Microsoft wares hit by vehemence of antitrust case

Microsoft boss Bill Gates has given Australia's online aspirations a "big tick" but in the U.S. the Department of Justice's case against Microsoft widens and the former darling of the computer industry is fast becoming public enemy number one

During the past year, Microsoft's detractors in the U.S. have become more mainstream as the issue of Microsoft's behaviour in the software industry has gone beyond the preserve of Silicon Valley. Now, the U.S. Congress and Attorney Generals in several states are scrutinising Microsoft's activities. Even seasoned U.S. consumer advocate Ralph Nader has joined the fray.

The major push has been the Department of Justice's (DOJ) ongoing antitrust investigation and enforcement action which, though not new, have heightened the recent focus on Microsoft. The antitrust examination began in early 1990 with the Federal Trade Commission (FTC) conducting a wide ranging inquiry into Microsoft practices, in particular its operating systems software, applications software and computer peripherals. The FTC suspended the investigation in February 1993 because its four commissioners were deadlocked as to whether or not to pursue Microsoft further.

In August 1993, the DOJ - in a rare turn of events - picked up the investigation where the FTC had left off. The department eventually filed a complaint against Microsoft on July 15, 1994, alleging violations of the Sherman Antitrust Act. The complaint centred on Microsoft's licensing agreements with original equipment manufacturers (OEMs) that excluded them from offering or pre-installing non-Microsoft operating system software, even if a consumer requested it.

The DOJ alleged that because MS-DOS was the dominant operating system, Microsoft could use its position to dictate the terms of the contract. The offensive contract terms included a payment scheme based on the number of processors sold rather than the number of processors on which MS-DOS was installed. OEMs, therefore, would pay Microsoft a royalty whether or not they shipped a computer with MS-DOS or with a competitor's operating system software.

The DOJ charged that these contracts "help Microsoft maintain its dominance in the PC operating system market. By inhibiting competing operating systems' access to PC manufacturers, Microsoft's exclusionary contracts slow innovation and deprive consumers of an effective choice among competing PC operating systems."

On the same day that the DOJ filed the complaint it entered into a settlement with Microsoft restricting Microsoft's licensing practices with OEMs. The settlement prohibited the per processor royalty arrangements. Section IV (E) of the Consent Decree prohibited conditioning the licensing of operating system software with another product. But Microsoft was not prohibited from developing integrated products. (*United States v. Microsoft*, 1995-2 Trade Cas. ¶ 71,096 (D.D.C. 1995). Perhaps more importantly for the DOJ, the decree allowed it better access to Microsoft documents. The District Court approved the decree on August 15, 1995.

While this was happening, Microsoft was developing a new operating system codenamed "Chicago," now known as Windows 95. As part of that system, Microsoft included its Internet browser software, Internet Explorer. Internet Explorer is the competitor to Netscape Navigator which, at the time of Internet Explorer's introduction, was the market leader among browsers. Internet browser technologies along with JAVA, as developed by companies like Netscape, are potential competitors in the PC operating system market.

The DOJ's recent enforcement action explained it thus: "This potential is a result of the fact that browsers and the technology they incorporate can serve as a platform to which applications can be written and accessed without regard to the identity of the underlying operating system. The development of application programs that are written to run on or through an Internet browser, which can itself run on any operating system, is a serious threat to Microsoft's monopoly..."

On October 20, 1997, the DOJ filed a petition in the U.S. District Court to hold Microsoft in contempt for violating Section IV(E)(i) of the Consent

Decree by bundling Internet Explorer with Windows 95. The DOJ alleged that Microsoft forced OEMs to license and distribute versions of Internet Explorer as a condition of licensing Windows 95. Microsoft "threaten[ed] OEMs with cancellation of their licences to Windows 95 in order to enforce the licensing of Internet Explorer with Windows 95. One OEM [Compaq] received a termination notice when it attempted to ship Windows 95 without Internet Explorer. The crux of the DOJ's case is that Internet Explorer is a separate product as covered by the Consent Decree's prohibition."

In response, Microsoft argued that Internet Explorer and Windows were a single product and that, even if they were considered separate products, the Consent Decree allowed Microsoft to develop integrated products such as the combination of Internet Explorer and Windows 95. Microsoft is contending that Internet Explorer is an integral element of the operating system. The company views access to the internet through Internet Explorer similar to other information retrieval functions of operating systems like access to information stored on a hard disk drive or CD-ROM drive.

In December 1997, the Court declined to find Microsoft in contempt because it could not conclude by "clear and convincing evidence" that Microsoft had violated a "clear and unambiguous" prohibition found in the consent decree. The ambiguity of the term "integrated product" in the Consent Decree left open the interpretation that "the Consent Decree did not preclude Microsoft's insistence that OEMs accept Internet Explorer as part of Windows 95." (United States v. Microsoft Corp., Civ. No. 94-1564 (D.D.C. December 11, 1997).

But the judge found that further evidence was needed to determine whether Microsoft was in violation of the Consent Decree by "tying" Internet Explorer to Windows 95. The Judge issued a preliminary injunction while the case proceeded, finding, inter alia, that the DOJ had a substantial likelihood of success on the merits of its petition.

The injunction required Microsoft to offer to OEMs a separate version of Windows 95 without the browser. Microsoft's offer was shamefully inadequate. In its December 15, 1997, public response to the injunction, it offered OEMs who did not want to license Internet Explorer in order to obtain the latest version of Windows 95 two options:

1. The OEM may license a version of Windows 95 that Microsoft believes will not work; or

2. The OEM may license a version of Windows 95 that is two-and-a-half years old and is not commercially viable.

This led to the DOJ filing a further motion for contempt on December 17, 1998. After a week of hearings and with the threat of a US$1 million-dollars-a-day contempt order hanging over its head, Microsoft agreed to offer OEMs a workable Windows 95 without the browser.

Microsoft then appealed the preliminary injunction. The District of Columbia Court of Appeals will hear the appeal on April 21, 1998. Some 27 states as well as the Computer & Communications Industry Association (CCIA) have filed amicus briefs in support of the DOJ and are urging the Court to maintain the preliminary injunction against Microsoft's bundling. The District Court continues to conduct discovery on whether the bundling of Windows 95 and Internet Explorer is proper under the Consent Decree.

But while the current case involves the narrow issue of the forced tying of Internet Explorer with Windows 95, the DOJ seems to be expanding its investigation. In recent months, it has been looking into Microsoft agreements with Internet content providers and purported attempts by Microsoft to co-opt JAVA or derail JAVA's potential threat to Windows. The DOJ may be looking to bring a new case against Microsoft, examining desktop dominance as a whole or its attempt to dominate the Internet.

Several states have begun their own formal or informal investigations. In February 1998, 10 states - spearheaded by New York - issued subpoenas for material similar to that requested earlier by the DOJ. But the states are focusing on Windows 98 as Microsoft has indicated that it will include Internet Explorer in this operating system which is set to launch on June 25. The DOJ and the various state Attorney Generals have been coordinating actions with respect to the overall investigation of Microsoft.

As for the U.S. Congress, it has joined the legions of antitrust regulators in the U.S., Europe and Japan all examining Microsoft. On March 3, 1998, the U.S. Senate Committee on the Judiciary held hearings investigating the market structure of the software industry. Appearing with Bill Gates, chairman and CEO of Microsoft, were his main competitors: Scott McNealy of Sun Systems and Jim Barksdale of Netscape. They attacked Microsoft's recent attempts to leverage its monopoly in operating systems to dominate Internet online sales and content. The DOJ has included some of these points in its further investigations.

While the hearings do not indicate that Congress will at this stage amend the antitrust laws, they have been seen as a show of support to the DOJ. If the DOJ fails to curb the perceived abuses of Microsoft, there may be more legislative action on the issue. Microsoft may not be circling the wagons quite yet but it is clear that a wider portion of the American public no longer views it as the darling of the computer industry.

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