



Competition Law and IPRs

- The Microsoft Cases -

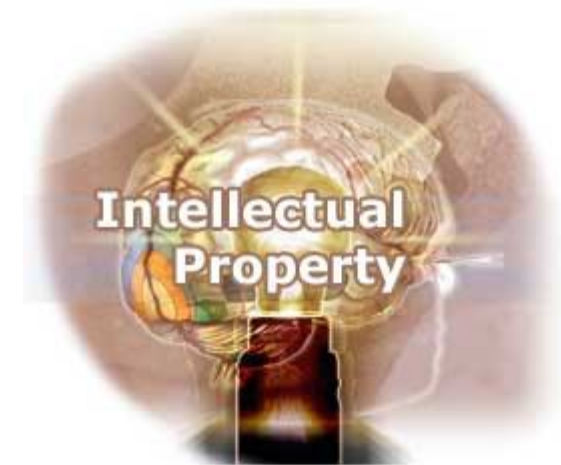
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(Speaking in a personal capacity.
The views expressed are not necessarily those of the European Commission.)

Scene setting

What are the IP rights?

- copyrights e.g. computer software
- patents e.g. Apple's "slide to unlock" feature (?)
- trade marks e.g. "Windows"



What is competition law?

- Article 102 TFEU e.g. refusal to supply
- Illegal agreements, mergers, state-aids





Competition Law and IPR

- IP laws confer legal monopoly, but no inherent conflict with competition law
- No antitrust immunity for IPRs
- But recognition of unique nature of IPRs and their contribution to innovation
 - Exclusivity of an IPR and its exercise are not in themselves regarded as anti-competitive
 - However, when accompanied by exceptional circumstances, exercise may be abusive so that it is permissible, in the public interest in maintaining effective competition, to encroach upon the exclusive right (T-201/04 *Microsoft*)



THE MICROSOFT CASES





Case T-201/04 (“Microsoft I”)

- Prohibition Decision of 24 March 2004:
 - Refusal to supply interoperability information
 - Tying of Windows Media Player to Windows
- Fine of EUR 497 million
- Remedy: disclosure order (RAND terms) & obligation to offer unbundled OS version
- EU Court upheld all substantive findings including the fine



Follow-on Compliance Cases

- **Penalty Payment Decision of 12 July 2006**
 - Incomplete and inaccurate interoperability information
 - Fine of EUR 280.5 million
- **Penalty Payment Decision of 27 Feb 2008**
 - Reasonable pricing of the interoperability information
 - Fine of EUR 899 million
 - On appeal (T-167/08), reduction to EUR 860 mio



Case COMP/39.530 (“Microsoft II”)

- Commitment Decision of 16 Dec 2009
 - Tying of Internet Explorer to Windows OS
- Commitments: Browser Choice Screen
- Non-Compliance Decision of 6 March 2013
 - Failure to honour commitments between May 2011 and July 2012 (affected 15 million users)
 - Fine of EUR 561 million



Browser Choice Screen



*Browser order presently randomly



MICROSOFT I

- Refusal to supply -



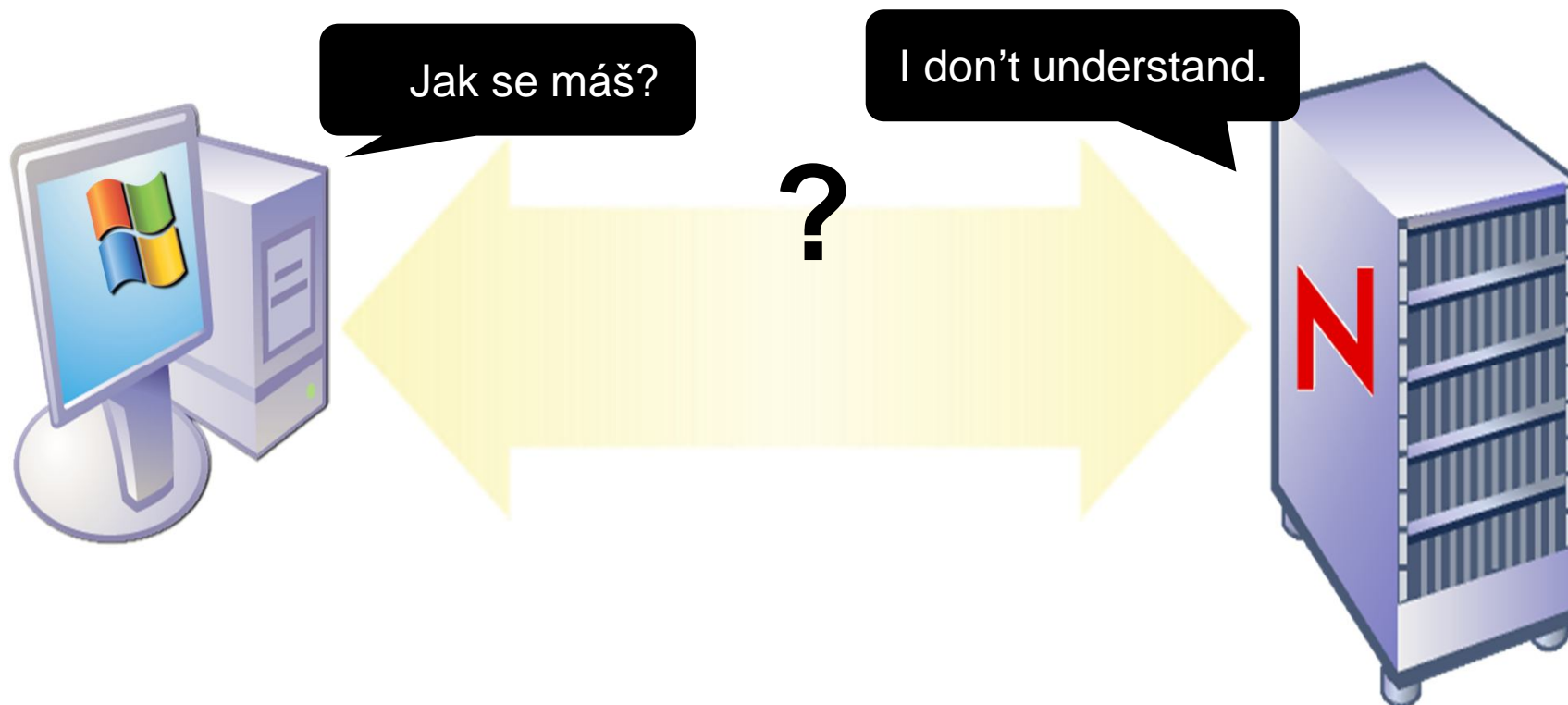
The relevant markets

- PC operating systems- software that control the basic functions of a computer
- Work group server operating systems- operating systems designed to deliver services (e.g. file sharing, printing) to PCs linked together in small to medium-sized networks

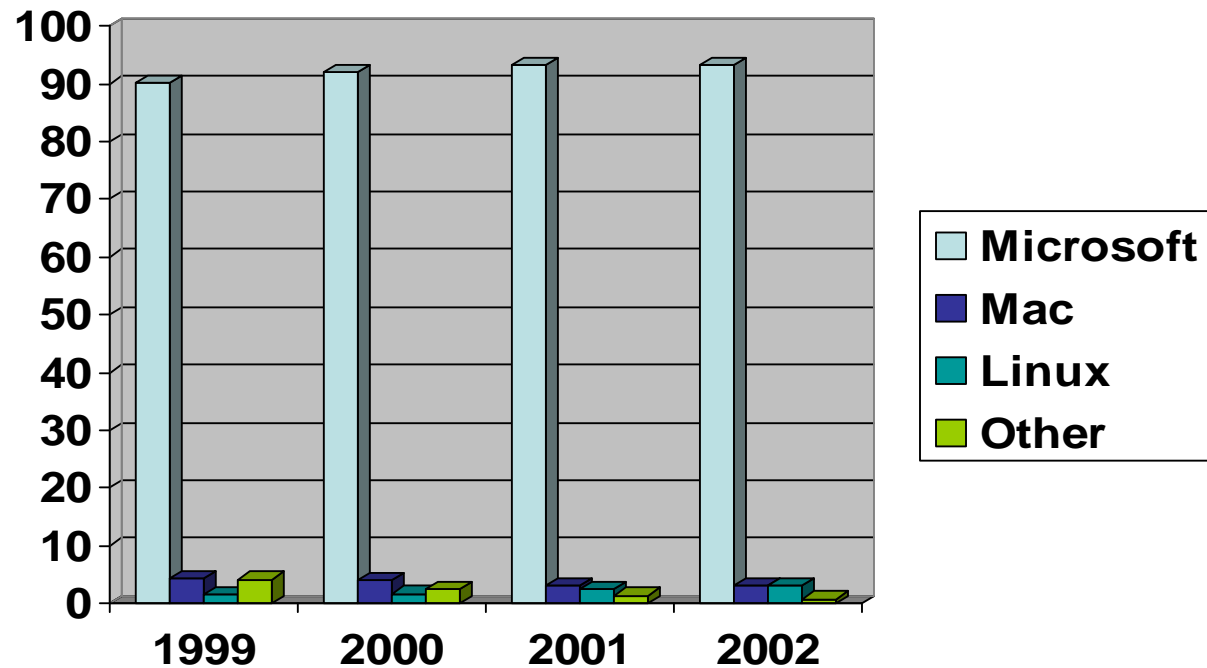
What is Interoperability?



The Interoperability Problem



Microsoft's Market Shares in the PC OS Market





Microsoft's Dominance

- Microsoft holds a dominant position on the PC OS market
 - Market position close to monopoly
 - *De facto* standard for client PCs
- Very high barriers to entry
 - Sunk cost for development of OS
 - Applications barrier to entry resulting from indirect network effects (i.e. need for critical mass of compatible applications)



Microsoft's Conduct

- Refusal to supply interoperability information and to allow its use for the development of compatible work group server OS products (10/1998 – 3/2004)
 - Only technical documentation needed
 - Part of broader pattern of conduct vis-à-vis all work group server OS providers
 - Disruption of previous levels of supply



Legal Assessment under Art.102 TFEU

- Follows a long line of consistent EU case-law: *Commercial Solvents, Magill, Volvo, Bronner, IMS*
- Indispensability of information that is refused for activity on neighbouring market
- Risk of elimination of competition on that market
- Refusal prevents appearance of a new product for which there is potential consumer demand
- No objective justification



Indispensability

- Windows is *de facto* standard for work group computing
- Competing work group server OS need to interoperate with Windows on an equal footing with Microsoft's own products to compete viably in the market
- No substitutes for disclosure of full specification of relevant protocols

Elimination of Competition

- Effects on neighbouring product market
- Elimination of effective competition
 - Marginal presence of competitors in certain niches not sufficient
- Risk of elimination sufficient
 - No immediate effect required
- Clearly confirmed by market developments (including Microsoft's own surveys)



New Product

- Limitation not only of production or markets, but also of technical development to the detriment of consumers (Article 102(b) TFEU)
- Detailed analysis of impact on consumers
 - Lock-in into homogeneous Windows solution
 - No choice of non-Microsoft products which were rated better on a range of key competitive parameters (e.g. reliability, security and speed)
- Microsoft has “artificial advantage”
 - Ample scope for differentiation and innovation



Objective Justification

- IPR itself cannot be a justification
- No reduction of Microsoft's incentives to innovate
 - Competitors cannot copy/clone Microsoft's products since no access to source code
 - Disclosure of interoperability information is industry practice



Impact on Innovation?

- Microsoft's CEO Steve Ballmer publicly confirmed the benefits of interoperability disclosures:

*"[...] what we are permitting is more innovation around our **products**, more interoperability, maybe also more potential for third parties to cannibalize what could have been Microsoft business, [...] But it is a path we have committed ourselves to **because we think it is good for customers** and is consistent with our legal obligations." (Herald Tribune, 3 March 2008)*



European
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THANK YOU!