

EINER ELHAUGE
Public Forum

A smart move on Microsoft

The government's decision in the Microsoft case to stop pursuing the breakup remedy and the "tying" claims reflects a sensible decision to emphasize speed and certainty by jettisoning weak claims that would take ages to pursue. As the appeals court noted, a central problem is that long-running antitrust litigation tends to be outpaced by technological developments.

The Microsoft litigation is largely about an operating system now four generations old. The most relevant issues today are instead about the new Windows XP operating system and the bundling into it of instant messaging, video and music players, photo software, and other software.

Rather than be condemned to irrelevance, any antitrust enforcer would want relief in place quickly to deal with Windows XP.

The government was never going to get a breakup anyway, given the standard set by the appellate court. The tying claim would also have been an uphill struggle. Recall that the appeals court held that the government failed to present evidence defining the browser market. Thus to win, the government would have had to prove anticompetitive effects through some other means. That would have been difficult and entailed lengthy discovery, putting off any relief for two to three years.

Netscape-AOL and Java-Sun

are better placed to pursue the tying claim because they can introduce evidence on browser market definition. Barred now from doing so, the government would have had to litigate with one hand behind its back, and might have lost and screwed up the tying claim for AOL-Netscape and Sun-Java.

It is not surprising that the state attorneys general, who have always been the most aggressive about going after Microsoft, agree entirely with Justice's decision to cast off the weak claims.

Many seem confused and think the government will no longer oppose software bundling. Nothing could be further from the truth. The Department of Justice has said it will pursue relief that would bar bundling, and more.

It would prohibit Microsoft from using threats, financial inducements, or agreements that discourage computer makers or software developers from using software made by Microsoft's rivals. It would bar Microsoft from conditioning the use of its operating systems on any agreement to use a separately distributed Microsoft product. It would prevent Microsoft from binding other software into its operating system unless Microsoft allows users to remove it and get a discount determined by the share of bytes the deleted software had.

Microsoft would have to offer its software on uniform terms to all buyers. It would have to refrain

from interfering with the interoperability of rival software, and the ability of computer makers to alter the boot sequence to launch or display rival products. Microsoft would have to disclose the application programming interfaces, which provide the platforms for applications to run on its software. And when Microsoft releases an upgrade, it would have to offer its older system for three more years.

That would cover everything Microsoft is accused of doing with Windows XP and more. Indeed, it is unclear whether the Department of Justice will really pursue all of it. The government, sensibly, is asking for expedited discovery, limited to post-trial developments, to see whether modifications are called for. But it seems entirely possible it could get at least preliminary injunctive relief before the mid-October release of Windows XP. That's why, although widely touted as a Microsoft victory, the government's decision is probably more bad news than good for the company — which may explain why its stock declined. The big concern is that unless Microsoft can settle, Windows XP seems likely to be delayed, which could cause adverse stock-market reactions for all the firms hoping Windows XP will revive the computer industry.

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