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The Compulsory Licence of Intellectual Property Rights under the EC Competition Rules: an analysis of the exception to the general rule of ownership immunity from competition rules

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This contribution analyses the special position of intellectual property right owners in the context of competition law enforcement. Whereas normally an intellectual property right provides an almost absolute and exclusive right to exploit the intellectual innovation achieved, such exploitation may have to be shared with third parties wishing to obtain access to the protected right in order to pursue exploitation activities of their own, whether or not in competition with the original owner of the right. In particular this may be the case if such access is indispensable for the achievement of the third party's objectives. This contribution focuses on the issue of 'compulsory licensing', which may be seen as impinging upon the absolute ownership of an intellectual property right with the direct effect of making that right open to competition. The owner of the intellectual property right may be seen as a gatekeeper, who under certain specific circumstances may be forced to grant third parties access to the right to exploit his protected property, even against his will. From an economic point of view, his position is comparable to that of other 'owners' of exclusive user rights, such as the owners of an essential facility or the undertakings holding an exclusive concession to provide services of general economic interest. Also these may be seen as gatekeepers who may under specific circumstances be forced to grant third party access to the whole or parts of their exclusive ownership or concession. This contribution analyses, inter alia in the light of the 2007 *Microsoft* judgment of the CFI, whether all gatekeepers are subject to the same rules in relation to granting third parties access to their individual exclusive rights. The analysis will focus on the doctrines developed by the Commission and the European Courts in the context of Art 82 EC only.

INTRODUCTION

In this contribution, we will deal with some competition law issues of compulsory or obligatory licensing of intellectual property rights (IPRs) as these have developed over the years in the case law of the European Courts and the decisional practice of the European Commission ('the Commission'). These issues will be analysed within the general doctrines relating to the abuse of dominance as laid down in Article 82 EC rather than in the context of the traditional thinking on IPR licensing which would fall within Article 81 and the group exemption Regulation 772/2004 on the transfer of technology ('the TTBER'). Compulsory licensing does not occur regularly but should be seen as an exception to the rule. In general, from a strategic point of view

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compulsory licensing will hurt the IPR-owner forcing him to licence whether or not that fits within his normal business strategy.

It will be shown below that from a competition law perspective, forced third party access to certain exclusive rights and compulsory licensing seems to be comparable in their economic effect. A comparable doctrinal approach seems to have taken place. For a proper analysis, it is sometimes necessary to think 'out of the box' taking into account developments in law relating to subjects which intrinsically may be said to be comparable by their very nature. In this case reference should be made to the developments in the field of 'essential infra-structures' (EIFs) and the granting of concessions to provide services of general economic interest (SGEIs).

In this context, we should also include in this analysis the recent Notice of the Commission on exclusionary practices under Article 82, and in particular the role of IPRs as seen in that document by the Commission.[1]

ABUSE OF DOMINANCE IN GENERAL

One of the main objectives of the European competition rules is to guarantee unrestricted competitive conditions in an open market economy.[2] In such an open market economy there is neither room for cartels nor for abusive use of dominance. When monitoring these competitive conditions, the Commission aims to guarantee a level playing field. Not only private undertakings but also Member States will be called to order when taking measures to the detriment thereof. The task of competition authorities – primarily the Commission but also National Competition Authorities (NCAs) – is not the protection of individual competitors but the protection of effective competitive market conditions. Protection of (the unrestricted development of) consumer welfare comes first and competition authorities cast a critical eye on any market developments that would be contrary thereto.

In the context of Article 82 EC a distinction has traditionally been made between 'exclusionary' and the 'exploitative' abuse. The first category involves undertakings holding a dominant position excluding their competitors by other means than competing on the merits of the products or services they provide, i.e. 'foreclosure of the market'.[3]

Competing fairly is not the problem. The problem emerges when dominant undertakings create artificial barriers to market entry for (potential) competitors.

In its Guidance Notice on Exclusionary Conduct, the Commission only once refers to IPR-related cases, to wit in the context of the chapter on 'refusal to supply and margin

1 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ 2009, C45/7. In addition, the Commission reportedly is still working on a further guidance paper concerning exploitative conduct which would complement the present Guidance Notice of February 2009.

2 As laid down in the Articles 3(1)(g) and 4 ECT.

3 Guidance Exclusionary Conduct, op cit, n 1, para 5

squeeze'.[4] In doing so, the Commission mentions two forms of abusive conduct in particular. In the first place mention is made of situations where the dominant undertaking competes on the 'downstream market' with the buyer it refuses to supply. The term *downstream market* is used to refer to the market for which the refused input is needed and includes both products and services. The other example concerns a rather more exploitative refusal to supply, e.g. for retaliatory purposes or tying arrangements.

It is in the first category that the Commission mentions the examples of:

(i) refusal to supply products to existing or new customers
(ii) refusal to licence IPRs including the situation in which the licence is necessary to provide interface information, or
(iii) refusal to grant access to an EIF or a network.[5]

In these cases, the Commission announces that application of Article 82 should merit special consideration and might lead to the imposition of an obligation to supply on the dominant undertaking. In its footnotes in this new Notice, the Commission refers to IPR cases like *Microsoft*, *Magill* and *IMS Health* which will be analysed in this contribution below. The fact that the Commission refers to these IPR-cases makes it clear that the subliminal message is that normal use of the specific substance of IPRs will not normally create competition problems but the artificial use of such right will, in particular when these rights are used to obtain extra advantages in the market which would not be obtained without such improper artificial use. Such use of IPRs is undoubtedly capable of running against the prohibition of Article 82 ECT. In its new Notice, the Commission emphasises the efficiency gains of 'normal' competitive conduct and the fact that residual competition should not be impeded in markets on which a dominant undertaking is active.[6] Normally, IPRs will lead to an acceptable (statutory) dominant position which remains immune to the application of the competition rules.[7] However, it is the further restriction of free competition and the creating of further barriers to the emerging of residual competition by the 'over-extensive' use of IPRs which is normally held to be objectionable.

In exclusionary abuse cases the main issue normally is whether third party access to the market is impeded. One sees this development not only in the case law on EIFs but also where any hypothetical niche market is being developed within a service, the performance of which has been proclaimed a SGEI. The general issue in those cases invariably is whether third parties will have to be admitted to the (co-)use of the existing infra-structure or public concession. Which undertakings will be allowed to transport gas or electricity through an infra-structure of pipeline grids or electricity cable networks already in existence, and owned by some other undertaking, whether or not that undertaking is active downstream using its own EIF to provide competing

4 Ibid, 75 *et seq* in Chapter D.

5 See Guidance, op cit, n 3, at para 78, and the cases mentioned in the footnotes to that paragraph.

6 Known from the case law of the Court of Justice, *inter alia* in Case 322/81 *Michelin* [1983] ECR 3461.

7 Case 24/67 *Parke Davis v Probel*, [1968] ECR 81.

services itself? Which undertakings may take part in the market for postal services, and for which type of services? Which undertakings will have access to telecoms (glass fibre) cable conduit streets? Which undertakings will be granted the right to publish TV-guides, thereby making use of programming details which might be protected by copyrights and owned by the programme makers or broadcasting companies? Under which circumstances would it be possible for third parties to force a patent owner to grant a licence deemed indispensable for these third parties to commence competing with that owner or to start new activities so far not pursued by the owner of that patent? To what extent will 'cherry-picking' by (emerging) competitors be possible within the wide range of tasks usually granted to undertakings providing SGEIs?

Third Party Access seems to be the name of the game in all of these far from imaginary examples. Therefore, we will first explore the legal developments in the areas of EIFs and SGEIs.

Essential Infra-Structural Facilities (EIFs)

EIFs are infra-structural installations incapable of duplication but indispensable to suppliers of certain services.[8] In this context, one should think of a gas pipeline and electricity wire grids and networks, the rail paths for the running of a train service, large maritime ports, an international airfield, etc.

The EIF doctrine is seen as part of the assessment of market behaviour under Article 82 ECT. In accordance with standing case law of the European Courts and the decisional practice of the Commission, ownership of an EIF creates dominance. Third party access issues come up depending on the manner in which the owners of the EIF defines the thresholds for making use of their infra-structural property to accommodate potential users/service providers. When these access thresholds are objective and non-discriminatory, Article 82 is not likely to come in play. However, most problems arise in those cases where the EIF owner, through its downstream operations, is also the user of the EIF and thus a provider of services on the secondary market where making use of the EIF is indispensable. Practice shows that the downstream operations of the EIF-owner are given priority or a (at least) a more advantageous treatment quite rapidly, thereby placing other users of the same EIF at a distinct competitive disadvantage.[9]

The first example in the Commission's decision practice has been the case of the two competing ferry services using the same maritime harbour of departure (clearly an EIF), one of the undertakings also being the owner of that harbour.[10] The owner of the EIF gave preferential treatment to his own ferry operations. In its decision, the Commission defined this preferential treatment as an abuse of a dominant position within the meaning of Article 82 EC. It is not necessary for the owner of an EIF to be active on

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[8] Commission Decision *re Port of Rødby*, OJ 1994, L55/52; Commission Decision *re British Midland (Zaventem)*, OJ 1995, L216/8.

[9] Discrimination pursuant to Article 82(c) EC may also be an issue, but this will not be dealt with in this contribution

[10] Commission decision re *Port of Rødby*, OJ 1994, L55/52.

an upstream or downstream market in order for discriminatory conduct in relation to upstream or downstream participants to constitute abuse. In *British Midland/Zaventem* the owner of the Brussels-Zaventem airport granted one undertaking, Sabena, quantity rebates on the fees payable for baggage handling that were in practice not available to competing air transport carriers. One of those competing air carriers, British Midland, filed a complaint and, also here, the Commission found an abuse of dominance.[11]

Both cases involve physical infra-structures. In *Magill* following these earlier two cases a similar doctrinal approach was given to EIFs based on copyright and, therefore, it is argued, to a virtual EIF.[12] Although the European Court in its judgment did not use the terminology of 'essential infra-structure', it did apply and endorse the EIF-doctrine developed by the Commission in the cases mentioned earlier by analogy. Unsurprisingly, *Magill* makes reference to earlier case law on the refusal to supply. Both cases were similar in that they dealt with a refusal to grant access (or rendered access difficult) to a market by the owner of some property which was deemed indispensable to a potential entrant of the market concerned. *Zoja* can be relied on since a distributor with a long-standing commercial relationship saw his distribution contract terminated by an undertaking in a dominant position and, consequently, experienced the immediate risk of going out of business.[13] Regardless of whether the refusal of access is concerned with a physical infra-structure or with the denial of access to an essential IPR, the systematic approach should not be different. IPRs have thus become 'virtual' EIFs which may be indispensable for the development of a certain hitherto non existing market. It is merely a variation on the theme of the many occurring market access puzzles, albeit it that for both the refusal to supply and the refusal to grant a licence the European Court has formulated that a number of additional special circumstances should apply for the required copyrights to constitute an abuse of a dominant position. Abuse of dominance will only be found when:

(i) the use of the IPRs (in this case the copyrights) are indispensable for achieving the envisaged objective
(ii) without which it would be impossible to bring on the market the envisaged product (comprehensive weekly TV-guides for all programmes of all British broadcasters)
(iii) such that the refusal to licence would effectively prevent the appearance of the new product
(iv) for which there was a clear consumer demand, and
(v) whereas no objective grounds for the refusal to licence could be identified; all the more so now that it had become clear that the IPR-owner did not have any intention himself to introduce and offer a similar product to the market (probably out of well-understood self interest).

[11] Commission Decision re *British Midland/Zaventem*, OJ 1995, L216/8.

[12] ECJ in the Joined Cases C-241 & 242/91P, *RTE (Magill TV-guides),* [1995] ECR I-743.

[13] ECJ in the Joined Cases 6/73 & 7/73 *Commercial Solvents and Istituto Chemiothrapico Italiano v. Zoja* [1974] ECR 223.

The structure and the build-up of the reasoning of the European Court fits the pattern already established in *Zoja*, even though in that case the facts were about the arbitrary stopping of supplies in a long-standing commercial relationship, whereas in *Magill* the facts centred around a new market entrant requesting access to certain copyrighted programme data. However, third party access should be identified as the common denominator in both cases. The physical and virtual cases are similar in that they deal with a refusal to grant access (or rendered access more difficult) to a market by the owner of some property which was deemed indispensable to a potential entrant of the market concerned.

Shortly after *Magill*, the European Court handed down the *Bronner* judgment,[14] in which the Court repeated almost verbatim the *Magill* criteria. However, it was held to be equally important that in cases where IPR-protection did not play a role and where a case simply relied on a (non-protected) commercial market position achieved by a hard working, efficient and successful undertaking, a way into access to its distribution network could not be forced by a smaller competitor save in very exceptional circumstances. This case dealt with the claim of small newspaper owner Oscar Bronner to 'piggy-back' on the efficient newspaper distribution network of his much larger competitor Mediaprint for the distribution of his own two small newspapers. Arguing that setting up a distribution network of his own would not be economically viable because of the very small numbers of his newspapers sold or subscribed to. 'Tough luck', was the Court's finding. There are no special circumstances that would justify the granting of access to a competing distribution network as long as the setting up of a network of his own - which might maybe come slightly more expensive - remained a possibility. Hence, Mediaprint's distribution network was not held to be indispensable for Bronner's aspirations to enter the market and neither was it held impossible to duplicate.

Special or Exclusive Rights in SGEIs and the Notion of Market Power

The case law dealing with the SGEIs has developed along similar lines. In the first place, the Court has held that undertakings vested with the task to provide *services of general economic interest* within the meaning of Article 86 EC and which for that purpose had been granted special or exclusive rights, frequently would be held to enjoy a dominant position within the meaning of Article 82 EC (in the case of *exclusive* rights) or, at least a position of collective dominance (in case of *special* rights).[15] This second category will be relatively less important in this contribution as in most cases the undertakings which are to be granted special rights will derive such rights from concessions granted by the public authorities as a result of public procurement tenders.

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[14] ECJ in Case C-7/97 *Oscar Bronner v Mediaprint*, [1998] ECR I-7791. It is worth noting that the Bronner case was mentioned also in the Commission's Guidance Notice on abusive exclusionary conduct, op cit, n 1, at para 83.

[15] Although in Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089 the Court made clear that dominance had to be established in each instance and could not be inferred automatically from the fact that the undertaking was public or enjoyed special or exclusive privileges (Cf. in particular recitals 31-38).

Normally, the concession granting authorities will supervise whether the holders of such concessions effectively compete with each other.[16] The situation is more difficult in those cases where the special rights have been granted to a limited number of undertakings as the direct result of the liberalisation of a formerly regulated market and where this limited number of holders of special right concessions is presumed to compete with each other.

An example hereof has been the legal maximum of five telecoms undertakings that could hold (tendered) concessions for the provision of mobile voice telephony in the Netherlands in the early years of this Century. The concession concerned a special right enabling the holders of such a concession to enter the mobile voice telephony market. An undertaking not having such concession, by law, did not have access to the market concerned and could not be active in that field. The Dutch telephony incumbent KPN acquired one of these newly issued concessions. KPN also continued to be the owner of the connection infra-structure needed to make it possible for mobile phones to communicate. In order to solve possible problems of market power and potential abusive thereof in the mobile voice telephony market in the country (e.g. by price squeeze type of behaviour), a special telecoms regulator was created, called OPTA.[17] This regulator is capable of issuing a sort of 'yellow card' to one or more of the concession holders by finding those who hold what is called 'considerable market power' (aanmerkelijke marktmacht). Once a finding of that kind has been made, OPTA can start regulating to some extent the business of the undertaking concerned, with the sole objective of guaranteeing effective competition on a level playing field. As such, a system of *ex ante* control over the market has been created, that *inter alia* is meant to avoid or mitigate the emergence of (collective) market power.

A similar form of *ex ante* control in the Netherlands is now exercised in the liberalised markets for gas and electricity by the *Dte*[18], one of the departments (called Chambers) of the NMa.[19] Therefore, in all three markets SGEIs provide the services required to the market, i.e. the users and the consumers.

Things did not go smoothly in all cases where exclusive or special rights were granted. In *Höfner & Elser v Macrotron*[20] the European Court held that an undertaking providing SGEIs and enjoying a statutory monopoly was dominant within the meaning of Article 82 EC. This dominance might be abused in those cases where the undertaking providing the SGEI effectively hinders third parties in their efforts to supply certain services competing with those (potentially) offered by the entrusted undertaking in a situation in which that undertaking decided not to provide such an aspect of service, or

[16] Cases where apparently this supervision was missing were shown in the judgments of the ECJ in Case 30/87 *Bodson Pompes Funèbres* [1988] ECR 2479 and Case 209/98 *Sydhavnen Sten & Grus* [2000] ECR I-3743.

[17] The so-called *Onafhankelijke Post en Telecommunicatie Autoriteit* (the Independent Post and Telecoms Authority), the creation and the powers whereof are based on the Dutch Telecommunications Act.

[18] *Dienst Toezicht Energie* with tasks and powers laid down in the Gas Act and the Electricity Act.

[19] The national Dutch Competition Authority.

[20] ECJ in Case C-41/90 *Höfner & Elser v Macrotron* [1991] ECR I-1979.

is shown to be incapable of doing so. This will especially be the case when there is market demand for such a type of service. Although the undertaking providing the SGEI operates on the basis of statutory provisions (which in principle have to be complied with), the European Court construes Article 86 EC in such a way that a public authority entrusting a SGEI has to make sure that the entrusted undertakings are fully equipped for their task. Failing this (i.e. not supplying the market with certain services) and in the case where there is an obvious demand from the market (which can be satisfied by other private entrepreneurs) the Member State fails to comply with its Treaty obligations as laid down in Articles 10 and 86 EC when it is to be expected that the entrusted undertaking will abuse its statutory monopoly within the meaning of Article 82 EC by trying to keep these new providers of services off the market. Obviously, the entrusted undertakings are likely to do everything within their means to deny newcomers, capable of providing the services needed, access to their reserved market. Also in *Höfner*, as in *Magill*, additional special conditions have been formulated for the finding of abuse:

(i) the exclusive right granted to the entrusted undertaking includes the services concerned (in *Höfner* these were: head-hunting for leading positions in the commercial market)
(ii) the SGEI is not sufficiently equipped to perform that part of the rights granted to it on an exclusive basis, or is not capable to satisfy all market demand
(iii) whilst the emergence of a private market is rendered impossible as a result of the strict enforcement of the statutory rules, and
(iv) private undertakings have shown their interest to become active in that *niche* of the market and, what is more, would be capable of satisfying the obvious demand for the neglected service.

Again, as in *Magill*, but then only with a different legal background, *Höfner* is concerned with 'third party access'. The case is about impeding the emergence of a market of services for which there is an obvious demand, but which cannot develop as a result of legal obstacles.[21]

The second judgment to be discussed in this context is *Corbeau*.[22] The Belgian entrepreneur Corbeau faced criminal law prosecution for infringing the Belgian Postal Act by setting up a private courier service for 'same day' mail delivery for all law firms in his home-town of Liège. It was established that the incumbent Belgian mail service provider RTT did not offer a comparable service. In line with previous judgments, the European Court held that Corbeau could not be denied the right to enter this market and provide his *niche* service, because the incumbent undertaking did not offer a comparable service and apparently was not capable of starting to do so. *Corbeau* is

[21] This general line of thought was developed by the European Court in a series of judgments in the early 90s of last Century, in each instance with a similar result. Cases to be mentioned include: Case C-260/89 *ERT* [1991] ECR I-2925; Case C-179/90 *Porto di Genova* [1991] ECR I-5889; Joined Cases C-115-117/97 *Brentjens* [1999] ECR I-6025 and Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089.

[22] ECJ in Case C-320/91 *Procureur du Roi v. Corbeau* [1993] ECR I-2533.

particularly important in that the Court held that in the exercise of their entrusted tasks, undertakings providing SGEIs are allowed to apply cross-subsidisation. They were permitted to use revenues derived from economically more viable services to subsidise activities within the package of entrusted tasks which were economically less viable. This ruling implied, however, that 'cherry picking' would not be allowed for potential entrants of a niche market within the context of a larger SGEI package and thus leaving the economically less viable activities to the SGEI. This would lead to a situation of unfair competition *vis-à-vis* the incumbent SGEI which normally has the legal obligation to offer to the market the entire package of services (as defined in their concession). However, for those services not offered by the incumbent itself which would be dissociable from the legal package of services, a competitor would be free to develop a niche market. Any action to impede the emerging of such activity would be held an abuse of the legal monopoly, and therefore an infringement of Article 82 EC.

Moreover, in *Porto di Genova*, it has been pointed out that insufficient or poor use of market opportunities by the legal monopolist may be held to be abusive when a private undertaking is prepared to make use of those opportunities more efficiently, e.g. by investing in modern production equipment to perform the services required more quickly or more cost efficient.[23]

From this and from both *Höfner* and *Corbeau* it can now be concluded that undeveloped market opportunities are open to private market entrants, in potential competition with the incumbents, as long as these opportunities have not been used by the legal monopolist, *i.e.* the entrusted undertaking holding exclusive rights. Any attempt from the side of the incumbent to frustrate the emergence of such new activities would constitute an infringement of Article 86 (by the Member State) in conjunction with Article 82 EC (by the incumbent). Consequently, the legal monopolist has the duty towards the market to avail himself with modern and efficient equipment so as to render the exercise of his tasks (in the general economic interest) as cost efficient as possible.

From the above, it can readily be understood, why in its Guidance Notice on exclusionary conduct the Commission criticises behaviour that does not bring about any efficiencies in the interest of the consumer.[24] Such behaviour is likely to put the objectives of the competition policy, *i.e.* the bringing about of efficient market structures to the benefit of the consumer and, hence, of consumer welfare, in jeopardy.

Competition Law and IPRs

The purpose of this contribution is mainly to see whether the competition law approach towards IPRs has developed along similar lines. The specific substance of IPRs is generally accepted to guarantee some scope for the reward for innovation achieved and to grant the successful innovator a reasonable period of competitive

[23] *Porto di Genova*, op cit, n 21, at 19.

[24] Commission's Guidance, op cit, n 1, para 5.

tranquillity so as to enable him to recoup his investments for the innovative effort. Potential competitors of his would be precluded from using the protected innovation without such licence. In this context, one of the options for the IPR-owner would be to licence his (legally) protected innovation to third parties against payment of a reasonable royalty fee. The opportunity of being awarded patent protection, plant propagating rights, model rights, copyrights and other comparable IPRs often requires large investments to secure innovative progress. Along similar lines, the same might be said of trademarks, copyrights, model rights and the like. Also there, potential large investments (in terms of publicity costs, of actual writing time, of creative efforts) have preceded the innovative and (legally) protected results. Nevertheless, this protection offered is not absolute. In particular, it does not provide immunity to the application of the competition rules

As early as in *Parke Davis* v *Probel*, the Court held that the protection of the IPRs only goes as far as the specific substance of the IPR concerned. Therefore, whilst normal activity to protect this specific substance would not constitute an abuse, behaviour going disproportionately further than the specific substance of the IPR concerned would be considered abuse of the dominant position derived from the legally protected status of the IPR.

A number of abuses were included within this type of infringement of Article 82, that were of less relevance to this contribution. Mention could be made of the obligation to make royalty payments over and beyond the period of legal protection of a patent, or the prohibition to challenge the validity of the patent once a licence agreement had been entered into. More recently, the Commission accused the Anglo-Swedish undertaking AstraZeneca of using a whole plethora of tricks and ruses to extend the legal protection period of its patents for certain medical drugs disproportionately in order to postpone the emergence of (cheaper) generic medical drugs with an equivalent medical treatment effect and purpose once the patent protection would have expired. The Commission has held this to constitute an abuse to the detriment of the consumer and consumer welfare.[25]

For this contribution the issue considered is: are there circumstances in which the holder of an IPR can be obliged to licence others (third parties) to exploit the IPR and would there be additional special circumstances which would render it more likely that such obligation would emerge? Within Article 82, this question may be classified somewhere in between the themes of 'refusal to sell' and 'foreclosure of the market'. In both instances one might argue that potential new entrants of a (niche-)market would be denied access. It is herewith argued that there are three categories of undertakings

[25] Commission Decision *re AstraZeneca* 37.507/F3 of June 15, 2005. A non-confidential version has been published on DG Comp's website on July 19, 2006. Probably because of the great length of the decision (over 200 pages) a short summary was published in the OJ 2006, L332/24 only. At the time of writing of this article, an appeal was pending before the Court of First Instance which hopefully will be decided upon later this year.

that may desire competition to be restored or imposed in the area of the IPR and so for a compulsory licence to be granted:

(i) The applicant of a licence in fact wishes to engage in the same activities as the IPR-owner, and for that reason wants to start competing with the latter;

(ii) The applicant of the licence needs the licence because he wishes to use the technology then becoming available to him to engage in activities not pursued by the IPR-owner. The applicant of the licence wants to enter a niche market or to expand his activities on that market, and for that purpose the licence is indispensable to him;

(iii) The technology protected has *de facto* turned into the market standard. This standard may have been patented. It may also consist of secret know-how. Any third party aspiring to enter the market of that standard faces the difficulty of obtaining the legal (and thus licensed) use of the technology involved. A broad and generous licencing policy on the side of the IPR-owner may stimulate further innovation and in doing so, it may also contribute to the increase of consumer welfare.

Each of these categories will now be considered in turn.

(i) The undertaking wishing to start activities in competition with the IPR-owner using the (protected) technology

In *Volvo* v *Veng*[26], the Court has dealt with this type of aspiration in a very concise and firm manner. Volvo accused Veng of infringing its protected design rights for the body-work of its Volvo cars. Veng defended this claim arguing that by denying the necessary and indispensable licence to use the protected designs for the manufacture of bodywork needed for the repair of damaged Volvo cars, Volvo abused its dominant position. The Court held that the refusal to grant a licence to exploit an IPR is not itself an abuse of a dominant position. This may only be different if additional special circumstances could be identified. These might include, according to the Court, the refusal without an objective reason to grant licences when similar licences are granted to other third parties already, or making the granting of the licence conditional upon the payment of an unreasonably high royalty fee with the direct result that it would be impossible for the licencee to enter the market in an economically viable manner. In this case, Volvo manufactured all bodywork needed for repair purposes themselves and had not licensed any other third party to do the same. On the same day, the Court took the opportunity to specify the notion of additional specific circumstances in another case involving motor cars in a situation where the original manufacturer had stopped manufacturing spare parts for one of its models although many cars of that model were still on the road. In such a case, the Court held it reasonable that a licence should be granted to a third party willing to continue the manufacture of those spare parts.[27]

[26] ECJ in case 238/87 *Volvo v Veng* [1988] ECR 6211

[27] ECJ in case 53/87 *Maxicar v Renault*, [1988] ECR 6039

In a similar vein though some years later, the Commission in remarkably careful wording held in the case of *Lederle-Praxis Biologicals* that:

> 'at the current stage of EC competition law, it is doubtful whether one could impose an obligation upon a dominant firm [...] as a remedy to ensure the maintenance of effective competition in the [...] market, to share its intellectual property rights with third parties to allow them to develop, produce and market the same products [...] which the alleged dominant firm was also seeking to develop, produce and market.'[28]

For that reason, it must be safe to assume that when the IPR-owner on a regular basis is using the specific substance of his innovative creation and refuses to share this substance with would-be potential market entrants, Article 82 is not infringed. Consequently, there is no tension between competition law and policy and the legitimate protection of IPRs. However, if he no longer uses his IPR, legitimate requests for the grant of a licence may arise.

(ii) An undertaking wishing to enter a (niche) market in which the IPR-owner is not active.

This category shows the most similarity with the developments described above relating to the EIFs and the undertakings granted the special or exclusive right to provide SGEIs. There is no judicial authority in relation to IPR although *Maxicar* comes close and may possibly be situated in both the first example as in this second one. For further guidance, we will have to look at other sources to assess what might be permissible in the field of licencing. In the first place reference could be made to the 'field of use' restrictions[29] established in *Maize Seed*[30] and the TTBER.[31] A field of use restriction in a licencing agreement is normally thought to fall within the category of the so-called 'inherent restrictions' which fall outside the scope of the prohibition of Article 81(1) ECT. By analogy, we may have to accept that some form of indication that licences based on a field of use restriction may generally be permissible under Article 81 EC. The positive news would then be that no major problems are to be expected from that point of view.

More problematic might be the assessment under Article 82 EC. Here, one should primarily look for guidance from *Magill* and *Porto di Genova*. For Article 82 to apply, there should be at least the identification of some form of abuse of dominance. It is herewith argued that we might expect the Courts to apply the *Magill* criteria by analogy to any other case in which IPRs would play a role. This would mean that an abuse of dominance is only found if there are specific circumstances beyond a mere refusal to

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[28] Cf. the XXIVth Report on the Competition Policy of the Commission (1994), at p 353.

[29] We should think of a patent with a broad underlying range of technical application possibilities, which then will be licenced for one field of application only.

[30] ECJ in Case 258/78 *Nungesser & Eisele v Commission (Maize Seed)* [1982] ECR 2015.

[31] Cf. in particular Article 4(1)(i) & (ii) in Reg 772/2004, OJ 2004, L123/11.

licence. For a potential applicant of a licence to be entitled to the grant thereof it is suggested that the following criteria are to be met:

(i) without the licence the applicant will not be able to develop, produce or market the product or service involved (i.e. the criterion of indispensability)
(ii) the results achieved by the IPR cannot be duplicated without disproportional efforts
(iii) whilst the IPR-owner is not (or no longer) active in developing, producing or marketing the application in which the applicant is interested
(iv) there appears to be consumer demand for such application.

The judgment in *Porto di Genova* may play a role in this discussion, as in that judgment it was held that a dominant undertaking's refusal to invest in modern production equipment for the benefit of his buyers constituted one of the elements contributing to an abuse of its dominant position. There was no alternative for the buyers as they could not go to another supplier, and for that reason they paid too much for the services that were offered to them by a supplier using technologically outdated equipment. If we are to draw a comparison with that line of thought and the position of the IPR-owner who is by choice leaving one of the possible applications of his IPR unused, the conclusion may be drawn that the buyers, and thus the consumer, are being denied a (new) market opportunity. This may be even more be so in cases where the owner deliberately leaves the new opportunity unused so as to recoup his investments in the earlier technology first, whereas others would be willing to invest in the new market opportunity and there would be demand for such a 'new' offer in the market.

Logically, one should possibly add the *Corbeau* criterion to the four (cumulative) criteria mentioned above. The application involved should be capable of being dissociated with the (field of) applications currently in use by the IPR-owner himself. When that is not the case, we would fall back to the *Volvo* v *Veng* or the *Maxicar* situation and that would leave us with little room to accept abuse of dominance, and consequently, to accept the necessity that there should be a cause for a (compulsory) licence.

Also, an undertaking seeking a (compulsory) IPR-licence should be able to do away with the potential analogy with the *Bronner* case. He should be able to identify additional specific circumstances of such a compelling nature that in all reasonableness it could not be expected for him to try and develop his market ambitions and the possible associated niche market by developing a technology of his own alongside the IPR-protected technology of the IPR-owner. If we look at the puzzle from this end, it may not be very surprising that in *Lederle-Praxis Biologicals* the Commission issued the carefully worded warning that one should not assume the right to obtain a (compulsory) licence too soon. In that situation the applicant for the licence wished to enter in direct competition with the original IPR-owner rather than it being a case of the type presently discussed, where such direct competition is not in issue. A compulsory licence should be an *ultimum remedium* in all circumstances.[32] If ever such an

[32] This *ultimum remedium* should be identified as a 'structural measure' which the Commission could impose to bring an infringement of Article 82 to an end in cases where no other remedy would available to do so. Such

analysis should be needed, it is herewith contended that in any case one should look at the legal developments in the other two legal doctrines discussed above, to wit the legal doctrines in the fields of EIFs and SGEIs.

Therefore, we may conclude that it should be possible in principle to obtain a compulsory licence in specific circumstances, if only to grant the Commission the opportunity of realising one of the most important objectives in competition law, *i.e.* the stimulation of innovation by investment and the ensuing increase of consumer welfare.

(iii) The IPR-protected or secret technology has developed into the de facto market standard

The Commission's general policy towards technological standardisation may be found in its Notice on the applicability of Article 81 to horizontal cooperation agreements.[33] Standardisation agreements include agreements on, 'technical specifications in markets where compatibility and interoperability with other products or systems is essential'.[34] In this Notice it is clearly indicated that the Commission favours agreements dealing with technological standardisation provided that undertakings not party to the agreement are not excluded from using the agreed standard. In that context, it seems to be of less importance that the parties to the agreement together enjoy a large market share. On the contrary, according to the Commission, this might even enhance the effectiveness of the standard chosen.

However, in the context of the assessment of the last criterion of Article 81(3), the Commission points out that when these standards would not be accessible to third parties, this might result in undesirable discriminating or foreclosure effects. There may come a time when the standard shows such a firm hold on the market that it has become *the* factual standard used. Private undertakings having developed such a standard might then be held to enjoy a position of collective dominance. Even then there might not be a problem as long as these standardised norms are applied in as open a manner as possible. Third parties should be granted access to the technology required for the application of the standard on clearly objective and non-discriminating conditions. The Commission's policy in this respect tallies seamlessly with the objective that innovation should be undertaken on as broad a level as possible in order to enhance consumer welfare. Also, it seems to tally with the more economic effects based approach of competition policy in which the strict demarcation between dominance and market power is no longer defined in terms of black and white. Ever since the introduction of Regulation 1/2003 and the group exemption regulations of the 'safe harbour'-type, these notions more or less seem to transform gradually from one into

a structural measure should at all times be applied in a proportional manner. Cf. Article 7(1) of Council Regulation 1/2003, OJ 2003, L1/1.

[33] Cf. Commission Notice, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ 2001, C3/2, paras 159-168.

[34] Ibid, para 159.

the other.[35] Also, within the framework of Article 81(3) and using modern economic reasoning, the Commission monitors whether or not too great a level of market power develops with the direct result that access to such a relevant market might be impeded. In any event, such emerging market power would render the application of a group exemption regulation impossible.[36] Hence, market power exceeding the regulation's market share threshold may also result in the non-applicability of Article 81(3) at the individual level.[37] And then, a still larger market power may be held to constitute a position of dominance and, consequently, may lead to the application of Article 82 ECT.

In the cases *IMS-Health*[38] and *Microsoft,*[39] the factual norm was not the result of cooperation between market players but rather the result of individual innovative efforts and investments. In such a context, the question should be answered whether the Commission's policy, as formulated to deal with collective market power under Article 81(3), may be transposed to the application of Article 82 without difficulty. In particular, aspects of compatibility and interoperability will draw attention. Should undertakings desiring to make use of this factual standard to start some market effort of their own be granted access to this standard; would these be entitled to obtain some form of licence (always under reasonable contractual conditions) if and when they would so wish?[40]

In both cases, it was one undertaking that had developed a norm that then became the *de facto* standard in the market. In *IMS-Health* this was the so-called '1860 brick structure' for the building-up of a catalogue and the systematic reporting of medical drugs. In the *Microsoft* case Windows has been identified as *the* standard for most computer operating systems. Both undertakings were held to be dominant within the meaning of Article 82 EC. Hence, it could be argued that by becoming the market standard their norms constituted an 'essential technological facility' ('ETF') paraphrasing slightly the notion of 'EIF'. It could be said that it would no longer make sense for other market participants to try and develop a technological standard of their own – if only because of the costs involved and the established user preference – as the market would simply not be prepared to accept a new standard. Whatever the case might have been, this was the experience of NDC, which wanted to take on IMS

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35 As is also made clear in the recent Commission Notice on Guidance on the enforcement priorities in applying Article 82 of the Treaty to exclusionary conduct, op cit, n 1.

36 Cf. the existing maximum market share percentages (the so-called market caps) allowed at 30%, 25% and 20% respectively.

37 Cf. also the Commission Guidelines on the application of Article 81(3) ECT, OJ 2004, C101/97, paras 105-116.

38 ECJ in Case C-418/01, [2004] ECR I-5039.

39 CFI in Case T-201/04, [2007] ECR II-3601.

40 My Ghent colleague I Govaere came up with a critical analysis of this case (dating from before the Microsoft judgment) titled: 'Het actuele spanningsveld tussen EG-mededingingsregels en intellectuele eigendomsrechten', in Actualiteiten in het Europese mededingingsrecht, 35th Asser Colloquium on European Law, TMC Asser Press 2006.

Health with a competing catalogue but did not get a foothold on the market. As a result NDC applied for a licence from IMS Health. In *IMS Health*, the European Court held that NDC was entitled to a compulsory licence under reasonable conditions. The mere refusal to grant this licence would constitute an abuse of dominance. The Court ruled that for the granting of a compulsory licence additional specific circumstances had to be put forward which for the applicant would render indispensable the obtaining of such a licence. It is interesting to note that the CFI held that it would suffice that the licence would have some potential or even hypothetical use to the applicant.[41] Also in this case, the Court mentioned that the object of the licence should be to develop new products or services which were not on offer by the IPR-owner in spite of the fact there was evidence of potential consumer demand for that product or service.[42] It was accepted, though, that refusal to grant a licence would be acceptable on objective grounds.[43] Regrettably, the Court did not state any examples of what such grounds might have been. It is herewith contended that such grounds might be the usual ones that give rise to an acceptable refusal to supply, i.e. an unreliable 'business record', reasonable doubt as to whether the contractual counterpart would be capable of fulfilling his financial obligations or the fact that the buyer is known for repeatedly committing breach of contract. From *Microsoft*, it has become clear that the mere protection of an intellectual property right as such will not qualify as an objective justification for the refusal to grant a licence.[44]

In *IMS Health,* the Court deals with the issue of a compulsory licence of a protected IPR, without which the applicant would not have been able to offer its (new) service to the market. In its ruling, the Court not only applied the *Magill* criteria by analogy but also the *Corbeau* criteria, and in doing so the Court appeared to indicate the view that these different doctrines are strongly interrelated, as has been defended in this article. In these circumstances one has, indeed, to think out of the box. Moreover, the Court reasoned entirely in line with what previously had been formulated by the Commission in the standardisation chapter in its Guidelines on Horizontal Cooperation Agreements. Whether we deal with collective market power or with individual dominance, this is only one more step to take. *Il n'y a qu'un pas!* As it now appears, there is uniformity of policy in this respect.

In *Microsoft*, the Court of First Instance rules in similar vein. In that case, the facts were about two different alleged types of abuse of a dominant position; the first being Microsoft's refusal to grant a licence (Article 82(b)) and the second Microsoft's alleged bundling and tying practices of the operating system Windows with the Microsoft media player (Article 82(d)). In this article, only the refusal to licence will be vetted. Windows appears generally to be recognised and accepted as the market standard – and for that reason, and in my wording, as an ETF – and, consequently, Microsoft gets the

41 Case T-201/04, 335.

42 In *IMS Health* the IPR concerned was a copyright.

43 See n 38 above, operative part of the judgment, in part 2.

44 See n 41 above, 690.

honour of being held dominant. Many parties in the market and many consumers will presumably have applauded that qualification. However, the case goes much further than the *IMS Health* case. On the one hand, the case is not concerned with the legally protective umbrella of an IPR (as *Microsoft* was about secret non-patented know-how) and on the other hand, the case was about several applications for a licence which in itself would render more transparent, certain data about the interoperability of Windows with all sorts of other applications for which that operating system was deemed indispensable, regardless of whether or not such applications competed with applications that were on offer by Microsoft itself.[45] Also in this case, the CFI holds that refusal to grant a licence would be capable of constituting abuse of dominance if additional specific circumstances would apply. This means that there can no longer be any misunderstanding about the underlying legal theory in this respect. It is interesting to note that in the *Microsoft* case a variation emerged of the known list of additional specific circumstances, as we knew them from previous case law already:[46]

(i) The refusal to licence should be related to a product or service indispensable for the pursuit of a (different) activity on the same, on a neighbouring or on an adjacent market;
(ii) The refusal to licence has the effect that all effective competition on those markets will be precluded;
(iii) The refusal to licence prevents the emergence of new products for which there is consumer demand on the relevant market.

These specific conditions should merely be seen as variations on the themes already known and defined in *Höfner*, *Magill*, *Corbeau* and *IMS Health*. Both the Commission and the Court of First Instance made explicit reference to these cases. Moreover, it is herewith suggested that *RTL-Telemarketing* should be added to this shortlist,[47] in which the Court took the view that an undertaking providing a SGEI and granted an exclusive right for that purpose cannot reserve for its own commercial purposes a secondary market for which no special or exclusive rights have been granted. This would be all the more so, if the abuse would result in denying access to that secondary market of market players that might be eminently suited to provide that market at a lower cost or with technically better products or services.

Also in the cases in which an EIF played a role, best known to us all, the dispute was about access to a secondary or a neighbouring market. Invariably, these cases were about an owner of an EIF using that structural infrastructure for commercial 'downstream' activities of its own in direct competition with (or even excluding access to) other market players using the same EIF. Therefore, it is concluded that, in European competition law, ETFs are being treated in the same manner as EIFs.

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[45] Ibid, 36-42, explaining the nature of 'interoperability'.

[46] Ibid, 331-332.

[47] ECJ in Case 311/84 *RTL-Telemarketing*, [1985] ECR 3261.

In *Microsoft*, the CFI indicated that, 'the appearance of a new product, as envisaged in *Magill* and *IMS Health*, cannot be seen as the only parameter which determines whether a refusal to licence is capable of causing prejudice to consumers'. It should be borne in mind that in Article 82(b) mention is made not only of 'a limitation of production or markets but also of a limitation of technical development', in other words of innovation to the direct benefit of the consumer.[48] From this wording, it should be concluded that apparently the consumer interest could be prejudiced in an indirect manner as well because either certain products may not be put on the market or as a result of the refusal to licence, these products may not have to cope with the rigour of innovative competition from third parties. According to the CFI, Microsoft had influenced the effective competitive structure of the market to the detriment of potential competitors, because Microsoft had build-up too significant (one should presumably read: dominant) a market share.[49] Keeping the interoperability at an artificially low level amounted to a barrier to entry for potential market entrants and competitors. This reasoning very much sounds like established case law, in which it was held that an undertaking in a dominant position bears special responsibility for the maintaining of effective competitive conditions on the market on which it is dominant and where competition has suffered by the mere presence of the dominant undertaking already.[50]

The CFI then ticks off one by one, and in an accurate manner, these specific circumstances to conclude that, in its analysis of the underlying decision under appeal, the Commission did not commit a 'manifest error of appraisal'[51] in its factual and economic assessment. As a result, all three conditions had been satisfied. In this article, it would not be interesting to deal with the question as to whether the CFI is right or wrong in its factual and economic findings. It is above all the construction of the CFI's reasoning that is of interest to this contribution. This system seems to be logical and consistent not only *in se* but also compared with previous case law. Here, it should be noted that in each case emphasis is laid on the fact that the case should be concerned with 'new' products for which there is potential consumer demand. In *Microsoft*, this criterion seems to be extended to new products that are capable of competing with products of the IPR-owner existing already and which, in doing so, may contribute to the innovation of the market to the consumer's benefit. Therefore, this approach seems to go further than the approach as in *Volvo* v *Veng, Maxicar* and *Lederle-Praxis Biologicals* as previously known and acclaimed. For an ETF, the approach is now by analogy similar to the one for EIFs, and also that finding arguably is a consistent way of looking at things. In a standardised and competitive market structure, this seems to be what it is all about. It is not just about one competitor wishing to compete with another

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48 See n 41 above, 647.

49 Ibid, para 664.

50 See n 6 above, ECJ in Case 322/81 *Michelin* [1983] ECR 3461, in particular in para 57. In *Microsoft*, para 229, reference is being made to this judgment, so that we may safely assume that the CFI's reasoning has been founded *inter alia* on this case.

51 Since the ECJ in case C-204/00P *Aalborg Portland v Commission*, [2004] ECR I-123, this is the established criterion for the appraisal on appeal of Commission decisions.

competitor, who also happens to be an IPR-owner. It is about bringing innovation to the market in a situation in which the dominant IPR-owner either fails to do so spontaneously or decides not to do so in his well-understood self-interest.

Moreover, special mention should be made of the finding of the CFI not wishing to grant (extra) protection to owners of secret know-how not legally protected by an IPR. The fact that a dominant undertaking chooses to protect its technology by (secret) know-how rather than by a patent (bringing about protection by law) constitutes a unilateral business choice. Such business choice should not entitle the owner of the know-how to any higher degree of protection.[52] It should be accepted that this constitutes an indication of a consistent competition law approach of IPRs in general as well.

The Instrument of Commitment Decisions pursuant to Article 9 of Council Regulation 1/2003

As from May 1st 2004, undertakings may offer commitments to the Commission when they are having a discussion with that authority whether or not they are acting in abuse of their alleged dominance. The Commission may but is not obliged to accept such specific commitments for future market behaviour in exchange for bringing the investigations (or even: the procedure once it is initiated) to an early end. These commitments are then transposed into remedies which will be imposed upon the undertaking under investigation in a formal Commission decision. Such a decision can only be taken subject to the specific rules of due process as recently formulated by the CFI in its judgment re *Alrosa*[53] and as such will then form the legal framework within which the future market behaviour of that undertaking is to be monitored. Behavioural infringement of these remedies may attract fines without the Commission having to bring further evidence of breach of Article 82. Hence, the question as to whether the behaviour of the dominant undertaking constituted an abuse, or even whether the undertaking under investigation was dominant in the first place, is of no further relevance once a remedies decision is taken by virtue of Article 9 of Regulation 1/2003.

In the future, and in view of the very 'costly' experience gained by Microsoft as an undertaking held to be dominant and abusing that position,[54] it seems advisable to undertakings that come under an Article 82 investigation to try and solve a case of refusal to licence along the lines and within the procedure of 'commitments' pursuant to Article 9 of Regulation 1/2003 first. This seems to be more efficient from a procedural point of view than what we have seen so far in *Microsoft*. It would be all the more advisable, as this would be nothing new in the Commission's enforcement history. We have seen this type of approach already in the past. Already in the 1970s, and therefore in an era well before the Commitments instrument was formally created,

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[52] See n 41 above, 692-693.

[53] CFI in Case T-170/06 *Alrosa v Commission*, [2007] ECR II-2601.

[54] To which we now may add *Intel* as well, having fetched an all-time record fine of €1.06 bn in May 2009 for monopolising the market of computer processor chips, IP/09/245.

the Commission and IBM reached a written agreement according to which IBM committed itself to handle requests related to interoperability from competitors in a specific and informatively lenient manner in exchange for the Commission stopping its investigation into whether IBM was dominant and, if so, whether IBM's consistent behaviour (refusal to communicate these data to third parties) constituted an abuse under Article 82 (then 86) ECT. In this manner, a formal procedure which had been dragging on for years was ended in an efficient manner. Originally, the case started after the Commission had received a complaint from IBM competitor Memorex, which related to the request by Memorex for IBM's obligatory release of data concerning the operating system of its large computers (main frames) in order to make interoperability possible between those computers and 'peripheral equipment' that could be plugged into these computers and which was to be developed by IBM's competitors such as Memorex. Many of the cases mentioned in this contribution at that time had not been brought before the Courts in Luxemburg as yet. The Commission-IBM settlement should therefore be regarded as an example of legally innovative 'pioneering' on both sides. In 1978, the parties signed an agreement specifying IBM's market behaviour in this respect for a period of four years. In 1982, the life of this agreement was extended for yet another period of four years and its text remained almost unchanged. Then in 1986, IBM refused to agree and sign another extension of the agreement arguing that it could no longer be said to have a dominant position, whatever the arguments, leaving open whether they had enjoyed such a position in the past. IBM had good arguments for this change in willingness to cooperate with the Commission as they had *de facto* lost the hectic battle for the PC market that had raged in the earlier half of the eighties. Networks of PC's were deemed to be a viable and less costly alternative for IBM's large computers and IBM had lost market share rapidly. Consequently, it wanted to devote all efforts and energy getting its market share up instead of being bound by restrictive covenants with the Commission for which presumably there was no longer a legal basis nor a need in the market. The Commission was wise enough not to revive its original investigation against IBM, so IBM's refusal to extend the commitments agreement for a third time brought an end to this long-lasting case of investigation and prosecution of over a decade.[55]

CONCLUDING REMARKS

On the basis of the above analysis some (careful) conclusions might be drawn. In the first place it seems obvious that IPR-owners enjoying a dominant position within the meaning of Article 82 EC bear a special responsibility for the up-keeping of an effective competitive structure on their relevant market as well as on the market(s) that are deemed to be derived from this initial market. This duty exists in the interest of innovative efforts and consumer welfare.

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55 The Commission reports extensively about this case and the factual circumstances described above in its VIIIth, XIIth and XVIth Annual Competition Reports.

Second, it should be remembered that the use of IPRs in accordance with their specific substance is not affected by the European Courts' case law on the relation between IPRs and competition law. Normal use of an IPR is – so to say – immune from competition rules interference. However, 'refusal to licence' should be seen as a *species* of the *genus* 'refusal to supply' and the Commission deals with these two types of refusal in a similar vein.

Third, this leads to the conclusion that refusal to licence by an IPR-owner may only then constitute an abuse of a dominant position within the scope of Article 82 EC when that undertaking (a) can be said to enjoy a dominant position and (b) special circumstances may be shown. For the construction of those circumstances, reference should be made to and guidance should be derived from the parallel doctrines developed by the European Courts in the field of EIFs and SGEIs.

Fourth, it should be concluded that in the case of public enforcement of the competition rules, it is for the Commission and the NCAs to establish on a case-by-case basis whether such specific circumstances prevail. In the case of private enforcement, it is for the national courts to establish whether this would be the case but it would be for the litigating parties to provide the national courts with sufficient evidence.

Fifth, as was made clear in *Microsoft* once again, the mere ownership of an IPR does not constitute sufficient objective justification to refuse a licence, provided other specific circumstances would point in the direction of a compulsory licence. Additional specific circumstances set aside the immunity of an IPR from the competition rules. However, licences may continue to be refused on objective grounds by analogy to the objectively justifiable grounds identified in the case law on refusal to supply.

Sixth and last, the conclusion seems justified that the instrument of 'commitment decisions' pursuant to Article 9 of Council Regulation 1/2003 would be eminently suitable for early resolution of a dispute concerning a refusal to licence between the Commission and an IPR-owner. A 'trench war' between these two parties should be avoided at all costs to encourage early innovation and increased consumer welfare.