The EU Microsoft judgment

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

Introduction

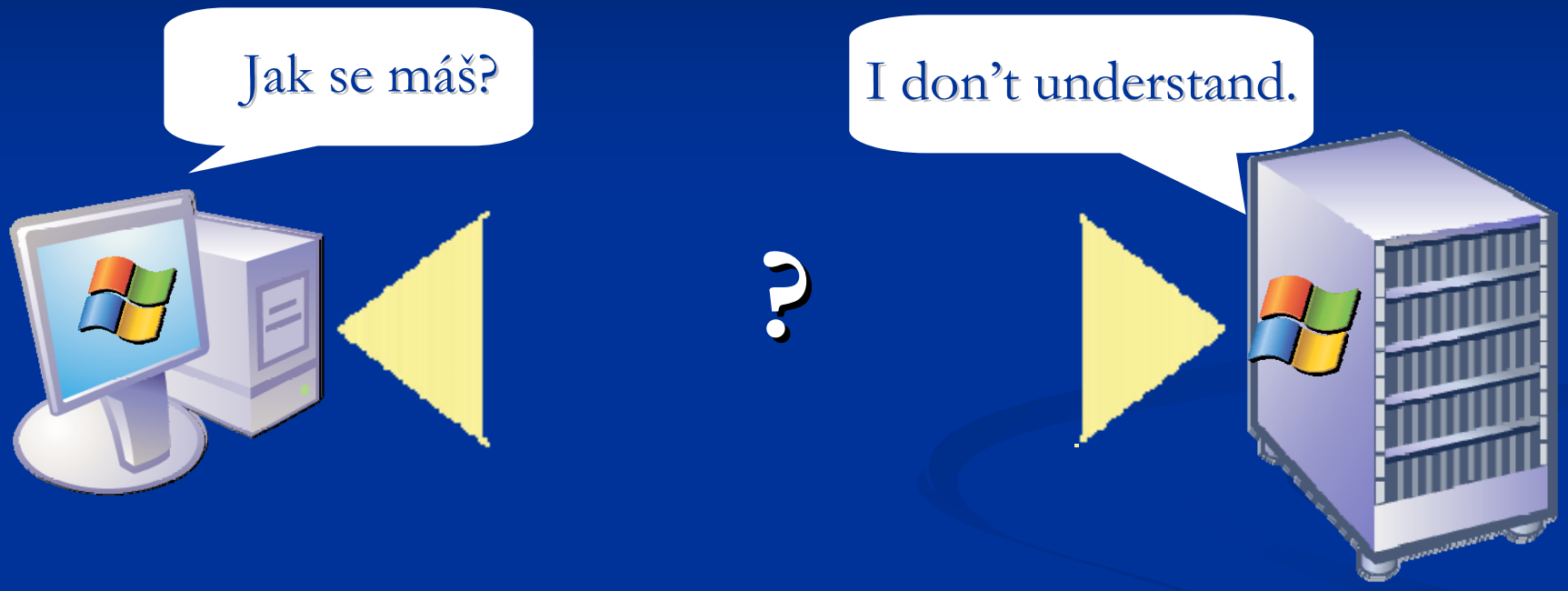
- The Court upheld all substantive findings of the Commission decision
- Very serious antitrust infringement - two abuses:
  - Refusal to supply interoperability information
  - Tying Windows Media Player to Windows
- Fine of 497 million Euro confirmed

Some key aspects

- Extraordinary market power of Microsoft - a virtual monopoly in the PC OS market
- Particular nature of operating systems
  - By their nature intended to interoperate
  - By their nature intended to be complemented with third-party products

Refusal to supply abuse

The “interoperability” case
The interoperability problem



The legal test

- Follows a long line of consistent case-law
  - *Commercial Solvents, Magill, Volvo, Bronner, IMS*
- Strictest legal test applied (assumes IPR)
- Four pronged test
  - Indispensability of information that is refused
  - Elimination of competition
  - Prevents emergence of new product
  - No objective justification

Indispensability

- Interoperability significant
  - Computers do not function in isolation
- Definition consistent with the Software Directive
- No viable alternatives to the information

Elimination of competition

- Neighbouring product market
- Elimination of ‘effective’ competition
- Elimination does not have to be immediate
- In this case, trend clearly confirmed
  - Including by Microsoft’s own surveys

New product

- Couched very clearly in terms of Article 82(b)
- Detailed analysis of impact on consumer
  - Lock-in, elimination of competition, denial of consumer choice
- Microsoft has an '*artificial advantage*'
  - Competition occurs on the basis of parameters other than interoperability
  - Innovative features of other products

Objective justification (I)

- Intellectual property in itself cannot be a justification
  - This would be a contradiction
- No reduction in Microsoft's incentives to innovate
  - Rivals can't copy/clone Microsoft's products
  - Aim of Decision is interoperability
  - US Settlement (settlement with Sun)

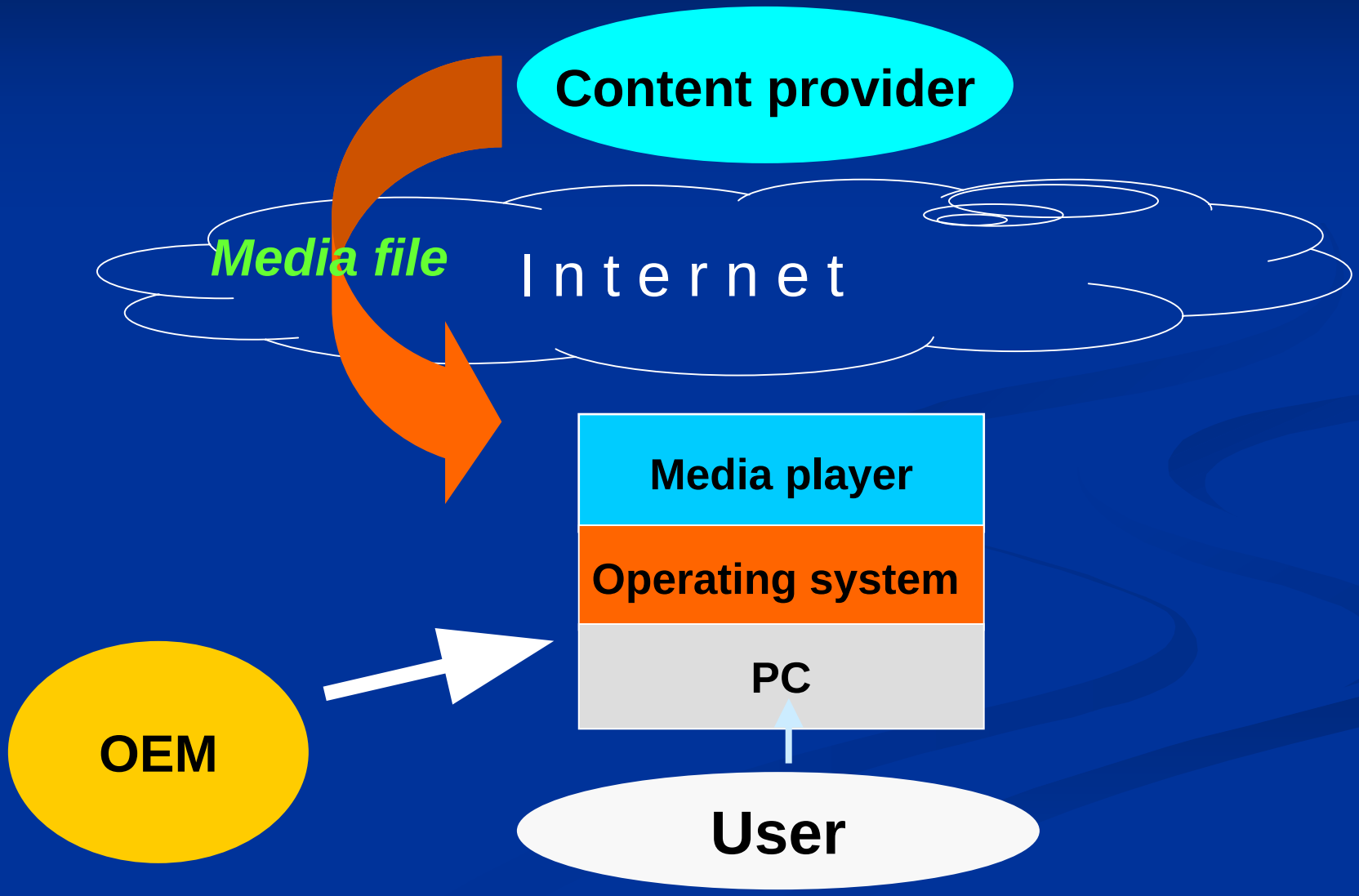
Objective justification (II)

'Microsoft itself expressly acknowledges in its written submissions … [that] *its competitors will not be in a position to develop products which are 'clones' or reproductions of Windows work group server operating systems by having access to the interoperability information at which the contested decision is aimed'* (para. 241)

'Microsoft … did not sufficiently establish that if it were required to disclose the interoperability information that would have a significant negative impact on its incentives to innovate. Microsoft merely put forward vague, general and theoretical arguments on that point' (paras. 697-698)

Tying abuse

Streaming media chain



Legal assessment of tying under Article 82

- Based on consistent case law, e.g. Hilti, Tetra Pak II
- Dominance in tying product (PC OS)
- Two separate products
- No choice for customers
- Harm to competition
- No objective justification/efficiencies

Dominance

- As mentioned…
  - Microsoft is dominant on the PC OS market
  - Microsoft has a very high and stable market share
  - Only fringe competitors: Apple and Linux
  - Barriers to entry are high:
    - Sunk cost (cost of developing OS)
    - Applications barriers to entry (indirect network effect)

Separate products

- Distinctness to be assessed by reference to independent demand
- Role of OEMs important
- Microsoft's own practice confirms the Commission's analysis
  - WMP exists for other operating systems
  - No technical reasons to put the products together

"reposition [the] streaming media battle from NetShow vs. Real to Windows vs. Real" and "follow the [Internet Explorer] strategy wherever appropriate"

RealPlayer

Quicktime

PC (Windows)

WMP

Coercion

- Windows could not be obtained without WMP
- Within the meaning of Art. 82(d) EC
- OEMs main target, passed on to customers
- Both contractual and technical
- WMP is <u>not</u> free of charge

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'*)
- The CFI confirms that this is sufficient, but also looks at other factors

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'

Objective justification

- Uniform platform argument
  - *De facto* standardisation should occur through competition, not monopoly extension
  - Tying unnecessary for platform benefits
- Technical benefits of 'integration'
  - Wholly unsupported
  - '*Microsoft acknowledged there was no technical reason*' to tie WMP with Windows

Conclusion

- The case is an important precedent
  - But not for every company in every industry
  - Precise factual analysis relating to specific circumstances
- Competition must always be assessed on the merits of the products
  - Consumer choice and innovation are key, particularly in the IT sector

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