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**Subject:** Microsoft Settlement

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Subject: Microsoft Settlement

Date: January 28, 2002

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Introduction

Having examined the proposed consent final judgment for USA versus Microsoft, we offer the following comments. We note at the outset that the decision to push for a rapid negotiation appears to have placed the Department of Justice at a disadvantage, given Microsoft's apparently willingness to let this matter drag on for years, through different USDOJ antitrust chiefs, Presidents and judges. The proposal is obviously limited in terms of effectiveness by the desire to obtain a final order that is agreeable to Microsoft.

We are disappointed of course to see a move away from a structural remedy, which we believe would require less dependence upon future enforcement efforts and good faith by Microsoft, and which would jump start a more competitive market for applications. Within the limits of a conduct-only remedy, we make the following observations.

On the positive side, we find the proposed final order addresses important areas where Microsoft has abused its monopoly power, particularly in terms of its OEM licensing practices and on the issue of using interoperability as a weapon against consumers of non-Microsoft products. There are, however, important areas where the interoperability remedies should be stronger. For example, there is a need to have broader disclosure of file formats for popular office productivity and multimedia applications. Moreover, where Microsoft appears be given broad discretion to deploy intellectual property claims to avoid opening up its monopoly operating system where it will be needed the most, in terms of new interfaces and technologies. Moreover, the agreement appears to give Microsoft too many opportunities to undermine the free software movement.

We also find the agreement wanting in several other areas. It is astonishing that the agreement fails to provide any penalty for Microsoft's past misdeeds, creating both the sense that Microsoft is escaping punishment because of its extraordinary political and economic power, and undermining the value of antitrust penalties as a deterrent. Second, the agreement does not adequately address the concerns about Microsoft's failure to abide by the spirit or the letter of

previous agreements, offering a weak oversight regime that suffers in several specific areas. Indeed, the proposed alternative dispute resolution for compliance with the agreement embraces many of the worst features of such systems, operating in secrecy, lacking independence, and open to undue influence from Microsoft.

OEM Licensing Remedies

We were pleased that the proposed final order provides for non-discriminatory licensing of Windows to OEMs, and that these remedies include multiple boot PCs, substitution of non-Microsoft middleware, changes in the management of visible icons and other issues. These remedies would have been more effective if they would have been extended to Microsoft Office, the other key component of Microsoft's monopoly power in the PC client software market, and if they permitted the removal of Microsoft products. But nonetheless, they are pro-competitive, and do represent real benefits to consumers.

Interoperability Remedies

Microsoft regularly punishes consumers who buy non-Microsoft products, or who fail to upgrade and repurchase newer versions of Microsoft products, by designing Microsoft Windows or Office products to be incompatible or non-interoperable with competitor software, or even older versions of its own software. It is therefore good that the proposed final order would require Microsoft to address a wide range of interoperability remedies, including for example the disclosures of APIs for Windows and Microsoft middleware products, non-discriminatory access to communications protocols used for services, and non-discriminatory licensing of certain intellectual property rights for Microsoft middleware products. There are, however, many areas where these remedies may be limited by Microsoft, and as is indicated by the record in this case, Microsoft can and does take advantage of any loopholes in contracts to create barriers to competition and enhance and extend its monopoly power.

Special Concerns for Free Software Movement

The provisions in J.1 and J.2. appear to give Microsoft too much flexibility in withholding information on security grounds, and to provide Microsoft with the power to set unrealistic burdens on a rival's legitimate rights to obtain interoperability data. More generally, the provisions in D. regarding the sharing of technical information permit Microsoft to choose secrecy and limited disclosures over more openness. In particular, these clauses and others in the agreement do not reflect an appreciation for the importance of new software development models, including those "open source" or "free" software development models which are now widely recognized as providing an important safeguard against Microsoft monopoly power, and upon which the Internet depends.

The overall acceptance of Microsoft's limits on the sharing of technical information to the broader public is an important and in our view core flaw in the proposed agreement. The agreement should require that this information be as freely available as possible, with a high burden on Microsoft to justify secrecy. Indeed, there is

ample evidence that Microsoft is focused on strategies to cripple the free software movement, which it publicly considers an important competitive threat. This is particularly true for software developed under the GNU Public License (GPL), which is used in GNU/Linux, the most important rival to Microsoft in the server market. Consider, for example, comments earlier this year by Microsoft executive Jim Allchin:

> http://news.cnet.com/news/0-1003-200-4833927.html
>
> "Microsoft exec calls open source a threat to innovation," Bloomberg News, February 15, 2001, 11:00 a.m. PT
>
> One of Microsoft's high-level executives says that freely distributed software code such as Linux could stifle innovation and that legislators need to understand the threat.
>
> The result will be the demise of both intellectual property rights and the incentive to spend on research and development, Microsoft Windows operating-system chief Jim Allchin said this week.
>
> Microsoft has told U.S. lawmakers of its concern while discussing protection of intellectual property rights . . .
>
> ''Open source is an intellectual-property destroyer,'' Allchin said. ''I can't imagine something that could be worse than this for the software business and the intellectual-property business.'' . . .

In a June 1, 2001 interview with the Chicago Sun Times, Microsoft CEO Steve Ballmer: again complained about the GNU/Linux business model, saying "Linux is a cancer that attaches itself in an intellectual property sense to everything it touches. That's the way that the license works,"1 leading to a round of new stories, including for example this account in CNET.Com:

> http://news.cnet.com/news/0-1003-200-6291224.html
>
> "Why Microsoft is wary of open source: Joe Wilcox and Stephen Shankland in CNET.com, June 18, 2001.
>
> There's more to Microsoft's recent attacks on the open-source movement than mere rhetoric: Linux's popularity could hinder the software giant in its quest to gain control of a server market that's crucial to its long-term goals
>
> Recent public statements by Microsoft executives have cast Linux and the open-source philosophy that underlies it as, at the minimum, bad for competition, and, at worst, a "cancer" to everything it touches.
> Behind the war of words, analysts say, is evidence that Microsoft is increasingly concerned about Linux and its growing popularity. The Unix-like operating system "has clearly emerged as the spoiler that will prevent Microsoft from achieving a dominant position" in the worldwide server operating-system market, IDC analyst Al Gillen

concludes in a forthcoming report.

. . . While Linux hasn't displaced Windows, it has made serious inroads. . . ]. . In attacking Linux and open source, Microsoft finds itself competing "not against another company, but against a grassroots movement," said Paul Dain, director of application development at Emeryville, Calif.-based Wirestone, a technology services company.

. . . Microsoft has also criticized the General Public License (GPL) that governs the heart of Linux. Under this license, changes to the Linux core, or kernel, must also be governed by the GPL. The license means that if a company changes the kernel, it must publish the changes and can't keep them proprietary if it plans to distribute the code externally. . .

Microsoft's open-source attacks come at a time when the company has been putting the pricing squeeze on customers. In early May, Microsoft revamped software licensing, raising upgrades between 33 percent and 107 percent, according to Gartner. A large percentage of Microsoft business customers could in fact be compelled to upgrade to Office XP before Oct. 1 or pay a heftier purchase price later on.

The action "will encourage--'force' may be a more accurate term--customers to upgrade much sooner than they had otherwise planned," Gillen noted in the IDC report. "Once the honeymoon period runs out in October 2001, the only way to 'upgrade' from a product that is not considered to be current technology is to buy a brand-new full license.'"

This could make open-source Linux's GPL more attractive to some customers feeling trapped by the price hike, Gillen said. "Offering this form of 'upgrade protection' may motivate some users to seriously consider alternatives to Microsoft technology." . . .

What is surprising is that the US Department of Justice allowed Microsoft to place so many provisions in the agreement that can be used to undermine the free software movement. Note for example that under J.1 and J.2 of the proposed final order, Microsoft can withhold technical information from third parties on the grounds that Microsoft does not certify the "authenticity and viability of its business," while at the same time it is describing the licensing system for Linux as a "cancer" that threatens the demise of both the intellectual property rights system and the future of research and development.

The agreement provides Microsoft with a rich set of strategies to undermine the development of free software, which depends upon the free sharing of technical information with the general public, taking advantage of the collective intelligence of users of software, who share ideas on improvements in the code. If Microsoft can tightly control access to technical information under a court approved plan, or charge fees, and use its monopoly power over the client space to migrate users to proprietary interfaces, it will

harm the development of key alternatives, and lead to a less contestable and less competitive platform, with more consumer lock-in, and more consumer harm, as Microsoft continues to hike up its prices for its monopoly products.

Problems with the term and the enforcement mechanism

Another core concern with the proposed final order concerns the term of the agreement and the enforcement mechanisms. We believe a five-to-seven year term is artificially brief, considering that this case has already been litigated in one form or another since 1994, and the fact that Microsoft's dominance in the client OS market is stronger today than it has ever been, and it has yet to face a significant competitive threat in the client OS market. An artificial end will give Microsoft yet another incentive to delay, meeting each new problem with an endless round of evasions and creative methods of circumventing the pro-competitive aspects of the agreement. Only if Microsoft believes it will have to come to terms with its obligations will it modify its strategy of anticompetitive abuses.

Even within the brief period of the term of the agreement, Microsoft has too much room to co-opt the enforcement effort. Microsoft, despite having been found to be a law breaker by the courts, is given the right to select one member of the three members of the Technical Committee, who in turn gets a voice in selecting the third member. The committee is gagged, and sworn to secrecy, denying the public any information on Microsoft's compliance with the agreement, and will be paid by Microsoft, working inside Microsoft's headquarters. The public won't know if this committee spends its time playing golf with Microsoft executives, or investigating Microsoft's anticompetitive activities. Its ability to interview Microsoft employees will be extremely limited by the provisions that give Microsoft the opportunity to insist on having its lawyers present. One would be hard pressed to imagine an enforcement mechanism that would do less to make Microsoft accountable, which is probably why Microsoft has accepted its terms of reference.

In its 1984 agreement with the European Commission, IBM was required to affirmatively resolve compatibility issues raised by its competitors, and the EC staff had annual meetings with IBM to review its progress in resolve disputes. The EC reserved the right to revisit its enforcement action on IBM if it was not satisfied with IBM's conduct.

The court could require that the Department of Justice itself or some truly independent parties appoint the members of the TC, and give the TC real investigative powers, take them off Microsoft's payroll, and give them staff and the authority to inform the public of progress in resolving compliance problems, including for example an annual report that could include information on past complaints, as well as suggestions for modifications of the order that may be warranted by Microsoft's conduct. The TC could be given real enforcement powers, such as the power to levy fines on Microsoft. The level of fines that would serve as a deterrent for cash rich Microsoft would be difficult to fathom, but one might make these fines deter more by directing the money to be paid into trust funds that would fund the development of free software, an endeavor that Microsoft has indicated it strongly opposes as a threat to its own monopoly. This would give Microsoft a much greater

incentive to abide by the agreement.

Failure to address Ill Gotten Gains

Completely missing from the proposed final order is anything that would make Microsoft pay for its past misdeeds, and this is an omission that must be remedied. Microsoft is hardly a first time offender, and has never shown remorse for its conduct, choosing instead to repeatedly attack the motives and character of officers of the government and members of the judiciary.

Microsoft has profited richly from the maintenance of its monopoly. On September 30, 2001, Microsoft reported cash and short-term investments of $36.2 billion, up from $31.6 billion the previous quarter -- an accumulation of more than $1.5 billion per month.

It is astounding that Microsoft would face only a "sin no more" edict from a court, after its long and tortured history of evasion of antitrust enforcement and its extraordinary embrace of anticompetitive practices -- practices recognized as illegal by all members of the DC Circuit court. The court has a wide range of options that would address the most egregious of Microsoft's past misdeeds. For example, even if the court decided to forgo the break-up of the Windows and Office parts of the company, it could require more targeted divestitures, such as divestitures of its browser technology and media player technologies, denying Microsoft the fruits of its illegal conduct, and it could require affirmative support for rival middleware products that it illegally acted to sabotage. Instead the proposed order permits Microsoft to consolidate the benefits from past misdeeds, while preparing for a weak oversight body tasked with monitoring future misdeeds only. What kind of a signal does this send to the public and to other large corporate law breakers? That economic crimes pay!

Please consider these and other criticisms of the settlement proposal, and avoid if possible yet another weak ending to a Microsoft antitrust case. Better to send this unchastened monopoly juggernaut a sterner message.

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1 http://www.suntimes.com/output/tech/cst-fin-micro01.html "Microsoft CEO takes launch break with the Sun-Times," Chicago Sun Times, June 1, 2001.

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