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POSITIVE
COMPETITION

Disclaimer: Positive Competition has been supporting Slack in its complaint against Microsoft. However, the views put forward in this presentation are only mine and do not represent the position of Slack on any of these issues.

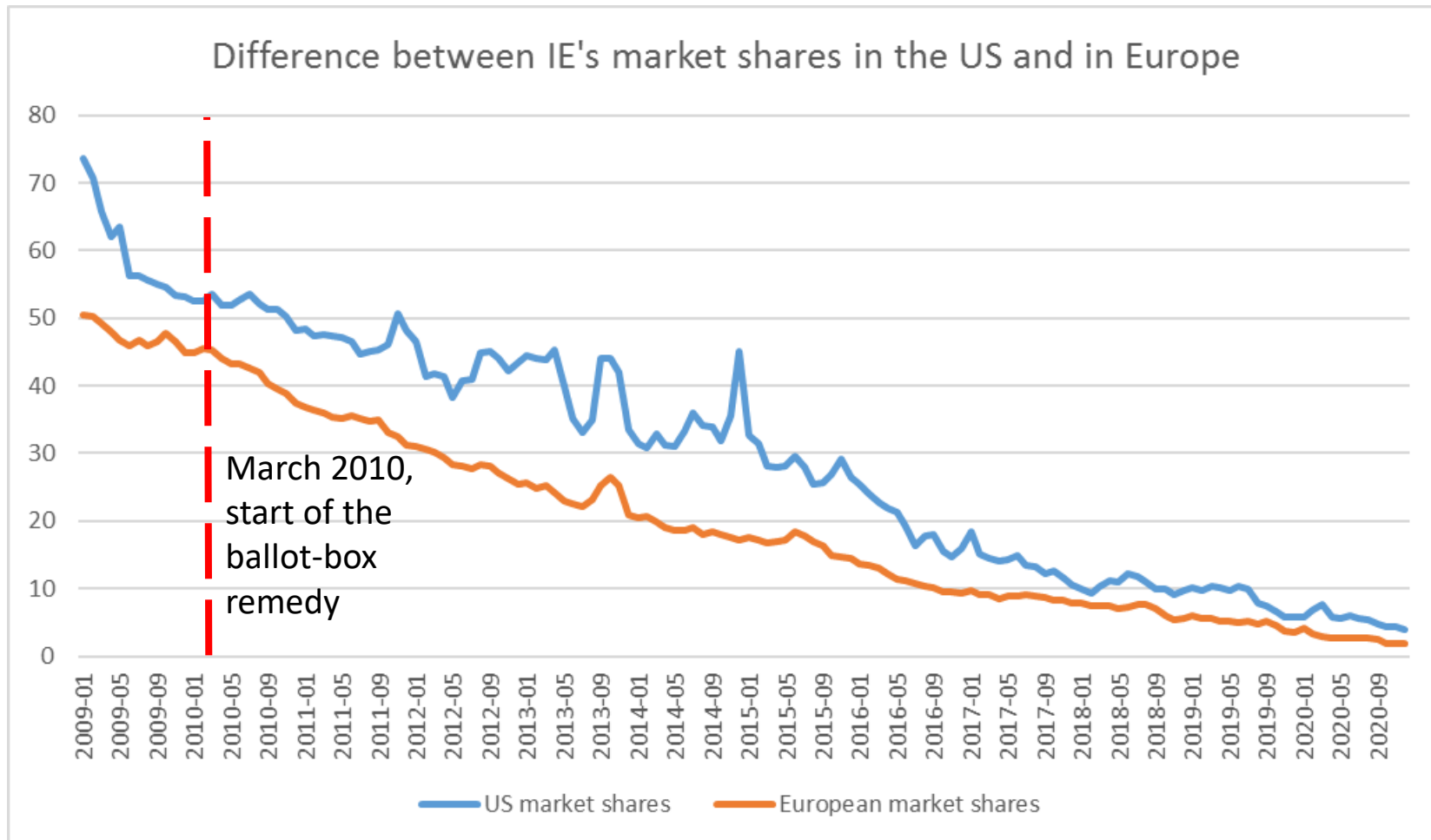
Positive takeaways from *Microsoft I and II*

Aleksandra Boutin

*The 16th annual GCLC conference
on ex-post assessment of EU
competition enforcement*

Was the remedy in the browsers case effective?

- The EC remedy in the browsers case did not have any discernable effect on the market structure. IE's decline in market shares was due to its well-documented shortcomings.



Theory of harm versus formal categories of abuse

- The three infringements featured specific conducts that were *conducive* to harm.
 1. **Tying** Windows Media Player to Windows OS without the possibility to uninstall (WMP case).
 2. **Refusing to supply interoperability** information between Windows OS and group server operating systems (WG OS case).
 3. **Pre-installing Internet Explorer** and forcing original equipment manufacturers to ship Windows PCs with the browser pre-installed (IE tying case).
- These behaviors are not mutually exclusive.
- The differences between these abuses are fuzzy: tying and pre-installation are often two sides of the same coin.
- These behaviors **are *only means to one end*: leveraging Microsoft's dominant position into neighboring markets** in order to:
 - monopolize them (offensive leveraging), or to
 - preserve pre-existing dominance in another market (defensive leveraging).

Leveraging market power (offensive)

Offensive leveraging: extending market power into a new market in order to exploit it

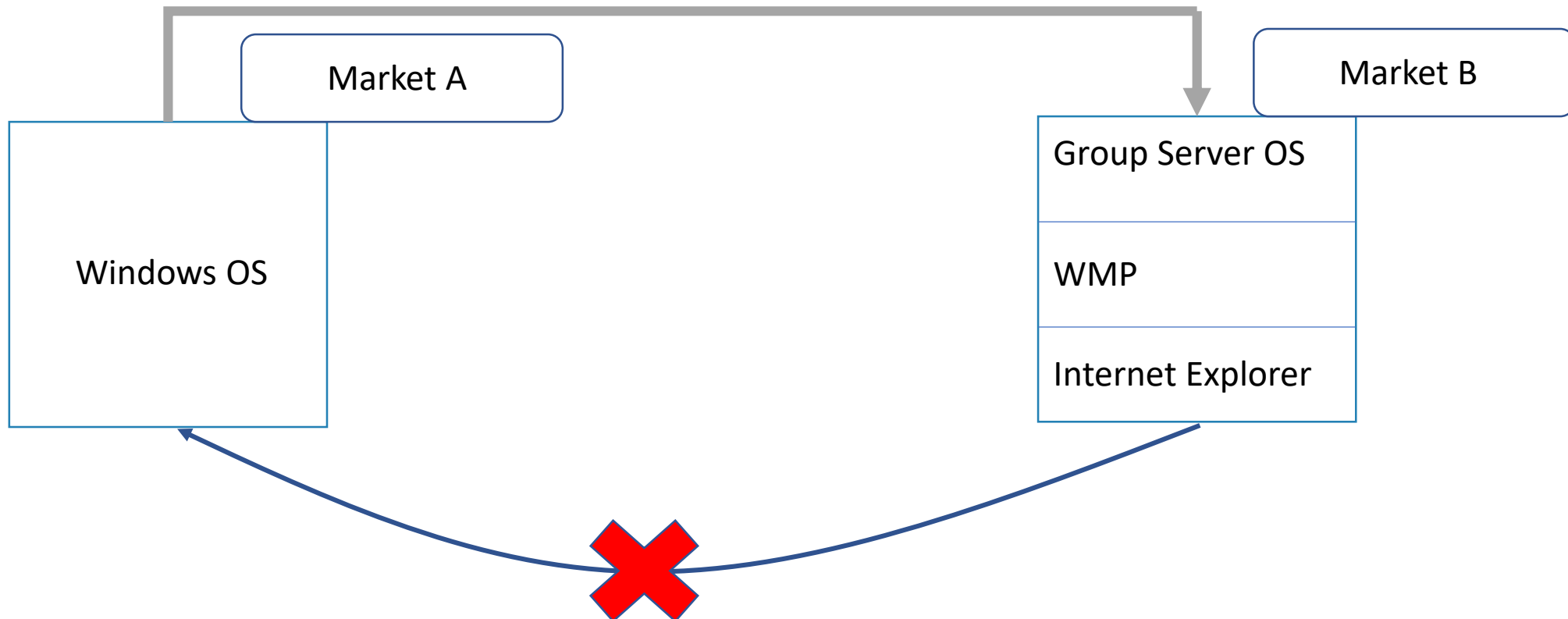


Leveraging market power (offensive)

- **The goal of offensive leveraging is to transfer the dominant position to a neighboring market to then exploit this market power.**
 - There are **clear elements of offensive leveraging in all three infringements.**
- Various types of behaviors (or their combinations) can have the same effects
 - Using the ubiquity of Windows to distribute applications
 - Commercial or technical tying
 - Mixed bundling
 - Self-favoring/limiting interoperability
 - Etc.
- **Offensive leveraging would require the dissipation of rents in the initial market:**
 - Why is it profitable to monopolize the second market rather than simply exploit market power in the first market (“one monopoly” Chicago argument).
 - Economic theory has identified conditions where this is profitable but such conditions are not always met.

Leveraging market power (defensive)

Defensive leveraging: enter market B to prevent/limit adoption of alternative solutions.



Alternative solutions in market B destabilize consumers' reliance on Windows OS and threaten its dominance/profits there

Leveraging market power (defensive)

- Successful entry in market B could threaten profits in market A in various ways:
 - Firms in market B would be able to subsequently enter A.
 - Adoption of alternative solutions could lower the barriers erected around market A and foster competition by third parties (e.g. “commoditize” market A).
- **Elements of defensive leveraging are also present in all three cases:**
 - Work Group operating systems have the potential to turn workstations into terminals (bypassing or commoditizing PC client OS).
 - Browsers can run web-based applications (also bypassing or commoditizing PC client OS).
 - Alternative media formats incentivize content creators to bypass the Microsoft ecosystem for content.
- **The defensive motivation for leveraging is clearer from a strategic perspective.**
 - In the counterfactual, rent in market A would disappear as well.

Remedies need to address the theory of harm

- Remedies in the 3 cases merely *mirrored the behaviors as identified by the Commission* (untying, obligation to provide licenses, browser ballot-box).
- **What if the strategy is multifaceted and changing overtime: dominant companies complement their strategy by other actions that remain unaddressed and/or find other ways to leverage?**
 - For example, Microsoft imposed on developers Active Directory (AD) compatible certification and used AD as a migration device between different versions of server OS [As noted in Paragraphs 169 and 171 of the Decision].
 - This effectively constituted **technical tying** between business developments of Windows OS and Server OS: AD has been the root cause of Microsoft's dominance on many distinct markets.
- **If you don't send the signal that the issue is not a particular behavior, but rather a comprehensive strategy (a *theory of harm*), then you neither remedy nor deter.**
 - Need to be clear that a similar behavior that corresponds to the same strategy in the same context is *mutatis mutandis* also abusive.
 - This is in a way what happened with Windows N sold at the same price.

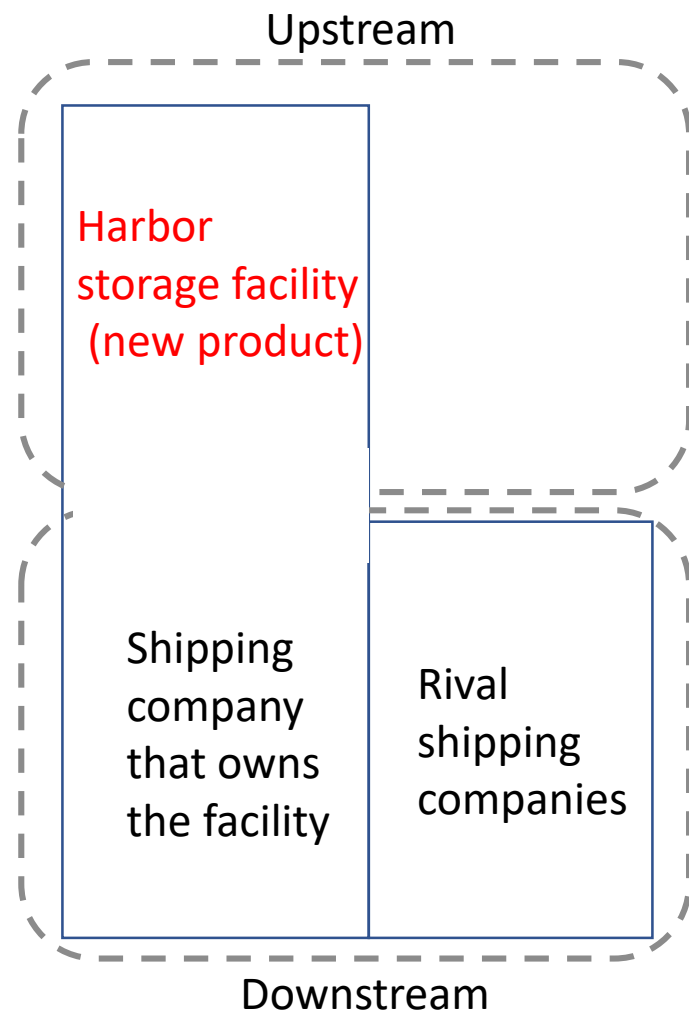
Remedies need to re-open markets and undo the harm

- **Remedies also need to re-open markets as if the abuse did not occur:**
 - There should be no residual profit from the abuse, otherwise crime pays.
 - In most circumstances, for instance **in the presence of switching costs, network effects, prominence, etc., the abuse has a long lasting impact.**
 - In this context, just stopping the behavior is *too little too late*.
 - **Proper remedies could also generate short term consumer loss, which needs to be compensated.**
 - For example, consider there are switching costs and because of the abuse, customers chose the Microsoft solution. Now, if you want to reopen the market, you need to compensate customers for this switching cost.
 - In fact, remedies should force the abusive firms to cover these costs (e.g. develop portability solutions).
 - Otherwise, you will never revert the harm.
 - **Very often positive remedies are the only proportionate answer** (including functional separation) and it is not clear why we need a regulation to impose such remedies.
 - Private enforcement would also help.

The remedies need to address leveraging

- The ineffective remedies that simply mirrored the identified behaviors in the 3 cases sent the message to the market that “*crime pays*”.
 - The Commission has not sent the message that it is the comprehensive strategy of leveraging that is bad.
 - All recent and ongoing digital cases feature defensive and offensive leveraging as their main theories of harm: *Google/Android, Google Shopping, Amazon self-preferencing, Facebook Marketplace, Facebook/Oculus, etc.*
 - The current complaint of Slack against Microsoft also concerns defensive and offensive leveraging through a comprehensive strategy using many different behaviors (means to an end):
 - pre-installation, tying, refusing interoperability, financial incentives, forced migration of Skype for business users, FUD, etc.
 - By leveraging market power from its dominant technology stack to collaboration software,
 - Microsoft protects its technology stack from Slack, a real threat that opens enterprise computing to the ecosystem of *best of breed* applications,
 - leverages its market power to the Cloud, an increasing threat to its stronghold in enterprise computing,
 - imposes Teams and attacks Slack to eventually impose other Microsoft solutions, e.g., CRM, data visualization, video-conferencing etc.
 - Theory of harm in the complaint against Microsoft is its old playbook: *defensive and offensive leveraging*

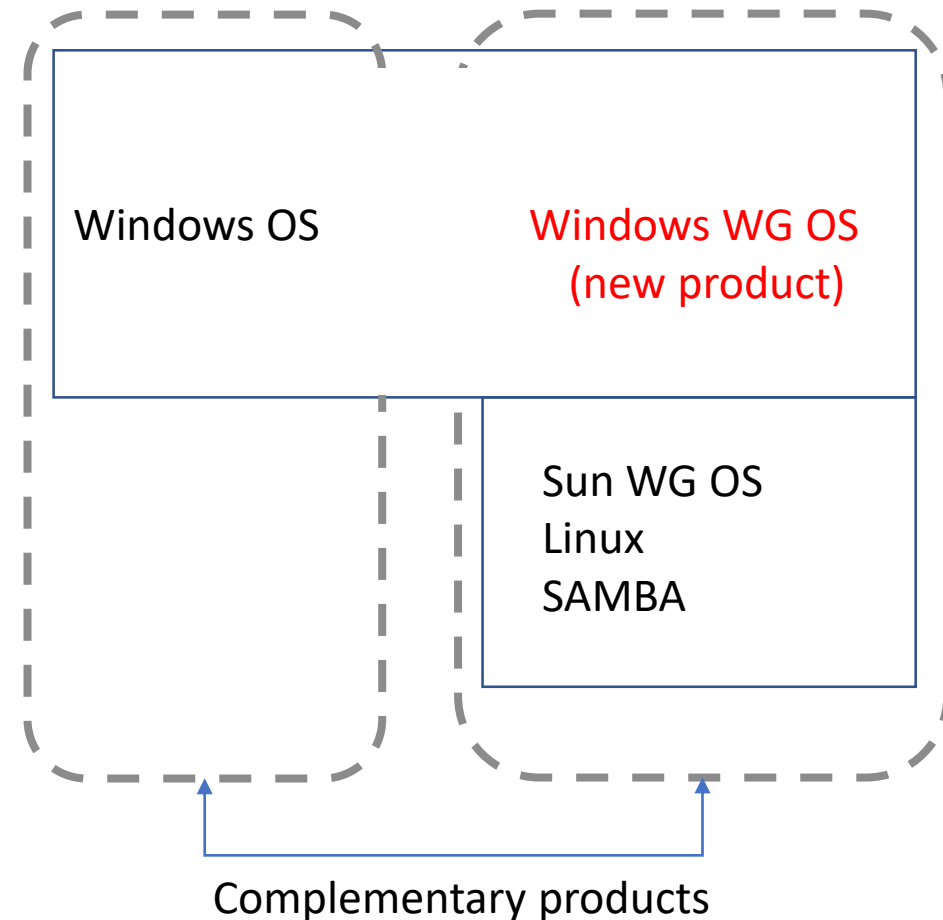
The traditional view of the essential facilities doctrine



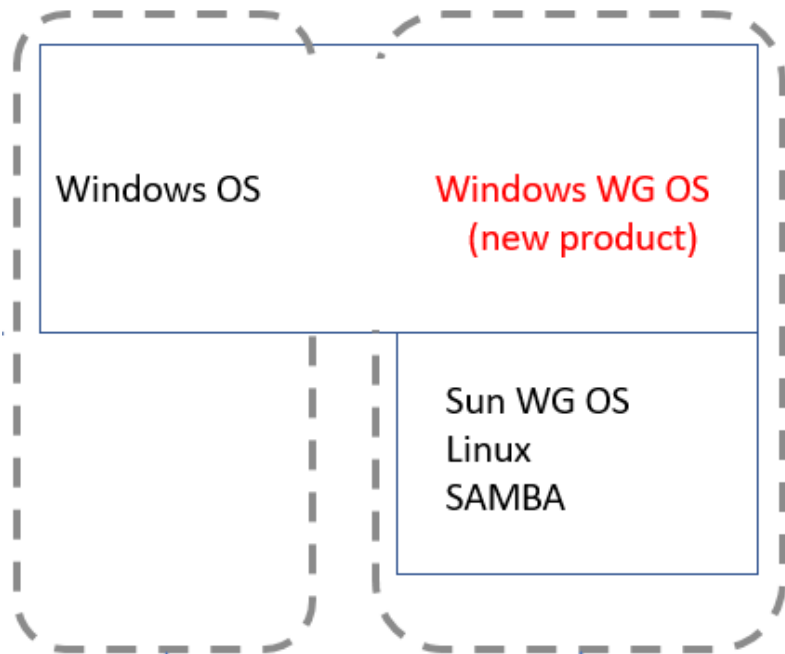
- The doctrine was developed in the case of physical infrastructures.
- To simplify, consider a hypothetical example whereby a dominant shipping company has invested in logistics infrastructures (e.g. storage) in its hub harbor.
- **There is a tradeoff between ex-ante and ex-post efficiency:** forcing access will increase competition, but if the dominant company had internalized it, it might not have invested in the first place.
- It is very difficult to assess where we are in this tradeoff in particular cases (unless for instance the infrastructure has always been there and comes from a former public monopoly).
- **The EU case law took an extreme (but pragmatic) view in favor of ex-ante efficiency** (also on the basis of higher principles like private property)
- To do so, it applied an old transverse concept: **investment should be protected as an efficiency, unless it eliminates competition**

The reality of the Microsoft case(s) is different

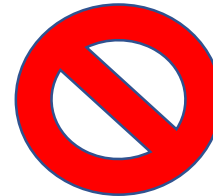
- Client PC operating systems and other applications are not inputs to each other, they are **complements**.
- **Third parties are not interested in getting access to the product in which Microsoft allegedly just invested, but to the pre-existing one.**
- Microsoft should have incentives to invest in new markets even if it cannot self-favor.
- **The ability to *self-favor* its product possibly creates additional incentives to invest, but this is due to a welfare reducing foreclosure premium.**
- **Therefore, the question of ex-ante investment incentives is very different** here and viewing the case through the lens of the essential facilities doctrine erroneously **pivots the market structure.**



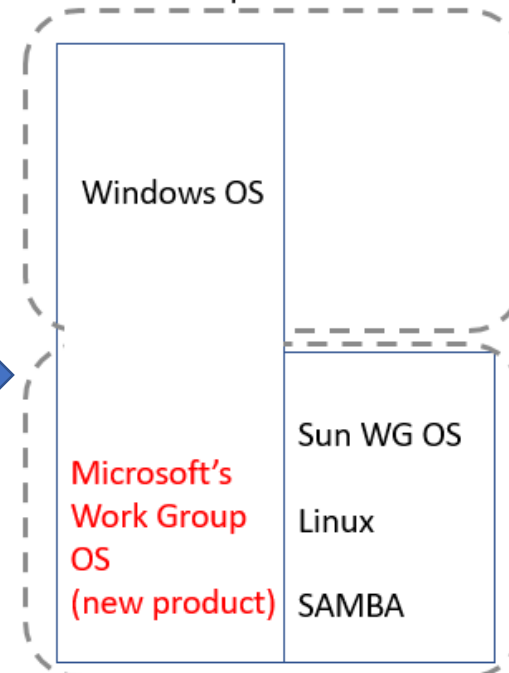
Erroneous pivoting of the market structure and departure from the original purpose of the doctrine



Complementary products



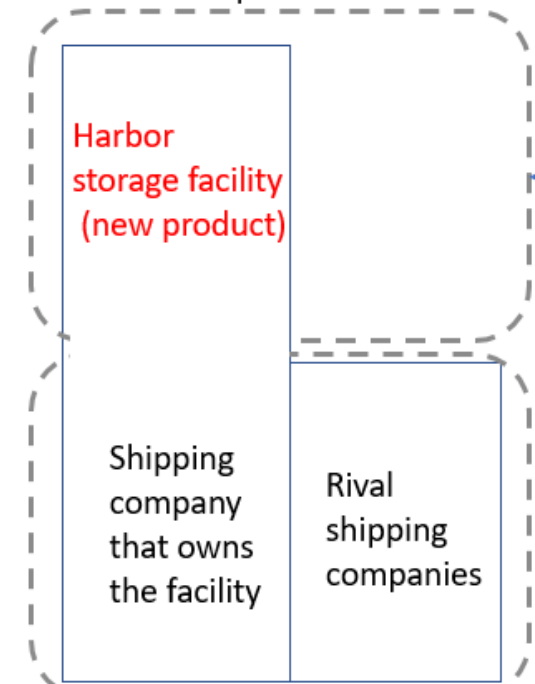
Upstream



Downstream



Upstream



Downstream

The goal of antitrust enforcement here

- There is absolutely no problem *per se* with Microsoft entering new markets, this should even be encouraged.
- However, Microsoft's situation creates different incentives:
 - Pure players would only enter B if they have a good product to offer and if there are sufficient profits to be made on this market on its own.
 - Pure player in market A has all incentives to promote interoperability with any player in market B as it increases demand
 - The only reason you would refuse interoperability is if you want to self-favour.
- Hence, Microsoft is possibly investing too much in entering B, including by renouncing profits that interoperability would generate.



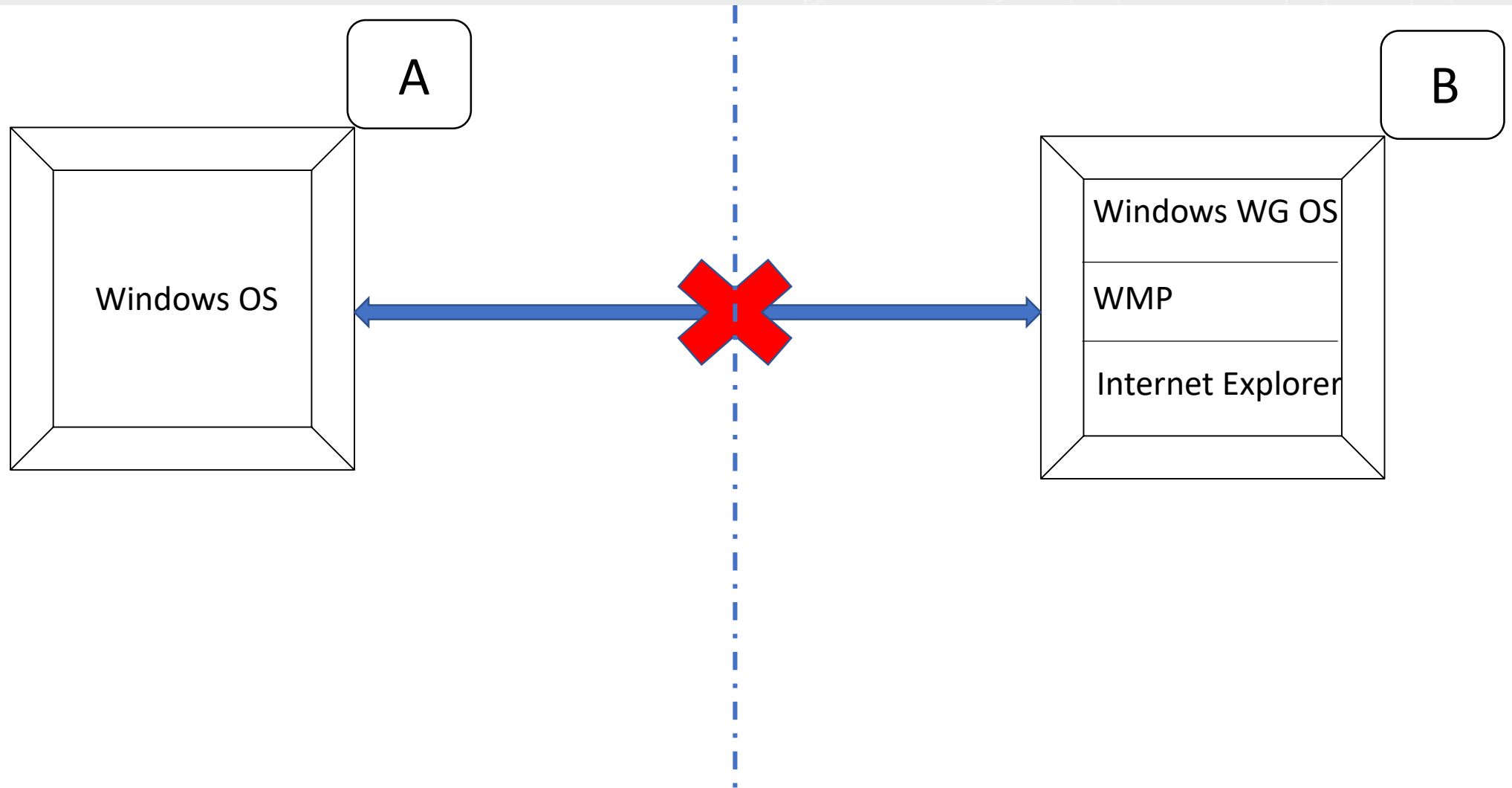
Investing “more” than a standalone firm is not always a bad thing: e.g. we don't have an obvious equivalent theory for Google investing in Chrome.

- This can be an issue only when a proper theory of harm has been delineated and substantiated in a particular case: blanket prohibitions and black lists are not a solution.

What are proper remedies here?

- If remedies arrive on time, before market positions have solidified, **they should restore the normal business outcomes.**
- This can be done in a constructive manner: “don’t do this” or “do this”.
 - But this can be circumvented if there are alternative ways to leverage.
 - This needs to be carefully monitored.
 - This is what the Commission tried to do for many years and it didn’t work.
- **An alternative, which is information free, is to directly tackle the cause of the problem and cut the strategic link: impose arm’s length obligations or functional separation**
 - This is of course very intrusive and **this is only proportionate when a real theory of harm has been identified (the remedy should be limited to the market in question).**
 - This is proportionate because none of the remedies implemented so far has been effective.
- If remedies arrive too late and the market positions are solidifying (or have solidified), then the remedy should impose even more positive obligations to promote competition (e.g. portability).
 - This is also intrusive, but there is no choice: otherwise *crime pays*.

Structural separation?





Thank you

I would be happy to answer any questions: aboutin@positivecompetition.com

To know more about us, please visit our website: [*www.positivecompetition.com*](http://www.positivecompetition.com)