sunt

¹²⁸ See Roger Parloff, Microsoft takes on the free world, CNN MONEY, May 14, 2007, available at http://money.cnn.com/magazines/fortune/fortune_archive/2007/05/28/100033867/.

¹²⁹ See Marguerite Reardon, Microsoft and EMC renew their vows, CNET.COM, Feb. 4, 2009, available at http://news.cnet.com/8301-10805_3-10156015-75.html

¹³⁰ See Gavin Clarke, Royalties are the admission price, Microsoft tells fretards, THE REGISTER, Mar. 27, 2008, available at http://www.theregister.co.uk/2008/03/27/microsoft_brad_smith_patents_royalties/.

¹³¹ See Parloff, Microsoft takes on the free world, supra, note 128.

¹³² See, e.g., Matt Asay, Microsoft continues to prey on the overly cautious with patent deals, CNET.COM, Mar. 21, 2008, available at http://www.cnet.com/8301-13505_1-9900817-16.html.

inclinati sa plateasca taxa de licenta, in ciuda naturii speculative a pretentiilor privind proprietatea intelectuala. Tacticile barbare ale Microsoft duc la cresterea costurilor generale si incetinirea intrarii pe piata a unor tehnologii inovative, menite sa concureze cu produsele de monopol ale Microsoft.

Mai mult, exista o mare probabilitate ca aceasta campanie de frica, nesiguranta si incertitudine dusa de Microsoft sa nu aiba temei legal. Jurisprudenta recenta din SUA a clarificat ca scopul metodelor afacerilor patentate, care sta la baza multor patente software, este mai ingust decat s-a considerat initial¹³³. In plus, unul dintre pragurile patentarii - acela ca o inventie sa fie evidenta pentru o persoana specializata in domeniu - a devenit tot mai greu de atins¹³⁴. Prin urmare, multe dintre patentele detinute de Microsoft au astazi o validitate ce poate fi pusa sub semnul intrebării. Mai mult, dat fiind numarul mare de patente software existente, consumatorii pot fi adesea incapabili sa determine cu siguranta daca utilizarea sau distribuirea anumitor produse software incalca efectiv drepturile de proprietate intelectuala (IP) ale altei companii. De aceea, contrar declaratiilor largite si categorice ale d-lui Gutierrez referitoare la natura intentionata a pretinselor nerespectari ale patentelor, este cunoscut pe scara larga in domeniu ca, indiferent daca se utilizeaza software proprietar sau "open source", exista o mare probabilitate ca nerespectarea patentelor sa fie comisa neintentionat. Microsoft a cautat sa exploateze lipsa de claritate din legea patentelor pentru a opri consumatorii sa achizitioneze produse concurente celor apartinand Microsoft.

Intr-o aparenta intensificare a strategiei sale de frica, nesiguranta si incertitudine legata de patente, Microsoft a dat in judecata furnizorul de sisteme de navigatie, TomTom, la sfarsitul lui Februarie 2009, pentru nerespectarea patentelor. In procesul de judecata sunt incluse trei patente legate de Linux¹³⁵. Cel putin doua din acestea au legatura cu patente destul de indoielnice privind suportul fisierelor cu nume lung in Windows, care au fost invalidate partial de curtea pentru patente a Comisiei Europene, pe motiv ca pretentiile Microsoft "nu erau bazate pe o activitate de inventie"¹³⁶. In timp ce Microsoft a sustinut public ca actiunea sa nu este indreptata impotriva Linux sau a programelor libere, iar cazul s-a incheiat in Martie 2009 ca urmare a unui acord aproape confidential, aceasta reprezinta o dezvoltare agresiva a modului in care Microsoft se

¹³³ See KSR International Co., Petitioner e. Teleflex Inc. et al., (2007) US 27, available at <http://www.supremecourtus.gov/opinions/06pdf/04-1350.pdf> and In Re Bernard L. Bilski and Rand A. Warsaw, United States Court of Appeals for the Federal Circuit, 2007-1130 (Serial No. 08/833,892), available at <http://www.cafc.uscourts.gov/opinions/07-1130.pdf>.

¹³⁴ See, e.g., KSR International Co., Petitioner e. Teleflex Inc. et al., supra, note 133; Angiotech Pharmaceuticals Inc. v. Conor Medsystems Inc. [2008] UKHL 49; Apotex Inc. v. Sanofi-Synthelabo Canada Inc. [2008] SCC 61.

¹³⁵ See Bruce Perens, Analyzing Microsoft's TomTom Lawsuit, DATAMATION.COM, Mar. 1, 2009, available at <http://itmanagement.earthweb.com/osrc/article.php/3807801/Bruce-Perens-Analyzing-Microsofts-Linux-Lawsuit.htm> and Richard Hillesley, TomTom – The drums of a patent war with Microsoft? ITPRO.COM, Mar. 5, 2009, available at <http://www.itpro.co.uk/610093/tomtom-the-drums-of-a-patent-war-with-microsoft>.

¹³⁶ See, e.g., Federal Patent Court declares FAT patent of Microsoft null and void, HEISE ONLINE, Mar. 2, 2007, available at <http://www.heise.de/english/newsticker/news/86141>.

foloseste de pretentii nesincere sau extrem de indoielnice legate de patente, pentru a intimida sau a elimina competitia din partea Linux, in scopul mentinerii sau intaririi pozitiei sale dominante pe piata sistemelor de operare.

C. Actualul Comportament Necorespunzator al Microsoft a generat Investigatii Suplimentare din partea Comisiei Europene

Asa cum s-a precizat la inceput, Comisia Europeana (CE) investigheaza de asemenea actualul comportament necorespunzator al Microsoft, ceea ce a culminat cu emiterea, la 15 Ianuarie 2009, a Declaratiei de Obiectiuni fata de Microsoft, privind adaugarea exclusiva a browserului web Internet Explorer la sistemul de operare Windows¹³⁷. In plus, CE continua sa investigheze numeroase alte actiuni luate de Microsoft pentru a lega alte produse de Windows, precum si refuzul Microsoft de a permite interoperabilitatea cu anumite tehnologii de monopol detinute, inclusiv Sharepoint, Outlook, Exchange si Office¹³⁸. CE investigheaza, de asemenea, actiunile Microsoft pentru a manipula Organizatia Internationala pentru Standardizare / Comisia Electrotehnica Internationala privind recenta standardizare a Office "Open" XML ("OOXML"). Asa cum s-a scris pe larg in presa si pe Internet, influentarea de catre Microsoft a procesului de stabilire a standardelor in favoarea OOXML a cuprins stimulente financiare, amenintari, informatii eronate si presiuni asupra comisiei (**comisie de umplutura**)¹³⁹. Aceste investigatii sunt exemple de necontestat ale comportamentului necorespunzator al Microsoft pentru detinerea monopolului asupra sistemului de operare sau a celorlalte produse.

¹³⁷ See Press Release, European Commission, Antitrust: Commission Confirms Sending a Statement of Objections to Microsoft on the Tying of Internet Explorer to Windows (Jan. 17, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/15>.

¹³⁸ See Press Release, European Commission, Commission Initiates Formal Investigation Against Microsoft in Two Cases of Suspected Abuse of Dominant Market Position (Jan. 14, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/19>.

¹³⁹ See Charles Forelle, Microsoft's Office Push Scrutinized by EU, WALL ST. J., Feb. 8, 2008, <http://online.wsj.com/article/SB120242867034452081.html> (stating that the EC is examining whether Microsoft's pressure on countries to vote for the Office Open XML standard "amounted to an undue stifling of competition"). "In the months and weeks leading up to the vote, Microsoft resellers and other allies joined standards bodies en masse – helping swell the Italian group, for instance, from a half-dozen members to 85." Id.; see also Daniel Goldberg, Microsoft Pressed Swedish Partners to Vote for Open XML, PC WORLD, Aug. 30, 2007, <http://www.pcworld.com/article/id,136599-pg,1/article.html> (noting that Microsoft offered "extra marketing contributions" and "extra support in the form of Microsoft resources" to persuade its Swedish business partners to vote for the adoption of Office Open XML).

IV. PROMISIUNI FALSE DIN PARTEA MICROSOFT PRIVIND INTEROPERABILITATEA

Desi Microsoft a promis in repetate randuri sa suporte standardele libere, atat in recentele "Principii de Interoperabilitate"¹⁴⁰, cat si in anuntul privind Internet Explorer 8¹⁴¹, se stie ca Microsoft a facut si in trecut promisiuni similare, in mod frecvent, dar fara sa le indeplineasca¹⁴². Ca rezultat, multi observatori au intampinat cu scepticism diversele anunturi Microsoft si fanfara orchestrata. De exemplu, ca urmare a unui anunt recent al Microsoft privind interoperabilitatea, Comisia Europeana a emis o scurta declaratie, in care afirma ca promisiunea Microsoft privind interoperabilitatea a urmat "cel putin altor patru declaratii similare facute de Microsoft in trecut, asupra importanteii interoperabilitatii"¹⁴³. Conform observatiei Comisiei, companiei Microsoft i-au luat 3 ani numai pana a se apropia de lansarea volumului de informatie privind interoperabilitatea pe care Prima Instanta a Curtii Europene i-a cerut sa o lanseze¹⁴⁴.

Chiar si atunci cand Microsoft pretinde ca implementeaza un standard, realitatea este ca implementarile Microsoft, in mod frecvent, fie sunt conforme numai partial, fie extind intr-un anume fel standardul, astfel incat programul dezvoltat pentru a lucra cu versiunea Microsoft din acel standard, nu va functiona cu implementarile altor furnizori pentru acelasi standard. Ca un exemplu, Microsoft a anuntat recent ca Internet Explorer 8 va suporta o functionalitate numita "local storage" (stocare locala), care permite siteurilor web sa stocheze o cantitate limitata de date pe calculatoarele utilizatorilor, astfel incat utilizatorii sa poata interactiona offline cu acele site-uri, caracteristica ce ar putea ajuta aplicatiile web sa inlocuiasca eficient traditionalele aplicatii de birou¹⁴⁵. Aceasta functionalitate face parte din HTML 5, urmatoarea versiune a standardului HTML utilizat pentru scrierea de pagini web¹⁴⁶. Din pacate, implementarea Microsoft este sensibil incompatibila cu standardul, ceea ce ar putea conduce dezvoltatorii web care isi testeaza site-ul in Internet Explorer 8 se le scrie intr-un mod in care sa nu functioneze in

¹⁴⁰ Press Release, Microsoft, Microsoft Makes Strategic Changes in Technology and Business Practices to Expand Interoperability (Feb. 21, 2008), available at <http://www.microsoft.com/presspass/press/2008/feb08/02-21ExpandInteroperabilityPR.msp>; Mary-Jo Foley, All About Microsoft: Reading the Fine Print on Microsoft's Open-Source Promises, ZDNET, Feb. 21, 2008, <http://blogs.zdnet.com/microsoft/?p=1208>.

¹⁴¹ See Dean Hachamovitch, Microsoft's Interoperability Principles and IE8, IEBLOG, Mar. 3, 2008, <http://blogs.msdn.com/ie/archive/2008/03/03/microsoft-s-interoperability-principles-and-ie8.aspx>.

¹⁴² See, e.g., Chris Wilson, Standards and CSS in IE, IEBLOG, July 29, 2005, <http://blogs.msdn.com/ie/archive/2005/07/29/445242.aspx>; Ted Schadler, Commentary: IBM, Microsoft's Web Services Sing-Along, CNET NEWS, Sept. 22, 2003, http://www.news.com/2030-1069_3-5079712.html; Nick Wingfield, Microsoft Standards: Windows to W3C, CNET NEWS, July 1, 1997, http://www.news.com/Microsoft-standards-Windows-to-W3C/2100-1023_3-201106.html.

¹⁴³ Press Release, European Commission, Commission Takes Note of Microsoft's Announcement of Interoperability Principles (Feb. 21, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/106> (emphasis added).

¹⁴⁴ Press Release, European Commission, Commission Decision to Impose Penalty Payments on Microsoft— Frequently Asked Questions (Feb. 27, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/125>.

¹⁴⁵ Microsoft Corp., Introduction to DOM Storage, Microsoft Developer Network, <http://msdn2.microsoft.com/enus/library/cc197062.aspx>.

¹⁴⁶ See World-Wide Web Consortium, HTML 5: A Vocabulary and Associated APIs for HTML and XHTML § 4.10 (Working Draft, June 10, 2008), available at <http://www.w3.org/TR/html5/#storage>.

alte browsere¹⁴⁷. Alte exemple din trecut privind acest comportament se refera la abordarea Microsoft fata de interfata grafica Windows (discutata in sectiunea II.A) si fata de instrumentele de dezvoltare Java (din sectiunea II.H). Din nou, acestea sunt doar cateva exemple privind promisiunile lipsite de continut ale Microsoft in ceea ce priveste interoperabilitatea. Istoricul Microsoft demonstreaza clar practicile sale pe termen lung de a face un set de declaratii in public despre interoperabilitate, iar apoi sa implementeze in practica o abordare diferita a interoperabilitatii.

V. MONOPOLURILE MICROSOFT AU PREJUDICIAT UTILIZATORII

Conduita Microsoft i-a permis sa isi protejeze monopolul, dar aceasta a dus la lipsa de optiune, preturi mari si mai putina inovatie decat ar fi prevalat altfel intr-o piata competitiva. Barierele de intrare care inconjoara principalele monopoluri Microsoft sunt foarte mari, iar cota de piata Microsoft si marjele de profit din sistemele de operare desktop, pachete pentru productie de birou si browsere au continuat sa reflecte puterea covarsitoare a monopolului sau pe aceste pietes¹⁴⁸. Pe scurt, conduita necorespunzatoare a Microsoft a prejudiciat si continua sa dezavantajeze semnificativ consumatorii.

A. Monopolul sistemului de operare Microsoft a prejudiciat consumatorii

De 15 ani, cota Microsoft pentru sistemele de operare desktop a ramas la peste 90%¹⁴⁹. In 2002, cand a intrat in vigoare Hotararea Finala din cazul Statele Unite vs. Microsoft, Windows XP era cel mai uzual sistem de operare desktop¹⁵⁰. Microsoft nu a mai lansat o alta versiune dupa Windows XP pana in 2007, cand a aparut Windows Vista¹⁵¹. Chiar si atunci, versiunea "Vista"

¹⁴⁷ Compare id. (documenting a standard set of storage related events and synchronous operations) with Microsoft Corp., Introduction to DOM Storage, Microsoft Developer Network, <http://msdn.microsoft.com/enus/library/cc197062.aspx> (documenting different storage-related event names and asynchronous operations).

¹⁴⁸ See California Group's Report on Remedial Effectiveness at 2-4 (Aug. 30, 2007), New York v. Microsoft Corp., 224 F. Supp. 2d 76 (D.D.C. 2002) (No. 98-1232), available at http://www.naag.org/assets/files/pdf/antitrust.2007-08-30_Filed_CA_Group_Effectiveness_Report.pdf; see also Microsoft Corp., Annual Report (Form 10-K) at 67 (July 31, 2008), available at <http://idea.sec.gov/Archives/edgar/data/789019/000119312508162768/d10k.htm>. The profit margin for Microsoft's client segment, which includes its Windows operating system, was 77% in fiscal year 2008. See id. at 23. The profit margin for Microsoft's business division, which includes Office, was 65%. See id. at 26.

¹⁴⁹ See Operating System Market Share Survey, Net Applications, Dec. 2008, available at <http://marketshare.hitslink.com/operating-system-market-share.aspx?qprid=8>; California Group's Report on Remedial Effectiveness at 10 (Aug. 30, 2007), New York v. Microsoft Corp., 224 F. Supp. 2d 76 (D.D.C. 2002) (No. 98-1232), available at http://www.naag.org/assets/files/pdf/antitrust.2007-08-30_Filed_CA_Group_Effectiveness_Report.pdf.

¹⁵⁰ See California Group's Report on Remedial Effectiveness at 10 (Aug. 30, 2007), New York v. Microsoft Corp., 224 F. Supp. 2d 76 (D.D.C. 2002) (No. 98-1232), available at http://www.naag.org/assets/files/pdf/antitrust.2007-08-30_Filed_CA_Group_Effectiveness_Report.pdf.

¹⁵¹ See id.; see also Hadley Stern, Mac Updates vs. Windows Updates, O'REILLY NETWORK, May 20, 2004, http://www.oreillynet.com/mac/blog/2004/05/mac_updates_vs_windows_updates.html (contrasting Apple's regular update schedule for its operating system with Microsoft's and noting that "Microsoft's ... approach leaves innovation on a very slow timeframe").

lansata de Microsoft nu cuprindea cele mai importante functionalitati pe care Microsoft le-a promis initial, iar criticii au etichetat-o ca putin mai mult decat o imbunatatire incrementală (de proba)¹⁵². CNet News, o publicatie importanta din industria calculatoarelor, a clasat Microsoft Windows Vista in "Top 10 Produse Tech Groaznice"¹⁵³. Chiar Microsoft recunoaste ca fortareata construita in jurul sistemului de operare a dezavantajat consumatorii:

*"Interfata de programare a aplicatiilor Windows (API) este atat de adanc incorporata in codul sursa al multor aplicatii Windows, incat exista un cost imens de modificare pentru a utiliza in schimb un sistem de operare diferit. ... Acest cost de inlocuire le-a dat utilizatorilor rabdarea sa ramana fideli Windows in pofida greselilor noastre sau a driverelor cu buguri, costurilor de achizitie mari, lipsei unei viziuni atractive la diferite momente de timp si multe alte dificultati. ... Clientii evalueaza constant platformele desktop, dar ar fi mai mult de lucru daca ar trebui sa ne miscam dupa cum isi doresc ei sa imbunatatim Windows, decat sa ii fortam pe ei sa se schimbe. Pe scurt, fara aceasta franchiza exclusiva numita Windows API, am fi fost morti cu mult timp in urma"*¹⁵⁴.

Tacticile Microsoft de a prelungi monopolul sistemului sau de operare prin alte mijloace decat competitia pe merit, merg mana in mana cu lipsa de inovatie recunoscuta.

B. Monopolul Microsoft Office a prejudiciat consumatorii

Pachetul Microsoft Office se mentine, de asemenea, la o cota de piata de 95%.¹⁵⁵ Pachetul Office standard contine Word (software de procesare text), Excel (calcul tabelar), PowerPoint (prezentari) si Outlook (email client pe desktop)¹⁵⁶, toate acestea reprezentand de fapt standardele in categoriile respective¹⁵⁷. Microsoft detine peste 500 milioane de utilizatori

¹⁵² See Robert Vamosi, Editors' Reviews: Windows Vista, CNET REVIEWS, Jan. 24, 2007, http://reviews.cnet.com/windows/windows-vista-home-premium/4505-3672_7-32013237.html?tag=prod.2 (labeling Vista a "warmed-over Windows XP Home edition" and noting that after five years of development "there's a definite 'Is that all?' feeling"); Ina Fried & Margaret Kane, Microsoft Revamps Its Plans for Longhorn, CNET NEWS, Aug. 27, 2004, http://www.news.com/Microsoft-revamps-its-plans-for-Longhorn/2100-1016_3-5327150.html (noting that Microsoft "has not had a full release of its desktop operating system since Windows XP debuted in October 2001").

¹⁵³ Top Ten Terrible Tech Products, CNET CRAVE, Nov. 20, 2007, <http://crave.cnet.co.uk/gadgets/0,39029552,49293700-10,00.htm>.

¹⁵⁴ EC Decision, supra note 52, ¶ 463 (citing an internal Microsoft memo drafted for Bill Gates by C++ General Manager Aaron Contorero and dated Feb. 21, 1997).

¹⁵⁵ See To Pay or Not to Pay: The World of Office Suites Opens Up, KNOWLEDGE@W.P. CAREY, Arizona State Univ. School of Business, Oct. 10, 2007, <http://knowledge.wpcarey.asu.edu/article.cfm?articleid=1483>; see also Daniel Eran Dilger, Microsoft's Outrageous Office Profits, ROUGHLY DRAFTED MAG, Sept. 9, 2007, <http://www.roughlydrafted.com/2007/09/09/microsoft%e2%80%99s-outrageous-office-profits/> ("Microsoft's Office suite represents the third pillar of the company's core trio of monopolies, next to its Windows desktop software and its Windows Server products.").

¹⁵⁶ See Microsoft Office - Compare the Office 2007 Suites, <http://office.microsoft.com/enus/suites/FX101635841033.aspx>.

¹⁵⁷ See Kurt Cagle, Microsoft Office Open XML Fails to Win ISO Vote, O'REILLY XML BLOG, Sept. 4, 2007, http://www.oreillynet.com/xml/blog/2007/09/microsoft_office_open_xml_fail.html.

Office¹⁵⁸. Divizia comerciala din cadrul Microsoft, care include Office, a obtinut o marja de profit de 65% si a obtinut venituri de aproape 19 miliarde \$ in anul 2008¹⁵⁹.

Puterea de monopol a Microsoft in domeniul aplicatiilor de birou a dus, de asemenea, la o multumire de sine care a dezavantajat consumatorii. Chiar fondatorul si primul arhitect software coordonator al Microsoft, Bill Gates, afirma ca singura presiune competitiva reala pentru imbunatatirea actualei versiuni a Microsoft Office este aceea ca utilizatorii sa nu mai faca upgrade-ul la noua versiune¹⁶⁰. Intre anii 1997 si 2007, Microsoft a lansat numai trei versiuni noi de Microsoft Office, un ritm foarte lent dupa standardele industriei software, iar criticii au observat ca fiecare versiune oferea doar cateva imbunatatiri fata de cele anterioare¹⁶¹. Abia dupa anul 2007, odata cu aparitia unor aplicatii de birou online concurente¹⁶², Microsoft a reproiectat interfata Office si nu a fost o coincidenta ca a introdus noi formate de fisiere incompatibile.¹⁶³

¹⁵⁸ See Jefferson Graham, Google Apps Can Be a Small Firm's Best Friend, USA TODAY, Feb. 12, 2008, http://www.usatoday.com/tech/products/software/2008-02-12-google-apps_N.htm (calling Microsoft Office "a software behemoth in Corporate America").

¹⁵⁹ See Microsoft Corp., Annual Report (10-K), at 26 (July 31, 2008), available at <http://idea.sec.gov/Archives/edgar/data/789019/000119312508162768/d10k.htm>; see also Daniel Eran Dilger, Office Wars 3—How Microsoft Got Its Office Monopoly, ROUGHLY DRAFTED MAG., Sept. 10, 2007, <http://www.roughlydrafted.com/2007/09/10/office-wars-3-how-microsoft-got-its-office-monopoly/> ("Microsoft's Office monopoly gives the company more revenues and delivers nearly as much profit as its Windows software.").

¹⁶⁰ See David Kirkpatrick, Gates and Ozzie: How to Escape E-Mail Hell, FORTUNE, June 27, 2005, 169-72, available at http://money.cnn.com/magazines/fortune/fortune_archive/2005/06/27/8263426/index.htm ("Our biggest competitor is always the status quo—people may just do things the way they've been doing them and feel, hey, that's good enough.").

¹⁶¹ See Gregg Keizer, Microsoft Office System, CNET REVIEWS, Oct. 21, 2003, http://reviews.cnet.com/4520-3513_7-5092597-1.html?tag=txt (explaining that Microsoft Office "isn't a must-have upgrade for the average home user"); Gregg Keizer, Microsoft Office XP Suite Reviews, CNET REVIEWS, Mar. 15, 2001, http://reviews.cnet.com/office-suites/microsoft-office-xp/4505-3524_7-5152705.html?tag=prod.txt.5 (noting that Microsoft Office XP is "not worth the cost, time, and effort for single or home users" and offers only "incremental improvements"); Gregg Keizer, All About Office 2000: Should You Upgrade?, CNET REVIEWS, Apr. 12, 1999, <http://web.archive.org/web/20001218073500/home.cnet.com/category/topic/0,10000,0-3670-7-278204,00.html> (follow the "Should You Upgrade?" link on the right) (stating that Office 2000 is not "cost smart" for "small businesses, work-at-homers, or those operating without the infrastructure of an intranet").

¹⁶² See Elinor Mills, Google Combines Word Processing, Spreadsheets, CNET NEWS, Oct. 10, 2006, http://www.news.com/Google-combines-word-processing-spreadsheets/2100-1032_3-6124593.html?tag=nfd.top (explaining that Google Docs & Spreadsheets is a free program that allows users to manage and create documents on the Web and noting that Microsoft has responded by "revamping its business"); see also Elsa Wenzel, Microsoft Office 2007 Office Suite Reviews, CNET REVIEWS, Jan. 29, 2007, http://reviews.cnet.com/office-suites/microsoft-office-2007/4505-3524_7-32143052.html?tag=prod.txt.1 ("The advent of Office 2007 comes as a growing number of competing tools are simpler, cost less (if they aren't free), and handle the same core features.").

¹⁶³ See Elsa Wenzel, Microsoft Office 2007 Office Suite Reviews, CNET REVIEWS, Jan. 29, 2007, http://reviews.cnet.com/office-suites/microsoft-office-2007/4505-3524_7-32143052.html?tag=prod.txt.1 (noting that the average user rating for Microsoft Office 2007 was "mediocre"). With Office 2007, Microsoft switched from its proprietary binary file format for electronic documents to XML file format. Id. ("The new era of Office affects even those who don't upgrade, and a conversion tool is needed to let older Office versions open Office 2007's default, Open XML files."). For developers who had spent years reverse engineering the proprietary binary file format in order to allow some level of interoperability with non-Microsoft systems, the switch to XML caused new incompatibility problems with these non-Microsoft users. See Ephraim Schwartz, ODF vs. OpenXML, INFO WORLD, May 15, 2007, http://weblog.infoworld.com/realitycheck/archives/2007/05/odf_vs_openxml.html.

C. Monopolul Microsoft WebBrowser a prejudiciat consumatorii

In ultimul deceniu, Microsoft a pastrat o cota dominanta pe piata browserelor web¹⁶⁴. Totusi, dupa succesul Microsoft in exterminarea Netscape, a investit foarte putin in dezvoltarea browserului web Internet Explorer. In graba Microsoft de a distruge Netscape, a lansat patru versiuni majore de Internet Explorer in 2 ani¹⁶⁵. Dar dupa ce a reusit sa excluda Netscape de pe piata, Microsoft a incetinit dezvoltarea browserului, lansand numai doua versiuni intre anii 1998 si 2001, niciuna din acestea nereprezentand un upgrade major¹⁶⁶. Dupa anul 2001, Microsoft *"a renuntat efectiv la grupul Internet Explorer, dupa ce a omorat Netscape"*¹⁶⁷. Microsoft nu a mai introdus o noua versiune de Internet Explorer pana in anul 2006, dar chiar si atunci, criticii au etichetat noua versiune ca pe o versiune inferioara¹⁶⁸. Unul din managerii programelor Microsoft .NET a marturisit ca *"din punct de vedere comercial, nu are sens ca Microsoft sa investeasca intr-o tehnologie care nu este intermediata de cea mai populara platforma a sa, sistemul de operare Windows"*¹⁶⁹. Asa cum un analist a rezumat aceasta situatie:

Browserul web este probabil cea mai utilizata categorie de software din lume. Dar in ultimii ani, browserul pe care se bazeaza multi oameni - Microsoft Internet Explorer - a stagnat, si a oferit foarte putine functionalitati noi.

Acesta este un model comun Microsoft. Compania este agresiva in privinta imbunatatirii programelor atunci cand intra pentru prima data pe piata. Dar odata ce isi zdrobeste

¹⁶⁴ See Browser Market Share for YTD 2009, Net Applications, <http://marketshare.hitslink.com/browser-marketshare.aspx?qprid=0> (showing Microsoft Internet Explorer market share at almost 70%); California Group's Report on Remedial Effectiveness at 3 (Aug. 30, 2007), New York v. Microsoft Corp., 224 F. Supp. 2d 76 (D.D.C. 2002) (No. 98-1232), available at http://www.naag.org/assets/files/pdf/antitrust.2007-08-30_Filed_CA_Group_Effectiveness_Report.pdf (noting shares above 85% through 2006). It is worth noting that what little ground Internet Explorer has recently lost to its rival browsers is not due to any success on the part of the consent decree that ended the United States' antitrust suit against Microsoft. As the California Group (the Plaintiff States of California, Connecticut, Iowa, Kansas, Minnesota, and Massachusetts and the District of Columbia) emphasized, even counsel for the United States was not willing to attribute any reduction in Microsoft's web browser market share to the Final Judgment. See *id.* at 9 (quoting counsel for the United States as saying, "It's hard to know what [that reduction is] attributable to, and I wouldn't want to credit the final judgment.").

¹⁶⁵ See Brian Wilson, Browser History Timeline: Overview, <http://www.blooberry.com/indexdot/history/browsers2.htm>.

¹⁶⁶ See *id.*; Rex Baldazo, Review: Microsoft Internet Explorer 6.0, CNET REVIEWS, Mar. 31 2003, http://reviews.cnet.com/software/microsoft-internet-explorer-6/4505-3513_7-20832430.html?tag=prod.txt.2; Jim Rapoza, IE 5.0's Best Surprise Is No Surprise, EWEEK, Mar. 29, 1999, <http://web.archive.org/web/20010209175240/zdnet.com/products/stories/reviews/0,4161,2227704,00.html>. (stating that as an upgrade, IE 5.0 is "bloated" and "doesn't radically change the product").

¹⁶⁷ Charles H. Ferguson, What's Next for Google, TECH. REV., Jan. 2005, <http://www.technologyreview.com/Infotech/14065/> (pointing out that only recently has Microsoft again begun innovation in the browser market once it "realized that Firefox was starting to gain share"). Around the same time, Microsoft also ended development of Internet Explorer for Mac users, redeploying the entire team to work on an unrelated project. See Jorg Brown, I was on the MacIE 6 Team When It Got Canned, SLASHDOT, Dec. 18, 2005, <http://apple.slashdot.org/comments.pl?sid=171546&cid=14288661> ("[A]lmost immediately after 5.0 was released, the MacIE team was redeployed to work on a set-top DVR box."); see also Colin Baker, Microsoft Drops Mac IE, CNET NEWS, Dec. 19, 2005, http://www.news.com/Microsoft-drops-Mac-IE/2100-1016_3-6000919.html (stating that Microsoft officially ended support for the Mac IE in 2003 and that it had not updated the software in over three years, meaning that Mac users only had access to IE 5 while Windows users had IE 6).

¹⁶⁸ See Robert Vamasi, Internet Explorer 7 Browser Review, CNET REVIEWS, Oct. 18, 2006, http://reviews.cnet.com/browsers/internet-explorer-7/4505-3514_7-32111537.html ("IE 7 was Microsoft's one chance to leapfrog ahead of the competition, but the company has only barely caught sight of the current frontrunners. For more features and greater security, switch to Mozilla Firefox."). Some changes within IE7 are "merely cosmetic" and the browser is missing the "innovative, cutting-edge features" found on Firefox2. *Id.*; see also Fred Vogelstein, Search and Destroy, FORTUNE, May 2, 2005, at 75, available at http://money.cnn.com/magazines/fortune/fortune_archive/2005/05/02/8258478/index.htm ("[T]he recently released Firefox browser, which can be downloaded free, has forced Gates to reconstitute an Internet Explorer development team.").

¹⁶⁹ Dare Obasanjo, Mac IE's Death: A Case for Microsoft Disbanding or Transferring the Windows IE Team, Dare Obasanjo aka Carnage4Life, Dec. 19, 2005, <http://www.25hoursaday.com/weblog/PermaLink.aspx?guid=ba90f4aa-4a07-4f3e-a318-bc1095c61980>.

*competitorii si castiga o pozitie de monopol, asa cum s-a intamplat in cazul browserelor Web, Microsoft pare sa renunte la inovatia semnificativa*¹⁷⁰.

Pana acum, in ciuda lipsei de inovatie pe piata browserelor, Microsoft a reusit sa mentina o cota de piata enorma¹⁷¹. Chiar browsere web evident superioare, precum Opera sau Mozilla Firefox, au intampinat mari dificultati pana la adoptarea lor pe scara larga. Dupa ce au fost lipsiti multi ani de inovatie din partea Microsoft, iubitorii de tehnologie au primit sansa de a adopta Firefox la lansare, iar criticii considera ca Firefox (sau alte browsere, inclusiv Opera) sunt de departe superioare Internet Explorer¹⁷². Pana acum, in ciuda superioritatii acestora, nici un OEM nu a distribuit vreodata unul din aceste browsere alternative, inovatoare¹⁷³. Astfel, in timp ce IE este garantat omniprezent, ca rezultat al practicilor agresive promovate de Microsoft, browserele rivale se confrunta cu bariere inalte de intrare, chiar daca sunt superioare din punct de vedere tehnic. Dincolo de popularitatea lor in randul unui grup limitat de utilizatori sofisticati, browserele alternative nu au fost capabile sa-si creeze drumuri de acces semnificative pe piata¹⁷⁴. Aceasta inseamna ca majoritatea consumatorilor nu au putut folosi, timp de un numar mai mare de ani, facilitati precum navigarea cu tab-uri (*tabbed browsing*) sau securitatea imbunatatita, decat pe o piata competitiva¹⁷⁵. Cota mare de piata pe care Microsoft o detine permanent, in ciuda produselor vizibil inferioare, este dovada ca producatorii de echipamente (OEM) nu selecteaza browserele web pe baza cererii consumatorilor.

Comportamentul anticoncurential al Microsoft pe piata browserelor a intarit, de asemenea, Internet Explorer ca browser web super-dominant pe statiile de lucru. Printre altele, in anii de

¹⁷⁰ Walter S. Mossberg, For Tabbed Browsing and Other New Tricks, Try Explorer's Rivals, WALL ST. J., Jan. 8, 2004, available at <http://web.archive.org/web/20070214035829/http://ptech.wsj.com/archive/ptech-20040108.html>.

¹⁷¹ See California Group's Report on Remedial Effectiveness at 3 (Aug. 30, 2007), New York v. Microsoft Corp., 224 F. Supp. 2d 76 (D.D.C. 2002) (No. 98-1232), available at http://www.naag.org/assets/files/pdf/antitrust.2007-08-30_Filed_CA_Group_Effectiveness_Report.pdf (reporting an 85% market share for Internet Explorer in 2006).

¹⁷² See Robert Vamosi, Internet Explorer vs. Firefox 2, CNET REVIEWS, Oct. 30, 2006, http://reviews.cnet.com/4520-10442_7-6656808-7.html?tag=btn (stating that "Firefox 2 still rules the browser roost for now, despite a much improved version of Internet Explorer" and noting that Firefox has "earned its spot at the top of the browsers"); (link is to inner page of review); Erik Larkin, Radically New IE 7 or Updated Mozilla Firefox 2—Which Browser is Better?, PC WORLD, Oct. 24, 2006, <http://www.peworld.com/article/id,127309-page,6-c,browsers/article.html> ("Of the two rivals, Firefox remains the better application.").

¹⁷³ See California Group's Report on Remedial Effectiveness at 12 (Aug. 30, 2007), New York v. Microsoft Corp., 224 F. Supp. 2d 76 (D.D.C. 2002) (No. 98-1232), available at http://www.naag.org/assets/files/pdf/antitrust.2007-08-30_Filed_CA_Group_Effectiveness_Report.pdf ("The OEM flexibility provisions of the Final Judgment have not produced competitively significant results because they do not adequately address the persistent disincentives (including Microsoft's advantage of free universal distribution, additional support costs, potential consumer confusion and PC resource constraints) that discourage OEMs from preloading rival middleware products on a Windows PC...."); see also Edward F. Moltzen, Firefox Gets No Respect from PC Makers, Despite Popularity, CHANNELWEB NETWORK, Oct. 15, 2007, <http://www.crn.com/software/202402974>.

¹⁷⁴ See Net Applications, Browser Market Share, <http://marketshare.hitslink.com/report.aspx?qprid=0>. As the Chairperson of the Mozilla Foundation put it: "Equally important, the success of Mozilla and Firefox does not indicate a healthy marketplace for competitive products. Mozilla is a non-profit organization; a worldwide movement of people who strive to build the Internet we want to live in. ... I certainly hope that neither the EU nor any other government expects to maintain a healthy Internet ecosystem based on non-profits stepping in to correct market deficiencies." Mitchell Baker, Chairperson, Mozilla Foundation, The European Commission and Microsoft, Mitchell's Blog, Feb. 6, 2009, <http://blog.lizardwrangler.com/2009/02/06/the-european-commissionand-microsoft/>.

¹⁷⁵ Paul Festa, Microsoft Offers Tabbed Browsing—In IE 6, CNET NEWS, June 8, 2005, available at http://news.cnet.com/Microsoft-offers-tabbed-browsing--in-IE-6/2100-1032_3-5738037.html (explaining that tabbed browsing is a feature, "long offered by IE competitors like Opera, Safari and Firefox," that enables users to open several web pages in a single window and select among them by clicking on a tab at the top of the page, and noting that tabbed browsing would not be standard on Internet Explorer until Version 7).

dupa eliminarea Netscape de catre Microsoft si inainte de aparitia Firefox, departamentele de informatica din numeroase corporatii au creat aplicatii si solutii intranet pe baza tehnologiilor proprietate Microsoft in Internet Explorer. Aceste companii ar intampina bariere semnificative daca ar trece astazi la un browser diferit¹⁷⁶.

VI. CONCLUZII

Comportamentul Microsoft din ultimele doua decenii a demonstrat vointa si abilitatea Microsoft de a se angaja intr-un comportament nelegal, cu scopul de a proteja si extinde principalele sale monopoluri. Acest comportament a cauzat un prejudiciu real fata de consumatori, care continua sa plateasca preturi mari si sa utilizeze produse de calitate mai slaba decat pe o piata competitiva. Prin intelegerea istoricului acestui comportament anticoncurential, dezvoltatorii, grupurile de consumatori si autoritatile guvernamentale vor fi pregatiti sa recunoasca intr-un stadiu incipient abaterile prezente si viitoare ale Microsoft, si sa intervina pentru a impiedica Microsoft sa utilizeze alte tactici in afara competitiei loiale. ECIS continua sa spere ca recenta Declaratie de Obiectiuni a Comisiei Europene, care se adreseaza comportamentului necorespunzator al Microsoft, va marca in cele din urma sfarsitul celor doua decenii de comportament anticoncurential din partea Microsoft si al prejudicierii consumatorilor.

¹⁷⁶ See Sara Grant, Lessons from the Browser Wars: Q&A with Pai-Ling Yin, HARV. BUS. SCHOOL WORKING KNOWLEDGE, Apr. 10, 2006, <http://hbswk.hbs.edu/item/5288.html> (detailing corporate managers' unwillingness to switch their companies to Firefox).