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[NEWS ANALYSIS](#)

Will Justice Let Microsoft Off the Hook?

The software giant's rivals fear that Antitrust Div. chief Charles James will merely slap Gates & Co. on the wrist

When Charles James took over as top trustbuster at the Justice Dept., he sent out signals he'd be plenty tough on Microsoft. He hired as his outside litigator and chief economist folks who would have made his Democratic predecessor, Joel Klein, proud. He kept on several Microsoft-bashers from among the career ranks at Justice. And in a brief filed in September with Judge Colleen Kollar-Kotelly, he said the chasm between his department and the software giant was so vast that mediation would be pointless.

Yet as three weeks of imposed mediation come to an end, he's beginning to look more and more like Bill Gates's new best friend. A tentative deal worked out between Justice and Microsoft is far from the tough medicine presaged by the unanimous D.C. Circuit Court of Appeals ruling that the company ruthlessly extended its monopoly powers. Critics charge that the deal is a "sell-out" or "capitulation."

Indeed, it's little more than a warmed-over -- and stripped-down -- version of the interim remedies proposed by the previous judge, Thomas Penfield Jackson. "It's the equivalent of a 30-day suspension of their driver's license," says Ed Black, President of the Computer & Communications Industry Assn.

UNBUNDLED VERSIONS. What's in the proposed settlement? A draft proposal is said to include language giving computer makers and consumers more power to delete Microsoft applications and replace them with those of competitors. Also included is language that tries to force Microsoft Windows to work better with rival applications by creating secure facilities where programmers could look at the inner workings of Microsoft code.

Microsoft, according to sources, would be allowed to continue bundling any of its own applications into its system -- but it would have to offer unbundled versions as well in cases where the application was deemed to be "middleware," which means it could serve as platform for other applications. And instead of a "crown jewel" provision that punishes Microsoft if it continues to engage in monopolistic practices, the draft merely calls for the remedies to be extended from five to seven years. Microsoft declined to comment.

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Other than the extension, these were part of a June, 2000, order by Jackson. Critics charge that the provisions are unlikely to address the monopoly problems identified by the D.C. Circuit Court of Appeals in a unanimous ruling this summer. The reason: Jackson's interim remedies were just that -- a set of stopgap measures to maintain the status quo until his ultimate weapon, a corporate breakup, went into effect. They aren't broad enough, tough enough, and flexible enough to cover any ongoing efforts by Microsoft to extend its monopoly. It's doubtful, for instance, they would have resulted in any significant changes to Windows XP, which critics say repeats many of Microsoft's past offenses.

BREAKUP OR BUST. Microsoft's opponents had hoped settlement talks would crash and burn. Then, when the case returned to Judge Kollar-Kotelly's courtroom, they hoped Jackson's remedies would be strengthened and augmented. They talked of enforced sharing of Microsoft's secret source code to ensure smooth interoperability between Windows and other applications. They proposed a tough policing of Microsoft's relationship with computer makers. Some even held out hope that Kollar-Kotelly would come around to the conclusion that a breakup was the only effective remedy. Alas, they say, none of these options are in the cards.

A deal could still fall apart or be blocked in court. One between Joel Klein and Microsoft tanked due to opposition from 19 state attorneys general. The AGs are making their presence known this time as well. In a clear message that they can pursue this case on their own if need be, they have hired aggressive litigator Brendan Sullivan. But there are also signs that some of them are suffering from Microsoft fatigue, particularly as the war on terrorism focuses their attention elsewhere.

"A couple of states may get peeled off because they're politically and logistically tired," says Glenn B. Manishin, an attorney who represents the Software & Information Industry Assn. "The big question is: Is it just New York, California, and a few others [who fight on]?"

If that happens, Microsoft may not even have to worry about its speeding tickets.

By Dan Carney in Washington
Edited by Patricia O'Connell

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