The Bush administration must decide whether to continue its predecessor's efforts.

Clinton's Brave New Business World

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An aggressive effort to use antitrust law to regulate the economy took place almost unnoticed in the last four years of the Clinton presidency. The U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) set implicit tests for anticompetitive behavior that effectively assumed many successful companies engaging in aggressive business practices were guilty of antitrust violations unless they proved themselves innocent. The federal agencies also took the position that business practices could be unlawful even when there was no specific evidence that the practices harmed consumers. That perspective shaped key antitrust cases in which the enforcement agencies sought restructuring and ongoing court-administered regulation of critical industries.

So far, the Clinton attempts to make antitrust a more powerful regulatory tool have fared poorly in litigation. The Supreme Court rejected the FTC's efforts to shift the burden of proof to the defendant in the 1999 *California Dental Association* decision. The FTC settled its case against Intel without getting the sweeping regulation over Intel's relationship with hardware makers that the FTC sought. A federal district court in Wichita dismissed the DOJ's antitrust case against American Airlines, noting, "The government's theory… represents a whole new mid-game spin on time-honored rules." The D.C. Circuit Court of Appeals found that "most" of the trial court's findings that Microsoft committed antitrust violations did "not withstand appellate scrutiny." The appeals court rejected the trial judge's decision to break-up Microsoft, prompting the Justice Department to move away from pursuing some of the sweeping regulatory remedies that it had previously sought.

Clinton's Justice Department nevertheless has left a full antitrust plate for the incoming Bush administration. The new administration will have to weigh the virtues of policy continuity against the possibility that the courts will defer to a level of agency interventionism that runs counter to Bush's business philosophy.

HANDS-ON VS. HANDS-OFF ANTITRUST

The answers to just two questions separate students of antitrust into what I call the "hands-on" and "hands-off" schools:

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- Apart from price-fixing and similar behavior, are anticompetitive practices common?

- Apart from price-fixing and other sorts of cartel behavior, can the courts distinguish anticompetitive from pro-competitive practices with sufficient accuracy, and design remedies with sufficient precision, to ensure that regulation will make consumers better off?

Answering "yes" to both questions, the federal enforcement agencies in the Clinton administration came down squarely on the interventionist "hands-on" side.

Prevalence of anticompetitive practices In the last quarter-century, game theorists have developed models that imply that a wide variety of business strategies can harm consumers. That is especially so in industries with few firms or with firms that make differentiated products – a common real-world phenomenon. For example, firms may exclude rivals by tying complementary products, adopting strategies that raise their rivals' costs compared to their own, and investing in innovation that destroys rivals.

Theory also buttresses the view that the invisible hand may work poorly in "network" industries wherein the product becomes more valuable as more people use it. Academic work from the late 1980s and early 1990s shows that (a) network industries tend toward monopoly, (b) the resulting monopolies may use inferior technologies, and (c) inefficient monopolists may be very difficult to dislodge.

To counter those charges, members of the hands-off school argue that such anticompetitive outcomes occur, in theory, only under very specific and often unrealistic assumptions. Moreover, they believe that, in the real world, it rarely is possible to differentiate anticompetitive from pro-competitive strategic behavior. For example, Dennis Carlton and Michael Waldman, in their 1998 paper "The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries," concluded that it could make sense for a monopolist to tie a complementary good to an established product, with the goal of preventing entry by a rival maker of the complementary good. But, the authors continued, the anticompetitive tie could only occur in the uncommon scenario in which the costs of entry into the market for the monopolized good are low and the costs of entry into the complementary good meet a Goldilocks condition: They cannot be too low or too high. What is more, there is no way for observers or involved parties to determine what is too low or too high.

Opponents of aggressive intervention also argue that theoretical models ignore market forces that prevent anticompetitive conduct from enduring. Frank Easterbrook's research helped persuade the Supreme Court that predatory pricing was seldom effective because rivals usually could engage in successful counter-strategies. Some "hands-off" proponents also argue that interventionists miss the value to consumers gained through the creation—and subsequent destruction—of monopoly power through innovation.

PAUL HOSEFROS/NYT (JACKSON), STEPHEN CROWLEY/NYT (GATES)

COURTROOM ADVERSARIES: Federal Judge Thomas Penfield Jackson (left) and Microsoft chairman Bill Gates (above) headlined the Clinton DOJ's key antitrust case.

Distinguishing anticompetitive actions Members of the hands-off school agree with their counterparts that businesses may restrain competition and thereby harm consumers. And hands-on supporters generally agree that the courts have to look to the facts to determine whether conduct is anticompetitive. So it would seem that both schools could agree that the courts should make the effort. And both schools recognize that courts make mistakes, sometimes convicting the innocent or absolving the guilty. But they part ways decisively on the frequency and consequence of such errors.

The hands-on school believes that a firm stance against certain business practices is worth the price of occasionally condemning pro-competitive actions, while the hands-off school sees the courts as having limited ability to differentiate practices in that way. And because the latter school believes that, apart

from price-fixing and similar cartel actions, anticompetitive conduct is relatively rare, it sees the costs of inhibiting procompetitive conduct as outweighing the benefits of deterring anticompetitive conduct.

The courts The history of antitrust lends support to the hands-off school. An extensive literature now documents that the courts declared many practices unlawful—predatory pricing, maximum price fixing, manufacturer-distributor restraints, tying, price discrimination—that economists have since concluded are usually innocuous or even beneficial. The fact that the Supreme Court has made so many fundamental errors in antitrust jurisprudence does not give one confidence that the courts are capable of reliably distinguishing good practices from bad.

Moreover, the Supreme Court has yet to reverse fully earlier restrictions that have no basis in economics—modern or otherwise. For example, combining products through bundling and integration obviously benefits consumers by reducing transactions costs, creating new products, and lowering prices. Yet the courts have made tying by firms with market power a per se violation under certain circumstances—one for which efficiency considerations and other consumer benefits provide little defense.

History reveals many fundamental errors in the Supreme Court's antitrust jurisprudence, which erodes confidence that the courts can distinguish good business practices from bad.

Recognizing their own limitations in recent decades, the courts have become less friendly to antitrust plaintiffs. In such decisions as *Matsushita* (1986) and *Brooke Group* (1993), the courts placed heavy burdens on plaintiffs who claim that their rivals have engaged in illegal predatory pricing. Other decisions such as *BMI* (1979), *Nabanco* (1986), and *Khan* (1997) sharply restricted the ability of plaintiffs to win simply by labeling cooperation among businesses as price-fixing. The true test, the courts said, should be whether consumers were harmed, and defendants must be given the opportunity to explain the countervailing efficiencies brought by their practices.

Most recently, *California Dental* (1999) made it clear that the plaintiff always bears the burden of showing that suspect practices raise prices or lower output to the detriment of consumers. In the case, the FTC was so certain that advertising restrictions adopted by a dental association were anticompetitive that it offered no expert testimony showing consumer harm. But the Supreme Court insisted on empirical evidence and remanded the case to a lower court for further consideration. On remand, the lower court looked at the record and ruled against the FTC.

Many appellate court decisions echo a skeptical view of theory-driven interventionism. In 1998, the D.C. Circuit suggested "that the limited competence of courts to evaluate high-tech product designs and the high cost of error should make them wary of second-guessing the claimed benefits of a particular design decision." Although there are exceptions—*Aspen* (1985) and *Kodak* (1992) being the most notable—the trend has been away from the courts looking suspiciously at business behavior, and perhaps even a bit towards looking suspiciously at plaintiff-competitors seeking court protection.

CLINTON'S PLAINTIFF-FRIENDLY ANTITRUST

Against the judicial tide, the Clinton antitrust enforcers advocated positions that would have made it easier for plaintiffs to win. The most prominent of those positions were efforts to weaken the plaintiff's burden to demonstrate that the challenged practices harm consumers, and attempts to shift the burden of proof to the defendant for many important purposes.

The plaintiff's burden In the last two decades, a near-consensus emerged that the antitrust laws only condemn practices that harm competition and consumers. But in several major cases brought since 1996, the DOJ and the FTC have implied that the government should not have to prove much to establish consumer harm. Their disclaimers in the landmark *Intel, Microsoft,* and *Visa/MasterCard* cases are telling.

In none of those cases did the agencies offer the direct evidence required by *California Dental* that the challenged practices had raised prices, reduced output, or retarded innovation. Instead, government lawyers suggested that it was enough to show that the practices interfered with conventional competitive processes. For example, in *Visa/MasterCard*, the Justice Department claimed "it is sufficient to prove that the challenged restraint had a significant impact on the process by which competitive decisions were made." Similar claims were made in the *Intel* and *Microsoft* cases.

The DOJ's claims about the effect of practices on the competitive process were based mainly on theory. In each case, the government's economists agreed they had no evidence that real consumers were harmed by higher prices or reduced output. Consider the following:

- In the *Intel* case, the FTC settled after the government's expert witness acknowledged in pre-trial testimony that no tangible harm could be identified.

- In the *Microsoft* case, the government's expert economic witness responded to a question of whether consumers had been harmed by saying, "I would

think the answer was no, up to this point."

- In the *Visa/MasterCard* case, the government's chief economic witness acknowledged that he had "not come up with… numerical quantification of the harm to competition and consumers."

- And, in a similar case against American Airlines, the district court judge who dismissed the case asserted that the DOJ had used what the judge termed a "semantic sleight of hand" in order to avoid trying to prove that consumers would be harmed by the company's actions.

The FTC and DOJ asserted in *Intel, Microsoft,* and *Visa/MasterCard* that the defendants must have harmed consumers indirectly by reducing incentives to innovate. But, apart from offering contrived examples, the government failed to provide evidence that the challenged practices had resulted, or would result, in a net decrease in innovation. For example, the government pointed to the introduction by the French of "smart" cards in the 1980s and blamed the failure of credit card companies to do so in the United States on the anticompetitive suppression of innovation.

Citing concerns over "network effects," the Clinton DOJ launched suits against technology-intensive giants Intel, Microsoft, Visa, and Mastercard.

Increasing the burden While heading the DOJ's Antitrust Division from 1997 to 2000, Joel Klein proposed a stepwise process for evaluating horizontal business agreements. He claimed that his agency should be required to present evidence of anticompetitive effects only if the defendant offered proof of pro-competitive effects.

In *California Dental*, the FTC similarly attempted to shift the burden, arguing that "a detailed analysis of market power is unnecessary to reaching a sound conclusion." The Supreme Court explicitly rejected that argument: Short of extreme behavior such as blatant price fixing, the burden to show anticompetitive effects always comes first.

REGULATION THROUGH ANTITRUST

The antitrust chiefs in the final four years of the Clinton administration believed that the then-burgeoning high-technology industries were particularly prone to market failure and that regulators needed to act quickly to prevent eventual consumer harm. In the words of Clinton FTC chairman Robert Pitofsky, "There are substantial costs to a 'hands-off' policy. Once a network monopoly is in place, it often is a simple matter for the monopolist to exclude would-be challengers."

Both enforcement agencies were particularly concerned about the consequences of "network effects"—the notion that the value of a product (e.g. fax machines) or service (e.g. AOL's Instant Messaging) increases as more people use it. They took seriously theories that showed network effects could enable a firm to capture an entire market quickly, and that consumers could be "locked-in" to an inferior service or technology.

In response to those concerns, Clinton antitrust lawyers launched three major suits in an effort to intervene in key technology-intensive industries. In *Intel*, the FTC sought court regulation of the hardware maker's licensing of its intellectual property. In *Microsoft*, the DOJ eventually sought the software company's break-up, as well as ongoing regulation of its key design decisions and access by rivals to its intellectual property. And, in *Visa/MasterCard*, the DOJ sought extensive reorganization of the credit-card cooperative associations along with regulation of association rulemaking.

Intel Intel, the giant microprocessor manufacturer, regularly provides its customers — predominately computer manufacturers — with advance technical material and prototypes of forthcoming microprocessors. That enables Intel's customers to develop hardware utilizing the newest technology.

Three Intel customers — Compaq, Digital, and Integraph— sued the microprocessor maker between 1995 and 1997 for infringing on their patents. Intel retaliated by withholding advance technical information from those customers and demanding the return of proprietary materials. Intel later settled with Compaq and Digital, while a district court dismissed Integraph's claims. Still, the FTC filed an antitrust complaint against Intel in June 1998, asking the court to prevent Intel from discriminating in the sale of microprocessors and the provision of information about microprocessors unless the company could "demonstrate that such action is based on legitimate business considerations."

Shortly before trial, the FTC and Intel reached a settlement under which the company agreed not to refuse customers access to technical information in response to disputes over intellectual property. However, Intel was not prohibited from basing decisions to share technical information on other business considerations.

The FTC's "protect[ing] incentives to innovate" argument provides a way to use antitrust to regulate what successful companies do with their intellectual property. Yet strikingly, the FTC's complaint and trial brief against Intel presented no evidence that the company's actions would reduce innovation.

In Integraph's parallel private antitrust case, the dis-

trict court entered a preliminary injunction that required Intel to reinstate Integraph as a "strategic customer." But the appeals court that handles patent cases reversed the lower court, finding no evidence that Intel's actions adversely affected competition. The appeals court concluded:

> *The remedy of compulsory disclosure of proprietary information and provision of pre-production chips and other commercial and intellectual property is a dramatic remedy for antitrust illegality, and requires violation of antitrust law or the likelihood that such violation would be established.*

The FTC pursued a novel interventionist antitrust approach that seemed to argue all it had to show was a tenuous link between Intel's actions and innovation decisions – without evidence of significant net effects on prices, output, innovation, or consumer welfare. Although it is possible that the FTC would have had more to say if the case had gone to trial, the failure of Integraph to present such evidence makes that doubtful.

In *Intel*, the FTC used novel interventionist arguments but did not claim the company's practices had negative effects on prices, output, innovation, or customer welfare.

Microsoft Microsoft has invested heavily over the years in adding features to its popular Windows operating system and persuading software applications developers to use them. Both Microsoft and applications developers have exploited network effects to increase Windows' sales: An operating system is more desirable to applications developers if more people use it, and more desirable to consumers if there are more applications for it. The DOJ claimed that Microsoft perpetuated Window's success by preventing alternative platforms for applications software, particularly those related to the Internet, from gaining a foothold.

In late 1994, a start-up called Netscape introduced Navigator, a commercial version of a piece of software called a "browser" that enables ordinary consumers to use the World Wide Web. By the end of 1995, Netscape had distributed over 15 million browsers worldwide and the software was used by over 70 percent of all browser users. Microsoft subsequently integrated its own browser, Internet Explorer (IE), into Windows so that Windows purchasers would receive the browser as part of their purchase. By 2000, Microsoft's share of browsers in use had reached 77 percent.

How and why that happened was the focus of the antitrust suit brought by the DOJ and 19 states in May 1998. The plaintiffs argued that Microsoft, in an anticompetitive move, had tied IE to Windows and had hindered the distribution of Netscape's browser. According to the DOJ, those actions prevented Navigator from evolving into a commercial platform for applications software and stopped Netscape from serving as an effective distribution vehicle for Sun Microsystems' Java programming technologies that could also evolve into a platform. By the time the trial began in October 1998, the government's case had expanded to include charges that Microsoft had engaged in a pattern of behavior to stifle competition for still other platform products.

The DOJ presented two major legal arguments that reflected its interventionist perspective, which were accepted by the trial judge, Judge Thomas Penfield Jackson. The judge also accepted the DOJ plan to restructure and regulate the operating systems industry.

Tying The DOJ claimed that IE and Windows were separate products that Microsoft had tied together in an effort to gain an illegal market advantage. Under the *Jefferson Parish* test, such tying is a per se violation of the antitrust laws if, as the DOJ claimed, Microsoft had monopoly power in operating systems.

A three-judge panel of the D.C. Circuit Court of Appeals initially rejected the DOJ argument that Microsoft's inclusion of a browser with its operating system violated a prohibition against tying contained in a 1994 consent decree. The panel suggested that integrating products could not violate the antitrust laws so long as they created "plausible" benefits for consumers. Judge Jackson later rejected the D.C. Circuit's reasoning, coming down squarely on the hands-on side of the debate on tying law.

Predation The DOJ also claimed that Microsoft had engaged in predation. According to government lawyers, the software maker had engaged in predatory practices when it sacrificed profit by investing heavily in developing and improving IE but not charging for it. The DOJ also cited other alleged acts of predation by Microsoft that included helping Internet Access Providers (IAPs) install IE on their Web servers for free and paying IAPs a bounty for getting people to use the browser.

In competitive markets, companies routinely sacrifice short-term profits by reducing prices, giving things away, and investing in improved products. They do so to increase their market shares at the expense (and, hopefully, the demise) of their rivals. In leveling its predation charge against Microsoft, the DOJ made a routine business behavior subject to challenge by enforcement agencies and private plaintiffs.

The DOJ's position on predation stands in sharp contrast to the skeptical view that the Supreme Court has taken

since the *Matsushita* decision in 1986. In *Matsushita*, the Court stated:

> *Cutting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect.*

Similarly, in the Brooke Group cigarette case, the Court noted:

> *As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting.*

Thus, the Supreme Court has set a high bar for proving predation. In *Brooke Group*, the justices ruled, "The plaintiff must demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation." Yet, in the Microsoft case, the DOJ presented no evidence during trial that Microsoft would have been able to recoup its losses.

Judge Jackson agreed with much of the DOJ's predation case. He apparently did not go so far as to condemn Microsoft for investing in the development of IE (though Jackson's language is open to interpretation). But he found the company guilty for developing a software kit that helped IAPs install IE on their servers and then giving that kit away for free, not charging IAPs for IE, and paying IAPs a bounty for securing additional IE users.

In *Microsoft*, the DOJ argued that efforts to improve and distribute Internet Explorer were an anticompetitive effort to hinder Netscape and Sun Microsystems.

Restructuring and regulating As a remedy, the government asked the Jackson court to divide Microsoft into two separate companies, one with most of Microsoft's operating system assets and the other with its software applications assets. The government argued that the split might induce additional operating system competition if the applications company developed its popular Microsoft Office software into a competing platform, or rewrote Office to run on competing operating systems such as "Linux."

The government also sought to limit Microsoft's ability to integrate certain technologies into its operating systems. The company would have to offer operating systems both with and without technologies (such as its browser) that could serve independently as a software platform. According to the government, the court should set the prices of the alternative operating systems in proportion to the number of lines of code they included.

Finally, the government sought to weaken Microsoft's control of its intellectual property. Rivals would gain access to the Windows source code and other proprietary information for "the sole purpose of enabling their products to interoperate effectively with Microsoft Platform Software." Just how the use of the information would be limited was never specified.

The appeal The appeal of *U.S. v. Microsoft* provided the higher courts with a stark choice between hands-on and hands-off antitrust. Along with siding with the government's industry restructuring proposals, Judge Jackson claimed the right to second-guess (a) product design decisions, on the grounds that they violate the *Jefferson Parish* tying test, and (b) pricing and investment decisions, on the grounds that it is illegal to sacrifice short-run profits for the purpose of harming a competitor. But in a 7-0 decision, the D.C. Circuit Court of Appeals mainly opted for judicial restraint.

The appellate court accepted Jackson's decision that Microsoft had monopoly power in PC operating systems. The appellate court also accepted some of Jackson's findings that the software giant had taken actions to deter Netscape and Sun Microsystems from challenging Microsoft's position in the operating systems market.

However, the appeals court rejected the government's attempt to apply the per se tying rules to platform software. According to the higher court, the "wooden application of per se rules in this litigation may cast a cloud over platform innovation in the market for PCS, network computers, and information appliances." The appeals court also rejected federal lawyers' efforts to expand the government's reach through aggressive predation arguments. The appeals court noted, "The rare case of price predation aside, the antitrust laws do not condemn even a monopolist for offering its product at an attractive price."

The appeals court did reach some conclusions that interventionists would applaud. Its analysis of Microsoft's actions did not examine whether they, individually or together, had a significant effect on competition. Nor did it insist on specific evidence of consumer harm. And the court took a fairly hands-on approach to exclusive contracts – contracts that many firms enter into for sound pro-competitive business reasons.

The appeals court remanded the case for further hearing on remedies, noting that it had "drastically altered the scope of Microsoft's liability." The court expressed deep

skepticism that a breakup of the company made sense, and instead encouraged the lower court to search for a remedy tailored to the court's liability findings. The court also removed Jackson from any further handling of the case, citing ethical violations.

Visa/MasterCard U.S. consumers, when making purchases, use one or more of four major brands of payment cards: American Express, which provides charge and credit cards; Discover, which provides credit cards; and MasterCard and Visa, which offer credit, charge, and debit cards.

Two cooperative associations of banks and other financial institutions operate MasterCard and Visa. The cooperatives promote their brand and manage the electronic networks that authorize transactions and settle accounts. Members of the cooperatives compete among themselves to issue cards and make independent decisions on fees, features, and promotion. Members also compete for the fees charged in processing merchant transactions. The two cooperatives operate on a break-even basis, assessing volume-related fees on their members to recover the costs of providing services. In contrast, American Express and Discover are unitary, for-profit entities that issue cards, promote the brands, and operate their own transactions networks.

In the early 1970s when Visa and MasterCard were in their infancy, there was controversy and some litigation over whether banks that belonged to one cooperative could also belong to the other. MasterCard approved of what is known as "duality" — members belonging to both associations. Visa, which was then smaller, opposed duality.

To reduce its potential exposure to treble-damage antitrust claims from MasterCard members that wanted to belong to both associations, Visa asked the DOJ to confirm that opposition to duality did not violate the antitrust laws. The federal agency's antitrust division ultimately declined to issue that confirmation, taking the position that letting members sign up merchants for both systems would increase competition — although it was less sure that letting members issue cards with both systems would be beneficial. The government acknowledged that its position would result in less competition between the associations as card systems, but it apparently believed that the tradeoff between system-to-system competition and bank-to-bank competition should be decided in favor of bank-to-bank competition.

Most banks joined both associations. But the associations' interests apparently started to diverge in the 1990s. Visa created incentives that encouraged dedicated membership, requiring Visa board members to have at least 75-percent shares (in dollars charged) on Visa cards and entering into "partnership agreements" with members that gave them special rates in return for agreeing to specialize in Visa cards.

Both associations later confronted another issue involving member loyalty. Discover — created by Sears in 1986 — asked to join Visa. The company wanted to continue operating a competing card brand, but it also wanted to issue Visa cards. Visa said no, and private antitrust litigation ensued. Ultimately, the 10th Circuit Court of Appeals ruled in favor of Visa, observing, "To impose liability on Visa USA for refusing to admit Sears or revise the bylaw to open its membership to intersystem rivals, we think, sucks the judiciary into an economic riptide of contrived market forces."

DOJ claimed that association bylaws for Visa and Mastercard — which allow banks to issue both cards — reduced competition between the two cards and with other payment cards.

Later, American Express decided that it wanted to enter into partnerships with members of Visa and MasterCard under which banks would issue American Express cards while continuing to issue Visa and MasterCard cards. Both associations rebuffed American Express. But an antitrust challenge in the European Union resulted in both associations yielding there and in all other regions except the United States.

DOJ's case The DOJ argued that association rules permitting banks to belong to both cooperatives (duality rules) and rules that prohibit banks from belonging to other systems (exclusivity rules) were both illegal. The government rationalized its apparently inconsistent positions by arguing that there are two aspects to duality — one pro-competitive and the other anticompetitive. The DOJ claimed that "duality in governance" reduced competition between the systems by stifling investments in innovation and advertising that could hurt the other system. By contrast, the DOJ claimed "duality in issuance" increased both the degree of competition between the two associations and the variety of cards available to consumers. The government thus wanted to prohibit individual banks from having a voice in governing more than one system, but to permit banks to issue cards through competing systems.

Industry restructuring By any common sense test, the payment card industry is highly competitive. Entry is easy, and more than 6,500 enterprises in this country issue credit cards. The industry's performance also indicates that it is highly competitive. Credit card issuers battle aggressively on price and features. That has made it possible for an ever-greater percentage of consumers to obtain cards and use

them. The average fee paid by consumers for using a credit card fell 20 percent in real terms between 1984 and 1999. Meanwhile, ancillary benefits — notably airline miles and cash rebates — have proliferated, and consumers can use cards at many more merchants.

By the same token, payment card services are increasingly easier to use: Advances in hardware and software have sharply reduced the time needed to process a card transaction.

The competitive evolution of the payment card industry should not be taken for granted. Prior to the establishment of the card associations, the primary sources of general-purpose payment cards were American Express and Diners Club. Both built proprietary networks for issuing charge cards and, as one would expect given the scale and network economies in operating such networks, the industry was highly concentrated. Thus, if the cooperative associations had never been formed, it is likely that the market would be less competitive today.

In recent years, market forces have been pushing the card associations to phase out duality and to seek loyalty from their members. But the DOJ's proposed restructuring would prevent the emergence of exclusive systems. Instead, the current industry would be replaced by one in which the cooperatives would not be able to demand loyalty from their members. Accordingly, the proprietary card companies would be able to pick and choose members with which they allied, but would incur no reciprocal obligation to open their own transaction systems to all comers.

One could, of course, debate whether the DOJ's proposed payment card industry would serve consumers better than the current industry structure. But, in what is becoming the trademark of the interventionist school, Clinton antitrust lawyers did not feel obliged to present empirical evidence that its restructuring would reduce prices, increase output, or increase innovation.

As this article went to press, the trial court had not issued a decision in the *Visa/Mastercard* suit.

THE CLINTON AFTERMATH

The FTC's *Intel* case ended with a settlement that imposed limited restrictions on Intel and an appeals court decision in a related matter that sharply questioned using the antitrust laws to mandate disclosure of intellectual property. The *Microsoft* and *Visa/MasterCard* sagas, as well as the *American Airlines* suit, continue and, depending on how they are resolved by higher courts, could have enduring consequences for important sectors of the economy as well as for antitrust policy.

The Justice Department has long recognized the value in policy continuity and in keeping politics out of law enforcement. It has therefore been reluctant to change positions in cases—especially ones that have been decided in the government's favor. But in deciding how to proceed with the antitrust cases left over from the Clinton years, the new administration must weigh the value of continuity against the consequences of interventionist antitrust policy.

In deciding how to handle cases left over from the Clinton years, the Bush administration must weigh the value of government policy continuity against the consequences of interventionist antitrust policy.

Antitrust prosecution remains a potent weapon—in ways scarcely imagined a few decades ago. No public purpose would be served by trying to persuade the courts to codify a hands-on approach that is antithetical to the new administration's beliefs, not to mention a reversal in the sound direction of antitrust law in the last quarter century. R

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