

Remedies in High-Tech Industries

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Microsoft Remedies

1994 CD and EU
Undertaking

- Licensing to computer manufacturers

2001 Consent Decree and
Litigated Final Judgment

- Software integration, interoperability

Competitor Lawsuits

- Damages, some conduct relief

Consumer Class Actions

- Damages

European Union Decision
March 2004

- Software integration, interoperability

Korean FTC Decision
February 2006

- Software integration

Overall Approach

Focus on creating or preserving competitive opportunities, rather than limiting defendant's efforts to deliver consumer value

U.S. Consent Decree

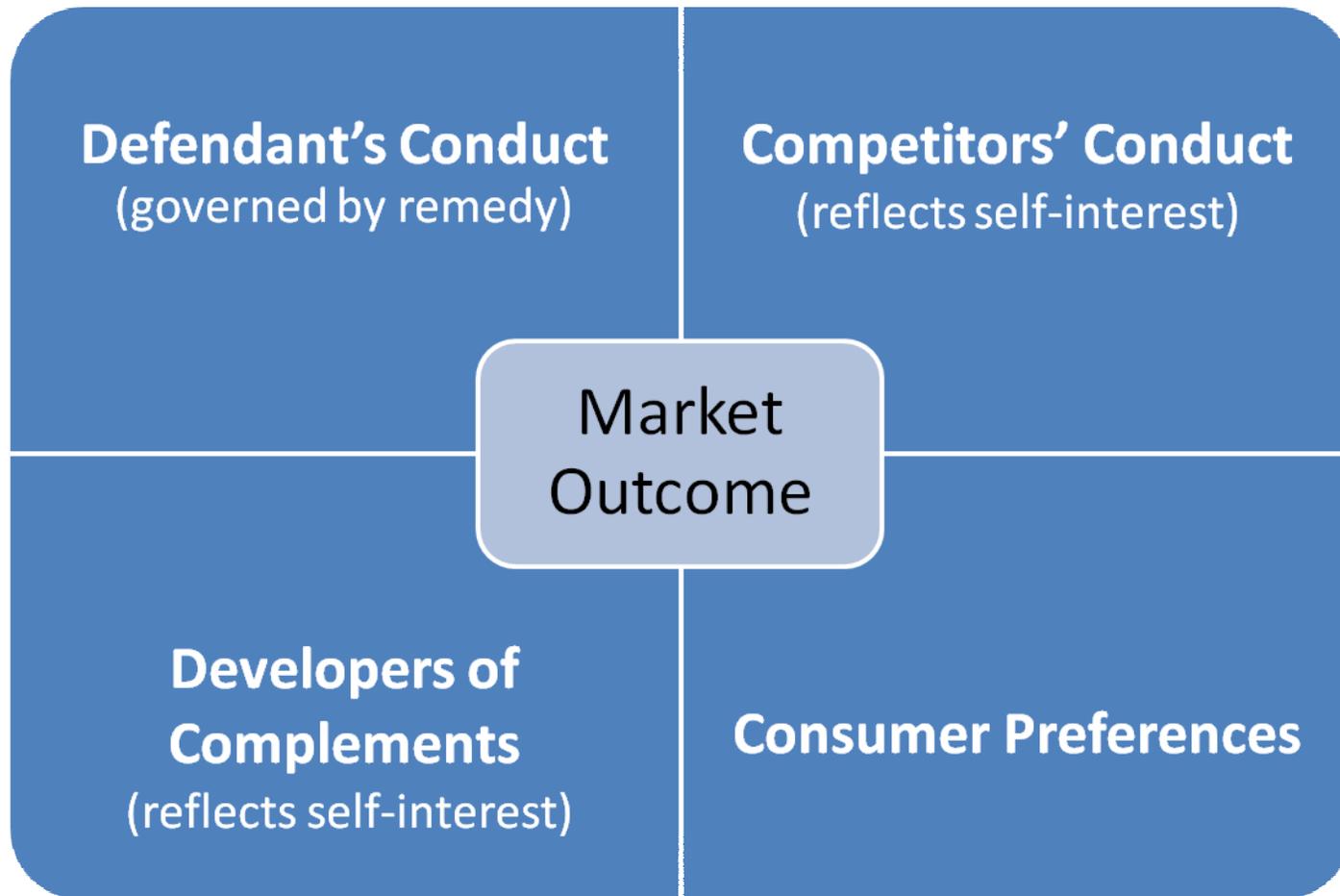
- **Focused on creating competitive opportunities**
- No ban on including new functionality (but governed by Rule of Reason)
- Consumers benefit from ability to choose integrated approach or separate programs—or both
- Today: Broad distribution of competing software on new Windows PCs

EU Decision

- **Focused on removing useful functionality from Windows (Windows XP N)**
- No uptake by any computer manufacturer
- Costs imposed, but little apparent benefit to anyone

Objective

Aim to create competitive opportunities, rather than engineer particular market outcomes



Assess Remedy and Liability Together

Careful consideration of remedy at outset may inform liability analysis, speed resolution

Windows Integration Legal Analysis

- May create challenges for competitors, yet . . .
- Benefits for software developers, consumers; and
- Long history of product improvement through integration across many product categories

Settlement

- Seemingly impossible to fashion appropriate remedy to limit integration over time
- Renders cases difficult or impossible to settle

Liability

- Unlawful in Europe & Korea to fail to offer a product (Windows XP N) for which there is no appreciable consumer demand?

Type of Remedy

Legal process generally best suited to contractual relief

Contracts

- Purview of lawyers
- Relatively easy to monitor (for defendant and enforcers)

Product Design

- May require considerable technical expertise to devise & monitor remedy
- Difficult for lawyers to assess issues that may arise, even with expert help
- Agency lawyers likely to get drawn into detailed design decisions

Technology Sharing

- Technological complexity may lead to enforcement complexity
- Pricing may be particularly challenging for information goods

Cross-Border Considerations

High-tech markets often global in nature

Agency Cooperation

- Greater coordination on remedies with global reach
- Due respect for comity principles

Windows

- Central value proposition: enabling compatibility through uniformity
- Value threatened by varying approaches to integration issue

Compulsory Licensing

- Most onerous legal regime becomes *de facto* legal rule worldwide

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