

Appendix A

U.S. Department of Justice
Antitrust Division

Office of the Assistant Attorney General Washington, D.C. 20530

January 6, 1982

Memorandum for the Attorney General
(Information Memorandum)

Re: *U.S. v. International Business Machines Corp.*

As you may be aware from my previous public comments, I have been devoting a substantial amount of time to reviewing our antitrust case against IBM, with a view toward becoming informed on the issues to a degree sufficient to allow me to supervise the case adequately. After numerous meetings and the review of voluminous materials prepared by our trial staff, counsel for IBM, and others, I am convinced that the only responsible course open to the government is to seek IBM's agreement to a stipulation of dismissal of this action. I expect IBM to agree to that proposal and that I will file a stipulation of dismissal on Friday, January 8. Because you and the Deputy Attorney General are recused on this matter, this memorandum is for purposes of information only, to enable you to respond to such inquiries as may result from our actions. As I am sure you will understand, I request that you hold this information in confidence pending public disclosure, anticipated to occur sometime Friday morning.

The *IBM* case was filed on January 17, 1969. Now, 13 years later, the trial, which began in early 1975, is finally in its closing stages. Proposed findings of fact are scheduled to be filed on February 1, 1982. A decision cannot be expected from the district court until at least 1983 and possibly 1984. That decision will not even consider relief issues; they have been deferred pending submission of the liability case. If the government prevails with respect to liability, substantial additional litigation regarding relief would be necessary. Finally, if the court's decision on relief, as well as its decision on liability, is favorable to the government, IBM will certainly appeal, with unknown result. Thus, unless the government loses the case at some earlier point, it will be many years before the litigation ends.

My review of the case has involved numerous meetings and discussions and the consideration of voluminous written materials. In a series of seven meetings starting in September and concluding in De-

ember, Division staff attorneys and counsel for IBM met with me to explain their respective views of the evidence. Prior to each meeting in this series, the trial staff and IBM counsel submitted, and I have carefully reviewed, written materials supporting their positions. I have also reviewed written materials submitted by the trial staff as follow-up to those meetings. In addition, I have studied several extensive reports prepared by an internal Division task force, aided by several distinguished outside consultants. That task force was assigned to study the case during the Carter Administration for purposes very similar to those of my own review. I have also considered a response to the task force reports written by the trial staff.

In addition to the series of meetings referred to above, I have met with the trial staff, without IBM counsel present, to hear their views and to share with them my reactions to the various materials and presentations. I have also met to discuss various issues in the case with the members of the internal Division task force mentioned above, and with several senior Division officials who attended the meetings and who reviewed the same written materials as I.

Before explaining the basis for my decision in greater detail, I would emphasize two related aspects of the review process itself. First, the work of all involved has been of very high quality. The members of the trial staff, in particular, distinguished themselves by producing a vast amount of highly informative material under substantial time pressures. Second, and primarily as the result of the high quality of the work just described, I believe that I have fulfilled my original goal—to acquire familiarity with the case sufficient to supervise it adequately. While no decision of this nature is ever completely free of doubt, I am thoroughly convinced that I have considered all available courses of action, and that I have heard the most compelling arguments for and against each.

In reaching my conclusions concerning this case, I weighed the financial and social costs of continuing the litigation, the government's likelihood of success, and the potential benefits to be obtained if the government should win. Viewed in this way, these considerations lead almost inexorably to the conclusion that we must dismiss the case. There are many factors that compel this decision, but prominent among them are the following:

1. It may well be that IBM is a monopolist and controls some segment of the computer market. However, even if that were so, the government's case does not allege that IBM achieved that position illegally. Rather, the complaint alleges that IBM maintained a monopoly

position lawfully achieved through a series of illegal actions ("bad acts") against its competitors. I have examined the merits of the government's case concerning IBM's "bad acts" and have concluded that, while several may have occurred in the manner and with the intent alleged, the most persuasive episodes concern computer systems that are not included within the market IBM is alleged to have monopolized. The company that was the target of IBM's actions in the most convincing episode, Control Data Corporation, received a substantial payment in settlement of its own lawsuit against IBM. Other allegations concern IBM's actions against manufacturers of peripheral equipment designed to operate with IBM systems. Most of these manufacturers sued on their own behalf, and all of them lost either at trial or at the appellate level.

2. Whatever the chances that the government will prevail at trial, the likelihood of success on appeal is small. The case would be appealed to the Second Circuit, which recently decided *Berkey*. In that opinion, the court defined the offense of monopolization in a manner which indicates it may be unreceptive to the theory of this case. As in *Berkey*, some of the allegations in this case involve efforts by a monopolist to make life difficult for its competitors through changes in its products. Also, the sheer length of the trial and the large number of pre-trial and trial rulings involved make it possible that there were errors at trial which may in themselves warrant reversal.

3. Finally, even assuming that the government could prove IBM's liability, there is no assurance that appropriate relief could be obtained. Where illegal acts have been proven, the purpose of relief is to remove the defendant's ability and incentive to engage in similar acts in the future. This can be done by injunction or divestiture, with courts expressing a preference to avoid structural relief where possible. See, e.g., *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 374 U.S. 521 (1954); *United States v. General Electric Co.*, 115 F. Supp. 835 (D.N.J. 1953). It could also be done by punitive sanctions in a criminal case. In addition, the United States could attempt to recover any damages it may have suffered as a result of illegal behavior.

In this case, injunctions are likely to be ineffective. The conduct episodes that appear most promising as potential bases for liability are time-bound and highly specific to the immediate context in which they occurred. It is impossible to fashion injunctions to prevent similar future violations that are neither so specific that they would be meaningless outside those now-extinct circumstances, nor so general that they

would simply echo the language of the antitrust laws themselves, which continue to be applicable to IBM in any event. Other conduct concerning manufacturers of IBM-compatible products might theoretically be ameliorated by injunctions. However, it is likely that such injunctions would be either so general as to be easily circumvented, or so stringent as to retard innovation in this technologically dynamic industry.

On the other hand, structural relief in this case would be totally disproportionate to the nature and scope of the violations that we might be able to prove. Moreover, despite years of effort, no structural relief proposal has been identified that would inject new competition into the industry while retaining the efficiencies necessary to create viable successor companies.

In my view, the most appropriate relief in cases of this nature may be to impose fines or other penalties commensurate with the gravity of any illegal behavior. Such relief could deter illegal conduct by punishing responsible individuals, and by depriving the perpetrator of some or all of the benefits from that behavior. However, the government here precluded the possibility of obtaining fines or incarceration of responsible individuals by pursuing a civil rather than a criminal action in 1969. Today the allegations would be time-barred.

Finally, while the United States could, as a theoretical matter, now seek to recover damages from IBM for any injury that it may have suffered as a result of illegal conduct, certain factors make this an unrealistic option at present. First, the difficulties already described in attaining a favorable adjudication of liability would also be encountered in establishing IBM's liability for damages. Second, insofar as the government alleges that IBM charged unlawfully low prices for its products, the government, as a purchaser of those products, may have benefitted. Finally, considering the length of time that has passed, the possibility of estimating any damage to the government with the requisite degree of accuracy is so remote, and the cost of doing so would be so great, that pursuit of damage claims would almost certainly result in no net benefit to the government.

For all the foregoing reasons, I have decided to dismiss the case. I have also considered two other options. First, I considered instructing the trial staff to pursue the case as they have been, or with some modifications suggested by me. Second, I considered approaching IBM counsel about settlement.

Pursuing this litigation would be the easiest and, in some respects, the least controversial course of action. I am convinced, however, that this is the least appropriate option. In my view, continuing the case

would commit the government to years of additional litigation with little prospect of victory or meaningful remedy. The cost to the government of further litigation is expected to be between \$1 million and \$2 million per year for the foreseeable future. One cannot ignore the significance of these costs in the current fiscal climate.

Rather than continue the case, I could attempt instead to negotiate a settlement with IBM. While this option has many advantages over continued litigation, it presents some of the same problems. For the reasons discussed above, no appropriate injunctive or structural relief can be specified. Accordingly, it is difficult to identify the goals that we would seek in a settlement. Moreover, I am pessimistic that IBM would agree at this point to more than token measures. In negotiations conducted at the end of the Carter Administration, IBM demonstrated its reluctance to settle for structural and injunctive relief measures far short of those proposed in the course of this litigation by the government. While it might have been possible to negotiate a purely cosmetic settlement, to do so would not have been in the best interests of the public.

In sum, the government is not likely to win this case. Even if it did, there is no relief I could recommend in good conscience. I am convinced that continuing the case would be an expensive and ultimately futile endeavor. I cannot and would not wish to speak for those of my predecessors whose decisions to continue this litigation have brought us to this point. I am certain that they acted in the public interest based upon the best information then available. Based upon the information available to me, I can see only one responsible course of action: to terminate this litigation as rapidly as possible.

Abbott B. Lipsky, Jr.

Acting Assistant Attorney General Antitrust Division

at the direction of Assistant Attorney General Baxter in his absence