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The European Commission's Microsoft case: analysis and principles

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(speaking in a personal capacity - the views expressed are not necessarily those of the European Commission)

Overview

- The European Court of First Instance upheld all substantive findings of the 2004 Commission decision and the 497m fine
- Very serious antitrust infringement - two abuses:
 - Refusal to supply interoperability information
 - Tying Windows Media Player to Windows



Key aspects

- Extraordinary market power of Microsoft in the PC operating system market
- Particular nature of operating systems
 - OS intended to interoperate
 - OS intended to be complemented with third-party products

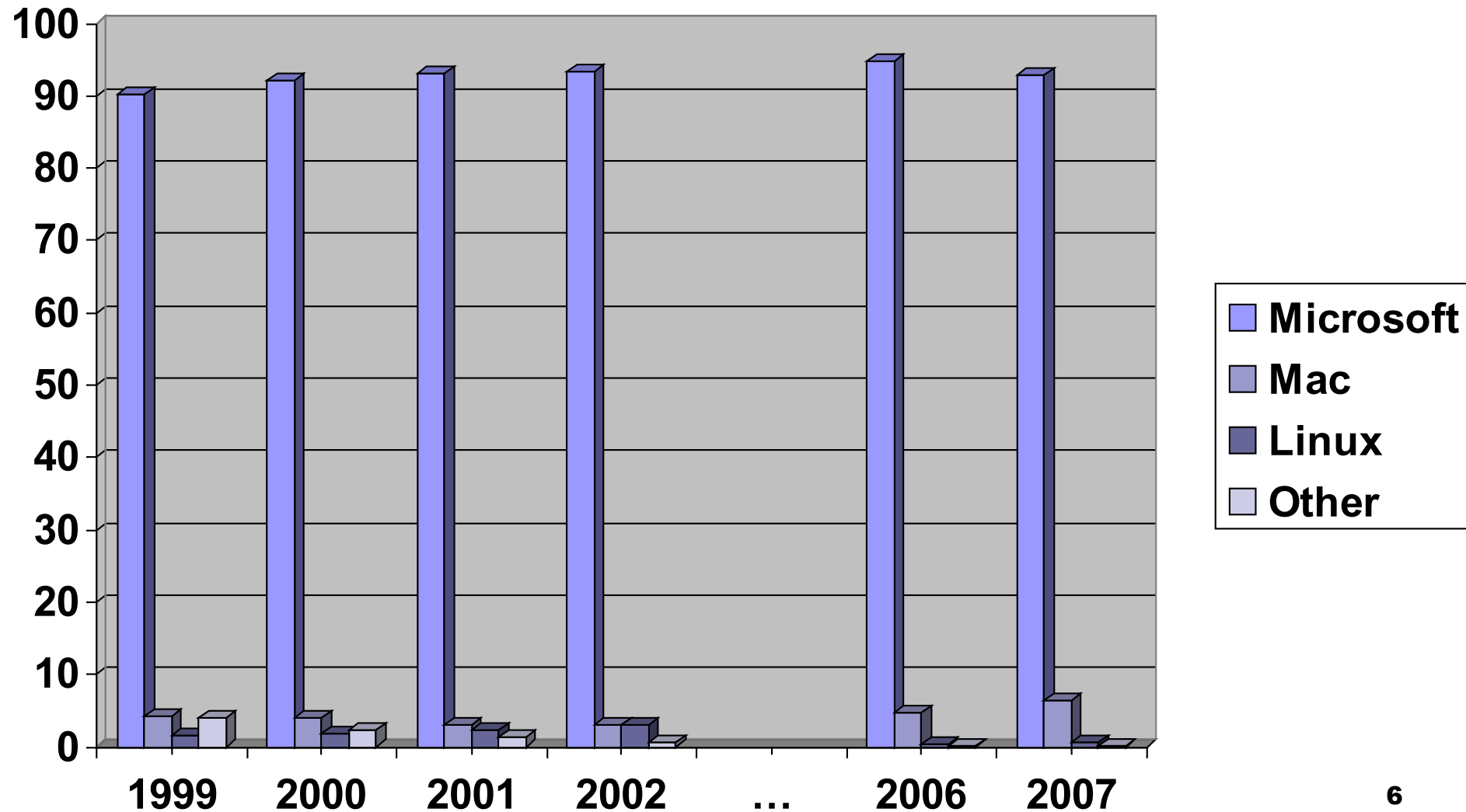


Refusal to supply abuse

Microsoft's dominance

- Microsoft holds a dominant position on the PC OS market
- Microsoft has a very high and stable market share
- Largest competitors: Apple and Linux
- Barriers to entry are high:
 - Cost of developing OS
 - Applications barrier (indirect network effect)

Microsoft's market shares



Sun Microsystems complaint

- Microsoft refuses to allow sufficient interoperability between Sun's **work group servers** (WGS) and Windows PCs
- Sun needs interoperability with Windows PCs to viably compete on the WGS market



Work Group Server Operating System Market

- WGS operating systems are optimised for file, print and group and user administration tasks
- Installed on cheaper servers
- Difference to other server operating system tasks



Results of the investigation

- Microsoft abusively leveraged its PC OS dominance onto the WGS OS market
- Competition on the merits of different WGS in terms of features, reliability, security, speed etc. rendered secondary

The interoperability remedy

- Microsoft must disclose interface information: explain how Windows PCs communicate with Windows servers
- What is disclosed is technical documentation on the interfaces:
 - Little innovative content in general
 - If there are true innovations (e.g. protected by patents) in the Microsoft protocols, Microsoft can charge a fair remuneration for these innovations
- No need to disclose (or allow copy of) software code

Legal assessment of refusal to supply under Article 82 (I)

- Follows a long line of consistent case-law

Commercial Solvents, Magill, Volvo, Bronner, IMS:

Refusal by a dominant undertaking to license an intellectual property right not itself an abuse unless ...

Legal assessment of refusal to supply under Article 82 (II)

1. Indispensability of information that is refused for activity on neighbouring market
2. Elimination of competition on that market
3. Refusal prevents appearance of a new product for which there is potential consumer demand
4. No objective justification

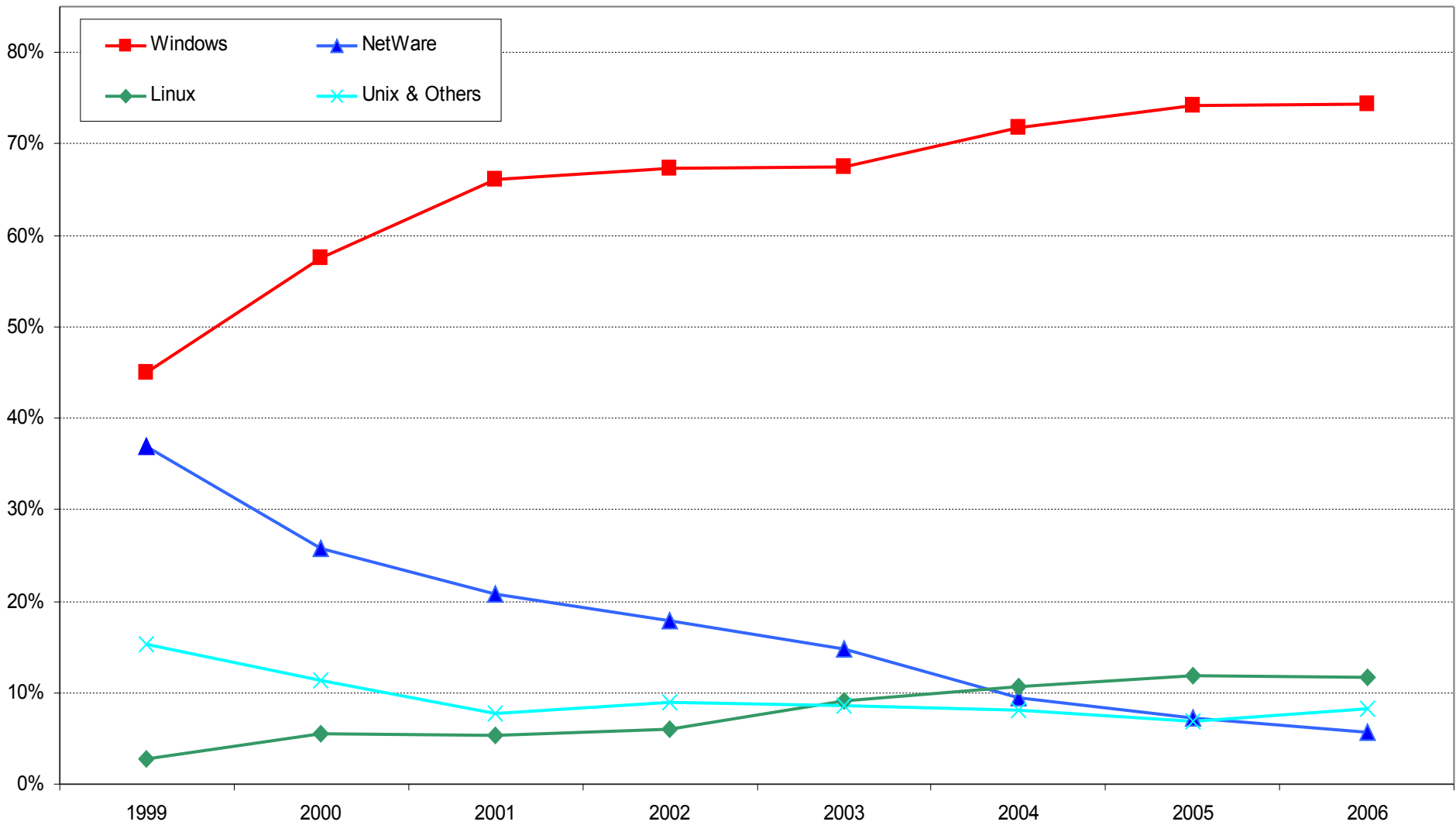
Ad 1.: Indispensability

- Servers cannot function in isolation: they need to be interoperable with clients
- Microsoft's dominant position on the PC OS market for many years enabled it to impose its technology as the *de facto* standard for interoperability in work group networks (*para. 392 of the Judgment*)
- There are no viable alternatives to the information sought

Ad 2.: Elimination of competition

- Neighbouring product market
- Elimination of 'effective' competition
(notwithstanding marginal competition)
- Elimination does not have to be immediate
- In this case, a clear trend was confirmed

Worldwide Operating System Market Shares (Servers < US\$25,000 based on REVENUES) - File & Print and Networking Workloads



Sources: IDC Server Workloads Models in 2000 and 2007.

Ad 3.: New product

- Limitation of technical development to the prejudice of consumers
- Detailed analysis of impact on consumer
 - Lock-in, elimination of competition, denial of consumer choice
- Microsoft retains an '*artificial advantage*' in terms of interoperability by its refusal to supply
 - Competition between WGS OS occurs on the basis of parameters other than interoperability
 - Innovative features of other products

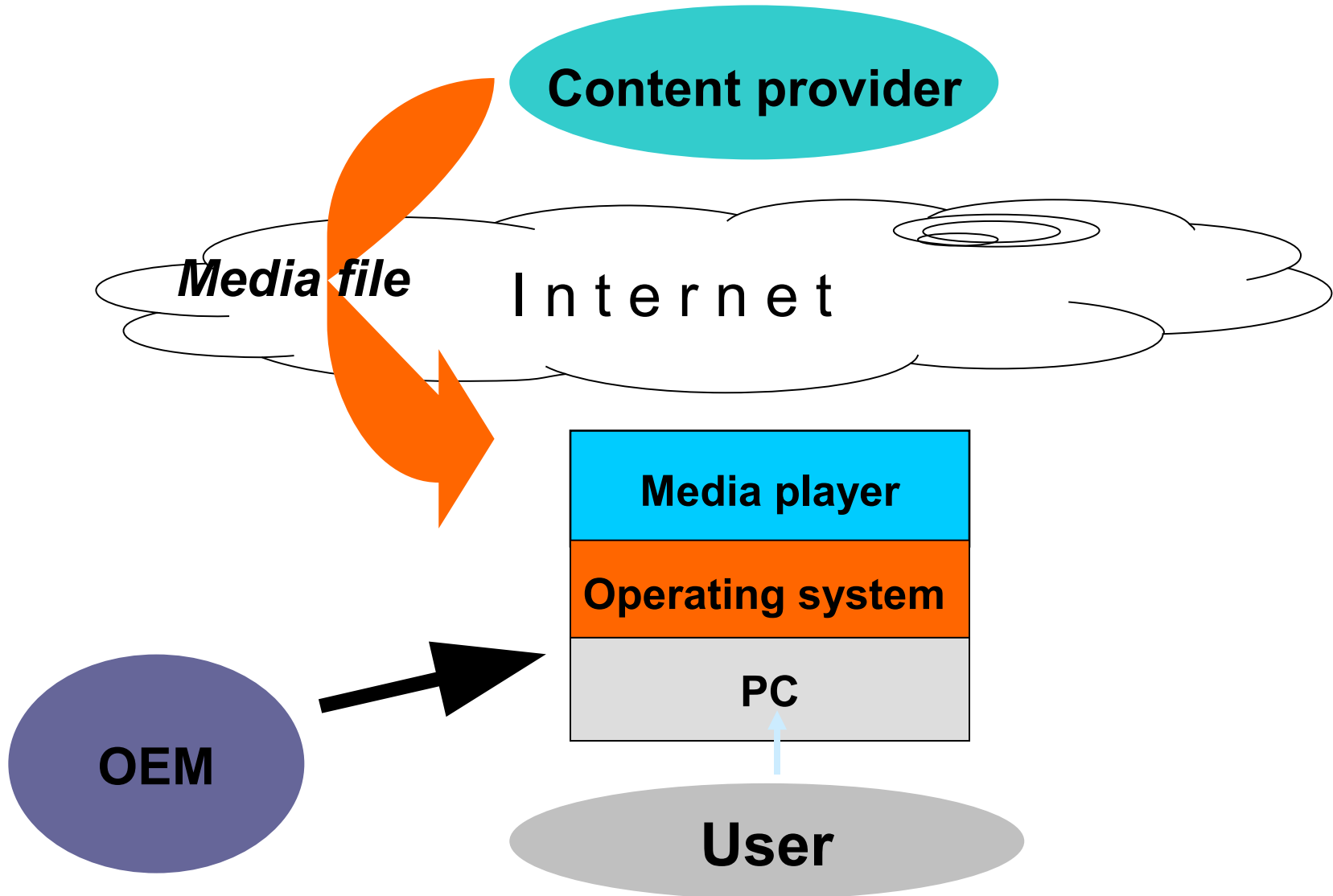
Ad 4.: No Objective justification

- Intellectual property in itself cannot be a justification
 - Otherwise refusal to license an intellectual property right could never be considered to constitute an infringement of Article 82 EC contrary to established case law
- No reduction in Microsoft's incentives to innovate
 - Rivals cannot copy/clone Microsoft's products
 - Disclosures are industry practice



Tying abuse

Streaming media chain



Legal assessment of tying under Article 82

- Follows consistent case law, e.g. *Hilti*, *Tetra Pak II*:
 2. Dominance in tying product (PC OS)
 3. Two separate products
 4. No choice for customers
 5. Anti-competitive foreclosure
 6. No objective justification/efficiencies

Ad 2.: Separate products

- Distinctness to be assessed by reference to independent demand for tied/tying products
- Role of OEMs important
- Microsoft's own practice confirms the Commission's analysis: no technical reasons to intertwine the products

Ad 3.: Coercion

- Windows could not be obtained without Windows Media Player
- OEMs are the main target, pass Windows on to customers
- Tie is both contractual and technical
- WMP is not free of charge

Ad 4.: Foreclosure of competition (I)

- Tying gives WMP unparalleled presence
 - This creates disincentives for OEMs and consumers
 - Competition on the merits prevented (*‘Microsoft’s competitors are a priori at a disadvantage even if their products are inherently better than Windows Media Player’*, para. 1088 of the judgement)
- The CFI confirms that this is sufficient, but also looks at other factors

Ad 4.: Foreclosure of competition (II)

- Indirect network effects mechanism
 - artificially induces content providers and software developers to the WMP platform
- Actual evolution of the market
- Tying has a detrimental impact on innovation

‘Microsoft interferes with the normal competitive process which would benefit users by ensuring quicker cycles of innovation as a consequence of unfettered competition on the merits’ (para. 1088 of the Judgment)

Ad 5.: No objective justification

- Uniform platform argument
 - *De facto* standardisation should occur through competition, not leveraging of a dominant position
 - Tying unnecessary for platform benefits
- No technical benefits of ‘integration’

What the case is about

- Microsoft's behaviour hurts innovation
 - Refusal prevents innovative products
 - Tying reduces the talent and capital invested in innovation
- The case is an important precedent
 - But not for every company in every industry
 - Precise factual analysis relating to specific circumstances

What the case is NOT about

- Reducing companies' incentive to innovate
 - How important is the IPR element?
 - Interoperability protocols are routinely disclosed for free in the industry
- Denying companies the right to improve products
 - Adding a separate product to a monopoly product is not improving that product



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