January 25, 2002

To: Renata B. Hesse
Antitrust Division
U.S Department of Justice
601 D Street NW
Suite 1200
Washington, DC 20530-001

Subject: Microsoft Settlement

The following are my comments regarding the proposed settlement of the United States vs. Microsoft antitrust case.

Personal Background

I am Information Technology specialist who works primarily in Systems architecture, design, and development. Over the past ten years I have specialized in Information Security. I have been a user of Microsoft products (for both consumers and developers) since the early 1980s.

United States v. Microsoft Background

The District Court and the Court of Appeals concluded that Microsoft had "unlawfully maintained its monopoly power by suppressing emerging technologies that threatened to undermine its monopoly control of the personal computer operating system market."

The Court of Appeals held "a remedies decree in an antitrust case must seek to 'unfetter a market from anticompetitive conduct,' to 'terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future.'"

Comments

Scope of Protection Is Too Limited

Microsoft's competition in the Operating system area varies greatly in type and size. This competion includes:

- direct competitors, organizations creating different Operating systems (e.g. Linux)
- organizations that build applications and middleware that run "on top" of an operating system (e.g. Java and Netscape Communicator)
- organizations that customize operating systems for their clients (hardware OEMs)
- organizations that provide software equivalence of the services of one operating system on a different system or environment.

The proposed restrictions on Microsoft business conduct will provide protection to a subset of these Microsoft competitors. The majority of the Proposed Settlement focuses on providing relief for 1) organizations that provide middleware that run exclusively on Microsoft Windows products, and 2)

hardware OEM vendors. There are only minimal changes in the Microsoft conduct to protect vendors of competing operating systems.

Only Large Competitors Are Protected

The size of organizations that develop software varies greatly. Even Microsoft started as a small number of people. Unlike many other businesses, there is not a requirement for a large capital investment to start developing software.

The restrictions on Microsoft conduct apply only to large organizations (both OEM and software developers). Not only does this not work to terminate the monopoly it creates new exclusionary and discriminatory practices which did not previously exist.

Scope of Interfaces to be Disclosed Is too Narrow

The Proposed Settlement requires that Microsoft disclose the APIs for its middleware. However, in the Proposed Settlement the definition of Middleware is so limited that it excludes many of the interfaces required by competitors. The Interfaces to be disclosed need to include not just Application Programming Interfaces (APIs) but all other data structures and protocols externalized by Microsoft software components. The Department of Justice chose not to pursue issues related to the comigling of software and yet the Proposed Settlement assumes to have sufficient knowledge of the separate pieces (middleware vs. operating system) to provide a working definition in the Proposed Settlement. As long as the definition of the Windows Operating Systems is outside the scope of the Proposed Settlement Microsoft will maintain the control over which interfaces must be disclosed. It would be more appropriate to require Microsoft to disclose ALL interfaces between all components of their products.

Not All Middleware Components are Identified.

Given that some of the Microsoft Middleware components that are subject to this settlement are mentioned in the Proposed Settlement, the ".net" interfaces, as the Microsoft followon to Java should be included. Given the complexity of the definition of Middleware provided in the Proposed Settlement, it would be desireable to include the complete list of all Microsoft Middleware. This list should be publicly available for the time period that the Settlement is enforced.

Not All Current Versions of Windows are Covered in the Settlement

All current versions of Windows that are based on Win-32 should be covered by the Settlement. This should at least include Windows CE and Windows XP Tablet Edition.

Too Many Restrictions on Disclosure of Security Interfaces

The Proposed Settlement places restrictions on the disclosure of Microsoft security interfaces in the name of National Security. I would suggest that the reverse is true. In the current environment it is important to nurture the development of security functionality. All Microsoft security programmable interfaces, protocols, and data structures should be fully disclosed. The only restriction should be that the content of some specific data elements may not be disclosed (private keys, etc.)

Limits on Which Organizations can Seek Disclosure of Interfaces

The proposed Settlement places restrictions on which competitors Microsoft must disclose their APIs. The competitors must be of sufficient size and have a valid business case. This allows Microsoft to chose which organizations they wish to compete. Even Microsoft in its earliest years would have failed these requirements. Given that in the current environment one of Microsoft's strongest competitors is primarily a volunteer organization (Lunix) it seems likely that Microsoft would not disclose any APIs to "Free" Software development organizations.

Poor Enforcement Mechanisms

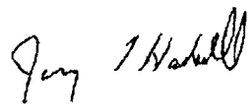
A good settlement should include enforcement that is easily understood, quantifiable, and verifiable. There should be metrics that can be used over a period of time to evaluate the success of the Settlement. A good enforcement needs to provide quick resolution of issues related the Settlement for the business needs of both any plaintiff as well as Microsoft. Finally, there needs to be a sufficient motivation to insure Microsoft will not violate the Settlement.

The Proposed Settlement provides almost none of the above. There is technical review by a three person team but all of their work will be confidential and not subject to review. There is no public or judicial review of the progress of the Settlement. The only option for handling misconduct, outside of the technical team, is to go back to court – one of the slowest ways to resolve any violations. Finally, given that there is no financial incentive required in this Settlement and that Microsoft earns billions of dollars using their current business conduct it is hard to see why Microsoft will be motivated to make any changes in their conduct.

Conclusion

The Proposed Settlement does not provide adequate changes in business conduct of Microsoft to provide a remedy that meet the requirements of the Court of Appeals mandate. In some cases the Proposed Settlement adds new barriers to the competition to Microsoft Operating Systems and Middleware. Thus, the Proposed Settlement does **not** serve in the public interest. I recommend that the Proposed Settlement be rejected.

Sincerely,



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