



Intellectual Property and Competition Law
Conference, Geneva, February 10th 2006

Refusal to supply interoperability information
The Microsoft case

Thomas Kramler

DG Competition, European Commission

(speaking in a personal capacity)

Outline of the presentation

- Introduction
- Microsoft's dominance
- Microsoft's refusal to supply
- No objective justification
- Remedy
- Implementation
- Conclusions

Introduction

Introduction

- Complaint by Sun in 1998
- Allegations of denial of interoperability
- Commission Decision in March 2004
 - Microsoft abused its dominant position by refusing to supply interoperability information
 - Microsoft ordered to supply this information on reasonable, non-discriminatory terms
 - Decision also found a tying abuse (Windows Media Player – not discussed today)
- CFI interim measures order in December 2004 denying Microsoft's request for suspension of the remedies

Microsoft's dominance

Microsoft's PC operating system dominance

- Market share: c. 95% (above 80% since the mid-1990s)
- Indirect network effects: applications barrier to entry
- Profit margins above 80 %

Microsoft's refusal to supply

Sun's complaint (end 1998)

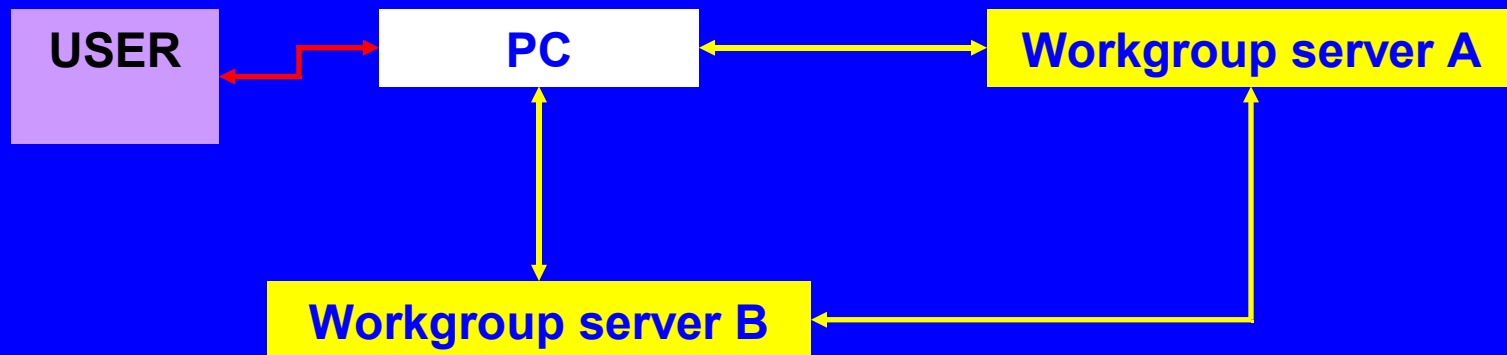
- Dominance in the PC operating system market
- Need interoperability with Microsoft's PCs to compete
- Microsoft refuses to allow sufficient interoperability between Sun's **work group servers** and Windows operating systems

Work Group Server Operating System Market

- Work group server operating systems are optimised for file, print and group and user administration
- Installed on cheaper servers
- Difference to other server operating system tasks (web, firewall)

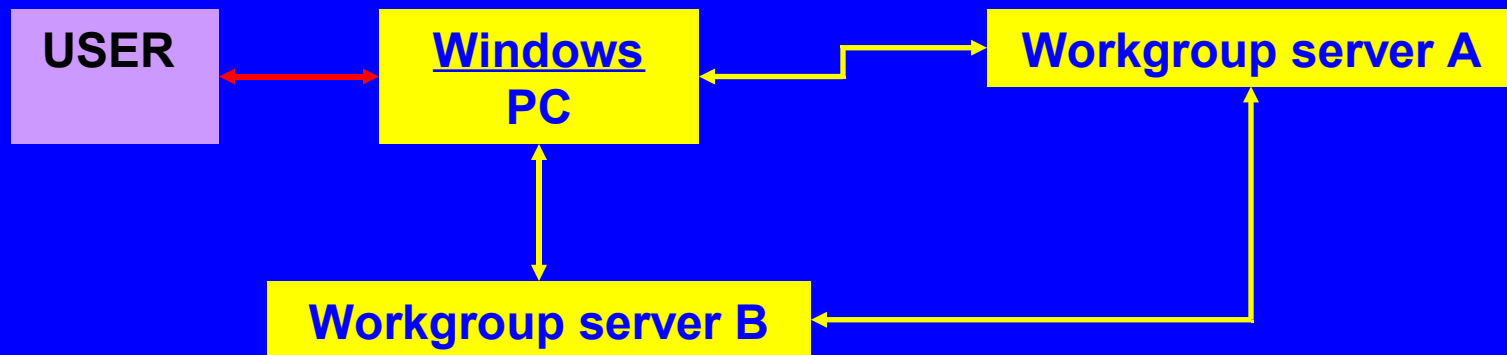
A simplified view of a workgroup network

↔ : interoperability



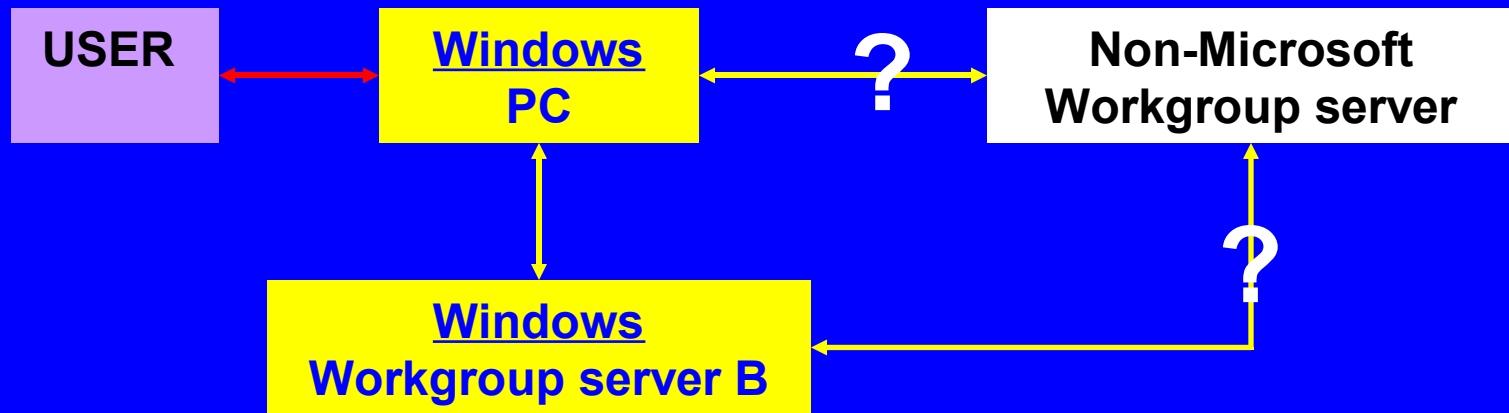
A simplified view of a workgroup network

↔ : interoperability



A simplified view of a (Windows-based) workgroup network

↔ : interoperability



Summary: infringement of Article 82 EC

- Exceptional circumstances
 - Refusal
 - Risk of elimination of competition (dominance + growing market shares + link to refusal)
 - Indispensability – No actual or potential substitute
 - Disruption of previous level of supply
 - Adverse impact on innovation (“new product” or “no cloning” criterion)
- No objective justification

No objective justification

No objective justification (I)

- Microsoft argued that disclosure of the information would seriously damage its incentives to innovate
- Not demonstrated:
 - No risk of cloning
 - Refusal prevents others from bringing their innovations to the market
 - Specifics of interoperability in the software industry

No objective justification (II)

- Microsoft argues that the information is IP protected
 - Copyright (specification/implementation)
 - Trade Secrets (proprietary extensions)
 - Patents
- Exceptional circumstances

Microsoft and IMS Health

Are they interoperable?

- The four “*IMS Health* criteria”:
 - Indispensability
 - Elimination of competition
 - New product
 - No objective justification
- No exhaustive checklist of exceptional circumstances

Microsoft and IMS Health

Are they interoperable?

- Indispensability:
 - Indispensability
 - Importance of interoperability (Software Directive)
- “New product”:
 - Compatibility, no “copying”
 - Competitors must innovate
- Elimination of competition
 - Dominance + trend towards further foreclosure
 - Irreversibility of the harm to the competition structure
- No objective justification

Remedy

Remedy

- Order to supply
- RAND terms
- Trustee

Implementation

- RAND Licensing Terms (market test)
- Trustee
- Article 24 procedure
 - Completeness and accuracy of the interoperability information
 - Reasonable remuneration

Conclusions

Conclusions

- Action considered only in exceptional circumstances
- Risk of elimination of competition
- Close examination of the nature of the information to be disclosed
- Incentives to innovate considered in detail