BEFORE THE
UNITED STATES DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

COMMENTS OF THE WASHINGTON LEGAL FOUNDATION SUPPORTING THE PROPOSED JUDGMENT IN *UNITED STATES v. MICROSOFT*

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Introduction and Summary. The Washington Legal Foundation (WLF), pursuant to the Tunney Act (Antitrust Procedures and Penalties Act, 15 U.S.C. § 16), hereby submits these comments in support of the settlement reflected in the Revised Proposed Final Judgment dated November 6, 2001 in *United States v. Microsoft Corp.*, Civil No. 98-1232.[1]

WLF is the nation's preeminent center for public interest law and policy, advocating free-enterprise principles, responsible government, property rights, a strong national security and defense, and a balanced civil and criminal justice system. WLF devotes substantial resources to these issues through litigation, by publishing through its Legal Studies Division, and by educating the public through its Civic Communications Program.

With respect to antitrust law, and the Microsoft case in particular, WLF filed a brief in the United States Supreme Court supporting the petition for writ of certiorari filed by Microsoft to review the judgment of the court of appeals that left intact the district court's findings of fact and conclusions of law, despite the flagrant judicial misconduct of the trial court in giving interviews to the press expressing his bias and hostility to Microsoft and Bill Gates. *Microsoft Corporation v. United States,* 122 S.Ct. 350 (2001). WLF's Legal Studies Division has also published studies and other materials on antitrust issues and the Microsoft case. *See* Antonio F. Perez, *U.S. v. Microsoft: DOJ's "New" Antitrust Paradigm Resurrects*

[1] The case is on remand from the Court of Appeals which vacated the Final Judgment, affirmed in part the market maintenance claims, ordered reconsideration of the Section 1 tying claim, reversed the browser market attempted monopolization claim, and ordered new remedy proceedings. *U.S. v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

Outdated Economics (WLF Legal Backgrounder, Feb. 4, 2000); Robert A. McTamaney, *Microsoft On Appeal: "Monopolies" In A Complex Society* (WLF Working Paper Feb. 2001).

WLF supports the Proposed Judgment (the result of intense negotiations with the assistance of two of the nation's top mediators) as a rational resolution to a case formally initiated in May 1998, but effectively tracing its roots to an FTC investigation begun more than a decade ago, therefore now rivaling in time and burden the IBM antitrust litigation of the 1980's. The matter is overly ripe for resolution, and the States which have declined to join the settlement should in our judgment be urged by the Department and the Court to reconsider and adopt it.

The Standard for Entry. The Tunney Act contemplates that the Court will evaluate the relief set forth in the Proposed Judgment and enter the judgment if the settlement is within the reaches of the public interest and within the government's rather broad discretion, considering (1) the competitive impact and adequacy of the judgment and (2) the impact on the public generally, and on affected individuals, and the benefit, if any, of an eventual trial determination. The Court reviews the Proposed Judgment in light of the Complaint's allegations, and withholds approval only if there is ambiguity, an inadequate enforcement mechanism, if third parties would be positively injured, or if the decree somehow makes a 'mockery' of judicial power.[2] The belief that other remedies might be preferable does not warrant rejection of the Proposed Judgment; the Tunney Act does not authorize the imposition of different terms or permit *de novo* review of the settlement.[3]

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[2] E.g., *U.S. v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995)

[3] "The court should therefore reject the [judgment] only if 'it has exceptional confidence that adverse antitrust consequences will result. . .'" *U.S. v. Enova Corp.*, 107 F. Supp. 10, 27 (D.D.C. 2000); accord, *U.S. v. Central Parking Corp.*, 2000 U.S. Dist. Lexis 6226 (D.D.C. 2000).

Applying these legal standards, the Proposed Judgment should be entered.

The Complaint Versus the Proposed Judgment. Under the Tunney Act, whether the public interest is served by entry of the judgment is first tested by comparing the allegations of the Complaint with the Proposed Judgment. As will be demonstrated, the comparison is more than a favorable one.

The Complaint is dated May 18, 1998. There are 141 numbered paragraphs in the Complaint, of which, read fairly, 128 paragraphs relate to Microsoft's browser technology, including its Internet Explorer (IE) in Windows 98, and the promotion and distribution of that technology to Windows 98 users. The principal responsible author of the Complaint described the case as an extremely limited, discrete, "surgical strike" directed solely against the Company's integration of browser technology with its operating system.[4]

On June 23, 1998, the U.S. Court of Appeals for the District of Columbia Circuit held that the IE Browser was not a product separate from Windows for purposes of the 1995 consent decree that had resolved the Department's 1994 case, and the related European Commission (EC) case, against Microsoft.[5] While the Court reserved its position on any future market power allegations, most observers believed that the May 18 Complaint had been rendered moot, since any arguably illicit tie requires, by definition, two products.

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[4] In its 1994 maintenance case against Microsoft, the Department did not contend that the company's obtaining of its market position was illegal, but rather that it was the fortuitous result of IBM's choice of Microsoft's MS-DOS for IBM's PCs. In that case the government's economic witness said that only artificial barriers such as restrictive license provisions should be prohibited since the company's market position was entirely natural and not the result of anticompetitive behavior. Id.

[5] *U.S. v. Microsoft Corp.*, 147 F. 3d 935 (D.C. Cir. 1998).

The trial judge disagreed, and permitted the case to proceed, and premised his eventual breakup order, in effect, on the sparse references in the Complaint to the alleged market dominance of Windows in a narrowly-defined market of Intel-powered personal PCs.[6] In its reversal and remand of the trial judge's conclusions and remedies, the Court of Appeals specifically reversed the conclusion that Microsoft attempted to monopolize a browser market, and remanded the issue of an illegal tie for reconsideration under the Rule of Reason.[7] In recognition of the rigors of this test, and in light of the demonstrated insistence of consumers on a browser-operating system combination, the Department determined not to pursue this claim.

To the extent therefore that the Tunney Act dictates measuring the judgment against the Complaint,[8] the Proposed Judgment is a remarkable result. The judgment exacts dramatic conduct remedies and imposes massive costs on a defendant, when the essential allegations of the Complaint were first deflated by the Court of Appeals, then carefully either selected or avoided by the Department and the State plaintiffs, then momentarily revived by the trial judge, only to be excised again by the Court of Appeals, which set a standard for resolution that the Department itself has decided unilaterally could never be met.

Certainty of the Proposed Judgment. The Tunney Act as interpreted next suggests that the Judgment should be examined for ambiguities. Ambiguity is measured by the trial judge interested in the reasonably manageable enforcement of the judgment, rather than by

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[6] Compare *U.S. v. Microsoft*, supra note 2 ("The government. . . urges us to flatly reject the district judge's efforts to reach beyond the complaint to evaluate claims that the government did not make . . .").

[7] The Court of Appeals dismissed 4 of the 5 principal claims against Microsoft, and also dismissed 23 of the 35 acts found wrong by the trial judge.

[8] E.g., *U.S. v. Alcoa*, 152 F.Supp. 2d 37, 44 (D.D.C. 2001) ("[T]he court is confined to the factors alleged in the government's complaint.").

competitors who might parse every comma to suggest ambiguities where none fairly exist. And of course ambiguity is anathema to the defendant, since it is the party most at risk from an overly broad interpretation urged by its competitors or others.

In that respect, the Proposed Judgment is a strikingly plain-worded document, difficult (for anyone versed or educated in the field) to misinterpret and even more difficult, it would seem, to avoid. The Proposed Judgment is accompanied by a thorough and convincing Competitive Impact Statement that explains the theory underlying each section of the Proposed Judgment, how it addresses and cures the conduct found wanting by the Court of Appeals, and how it would operate in practice. The Competitive Impact Statement itself would surely assist in, if not dictate, the resolution of any arguable ambiguity.

The Proposed Judgment broadly prohibits any retaliation against OEMs that distribute competitive middleware or operating systems (Section III.A), requires uniform licensing terms (which cannot include exclusive or percentage promotion of Microsoft middleware) to the significant universe of OEMs (Section III.B), and leaves most desktop decisions to the OEMs' discretion. (Section III.C). This all seems very plain.

The Proposed Judgment permits OEMs to install icons or shortcuts to access products that provide particular types of functionality, even if they compete with Microsoft's own installed versions (Section III.C.1), so long as they do not impair the user interface. Basically, the Original Equipment Manufacturers (OEM) can add an icon to access, for example, a competing photo program, provided that shortcut works without unseating Windows itself. Surely there is little room for ambiguity here.

Under the Proposed Judgment, Microsoft can override a competing product only if that product "fails to implement a reasonable technical requirement." Basically, Microsoft can provide the consumer with its own product if the competitor's doesn't work, and even then the failing product's proponent is given the right to remedy the problem. Competitors have objected to the use of the word 'reasonable,' which is obviously a standard the Courts have dealt with successfully since the outset of the common law. There is no ambiguity apparent here.

Next, the Judgment requires Microsoft to disclose the Application Programming Interfaces (API) for new products to makers of interoperable products, whether they make hardware or software or are Internet carriers, unless the disclosure would compromise security or anti-privacy safeguards (Section III.D). No ambiguity exists here, and the burden would certainly be on Microsoft to demonstrate that the API disclosure would impair security or privacy, which should in any event be a primary goal of the competitor as well.[9] And the API disclosure must be made timely and in good faith, again well-recognized standards in the courthouse.

Microsoft also agrees not to automatically alter competitors' icons or shortcuts placed on the desktop by OEMs (Section III.H.3). It can offer its own alternatives to consumers, but they can accept or decline as they see fit, and many a court has said in other contexts that there's no harm in asking.

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[9] This has been a goal for Microsoft, which has just announced a company-wide suspension of development while security concerns are assessed and resolved. *The New York Times*, January 17, 2002.

Under the judgment, OEMs can even include a competing *operating* system as easy to access as Windows, and even give it preference in the boot sequence. Again, this seems to be as clear as it reads.

In short, the Proposed Judgment is plainly worded and devoid of apparent ambiguity. One competitor has suggested that Microsoft improperly seized on an ambiguity to avoid the 1995 Consent Decree to the extent that the decree prohibited the integration of the IE browser with Windows. This is an intriguing fallacy, but a fallacy nonetheless. Microsoft certainly did seek to integrate IE with Windows, but this was consistent in its judgment with the 1995 Decree; and the Court of Appeals agreed that it was entirely legal for Microsoft to do so, under the plain wording of that document.

Impact Upon Third Parties. The Proposed Judgment goes far beyond the prohibition of the handful of specific and isolated instances of conduct found wanting by the Court of Appeals, to generic relief which presumably will benefit all those to which it is directed and all others within its ambit. Will consumers be satisfied? Presumably they will vote with their pocketbooks. Will competitors be satisfied? Presumably never, but the correct test is whether the proposed decree would positively injure third parties, not whether some competitor claims that it could be better treated.[10]

For example, California and the other States dissenting thus far from the settlement have proposed instead that the Company completely redesign Windows (and then presumably maintain, update, and support it) to offer a version stripped even of the browser, then force open-source licensing of the browser, require Java (a competitive operating system of sorts),

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[10] *U.S. v. Microsoft*, 56 F.3d 1448, 1461 n.9.

to be included in Windows, and require licensing of the Office Suite to third parties like Apple (although Apple now already has it). A new 60-day version of Hart Scott Rodino Act would also be imposed on Microsoft acquisitions, another and entirely new commercial burden on a company never even accused of growth through acquisition. Conduct specifically upheld by the Court of Appeals would be specifically barred. We submit that this is a wish list for competitors, not consumers, and has nothing to do with fostering competition as anticipated by the U.S. antitrust laws.[11] To the extent that alternative remedy proposals were put forward by all parties, including the competitors intent on imposing their own punitive *schadenfreude* on Microsoft, they were considered by the Department in formulating the Proposed Judgment, including specifically the very remedies now proposed again by the dissenting States.[12] "The United States has ultimately concluded that the requirements and prohibitions set forth in the [Proposed Judgment] provided the most effective and certain relief in the most timely manner."[13]

The Enforcement Mechanism. The final substantive prong of the Tunney test is whether the Proposed Judgment is readily enforceable. In this respect, the Proposed Judgment contemplates contempt sanctions and other relief if violated. Microsoft has agreed to appoint an Internal Compliance Officer[14] to supervise an internal compliance program, and has also agreed to the extraordinary remedy of an onsite, court-approved Technical Committee,

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[11] Netscape, the competitor whose objections set off the 1998 case, has objected that it never would have come into being if the Proposed Judgment had been in place when Netscape's own monopoly was created in 1994. *Dow Jones Newswires* Dec. 12, 2001. If this is to be believed, then presumably Netscape's multi-billion dollar combination with AOL also would have been avoided.

[12] *Competitive Impact Statement*, p. 35

[13] Id. at 36.

[14] Microsoft on December 13, 2001 announced the appointment of its internal compliance officer as contemplated by the Proposed Judgment. He is a former enforcement lawyer with the Federal Trade Commission.

experienced in software design and programming, with virtually unfettered access, for at least five years, to the Company's design and business planning and implementation, for the purpose of ongoing and constant oversight regarding the Company's compliance.[15] In this respect, as well as in the breadth of the conduct remedies which will be supervised, the Proposed Judgment vastly exceeds the typical constraints imposed upon a settling defendant. Courts are most reluctant to impose sanctions which require the ongoing observations of a defendant's commercial activities. Here, to the contrary, the oversight established by the onsite observers will give the Court, and interested outsiders as well, more assurance than could reasonably be ever expected regarding the Company's ongoing good faith adherence.

The Public Interest. Overall, the Tunney Act contemplates an affirmative finding that the settlement is in the public interest. There are several other factors relevant to this consideration, beyond the specific traditional tenets of approval discussed above.

Adequacy of the Remedy. First, the Proposed Judgment should be considered in light of the remedies one might expect to have been imposed after further evidentiary hearings, briefs, arguments, conclusions, and the inevitable appeals. In this respect, one searches in vain for precedents as broad and inhibiting as the Proposed Judgment in a case where all claims except isolated, specific findings of market position maintenance have been dismissed or unilaterally discarded by the principal prosecutors. We submit that judicial remedies might well be expected to be far more 'surgical' and conduct-specific than the broad and thoroughgoing conduct requirements imposed by the Proposed Judgment, not the least of which is the ongoing oversight to assure good faith compliance.

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[15] By Stipulation, Microsoft began complying with the Proposed Judgment effective December 16, 2001.

Certainty of the Remedy. Second, there is no assurance that an eventual judicial remedy would survive appeal, since the case is presently proceeding on remand on the basis of findings of fact and, in part, on conclusions of law[16] expressed by a trial judge with deep-seated, privately expressed, actively concealed, personal bias against the company and its president reflected by the drastic remedies ordered after the briefest of further proceedings.[17] The Supreme Court has deferred consideration of this issue, and so observers in the meantime must accept the illogic of an appellate court finding that the District Judge had repeatedly violated law and the judicial canons, but nonetheless feeling constrained to accord his findings of fact and law the same presumptions of correctness usually reserved for judges with no appearance of impartiality.[18]

If the case proceeds to judicial remedies, with the inevitable appeals, there is more than a fair likelihood that the Supreme Court would refuse to accept any of the former trial judge's findings under the circumstances; rather, the Court would likely remand the case to begin again before an unbiased jurist. The Proposed Judgment obviates that possibility to some extent, and would avoid it completely if it were joined by the thus far dissenting States, and thereby achieve a final resolution.

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[16] *U.S. v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999); *U.S. v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000).

[17] *U.S. v. Microsoft Corp.*, 97 F. Supp. 2d 59 (D.D.C. 2000).

[18] According to the Court of Appeals, the District Judge's violations of the Code of Conduct for United States Judges and Section 455(a) of the Judicial Code by speaking to reporters about the case while it was pending were "deliberate, repeated, egregious, and flagrant." 253 F.3d 34, 107 (D.C. Cir. 2001). The judge's insistence to the reporters to embargo his comments until the trial was over implied full knowledge of the improprieties. This arrangement made it impossible for Microsoft to have objected sooner, an objection that the appellate court said would have succeeded by the removal of the trial judge from the case.

The Remedy and Innovation. In 1998, when the then Assistant Attorney General made his often-quoted 'surgical strike' comments, his purpose was to allay concern in the computer industry that the Government was opening a broadside attack on Microsoft, which is, sadly, exactly what the case then became. His purpose was to assure innovators that they could continue to innovate without governmental interruption or interference, provided that they stayed within the principal antitrust boundaries.

Microsoft has been reported publicly as saying that innovation, at least its own, will not be impeded by the Proposed Judgment. We submit that is a critically important issue for the Court in considering the public interest overall.

For example, Windows XP, Microsoft's latest rendition of the operating system, presents users, according to its reviewers, with improvements in reliability, performance, and system security, and also facilitates multi-use end user customization, workplace enhancements, and marked file improvements. It continues to integrate IE, and adds instant messaging (a favorite feature of AOL), digital photography and movie making, and other media features to the new design.

Industry reaction has been fascinating. Some competitors have reportedly been encouraging the Department and certain of the States to resurrect the original IE integration case, arguing that the Company should make the various components of its integrated design (some of which have been part of Windows for many years) available separately. Others, notably Apple, have instead decided to compete where competition belongs – in the marketplace instead of the courthouse. Apple is scheduled to begin shipping the elegant and affordable "*iMac*," which will incorporate "*iDVD*," a DVD recording software, "*iPhoto*," a

photo organizer and processor, "*iTunes*," a CD and internet music player and converter, and "*iMovie*," which enables easy home-movie production, and other features, all on a 15-inch flat panel display connected to a computer half the size of a basketball at a very competitive price.

Would Apple have created this incredible device had Microsoft not raised the bar with Windows XP? Perhaps, but far less likely. We submit therefore that an important component of the Court's Tunney Act determination is to ensure that any proposed judgment does not stifle the very innovation the antitrust laws were enacted to promote. Otherwise, such a judgment could surely serve the private interests of competitors rather than the public interest of competition and consumers, and thereby make a mockery of the very process which the Tunney legislation cautions against and condemns.

Conclusion. The United States has said it best: "[T]he [Proposed Judgment], once implemented by the Court, will achieve the purposes of stopping Microsoft's unlawful conduct, preventing its reoccurrence, and restoring competitive conditions in the personal computer operating system market, while avoiding the time, expense and uncertainty of a litigated remedy."[19] We support the Proposed Judgment. The matter is long overdue for resolution, and the States that have declined to join the settlement should, in our judgment, be urged by the Department and the Court to reconsider and adopt it.

[19] Competitive Impact Statement, p. 34.

Respectfully submitted,

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