

# US Justice Department drops demand for Microsoft break-up

By Mike Ingram  
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The decision by the US Department of Justice (DoJ) to drop its demand for the break-up of Microsoft is a dramatic reversal of policy by the Bush administration. In a statement issued Thursday September 6, the DoJ's Antitrust Division said it had advised the software giant that it will not seek a break-up of the company in remand proceedings before the US District Court. It also said that it does not intend to pursue further proceedings on the tying of the Internet Explorer web browser to the Windows operating system, a central component of the original case brought four years ago against the company.

The Justice Department was forced to deny that the decision showed it was "going soft on Microsoft", insisting that it will seek restrictions on the company's practices along the lines of those originally laid down by Judge Thomas Penfield Jackson. They argued that dropping the request for a break-up will allow the case to move forward faster, "in an effort to obtain prompt, effective and certain relief for consumers." But many legal experts rejected these claims, insisting that in removing the most severe possible sanction, the Justice Department and the States and the District of Columbia that were aligned to it, have handed a significant victory to Microsoft.

Microsoft, the Justice Department and the State and DC attorneys general are due in court to begin remedy hearings on September 21. One week earlier, US District Judge Colleen Kollar-Kotelly, a Democrat selected at random by computer to hear the case, will have received a brief prepared jointly by the parties on what issues are still to be resolved.

The DoJ announcement does not come out of the blue. In June of this year, the Court of Appeals upheld the District Court's ruling that Microsoft had engaged in exclusionary conduct intended to maintain its monopoly in the market for PC operating systems. But the Court of Appeals reversed the judgment of the District Court that Microsoft had unlawfully tied its web browser to the operating system. The Court criticised Judge Thomas Penfield Jackson, who had brought the earlier ruling, for talking to reporters during the case, saying there was a perceived bias against the company, and removed him from the case. It reversed the break-up order imposed by Jackson, on the grounds that he had held no evidentiary hearings. In giving broad discretion to a lower court to consider any remedy, the Appeals court made clear it questioned the

wisdom of a break-up, making it unlikely that any new order would be imposed.

Nevertheless, the neutering of the case by the DoJ has provoked allegations of political interference from the White House. Democratic Representative John Conyers, a top House Judiciary Committee member, said in a letter to Attorney General John Ashcroft that he was "concerned there may have been unneeded or inappropriate contact or appearance of such contact" between the White House and the department. He demanded that records of all communication between the two be made available for inspection.

Microsoft gave \$2.5 million to Bush and other Republicans during last year's election campaign. Microsoft CEO Steve Ballmer met with Vice President Cheney in June this year. Officials unconvincingly insisted that antitrust issues were not discussed. Cheney's son-in-law, Phil Perry, oversees the Justice Department's antitrust division as acting associate attorney general.

Justice Department officials insist that the decision to abandon the breakup remedy was made by Charles A James, the new antitrust chief who had been given full discretion by Attorney General John D Ashcroft. James briefed Ashcroft, Perry and Alberto Gonzales, the White House counsel, on the decision, but Justice officials claim none of these had any influence over what action to take.

Microsoft's opponents have been quick to point to a significant increase in the company's political lobbying as a result of the DoJ action. In 1997, the year the action began, the company's total political donations to federal candidates were less than \$100,000. In contrast, last year federal political candidates or parties received \$4.7 million from Microsoft and its employees. According to the Center for Responsive Politics, more than two-thirds of this went to Republican candidates. The company also paid \$6 million to lobbyists, who were charged with persuading politicians to accept Microsoft's point of view.

A lobbying organisation working for Microsoft's corporate opponents gathered donation reports from state candidates, political parties and political action committees. The Washington-based group told the *New York Times* it had found that Microsoft had donated \$6.1 million overall, of which \$3.2

million had gone to Republicans. If this report is true, then Microsoft spent far more on greasing the wheels of both parties than official reports indicate.

Microsoft last year hired Ralph Reed, a political consultant who was at the time a senior adviser to the Bush campaign. His job was to urge Bush to take a softer approach toward the company if elected president. Reed was forced to officially drop the Microsoft campaign after it was publicly disclosed.

The president of the Computer and Communications Industry Association, Edward J Black, which backs Microsoft's opponents said, "Microsoft has demonstrated time and again that through their sheer power and immense wealth, they can easily evade behavioural remedies designed to constrain their unlawful activity." In an interview with the *New York Times* he added, "One would be hard pressed to say that all the money and the lobbying was not intended to get a positive result—to get a huge back-off on the case. And they got a huge back-off on the case."

The DoJ insist that they are not walking away from the case and that they will ask the court to impose strict changes in Microsoft's business practices. These will include limits on licensing agreements with computer makers and other software designers, curbs on "bundling" new components with the Windows operating system, and requirements for uniform pricing for computer makers. They may also insist on the release and possible publication of the code that makes up the Microsoft operating system. But the issue remains as to how the courts can possibly make a company such as Microsoft comply with these demands. The 1998 case was brought precisely because the company had refused to comply with earlier court sanctions. In making the break-up ruling, Judge Jackson had insisted it was the only viable option, given "Microsoft's intransigence."

Benjamin D Black, a principal of the Rosewood Venture Group, a venture capital firm in San Francisco summed up the feelings of Microsoft opponents, asking, "What can they possibly come up with that can frighten Microsoft enough to change its behaviour that it's been developing for decades?" He added, "I still won't invest in companies that are directly in front of Microsoft's development path."

Microsoft is still pursuing a hearing in the US Supreme Court aimed at throwing out Jackson's ruling in its entirety and demanding a fresh trial. Given the current make up of the court, should such a hearing take place it is highly likely to find in favour of the company.

The decision by the DoJ has the character of a declaration of political intent by the Bush administration. Andrew Gavil, a law professor at Howard University, told the *Washington Post* that the decision fits in with the Bush administration's more conservative views of antitrust law and how far governments should intervene in the market. "It's clear this Department of Justice was never crazy about the idea of a breakup as a philosophical matter," he said. President Bush had already

indicated during his election campaign that he had concerns about a proposed Microsoft breakup, saying that he was "on the side of innovation, not litigation." In recognition of the Republican's willingness to turn a blind eye to monopolistic practices, news reports have begun referring to the case as the "Clinton Justice Department's case".

Nevertheless it is something of a simplification to portray events of the past four years as a one-party campaign against Microsoft. Judge Jackson, who ordered the breakup, was a Reagan appointed Republican. and divisions over the case have not followed strict party lines.

The motive force in the actions against Microsoft was not consumer choice but the ability of US capitalism to maintain its lead in the global market for computer technology. Faced with increasing competition from Europe and Japan, particularly in relation to the Internet and mobile communications, sections of America's ruling elite had concluded that—contrary to Bush's aphorism—the unchallenged monopoly of Microsoft was stifling innovation and could leave the US ill-prepared to meet a competitive challenge by its European and Japanese rivals.

In answer to this argument, Microsoft argued that it was precisely the dominance of their company that gave the US its leading role in the software market and that any undermining of Microsoft would be bad for the US economy. This argument was given added weight with the impact of the case upon Microsoft shares and its effect upon the economy as a whole.

Microsoft share prices have plummeted from 149.18 in January 1998 to just 57.05 as of September 8. Given the prominent place of the company within the Nasdaq exchange, it is no doubt hoped that an end to speculation over the future of the company will lead to an increase in share prices for the company and a resultant increase in market confidence overall.

In direct contrast to the stance taken by the Republicans in the US, the European Union recently announced that it was broadening its own investigation of Microsoft. The DoJ no doubt feel that if they can convince the company to abide by an agreement in the US, this will undermine the case in Europe and prevent possible trade sanctions against the company.

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