Conclusion to Microsoft anti-trust case delayed: Supreme Court decides against expedited hearing

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Last week's decision by the US Supreme Court not to hear the anti-trust case against Microsoft before it has gone through the appeals court has been hailed as a victory for the software giant in its battle against the US government's proposed break up of the company.

In a district court hearing that concluded in June this year, District Judge Thomas Penfield Jackson ruled that Microsoft should be split into two companies after finding the company guilty of anti-competitive business practices. In a harshly worded ruling, Jackson said that Microsoft had engaged in illegal practices to use its dominant share in the market for desktop computer operating systems against competitors in this and other fields.

Jackson agreed with a recommendation by the US Department of Justice and 17 states bringing the case that Microsoft should be split into two companies. Under the proposal, the business applications such as Microsoft Office and Internet software Explorer would be taken into a separate company from the Windows operating system. In this way it was hoped that the conditions would be created for the development of rival products in both sectors.

Shortly after issuing his conclusions of law, Jackson said that the break-up proposal should not take effect until the appeals process had been completed. At the same time he took advantage of a little used piece of 1974 anti-trust legislation to refer the case directly to the Supreme Court. Jackson and the US government claimed that bypassing the Court of Appeals for the District of Columbia was in the public interest, as it would speed up a conclusion to the case that was decisive to the US economy.

But the nine-member Supreme Court on Tuesday September 26 decided that it would not hear the case on an expedited basis and instead referred it back to the Court of Appeals. The judges who sit on America's highest court are not in the habit of releasing voting patterns for such decisions. It is reported, however, that there was one voice of public dissent—justice Stephen G Breyer. In a written statement Breyer said, "the case significantly affects an important sector of the economy—a sector characterised by rapid technological change." He said that a speedy decision "may help create legal certainty." It is believed that his colleagues disagreed and felt that an appeals court had far more experience in dealing with such a case and would narrow the issues at stake.

Significantly, no such dissension was forthcoming from Chief Justice William H Rehnquist who issued his own statement explaining why he would not recuse himself from the case. While not saying how he had voted in the hearing, Rehnquist said in a written statement attached to the court's brief order that his son is a partner in the Boston law firm defending Microsoft against private lawsuits involving anti-trust allegations. Rehnquist said he would not recuse himself because there is "no reasonable basis to conclude that the interests of my son or his law firm will be substantially affected by the proceedings before the Supreme Court."

Rehnquist acknowledged that, "A decision by this court as to Microsoft's antitrust liability could have a significant effect on Microsoft's exposure to antitrust suits in other courts." But he argued "by virtue of this court's position atop the federal judiciary, the impact of many of our decisions is often quite broad. The fact that our disposition of the pending Microsoft litigation could potentially affect Microsoft's exposure to antitrust liability in other litigation does not, to my mind, significantly distinguish the present situation from other cases that this court decides."

While the Supreme Court decision is of a procedural character and does not necessarily indicate which way the court would decide in a final hearing, many commentators have interpreted the decision as a death sentence for the break-up proposal made in Jackson's ruling.

It is anticipated that Microsoft will get a more favourable hearing in the Appeals Court. Twice before the same body has ruled in favour of the software giant. In 1995 the court upheld a consent decree worked out between Micrsoft and the Justice Department to resolve an earlier antitrust dispute. The decree had been rejected by US District Judge Stanley Sporkin, who said it was too lenient towards Microsoft.

In 1998 the Appeals Court overturned a ruling by Judge Jackson that the 1995 consent decree barred Microsoft from

incorporating its Internet Explorer web browser into the Windows operating system. The 1998 ruling cleared the way for the distribution of the Windows 98 operating system. Most controversially, two of the three judges wrote that Microsoft had a right to add new features to its products, even if this harmed competitors, if the new features benefited customers. In his June ruling Judge Jackson sharply criticised the 1998 appeals court ruling and said that the judges who reversed his decision had ignored Supreme Court precedents.

Another ominous sign for the break-up proposal is the eagerness of the appellate justices to hear the case. Back in June they issued a statement saying that the entire 10-judge panel, minus three who have recused themselves, would hear the case, "in view of its exceptional importance." The seven remaining judges will include the two who ruled against Jackson previously.

Any attempt to portray Jackson as some kind of radical trust buster could not be more wrong. As a Reagan appointee and staunch Republican, his argument both during and since the hearing has been that the break-up arose from Microsoft's intransigence and could be avoided if only they would talk. In a speech last Thursday, Jackson said that splitting the company was not his "remedy of choice," but a last resort. "I am full of admiration for the people whose imagination and industry built the enterprise known as Microsoft," the judge said in a speech to an anti-trust conference. "I have never conceived of this case as a contest of wills between me and Mr Gates," Jackson said. "The structural remedy was never my remedy of choice, and is not even so today. It was always my preference that the market itself be allowed to rectify the dysfunction disclosed by the evidence, failing which a negotiated settlement was next best."

Some analysts believe that the Supreme Court decision provides new grounds for believing a negotiated settlement is still possible. John Shepard Wiley Junior, a professor of antitrust law at the University of California, said, "the government could change its position; Microsoft could change its position. Settlement is never out of the question."

Speed was always of the essence for the US government and what amounts to a decision to delay the case for more than a year is a gift horse to Microsoft. A case that began five years ago over the integration of Internet browsing software into the Windows operating system is no nearer completion as Microsoft unleashes a new strategy in which the Internet increasingly replaces the desktop as the basis for software development. The announcement this summer of the new strategy called .Net consists essentially of creating a set of programs resembling an operating system that will live on the Internet rather than on the individual desktop computer.

Microsoft's pressing ahead with the development of software for a growing array of wireless and hand-held devices, as well as television set-top boxes, may well have convinced those sections of the American political establishment who believed the company and therefore the US was in danger of losing out to European rivals that it is still able to innovate if left alone. The company has announced its intention to go head to head with the video game giants Nintendo, Sega and Sony, previewing its first Microsoft-branded computer system, the X-Box, to be available from the end of next year.

While it is still too early to predict the final outcome of the antitrust case against Microsoft, it is possible to see certain parallels with earlier actions against International Business Machines (IBM). What was then, and still is, the leading manufacturer of computers was hauled before the anti-trust bodies for attempts to stifle the emergence of the desktop computer—which posed a serious threat to the big mainframe computer market which IBM dominated. Rather than a breakup of IBM, what occurred was a decade of negotiations during which the company altered some of its more overt anti-competitive practices in line with government demands, until the case was finally dropped with the issues involved having lost any relevance due to technological advances.

Microsoft will continue to argue that government demands are unrealistic. The company will insist that far from maintaining an unchallenged monopoly, it faces serious competition on a number of fronts. At the consumer end they will cite the increased popularity of the Linux operating system that is available for free. In the business sector they will emphasise that until now they have been the underdog, having never made any real headway with the NT operating system.

Also acting in Microsoft's favour is the place it holds within the US economy and the danger that a collapse in share prices for the company could create a major crisis for US capitalism. In the immediate aftermath of the Department of Justice decision to pursue the antitrust case, Microsoft's shares dropped by more than 16.5 percent, bringing the Nasdaq down by more than 5.5 percent. News of the Supreme Court ruling sent company shares slightly higher with a close of trading price on Tuesday 2.35 percent up.