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# Refusal to License IP as Abuse of Dominance: Balancing Intellectual Property and Competition Law

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# 1 Introduction

## 1.1 The research problem and why it is interesting

This paper concerns the intersection between two bodies of law. The first body consists of intellectual property laws (“IP” - laws). An intellectual property right (“IPR”) amounts to a time limited exclusive right granted in reward of innovative intellectual efforts. [1] There are several forms of IP, in addition to traditional patents and copyrights. [2]

The second body is that of competition law. EU competition law protects the process of competition, thereby ensuring that the “principle of an open market economy with free competition” plays out in practice. [3]

A property owner’s right to choose whether and with whom to deal is fundamental, and applies in relation IP as it does in relation to tangible property. [4] In some circumstances, however, art. 102 TFEU establishes an exception from the principle of contractual freedom by prohibiting a refusal to deal as an abuse of a dominant position.[5] The topic up for discussion in this paper is under what circumstances art. 102 establishes such an exception in relation to IP by condemning the exercise of the negative side of an IPR by means of a refusal to license as abusive.

Two recent developments make the EU approach to unilateral refusals to license especially interesting for research purposes. Firstly, the CFI issued its *Microsoft* judgment in 2007. [6] *Microsoft* is by far the most comprehensive refusal to license case to date, and spurred a

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[1] Caggiano (2012) p. 9.

[2] For an overview of different forms of IP, see Whish (2012) p. 767 – 768.

[3] Caggiano (2012) p. 9, principle in in Art. 119 TFEU.

[4] Lidgard (2009) p. 695.

[5] Treaty on the Functioning of the European Union.

[6] Case T-201/04 Microsoft v Commission *(Microsoft)*.

significant deal of debate as it was perceived by many as widening the scope for a finding of an abuse.

Secondly, the Commission has for some time been in the process of modernizing its enforcement practice to unilateral exclusionary conduct. These efforts led to the publication of its Guidance Paper in 2009, two years after *Microsoft*. [7] The modernized approach to refusals to license incorporates different conditions than the test applied by the CFI, and consequently revitalized the debate.

## 1.2 The scope for intervention and the need to look into the underlying considerations reflected in law

Competition and IP laws have complementary goals. [8] Both bodies of law seek to maximize consumer welfare and facilitate dynamic efficiencies ultimately benefitting consumers by technological progress and improved products. [9]

IP laws promote innovation by establishing *ex-ante* incentives. They achieve this by promising that time limited, exclusive rights will be accorded to the fruits of innovative efforts when specific conditions are satisfied. The exclusive right represents a protection against imitation, and the innovator's financial reward is accordingly secured – provided that there is a market for the asset.[10]

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[7] "Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings", (2009/C 45/02) (Guidance Paper)

[8] Drexl (2007) p. 648.

[9] Whish (2012) 769 – 770 with reference to key EU and US documents. Note that competition law seeks to promote other forms of efficiencies as well, see Whish (2012) p. 4 – 6.

[10] Kwok (2011) p. 262, Drexl (2007) p. 651.

Competition law, on the other hand, promotes innovation by protecting rivalry. [11] Competition as a rivalrous process is presumed to facilitate dynamic efficiencies.[12]

It has gradually become accepted that there is no inherent conflict between granting exclusive rights and protecting the process of competition.[13] Once granted, however, the exercise of an IPR is subject to the limits for legitimate commercial behavior established by competition law. [14] These limits are seldom crossed, as competition law accommodates for the normal exercise of IPRs. [15] As a general proposition, it is only appropriate to invoke compulsory licenses under art. 102 in “exceptional circumstances”.[16]

In functional terms, such “exceptional circumstances” occur when a refusal to license has effects running counter to the economic rationale behind granting the IPR in the first place. Rather than inducing, it blocks dynamic competition. [17] In theory, it has been observed that forced licensing has been invoked in two distinguishable scenarios:

1) The exclusive right is construed too broadly from the outset, i.e. the IP regime is poorly designed.
2) Due to external market failures, a refusal to license produces negative effects that could not be foreseen by the lawmakers when the IP- regime was contemplated.[18]

The appropriate scope for *ex-post* intervention under competition law wherein forced licenses are invoked, is an economical question at its core and highly controversial. [19] It is

[11] Kwok (2011) p. 262, Drexl (2007) p. 648.

[12] Whish (2012) p. 5.

[13] Drexl (2007) p. 648, Whish (2012) 769 – 770.

[14] Anderman in Anderman & Ezrachi (2011) p. 4.

[15] Ibid.

[16] Whish (2012) p. 797.

[17] Drexl (2007) p. 651.

[18] Ibid, p. 651 – 652.

important to stress, therefore, that the focus of this paper is on law and not economics. Its ambit of reach is limited to ascertaining under what circumstances refusals to license might be challenged as abuses of dominance under art. 102. This entails identifying and interpreting the legal conditions for such a finding.

That being said, the nature of competition law is such that its application necessarily reflects underlying considerations of an economical/policy nature. In a legal analysis, it is highly relevant to look into what considerations the law departed from and whether developments in case law express changes in these underlying views. Establishing such conceptual developments might provide indications about where the law is heading.

The following discussion will consequently attempt to shed light on these broader lines in addition to interpreting the relevant sources of law in isolation.  A fundamental issue in this respect is to what extent EU law reflects the notion that IP has special qualities that justifies a different treatment than tangible property in a refusal to supply scenario.

### 1.3 Delimiting the topic

Two important issues will not be dealt with in this paper. Firstly, I will not consider the threshold for falling within the functional scope of Art. 102 in the first place, namely that of a "dominant position". The reader should be aware, however, that the establishment of a dominant position in IP cases poses particular challenges. [20]

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[19] Compare for example Spulber (2008) and Fox (2009) regarding the effects on dynamic efficiencies of invoking forced licensing in *Microsoft*.

[20] The two market feature of and implications from "essential facilities" dominance has been pointed out in theory, see Hou (2012) p. 2 following and Anderman (2009) p. 88.

Secondly, I will not distinguish between different forms of IP or deal with arguments flowing from the IP regimes. [21] There is a very limited basis in case law for dealing with these issues, and they deserve to be addressed directly.

## 1.4 Sources and methodology

The legal basis for condemning refusal to license practices as abuses of a dominant position is art. 102 TFEU. That article is set out in general terms, however, and does not specifically address refusals to license IP. In fact, it was not until in the late eighties that the ECJ suggested that such practices might be prohibited by art. 102. [22]

Consequently, the primary source for addressing the topic is case law from the community courts. The highest court in the EU was named the "Court of Justice of the European Communities" after the entry into force of the Lisbon Treaty. It is commonly referred to as the ECJ, however, and I will use that term in the following. The ECJ hears appeals from the General Court, which was previously called the Court of First Instance. [23] It additionally gives preliminary rulings on questions of EU law referred to it by courts in member states.[24]

It is generally acknowledged that the ECJ develops community law by applying a dynamic interpretation. [25] The relevant judgments might consequently be perceived as expressions of the law at a given time in its development. From a methodological perspective, therefore, one major challenge in this paper is to establish the snapshots of the law by means of

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[21] An example is the relationship between the forced licensing remedy in *Microsoft* and the EU's possible obligations under the TRIPS agreement. See, *inter alia*, Subramanian (2013).

[22] See section 2.1.2.

[23] TFEU art. 256.

[24] Art. 267

[25] For a good analysis, see Itzcovich (2011).

interpreting the individual judgments, and subsequently identify when and how the law has evolved by comparing the snapshots.

In addition to relevant jurisprudence, the aforementioned Guidance Paper will be considered. This is not a source of law but of policy. [26] It could potentially have bearing on how the next refusal to license case is decided, however, and will at the very least affect the Commission's own approach to assessing such practices.

### 1.5 The road ahead

Structurally, this paper is divided into five main parts. The first concerns the relationship between the law on abusive refusals to license IP and the law on abusive refusals to supply tangible property. Using the groundbreaking cases establishing these concepts as the point of departure, I will look into relevant jurisprudence with a view to ascertain whether and how the law on refusals to license and supply differs.

Having established that a "new product" requirement has consistently been invoked in the IP cases, I will move on to the second part of the paper. This provides for an analysis of how this requirement has been interpreted in case law. Based on the hypothesis that the IP – specific requirement presumably mirrors the courts' underlying views on the IP/competition law intersection and especially the degree to which they consider that IP "require special deference" in a refusal to supply scenario, I will discuss whether the interpretations of the "new product" requirement reflect broader changes in these underlying views. [27]

Chapter 4 is purely concerned with substantive law, and amounts to the third part of the paper. I will identify the conditions that are not specific to the IP context and interpret these

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[26] Para 3.

[27] Expression used by Ritter (2005).

in light of available case law. An important question is whether *Microsoft* relaxed these conditions compared with what followed from the relevant judgments of the ECJ.

Subsequently, I will address the Commission's modernized approach to refusals to license practices. I will explain how *Microsoft* facilitated the reform, before looking into the theoretical and practical implications of departing from a "new product" inquiry in favor of a generic refusal to supply test focusing on consumer harm.

In the fifth and final part of the paper, I will use the findings made in the previous analyses to shed light on the question of what the next "refusal to license" case might look like – when viewed through legalistic lenses. I will identify three categories of possible tests and identify factors that will practically affect the likelihood for a finding of an abuse. Lastly, I will discuss what unarticulated considerations case law might be interpreted as reflecting, and provide some thoughts on arguments IP holders may invoke on this basis.

# 2 Refusals to deal and refusals to license

## 2.1 The relationship between the legal tests mandating forced dealing of tangible property and forced licensing of intellectual property

### 2.1.1 The emergence of a doctrine on abusive refusals to supply tangible property

*Commercial Solvents* concerned the only producer of a chemical raw material necessary in the production of tuberculosis drugs. [28] The producer vertically integrated into the downstream market for drugs and simultaneously stopped supplying a drug producer already active in that market with the raw material.[29] This refusal was considered abusive, which makes *Commercial Solvents* a groundbreaking case.

*Commercial Solvents* was decided at a time when the methodology applied in relation to single firm conduct did not necessarily reflect the insights of the economic discipline. No theory of competitive harm was established to support the finding of an abuse. From a pedagogical point of view, therefore, it is beneficial to point out how a refusal such as that put under scrutiny might raise competitive concerns.

In economic terms, *Commercial Solvents* concerned monopoly leveraging achieved through vertical foreclosure. The economic argument that could have been articulated [30] would run like this: Commercial Solvents enjoyed a monopoly position on the upstream market for the production of a raw material. This raw material amounted to an input which was essential for any entity operating on a downstream market for the production of finalized drugs. As a consequence of its monopoly position and the lack of viable substitutes for the raw material, Commercial Solvents was in a position where it could strategically refuse

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[28] Cases 6 and 7/73, Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission. *(Commercial Solvents)*

[29] Ibid, para 23.

[30] Fatur (2012) p. 177.

to supply independent entities with the essential input. Such a move would facilitate the extension of Commercial Solvent's monopoly position to the secondary market as the market presence of independent entities depended on continuous supplies. In addition to removing the competitive pressure exerted by firms already active in the downstream market, the refusal would send a strong signal to potential entrants: They could not expect to be supplied with the input, and consequently would have to enter the upstream market as well. The refusal could in other words have an entry deterrent effect in addition to removing actual competition.

In legal theory, unilateral refusals to deal is a controversial topic. Representatives of the so-called Chicago School have generally argued in favor of per se legality while Harvard School-scholars traditionally advocates a more nuanced, circumstance - based approach. [31] The example above does not purport to take a stand in this debate, but presents a possible rationale that could justify intervention in a *Commercial Solvents* – type scenario.

As a matter of law, *Commercial Solvents* made it crystal clear that some unilateral refusals to deal to existing customers on a downstream market are regarded as abuses of a dominant position.[32] Unfortunately, the ECJ hesitated to explicitly list the conditions drawing the line between a legitimate exercise of private property rights and anticompetitive conduct. The question is accordingly whether these conditions may be construed on the basis of a careful reading of the judgment.

The ECJ's focus was on the effects of the refusal on competition in the secondary market. It rather categorically stated that dominant undertakings cannot act in such a way as to *"eliminate their competition"*.[33] This statement indicates that a refusal resulting merely in a weakening of competition would not have been considered abusive. The ECJ was further-

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[31] Hovenkamp (2008) p. 110.

[32] Whish (2012) p. 699

[33] Para 26.

more satisfied with a *"risk"* of elimination, thereby justifying intervention on the basis of a possibility as opposed to an actual effect. [34]

The effects of a refusal to deal on competition mirror the degree to which the market presence of independent entities is dependent on the input they are being denied. [35] While not explicitly requiring the input to be essential, indispensable or the like, the question is whether *Commercial Solvents* might nevertheless be interpreted as implying some sort of "essential input" condition.

The ECJ did in fact look into whether there existed actual or potential substitutes for the raw material. This discussion was conducted in conjunction with the dominance assessment. In the ECJ's view, it was "irrelevant" that there existed a theoretical possibility that the requestor might have been able to continue production by adapting its manufacturing processes so that the final product could be manufactured on the basis of alternative raw materials. [36] According to Larrouche, this finding indicates that *Commercial Solvents* was not an essential facilities case as the input was not "indispensable". [37]

Other authors interpret *Commercial Solvents* as reflecting a condition of indispensability/ essentiality, however. Eagles and Longdin identifies the fact that the requested input was "crucial" for the market presence of the requestor as one of the "pivotal" factors for the finding of an anticompetitive refusal. [38] Hou interprets the judgment as requiring that there should be "no economically viable substitutes for the input on the primary market". [39] Ezrachi and Maggiolino even argue that *Commercial Solvents* reflects a stricter condition of

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[34] Ibid.

[35] Ahlborn (2008) p. 10.

[36] Para 15.

[37] Larrouche (2000) p. 168.

[38] Eagles (2011) p. 159 -60.

[39] Hou (2012) p. 8, see section 4.3 below about "economic viability" as a controversial concept.

indispensability than modern cases.[40] The ECJ itself has furthermore, as acknowledged by Larrouche, interpreted *Commercial Solvents* as consistent with an indispensability criterion.[41]

A last important observation is that the ECJ confirmed the Commission's finding that the potential substitutes were only at an "experimental stage" or "too vague and uncertain to be seriously considered". [42] The requirement that alternatives must have a degree of realism to be considered relevant is consistent with how the "indispensability" condition has been interpreted in subsequent case law. [43]

On this basis, it is submitted that *Commercial Solvents* established a test under which a refusal to continue to supply an input to an entity operating on a downstream market will be deemed to be abusive if three circumstances are present. Firstly, the input must be essential for the productive activities of the requesting entity. Secondly, the refusal must risk eliminating all competition in the downstream market as a result of the essentially of the input. Lastly, the refusal must not be objectively justified. The *Commercial Solvents* test was subsequently confirmed in *Télémarketing*. [44]

While providing clarity in this respect, *Commercial Solvents* raised two particularly vexing questions. Firstly, it was not clear whether a dominant undertaking sometimes has an obligation to supply new entrants to a market in which it is already active with an essential input. Secondly, it was not clear whether and under what circumstances the obligation to

[40] Ezrachi & Maggiolino (2012) p. 602 – 603.

[41] Larrouche (2000) p. 168 in note 206, Case C-7/97 Oscar Bronner GMBH v Mediaprint and Others *(Bronner)* in para 38.

[42] Para 13.

[43] See section 4.11.

[44] Case C- 311/84 CBEM v CLT and IPB para 25 – 27.

supply an essential input could establish an obligation to license where the requested input is protected by some form of IPR. [45]

### 2.1.2 Accepting that the exercise of IP rights in secondary markets can be abusive: The Volvo case as a door opener

14 years after *Commercial Solvents*, the ECJ issued its groundbreaking ruling in *Volvo*.[46] This judgment established that refusals to license IP can amount to abuse of dominance, and furthermore provides important insights into the relationship between the law on refusals to supply and refusals to license.

The factual background to the dispute was that an entity had begun to import body panels made for a certain Volvo model into the UK. The design of the panels was registered under and protected by UK law. Volvo commenced proceedings before national courts on the basis that the panels had been manufactured without the necessary consent.

Two questions arising from the dispute were referred to the ECJ for preliminary ruling. The following discussion relates to the second, which reads as follows:

*"Is it prima facie an abuse of such dominant position for such a manufacturer [Volvo] to refuse to licence others to supply such body panels, even where they are willing to pay a reasonable royalty for all articles sold under the licence [....]?".* [47]

The ECJ's starting point was the recognition that exclusivity is the very core of the protection provided under IP laws. The negative right to refuse to grant access to the protected asset lies at the heart of such exclusivity. To impose an obligation to license would conse-

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[45] Anderman (2011) at 94.

[46] Case C-238/87 Volvo UK v Veng AB *(Volvo)*

[47] Ibid.

quently deprive the proprietor of the very "substance of his exclusive right" - even if the grant of access was to be conditioned on the return of a reasonable royalty.[48] Hence, a mere refusal to license on reasonable terms cannot amount an abuse in itself. [49]

The Court went on to clarify, however, that additional circumstances may render a refusal to license with an abusive character. If, hypothetically, an undertaking in Volvo's position refuses to provide an independent entity with a license it needs to make spare parts for a model which is still in widespread circulation, and that refusal is coupled with a decision on the part of the proprietor to cease production of spare parts for that very model, the practice might amount to an abuse.[50]

Interestingly, this example indicates that refusals to license must have a particular effect, which was not a part of the *Commercial Solvents* test, to qualify as abusive: They must deprive consumers of a particular product (spare parts for a specific model) for which consumer demand can be established (the model is still in widespread circulation).

### 2.1.3 Framing the question on the basis of *Commercial Solvents* and *Volvo*

The discussion of *Commercial Solvents* and *Volvo* was intended to serve a twofold purpose. Firstly, it provides a basis for discussing whether subsequent case law reflects a consistent view on the relationship between the legal tests mandating forced dealing of tangible property and forced licensing of intellectual property. It was established that the ECJ, from the very outset of the relevant jurisprudence, drew a distinction between tangible and intangible property which was reflected in the competition law analysis.

[48] Para 8.

[49] Coco (2008) p. 13

[50] Para 9.

The second purpose was to establish what action the ECJ took to accommodate for an appropriate consideration of the specific characteristics of IP under a refusal to supply scenario. *Volvo* reflects a particular concern with whether consumers would be deprived of a specific product as consequence of the refusal. The hypothetical example constructed by the Court indicates that unlike in *Commercial Solvents*, the risk of elimination of competition in the secondary market will not qualify as a sufficient effect to justify intervention. The historical starting point of EU jurisprudence was in other words that the threshold for forced licensing should be higher than the threshold for forced dealing of physical assets.

The question then, is whether subsequent cases support the interpretation that there are two legal tests, one of which is specific to the IP context, governing unilateral refusals to supply. If that is the case, it needs to be examined how *Volvo's* additional IP - specific requirement has been interpreted and specified by the courts.

## 2.2 EU law on refusals to deal operates with at least two competing tests

### 2.2.1 Modern case law reflects the positions taken in *Volvo* and *Commercial Solvents*

*Bronner* is the natural starting point for this discussion as it is the only instance at which the ECJ has explicitly said something about the relationship between the legal requirements for forced access to tangible and intangible property.[51] The case concerned a refusal to grant access to a distribution system for newspapers. IPRs were not involved.

While recalling that it had considered the effect that the refusal in question prevented the emergence of a "new product" relevant in *Magill*[52], which was an IP case, the ECJ was unwilling to elaborate on whether this circumstance is a requirement for forced access to tangible property. It held that:

"*even if that case-law*[53] *on the exercise of an intellectual property right were applicable to the exercise of any property right whatever, it would still be necessary [.....], not only that the refusal of the service comprised in home delivery be likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and that such refusal be incapable of being objectively justified, but also that the service in itself be indispensable to carrying on that person's business[.....].* "[54]

In short, even if the blocking of a ("new") product is a requirement in tangible property cases, the conditions of i) indispensability, ii) elimination of competition and iii) no objective justification would still have to be satisfied. The condition of indispensability was not

[51] In theory, it has been debated whether there is a separate line of "essential facilities" cases, see Ritter (2005) p. 2-6. Ritter (p. 6) and Fatur (2012) p. 185 argue that there is a "single strand of case law" encompassing both refusal to grant access and refusal to supply.

[52] Cases C-241/91P and C-242/91P RTE and ITP v Commission (*Magill)*

[53] *Magill.*

[54] Para 41.

met in *Bronner* as several alternatives to the dominant undertaking's distribution system could be identified.[55]

While it is important to stress how the ECJ refrained from articulating a position on whether the legal test is the same irrespective of whether the asset to which access is sought is protected by IPRs, *Bronner* does not necessarily contradict the conclusion that modern jurisprudence is consistent with the positions taken in *Commercial Solvents* and *Volvo.* In order to answer that question, I will examine whether the IP cases share a common denominator in that a circumstance echoing the one in *Volvo* has been present. The question is in other words whether the community courts have always found that a product has been blocked from the market leaving unsatisfied consumer demand in the cases where a refusal to license has been deemed to be abusive.

As acknowledged in *Bronner,* the ECJ considered the circumstance that the refusal blocked a "new product" consumers were in demand of relevant in *Magill*.[56] It did not merely ask whether competition in the secondary market would be eliminated following the refusal. Such an approach is consistent with the one indicated by *Volvo.*

*IMS*[57] is the second modern case on refusals to license IP. It provided clarity about the relationship between the "new product" factor identified in *Magill* and the triplet of circumstances[58] required in physical property – cases. The ECJ considered that the test applied in *Magill* establishes cumulative requirements. Among these is the condition that the refusal must prevent the offering of a "new product" for which potential consumer demand can be established.[59] This additional requirement reflects the example in *Volvo* in that the blocking

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[55] Para 42, 43 and 44.

[56] Para 54.

[57] Case C – 418/01 IMS Health v NDC Health. *(IMS)*

[58] See section 2.1.2.

[59] Para 38.

of a product leaves unsatisfied consumer demand. It is refined, however, as the blocked product has to be "new".

*Microsoft* [60] is the most recent IP judgment to date. I will deal with the specific facts of the case below. For the purposes of this discussion, the point is that the CFI considered the question of whether the refusal amounted to an abuse on the basis of a test which incorporated an additional "new product" condition. [61] Formally speaking, therefore, *Microsoft* confirms the consistent line from *Volvo* to modern jurisprudence.

While the pattern of the conditions that have been required in IP cases is one of consistency, it should be stressed that case law provides an opening for formulating an alternative test. According to the ECJ, the *Magill/IMS* - list of exceptional circumstances are cumulatively "sufficient" rather than cumulatively "necessary". [62] It is consequently not ruled out that the ECJ will depart from a test incorporating a condition relating to the blocking of a "new" product in future cases, and find exceptional circumstances in other factors. [63]

### 2.2.2 Final remarks and the way forward

The community courts have required a "triptych" of circumstances to be identified in cases concerning refusals to deal/grant access to physical property.[64] In all the cases where a refusal to supply an input protected by IP has been considered abusive, however, they have identified a fourth circumstance. This fourth circumstance relates to the blocking of a novel product from the market place, leaving unsatisfied consumer demand.

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[60] Case C – 3/37.792 Microsoft v Commission

[61] Paras 332, and 643 – 665.

[62] *IMS* para 38.

[63] Østerud (2010) p. 229 - 30.

[64] Lévêque (2005) at 104.

This paper is concerned with how refusals to license are treated under art. 102. The substantive content of the "new product" requirement is accordingly of primary interest. The relevant cases from the community courts must be interpreted with a view to establish when the "new product" condition is satisfied.

It is natural to raise a question of a more conceptual nature as well, however. To the degree the judgments provide a basis for it, it should be examined why the law on refusals to license incorporates a "new product" requirement not found in the cases concerning tangible property. As the application of the "new product" condition is limited to the IP context, such an analysis can hopefully provide insights into the courts underlying views on how to strike the right balance between IP and competition law, and whether these views have been consistent or evolved over time.

# 3 The “new product” requirement

## 3.1 From the blocking of an identified product to a limitation of technical development on the competitor side

### 3.1.1 *Magill and IMS* – a gradual relaxation of the threshold for intervention

The *Magill* case arose as a result of individual television stations enjoying copyright protection over their respective weekly programmes listings under Irish law. [65] An independent publisher called “Magill” was denied the licenses necessary to accumulate the information about each station’s future programmes and use it to produce a television guide containing advance information about the programmes running on each of the stations in the week to come.[66]

On appeal, the ECJ confirmed the Commission’s and the CFI’s findings of there being no actual or potential substitutes for Magill’s blocked guide. [67] A comprehensive weekly television guide giving advance information about the programmes of the week (the “new product”) was considered to meet a *“specific, constant, and regular consumer demand”* left unsatisfied by the lists of programmes for periods of respectively 24 and 48 hours published in the newspapers, and the “highlights of the week” programmes featured in some magazines (the old products). The ECJ agreed that *“only weekly television guides containing comprehensive listings for the week ahead would enable users to decide in advance which programmes they wished to follow and arrange their leisure activities for the week accordingly”*. [68]

[65] Para 7.

[66] Para 10.

[67] Paras 52 and 57.

[68] Paras 52 and 57.

As is evident from this extract, the "new product" inquiry took the form of a concrete comparative exercise. The ECJ asked whether a specific blocked product was sufficiently differentiable from specific products currently offered on the market. When executing this comparison, it focused on the functionalities of the preexisting products and the blocked product. What was confirmed by the ECJ was that a specific blocked product offered specific functionalities in addition to those provided by the products already available on the market, and that a *"specific, constant and regular potential consumer demand"* for these additional functionalities could be identified. [69]

Logically, a comparative test presupposes that two parameters are established. The first is the threshold for sufficient newness. The question is whether a product is new enough. *Magill* does not provide more guidance on how to define this threshold than what follows from a linguistic interpretation of the term "new", however.

The next parameter is that of guiding principles for distinguishing between relevant and irrelevant differences in products. Such guiding principles is a prerequisite for comparing the degree of differentiation between the blocked and the preexisting products in question with the baseline represented by the threshold for sufficient newness. While establishing that differences in functionalities are relevant, *Magill* gives little information about what differences should be regarded as irrelevant. [70]

It might be argued that the *Magill* case simply did not turn on the threshold for sufficient newness as the blocked product was clearly "new" from a common sense perspective. In *IMS*, however, the interpretation of the "new product" condition was at the crux of the case. In the following, I will discuss to what extent *IMS* clarifies or modifies the approach adopted in *Magill*.

[69] Para 52.

[70] Monti (2007) p. 229 argues that *Magill* and *IMS* give little indication about the methodology for identifying a "new product". His analysis appears to presuppose that a specific blocked product can be identified.

The petitioner in *IMS*, a company called NDC, wanted to enter a market for pharmaceutical sales data. IMS Health was dominant in this market, and offered studies of regional sales data based on two alternative brick structures. [71] Each of the bricks in the structures corresponded to a specific geographic area, and took account of various parameters.[72] Clients quite rapidly adapted their systems to rely on the structures. [73]

When NDC tried to enter the market, IMS was granted an interlocutory order prohibiting NDC from presenting sales data through the brick structure or any alternative structure derived from it. Under national legislation, the brick structure might enjoy copyright protection. [74]

As a result of the adaptations made by potential clients, however, the exclusive right conferred by the copyright legislation equated to a form of control over access to a *de facto* industry standard. [75] The questions issued by the national court to the ECJ for preliminary ruling were based on the proposition that clients would not be interested in sales data presented through any other formats than the protected brick structure. NDC could only enter the relevant market by imitating it, as potential clients would *"reject any product which does not make use of the databank protected by copyright"*. [76]

The fact that partial imitation was a prerequisite for potential consumer demand for the blocked product made the discussion of the "new product" condition particularly delicate. The ECJ was forced to draw the line for sufficient newness.

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[71] Para 4.

[72] Ibid.

[73] Para 6.

[74] Para 10.

[75] Para 6.

[76] Para 17 question 1.

By means of introduction, the Court referred to the opinion of the General Advocate establishing that forced licensing is appropriate if the *"refusal to grant a license prevents the development of a secondary market to the detriment of consumers"*. [77] A refusal to supply an indispensable input protected by IP will consequently be regarded as abusive only provided that the undertaking requesting the input:

*"does not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the intellectual property right, but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand".* [78]

This standard supports a fairly lenient interpretation of the term "new product". The limitation lies in the word "essentially", and that formulation indicates that duplication on the part of the newcomer is allowed to a certain extent.[79] The Court did not adjudicate on where to draw the line, however.[80] Effectively, the ECJ answered the question of what amounts to sufficient newness by formulating a new question which is not much clearer.

For an undertaking to *"limit itself essentially to duplicating"* the products already provided on the marketplace is presumptively a viable commercial strategy only if it is in a position to profitably sell its imitations at lower prices than the originals. One conclusion indicated by *IMS*, therefore, is that the promise of a static efficiency gain on the secondary market cannot justify forced licensing. [81] This conclusion is hardly surprising given the purpose of

[77] Para 48.

[78] Para 49.

[79] Coco (2008) p. 16.

[80] Ibid.

[81] Monti (2007) p. 229.

IP laws, and is consistent with the interpretation of the *Volvo* case established in section 2.1.3 above.

Perhaps what is most important is not what the ECJ said about the substantive content of the "new product" criterion, but rather what it rejected. It has been regarded as "crucial" that the ECJ did not endorse the stringent test adopted by the Advocate General.[82] In his opinion, A.G. Tizzano argued that the "new product" requirement will be satisfied only where the undertaking requesting the input "intends to produce goods or services of a different nature which, although in competition with those of the owner of the right, answer specific consumer requirements not satisfied by existing goods or services". [83] This position reflects the concrete and comparative approach in *Magill.* [84]

The standard applied by the ECJ does not require products to "be of a different nature" or answer "specific consumer requirements" to be regarded as "new", however. As a result, it provides an opening for the interpretation that improvements of existing functionalities may amount to "new products". There appears to be a basis for concluding, therefore, that the "new product" criterion was relaxed in *IMS* compared with the standard applied in *Magill.*[85]

On a last note, it should be stressed that *IMS* clarified that forced licensing is not limited to vertical relationships. IMS and NDC were potential competitors in the same market for pharmaceutical sales data, and the protection was granted to the fruits of IMS' efforts of improving its services in that market. Following *IMS*, therefore, the term "new product" encompasses products serving some of the same basic functions as and offered in direct

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[82] Fine (2006) p. 141.

[83] Opinion of A.G. TIZZANO in Case C-418/01 (2003) para 62.

[84] Para 63 following.

[85] As argued by Kwok (2011) p. 265.

competition with the products of the proprietor of the IP. No new market has to be foreclosed as a result of the refusal. [86]

In this respect, *IMS* answers one of the principal questions raised by *Commercial Solvents* in the refusal to license context. While establishing that a disruption of an ongoing supply of an indispensable input facilitating the extension of a dominant position into a downstream market might be abusive, *Commercial Solvents* left the question of whether a dominant undertaking sometimes has an obligation to supply new entrants to a market in which it is already active unanswered. [87] Following *IMS*, it is clear that dominant undertakings controlling an indispensable input protected by IPRs sometimes have an obligation to facilitate the emergence of products competing directly against their own portfolio.

[86] Devlin (2009) p. 87.

[87] See section 2.1.2 above.

### 3.1.2 The *Microsoft* case – how the Commission satisfied the "new product" requirement without trying to do so

The Commission's decision[88] in *Microsoft* was made after *Magill*, but prior to *IMS*. It was not until after *IMS* it became clear that the *Magill* test operates with cumulative requirements. This provided an opening for the Commission to adopt what it referred to as an "entirety of the circumstances" approach in *Microsoft.* It focused on the totality of the factual surroundings of the refusal rather than on whether the checklist of conditions identified in *Magill* was present.[89] According to the Commission's interpretation, *Magill* identified three sets of exceptional circumstances. [90]

Consequently, the Commission never asked whether the "new product" requirement was fulfilled. The closest it came was to provide a rather short discussion under the heading "Impact on technical development and consumer welfare". [91]

Shortly after the publication of the Commission's decision, however, the ECJ issued its ruling in *IMS.* The clarification that the *Magill* case reflected a test with cumulative conditions obviously created a tension between the Commission's decision and the relevant precedents. Effectively, there were only two openings for concluding that the Commission had shown to the requisite legal standard that the conditions for compulsory licensing were fulfilled. Firstly, the CFI could use the opening provided in case law for formulating and applying an alternative test for the first time. The second option would be to show that the Commission's decision actually did fit the *Magill/IMS* test.

The CFI addressed the apparent discrepancy between the Commission's approach and the most recent ECJ precedent head on. It introduced its discussion relating to the "new prod-

[88] Commission's Decision COMP/C-3/37.792, 24.3 - 2004 (Commission's Decision).

[89] Para 554 – 555, 558.

[90] Para 551.

[91] Commission's Decision from para 693.

uct" condition by emphasizing that the *"fact that the applicant's conduct prevents the appearance of a new product on the market falls to be considered under Article 82(b) EC, which prohibits abusive practices which consist in limiting production, markets or technical developments to the prejudice of consumers"*.[92]

The importation of Article 82 (b) into the test for forced licensing effectively meant that the CFI did not have to undertake a detailed discussion of the "new product requirement" on the basis of established case law. It held that *"the circumstance relating to the appearance of a new product, as envisaged in Magill and IMS Health [...] cannot be the only parameter which determines whether a refusal to license an intellectual property right is capable of causing prejudice to consumers within the meaning of Article 82(b) EC"*.[93]

It was on this basis that the CFI was able to approve of the Commission's approach. A limitation of technical development may cause prejudice to consumers within the meaning of Article 82 (b), and the Commission had as previously mentioned explicitly sought to establish that the refusal had the effect of limiting technical development to the detriment of consumers.[94] Consequently, the CFI held that the Commission had established the circumstance relating to the appearance of a "new product" in spite of the fact that the Commission had never purported that the "new product" prong of the *Magill/IMS* test was satisfied.[95]

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[92] *Microsoft* para 643. Art. 102 TFEU was known as art. 82 EC prior to entry into force of the Lisbon Treaty.

[93] Para 647.

[94] Supra n 90.

[95] *Microsoft* 665.

### 3.1.3 Limiting technical development to the prejudice of consumers – the two elements of the new standard

Following *Microsoft*, it is clear that refusals to license that have the effect of *"limiting […] technical development to the prejudice of consumers"* satisfy the "new product" prong of the only test that has ever formed the basis for a community court's condemnation of a refusal to license as abusive. [96] It is by no means obvious that a limitation of technical development in the short term will result in consumer prejudice in the long term, however. In the following discussion, therefore, I will distinguish between the element of a relevant limitation of "technical development" and the element of "prejudice of consumers".

The requirement that the refusal limits "technical development" could be interpreted as a question of sufficient differentiation between specific products, in line with the *Magill* approach. If this was the correct methodology, the mere absence of cloning would not be regarded as a technical development, while the bar should not be sat as high as to require the development of an entirely new product market. [97] The challenge would be to define where to draw the line for sufficiently developmental activities.

In practice, however, *Microsoft's* inquiry did not take the form of a concrete comparison of specific products. [98] The CFI never examined at a detailed level whether future improvements of available software would amount to "new products" or "technical developments".[99] Rather, the Court approved of the Commission's highly fact specific analysis of what effect the refusal was likely to have on the aggregate developmental activities of Microsoft's competitors compared with a scenario where forced licensing was invoked. Such a focus on aggregate effects is fundamentally different from asking whether a specific product offered by one vendor is "new".

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[96] *Microsoft* para 643.

[97] Kwok (2011). 265.

[98] Whish (2012) p. 801.

[99] Andreangeli (2011) p. 883.

In order to provide for a meaningful analysis of this effect based approach, it is necessary to briefly account for the facts of the case and the technologies in play. An important clarification is that what Microsoft refused to supply was not IP *per se* but “interoperability information”. [100] In the Software Directive, interoperability is defined as the “ability to exchange information and mutually to use the information which has been exchanged”. [101] A recent OECD report provides an alternative formulation, conceptualizing “interoperability” as relating to the “interconnection and interaction between elements of software and hardware”. [102]

A prerequisite for achieving interoperability between two software components is logical access to the so – called interface of the other component. [103] The exclusivity conferred by national IP legislation might be used to hinder such access, however. When parts of the interface enjoy IP protection, control over the interface specifications effectively equates to control over interoperability.[104] A refusal to license blocks the requestor’s products from achieving sufficient interoperability with the proprietor’s components. Microsoft enjoyed such indirect control over interoperability with its client PC operating system “Windows”.

The key to understanding why the CFI considered that Microsoft’s exercise of this control would “limit technical development” in the secondary market is to look at the case through the lenses of the requestors: Why did independent manufacturers of work group server OS need sufficient interoperability information from Microsoft in order to develop and distribute their own products?

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[100] Operative part of the Commission’s decision Article 2 (a) and 5 (a).

[101] Council Directive 91/250/EEC recital 12.

[102] DAF/COMP(2012)22 p. 11 section 5(12).

[103] Van Rooijen (2010) p. 13.

[104] Ibid, p. 21.

The *Microsoft* case concerned two forms of operating systems: Client PC OS and work group server OS. These systems interoperate within the networks of computers in modern office environments. [105] A detailed explanation of the functional roles of the two forms of operating systems goes beyond the scope of this paper. [106] It suffices to observe that, within a network, workgroup servers had to “interoperate with Microsoft’s PC Operating System” to “do their job”. [107]

Consumers clearly want their work group servers to “do their job”. Due to the ubiquity of “Windows”, sufficient interoperability with this was an immensely important criterion when consumers decided which work group server OS to buy. They simply would not choose a competing work group server OS, regardless of its intrinsic superiority to Microsoft’s alternative, if it was not sufficiently interoperable with the most recent version of “Windows”. As a result, consumer’s purchasing decisions would be channeled towards Microsoft’s work group server OS if the interoperability information was not disclosed to independent producers. [108]

This lock in effect was the starting point for the analysis of the effects of the refusal on “technical development”.  Competing producers of work group server OS have no incentive to incur the costs required to improve their products if the intrinsic quality of a work group server OS is secondary to its capability for interoperating with “Windows” in the eyes of consumers.

In the event that the interoperability protocols were disclosed, however, independent producers would be put in a position where it could be rational to develop products differing

[105] Molden (2008) p. 315.

[106] For a good explanation from a legal perspective, see Molden from p. 315.

[107] Fox (2009) p. 86.

[108] *Microsoft* para 651.

from Microsoft's alternative in ways consumers appreciate. [109] One fundamental question when determining whether the refusal "limited technical development" was accordingly whether competing producers of work server group OS, if granted forced access to the interoperability information, were most likely to offer technological improvements or limit themselves to imitating Microsoft's technology.

The CFI held that competing producers were most likely to come up with additional features considered important by consumers under a scenario of forced access. [110] This standpoint has been characterized as "crucial", and could explain how it was able to conclude that the circumstance relating to the blocking of a "new product" was present.[111] Under this interpretation, the term "new product" refers to innovative technologies rather than to a specific product. [112] Microsoft's refusal blocked innovative technologies from entering the market by removing the incentives of independent producers for developing the technologies in the first place.

In line with this interpretation, it has been observed that *Microsoft* effectively used Article 102 (b) to "import innovation into the *Magill* equation". [113] The CFI did not express any strict standard on the relevant fruits of innovation, however. The *Microsoft* inquiry has consequently been dubbed a "new features" as opposed to a "new product" test. [114]

The low threshold for relevant technological improvement was furthermore coupled with a low standard of proof. It has been pointed out that the CFI found it "sufficient for there to be a possibility that a new product or a variation of an existing product might have emerged

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[109] Ibid, para 656.

[110] See in particular paras 654 and 658.

[111] Squiteri (2012) p. 82, *Microsoft* para 665.

[112] Squiteri (2012) p. 82.

[113] Ezrachi & Maggiolino (2012) p. 602.

[114] Eagles (2011) p. 173.

but for Microsoft's conduct". [115] An alternative formulation is that *Microsoft's* "new product" inquiry is "satisfied with the possible emergence of unspecified products". [116]

The second element of the standard applied in *Microsoft* requires that the limitation of technical development "prejudice" consumers. This concern with effects on consumers has been used as support for the conclusion that the decisive parameter under the *Microsoft* version of the "new product" inquiry is whether consumer welfare is reduced.[117]

In my view, this perspective is not altogether convincing, however. The CFI considered the consequences of an order to supply on Microsoft's incentives to innovate irrelevant for the discussion of whether the refusal limited technical development to the prejudice of consumers. [118] A meaningful attempt at establishing impacts on consumer welfare under a test which is concerned with dynamic efficiencies must logically take the potential for this negative effect of forced licensing into account.

A more fruitful starting point is the recognition that EU law operates with a broad concept of consumer prejudice differing somewhat from the notion of direct consumer harm in economic theory. [119] *Microsoft* confirms that the legal concept of consumer prejudice captures not only the parameters of price and quantity, but also quality, choice and innovation. [120] The essence of the CFI's finding of consumer prejudice was that future innovative products differing from one another and from the OS offered by Microsoft in features considered important by consumers were prevented from entering the market due to the refusal.[121]

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[115] Ibid, p. 172.

[116] Forrester (2010) p. 109.

[117] Koch (2011) p. 35.

[118] *Microsoft* para 659.

[119] Kellezi (2009) p. 157.

[120] Ibid.

[121] Banasevic (2010) p. 57.

Importantly, the CFI focused specifically on the effects of the refusal on the market structure in the secondary market. In the same way as the Commission, it relied on established case law[122] and considered that practices having the effect of impairing an "effective competitive structure" cause an indirect form of consumer prejudice which is relevant under art. 102 (b).[123] The refusal to supply interoperability information caused such indirect consumer prejudice as Microsoft *"impaired the effective competitive structure on the work group server operating systems market by acquiring a significant market share on that market"*.[124]

Whish characterizes this statement as "bizarre", and anticipates that the substantial content of the "new product" condition will be examined further in future cases. [125] The concern with maintaining an "effective competitive" structure has additionally been criticized from an economic point of view as being reminiscent of German ordoliberalism and the Harvard School's structure/conduct/performance paradigm. [126]

An alternative perspective is that *Microsoft* reflects the notion that evidence of direct prejudice to final consumers does not constitute a condition for the finding of an abuse in EU law, as the foreclosure of competitors is presumed to have an adverse impact on consumer welfare.[127] The concern with market structure/foreclosure effects should furthermore not be interpreted in isolation, but contextualized against the previous findings of the CFI. It is particularly noteworthy that control over interoperability was considered to amount to an

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[122] Cases C-85/76 Hoffmann-La Roche & Co. AG v Commission and T-228/97 Irish Sugar plc v Commission.

[123] *Microsoft* para 664, Commission's Decision para 704.

[124] *Microsoft* para 665.

[125] Whish (2012) p. 801.

[126] Devlin (2009) p. 93 – 95, recognized but not supported by Drexl (2009) p. 8.

[127] Kellezi (2009) at 158. The role of the "new product" condition has traditionally required a direct effect, however. See section 5.1 below.

"artificial advantage".[128] It might be argued, therefore, that the CFI's concern with structural impairments reflects how it considered that they were achieved by recourse to means distinguishable from competition on the merits.[129] It is important to stress, however, that such a reservation has no explicit support in the paragraph of the judgment equaling impairments to an effective competitive structure with consumer prejudice, as this is set out in general terms. [130]

[128] Para 653.

[129] Molden (2008) p. 330 argues that the exploitation of control over interoperability to make it more difficult to compete is not a "legitimate competitive strategy".

[130] *Microsoft* para 664.

## 3.2 Why a "new product" requirement?

The aim of the following discussion is to shed light on and, if possible, answer two questions:

1) What was the original rationale behind incorporating a "new product" condition in the compulsory licensing test?
2) Are the subsequent interpretations in case law consistent with this rationale?

The above analysis of the origin and gradual development of the "new product" inquiry form the foundation for answering these questions. The "new product" condition is a creature of the courts, and the best way to shed light on its purpose is accordingly to look into how they have applied it. Systematically, therefore, the discussion of the underlying rationale behind the "new product" requirement belongs after the analysis of its historical application.

The starting point is how the community courts, from the very outset of the relevant jurisprudence, drew a distinction between tangible and intangible property which was reflected in the competition law analysis under a refusal to supply scenario [131] In the IP cases, they consistently invoked an additional "new" product requirement. [132]

The additional character of the "new product" requirement must logically reflect the underlying view that intellectual property is qualitatively different from tangible property in such a way as to justify a heightened threshold for intervention. This conclusion is supported by the ECJ's endorsement of the Advocate General's view on the purpose of the "new product" criterion in *IMS*. The ECJ affirmed that the "new product" condition "*relates to [....] the balancing of the interest in protection of the intellectual property right and the econom-*

[131] See section 2.1.4 above.

[132] Ibid.

*ic freedom of its owner against the interest in protection of free competition"*. [133] The interest in protecting an intellectual property right is a reflection of the rationale for granting it in the first place, while the interest in protecting the economic freedom of the owner of the asset is equally present in cases concerning tangible property.

The traditional, formalistic interpretation of the "new product" criterion might be interpreted as an expression of a conservative approach to encroaching upon the exclusive rights granted under IP regimes. It has been argued that the *Magill/IMS* test amounted to a very "very low false convictions rule".[134] Anderman has emphasized that the *Magill* standard "gives considerable recognition to the special qualities of IPRs as regulated by their own legislation and as promoters of innovation". [135] The "new product" requirement must logically have played a fundamental role in providing such "considerable recognition" as the other conditions are found in cases concerning refusals to deal tangible property as well.

It appears, therefore, that the "new product" requirement was originally not intended to function as an accurate proxy maximizing dynamic competition on a case by case basis.[136] Rather, it amounted to a strong barrier against intervention ensuring that the *ex - ante* choice of exclusivity as the preferred means of promoting innovation is respected if not obviously flawed.

As established above, however, the meaning of the "new product" condition shifted from encompassing a specific product the requestor would develop to a much broader concept of technical development in *Microsoft*. [137] All refusals to license are potentially capable of

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[133] *IMS* para 48.

[134] Katsoulacos (2008) p. 286.

[135] Anderman (2004) p. 8 and 13.

[136] As observed by Østerud (2010) p. 226.

[137] See, chapter 3.1 above, Forrester & Czapracka (2011) p. 157.

limiting technical development to the detriment of consumers. [138] The *Microsoft* version of the "new product" inquiry is accordingly not consistent with the notion that Court's should adopt a deferential approach to claims that refusals to license cause consumer prejudice.

It appears, therefore, that while the purpose of the "new product" inquiry has always been to strike the correct balance between IP and competition law, the views on how this is best achieved have changed. What started out as a high barrier against intervention reflecting a strong presumption of refusals to license not hampering dynamic competition, became a concrete inquiry into incentives for innovation on the secondary market. Conceptually speaking, the development from *Magill* to *Microsoft* amounts to a move from a categorical, formalistic condition to an effect based approach.

The desirability of this development is debatable. It might be argued, however, that the traditional "new product" inquiry was inapt for discovering what it was intended to anyway. According to the ECJ, the inquiry serves the function of determining whether the the refusal to license "prevents the development of the secondary market to the detriment of consumers".[139]

From an economic point of view, the relevant question when making this assessment is not whether the blocked product is "new", but whether and to what extent consumers' willingness to pay for the product improvement in question outweighs the cost of making it.[140] The concern with "newness" has no basis in modern microeconomics, which considers products merely as a bundle of characteristics. [141] On this basis, it has been argued that the formalistic interpretation of the "new product" requirement was a "bad proxy" for establishing the very effect courts are ultimately concerned with in refusal to license cases: the

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[138] Ibid.

[139] *IMS* para 48.

[140] Leveque (2005) p. 106.

[141] Ibid.

loss incurred by consumers as a result of the improvement not being offered on the market.[142]

### 3.3 Reflections and the road ahead

The analysis in this chapter has uncovered a gradual development in the interpretation of the "new product" criterion in case law. This development might legitimately be interpreted as reflecting broader changes in the underlying views on how to address the IP/competition law intersection.

From a practical perspective, however, it is important to stress that the threshold for a finding of an abuse is a product of all the conditions of the test. The debate sparked by *Microsoft* has furthermore not been limited to the "new product" inquiry, but additionally revolved around alleged relaxations of the non IP- specific conditions. These conditions must consequently be analyzed as well with a view to identify how *Microsoft* clarified and possibly departed from established case law.

[142] Ibid.

# 4 The non IP-specific elements of the test

## 4.1 The “indispensability” of the asset to which access is sought

It was established above that even the earliest case law on refusals to supply is consistent with an “indispensability” condition.[143] Alternative expressions pointing at the same characteristic as the term “indispensable” are “essential facility” or “objectively necessary”.[144] It has been argued that these expressions might be used “interchangeably”[145], a standpoint which is supported by the Commission’s preference for the term “objectively necessary” in its recent Guidance Paper.[146] The Guidance Paper draws on case law, and the courts have preferred to use the term “indispensable” rather than “objectively necessary”.[147]

The key case on “indispensability” in modern jurisprudence is *Bronner*. This judgment clarified the existence and substantive content of the “indispensability” requirement and has formed a basis for subsequent interpretations. [148]

*Bronner* established that the determinative question when assessing “indispensability” is whether potential or actual substitutes for the requested input can be identified. [149] When subsequently interpreting *Bronner* in *IMS*, the ECJ stressed that the fact that reliance on a substitute will amount to a competitive disadvantage is not decisive, as “less advantageous” solutions are considered relevant. [150] The threshold is clearly higher than mere conven-

[143] See section 2.1.2 above.

[144] Whish (2012) p. 701.

[145] Ibid.

[146] Para 83.

[147] Whish (2012) p. 701.

[148] Ibid p. 701 – 703.

[149] *Bronner*, paras 43 and 44.

[150] *IMS Health* para 28 .

ience, and it falls on the undertaking seeking access to concretely demonstrate that there are no alternative solutions. [151]

A frequently held view is that this interpretation of the "indispensability" criterion was relaxed in *Microsoft*. It has been argued that the CFI "degraded" the indispensability condition, effectively rewriting it to a condition of an identifiable "competitive disadvantage"[152], that the legal concept of "indispensability" was widened[153], and that the condition was "tweaked" as the interoperability information was regarded as "indispensable" to the extent that it "was necessary to keep a viable competitor in the market (or to persuade one to enter) and the dominant firm was the only economically feasible source of that information".[154] Several other commentators argue along the same lines. [155]

Many contributions appear to, either explicitly or implicitly, reflect the position that the concept of "economic indispensability" was introduced in *Microsoft*. [156] This concept refers to how the CFI considered that while access to the market might have been technically possible to achieve, the interoperability information was nevertheless "indispensable" as a continued refusal would eliminate the "economic viability" in competing. [157]

What is important to remember, however, is that the ECJ expressly recognized that the cost of duplicating the facility could amount to such a substantial economic obstacle that duplication would not be regarded as a "realistic potential alternative" already in *Bronner*. [158]

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[151] *Bronner*, para 46, Whish (2012) p. 703.

[152] Kwok (2011) p. 264.

[153] Ezrachi & Magelliano (2012) p. 602.

[154] Longdin (2011) p. 172.

[155] Koch (2011) p. 31, Ahlborn (2008) p. 9 – 10, Tusek (2010) p. 110 – 112,

[156] Explicitly in Ezrachi & Magelliano (2012) p. 603, Koch (2011) p. 35, Tusek (2010) p. 110 "indispensability [...] closely connected with economic viability".

[157] Ezrachi & Magelliano (2012) p. 603, *Microsoft* para 374 and 230.

[158] *Bronner* para 45.

Economically speaking, it is irrelevant whether the economic "realism" in an alternative solution is obstructed by very high costs or by a dramatic reduction of sales. The result on the bottom line is the same when income is reduced as when additional costs are incurred. It is submitted, therefore, that the view that competing in the secondary market would not be "economically viable" under a scenario of continued refusal in *Microsoft* (interoperability is an economically indispensable sales argument) is consistent with the qualification that substitutes have to have a degree of realism to be considered relevant in *Bronner* (access is economically indispensable when duplication costs are unrealistically high).

As the basis for concluding that the legal concept of "economic indispensability" amounted to a novelty not observed in established jurisprudence, several commentators rely on an article by former CFI president Bo Vestdorf .[159] That article does not take the part of the *Bronner* judgment discussed in the previous paragraph into account, however. [160] In fact, this part of *Bronner* is not explicitly addressed in any of the contributions cited above arguing that *Microsoft* modified the "indispensability" condition.

Banasevic and Hellstrøm provides for a highly insightful analysis of the application of the "indispensability" condition in *Microsoft*. [161] In their opinion, the discussion of the "indispensability" of the requested interoperability information rests on the concept of "competition on the merits" in EU competition law. [162] As the reader will recall, one of the key findings confirmed by the CFI was that the intrinsic qualities of a work group server OS were irrelevant for consumers absent sufficient interoperability with Microsoft's most recent client PC OS. [163] As a result, there would be no available scope for "competition on the

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[159] Ezrachi & Magelliano (2012) p. 603, Tusek (2010) p. 111.

[160] Vestdorf (2008) p. 6 – 7.

[161] Banasevic (2010) p. 53 following.

[162] Ibid p. 54.

[163] See section 3.1.3 above.

merits on the basis of the core functionalities" of the work group server OS offered by Microsoft and independent vendors under the scenario of continued refusal. [164]

This "objectively necessary to compete on the merits in the secondary market" - perspective is consistent with the logic applied in *Bronner* when indicating under what circumstances unrealistically high duplication costs might satisfy the "indispensability" condition. The ECJ considered that if the economic realism in duplicating the distribution system was obstructed by the fact that the requestor had a comparatively much smaller circulation than the proprietor, access would not be regarded as "indispensable". If duplication would have represented an unrealistic cost even for a hypothetical undertaking with a circulation comparable to that distributed under the existing scheme, on the other hand, forced access might be justified.[165] The underlying rationale must have been that the potential elimination of competition would stem from the vulnerability of the competitor seeking access under the first scenario, while competition on the merits from an equally efficient entity might be eliminated under the second.

*Microsoft* could furthermore be interpreted as a highly fact specific reflection of how the "indispensability" condition is logically interlinked with the "elimination of competition" requirement. [166] What the CFI confirmed was that the nature of the interoperability information was such that a strategic refusal to supply it could create a "substantial threat" that the work group server OS market would be monopolized by Microsoft. [167] By preventing the company from using its control over the interoperability information as a bottleneck,

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[164] Banasevic (2010) p. 54.

[165] *Bronner* paras 45 - 46.

[166] Ahlborn (2008) p. 10 emphasizes how the approach under the "elimination of competition" prong effectively softened the indispensability standard which is its "flip side".

[167] Bohannan (2012) p. 316.

the Court sought to protect future competition on the merits in a secondary market which was in fact competitive prior to the refusal.[168]

Interestingly, this rationale is reminiscent of the one applied already in *Commercial Solvents*. While it might have been technically possible to come up with an alternative to forced access in that case, the options were so theoretical and disadvantageous that a continued refusal would create a serious "risk" of monopolization of the secondary market. [169]

On the basis of the foregoing analysis it is submitted that *Microsoft* neither tweaked nor softened the "indispensability" criterion. The discussion of the "indispensability" of the interoperability information should quite to the contrary be characterized as consistent with the landmark cases of *Commercial Solvents* and *Bronner*, but naturally turned on the specific facts of the case.

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[168] Ibid.

[169] See section 2.1.2 above.

## 4.2 The effect of eliminating competition in the secondary market

Two main questions must be examined in an analysis of this prong of the forced dealing/forced licensing test. Firstly, it needs to be established whether competition actually has to be eliminated to justify intervention, or if a risk of such an effect occurring in the future is sufficient. Secondly, the required degree of elimination needs to be established. Does the refusal have to eliminate all competition in the secondary market for forced licensing/dealing to be justified, or is it sufficient that competitors are marginalized to a certain extent?

Both of these questions were explicitly addressed in *Microsoft*. Microsoft asserted that it had to be demonstrated that the refusal was "likely to limit all competition", and that the standard of proof was something "close to certainty". [170] While acknowledging that *Commercial Solvents* was satisfied with a "risk" of elimination, Microsoft argued that that case was irrelevant as it did not involve a refusal to license IP. [171] The company did in other words take the position that a higher threshold for intervention in IP cases should be accommodated not only by the additional "new product" requirement, but also by a stricter, IP specific interpretation of the elimination of competition prong.

The CFI was not convinced, however, and regarded Microsoft's arguments as purely terminological and *"wholly irrelevant".* [172] Implicitly rejecting an IP specific interpretation, it held that: *"the expressions 'risk of elimination of competition' and 'likely to eliminate competition' are used without distinction by the Community judicature to reflect the same idea, namely that Article 82 EC does not apply only from time to time when there is no more, or practically no more, competition on the market".* [173] The standard advocated by

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[170] *Microsoft,* para 439.

[171] Para 440.

[172] Para 561.

[173] Para 561.

Microsoft would effectively prevent the Commission from achieving the very purpose of Article 82 through intervention, *"which is to maintain undistorted competition […]"*. [174]

The CFI's concern with a possibility for a future effect has been contrasted against the ECJ precedents. [175] In the *Magill* case, for example, the refusal would have resulted in an immediate elimination of competition in the market for comprehensive weekly television guides as that market would be wholly foreclosed if no licenses were granted. [176] Linguistically speaking, there is furthermore an undisputable difference between a possibility for an effect ("risk") and the probability for the effect actually occurring in practice ("likelihood"). [177] The CFI seemingly did not consider that distinction relevant, however.

In relation to the required degree of potential elimination, the CFI considered that the Commission was not required to show that "all" competition would be eliminated. It was sufficient that the refusal jeopardized "effective competition". [178] The concept of "effective competition" was subsequently incorporated in the Commission's 2009 Guidance. [179]

Several commentators have subsequently criticized the standard of "risk of elimination of effective competition", considering it to amount to an unwarranted lowering of the threshold for intervention. [180] The concept of "effective competition" has additionally been subject to specific criticism, as it is difficult to establish when competition in a given market is "effective". [181]

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[174] Para 561.

[175] Katsoulacos (2008) p. 288.

[176] Kerber (2008) p. 13.

[177] Squiteri (2008) p. 75, Kwok (2011) p. 265.

[178] *Microsoft* para 563.

[179] Guidance Paper para 85.

[180] Devlin (2009) p. 97, Kwok (2011) p. 256, Ezrachi & Maggiliono (2012) p. 603.

[181] Kwok (2011) p. 265, Tusek (2010) p. 111 – 112, Devlin (2009) p. 97 – 98.

Importantly, *Microsoft* did not merely clarify the standard, but provides valuable guidance about factors that will be affect the likelihood for it being met as well.

Firstly, the CFI confirmed the relevance of Microsoft's already high market share on the market it sought to monopolize as this was characterized by certain loyalty inducing features which made consumer switching from Microsoft's product unlikely to be observed for those organizations that had already opted for this solution. [182] The practical relevance of the proprietor's market share on the secondary market in refusal to supply scenarios is corroborated by the Guidance Paper which identifies it as being indicative of the risk for elimination of effective competition. [183] It is important to stress how the Commission qualifies this point of view, however, by referring to dynamics such as capacity constraints explaining why such a correlation is likely to be observed.[184]

In relation to high tech markets in particular, an important observation is how the CFI argued that the presence of strong network effects in the secondary market made it pertinent to intervene before the risk of elimination of competition had materialized, as such degradation would be difficult to reverse. This might reflect the view that intervention is justified at an earlier stage in markets characterized by strong network effects.

Lastly, *Microsoft* did, in the same way as *Commercial Solvents,* concern a disruption of previous levels of supply coinciding with the proprietor's entry into the downstream market. [185] In *Commercial Solvents,* the CJ did as previously mentioned hold that dominant undertakings cannot act in such a way as to *"eliminate their competition".*[186] It is indeed possible to argue that the circumstance of disruption of historical levels of supply coupled

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[182] *Microsoft* para 619.

[183] Guidance Paper para 85.

[184] Ibid.

[185] Anderman (2011) p. 113, Commission's decision from para 578.

[186] See section 2.1.2 above.

with vertical integration is legally relevant, and that such practices will be considered abusive unless objectively justified.[187] The Guidance Paper does not go that far, but indicates that an interruption of existing levels of supply is more likely to be found abusive than first time refusals.[188]

[187] Anderman (2011) p. 113.

[188] Guidance Paper para 84.

## 4.3 No objective justification for the refusal

The concept of objective justifications/necessities has been expressed in a number of judgments and decisions under art. 102. [189] This concept entails that conduct which has been identified as a *prima facie* art. 102 infringement will not be characterized as abusive if the dominant undertaking concretely demonstrates that it was objectively justified/necessary and proportionate. [190] The concept of objective justifications does in other words serve the function of a defense.

For the purposes of the following discussion, it is clarifying to distinguish between three categories of such defenses. [191] The first category consists of external circumstances which may arise in relation to many different forms of potentially abusive conduct. This category encompasses "objective necessities", such as health or safety considerations, and economic justifications, such as the customer being a bad debtor, representing a credit risk or failing to fulfill its contractual obligations.[192]

The second category is narrower, and refers to negative effects that might typically be observed when access is sought to so – called "essential facilities". This term is used by many commentators to describe facilities such as ports, electricity grids or pipelines. These physical facilities are characterized by a definite capacity limit, and forced access may consequently result in congestion effects. [193]

The third category resembles the efficiency defense under Article 81 (3). The logic is that conduct which has negative effects on competition should not be prohibited if these con-

[189] Whish (2012) p. 211.

[190] Whish (2012) p. 211, van Der Vijver (2012) p. 124 following.

[191] For an alternative systematization, see van Der Vijver (2012) p. 122.

[192] Whish (2012) p. 211, 708.

[193] Leveque (2005) p. 110.

cerns are offset by efficiencies benefitting consumers to the point where they are not harmed on balance.

An in-depth discussion of the concept of objective justifications goes beyond the scope of this paper. As an introductory matter, it should be pointed out that category 1 and 2 defenses may arise within the context of a refusal to license IP. In *Microsoft*, for example, the control over the IP amounted to an indirect form of control over interoperability. An increased number of interoperable products could potentially make the system in question more vulnerable to attacks representing a security issue, or cause capacity problems impeding its functionalities. [194]

What this paper is particularly concerned with, however, is the intersection between competition and IP law. At the very core of this complex field lies the objective of facilitating dynamic competition to the benefit of consumers. The efficiency defense will accordingly be the focus of the following discussion.

The community courts have gradually accepted that an efficiency defense is available under art. 102, in spite of the fact that the defense in art. 101 (3) is not mirrored in the wording of this article. [195] *Microsoft* forms a part of, but not the last word in this development. Two more recent judgments have explicitly dealt with the efficiency defense, namely the *TeliaSonera* and the *Post Danmark* cases. [196]

Both of these cases dealt with the effects of pricing practices. *TeliaSonera* concerned a margin squeeze resulting from the prices charged by TeliaSonera for respectively the input services necessary for the activities of independent entities offering broadband services to

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[194] Van Rooijen (2010) p. 128.

[195] For an overview of the relevant cases, see Rousseva (2012) p. 48.

[196] Case C-52/09 Konkurrenseverket v TeliaSonera Sverige AB *(TeliaSonera)* and Case C-209/10 Post Danmark A/S v Konkurrencerådet *(Post Danmark).*

end users, and for its own competing broadband services offered to the very same group of end – users. [197] *Post Danmark* concerned targeted, loyalty inducing pricing policies on the Danish market for the distribution of unaddressed mail.[198]

*TeliaSonera* is an important case as the court expressly recognized that unilateral pricing practices having exclusionary effects *"may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer".* [199] *Post Danmark* provided further clarity in that the ECJ identified the conditions that have to be satisfied for this defense to apply. The conclusion remains, however, that *Microsoft* is the only refusal to license case in which claims that the refusal is justified on efficiency grounds has formed a central part of the litigation.

Systematically, the following discussion will be limited to *Microsoft*. I will deal with the issue of whether the efficiency claims likely to be raised in the refusal to license context are capable of satisfying a *Post Danmark* – style test in chapter 5. This separation is logical as the *Post Danmark* test is virtually identical with the efficiency defense in the Commission's Guidance Paper. This defense forms an integral part of the Commission's modernized approach to refusals to supply, and consequently has to be addressed in conjunction with the discussion of this framework anyway.

Two findings made above provide the starting point for an analysis of the efficiency defense in the refusal to license context. Firstly, it was established that the CFI considered the negative impact of compulsory licensing on the IP holder's incentives for innovation irrelevant for the discussion under the modified "new product" inquiry.[200] Secondly, it was ar-

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[197] *TeliaSonera* para 19.

[198] *Post Danmark* para 8.

[199] *TeliaSonera* para 76.

[200] See section 3.1.3 above.

gued that *Microsoft* lowered the threshold for a *prima facie* finding of an abuse compared to the *Magill/IMS* doctrine, which amounted to a very low false convictions rule.[201]

In sum, these factors have made the question of the practicality of the efficiency defense more pertinent. The topic of the following discussion is what can be inferred from *Microsoft* about the scope available to IP holders for arguing that respecting the refusal will benefit consumers by facilitating greater dynamic efficiencies than forced licensing.

The underlying purpose of the Commission's intervention in *Microsoft* was to facilitate future innovation in the secondary market to the benefit of consumers. This was reflected directly in its approach to ascertaining whether the refusal was abusive. Departing from the traditional "exceptional circumstances" test in favor of an "entirety of the circumstances" approach, it weighed the effects of respectively forced dealing and continued refusal against each other.[202]

In the first part of this balancing exercise, it established that the refusal would discourage independent vendors from developing improved products.[203] This part of the decision was confirmed by the CFI under its modified "new product" inquiry.[204] The Commission's approach differs from the one applied by the CFI, however, in that it found it necessary to establish the negative effects of compulsory licensing on Microsoft's incentives to innovate when determining whether the refusal was objectively justified.[205] These incentives were weighed concretely against the negative effects on technical development from the compet-

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[201] See section 3.2.1 above.

[202] Denozza (2012) p. 270.

[203] Commission's decision para 694.

[204] See section 3.1.3 above.

[205] Commission's Decision para 712 following.

itor side that would occur under a scenario of continued refusal. [206] This balancing act amounted to a novelty not previously seen in EU jurisprudence. [207]

The Commission's approach was quickly dubbed the "incentive balancing" test.[208] That term is informative as it points at the core of the Commission's rationale: Compulsory licensing is appropriate if it is established that the negative effects of such intervention on the IP holder's incentives for innovation are outweighed by the positive effects on aggregate incentives for innovation in the whole market. [209] An alternative perspective is that the former "new product" and "no objective justification" conditions were functionally merged into a consumer harm requirement conceived as a balancing of effects. [210]

The CFI was unwilling to admit that the Commission had reached its conclusion on the basis of a concrete balancing act, however. It considered that:

*"The Commission came to a negative conclusion but not by balancing the negative impact which the imposition of a requirement to supply the information at issue might have on Microsoft's incentives to innovate against the positive impact of that obligation on innovation in the industry as a whole, but after refuting Microsoft's arguments relating to the fear that its products might be cloned".* [211]

This statement is unclear about the scope available to dominant undertakings for arguing that compulsory licensing will reduce incentives for innovation under the "objective justification" prong. On the one hand, the CFI rejected that the Commission had in fact reached

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[206] Ibid.

[207] Lidgard (2008) p. 212.

[208] Koch (2008) p. 29.

[209] Ibid.

[210] Denozza (2012) p. 271

[211] *Microsoft* para 710.

its conclusion on the basis of an ad – hoc balancing of incentives for innovation. On the other hand, it did not say that such an approach would have been wrong either.[212] The CFI was careful not to completely close the door for future application of the incentive balancing test. [213]

Subsequently, the CFI refuted three main categories of justifications. Firstly, Microsoft argued that the IP protection of the requested information amounted to an objective justification in itself. That argument was swiftly rejected. It was considered to be *"inconsistent with the raison d'être"* of the exceptional circumstances doctrine, insomuch as the recognition of the mere holding of an IPR as an objective justification would mean that *"the exception established by the case law could never apply".* [214]

Secondly, Microsoft claimed that its incentives for innovation would be reduced if compulsory licenses were granted. The CFI considered these assertions to be *"vague and theoretical"*, however, as they were not backed up by hard evidence. [215] Interestingly, it regarded the fact that Microsoft had historically supplied independent vendors with interoperability information as an indication that its incentives for innovation would not be significantly hampered under the scenario of forced licensing.[216] This indicates that the scope for arguing that a disruption of historical levels of supplies was necessary to maintain incentives for innovation is narrower than the scope for relying on this argument in relation to a *de novo* refusal.

Microsoft's concerns relating to possible cloning of its products were lastly considered to be unfounded. As support for this conclusion, the CFI referred to its "crucial" finding of

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[212] Kerber (2008) p. 15.

[213] Ibid.

[214] *Microsoft* para 690.

[215] *Microsoft* para 698, criticized in Devlin (2009) p. 106.

[216] *Microsoft* para 702.

competitors being most likely to offer products differing from one another in ways consumers appreciate under the scenario of forced access. [217]

The general impression is nevertheless that *Microsoft* provides little or no guidance as to what arguments the IP holder must bring forward to justify the refusal on the ground that that it maintains *ex-ante* incentives for innovation. [218] While establishing that IPRs cannot amount to an objective justification *per se*, the discussion under the objective justification prong has rightly been characterized as "underdeveloped" and in need of further clarification. [219] It has been observed that the law on refusals to license is "missing" a particular objective justification: The IP holder should be provided with an ample scope for invoking an objective justification - defense where it can show that "substantial and risky investments lie beneath the challenged IP rights". [220] An interesting question is accordingly whether the Commission envisages a realistic opportunity to present such claims under its modernized approach to refusals to supply.

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[217] *Microsoft* para 701, para 656-658, see section 3.1.3 above.

[218] Howarth (2008) p. 124 argues that it remains unclear what could constitute an "objective justification" in the refusal to license context.

[219] Eklof (2009) p. 106, see Vezzoso (2005) p. 5.

[220] Eklof (2009) p. 106.

# 5 The Commission's proposed generic refusal to supply test

Refusals to license IP have consistently been treated differently than refusals to supply/grant access to physical property by the community courts. A "new product" condition heightening the threshold for intervention has been invoked in the IP cases.[221]

When viewed against this background, the approach advocated in the Commission's 2009 Guidance Paper stands out as fairly radical. By establishing a generic test applicable to all refusals to supply/grant access irrespective of whether the asset to which access is sought is protected by IP, the Guidance Paper simply rejects the relevance of the "new product" condition altogether. In this chapter, I will account for the Commission's framework. I will begin with establishing how *Microsoft* played a key role in facilitating the reformed approach before discussing its implications.

## 5.1 *Microsoft* as a door opener for the Commission's reform

*Microsoft's* role in breaking the ground for the Commission's reform is best understood by adopting a somewhat theoretical perspective. The starting point is how the law on exclusionary abuses has traditionally been concerned with market structure and dynamics, asking whether the "practice interferes with and degrades the market mechanism".[222] The very role of the "new product" condition has been to require more than such indirect and potential consumer harm in refusal to license cases, however. Exclusion to the point that competition in the secondary market was eliminated did not suffice, and the law on refusals to license effectively prescribed a hybrid form of abuse requiring both foreclosure and a direct effect on consumers.[223]

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[221] See chapter 2 above.

[222] Fox (2002) p. 372.

[223] Kolstad (2005) p. 84 - 85.

By importing art. 102 (b) into the “new product” condition, *Microsoft* made case law accepting impairments to an effective competitive structure as an indirect form of consumer prejudice relevant under this prong. [224] The “new product” inquiry became concerned with exclusionary effects. As a result, the hybrid character of the refusal to license abuse was blurred, and the law on refusals to license moved closer to the law on traditional refusals to supply.

This development paved the way for the Commission’s modernized approach. At this stage, it is important to stress two factors: 1) There is an opening for applying an alternative test as the circumstances established in *IMS, Magill* and *Microsoft* are cumulatively sufficient rather than necessary[225], and 2) The CFI was careful not to explicitly disapprove of the incentives balance test in *Microsoft.*[226]

The application of an alternative standard, possibly resembling the incentives balance test, would in other words not be in breach of established jurisprudence. As a result, the door was open for the Commission to use the “lack of a bright line between the “new product” and “elimination of effective competition” criterion in *Microsoft* to “play down the IP/Antitrust issue as a special case and bring it more into line with the standard Article 102 TFEU jurisprudence”. [227]

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[224] See section 3.1.3 above.

[225] See section 2.2.1 above

[226] See section 4.3 above.

[227] Fatur (2012) p. 192, see also Eklof (2009) p. 105.

## 5.2 What are the implications of the Commission's proposed test?

The Commission's generic approach warrants intervention when the refusal:

1) relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market,
2) is likely to lead to the elimination of effective competition on the downstream market; and
3) is likely to lead to consumer harm.[228]

The novel condition is that of likely "consumer harm". To provide an in depth analysis of this complex requirement goes beyond the scope of this paper. The challenge is to identify the implications of applying it to refusals to license practices.

The Guidance Paper explains in a straightforward fashion that the Commission will establish the impacts on consumer welfare on the basis of a balancing test. The question is whether "the likely negative consequences of the refusal to supply in the relevant market outweigh over time the negative consequences of imposing an obligation to supply". [229] On the face of it, this approach is reminiscent of the incentives balance test applied in *Microsoft*.[230]

When providing examples of scenarios where the balancing test might result in a finding of consumer harm, however, the Commission limits itself to reiterate effects deemed to satisfy the "new product" requirement in case law. [231]As a result, the examples do little more than implying the obvious: The Commissions considers that its new approach is not directly in

[228] Guidance Paper para 81.

[229] Para 86.

[230] Forrester & Czapracka (2011) p. 161, see also section 4.3 above.

[231] Para 87.

breach of established jurisprudence as the consumer harm requirement will evidently be satisfied in scenarios previously deemed to be abusive.

The Commission's first example is a *Microsoft* – type scenario. It considers that consumer harm may arise where "the competitors that the dominant undertaking forecloses are, as a result of the refusal, prevented from bringing innovative goods or services to market and/or where follow-on innovation is likely to be stifled".[232] Relying on the *IMS* formulation of the standard, it goes on to explain that "this may be particularly the case if the undertaking which requests supply does not intend to limit itself essentially to duplicating the goods or services already offered by the dominant undertaking on the downstream market, but intends to produce new or improved goods or services for which there is a potential consumer demand or is likely to contribute to technical development".[233]

It is important to stress how these examples focus exclusively on the negative effects of the refusal on the competitor side of the market. No mentioning is made of the negative impact of an order to supply on the IP holder's incentives. This fits poorly with the balancing test which, if taken literally, presupposes that the negative impact of an order to supply is established for a finding of an abuse. Exclusion having the effect of blocking innovative products offered by competing producers from the market, for example, would only be considered abusive if it is demonstrated this "likely negative consequences of the refusal to supply in the relevant market outweigh over time the negative consequences of imposing an obligation to supply". [234]

In my opinion, this inconsistency most likely reflects two findings made in *Microsoft*. Firstly, the CFI insisted that the effects of compulsory licensing on Microsoft's incentives for innovation were irrelevant for a *prima finding* of an abuse, and could only be ascertained

[232] Para 87, referring to the "new product" inquiry in *Microsoft*.

[233] Ibid.

[234] Para 86.

under the objective justification prong. [235] Secondly, it accepted impairments to an effective competitive structure as an indirect form of consumer prejudice.[236] A literal interpretation of the proposed balancing test requiring a concrete demonstration of the negative effects of an order to supply for a *prima facie* finding of an abuse is clearly not easily reconciled with these findings.

Interestingly, the ambivalence between the concern with foreclosure effects and an additional concept of demonstrable consumer harm is a recurring theme in the Guidance Paper.[237] The Commission's starting point is structural, as it will "normally intervene"[238] where it succeeds in establishing that the conduct will lead to "anticompetitive foreclosure".[239] This concern with structural changes has been criticized as "simplified"[240] , but is consistent with established jurisprudence.[241]

Under the modernized efficiency defense, however, the focus is on net consumer harm. The conduct might not be prohibited after all if the dominant undertaking succeeds in establishing that the conduct "leading to foreclosure of competitors" is likely to produce sufficient efficiencies "to guarantee that no net harm to consumers is likely to arise"[242]. On this basis, it has been argued that the focus on "anticompetitive foreclosure" under the modernized approach should not be misread as an indication that impairments to the market structure are considered harmful *per se*, as the concept of an effective competitive structure is merely used as a proxy for promoting consumer welfare. [243]

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[235] See section 3.1.3 above.

[236] See section 3.1.3 above.

[237] Drexl (2009) p. 10.

[238] Para 20.

[239] Defined in para 19.

[240] Ezrachi (2011) p. 105.

[241] Drexl (2009) p. 10.

[242] Para 30.

[243] Drexl (2009) p. 8 – 11.

This observation provides for a natural transition to a next important issue. It was established above that the concept of "objective justifications" is underdeveloped in the refusal to license context. [244] A key question is accordingly to what extent the Commission's modernized approach provides IP holders with a realistic opportunity for justifying a refusal on grounds such as that it maintains incentives for investing in R & D as the challenged right protects the fruits of substantial and risky investments. [245]

On the face of it, the Guidance Paper appears to establish a practical framework for taking such arguments into account. The section dealing with refusals to supply clarifies that the Commission, when establishing consumer harm, will consider claims by the dominant undertaking that: 1) "a refusal to supply is necessary to allow […] an adequate return on the investments required to develop its input business, thus generating incentives to continue to invest in the future", and 2) "its own innovation will be negatively affected by the obligation to supply, or by the structural changes in the market conditions that imposing such an obligation will bring about". [246]

A crucial qualification of the relevance of such claims is made in the following paragraph, however. The initial burden of proof is placed upon the IP holder, who must establish that "the conditions set out in Section III D are fulfilled" for the claims to be considered.[247] The question, then, is what conditions follow from "Section III D"?

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[244] See section 4.3.

[245] Ibid.

[246] Para 89.

[247] 90.

Section III D is the general part of the Guidance Paper dealing with objective justifications. It stipulates that a four pronged cumulative test must be satisfied for the efficiency defence to apply: [248]

1) "The efficiencies have been, or are likely to be, realised as a result of the conduct".
2) "The conduct is indispensable to the realisation of those efficiencies".
3) "The likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets"; and
4) "The conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition".

The ECJ's formulation of the efficiency defense in *Post Danmark* slightly relaxes the "indispensability" condition, but is otherwise virtually identical with this test. The judgment furthermore confirms that the burden for proving that all the conditions of the defense are fulfilled vests with the dominant undertaking. [249] It must demonstrate that:

1) The identified efficiency gains "*have been, or are likely to be, brought about as a result of"* the conduct put under scrutiny.
2) *"Such conduct is necessary for the achievement of those gains in efficiency".*
3) *"The efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets"*; and
4) That the conduct *"does not eliminate effective competition, by removing all or most existing sources of actual or potential competition".* [250]

[248] Para 30.

[249] Para 42, Rousseva (2012) p. 49.

[250] Para 42.

For the purposes of this discussion it is not important whether the efficiency defense which is now law, namely the one following from *Post Danmark*, is completely identical with the version advocated by the Commission in its Guidance Paper. The important question is whether a test in line with the one advocated by the Commission and confirmed in essentially the same form by the ECJ is conceptually adequate for evaluating the claims relating to negative effects on incentives for innovation that are recognized in the refusals to supply - section of the Guidance Paper, i.e. claims that 1) "a refusal to supply is necessary to allow […] an adequate return on the investments required to develop its input business, thus generating incentives to continue to invest in the future", and 2) "its own innovation will be negatively affected by the obligation to supply, or by the structural changes in the market conditions that imposing such an obligation will bring about". [251]

The starting point for a successful efficiency defense is identifiable, specific efficiencies arising as a result of a particular course of conduct. [252] The adequacy of such a mechanical conduct – effect perspective is questionable, however, when the refusal is alleged to maintain proper incentives for innovation possibly benefitting consumers by unspecified novel products. Such claims are inherently abstract. It has convincingly been pointed out that maintaining incentives for future innovation should not be perceived as an efficiency gain flowing directly from a particular course of conduct, but as a question of long – term effects to be taken into account as a component in a broad analysis. [253] The Commission's approach in *Microsoft* arguably reflected this view as it conducted a concrete and broad balancing of effects. [254]

The issues arising from applying a mechanical conduct-effect approach in the IP context become even more evident when the balancing standard is taken into consideration. This

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[251] Para 89.

[252] Condition No. 1.

[253] Larrouche (2008) p. 12.

[254] See section 4.3 above.

prong of the test requires the IP holder to demonstrate that the likely efficiencies brought about by the refusal outweigh/counteract “any likely negative effects on competition and consumer welfare in the affected markets”. [255] It is difficult to see what evidence the IP holder can produce that is capable of satisfying this prong. Predictions that compulsory licenses will weaken incentives for innovation have a theoretical nature, and as such “cannot be subject to rigorous to empirical proof”. [256]

A last issue arises from the additional concern with exclusionary effects within the efficiency defence itself. The final prong of the test requires the dominant undertaking to demonstrate that the refusal “does not eliminate effective competition, by removing all or most existing sources of actual or potential competition”.[257] This requirement reflects the underlying position that “rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the form of innovation”, as “the dominant undertaking will lack adequate incentives to continue to create and pass on efficiency gains” in the absence of competitive pressure.[258]

It is not clear how a requirement of no “elimination of competition” can be satisfied in a refusal to supply scenario, however. [259] For the consumer harm requirement and thereby the efficiency defense to come into play, the Commission must already have established that the refusal is “likely to eliminate effective competition” in the secondary market. It could be the that the term “likely elimination of effective competition” understood as the lower threshold for relevant foreclosure[260] has a different meaning than the requirement that the

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[255] Condition No. 3.

[256] Kwok (2011) p. 266.

[257] Condition No. 4.

[258] Guidance Paper para 30.

[259] Ezrachi (2011) p. 107, Kwok (2011) p. 266. Schweitzer (2007) p. 28 points out that an “analogue application” of art. 101 (3) is deemed to fail in refusal to supply/license cases.

[260] See section 4.2 above.

refusal “does not eliminate effective competition” for asserted efficiencies to be taken into account, but how and to what extent the standards differ remains an open question.

On last note, it should be pointed out that the Commission considers the room for relying on prospective efficiencies to be very limited within a scenario where a super – dominant undertaking’s exercise of an exclusive right has the effect of entrenching, creating or extending its market position. The Commission’s position is crystal clear in this respect: “exclusionary conduct which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains”.[261] It appears, therefore, that sufficient foreclosure will practically equate to a finding of consumer harm in a situation such as that put under scrutiny in *Microsoft* where a super – dominant undertaking leverages its market power into an adjacent market by means of a refusal to license.

In sum, the analysis undertaken above indicates that the implications of the Commission’s modernized approach to refusal to license practices are ambiguous. From a theoretical point of view, the generic character of the test implies that the Commission has rejected the notion that IP “require special deference compared to tangible property” in a refusal to supply scenario.[262] This rejection is consistent with the standpoint taken in a number of recent academic contributions. It has been observed that that there is “no clear basis” in economics for applying an IP specific test heightening the threshold for intervention simply because of the nature of IP rights. [263] The crucial question is the same in refusal to deal and refusal to license cases, namely what effects forced access will have on future incentives for investment. [264]

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[261] Guidance Paper para 30.

[262] As argued by Ritter (2005) p. 6 – 22.

[263] O’Donoghue (2006) p. 423.

[264] Fatur (2009) p. 179, with reference to several commentators. But see Van Rooijen (2010) p. 125

It is not clear, however, what practical implications the generic test will have compared with the *Microsoft* formula for intervention. This uncertainty is a result of two factors in particular: 1) The exemplified scenarios of IP refusals capable of resulting in consumer harm merely reiterates the findings made under the "new product" inquiry, and 2) While initially accepting arguments relating to the protection of future incentives for investment and innovation as relevant, these claims will be extremely hard to present within the bounds of the efficiency defense.

# 6 The broad picture – what will future cases look like?

The previous chapters have provided for a fairly detailed analysis of two elements that are particularly relevant from a practical point of view. Firstly, I identified the conditions that have always been considered satisfied when compulsory licenses have been invoked under art. 102, and ascertained how they are to be interpreted. [265] Secondly, I identified in what way the Commission's modernized approach is different, and discussed the implications of applying this framework in future cases.[266]

This last chapter is not intended to merely provide for a summary of these findings. Rather, it purports to take one step back and shed light on the broader issue of what the next refusal to license case might look like - when viewed through legalistic lenses. This entails addressing the questions of:

- What categories of tests might be applied in future cases?
- Which factors affect the likelihood for a finding of an abuse?

In some respects, it is only possible to identify and distinguish between possibilities for future developments. In others, IP holders are actually provided with significant guidance.

[265] Chapter 2 – 4.

[266] Chapter 5.

## 6.1 What test might be applied in future cases?

The analysis of the historical application of the "new product" condition revealed that the law on refusals to license originated from the proposition that the threshold for forced licensing of IP should be higher than the threshold for forced dealing of tangible property.[267] The *Magill* – style, formalistic "new product" condition played a key role in an IP -specific test which effectively amounted to a very low false convictions rule. [268]

It is not definitively ruled out that this traditional form of the "exceptional circumstances" test will be applied in future cases. The CFI's judgment in *Microsoft* was not appealed, and the ECJ has consequently never had the chance to confirm or reject it.

Nonetheless, it can hardly be emphasized too strongly that *Microsoft* amounts to the most recent and most comprehensive judgment on refusals to license. This paper has taken the position that it was less radical than is frequently argued, as the discussions under the non – IP specific conditions mostly reflected the specific facts of the case as opposed to a departure from established jurisprudence.

That being said, a significant development did take place in conjunction with the identification of the "new product" circumstance. [269] Conceptually, *Microsoft* represents a move from a formalistic application to an effect based approach. The basis for establishing that the "new product" condition was satisfied was not a comparison of specific products but an extensive inquiry into incentives for innovation on the competitor side. [270] In this respect, the CFI's art. 102 (b) inquiry is dramatically different from a strict, *Magill* – style application of the "new product" condition. While formally reflecting the cumulatively sufficient

[267] Section 3.2 above.

[268] Ibid.

[269] See section 3.1.3 above.

[270] See section 3.1.3 above.

“exceptional circumstances” list, *Microsoft* should consequently be regarded as an expression of the second test future refusals to license practices might be assessed against.

The *Microsoft* doctrine represents a middle ground between the traditional test and the approach advocated by the Commission in its Guidance Paper. By limiting its examples to scenarios where the “new product” circumstance has been identified in case law, the Commission plays down the implications of its generic refusal to supply test. The conclusion nevertheless remains that it has simply brushed out the very foundation for according IP “special deference” under a refusal to supply scenario.

The Commission’s test should accordingly be regarded as an articulated example in the category of alternatives to the cumulatively sufficient “exceptional circumstances” list. Case law provides an opening for applying such a test, but it remains to be seen how the courts will fare with the Commission’s approach. [271]

## 6.2 Which factors affect the likelihood for a finding of an abuse?

While the existence of three categories of possible tests represents a fundamental uncertainty for IP holders, the relevant sources provide them with significant guidance about factors which practically affect the likelihood for a finding of an abuse. Case law furthermore follows a distinct pattern which might be interpreted as a reflection of unarticulated factors. In the following, I will identify the articulated factors and provide some thoughts on the arguments IP holders may invoke if the pattern is broken in future proceedings.

Firstly, case law reflects a distinction between refusals to facilitate market entry and offensive leveraging of market power into a secondary market. *Microsoft* essentially confirmed *Commercial Solvents* in the refusal to license context, indicating that the factor of a disruption of historical levels of supplies of an indispensable input coupled with entry into the

[271] See section 2.1.2 above.

secondary market increases the likelihood for a finding of an abuse. [272] In general, disruptions of established levels of supplies are more likely to be considered abusive, and more difficult to justify on grounds of claimed efficiencies. [273]

The second factor is that of degree of dominance. It was Microsoft's extraordinary position on the client PC OS market that made the ability to achieve sufficient interoperability with "Windows" an indispensable sales argument for work group server OS.[274] Throughout its ruling, the CFI made repeated references to the company's long lasting super – dominant position. [275] Subsequently, it has been observed that entities with market positions in the lower end of the dominance scale are unlikely to be caught in refusal to license cases.[276]

*TeliaSonera* deserves mentioning at this point, as the ECJ was explicitly asked to provide guidance on the relevance of the factor of "degree of dominance" in the establishment of an abuse in this case. The Court stressed that, as a general rule, the degree of market strength is relevant *"in relation to the extent of the effects of the conduct of the undertaking concerned rather than in relation to the question of whether the abuse as such exists"*. [277]

This clarification is consistent with the CFI's approach in *Microsoft* as it did not consider Microsoft's super dominant position as indicative of an abuse *per se*, but incorporated it in a highly fact specific analysis of the effects of the refusal. It does not alter the conclusion, however, that in practice, the degree of dominance in the primary market affects the likelihood for a finding of an abuse as a very strong market position makes it all the more likely that the requisite effects will be observed. If the proprietor is already active in the second-

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[272] See section 2.1.1 and 4.2 above.

[273] Guidance Paper parar 84, section 4.3 above.

[274] *Microsoft* para 388.

[275] See section 4.2 above.

[276] Eklof (2009) p. 106.

[277] *TeliaSonera* para 81.

ary market and has obtained a strong market position there, this will similarly affect the likelihood for a finding of an abuse. [278]

Thirdly, the CFI's call for timely intervention when the secondary market is characterized by the presence of strong network effects is important. [279] It was made in relation to the "elimination of competition" requirement, which a number of commentators regard as being relaxed in *Microsoft.*[280] One possible interpretation, therefore, is that the identification of strong network effects on a secondary market the IP holder seeks to monopolize by means of the refusal lowers the threshold for intervention by shifting the focus to a risk of a future monopolization as opposed to an actual or immediate elimination of competition.

As regards unarticulated factors, a crucial observation is that the two most controversial refusal to license cases, namely *IMS* and *Microsoft*, could both be regarded as standardization cases. [281] It has been observed that a *Magill* – style, formalistic "new product" condition might be too high a threshold for access to IPRs that effectively governs access to industry standards. [282] A general broadening of the "new product" condition on the other hand, would arguably reflect a failure of properly ascertaining the standardization issue in isolation. [283] On this basis, one might take the position that the relaxation of the "new" product criterion in *IMS* and especially in *Microsoft*, is specific to the standardization context. Future defendants who do not control access to a *de facto* standard would be well advised to advocate this interpretation.

[278] See section 4.2 above.

[279] See section 4.2 above.

[280] See section 4.2 above.

[281] *Microsoft* paras 387 and 392, *IMS* para 6.

[282] Van Rooijen (2010) p. 143-147.

[283] Ibid p. 199.

Lastly, the instances at which compulsory licensing has been invoked by the community courts share a common denominator in that they concerned “peripheral” and “weak” copyrights. [284] Forced licensing has never been invoked in relation to any other form of IP and never in relation to the core of the intended protection under the copyright regime in question. [285] This pattern might reflect that the intrinsic qualities of the IP right is taken into account as a relevant factor when determining whether its concrete exercise is prohibited by Article 102.[286] It has been argued that such a qualitative evaluation would be “systematically adequate to undertake”. [287]Again, the existence of an identifiable pattern provides IP holders with arguments if it is broken in future proceedings.

[284] Eklof (2009) p. 114.

[285] Ibid.

[286] Eklof (2009) p. 114.

[287] Ibid.

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