

FACULTY OF LAW  
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# **Refusal to License Intellectual Property Rights as Abuse of Dominant Position in EU Competition Law**

## **The Implications of the *Huawei* Judgment**

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## Summary

The act on part of a dominant undertaking to refuse to license its intellectual property rights to a third party illustrates one of several interfaces between EU competition law and national laws regulating intellectual property rights, where the significant legal question is whether a refusal to grant a license constitutes an abusive practice contrary to article 102 TFEU. It is critically important from a policy perspective as well as a legal predictability point of view that the determinative legal framework safeguards both (i) businesses' *ex ante* incentives to invest in innovation and research and development and (ii) free and undistorted competition within the internal market. In a series of cases, the European courts have found that an undertaking occupying a dominant position which refuses to share its intellectual property rights with other market participants may become liable for infringing the EU competition rules. In a jurisprudence that stretches from *Volvo v. Veng* to *Microsoft*, the European courts have established that a dominant undertaking's refusal to license will amount to abusive conduct in 'exceptional circumstances'.

The thesis analyses the evolution of the 'exceptional circumstances' doctrine in the case law of the ECJ and the GC and makes an attempt to clarify the interpretation of the prerequisites of the doctrine. The thesis argues that the ECJ has provided itself with a flexible legal tool by adopting the notion of 'exceptional circumstances' as the relevant legal standard to determine the compatibility of a refusal to license with article 102 TFEU. The doctrine enables the European courts to assess each case on its own merits and take into regard the specific circumstances surrounding the refusal to grant a license. This has to a certain extent been on the expense of providing legal certainty and predictability to industries where the possession of intellectual property rights constitutes an important competitive constraint. Up until the judgment in *IMS Health*, the ECJ had applied and interpreted the 'exceptional circumstances' doctrine in a coherent and consistent manner. The thesis maintains that, as a result of the outcome in *Microsoft*, the GC deviated from settled case law and utilized a legal reasoning that widened the ECJ's original interpretation of the doctrine. By the combination of excluding the 'new product' and 'elimination of competition' requirements and introducing a new 'exceptional circumstance' in *Huawei*, the ECJ increased the ambiguous structure of the 'exceptional circumstances' doctrine. For this reason, the thesis holds that the European courts' judgments in *Microsoft* and *Huawei* contributed to an inconsistent application of the 'exceptional circumstances' doctrine and to a lower degree of legal predictability.

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## Preface

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*Haris Čatović*

## Abbreviations

AG	Advocate General
C.M.L.R.	Common Market Law Review
Commission	European Commission
E.C.L.R.	European Competition Law Review
ECJ or the Court	European Court of Justice
E.C.R.	European Court Reports
E.I.P.R.	European Intellectual Property Review
EU	European Union
European courts	European Court of Justice and General Court
FRAND	Fair, Reasonable and Non-Discriminatory
GC	General Court
IPR(s)	Intellectual Property Right(s)
OJ	Official Journal of the European Union
SEP(s)	Standard-Essential Patent(s)
SSO	Standard-Setting Organization
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

*“Effective protection of copyrights and patents is most important for technological progress. However, we will not tolerate the extension of existing dominance into adjacent markets through the leveraging of market power by anti-competitive means and under the pretext of copyright protection.”*

– Mr. Mario Monti, former Commissioner of the Directorate General for Competition.

# 1. Introduction

## 1.1 Background

The interaction between competition law and intellectual property law has become increasingly significant in the modern global economy and has at the same time caused difficulties for policy-makers to find a functioning balance to reconcile these separate bodies of law. The objective of intellectual property law to provide the entrepreneur with a reward of exclusivity to the subject matter of his innovative efforts may in specific circumstances be contrary to the aim of competition law to preserve open market structures. The frame within which holders of intellectual property rights may legitimately exercise and exploit the fruits of their intellectual endeavour is not solely drawn by the provisions in national intellectual property laws but also by reference to the rules on competition law. Particularly relevant is that article 102 TFEU<sup>1</sup> prohibits dominant undertakings from engaging in commercial conduct that is abusive in relation to their market power. The relationship between these fields of law reaches one of its most sensitive peaks when an undertaking occupying a dominant position refuses to license its intellectual property rights to a third party. This scenario raises delicate policy issues and requires a balancing act of the interests between, on the hand, not damaging or discouraging businesses' *ex ante* incentives to invest in research and development and, on the other, preserving effective and undistorted competition within the borders of the internal market. The question of whether a third party can effectively utilize article 102 TFEU to acquire access to intellectual property rights is particularly important in high-technology markets and within the telecommunication, media and information technology sectors, where innovation is a key factor to operate and compete successfully on the market.

In an attempt to create a legal framework that provides room for manoeuvre, the ECJ introduced an 'exceptional circumstances' doctrine in *Magill*<sup>2</sup> and has developed that jurisprudence through a series of cases involving dominant firms' refusals to license their intellectual property. Adopting a disproportionately interventionistic approach in these cases could interfere with the interest of encouraging progress in innovation, while remaining unresponsive to anti-competitive refusals to license may hamper technical

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<sup>1</sup> Consolidated Version of the Treaty on the Functioning of the European Union, OJ 2012, C 326/49.

<sup>2</sup> Joined Cases C-241/91 P and C-242/91 P, *RTE and ITP v. Commission (Magill)* [1995] E.C.R. I-743.

development and impede the growth of diversity in products and services offered on the market. It is therefore fundamental that the appraisal of the alleged anti-competitive refusal to license is carried out in a manner that safeguards both the interests of individual enterprises to freely dispose their intellectual property and the public interest in preserving free and undistorted competition to the benefit of the society as a whole.

## **1.2 Formulation of Research Questions**

The purpose of the thesis is to illustrate the interaction between the rules on European competition law and intellectual property law in the context of refusal to license and to examine under which specific circumstances a dominant undertaking's refusal to license its intellectual property right(s) could constitute an abuse according to article 102 TFEU. The intention is to clarify the jurisprudence of the EU courts in refusal to license cases and to analyse the prerequisites for establishing a license refusal as prohibited abusive conduct. By analysing the existent case law in this particular area of European competition law, the thesis aims to demonstrate the evolution of the 'exceptional circumstances' doctrine and to illustrate whether the EU judiciary has applied and interpreted this legal framework with consistency.

The following two questions constitute the issues the thesis aims to answer:

- (1). What are the conditions for a refusal to license intellectual property rights to become an abuse of a dominant position according to article 102 TFEU and how have the criteria been interpreted by the EU courts?
  
- (2). Has the case law of the ECJ and GC established a consistent legal framework for determining whether a refusal to license intellectual property rights on part of a dominant undertaking constitutes an abuse within the meaning of article 102 TFEU?

## **1.3 Delimitations**

In order to maintain a defined and coherent analysis of the research questions, several limitations have been made to structure the paper.

Initially, the territorial scope of the thesis is centred on the European regulation of prohibiting abusive practices of dominant position in accordance with article 102 TFEU. Consequently, the on-going debate and solutions articulated in regard to refusal to supply

or license as prohibited practices in individual Member States or other jurisdictions, primarily in American antitrust law, are left out. There has been a voluminous (policy) debate among legal scholars and practitioners on both sides of the Atlantic on how a dominant undertaking's refusal to license its intellectual property right(s) should be treated under the rules of competition law.<sup>3</sup> While a comparative analysis with American antitrust law in this matter would portray important policy divergences between the two jurisdictions, the exclusion is motivated by reason of space limitations and to preserve an intelligible analysis of the applicable EU law.

In regard to the substantive scope, the thesis examines an undertaking's exercise and exploitation of its intellectual property rights in relation to refusal to supply or license situations, and does therefore not cover any other abusive practices involving intellectual property, such as bundling, tying and excessive or predatory pricing. In this context, when reviewing the *Microsoft*<sup>4</sup> case, solely the aspects involving Microsoft's refusal to license its copyright protected technology for computer operating systems are considered. Consequently, the tying and bundling issues raised in the case are entirely excluded from this thesis. The thesis does also include the ruling in *Bronner*<sup>5</sup> when presenting the evolution of the 'exceptional circumstances' doctrine. Although the case in *Bronner* concerned the refusal to grant access to physical property, the judgment is frequently referred to by the ECJ in cases involving refusal to license intellectual property rights and provides valuable assistance in interpreting the prerequisites that form part of the 'exceptional circumstances' doctrine.<sup>6</sup> Another delimitation of the thesis is that it focuses entirely on one of the five elements of article 102 TFEU, namely the criterion of the existence of abusive conduct. Therefore, the thesis resists making an attempt to examine

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<sup>3</sup> Hovenkamp, Janis & Lemley, *Unilateral Refusals to License*, *Journal of Competition Law and Economics*, 2006; Geradin, *Limiting the Scope of Article 82 EC: What Can the EU Learn From the U.S. Supreme Court's Judgement in Trinko in the Wake of Microsoft, IMS, and Deutsche Telekom?*, C.M.L.R., 2004; Temple Lang, *Mandating Access: The Principles and the Problems in Intellectual Property and Competition Policy*, *European Business Law Review*, 2004.

<sup>4</sup> Case T-201/04, *Microsoft v. Commission (Microsoft)* [2007] E.C.R. II-3601.

<sup>5</sup> Case C-7/97, *Bronner* [1998] E.C.R. I-7791.

<sup>6</sup> Case C-418/01, *IMS Health* [2004] E.C.R. I-5039, para. 28 and 40, where the ECJ explicitly referred to its findings in *Bronner*. See also Derclaye, *Abuses of Dominant Position and Intellectual Property Rights: A Suggestion to Reconcile the Community Courts Case Law*, *World Competition*, 2003, p. 687; Byrne, *Compulsory Licensing of IP Rights: Has EC Competition Law Reached a Clear and Rational Analysis Following the IMS Judgment and the Microsoft Decision?*, *Journal of Intellectual Property Law & Practice*, 2007, p. 326; Venit, *Article 82 EC: Exceptional Circumstances: The IP/Antitrust Interface After IMS Health*, *European Competition Law Annual*, 2005, p. 611; Kanter, *IP and Compulsory Licensing on Both Sides of the Atlantic – An Appropriate Antitrust Remedy or a Cutback on Innovation?*, E.C.L.R., 2006, p. 355; Angelov, *The 'Exceptional Circumstances' Test: Implications for FRAND Commitments from the Essential Facilities Doctrine under Article 102 TFEU*, *European Competition Journal*, 2014, p. 47.

the remaining requirements necessary for finding an infringement of the article, for instance the determination of dominant position and effect on trade between Member States. Furthermore, the regulation in article 101 TFEU concerning agreements or concerted practices between undertakings whereby the parties gather or share technology with each other is also beyond the scope of the thesis.

## 1.4 Method and Materials

An essential starting point in determining the relevant method and the necessary materials is the field of law within which the subject of the thesis falls under and the legal issues that are tackled by the thesis. This paper discusses the European Union law on competition and is, accordingly, based on EU legal reasoning and the sources of law that are commonly used to understand the significance of EU law.

The methodology utilized in this paper is based on the traditional legal dogmatic method and the source of law doctrine. While the opinions of legal scholars on what the legal dogmatic method actually implies remain divided, a generally accepted view is that the method is utilized to interpret and systematically present the currently applicable law (*de lege lata*).<sup>7</sup> According to the (Swedish) source of law doctrine, the instruments available for identifying the current state of the law are (in hierarchal order) legislation, preparatory work, case law and doctrine.<sup>8</sup> When analysing the current state of the law, it is of particular importance that the sources of law are used in such a way that their internal hierarchy is maintained. Since the EU legal order is observed as an autonomous and a coherent normative system, applying the traditional legal dogmatic method is appropriate.<sup>9</sup>

The hierarchy of norms in EU law is multidimensional and consists of primary law, secondary law, general legal principles as well as non-binding normative documents.<sup>10</sup> In addition to Union primary- and secondary law, the case law of the European Union courts is a central source of law and plays an integral part in interpreting the often general and vague terminology of the Treaties and secondary law. In understanding the case law from the European courts, account has to be taken to, firstly, the various techniques of interpretation that the courts utilize when dealing with a case. The ECJ does not

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<sup>7</sup> Peczenik, *Juridikens Metodproblem: Rättskällelära och Lagtolkning*, 1980, p. 9-10.

<sup>8</sup> Lehrberg, *Praktisk Juridisk Metod*, 2015, p. 39.

<sup>9</sup> Bernitz & Kjellgren, *Europarättens Grunder*, 2010, p. 36.

<sup>10</sup> Hettne & Otken Eriksson, *EU-rättslig Metod*, 2011, p. 40-44.

exclusively interpret a provision strictly by its wording (literal interpretation),<sup>11</sup> but attempts to explain the meaning of the relevant legal rule by ascertaining its purpose(s) (teleological interpretation) and with regard to the broader context in which the rule exists (systematic-contextual interpretation).<sup>12</sup> The Court's heavy reliance on a contextual and teleological legal reasoning has contributed to an integration-friendly and dynamic interpretation of EU law, which has simultaneously been accompanied by criticism accusing the Court for being far too interventionistic and occupying an excessively law-making role (judicial activism).<sup>13</sup> Secondly, a ruling should not solely be read in isolation, but rather be observed in the light of and in connection with previous and latter judgments. Even if the ECJ is not formally bound by its previous judgments, the Court relies substantially on its earlier case law and anteriorly established rules and principles are further developed in subsequent rulings.<sup>14</sup>

Unlike in the Swedish legal tradition, which attaches particular importance to preparatory work, they have limited legal significance in the EU legal order. The European legislative process consists to a great extent of conflicting interests, political negotiations and compromises, which makes it more complicated to distinguish the intentions of the European legislature rather than the national one.<sup>15</sup> Despite the reserved use of preparatory work in EU legal reasoning, the recitals and preambles of a regulation or directive may address the objectives of the legislation and provide guidance on how certain articles are intended to be applied by the Community courts. In addition, guidelines, notices, discussion papers as well as other official documents issued by EU-institutions, primarily the Commission, are useful in understanding the intentions of the European legislature. While the validity of these legally non-binding documents (*soft law*) as a source of law is not entirely explicit, their importance has gradually increased over

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<sup>11</sup> Lenaerts & Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, Columbia Journal of European Law, 2004, p. 6-8.

<sup>12</sup> Neergaard, Nielsen & Roseberry, *European Legal Method – Paradoxes and Revitalisation*, 2011, p. 108-113; Maduro, *Interpreting European Law – Judicial Adjudication in a Context of Constitutional Context*, Working Paper IE Law School WPLS08-02, 05-02-2008, p. 3-7. See also Cases C-294/83, *Les Verts v. Parliament* [1986] E.C.R. 1357, para. 25; Case C-283/81, *CILFIT* [1982] E.C.R. 3415, para. 20, where the ECJ held that "[...] every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof [...]."

<sup>13</sup> Bernitz & Kjellgren, p. 35-36. See also Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking*, 1986. However, compare with Maduro, p. 5-8.

<sup>14</sup> Hettne & Otken Eriksson, p. 37 and 50.

<sup>15</sup> *Ibid.*, p. 114-115.

the past years.<sup>16</sup> Whereas the European Courts are not legally bound by the guidelines, notices or other official documents enacted by the Commission, they “may form an useful point of reference”<sup>17</sup> and constitute an interpretative framework which may not depart from the provisions of the Treaties nor be in conflict with or modify secondary law or the case law of the European Courts.<sup>18</sup> According to the ECJ, the adoption of these soft law instruments by the Commission imposes certain obligations on the manner in which it may act (rules of practice) and constrains the Commission’s exercise of its discretion of powers conferred on it by the Treaties.<sup>19</sup>

The legal foundation of the thesis is EU primary law and in particular article 102 TFEU, but since the wording of the article is rather ambiguous and requires more precision, case law from the ECJ and GC and the decisional practice of the Commission are of fundamental importance in explaining how the article has been interpreted in concrete and practical situations. The appraisal of a license refusal as an abusive conduct has been largely defined and influenced by the ECJ and the GC in a series of cases. The Commission’s authority and dynamism in enforcing the competition rules should not be underestimated, as their decisions in individual cases, publication of guidelines, notices and other communications provide valuable guidance on how it interprets the competition rules. Furthermore, doctrine and articles written by various legal academics and practitioners as well as opinions by Advocate Generals<sup>20</sup> form an essential part of the paper and ensure that different opinions on the legal issues are represented.

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<sup>16</sup> Ibid., p. 46-48. See also Korling & Zamboni, *Juridisk Metodlära*, 2013, p. 127-128; Jones & Sufrin, *EU Competition Law: Text, Cases, and Materials*, 2014, p. 118; Sevón, *Rättskällor och Lagtolkning i EG-domstolen*, Festskrift till Edward Andersson, 2003, p. 338.

<sup>17</sup> Case C-310/99, *Italy v. Commission* [2002] E.C.R. I-2289, para. 52.

<sup>18</sup> Case T-114/02, *BaByliss v. Commission* [2003] E.C.R. II-1279, para. 143; Case C-309/94, *Nissan France and Others* [1996] E.C.R. I-0677, para. 22; Joined Cases C-189/02 P, C-202/02 P, C-208/02 P and C-213/02 P, *Dansk Rørindustri and Others v. Commission* [2005] E.C.R. I-5425, para. 252.

<sup>19</sup> Case C-226/11, *Expedia*, 13 December 2012, para. 28; Case C-51/92 P, *Hercules Chemicals v. Commission* [1999] E.C.R. I-4235. See also Cosma & Whish, *Soft Law in the Field of EU Competition Policy*, European Business Law Review, 2003, p. 43; Hofmann, *Negotiated and Non-Negotiated Administrative Rule-Making: The Example of EC Competition Policy*, C.M.L.R., 2006, p. 159-162.

<sup>20</sup> Hettne & Otken Eriksson, p. 116-120.

## 2. The Relationship Between EU Competition Law and Intellectual Property Rights

### 2.1 Complementary or Incompatible Objectives?

The underlying rationale of granting intellectual property rights is the stimulation of innovation and providing exclusive protection for the innovator's innovative achievements.<sup>21</sup> Correspondingly, one of the principal aims of intellectual property legislation is to provide pioneers a reward for their innovative efforts by offering rights ascribing exclusivity to the subject matter of their intellectual endeavour.<sup>22</sup> The various intellectual property regimes assign protection against third parties from copying or commercially exploiting the protected subject matter without the consent of the right-holder. It would undermine the willingness of businesses and other actors from investing resources in developing new technologies or crafting new designs if they knew that others could reap the benefits of their work without receiving remuneration in exchange.<sup>23</sup> Therefore, it can be presumed that the two main mechanisms fulfilled by intellectual property protection are (i) the prevention of third parties free-riding on the innovator's investments and (ii) encouraging 'competition by substitution' rather than 'competition by imitation'.<sup>24</sup>

The objectives pursued by EU competition policy have to be understood in the light of the competition rules' role and function within the EU-project. As is embedded in article 3(3) TEU,<sup>25</sup> one of the pillars of the EU is the establishment of an integrated internal market for the free movement of workers, goods, services and capital. Consequently, one of the main objectives promoted by EU competition policy is the integration of a common market within the Union.<sup>26</sup> One of the principal concerns of the EU has been that private actors may re-create market barriers that were previously devised by protectionist state measures such as quotas, tariffs or other import restrictions.<sup>27</sup> The ECJ has repeatedly maintained the crucial nature of the competition provisions in

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<sup>21</sup> Kwok, *A New Approach to Resolving Refusal to License Intellectual Property Rights Disputes*, World Competition, 2011, p. 262-263.

<sup>22</sup> Anderman, *The Interface Between Intellectual Property Rights and Competition Policy*, 2007, p. 37.

<sup>23</sup> Peeperkorn, *IP Licenses and Competition Rules: Striking the Right Balance*, World Competition, 2003, p. 527.

<sup>24</sup> Käseberg, *Intellectual Property, Antitrust and Cumulative Innovation in the EU and the US*, 2012, p. 47; Anderman & Ezrachi, *Intellectual Property and Competition Law: New Frontiers*, 2011, p. 4.

<sup>25</sup> Consolidated Version of the Treaty on European Union, OJ 2012, C 326/13.

<sup>26</sup> Monti, *EC Competition Law*, 2007, p. 20.

<sup>27</sup> *Ibid.*, p. 39.

accomplishing and preserving a functioning single market and combating anti-competitive behaviour that partitions the internal market into individually disintegrated territories.<sup>28</sup> Similarly, it can be assumed that EU competition law plays both a negative and a positive part in the EU machinery: on the one hand, it has been assigned to ward off measures that attempt to isolate domestic markets from each other, while on the other, it has an affirmative role by stimulating cross border trade and forming a level playing field for firms.<sup>29</sup> In this context, a second legislative goal of competition law is to establish and maintain competitive market structures.<sup>30</sup> This is interrelated with providing smaller and medium-sized firms access to market entry and ensuring that markets are not foreclosed by unilateral practices by firms holding a dominant position or by undertakings that agree on implementing a common strategy to restrict or frustrate the appearance of new market participants.<sup>31</sup> Particularly in relation to market dominance, it is assumed that undertakings with (substantial) market power are able to alter the structures of the market and therefore carry a ‘special responsibility’ not to implement measures that are injurious to the competitive growth of the market or to impose limitations on the ‘freedom of manoeuvre’ of other market players.<sup>32</sup> Herein also lies an aspect of preserving ‘fairness’ within the market structure, namely that smaller players are not excluded or driven out from the market due to disproportionate or discriminatory methods or excessive force exercised by dominant undertakings.<sup>33</sup> It is argued that this structural objective of competition policy intends to create an unrestrained interaction of the competitive forces existing on the market, which in turn advances technical and entrepreneurial progress, increases product quality and generates a higher degree of product differentiation, thus enhancing consumer welfare.<sup>34</sup> While consumer welfare has earned widespread recognition among legal scholars<sup>35</sup> and the Commission<sup>36</sup> as an

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<sup>28</sup> Case C-126/97, *Eco Swiss* [1999] E.C.R. I-3055, para. 36; Case C-453/99, *Courage and Crehan* [2001] E.C.R. I-6297, para. 20.

<sup>29</sup> Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches*, 2012, p. 53.

<sup>30</sup> Hildebrand, *The Role of Economic Analysis in the EC Competition Rules*, 2009, p. 99. See also the statements of the ECJ in the following rulings: Case C-6/72, *Europemballage Corporation and Continental Can Company v. Commission (Continental Can)* [1973] E.C.R. 215, para. 12; Case C-501/06 P, *GlaxoSmithKline Services Unlimited and Others v. Commission and Others* [2009] E.C.R. I-9291, para. 63.

<sup>31</sup> Ezrachi, *Article 82 EC: Reflections on its Recent Evolution*, 2009, p. 130.

<sup>32</sup> Akman, p. 51-52.

<sup>33</sup> Anderman & Schmidt, *EU Competition Law and Intellectual Property Rights: The Regulation of Innovation*, 2011, p. 25-26.

<sup>34</sup> Jones & Sufrin, p. 16-17; Hildebrand, p. 99.

<sup>35</sup> Lianos & Dreyfuss, *New Challenges in the Intersection of Intellectual Property Rights with Competition Law: A View From Europe and the United States*, CLES Working Paper Series, 2013, p. 38; Nazzini, *The Foundations of European Union Competition Law: The Objectives and Principles of Article 102*, 2011, p. 118-119; Anderman, p. 37;

objective of competition law in itself, its perception in the eyes of the European courts tends to be more diversified. The ECJ has affirmed in its judicial practice that the competition rules are designed not only for the purpose of protecting the interests of individual competitors or consumers, but also to safeguard the structure of the market and competition as such.<sup>37</sup> In *Hoechst*, the ECJ utilized a similar line of reasoning by asserting that the EU competition rules do not only target practices causing damage to consumers directly, but rather that their function is to prevent competition from being distorted to the detriment of public interest and individual undertakings and consumers.<sup>38</sup> These statements from the Court appear to indicate that the objective of protecting the competitive structure has a broader dimension that encompasses a public interest, namely the deterrence of unilateral or coordinated practices by undertakings to distort competitive market structures and competition as such.<sup>39</sup> Although the Commission is setting a consumer standard to its enforcement priorities, the European courts seem to consider the consumer interest only as one factor in the algorithm.

The exclusive rights that are conferred on a right-holder upon the grant of the intellectual property right are occasionally regarded as inherently irreconcilable with competition policy.<sup>40</sup> The exclusivity to the subject matter of the intellectual property provides the right-holder with time-limited economic rights to control the exploitation of his creations and to exclude third parties using the invention as part of their commercial strategy.<sup>41</sup> Such restrictions may have foreclosing effects on competition on innovation, technology and product markets.<sup>42</sup> Correspondingly, it has been maintained that utilizing competition provisions in a far-reaching interventionistic manner and as a corrective device against (anti-competitive) commercial exploitation of intellectual property rights has deterrent effects on businesses' *ex ante* incentives to innovate and invest in research

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Kjølbye, *Article 82 EC as Remedy to Patent System Imperfections: Fighting Fire with Fire?*, World Competition, 2009, p. 163.

<sup>36</sup> Guidance on the Commission's Enforcement Priorities in Applying Article 82 [now Article 102 TFEU] of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, OJ 2009, C 45/2, para. 5 (hereinafter referred to as the "Guidance Paper"); DG Competition Discussion Paper on the Application of Article 82 [now Article 102 TFEU] of the Treaty to Exclusionary Abuses, 2005, para. 54 (hereinafter referred to as the "Discussion Paper").

<sup>37</sup> Case C-8/08, *T-Mobile Netherlands and Others* [2009] E.C.R. I-4529, para. 38; Case C-68/12, *Slovenská sporiteľňa v. Protimonopolný úrad Slovenskej republiky*, 7 February 2013, para. 63.

<sup>38</sup> Joined Cases C-46/87 and C-227/88, *Hoechst v. Commission* [1989] E.C.R. 2859, para. 25.

<sup>39</sup> Compare with Case C-52/09, *TeliaSonera Sverige* [2011] E.C.R. I-527, para. 22, where the ECJ refers to public interest as one of the protected interests of the competition rules.

<sup>40</sup> Turner, *Intellectual Property and EU Competition Law*, 2010, p. 3.

<sup>41</sup> Kwok, p. 262.

<sup>42</sup> Käseberg, p. 12.

and development.<sup>43</sup> However, on a principle level both bodies of law constitute complementary components as part of a modern industrial policy and promote technical progress and economic growth in the form of optimum prices and quality of goods and services to the benefit of society and consumers.<sup>44</sup> Intellectual property law reaches this end-objective by restricting the availability of intellectual property during a specific time period as a means of encouraging innovation and investments in developing innovative products and new technology.<sup>45</sup> Thus, intellectual property law constitutes an incitement for producing new competitors on existing markets and stimulates the creation of substitutable products that accelerate completely new markets.<sup>46</sup> In a similar manner, competition law attempts to protect competitive market structures as a driving force for innovation by maintaining access to markets and deterring measures that foreclose market entrance.<sup>47</sup> These principles and considerations are diligently highlighted by Cornish:

“It can certainly be argued that this fencing off of intangible subject matter fulfils an economic function equivalent to that of ownership of physical property, because otherwise the incentive to optimise the value of the information will be impaired or destroyed. Those who would be innovators will wait instead to be imitators and the dynamic processes which would have generated new ideas will disappear; in the end there will be little or nothing different to imitate.”<sup>48</sup>

At first glance it appears that intellectual property law and competition law have conflicting effects: while the grant of an intellectual property right confers a legal monopoly on the inventor and exclusive rights to restrict third parties from using the subject matter of the innovation, competition law prohibits, among other practices, abusive exercises of market power and arbitrary exclusion of competitors.<sup>49</sup> An arbitrary exploitation of the bundle of exclusive rights that are incorporated in an intellectual

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<sup>43</sup> Ibid., p. 6.

<sup>44</sup> Arena, Bergmann & Himes, *Two Bodies of Law Separated by a Common Mission: Unilateral Conduct by Dominant Firms at the IP/Antitrust Intersection in the EU and the US*, *European Competition Journal*, 2013, p. 623.

<sup>45</sup> Ezrachi & Maggolino, *European Competition Law, Compulsory Licensing, and Innovation*, *Journal of Competition Law & Economics*, 2012, p. 596-597.

<sup>46</sup> Anderman, p. 38.

<sup>47</sup> Peeperkorn, p. 528.

<sup>48</sup> Cornish, Llewelyn & Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 2013, p. 38.

<sup>49</sup> Dolmans, O'Donoghue & Loewenthal, *Are Article 82 EC and Intellectual Property Interoperable? The State of the Law Pending the Judgment in Microsoft v. Commission*, *Competition Policy International*, 2007, p. 110.

property right may result in increased monopolistic behaviour and jeopardize or disrupt the competitive structure of a market. However, there seems to be a general acceptance that the statutory monopoly that comes with an intellectual property right does not automatically confer a dominant position in the sense that article 102 TFEU has been interpreted by the EU courts and the Commission.<sup>50</sup> While it is acknowledged that an excessively heavy regulatory burden on the exercise of intellectual property rights may have disincentive effects on entrepreneurs, EU competition law does make a reservation to constrain the free exercise of intellectual property rights and intervene in certain cases where a right-holder's exploitation of his exclusive rights (*inter alia*) forecloses competitors, prevents or blocks cumulative follow-on innovation or otherwise is arbitrary or anti-competitive. The assessment of striking a balance between the negative effects of reducing businesses' *ex ante* incentives to innovate and the *ex post* inefficiencies from abusive exercise of market dominance calls for a careful balancing act and a case-by-case appraisal.<sup>51</sup>

## 2.2 Intellectual Property Rights and the 'New Economy'

The 'new economy' is an expression comprising the telecommunications, media and information technology sectors, as well as high technology industries such as computer software and hardware, biotechnology and Internet-based businesses.<sup>52</sup> These markets are characterized by very rapid innovation and technological change, reliance on and exploitation of intellectual property rights, interoperability between services and platforms as well as a high degree of technological complexity.<sup>53</sup> Many new economy industries produce markets that generate 'network effects' – that is, the products, platforms or services become more valuable and attractive to each individual user if more people use them.<sup>54</sup> Once a network increases in the number of users, the market may 'tip'

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<sup>50</sup> Anderman & Schmidt, p. 58-59; Ritter, *Refusal to Deal and "Essential Facilities": Does Intellectual Property Require Special Deference Compared to Tangible Property?*, *World Competition*, 2005, p. 292-293; Whish & Bailey, *Competition Law*, 2015, p. 840.

<sup>51</sup> Ahlborn, Evans & Padilla, *The Logic and Limits of the "Exceptional Circumstances Test" in Magill and IMS Health*, *Fordham International Law Journal*, 2004, p. 1110-1111.

<sup>52</sup> Jones & Sufirin, p. 54. See also the Commission's Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation, COM(97)623, December 1997.

<sup>53</sup> Messina, *Article 82 and the New Economy: Need for Modernisation?*, *The Competition Law Review*, 2006, p. 74-75.

<sup>54</sup> Ahlborn, *Competition Policy in the New Economy: Is the European Competition Law Up to the Challenge?*, *E.C.L.R.*, 2001, p. 159.

towards that network and it could ultimately develop into a *de facto* standard.<sup>55</sup> That is the reason why it is said that competition between undertakings in the new economy is *for* rather than *in* the market (this often referred to as ‘dynamic competition’).<sup>56</sup> The firm possessing the network may be assisted by the intentions of manufacturers of complementary products, who will want to design products (e.g. applications) that are compatible with the standard network. More costumers will be attracted to start utilizing the network due to the interoperability and functionality with other products and its popularity amongst other users.<sup>57</sup> The prime illustration of this effect is the case in *Microsoft*.<sup>58</sup> In addition, these markets display a distinctive set of characteristics that distinguish them from traditional industrial sectors, particularly consumer lock-in, network externalities, economics of scale and high rates of innovation.<sup>59</sup>

New economy sectors cause particular problems for competition law, for instance, competition between firms is not so much on price as on innovation and the conventional way of defining relevant (product) markets and establishing dominance may not properly reflect the market and its structure.<sup>60</sup> It is therefore of particular importance that the application of EU competition law takes into account the special attributes of the contemporary economy industries.<sup>61</sup>

The speedy development within the new economy sectors raise competition concerns that the competition authorities have not been dealing with in the past. The risks from a competition law point of view are associated with the possibility that individual market leaders may abuse their market power inherent in the industrial standards protected by intellectual property rights.<sup>62</sup> The commercial strategies of proprietors to industry standards reinforced by intellectual property rights can take the form of vertical foreclosure by exclusive contracts, tying or bundling of products and refusals to deal or license or any other means by which the right-holder may leverage its dominance on an upstream market into a downstream or neighbouring market. The risks that are entailed by these practices, especially in the vertical foreclosure scenario but also in situations involving refusal to license, are (a) that the process of cumulative follow-on innovation is

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<sup>55</sup> Jones & Sufrin, p. 362.

<sup>56</sup> Ahlborn, 160; Anderman, p. 10.

<sup>57</sup> Jones & Sufrin, p. 362.

<sup>58</sup> Case T-201/04, *Microsoft v. Commission (Microsoft)* [2007] E.C.R. II-3601. The circumstances of and outcome in the *Microsoft* case will be analysed and discussed in the subsequent chapters of this thesis.

<sup>59</sup> Messina, p. 75.

<sup>60</sup> Jones & Sufrin, p. 55.

<sup>61</sup> Ahlborn, p. 156.

<sup>62</sup> Anderman, p. 9.

hampered and restricted to the research and development of the owner of the upstream standard and (b) that the network effects of an industrial standard could constitute an entry barrier for prospective innovators, which in turn can result in technologically inferior products taking over markets while superior products are left on the drawing table.<sup>63</sup> However, it can also be argued that market frontrunners in new economy industries are not automatically occupying a dominant position just because it is high on demand.<sup>64</sup> As was mentioned earlier, competition on these markets is defined by virtue of the firms' innovative products and services. Firms invest heavily on continuously introducing superior innovations and thereby superseding the previous market leader.<sup>65</sup> Since the market shares in new economy markets are under permanent threat from innovating companies, monopolies or dominant positions in these sectors are regarded as temporary and fragile.<sup>66</sup> Consumers will be less dependent on a specific firm's products since they will quickly be able to find substitutable commodities and have low costs to make the switch.<sup>67</sup> To conclude, the argument is thus that in dynamically competitive markets in the new economy, the *immediate* constraints facing an undertaking are far less important than the *potential* competition.<sup>68</sup>

### **2.3 The Evolution and Renunciation of Distinguishing Between the Existence and Exercise of Intellectual Property Rights and the 'Specific Subject Matter'**

As has been indicated above, the interaction between intellectual property rights and competition law has been a strained one for EU policymakers. Historically, the legal foundation for reconciling the EU rules on competition and free movement of goods with national intellectual property laws<sup>69</sup> has been enshrined in article 345 TFEU. Pursuant to that provision, the Treaties shall not prejudice the rules in Member States governing the

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<sup>63</sup> Ibid., p. 10.

<sup>64</sup> Govaere & Ullrich, *Intellectual Property, Market Power and the Public Interest*, 2008, p. 14-17.

<sup>65</sup> Ahlborn, p. 159.

<sup>66</sup> Ibid., p. 160; Jones & Sufrin, p. 361; Anderman, *EC Competition Law and Intellectual Property Rights in the New Economy*, Antitrust Bulletin, 2002, p. 286.

<sup>67</sup> Messina, p. 78.

<sup>68</sup> Ahlborn, Denicolò, Geradin, & Padilla, *DG Comp's Discussion Paper on Article 82: Implications of the Proposed Framework and Antitrust Rules for Dynamically Competitive Industries*, p. 25, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=894466](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=894466); Jones & Sufrin, p. 361.

<sup>69</sup> The EU has developed a harmonization process within the trademark spectra through the adoption of Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to Approximate the Laws of the Member States relating to Trade Marks, OJ 2008, L 299/25, and Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community Trade Mark, OJ 2009, L 78/1.

system of property ownership. EU law therefore recognizes the authorisation and ownership of, *inter alia*, intellectual property rights in national legislation. In the case law of the EU courts, primarily in the free movement context and then subsequently in the application of the competition provisions of the Treaty, a distinction was drawn between the *existence* and *exercise* of an intellectual property right.<sup>70</sup> According to that doctrine, the existence (or grant) of an intellectual property right remained unaffected by the provisions of the EU Treaties, while the exercise of such rights fell within the scrutiny of the competition and free movement rules.<sup>71</sup> This solution was introduced by the ECJ in the seminal judgment of *Consten & Grundig*.<sup>72</sup> In the case, a trademark was used to reinforce an exclusive distribution agreement between Grundig (a German manufacturer) and Consten (a French distributor). As part of the agreement, Grundig undertook to block any parallel import into the French market, thus giving Consten an absolute territorial protection in France. For the purposes of the parties' distribution agreement, Consten was permitted to register the Grundig trademark in France. When it was discovered that another French distributor (UNEF) had purchased Grundig products from German traders and exported them to French retailers at more favourable prices than Consten, Consten subsequently brought an action against UNEF for infringement of the Grundig trademark. The ECJ stated that the exclusive distribution agreement concluded by Consten and Grundig was caught by the prohibition in article 101 TFEU. At the same time, the Court was careful to ensure that the enforcement of article 101 TFEU would not interfere with the grant of intellectual property rights in the Member States. However, the ECJ emphasized that the application of the prohibition limits the exercise of the exclusive rights to the extent necessary to give effect to article 101 TFEU. Correspondingly, the Court found that article 345 TFEU and the rules on free movement "do not exclude any influence whatever of Community law on the exercise of national industrial property rights". The conclusions drawn by the ECJ in *Consten & Grundig* were reaffirmed in the subsequent case *Parke, Davis v. Probel*,<sup>73</sup> where the ECJ in a similar manner reiterated that while the existence of the rights granted by a Member State to the holder of a patent is not affected by the prohibitions contained in articles 101 and 102

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<sup>70</sup> Faull & Nikpay, *The EU Law of Competition*, 2014, p. 1447.

<sup>71</sup> Anderman, *Does the Microsoft Case Offer a New Paradigm for the 'Exceptional Circumstances' Test and Compulsory Copyright Licenses under EC Competition Law?*, *The Competition Law Review*, 2004, p. 7-8. See also Case C-262/81, *Coditel v. Ciné-Vog Films (Coditel II)* [1982] E.C.R. 3381, para. 13.

<sup>72</sup> Joined Cases C-56/64 and C-58/64, *Consten & Grundig v. Commission (Consten & Grundig)* [1966] E.C.R. 299.

<sup>73</sup> Case C-24/67, *Parke, Davis v. Probel* [1968] E.C.R. 81.

TFEU, the exercise of such rights may come within the ambit of the provisions in the EU Treaties.

To this end, it seems to be settled case law that EU law offers full immunity to the determination of the conditions and procedures for the grant of intellectual property rights by the Member States.<sup>74</sup> In regard to dividing the line between permitted and prohibited exercise of the package of exclusive rights bundled in an intellectual property right, the existence and exercise dichotomy originated from the notion of the ‘specific subject matter’ of an intellectual property right.<sup>75</sup> The use of an intellectual property right in a manner that safeguards the proprietor the benefits of the specific subject matter of that right was regarded as preserving the existence of the right and could not be trumped by the Treaties’ provisions on competition and free movement of goods and services.<sup>76</sup> How the analysis should be carried out to identify these ‘core rights’ or ‘essential functions’ of an intellectual property right was further discussed by the ECJ in *Hoffman-La Roche*,<sup>77</sup> where the Court explained that “the exercise of a trademark is [...] not contrary to article 102 TFEU on the sole ground that it is the act of an undertaking occupying a dominant position on the market if the trademark has not been used as an instrument of abuse of such a position”. In converse, utilizing an intellectual property right beyond the boundaries of the specific subject matter of the right was observed as being an exercise that had to be scrutinized in the light of applicable EU law, primarily the rules on competition and free movement.<sup>78</sup> It is beyond the scope of this thesis to comprehensively ascertain the edges of the specific subject matter of each category of intellectual property rights, but very broadly, within the specific subject matter of patents, it is believed to encompass “the exclusive right to use an invention with a view to manufacturing industrial products and putting them into circulation for the first time, either directly or by the grant of licenses to third parties, as well as the right to oppose infringements”.<sup>79</sup> In relation copyrights, the specific subject matter has been defined to comprise, amongst others, the rights to decide on the first placing of a work on the market,<sup>80</sup> to rent out a literary or artistic work<sup>81</sup> and to require fees for public

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<sup>74</sup> Case C-144/81, *Keurkoop v. Nancy Kean Gifts* [1982] E.C.R. 2853, para. 18.

<sup>75</sup> Faull & Nikpay, p. 1447. See also Case C-78/70, *Deutsche Grammophon* [1971] E.C.R. 487.

<sup>76</sup> Faull & Nikpay, p. 1447.

<sup>77</sup> Case C-85/76, *Hoffman-La Roche v. Commission (Hoffman-La Roche)* [1979] E.C.R. 461, para. 16.

<sup>78</sup> Jones & Sufirin, p. 854.

<sup>79</sup> Case C-15/74, *Centrafarm BV v. Sterling Drug* [1974] E.C.R. 1147, para. 9.

<sup>80</sup> Joined Cases C-55/80 and C-57/80, *Musik-Vertrieb Membran GmbH v. GEMA* [1979] E.C.R. 147, para. 25.

<sup>81</sup> Case C-158/86, *Warner Brothers and Others v. Christiansen* [1988] E.C.R. 2605, para. 13.

performances of the creative endeavour.<sup>82</sup> In *Centrafarm v. Winthrop*,<sup>83</sup> the ECJ stated that the specific subject matter of trademarks incorporates “the exclusive right to utilise the mark for the first putting into circulation of a product, and to protect him thus against competitors who would take advantage of the position and reputation of the mark by selling goods improperly bearing that mark”.

The ECJ’s concept of distinguishing between the existence and exercise of an intellectual property right received heavy criticism for being “artificial”, “unconvincing” and “metaphysical”.<sup>84</sup> Several legal scholars have stressed that the value of an intellectual property right originates from the fact that it enables the right-holder to exercise certain rights to prevent third parties from committing infringing acts. If right-holders are unable to control third parties under the grant of the property right, then the value of the right is diminished.<sup>85</sup> The debate is attentively reflected by Korah:

“In legal theory, it is impossible to draw the line between existence and exercise, except at the extremes. Analytically, the existence of a right consists of all the ways in which it may be exercised.”<sup>86</sup>

By judging from the case law posterior to the rulings mentioned above, predominantly in the context involving refusal to license intellectual property rights and article 102 TFEU, the ECJ appears to have reshaped its ‘existence and exercise’ jurisprudence and has designated a new course to reconcile the interface between the exercise of intellectual property rights and competition law. In *Volvo v. Veng*,<sup>87</sup> the Court initially manifested that the right of a design proprietor to prevent third parties from manufacturing and selling, without its consent, products incorporating the design constitutes the very subject matter of his exclusive right. However, the ECJ made it clear that the exercise of an exclusive right by the right-holder of a registered design may be prohibited by article 102 TFEU if it involves certain abusive conduct on part of an undertaking occupying a dominant position. Commentators have described the case as significant since it establishes that it is

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<sup>82</sup> Case C-62/79, *Coditel v. Ciné Vog Films (Coditel I)* [1980] E.C.R. 881, para. 14.

<sup>83</sup> Case C-16/74, *Centrafarm v. Winthrop* [1974] E.C.R. 1183, para. 8.

<sup>84</sup> Jones & Sufirin, p. 854, footnote 33; Faull & Nikpay, p. 1447; Korah, *The Interface Between Intellectual Property and Antitrust: The European Experience*, Antitrust Law Journal, 2001, p. 805.

<sup>85</sup> Jones & Sufirin, p. 854, footnote 33; Lidgard & Atik, *The Intersection of IPR and Competition Law*, 2008, p. 157-158; Opinion of AG Fennelly, para. 93, in Joined Cases C-267/96 and C-268/95, *Merck v. Primecrown* [1996] E.C.R. I-6285.

<sup>86</sup> Korah, *An Introductory Guide to EC Competition Law and Practice*, 2004, p. 292.

<sup>87</sup> Case C-238/87, *Volvo v. Veng* [1988] E.C.R. 6211, para. 8-9.

possible under article 102 TFEU to interfere with rights falling within the specific subject matter of an intellectual property right,<sup>88</sup> which stands in contrast to the previous concept that rights constituting the specific subject matter of an intellectual property right shall be regarded as preserving its existence and therefore exempted from the scope of the Treaties. In subsequent cases involving refusal to license as abusive practice,<sup>89</sup> in particular the essential ruling in *Magill*,<sup>90</sup> the EU courts make no reference to the existence and exercise dichotomy or to the specific subject matter of the intellectual property rights in question. Instead, the ECJ has established that a refusal to license does not in itself constitute an abuse of dominant position, but that such practice could arise to an abuse in ‘exceptional circumstances’.<sup>91</sup> The recent case law therefore seems to suggest that the omission of distinguishing between the existence and exercise of an intellectual property right, noticeably in article 102 TFEU cases, was not an inconsistency or a deviation, but rather that the ECJ overrode its older case law and took steps towards a distinctive and more circumstances-based assessment.<sup>92</sup> This novel approach marked ECJ’s renunciation of the ‘existence and exercise distinction’ as an instrument to determine whether certain commercial practices of intellectual property rights are incompatible with EU competition law and has in its place advocated for an ‘exceptional circumstances’ doctrine.<sup>93</sup>

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<sup>88</sup> Opi, *The Application of the Essential Facilities Doctrine to Intellectual Property Licensing in the European Union and the United States: Are Intellectual Property Rights Still Sacrosanct?*, Fordham Intellectual Property Media and Entertainment Law Journal, 2001, p. 453; Lidgard & Atik, p. 159-160. Compare with Anderman & Ezrachi, p. 127-129.

<sup>89</sup> Case C-418/01, *IMS Health* [2004] E.C.R. I-5039.

<sup>90</sup> Joined Cases C-241/91 P and C-242/91 P, *RTE and ITP v. Commission (Magill)* [1995] E.C.R. I-743.

<sup>91</sup> Whish & Bailey, p. 840-843.

<sup>92</sup> Lidgard & Atik, p. 161.

<sup>93</sup> Opi, p. 461.

### 3. Refusal to License Intellectual Property Rights as Abusive Practice

#### 3.1 The Concept of ‘Abuse’

Article 102(1) TFEU stipulates that “[a]ny abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States”. While the term ‘abuse’ is not defined in the Treaty, the article sets out in its the second subparagraph an exemplifying catalogue of practices that can, in particular, consist in an abuse: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions, (b) limiting production, markets or technical development to the prejudice of consumers, (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, or (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. The ECJ has repeatedly maintained that article 102(2) TFEU only constitutes a non-exhaustive list of conducts that can amount to an abuse and that the Commission and the EU courts are free to apply the article to numerous practices not explicitly cited in it.<sup>94</sup>

The different types of abuses are frequently classified as either ‘exploitative’ or ‘exclusionary’ abuses.<sup>95</sup> While an exploitative abuse is conduct whereby the dominant undertaking takes advantage of its market power to exploit its trading partners,<sup>96</sup> an exclusionary abuse is characterized by conduct whereby it prevents or hinders competition on the market.<sup>97</sup> Exploitative abuses have also been described as “all practices exploiting dominant market power at the expense of costumers or consumers”.<sup>98</sup> In turn, the ECJ has interpreted exclusionary abuses as referring to

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<sup>94</sup> Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge Transports and Others v. Commission* [2000] E.C.R. I-1365, para. 112; Case C-280/08 P, *Deutsche Telekom v. Commission* [2010] E.C.R. I-9555, para. 173; Case C-95/04 P, *British Airways v. Commission (British Airways)* [2007] E.C.R. I-2331, para. 57-58.

<sup>95</sup> The Guidance Paper, para. 7.

<sup>96</sup> Case C-27/76, *United Brands v. Commission (United Brands)* [1978] E.C.R. 207, para. 249-250.

<sup>97</sup> Jones & Sufirin, p. 367.

<sup>98</sup> Temple Lang, *Monopolisation and the Definition of “Abuse” of a Dominant Position under Article 86 EEC Treaty*, C.M.L.R., 1979, p. 345.

“practices that cause consumers harm through their impact on competition”.<sup>99</sup> In the influential case *Hoffman-La Roche*, the ECJ gave a definition of the concept of (exclusionary) abuse that has set a precedent in its jurisprudence:

“The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structures of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.”<sup>100</sup>

The EU courts have consistently emphasized that while the finding of an undertaking holding a dominant position is not in itself unlawful, dominance does however impose a ‘special responsibility’ on firms not to “allow its conduct to impair genuine undistorted competition on the internal market.”<sup>101</sup> Along with the concept of abuse that the ECJ established in *Hoffman-La Roche*, the special responsibility on dominant firms entails that they are required to compete on the basis of performance (‘competition on the merits’), rather than exploiting its trading partners by, *inter alia*, excessive or predatory pricing or any other anti-competitive methods that it can implement due to its market power.<sup>102</sup> It can therefore be argued that the special responsibility imposes an affirmative duty on dominant undertakings to act in certain ways.<sup>103</sup> Or as Bellamy and Child puts it: “undertakings in a dominant position may be deprived of the right to adopt a course of conduct or to take measures which would be unobjectionable if adopted [...] by non-dominant undertakings”.<sup>104</sup> Furthermore, the ‘objective’ concept of abuse implies that the

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<sup>99</sup> Case C-209/10, *Post Danmark A/S v. Konkurrencerådet (Post Danmark)*, 27 March 2012, para. 20.

<sup>100</sup> Case C-85/76, *Hoffman-La Roche v. Commission (Hoffman-La Roche)* [1979] E.C.R. 461, para. 91. This part of the judgment has been repeated in numerous cases, for instance Case C-202/07 P, *France Télékom v. Commission* [2009] E.C.R. I-2369, para. 104; Case C-280/08 P, *Deutsche Telekom v. Commission* [2010] E.C.R. I-9555, para. 174.

<sup>101</sup> Case C-322/81, *Michelin v. Commission* [1983] E.C.R. 3461, para. 57. See also Case C-457/10 P, *AstraZeneca v. Commission*, 6 December 2012, para. 134.

<sup>102</sup> Faull & Nikpay, p. 393.

<sup>103</sup> Jones & Sufrin, p. 374-375.

<sup>104</sup> Bellamy & Child, *European Union Law of Competition*, 2013, p. 786.

finding of one or several abusive practices is independent on the dominant undertaking's negligence or subjective intent to exclude competitors or distort competition.<sup>105</sup>

### 3.1.1 Abuse and Intellectual Property Rights

The use of intellectual property rights as a channel for commercial strategy has resulted in a number of cases where intellectual property owners have been found to violate article 102 TFEU. The application of article 102 TFEU on intellectual property rights opens the door to several multifaceted questions: to what extent does normal exploitation of intellectual property rights constitute competition on the merits? And, how can the bundle of exclusive rights of an intellectual property that entitles the right-holder to exclude third parties from utilizing or duplicating the subject matter of the intellectual property right be compatible with the prohibition against foreclosing competitors or market players active on neighbouring markets? The EU courts have, for instance, restrained a dominant undertaking from acquiring other firms with competing technology<sup>106</sup> and required undertakings to license their intellectual property rights where their innovations or technologies have become a standard on the market<sup>107</sup> or constituted an indispensable input for competing actors to develop new products.<sup>108</sup>

The approach of the Commission and the European courts to determine the existence of an abuse in cases involving intellectual property rights, particularly in refusal to license cases, has been shaped by whether the alleged abusive practice is being committed on a primary or a secondary market.<sup>109</sup> In principle, the exclusive exploitation of an intellectual property right is permitted in the primary market for a specific product, while attempts to extend the measures of exclusive exploitation into neighbouring secondary markets or related products in order to preclude alternative sources of supply could be caught by article 102 TFEU as prohibited anti-competitive conduct.<sup>110</sup> In other words, if an owner of an intellectual property right leverages its dominance from an upstream market into an independent secondary market, the IP proprietor then risks becoming liable for infringing article 102 TFEU. This distinction has become increasingly

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<sup>105</sup> Ibid., p. 376. See also Case T-301/04, *Clearstream v. Commission* [2009] E.C.R. II-3155, para. 142-144; Case C-549/10 P, *Tomra and Others v. Commission*, 19 April 2012, para. 20-21.

<sup>106</sup> Case T-51/89, *Tetra Pak v. Commission (Tetra Pak I)* [1990] E.C.R. II-309.

<sup>107</sup> Case T-201/04, *Microsoft v. Commission (Microsoft)* [2007] E.C.R. II-3601.

<sup>108</sup> Joined Cases C-241/91 P and C-242/91 P, *RTE and ITP v. Commission (Magill)* [1990] E.C.R. I-743.

<sup>109</sup> Anderman & Schmidt, p. 85.

<sup>110</sup> Ibid., 85-86.

important in industries where systems of complementary products have become widespread.<sup>111</sup>

Another factor is the increased expansion of subject matter that can be protected by patents, copyrights, designs or trademarks.<sup>112</sup> In the case of patents, it is argued that the domains of patentability have progressively expanded and that the standards for granting patents have gradually loosened, thus broadening the role of patents beyond the aim of creating sufficient incentives for businesses to innovate.<sup>113</sup> Also copyright protection has been introduced to completely new areas in order to accommodate new technology such as computer software, business methods as well as *sui generis* protection for databases.<sup>114</sup> As a result, patents, copyrights and any other intellectual property rights are used for strategic purposes, for example to deter entry of new market participants, to block rival innovations or technologies or as a ‘bargaining chip’ in the exchanges of technology between firms.<sup>115</sup>

### 3.2 Objective Justification

While article 102 TFEU does not include an exemption provision equivalent to article 101(3) TFEU, the European courts and the Commission have developed the principle of an ‘objective justification’ defence by which otherwise *prima facie* abusive practices may be deemed permitted and thus avoid infringing article 102 TFEU.<sup>116</sup> In *Télémarketing* the ECJ stressed that an abuse would be committed if the dominant undertaking engaged in such conduct ‘without any objective necessity’.<sup>117</sup> In the *British Airways* case, the Court accepted that a dominant undertaking’s alleged abusive conduct could be objectively justified if it could be counterbalanced or outweighed by advantages in terms of efficiency which also benefit consumers. However, the ECJ maintained that the anti-competitive conduct (in this case, a bonus system with travel agencies) would be regarded as an abuse if the exclusionary effect of the conduct goes beyond what is necessary in order to attain those efficiencies.<sup>118</sup>

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<sup>111</sup> Anderman, p. 54.

<sup>112</sup> *Ibid.*, p. 8.

<sup>113</sup> Faull & Nikpay, p. 490.

<sup>114</sup> Anderman, p. 8-9.

<sup>115</sup> Faull & Nikpay, p. 490.

<sup>116</sup> Whish & Bailey, p. 221-222. See also Albers-Llorens, *The Role of Objective Justification and Efficiencies in the Application of Article 82 EC*, C.M.L.R., 2007, p. 1736.

<sup>117</sup> Case C-311/84, *CBEM v. CLT and IPB (Télémarketing)* [1985] E.C.R. 3261, para. 27.

<sup>118</sup> Case C-95/04, *British Airways v. Commission (British Airways)* [2007] E.C.R. I-2331, para. 69.

In the leading case *Post Danmark*, the ECJ gave its most complete explanation yet of the possibility for dominant undertakings to present an objective justification defence. The Court identified two separate grounds of justification: either the dominant undertaking may demonstrate that its conduct (i) is objectively necessary or (ii) produces efficiencies or advantages that counterbalance or outweigh the exclusionary effects of its conduct. In regard to (i) objective necessity, the ECJ referred to its judgment in *Télémarketing* and did not elaborate further on the interpretation of the term. Concerning the second ground, (ii) efficiencies, the ECJ affirmed that this category of defence has to fulfil four cumulative conditions: (a) the efficiency gains counteract any likely negative effects on competition and consumer welfare, (b) the gains have been or are likely to be brought about as a result of that conduct, (c) the conduct is necessary for the achievement of those gains in efficiency and (d) the conduct does not eliminate effective competition.<sup>119</sup> These two categories of justifications follow the same line of reasoning as presented by the Commission in its Guidance Paper.<sup>120</sup> There, the Commission maintains that the determination of whether a conduct is objectively necessary or not shall be based on proportionality and factors external to the dominant undertaking.<sup>121</sup> This is a reflection of the Commission's view in its decisional practice.<sup>122</sup> Examples of objectives that can be objectively necessary are health and safety considerations,<sup>123</sup> as well as technical or commercial requirements relating to the product or service in question.<sup>124</sup> Some commentators have suggested that the factors that count as an objective justification correspond to or are very similar with the circumstances constituting *force majeure* in contractual relations, such as natural disasters, other kinds of extreme weather or actions by third parties out of the control of the dominant undertaking.<sup>125</sup> Concerning the conditions for successfully putting forward an efficiency defence, the Guidance Paper mirrors those set out by the ECJ in *Post Danmark*. For the purpose of clarity, the Commission states that the efficiency gains of the conduct can, for instance, take the form of technical improvements or reduction in the cost of production or distribution.<sup>126</sup>

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<sup>119</sup> Case C-209/10, *Post Danmark A/S v. Konkurrencerådet (Post Danmark)*, 27 March 2012, para. 41-42.

<sup>120</sup> The Guidance Paper, para. 28.

<sup>121</sup> *Ibid.*, para. 29.

<sup>122</sup> Commission Decision COMP/39.525, *Telekomunikacja Polska*, 22 June 2011, para. 874.

<sup>123</sup> Case T-30/89, *Hilti v. Commission* [1991] E.C.R. II-1439, para. 118-119.

<sup>124</sup> Faull & Nikpay, p. 395.

<sup>125</sup> Van der Vijver, *Objective Justification and Article 102 TFEU*, World Competition, 2012, p. 63; Rousseva, *The Concept of 'Objective Justification' of an Abuse of a Dominant Position: Can It Help to Modernise the Analysis under Article 82 EC?*, The Competition Law Review, 2006, p. 39.

<sup>126</sup> The Guidance Paper, para. 30.

Additionally, the conduct has to be indispensable for the achievement of those efficiencies, inasmuch as there does not exist any less anti-competitive alternatives to produce those gains or advantages.<sup>127</sup> As for the burden of proof, the Commission holds that it is upon the dominant undertaking presenting efficiencies to provide all the necessary evidence and arguments that the conduct in question is objectively justified. It then falls to the Commission to show that the conduct is not objectively justified in the light of the evidence and arguments put forward.<sup>128</sup>

### 3.3 Refusal to Supply in General

In a market economy, companies are generally free to choose for themselves the parties with whom they wish to enter into contractual relations.<sup>129</sup> This is ultimately manifested by the general principle of freedom of contract. As a general rule, EU competition law recognizes that any undertaking (whether dominant or not) is free to unilaterally choose its trading partners and dispose unreservedly of its property.<sup>130</sup> A second point to have in regard when studying the EU law on refusal to deal, is that there are numerous perfectly reasonable explanations for a dominant undertaking to refuse to enter into a contract: for example, the purchaser may be insolvent or a problematic debtor, there is a shortage of supplies or that the company's production has disrupted.<sup>131</sup> Nevertheless, there are certain well-defined circumstances in which an undertaking occupying a dominant position may infringe article 102 TFEU by refusing to supply its physical or intangible property.

There is a wide collection of commercial conduct that can be categorized as a refusal to deal: refusal to supply key input products and services, refusal to provide essential interoperability information, refusal to grant access to indispensable facilities or networks and refusal to license intellectual property rights. These practices are characterized as outright or straightforward refusals to deal with a third party.<sup>132</sup> But the concept of a refusal to deal does also encompass 'constructive' refusals, namely when the contract is offered under such uneconomic or unreasonable conditions that the supplier knows that

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<sup>127</sup> Ibid., para. 30.

<sup>128</sup> Ibid., para. 31. This is also confirmed by the GC in *Microsoft*, Case T-201/04, *Microsoft v. Commission* (*Microsoft*) E.C.R. II-3601, para. 688.

<sup>129</sup> Bellamy & Child, p. 832.

<sup>130</sup> The Guidance Paper, para. 75. See also the Opinion of AG Jacobs, para. 56, in Case C-7/97, *Bronner* [1998] E.C.R. I-7791. Case T-41/96, *Bayer v. Commission* [2000] E.C.R. II-3383, para. 180.

<sup>131</sup> Whish & Bailey, p. 738.

<sup>132</sup> Faull & Nikpay, p. 463.

the agreement is unacceptable.<sup>133</sup> Moreover, a refusal to deal can take the form of withdrawing supply to an existent customer and refuse to start supplying potential customers.<sup>134</sup> What normally unites these various types of refusals is that the dominant undertaking's refusal denies the other party the tools, be it interoperability information, a right to access essential infrastructures or platforms or intellectual property rights, that are fundamental for it to compete effectively.<sup>135</sup> Many of these cases involve vertically integrated companies occupying a dominant position on an upstream market refusing to either supply certain goods, provide access to 'essential facilities' or license intellectual property rights in the downstream market.<sup>136</sup> One of the possible anti-competitive effects in these cases is therefore that, as a result of the refusal, competition risks to be distorted in a market downstream from the market for the refused input and lead to vertical foreclosure of potential competitors.<sup>137</sup>

### **3.4 Refusal to License Intellectual Property Rights as Abusive Conduct**

In the context of intellectual property rights, a refusal to license refers to a situation in which the owner of the intellectual property denies a third party a license, thus leaving potential licensees with no other alternative than to seek a compulsory license.<sup>138</sup> Formalistically, a refusal to license can be regarded as a sub-category to refusal to supply.<sup>139</sup> However, a refusal to license is not solely limited to cases of direct refusals but may also involve situations in which there is a disproportionate delay in negotiations or where the contractual terms of the license are so excessive that the refusal amounts to a constructive refusal to deal.<sup>140</sup>

It is evident that the existence of intellectual property rights constitutes a barrier for other firms to establish themselves on a specific market.<sup>141</sup> The product or service

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<sup>133</sup> Jones & Sufrin, p. 510.

<sup>134</sup> Bellamy & Child, p. 832.

<sup>135</sup> Faull & Nikpay, p. 464.

<sup>136</sup> See for example Joined Cases C-6/73 and C-7/73, *Istituto Chemioterapico Italiano and Commercial Solvents v. Commission (Commercial Solvents)* [1974] E.C.R. 223.

<sup>137</sup> Vogelaar, *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*, The Competition Law Review, 2009, p. 119.

<sup>138</sup> Faull & Nikpay, p. 465.

<sup>139</sup> Lidgard, *Application of Article 82 EC to Abusive Exclusionary Conduct – Refusal to Supply or License*, *Europarättslig Tidskrift*, 2009, p. 694; Venit, p. 611.

<sup>140</sup> Faull & Nikpay, p. 466.

<sup>141</sup> Jones & Sufrin, p. 526.

protected by intellectual property might have grown into a market standard that other complementary products have to be compatible with in order to function properly. These interoperability issues and network effects arise for example in cases involving standard essential patents.<sup>142</sup> Although, neither the EU courts nor the Commission presume that ownership of intellectual property necessarily implies dominance because there might exist competing technologies or products that consumers found interchangeable.<sup>143</sup> Since the remedy of a compulsory licensing cuts at the heart of one of the most fundamental exclusive rights, namely the right of the right-holder to exclude others from using or duplicating the subject matter of the intellectual property, it is essential that an obligation to license based on competition law is balanced in such a way that it takes into regard both the potential risks of decreasing firms' *ex ante* incentives to innovate and invest in research and development, on the one hand, and to promote free and effective competition, on the other.<sup>144</sup> The principal rule under article 102 TFEU is therefore that it does not exist a general obligation for dominant undertakings to license their intellectual property rights. Instead, the jurisprudence from the European courts indicates restrictiveness and that a refusal to license on part of a dominant undertaking will only amount to an abuse of dominance in 'exceptional circumstances'.

### **3.5 The Evolution of the 'Exceptional Circumstances' Doctrine in the Case Law of the European Courts**

#### **3.5.1 The Car Spare Parts Cases: Volvo v. Veng and Renault**

The first judgments of the ECJ concerning refusal to license intellectual property rights under article 102 TFEU were raised in *Volvo v. Veng*<sup>145</sup> and *Renault*.<sup>146</sup>

In *Volvo v. Veng*, Volvo was the proprietor of a British registered design for the front wing panels of one of its classic car models. At this point of time, the cars were sold in most of the EU Member States by subsidiaries in the Volvo corporate group, except for the U.K., Spain and Greece, where they were imported and sold by wholly independent

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<sup>142</sup> Koenig & Trias, *Some Standards for Standardisation: A Basis for Harmonisation and Efficiency Maximisation of EU and US Antitrust Control of the Standard-Setting Process*, E.I.P.R., 2010, p. 229-230.

<sup>143</sup> Faull & Nikpay, p. 466.

<sup>144</sup> Fox, *Monopolization, Abuse of Dominance, and Refusal to License Intellectual Property to Competitors – Do Antitrust Duties Help or Hurt Competition and Innovation? How Do We Know?*, European Competition Law Annual, 2005, p. 633.

<sup>145</sup> Case C-238/87, *Volvo v. Veng* [1988] E.C.R. 6211.

<sup>146</sup> Case C-53/87, *CICRA and Maxicar v. Renault (Renault)* [1988] E.C.R. 6039.

companies. Veng was an independent company based in the U.K. Without the authorization of Volvo, Veng manufactured and imported imitations of the design-protected spare parts for Volvo cars into the U.K. Volvo refused to license its design rights for the car spare parts, even though Veng was willing to pay a reasonable royalty for all articles sold under the license. Subsequently, Volvo instituted proceedings against Veng for infringement of its intellectual property right. In its defence, Veng argued that Volvo's refusal to license its design rights amounted to an abuse of a dominant position. A British court requested a preliminary ruling from the ECJ to guide its decision whether Volvo's refusal amounted to an abuse of dominant position according to article 102 TFEU.

Similarly, in the *Renault* case the holder of patent rights in body panels for vehicles exercised those rights to restrain the production and sale of unauthorized copies on the maintenance market. CICRA was a trade association made up of a number of Italian undertakings which manufactured and marketed motor vehicle bodywork components as spare parts. One of its members, Maxicar, produced bodywork components for Renault cars. Renault had the ownership of protective rights for individual bodywork components for its car models. CICRA and Maxicar brought actions against Renault for the annulment of certain protective rights. The Italian court expressed doubts regarding, *inter alia*, the compatibility of the exercise of those rights with article 102 TFEU and referred the question to the ECJ for a preliminary ruling.

In essence, the ECJ was asked the identical question by the both referring courts: is it an abuse of a dominant position for a car manufacturer to refuse to license the design rights on its car spare parts to third parties wishing to manufacture and sell such parts?

### **3.5.1.1 The Judgments of the ECJ**

The ECJ adopted a rather orthodox approach to the application of article 102 TFEU to refusals to license intellectual property rights and held that, in the absence of EU standardization or harmonization of laws on designs, it was a matter for national law in each Member State to determine the nature and extent of protection for such products.<sup>147</sup> The Court reasoned that the right of the proprietor of a protected design to prevent third parties from manufacturing and selling or importing products incorporating the design

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<sup>147</sup> Case C-238/87, *Volvo v. Veng* [1988] E.C.R. 6211, para. 7; Case C-53/87, *CICRA and Maxicar v. Renault (Renault)* [1988] E.C.R. 6039, para. 10.

without the right-holder's consent constituted "the very subject matter of its exclusive right".<sup>148</sup> Accordingly, the ECJ ruled that "an obligation imposed on the proprietor of a protected design to grant third parties, even in return for a reasonable royalty, a license for the supply of products incorporating the design would lead to the proprietor thereof being deprived of the substance of his exclusive right".<sup>149</sup> For this reason, the ECJ concluded that a refusal to grant a license could not in itself constitute an abuse of a dominant position.<sup>150</sup> In its holding, the Court introduced various nuances in distinguishing the refusal to license the design rights from an arbitrary refusal to supply replacement parts. To this end, the Court emphasized that the exercise of an exclusive right by the proprietor of a registered design for car body panels may be prohibited by article 102 TFEU if the refusal involves "certain abusive conduct".<sup>151</sup> Consequently, the existence of other circumstances in association with a simple refusal to license could render the behaviour as an abuse in violation of article 102 TFEU. The ECJ exemplified non-exhaustively the following potential practices that could contribute to find a refusal to grant a license as an abuse: (a) an arbitrary refusal to supply spare parts to independent repairers, (b) fixing of prices for spare parts at an unfair level or (c) a decision to cease or no longer produce spare parts for a particular model even though many cars of that model are still in circulation on the market.

### 3.5.1.2 Comments

In both cases, the holder of the intellectual property rights was limiting the use of the technology in question (designs for car spare parts) and to restrict competition on the secondary markets for repairs and production of body parts for vehicles where the owners of the exclusive rights did not necessarily use the technology. Particularly in *Renault*, the refusal to grant a license was directed towards a new, rather than an existing, customer and the right-holder were thus utilizing its exclusive rights as a mechanism to prevent the emergence or growth of ancillary markets (market for repair of spare parts) on which it was not even operating.<sup>152</sup> In *Volvo v. Veng*, the refusal to provide a license targeted a direct competitor that was competing on the same (primary) market as Volvo. By refusing to deal with Veng, Volvo was restricting competition in the core area of its

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<sup>148</sup> Case C-238/87, *Volvo v. Veng* [1988] E.C.R. 6211, para. 8.

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.*

<sup>151</sup> *Ibid.*, para. 9.

<sup>152</sup> Faull & Nikpay, p. 1504.

business. Therefore, the foreclosure effects in *Renault* could be described as vertical, while the refusal to license in *Volvo v. Veng* is more likely to be characterized as having horizontal foreclosure effects.

The references in the judgments to the ‘very subject matter of the exclusive right’ and the ‘exercise of an exclusive right’ were two familiar concepts in the jurisprudence of the Court and something it had developed to manage the tension between EU law and intellectual property rights, mainly in the area of the free movement of goods and services but also in relation to the competition rules. However, the most novel and significant aspect in *Volvo v. Veng* was that the ECJ did not distinguish between the exercise and existence of an intellectual property right and established that it is possible to interfere, under article 102 TFEU, with exclusive rights falling within the specific subject matter of an intellectual property right. These rulings have to be seen as a shift in the case law of the Court, since earlier cases had suggested that exclusive rights constituting the very subject matter of an intellectual property were equivalent as to preserving its existence and could therefore not be confronted by application of the provisions in the Treaties. Instead the ECJ maintained that a refusal to license could constitute an abuse contrary to article 102 TFEU if it gave rise to or involved ‘certain abusive conduct’. This part of the judgment is, however, not unproblematic and the examples of abusive conduct did not shed much light. For instance, how shall price fixing at an ‘unfair level’ be interpreted? Does it only involve predatory pricing, or is excessively high pricing also encompassed?

As a final observation on the *Volvo v. Veng* case, in declaring that a refusal to license does not in itself constitute abusive practice, the ECJ held firmly that an obligation imposing a dominant undertaking to share its intellectual property rights with third parties would deprive the company of the substance of its exclusive right. The Court’s use of this terminology in the judgment indicated that it took into account the industry’s incentives to invest in research and development, since it would not be viable for firms to capitalize heavily on innovation if they are not able to recoup the economic rewards of a successful innovation.

### 3.5.2 Magill

The case in *Magill*<sup>153</sup> concerned British and Irish television companies’ refusal to license their copyright protected television programme schedules. Under the national U.K. and

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<sup>153</sup> Joined Cases C-241/91 P and C-242/91 P, *RTE and ITP v. Commission (Magill)* [1995] E.C.R. I-743.

Irish legislation, copyright did not only protect literary and artistic work which resulted from intellectual endeavour but also compilations of information such as listings of programmes to be TV-broadcasted.

RTE enjoyed a statutory monopoly over television broadcasting in Ireland and BBC and IBA had a statutory duopoly in the U.K. (including Northern Ireland). A majority of viewers in Ireland and Northern Ireland were able to receive the channels of all three television broadcasters. RTE and BBC had the ownership of the copyright in the programme schedules for their respective channels and ITP owned the copyright in the TV-listings of the IBA franchised channels. ITP, BBC and RTE ('the broadcasting companies') each published their weekly TV guide containing only their own individual weekly programme schedules. Television audiences wishing to plan their TV-consumption for the forthcoming week were therefore forced to purchase each of these TV guides separately. The broadcasting companies did also, on request, provide daily or periodical newspapers and magazines a license free of charge with listings information to be published according to strictly enforced licensing conditions. In order to meet the increased consumer demand, the Irish publisher Magill commenced to publish a comprehensive weekly TV guide containing details of all of the television programmes to be transmitted by the broadcasting companies. According to the three television companies, Magill's comprehensive weekly TV guide infringed their respective copyrights in the programme listings. The broadcasting companies initiated legal proceedings in domestic courts in order to prevent Magill from producing and publishing its listings magazine and eventually obtained injunctions against Magill for copyright infringement. Magill lodged a complaint to the Commission, stating that the broadcasting companies were abusing their dominant position contrary to article 102 TFEU by refusing to grant it a license for the publication of its comprehensive weekly TV guide.

The Commission adopted a decision where it concluded that the behaviour of the television companies was a breach of article 102 TFEU and ordered the companies to supply Magill on a non-discriminatory basis the advanced weekly programme listings and permitting reproduction of such information.<sup>154</sup> The decision was appealed to the GC and subsequently to the ECJ.

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<sup>154</sup> Commission Decision 89/205/EEC, *Magill TV Guide/ITP, BBC and RTE* [1988] OJ 1989, L 78/43, para. 26-27.

### 3.5.2.1 The Judgment of the ECJ

As far as dominant position was concerned, the Court held that “the mere ownership of an intellectual property right cannot confer such a position”.<sup>155</sup> The ECJ further stated that, since the basic information for the programme listings were the necessary result of programming by the television stations, the broadcasting companies were therefore the only source having access to such information.<sup>156</sup> To this end, the Court concluded that the television companies had a *de facto* monopoly over the information used to compile schedules for the television programmes and they were thus occupying a dominant position in the market for weekly television magazines.

In regard to the issue of the existence of abusive conduct, the ECJ initially clarified that the reasoning of the broadcasting companies incorrectly presupposed that conduct consisting in the exercise of an intellectual property right could never be reviewed in relation to article 102 TFEU.<sup>157</sup> The Court’s judgment reiterated its position in *Volvo v. Veng*, holding that a dominant undertaking’s refusal to grant a license does not in itself constitute an abuse contrary to article 102 TFEU.<sup>158</sup> Instead, the ECJ opted for a circumstance-based approach, holding that a refusal to license on part of a dominant undertaking may amount to an abuse only in ‘exceptional circumstances’.<sup>159</sup> The Court went on to assess whether such circumstances were at hand in the present case, which it ultimately answered in the affirmative. The ECJ identified four arguments which contributed to the finding of exceptional circumstances. First, the refusal to license had prevented the emergence of a ‘new product’ (a comprehensive weekly guide to television programmes) that the broadcasting companies did not offer and for which there was a potential consumer demand.<sup>160</sup> According to the Court, there were no actual or potential substitutes for a weekly TV guide offering information about the programmes for the forthcoming week. Daily or weekend guides were not adequate alternatives and consumers would otherwise have no other option but to buy each individual weekly guide separately.<sup>161</sup> Secondly, the ECJ noted that there was no objective justification based on either the activity of television broadcasting or on that of publishing television

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<sup>155</sup> Joined Cases C-241/91 P and C-242/91 P, *RTE and ITP v. Commission (Magill)* [1995] E.C.R. I-743, para. 46.

<sup>156</sup> *Ibid.*, para. 47.

<sup>157</sup> *Ibid.*, para. 48.

<sup>158</sup> *Ibid.*, para. 49.

<sup>159</sup> *Ibid.*, para. 50.

<sup>160</sup> *Ibid.*, para. 54.

<sup>161</sup> *Ibid.*, para. 52-53.

magazines.<sup>162</sup> Thirdly, the broadcasting companies had exercised their exclusive rights in such a manner that they had reserved to themselves the secondary market of weekly television guides by excluding all competition on that market.<sup>163</sup> Fourth and finally, the information that the broadcasting companies denied Magill access to was indispensable for the compilation of a comprehensive weekly television guide.<sup>164</sup>

In conclusion, the ECJ upheld the Commission's original decision and held that the behaviour and policies adopted by the broadcasting companies constituted abuse of a dominant position, thus in violation of article 102 TFEU. The Court issued a compulsory license as a remedy to bring the infringement to an end and required the television companies to provide Magill with the information contained in the television programme listings.

### 3.5.2.2 Comments

It can be witnessed in this judgement that the ECJ held that while it is incorrect that the exercise of intellectual property rights can never be reviewed under article 102 TFEU, a refusal to provide a license to a third party does not in itself constitute an abuse of dominant position. Similarly as in *Volvo v. Veng*, the Court ignored the 'existence and exercise' dichotomy that it had established in previous case law and affirmed that any exercise of intellectual property rights may fall within the ambit of article 102 TFEU. Taking into regard the rulings in *Magill* and *Volvo v. Veng* and the ECJ's omission of including the distinction between the exercise and existence of intellectual property rights and its specific subject matter in these judgments, the Court inexplicitly distanced itself from its previous case law and chose to take a new path. The assessment of whether a refusal to license intellectual property rights is compatible with or contrary to article 102 TFEU will instead be circumstances-based and such practice may constitute an abuse only in 'exceptional circumstances'.

In *Magill*, the ECJ identified four exceptional circumstances: (i) the refusal to license the copyright protected television listings prevented the emergence of a 'new product' for which there was potential consumer demand, (ii) the broadcasting companies were reserving to themselves the secondary market for weekly television guides by 'excluding all competition on the market', (iii) there was no 'objective justification' for refusing to

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<sup>162</sup> *Ibid.*, para. 55.

<sup>163</sup> *Ibid.*, para. 56.

<sup>164</sup> *Ibid.*.

license and lastly (iv) the information that the television companies denied Magill access to was 'indispensable' for the compilation of the comprehensive weekly TV guide. The 'list' of exceptional circumstances acquired great significance and the judgement itself was controversial and resulted in numerous comments and debates among legal scholars and practitioners.<sup>165</sup> It remained unclear whether the four circumstances on the list were alternative or cumulative conditions for finding 'exceptional circumstances'. It was particularly uncertain whether the requirement of preventing the emergence of a new product constituted a necessary or a separate and sufficient ground for establishing a refusal to license as prohibited abusive conduct.<sup>166</sup> As Jones and Sufrin correctly note, if the television companies had assembled a comprehensive television guide themselves by cross-licensing each other their respective programme listings then a third party like Magill would not have been able to introduce a new product.<sup>167</sup> However, the broadcasting firms would still have reserved for themselves a unique position on the secondary market for composite TV guides. The 'new product' criteria also raise the question how novel or distinguishable that product needs to be in comparison with already existent products in order to be considered 'new'. It is obvious that the comprehensive weekly TV guide that Magill had intended to offer the television audience would compete with the individual weekly guides published by the television companies. Whether or not the prevention of a new product was a necessary criterion for finding a refusal to license abusive became a debated issue, as is reflected by subsequent case law on this matter.

As the Court emphasized in its judgments in *Magill* and *Volvo v. Veng*, a dominant undertaking's refusal to grant a license to its intellectual property right(s) does not in itself constitute an abuse of dominance. In order for a refusal to license to take the form of an abuse in accordance with article 102 TFEU, it needs to be combined with additional and 'exceptional' circumstances. As the terminology of the Court implies, the norm in EU competition law after *Magill* is therefore that dominant firms are not under a general obligation to license their intellectual property, but as an exception, such a duty may arise in exceptional circumstances. However, it was uncertain to what extent the *Magill* criteria would be applicable in other cases involving refusals to license intellectual property rights

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<sup>165</sup> Vinje, *The Final Word on Magill: The Judgment of the ECJ*, E.I.P.R., 1995: Prete, *From Magill to IMS: Dominant Firm's Duty to License Competitors*, European Business Law Review, 2004; Greaves, *Magill Est Arrive: RTE and ITP v. Commission of the European Communities*, E.C.L.R., 1995.

<sup>166</sup> Jones & Sufrin, p. 530.

<sup>167</sup> *Ibid.*.

since the outcome was largely influenced by the particular circumstances of the case. In addition, several commentators have also pointed out that the outcome in *Magill* could also have been shaped by the fact that TV programme listings were entitled to copyright protection under national law.<sup>168</sup> While the merit to provide copyright protection for compiling television programme schedules may be argued, this does not follow explicitly by the reasoning in the Commission's decision or the European courts' judgments. Nevertheless, by analysing subsequent cases involving dominant undertakings' refusals to license their intellectual property rights, it is clear that the *Magill* criteria has set a precedent in the European courts' case law, where the 'exceptional circumstances' doctrine has been further developed.

Another noteworthy remark in regard to the 'hindrance of a new product' requirement was that the ECJ utilized article 102(2)(b) TFEU as the legal basis,<sup>169</sup> namely that an abuse may in particular consist in "limiting production, markets or technical development to the prejudice of consumers". As has been clarified earlier in this thesis, the list of abusive practices in article 102(2) TFEU is not exhaustive and authorities enforcing the EU competition rules may oppose against practices that do not necessarily fall within one of the points in that provision. However, the Court's reliance on article 102(2)(b) TFEU as the legal basis in *Magill* have had major significance and consequences in later cases, most notably in *Microsoft*, where the GC applied a broad interpretation of the 'exceptional circumstances' doctrine by building its argumentation around article 102(2)(b) TFEU.

### 3.5.3 Bronner

In the *Bronner* case,<sup>170</sup> a reference for a preliminary ruling from an Austrian court, Mediaprint published and distributed two daily newspapers in Austria, which together had a combined market share of 46,8 per cent of circulation and 42 per cent in terms of advertising revenues. Bronner published and distributed the daily newspaper *Der Standard*, which had approximately 3,6 per cent of the Austrian daily newspaper market in terms of circulation and 6 per cent in terms of advertising revenue. For the distribution of its newspapers, Mediaprint had established a nationwide early-morning home-delivery

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<sup>168</sup> Whish & Bailey, p. 842; Opi, p. 460-461.

<sup>169</sup> Joined Cases C-241/91 P and C-242/91 P, *RTE and ITP v. Commission (Magill)* [1995] E.C.R. I-743, para. 54.

<sup>170</sup> Case C-7/97, *Bronner* [1998] E.C.R. I-7791.

service, which was put into effect through an intermediary. Bronner wanted Mediaprint to include Der Standard in its delivery scheme but Mediaprint refused. Bronner sought an order from an Austrian court requiring Mediaprint to cease abusing its alleged dominant position on the home-delivery market and ordering it to include Der Standard in its home-delivery scheme service in return for a reasonable remuneration. Bronner claimed that other methods of sale, such as postal delivery or sales in shops, were less advantageous and, given the small circulation of its daily newspaper, it would be entirely unprofitable for it to construct its own home-delivery scheme.

The Austrian referred to the ECJ two questions as to whether Mediaprint's conduct amounted to an abuse of dominant position.

### **3.5.3.1 The Judgment of the ECJ**

In analysing whether Mediaprint's refusal to include Der Standard in its home-delivery scheme constituted an abuse, the ECJ referred to and reiterated its case law in *Commercial Solvents* and *Magill*.<sup>171</sup> The Court did not explicitly confirm that the criteria it had set out in relation to refusals to license intellectual property rights in *Magill* was directly or analogously applicable also to refusals to provide access to physical property.<sup>172</sup> However, it maintained that the circumstances constituting exceptional circumstances in *Magill* were also relevant for the assessment whether Mediaprint's refusal to provide Bronner access to its home-delivery service amounted to an abuse. Utilizing a reasoning echoing that in *Magill*, the ECJ numbered these as the three relevant factors in determining whether Mediaprint's behaviour was unlawful under article 102 TFEU: (a) the refusal to provide the home-delivery service must be likely to eliminate all competition in the daily newspaper market on part of the person requesting the service, (b) the refusal is incapable of being objectively justified and (c) the service in itself is indispensable to carrying on the requestor's business, inasmuch as there is no actual or potential substitute.<sup>173</sup> The Court concluded that it was undisputed between the parties that other methods of distribution existed, such as post delivery or sales in shops or kiosks, even if they were less favourable or advantageous.<sup>174</sup> Furthermore, the ECJ noted that it did not appear to be any technical, legal or economic obstacles capable of making it impossible, or even

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<sup>171</sup> Ibid., para. 38-39.

<sup>172</sup> Ibid., para. 41.

<sup>173</sup> Ibid..

<sup>174</sup> Ibid., para. 43.

unreasonably difficult, for any other publisher of daily newspapers to establish alone or in cooperation with others its own home-delivery service.<sup>175</sup> In order to demonstrate that the creation of such a system is not a realistic potential alternative and that access is therefore indispensable, the ECJ emphasized that it is not enough to argue that it is not economically viable by reason of the small nature of the circulation of the daily newspapers to be distributed. In accordance with the Opinion of AG Jacobs, the Court held that for access to the delivery system to be indispensable it is necessary to establish that it is not economically viable to create a second system for the distribution of daily newspapers with a circulation or scale comparable to that distributed by the existent delivery scheme.<sup>176</sup>

Since the Court concluded that there were several substitutable delivery methods available for Bronner to utilize in his business and access to Mediaprint's home-delivery system was therefore not indispensable, it did not elaborate any further on the other two preconditions. In conclusion, the ECJ did not consider that Mediaprint committed an abuse of its dominant position when it refused Bronner access to its nationwide distribution system of daily newspapers.

### 3.5.3.2 Comments

The *Bronner* case dealt with a refusal to provide access to physical property, dissimilar to the cases in *Magill* and *Volvo v. Veng*, which concerned the refusal to license intellectual (intangible) property. However, as is indicated in the *Bronner* judgment, the framework for assessing refusals to provide access to physical property and refusals to license intellectual property rights, respectively, is practically identical in both situations. The one aspect separating them is that in refusal to license intellectual property rights the refusal has to, in addition, prevent the emergence of a new product. Since the phraseology of the Court in *Bronner* corresponds to a large extent to the criteria established in *Magill*, and taking into account that the *Bronner* ruling was heavily relied on the Court's reasoning in *Magill*, the interpretation of the three common requirements can be analogously applied in the context of refusal to license intellectual property rights.<sup>177</sup>

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<sup>175</sup> *Ibid.*, para. 44.

<sup>176</sup> *Ibid.*, para. 46.

<sup>177</sup> Dolmans, O'Donoghue & Loewenthal, p. 117; Vogelaar, p. 129; Derclaye, p. 687-688; Lévêque, *Innovation, Leveraging and Essential Facilities: Interoperability Licensing in the EU Microsoft Case*, World Competition, 2005, p. 73-74.

The judgment in *Bronner* was heavily focused on the ‘indispensability’ criteria. It follows from the ruling that it is insufficient by a requesting undertaking to argue that access to the property is desirable, convenient or economically unviable due to the small circulation of the newspaper distribution compared to the undertaking possessing the desired facility. As is pointed out in the judgment, additional factors such as technical, legal or economic constraints are relevant elements in appraising the indispensability criterion. In order for access to be indispensable, the options of utilizing any actual or potential substitutes have to be exhausted. In the present case, several alternatives for distributing its newspaper were still available for Bronner even though if they were not equally as advantageous or favourable as Mediaprint’s distribution system. It can therefore be held that the standard for indispensability is held high by the ECJ and that it took a quite restrictive view of obligating dominant firms to share their physical property with competitors.

Since the Court concluded that access to the home-delivery scheme was not indispensable, it did not continue to consider the other two criteria. However, the ECJ stressed that the refusal must be ‘likely to eliminate all competition’<sup>178</sup> from the requesting undertaking. While the Court did not give any guidance on how this criterion is presumed to be interpreted, the word ‘likely’ suggests that it is not necessary for competition from the requestor to actually be eliminated, but rather that there is a risk for such an effect.

### 3.5.4 IMS Health

In the case *IMS*,<sup>179</sup> both IMS and NDC were participating in the German market for providing data related services to pharmaceutical companies. IMS had developed a database structure known as the ‘1860 brick structure’, a system presenting regional pharmaceutical sales data in Germany. The structure utilized a method for dividing the German territory into small geographical segments (bricks) based on factors including postal codes, population density, administrative and political boundaries as well as the location of pharmacies and doctors. IMS collected pharmaceutical sales information from wholesalers, configured it in accordance with the brick structure thus enabling it to be analysed in various ways, and then provided sales reports to its customers (the

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<sup>178</sup> Case C-7/97, *Bronner* [1998] E.C.R. I-7791, para. 41 (emphasis added).

<sup>179</sup> Case C-418/01, *IMS Health* [2004] E.C.R. I-5039.

pharmaceutical companies). The brick structure was developed by IMS over a long period of time in close collaboration with the pharmaceutical industry and it had become the *de facto* market standard to which clients adapted their information and distribution systems. Rivals to IMS attempted to create similar brick structures but IMS claimed that these infringed its copyright and obtained interim injunctions in domestic proceedings. NDC complained to the Commission that IMS's refusal to license its copyright protected '1860 brick structure' was an abuse of dominant position in violation of article 102 TFEU. In its decision, the Commission repeated the principles of the 'exceptional circumstances' doctrine in *Magill* and *Bronner*.<sup>180</sup> By stating that the IMS's 1860 brick structure was (i) indispensable for NDC to continue carrying out its business due to the legal and technical constraints to develop a new structure were too heavy of a burden<sup>181</sup> and (ii) that the refusal to license was incapable of being objectively justified,<sup>182</sup> the Commission found that the test of exceptional circumstances was fulfilled in the case. The Commission ordered an interim measure requiring IMS to grant NDC a license to its copyright protected brick structure on non-discriminatory terms.<sup>183</sup> IMS brought an action for the annulment of the decision and the execution of the decision was subsequently suspended pending the appeal.<sup>184</sup>

In parallel, the domestic court proceedings were in progress and the German court made a reference for a preliminary ruling to the ECJ asking about the interpretation of article 102 TFEU in the context of IMS's refusal to license. The Commission therefore decided not to adopt a final decision on the matter and withdrew the decision for interim measures.<sup>185</sup> In turn, the Court proceeded to give a ruling on the preliminary reference.

#### **3.5.4.1 The Judgment of the ECJ**

In similarity with the principles set out in *Volvo v. Veng* and *Magill*, the ECJ recalled that it follows from settled case law that the exclusive right of reproduction forms part of the bundle of rights of the owner of an intellectual property right and that the act of a dominant undertaking to refuse to provide a license to its intellectual property does not in

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<sup>180</sup> Commission Decision 2001/165/EC, *NDC Health/IMS Health: Interim Measures* [2001] OJ 2002, L 59/18, para. 67-70.

<sup>181</sup> *Ibid.*, para. 127-131.

<sup>182</sup> *Ibid.*, para. 167-174.

<sup>183</sup> *Ibid.*, para. 215.

<sup>184</sup> Case T-184/01 R, *IMS Health v. Commission* [2001] E.C.R. II-3193, para. 125.

<sup>185</sup> Commission Decision 2003/741/EC, *NDC Health/IMS Health: Interim Measures* [2003] OJ 2003, L 268/69.

itself constitute abuse of a dominant position. Reiterating the same cases, the Court held that it is clear from that case law that the exercise of an exclusive right may involve abusive conduct in ‘exceptional circumstances’.<sup>186</sup> In the next step of its appraisal, the Court numbered the four elements constituting exceptional circumstances in *Magill* and *Bronner*.<sup>187</sup> The ECJ then made an attempt to reconcile the rulings in *Magill* and *Bronner* by concluding that these two cases established that, in order for a dominant undertaking’s refusal to license its intellectual property right to be treated as abusive conduct, it was sufficient if these four *cumulative* conditions were satisfied: (a) access to the material protected by an intellectual property right is indispensable in order to carry out a particular business, (b) the refusal prevents the emergence of a new product for which there is potential consumer demand, (c) the refusal is incapable of being justified by objective considerations and (d) the refusal is likely to exclude any competition on a secondary market.<sup>188</sup>

In regard to criterion (a), indispensability, the Court stated that it was necessary to determine whether there are products or services which constitute alternative solutions, even if they are less advantageous, and whether the existence of technical, legal or economic obstacles is making it impossible or unreasonably difficult for any company wishing to penetrate the market to develop alternative products or services.<sup>189</sup> In accordance with the Opinion of AG Tizzano, the ECJ said that consideration had to be taken to the fact that the high level of participation by the pharmaceutical companies to develop and improve the 1860 brick structure had created a dependency by the users in relation to that structure. Developing further on this reasoning, the Court held that these laboratories would have to make exceptional organisational and financial efforts in order to acquire reports of pharmaceutical sales data from a structure other than IMS’s brick structure and that the supplier of the alternative structure would be required to offer contractual terms which would most likely rule out any economical viability of business on a scale similar to that of IMS.<sup>190</sup>

Discussing the interpretation of prerequisite (b), the emergence of a new product, the Court explained that the undertaking requesting access to the indispensable material may “not intend to limit itself essentially to duplicating the goods or services already offered

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<sup>186</sup> Case C-418/01, *IMS Health* [2004] E.C.R. I-5039, para. 34-35.

<sup>187</sup> *Ibid.*, para. 36-37.

<sup>188</sup> *Ibid.*, para. 38.

<sup>189</sup> *Ibid.*, para. 28.

<sup>190</sup> *Ibid.*, para. 29.

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”.<sup>191</sup> The key to this is the interest of protecting consumers. According to the ECJ, the only time that the interest of protecting free competition can prevail the interest in protection of the intellectual property right and the economic freedom of its owner is in a situation where “the refusal to grant a license prevents the development of the secondary market to the detriment of consumers”.<sup>192</sup>

The Court was very cautious to develop any further on requirement (c), the existence of objective justification. Utilizing a careful terminology, the ECJ held that, in the light of all the facts in the case, it had to be determined whether the refusal to license could be justified by objective considerations.

In relation to the final condition (d), the refusal’s likelihood of excluding all competition on a secondary market, the Court recalled its approach in *Bronner* and held that it is relevant to distinguish between an upstream market, constituted by the indispensable product or service, and a secondary market, on which the product or service is used for the production of another product or the supply of another service.<sup>193</sup> In making this distinction and establishing a primary (upstream) market, it is sufficient that a potential or hypothetical market can be identified. According to the Court, that is the case where the products or services are indispensable in order to carry on a particular business and where there is an actual demand for them on the part of undertakings which seek to carry on the business for which those products or services are indispensable.<sup>194</sup> To this end, it is determinative that two different stages of production may be identified and that they are interconnected, inasmuch as the upstream product is indispensable for the supply of the downstream product.<sup>195</sup> Applying these considerations to the circumstances of the case, the Court stated that the relevant question for the referring court to ask itself in order to determine whether criterion (d) is satisfied is whether IMS’s 1860 brick structure constitutes (upstream) an indispensable factor in the downstream supply of regional sales data for pharmaceutical products.

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<sup>191</sup> Ibid., para. 49.

<sup>192</sup> Ibid., para. 48.

<sup>193</sup> Ibid., para. 41-42.

<sup>194</sup> Ibid., para. 44.

<sup>195</sup> Ibid., para. 45.

### 3.5.4.2 Comments

While *IMS Health* was an article 267-reference case and the Court did not provide a ruling on the merits of the case, it did however enlarge the toolbox for understanding the ‘exceptional circumstances’ doctrine established in previous case law and gave advanced guidance on the interpretation of several of the four sub-conditions. The Court claimed that it was *sufficient* if four cumulative conditions were fulfilled in order for the refusal to license to be considered an abuse, namely:

(a) access to the material protected by an intellectual property right is ‘indispensable’ in order to carry out a particular business,

(b) the refusal prevents the emergence of a ‘new product’ for which there is potential consumer demand,

(c) the refusal is ‘incapable of being justified by objective considerations’, and

(d) the refusal is ‘likely to exclude any competition on a secondary market’.

In this context, the choice to utilize ‘sufficient’ in paragraph 38 of the judgment should be noted. This terminology of the Court indicates that if all four of these cumulative conditions are satisfied in a refusal to license case, then an ‘abuse’ in the meaning of article 102 TFEU is established. However, it does also leave the door open that ‘exceptional circumstances’ may be at hand in situations other than those mentioned in (a)-(d). It can therefore be argued that the ‘catalogue’ of exceptional circumstances is not an exhaustive checklist, but merely one collection of many ‘exceptional circumstances’. This does not follow explicitly by the Court’s judgment but is a consistent textual interpretation of the wording of the passage. Naturally, this ambiguity in terminology is unfortunate since it leaves behind several question marks that remain necessary for future jurisprudence to provide an answer for.

Reciting the principles in *Volvo v. Veng* and *Magill*, the ECJ acknowledged the exclusive right of reproduction of the holder of an intellectual property right and emphasized that a refusal to grant a license to a third party cannot in itself constitute an abuse. The possibility of a compulsory license on basis of article 102 TFEU may only

arise in 'exceptional circumstances'. The Court's use of the expression 'exceptional' reflects its restrictive view to treat a refusal to license as abusive conduct. It can therefore be held that there is a preliminary presumption against issuing the remedy of a compulsory license, but it can be successfully rebutted in very limited and specific circumstances. The hesitance of the Court to straightforwardly regard a refusal to grant a license as an abuse is an indication that it took a position on the side of intellectual property right holders and were undoubtedly welcoming news in 'new economy' industries.

Concerning the interpretation of the 'new product' condition, the ECJ held that the appraisal of the requirement was a matter of whether the requesting undertaking would 'essentially duplicate' the right-holder's product or if it would concentrate on offering a new product that was not already on the market. A conclusion from this part of the judgment suggests that a refusal to license will not be regarded as an abuse where the potential licensee's intention is to merely develop a product that duplicates or imitates the product already offered by the prospective licensor. It can be argued that the Court is thus (indirectly) encouraging 'competition by substitution' rather than 'competition by imitation'. It is also a signal that competitors or other third parties will not be able to utilize competition law as an instrument to free ride on the innovative efforts of right-holders. The Court held that competition law intervention in the context of refusal to license is warranted solely when the refusal prevents the development of a secondary market for the detriment of consumers. The rationale for this line of reasoning was to safeguard the interest of consumer welfare and not to protect the interests of individual competitors.

While the Court did not decide *IMS Health* on the substance of the case, it should be problematized whether NDC actually had the intention to offer a new product. NDC was a direct rival to IMS on the market for providing regional sales data on pharmaceutical products. The circumstances of the case clearly demonstrate that the reason behind NDC's request to access IMS's brick structure was to create its own regional sales reports based on that structure. The relevant aspect in this regard is thus the degree of novelty of those sales reports in comparison to the reports provided by IMS. The circumstances provided in the preliminary ruling do not specify the distinct characteristics of NDC's 'new' sales reports, but it is clear that both companies offered an identical service to their clients, namely the provision of regional sales reports on pharmaceutical products. The essence of the 'new product' requirement, when it was first introduced and contemplated

in *Magill*, was the unsatisfied consumer demand for ‘something’ that was not available on the market. Since IMS was already present on the relevant market and offered a service that was attractive among its clients, and which NDC aimed to compete with by acquiring access to the standardized brick structure, there is not much persuasion in arguing the NDC’s sales reports were novel or sufficiently different than those already marketed by IMS.

### 3.5.5 Microsoft

In 1998, the Commission started an investigation against Microsoft after a complaint filed by Sun Microsystems (Sun). Sun was a company operating on the market for provision of network computing infrastructure solutions that comprised computer and network storage systems. In its complaint to the Commission, Sun alleged that Microsoft abused its dominant position contrary to article 102 TFEU by refusing to disclose sufficient interface information in order to enable Sun to create ‘work group operating systems’ (WGOS) that would operate satisfactorily with Microsoft’s Windows desktop and server operating systems. According to Sun, the withheld interoperability information was necessary to viably compete as a work group server operating system supplier. It was also assumed that Microsoft’s interoperability information enjoyed intellectual property protection, primarily copyright and patent, and constituted business secrets. Microsoft had previously supplied complete interoperability information to producers of servers, but once Microsoft entered the market itself and started producing its own competing server operating system software, its incentives changed and decided to hold back access to the interoperability information.

In 2004, the Commission adopted a decision in which it concluded that Microsoft had infringed article 102 TFEU.<sup>196</sup> The Commission concluded that Microsoft occupied a dominant (quasi-monopoly) position on the client PC operating system market and that it had become the *de facto* market standard for interoperability in work group networks.<sup>197</sup> In the decision, the Commission reiterated the notion of the ‘exceptional circumstances’ doctrine established in the case law of the European courts and made reference to, *inter alia*, *Volvo v. Veng*, *Magill* and *Bronner*.<sup>198</sup> In the Commission’s opinion, the sets of exceptional circumstances identified in these couple of cases did not signify that it was

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<sup>196</sup> Commission Decision COMP/C-3/37.792, *Microsoft* [2004] 24 March 2004.

<sup>197</sup> *Ibid.*, para. 779.

<sup>198</sup> *Ibid.*, para. 550-554.

prevented from taking into regard other circumstances of exceptional character and that “there is no persuasiveness to an approach that would advocate for an exhaustive checklist of exceptional circumstances”.<sup>199</sup> The Commission’s understanding of the case law was therefore that it had to analyse the entirety of the circumstances surrounding a specific instance of a refusal to supply.<sup>200</sup> For instance, the Commission had identified a couple of particular circumstances in the case that did not directly fall under the *Magill* or *IMS Health* criteria: (i) Microsoft was using its ‘extraordinary power’ on one market in order to exclude or eliminate competition on an adjacent secondary market and (ii) that the case involved the disruption of previous levels of supply.<sup>201</sup> However, even though the view of the Commission suggested that it was free to make an overall assessment, its examination of Microsoft’s refusal to supply the interoperability information as abusive behaviour relied on the framework of four cumulative conditions that the ECJ had laid down in *Magill* and *Bronner*. The Commission held that the criteria for the existence of ‘exceptional circumstances’ were fulfilled. Firstly, the Commission held that the interoperability information was indispensable due to the non-existence of substitutes for disclosure by Microsoft.<sup>202</sup> The Commission concluded that the rivals’ systems had to be capable of interoperating with Microsoft’s Windows operating system on an equal footing as Microsoft’s own systems in order to compete viably and that this was not possible without the information Microsoft refused to disclose.<sup>203</sup> However, Microsoft argued that access to the interoperability information was not indispensable since distributors of, for instance, Linux products had constantly increased in market shares on the work group server operating systems market without having access to Microsoft’s interoperability information. Secondly, instead of arguing that the refusal prevented the emergence of a new product, the Commission claimed that Microsoft’s refusal to disclose the interoperability information had negative impact on technical development to the detriment of consumers.<sup>204</sup> To this end, the Commission maintained that if Microsoft’s competitors had access to the interoperability information they could use the disclosures to develop advanced features of their own products.<sup>205</sup> However, due to the lack of interoperability that competing work group server operating system products could

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<sup>199</sup> Ibid., para. 555.

<sup>200</sup> Ibid., para. 558.

<sup>201</sup> Ibid., para. 556.

<sup>202</sup> Ibid., para. 668.

<sup>203</sup> Ibid., para. 692.

<sup>204</sup> Ibid., para. 701.

<sup>205</sup> Ibid., para. 695.

achieve with the Windows domain architecture, an increasing number of customers were locked into a homogenous Windows solution.<sup>206</sup> According to the Commission, this impaired the ability of consumers to benefit from the innovative efforts that Microsoft's rivals brought to the market and that there would be limited scope for innovation. Thirdly, with regard to the criteria of the exclusion of competition, the Commission held that Microsoft's refusal to supply put its competitors at a strong competitive disadvantage in the WGOS market to such an extent where there was a risk of elimination of competition.<sup>207</sup> Fourth and lastly, the Commission rejected Microsoft's plea that its refusal was objectively justified by the fact that the interoperability information was protected by intellectual property rights and that involuntary disclosure would negatively affect its incentives to innovate.<sup>208</sup> According to the Commission, even if there was such a disincentive, "the possible negative impact of an order to supply on Microsoft's incentives to innovate is outweighed by its positive impact on the level of innovation of the whole industry (including Microsoft)".<sup>209</sup>

Subsequently, Microsoft brought an action by application to the GC for the annulment of the Commission's decision.<sup>210</sup>

### **3.5.5.1 The Judgment of the GC**

The GC first examined the relevant criteria it had to adopt for the assessment of Microsoft's act to refuse to disclose the interoperability information. After making the assumption that the interoperability information was protected by intellectual property rights and constituted trade secrets,<sup>211</sup> the GC concluded that it was undisputed between the parties that the refusal in question could be assessed under article 102 TFEU on the assumption that it constituted a refusal to license intellectual property rights.<sup>212</sup> The GC then observed that, while undertakings as a general rule are free to choose their business partners, in certain circumstances a refusal to supply on the part of a dominant undertaking may constitute an abuse of dominance within the meaning of article 102 TFEU.<sup>213</sup> The General Court then proceeded by referring to the case law of the ECJ and

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<sup>206</sup> Ibid., para. 694.

<sup>207</sup> Ibid., para. 589.

<sup>208</sup> Ibid., para. 712.

<sup>209</sup> Ibid., para. 783.

<sup>210</sup> Case T-201/04, *Microsoft v. Commission (Microsoft)* [2007] E.C.R. II-3601, para. 59.

<sup>211</sup> Ibid., para. 289.

<sup>212</sup> Ibid., para. 314.

<sup>213</sup> Ibid., para. 319.

pointed out the circumstances that had ‘exceptional’ character in *Magill, Bronner* and *IMS Health*.<sup>214</sup> By reciting settled case law, the GC held that a refusal to license a third party to use a product covered by intellectual property rights cannot in itself constitute an abuse, but that the exercise by the owner of an exclusive right may give rise to an abuse in ‘exceptional circumstances’.<sup>215</sup> It thus confirmed that the ‘exceptional circumstances’ doctrine was the applicable criteria in the light of which Microsoft’s alleged abusive behaviour would be examined.<sup>216</sup>

The GC’s interpretation of the ‘exceptional circumstances’ doctrine was that the following four circumstances, “in particular”, had to be considered as ‘exceptional’: (i) the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market, (ii) the refusal is of such a kind as to exclude any effective competition on that neighbouring market, (iii) the refusal prevents the emergence of a new product for which there is potential consumer demand and (iv) the refusal is incapable of being objectively justified.<sup>217</sup> The GC did also note that the criterion of prevention of a new product is found only in the case law on the exercise of intellectual property rights.<sup>218</sup> Finally, it also emphasized that it was necessary to distinguish between two markets, namely, one market constituted by the indispensable product or service on which the undertaking refusing to supply or license is holding a dominant position and a second neighbouring market on which the indispensable product or service is used in the manufacture of another product or for the supply of another service.<sup>219</sup>

In regard to the indispensability criterion, the GC concluded that the Commission was correct in finding that the interoperability information was indispensable. It drew this conclusion by stressing that, due to the quasi-monopoly Microsoft had on the client PC operating system market, non-Windows WGOS would be prevented from competing viably in the market if they were incapable of achieving a high degree of interoperability with Windows.<sup>220</sup> According to the GC, various sources of evidence showed that interoperability with Windows infrastructure was a key factor in the uptake of Windows

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<sup>214</sup> *Ibid.*, para. 324, 328-330.

<sup>215</sup> *Ibid.*, para. 331.

<sup>216</sup> *Ibid.*, para. 336.

<sup>217</sup> *Ibid.*, para. 332-333.

<sup>218</sup> *Ibid.*, para. 334.

<sup>219</sup> *Ibid.*, para. 335.

<sup>220</sup> *Ibid.*, para. 387-388.

work group server operating systems.<sup>221</sup> In addition, none of the proposed alternatives of ensuring interoperability, for instance reverse engineering, made it possible to attain the high degree of compatibility.<sup>222</sup> Furthermore, the GC rejected Microsoft's argument that other alternative operating systems were competing effectively on the market and considered that "the growth of Linux products on the work group server operating systems market was only modest".<sup>223</sup>

Concerning the requirement of elimination of competition, as a first observation, the GC interpreted this requirement as signifying the elimination of 'effective' competition on the downstream (neighbouring) market. The continued existence of competitors with marginal presence in niche markets would not suffice to substantiate 'effective' competition.<sup>224</sup> Secondly, according to the GC, it is sufficient to demonstrate merely a 'risk' of effective competition being excluded or eliminated and it accepted that the Commission was not required to wait until competitors were actually eliminated from the market before it could intervene.<sup>225</sup> The GC was satisfied that the Commission had established a 'risk' of elimination of effective competition by relying on "accurate, reliable and coherent evidence"<sup>226</sup> and subsequently found that this criterion was satisfied as well.

Discussing the interpretation of the new product requirement, the GC observed that the legal basis for a refusal to license preventing the emergence of a new product falls under article 102(2)(b) TFEU and emphasized that the circumstance relating to the appearance of a new product, as envisaged in *Magill* and *IMS Health*, could not be the only parameter which determines whether a refusal to license intellectual property rights is capable of causing prejudice to consumers within the meaning of article 102(2)(b) TFEU.<sup>227</sup> As that provision stipulates, a refusal to license may not only consist in limiting production or markets, but also technical development. The GC considered that the Commission was correct to observe that an increasing number of consumers were locked into a standardized Windows solution at the level of work group server operating systems.<sup>228</sup> This limitation in choice was all the more damaging to consumers because

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<sup>221</sup> Ibid., para. 393.

<sup>222</sup> Ibid., para. 435.

<sup>223</sup> Ibid., para. 432.

<sup>224</sup> Ibid., para. 563.

<sup>225</sup> Ibid., para. 561-562.

<sup>226</sup> Ibid., para. 564.

<sup>227</sup> Ibid., para. 643 and 647.

<sup>228</sup> Ibid., para. 651.

they considered that non-Microsoft work group server operating systems were better than those of Microsoft with respect to a series of important features.<sup>229</sup> In addition, the artificial advantage in terms of interoperability that Microsoft retained by its refusal discouraged its competitors from developing and marketing work group server operating systems with innovative features.<sup>230</sup> Furthermore, according to the GC, Microsoft's competitors would not have any incentives to or interest in reproducing or cloning Microsoft's products after gaining access to the requested interoperability information.<sup>231</sup> In the GC's opinion, the rivals would not have any other choice than to differentiate their products from Microsoft's.<sup>232</sup>

Microsoft relied its plea for objective justification on two separate grounds. The first ground for objective justification involved the fact that the technology in question was protected by intellectual property rights and constituted trade secrets. Microsoft argued that it had made significant investments in designing the interoperability information and that the commercial success represented the just reward.<sup>233</sup> The second basis for Microsoft's objective justification defence was that an order of compulsory license would eliminate or prejudice its future incentives to invest in the creation of more intellectual property. In regard to the defence relating to that the interoperability information enjoyed intellectual property right protection, the GC rejected Microsoft's defence on the ground that an acceptance of such a basis for objective justification would lead to the conclusion that a refusal to license could never constitute an infringement of article 102 TFEU.<sup>234</sup> As to the plea that the interoperability information constituted business secrets, the GC dismissed this defence as well and claimed that "there is no reason why secret technology should enjoy a higher level of protection than, for example, technology which has necessarily been disclosed to the public by its inventor in a patent application procedure".<sup>235</sup> The GC did neither accept Microsoft's plea that compulsory disclosure would have negative impacts on its incentives, dismissing them as "vague, general and theoretical arguments".<sup>236</sup> In the GC's opinion, Microsoft did not provide sufficient and concrete evidence as to demonstrate that a compulsory license would significantly reduce

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<sup>229</sup> Ibid., para. 652.

<sup>230</sup> Ibid., para. 653.

<sup>231</sup> Ibid., para. 656-657.

<sup>232</sup> Ibid., para. 658.

<sup>233</sup> Ibid., para. 666.

<sup>234</sup> Ibid., para. 690.

<sup>235</sup> Ibid., para. 693.

<sup>236</sup> Ibid., para. 698.

its future incentives to innovate and held, contrastingly, that it constituted “normal business practice for operators in the industry to disclose to third parties the information which will facilitate interoperability with their products” and that “[s]uch disclosure [would] allow the [competing] operators concerned to make their own products more attractive”.<sup>237</sup>

In conclusion, as the GC found that the ‘exceptional circumstances’ identified by the ECJ in previous and settled case law were present in this case, Microsoft’s appeal was rejected as wholly unfounded.<sup>238</sup>

### 3.5.5.2 Comments

An introductory remark to note from *Microsoft* is the Commission’s (extensive) interpretation of ECJ’s ‘exceptional circumstances’ doctrine from previous case law. In the Commission’s view, the four-folded catalogue of ‘exceptional circumstances’ that the ECJ had identified in *Magill* and *IMS Health* was not exhaustive, but rather a list of criteria which it was ‘sufficient’ to satisfy.<sup>239</sup> According to the Commission, this left the door open for it to examine the entire range of factors surrounding a refusal to license. This was one of several attempts in the *Microsoft* case that the Commission made in order to stretch the *Magill* and *IMS Health* criteria. Another illustration was its interpretation of the ‘new product’ condition. By relying on article 102(2)(b) TFEU, the Commission (successfully) argued that the new product criterion did not solely encompass situations where a refusal to license limits production or markets but also where such behaviour hampers technical development. However, the Commission’s argument that it should not be restricted from considering all relevant factors and circumstances surrounding a refusal to license implies that the Commission’s view is that a case-by-case approach should be adopted in reviewing refusals to license intellectual property rights so that also refusals that do not ‘neatly’ or directly fit into the *Magill*, *Bronner* or *IMS Health* criteria could still be regarded as an abuse contrary to article 102 TFEU. Future jurisprudence will answer whether the Commission’s approach will win the sympathy of the judiciary.

The General Court’s judgment is also noteworthy in various regards. Its finding that Microsoft’s refusal to disclose the interoperability information amounted to abusive conduct was dependent on an expansive interpretation of the case law of the ECJ. It

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<sup>237</sup> Ibid., para. 701-702.

<sup>238</sup> Ibid., para. 712.

<sup>239</sup> Ibid., para. 303.

might have been preferably if the GC had seized the opportunity and considered the other relevant special circumstances put forward by the Commission, for example the 'leverage theory' that Microsoft was utilizing its extraordinary strength on one market to eliminate competition on an adjacent market or that the case involved the disruption of previous levels of supply. Nevertheless, the most significant part of the judgment is undoubtedly the GC's interpretation of the 'new product' criteria. The GC held that the new product requirement could not be the only parameter which determines whether the refusal to license an intellectual property right is capable of causing prejudice to consumers in accordance with article 102(2)(b) TFEU. As the GC pronounced, once Microsoft's competitors would achieve a sufficient degree of interoperability with its Windows domain, they would market improved products and be able to offer software that, far from merely cloning or duplicating Microsoft's work group server operating systems, would be more innovative and distinguishable from those of Microsoft. This line of reasoning implies that the GC took into regard the negative impact that the refusal had on cumulative follow-on innovation and the problem of a consumer 'lock-in' to a homogenous Microsoft solution, which was not necessarily the most preferred among consumers. Since the competitors were restricted from having access to the interoperability information, they were consequently foreclosed from competing viably in the (downstream) market and unable to develop upgraded software products for Microsoft's Windows operating system. It can therefore be argued that, instead of distinguishing *Microsoft* from previous cases, the GC decided to broaden the precedent by also including limitation of technical development as a factor in the equation.

However, one cannot help but wonder whether the GC could have utilized this line of reasoning in accordance with the 'traditional' approach in assessing the new product criterion, instead of entering into entirely new and unfamiliar territory by including 'limitation on technical development' as a relevant parameter. Since the GC had already concluded that the competitors would not limit themselves to simply emulate Microsoft's software but rather develop improved and distinguishable products, it could have come to the same conclusion by utilizing the *Magill* and *IMS Health* criteria. This way the GC would have avoided spreading added uncertainty and by implementing a more unadventurous approach it would have contributed with more uniformity in interpreting the 'exceptional circumstances' doctrine.

### 3.5.6 Huawei

In the preliminary ruling of the ECJ in the *Huawei*<sup>240</sup> case, Huawei Technologies ('Huawei') was active in the telecommunications sector and the proprietor of a European patent. The focus in the case lied on the 'Long Term Evolution' (LTE) standard, a standard for wireless high-speed data communication for mobile phones, and the standard for fourth-generation (4G) mobile phones systems. Huawei had notified its patent to the leading standard-setting organisation (SSO) ETSI, who declared Huawei's patent as a standard-essential patent (SEP) for the LTE and 4G standards. As a consequence of the affirmation of the patent as a SEP, Huawei made a commitment to license the essential patent to third parties on fair, reasonable and non-discriminatory (FRAND) terms. ZTE, a Chinese telecommunications company, marketed products that incorporated the LTE software technology and inevitably used the teaching of the SEP without paying royalties to Huawei. The parties engaged in discussions concerning, *inter alia*, the infringement of Huawei's SEP and held lengthy negotiations in an attempt to reach a licensing agreement on FRAND terms. In the license negotiations, Huawei proposed an amount which it considered to be a reasonable royalty fee. For its own part, ZTE sought a cross-licensing agreement with a trivial royalty on top. However, the parties were unsuccessful to reach a mutual understanding of a licensing agreement based on FRAND terms and a contract was thus never concluded. Since ZTE (allegedly) continued to utilize the LTE technology without paying royalties, Huawei brought an action for infringement of its SEP before a German district court, seeking damages, the recall of products, an injunction prohibiting the continuation of the infringement and the rendering of accounts. Opposing Huawei's claim, ZTE argued that Huawei was abusing its dominant position by refusing to grant a license to its essential patent on FRAND terms and by subsequently instituting an action for injunction relief.

The German court stayed the national proceedings and referred several questions to the ECJ to provide answers for. Essentially, the Court was asked whether and under which circumstances a SEP holder who has made a FRAND commitment to a SSO infringes article 102 TFEU by bringing an action for injunction against a third party that is willing to negotiate and enter a licensing agreement on FRAND terms.

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<sup>240</sup> Case C-170/13, *Huawei Technologies (Huawei)*, 16 July 2015.

### 3.5.6.1 The Judgment of the ECJ

For the purpose of providing an answer for the referred questions by the German court and in assessing the legitimacy of an action for injunction brought by a holder of a SEP against an infringer, the ECJ stated that it was necessary to strike a balance between the general interests of (i) maintaining free and undistorted competition within the internal market and (ii) safeguarding the (enforcement of the) proprietor's intellectual property rights and its right to effective judicial protection, as is guaranteed by articles 17(2) and 47 of the EU Charter of Fundamental Rights.<sup>241</sup>

The ECJ pointed out that the national court had stated in its reference for a preliminary ruling that the existence of a dominant position was undisputed between the parties in the main proceedings. The Court therefore considered that it was obliged to provide guidance only in relation to the existence of abusive practice and consequently avoided to address the issue of dominance.

The Court began its assessment of Huawei's conduct by referring to the principles that it had established in its previous case law concerning refusal to license intellectual property rights. In this connection, the ECJ held that the exercise of an exclusive right linked to an intellectual property right, in the present case the right to bring an action for injunctive relief, forms part of the bundle of rights of the proprietor of an intellectual property right and that the exercise of such a right cannot in itself constitute an abuse, even if it is an act of an undertaking holding a dominant position.<sup>242</sup> By repeating its case law in *Volvo v. Veng*, *Magill* and *IMS Health*, the Court stated that the exercise of an intellectual property right may involve abusive conduct in 'exceptional circumstances'.<sup>243</sup>

However, the ECJ noted that the particular circumstances in *Huawei* distinguished the case from the precedents in two significant aspects. First, the ECJ acknowledged that the patent at issue was essential to a standard established by the standardization body, rendering its use indispensable to all competitors which envisage manufacturing products that comply with the standard to which it is linked.<sup>244</sup> The Court argued that this characteristic distinguishes standard-essential patents from a patent that is not essential to a standard. According to the ECJ, non-SEP:s do not 'normally' prevent third parties from manufacturing competing products since they can diverge from the non-SEP "without

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<sup>241</sup> Charter of Fundamental Rights of the European Union, OJ 2012, C 326/391.

<sup>242</sup> Case C-170/13, *Huawei Technologies (Huawei)*, 16 July 2015, para. 46.

<sup>243</sup> *Ibid.*, para. 47.

<sup>244</sup> *Ibid.*, para. 49.

compromising the essential functions of the product in question”, which is generally not the case in situations involving SEP:s.<sup>245</sup> Secondly, the Court considered that the present case was distinct from the previous cases concerning refusal to license by the fact that Huawei’s patent obtained SEP status only in return for the right-holder’s irrevocable commitment to grant licenses to the SEP on FRAND terms and which Huawei had in fact communicated to the SSO.<sup>246</sup> Consequently, the ECJ held that the right-holder of the SEP is capturing a position from which it can deploy a claim for injunctive relief in order to “prevent products manufactured by competitors from appearing or remaining on the market and, thereby, reserve to itself the manufacture of the products in question”.<sup>247</sup> The Court also emphasized that the assurance of the proprietor of the SEP to grant licenses on FRAND terms created ‘legitimate expectations’ on part of third parties that the right-holder would actually provide licenses on such terms.<sup>248</sup> The ECJ subsequently held that, in those (exceptional) circumstances, a refusal by a possessor of a SEP to grant a license to a third party on FRAND terms may, in principle, constitute an abuse of dominance in accordance with article 102 TFEU.<sup>249</sup>

Similarly, the Court manifested that the abusive nature of such a refusal to license may be raised by a potential infringer as a defence to actions for a prohibitory injunction or for the recall of products.<sup>250</sup> Nevertheless, the ECJ indicated that the proprietor of the SEP is obliged, under article 102 TFEU, to grant a license to its patent only on FRAND terms and pointed out that the parties in the main proceedings were not in agreement as to what licensing conditions that constituted FRAND terms.

In the next step of assessing the lawfulness of Huawei’s alleged abusive practice, the Court proceeded to explain the circumstances in which an application for injunction or recall of products *does not* constitute an abuse. It did so by declaring, at paragraph 55 of the judgment, how a SEP holder can “prevent an action for a prohibitory injunction or for the recall of products from being regarded as abusive”. While the referring German court submitted questions on the existence of abuse, the ECJ provided an answer in regard to the ‘absence of abuse’. By utilizing such reasoning, the Court thus reversed the perspective of the case.

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<sup>245</sup> Ibid., para. 50.

<sup>246</sup> Ibid., para. 51.

<sup>247</sup> Ibid., para. 52.

<sup>248</sup> Ibid., para. 53.

<sup>249</sup> Ibid..

<sup>250</sup> Ibid., para. 54.

On the basis of this analysis, the ECJ noted that the SEP holder “must comply with [specific] conditions which seek to ensure a fair balance between the interests concerned”.<sup>251</sup> In the subsequent passages of the judgment, the ECJ maps out the negotiation process and identifies specific procedural requirements that SEP holders should comply with if they wish to avoid antitrust liability and which unlicensed users of the SEP should observe in order to resist actions for injunctions. The procedural steps that the proprietor of the SEP and the unlicensed user of the SEP have to comply with, respectively, are set out by the ECJ as follows:

(a) prior to seeking an injunction, the licensor must alert the SEP user of the alleged infringement, designate the SEP concerned and specifying the way in which the patent is infringed,<sup>252</sup>

(b) the potential licensee must express its willingness to conclude a licensing agreement on FRAND terms,<sup>253</sup>

(c) subsequently, the SEP holder must present to the willing licensee a specific, written offer for a license on FRAND terms that includes the amount of royalty and the method in which the royalty is to be calculated,<sup>254</sup>

(d) the potential licensee must then respond to the SEP licensor’s offer diligently and in good faith, in accordance with recognized commercial practices in the industry, and without engaging in any delaying tactics.<sup>255</sup> If the willing licensee does not accept the licensor’s offer, it must promptly and in written submit a specific counter-offer that corresponds to FRAND terms,<sup>256</sup>

(e) if the potential licensee’s counter-offer is rejected by the SEP holder, and the potential licensee is already using the SEP before a licensing agreement is reached, it must provide appropriate security (e.g. a bank guarantee or by placing the amounts necessary on

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<sup>251</sup> Ibid., para 55.

<sup>252</sup> Ibid., para. 60-61.

<sup>253</sup> Ibid., para. 63.

<sup>254</sup> Ibid..

<sup>255</sup> Ibid., para. 65.

<sup>256</sup> Ibid., para. 66.

deposit) in accordance with recognized commercial practice and the calculation of the security must include the number of past acts of use of the SEP and the alleged infringer must also be able to present an account in respect of those acts of use,<sup>257</sup>

(f) where no agreement is reached following the counter-offer, the parties may request by common agreement that the level of the royalty shall be determined by an independent third party.<sup>258</sup>

A holder of a SEP has thus, from an article 102 TFEU perspective, legitimately commenced injunction proceedings if it has complied with the specific procedural requirements in (a) and (c), and the alleged infringer of the SEP has in turn not acted in conformity with at least one of the specific conditions in (b), (d) and (e). In contrast, an alleged infringer will successfully escape IP liability if it fulfils its obligations in (b), (d) and (e) and the SEP holder in turn fails to respect the procedural steps in either (a) or (c).

Finally, in regard to Huawei's claim for damages and seeking the rendering of accounts, the ECJ held that such exercises of intellectual property rights do not constitute an abuse of dominant position since such acts "do not have a direct impact on products complying with the standard in question manufactured by competitors appearing or remaining on the market".<sup>259</sup>

### 3.5.6.2 Comments

*Huawei* was not a 'classic' refusal to license case. Instead it concerned the prohibitive nature of the act of a dominant undertaking to commence an action for injunctive relief based on a standard-essential patent. However, the ECJ recited its general principles from *Magill* and *IMS Health* and held that the exercise of an intellectual property right can amount to an abuse in 'exceptional circumstances'. Subsequently, the Court discussed the anti-competitive nature of a refusal to license standard-essential patents and identified the existence of two circumstances that distinguished *Huawei* from previous case law on refusal to license and which the ECJ considered had 'exceptional' characteristics when the refusal in question was linked to a SEP. First, the essential nature of the patent to a standard established by a SSO rendered access to the SEP as 'indispensable' in order for

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<sup>257</sup> Ibid., para. 67.

<sup>258</sup> Ibid., para. 68.

<sup>259</sup> Ibid., para. 74-75.

competitors to manufacture products that comply with the industry standard. This is a familiar reasoning that the ECJ has utilized in prior case law. However, an interesting aspect in the SEP context is that the ‘indispensability’ criterion seems to be more or less automatically fulfilled due to the essential nature of the patent in question. This may very well be in line with the interpretation of the ‘indispensability’ condition as elaborated in *Bronner* and *IMS Health*. Due to the industry-wide implementation of one specific standard, the presence of alternative methods is non-existent or merely marginal. Utilizing the *Bronner* and *IMS Health* line of reasoning, it can also be argued that the adoption of one industry standard results in technical and economic obstacles that make it, if not impossible, at least unreasonably difficult to compete viably on the market without access to the SEP. The second ‘exceptional circumstance’ that the ECJ identified in *Huawei* was the fact that the patent had acquired SEP status only in return for Huawei’s commitment to grant licenses to the SEP on FRAND terms. Combining these two ‘exceptional’ circumstances and observing them as a whole in the SEP context, the reasoning in *Huawei* seems to indicate that the mere refusal to license a standard-essential patent means that the ‘exceptional circumstances’ doctrine is satisfied. When a patent obtains its status as a SEP, the essentiality (and indispensability) of the SEP becomes embedded in its very nature. As long as the standard for which the patent is essential still is ‘alive’ in the market, a competitor or another third party will practically always be in need of acquiring access to the SEP in order to develop products that can interoperate with that market standard. Also the second ‘exceptional’ circumstance, that the SEP holder has communicated its irrevocable pledge that it will license the patent to third parties on FRAND terms, is rooted in the nature of a SEP since the SSO would not have awarded the patent its SEP status unless its proprietor provided such a guarantee. As the beginning of paragraph 53 of the judgment refers to “in those circumstances”, the presence of those two ‘exceptional circumstances’ appears to be sufficient to find a refusal to grant a SEP license on FRAND terms as an abuse. This comes close to constitute a *per se* abuse. The criteria to find a refusal to provide a license to a SEP as an abuse therefore seems to have been set lower than for other intellectual property rights that do not enjoy ‘standard-essential’ status. But is this really the intention of the ECJ? When discussing the second ‘exceptional circumstance’, the Court argued that the pledge to license on FRAND terms had created legitimate expectations among third parties and that the proprietor of the SEP was in a position where it could prevent products manufactured by

competitors from appearing (or remaining) on the market and thereby reserved to itself the manufacture of those products. While the ECJ did not explicitly refer to the 'new product' requirement in *Huawei*, the reference to that the refusal to license the SEP 'prevents products manufactured by competitors from appearing on the market' is a strong insinuation of that criterion. Additionally, the notion of that the undertaking holding the SEP was 'thereby reserving to itself the manufacture of those products' discreetly reflects the criterion of 'elimination of competition'. Does this mean that the 'new product' and 'elimination of competition on a secondary market' criteria are also applicable in the SEP setting? If so, the essentiality of acquiring access to the SEP seems to assume that the SEP holder's refusal of granting a license on FRAND terms inevitably results in the prevention of the emergence of a new product and the elimination of competition on a secondary market. The undertaking possessing the SEP faces a struggling uphill battle to convince the European courts and the Commission of the opposite.

In the second part of the judgment, the ECJ set out a negotiation procedure containing specific conditions which the SEP holder and the potential SEP licensee need to act in conformity with in order to avoid antitrust and IP liability, respectively. In order for the SEP holder's initiation of injunction proceedings not to constitute an abusive conduct, it has to first alert the alleged infringer of the SEP and specify the ways in which it considers that the patent is being infringed. As a second step of the negotiation procedure, and following the potential licensee's declaration of being willing to enter a licensing agreement on FRAND terms, the SEP holder has to present a specific, written offer for a license on FRAND terms that includes the level of the royalty and the way in which the royalty is to be calculated. This suggests that the ECJ has placed the primary responsibility on the SEP holder to take the initiative and notify the unlicensed user of the SEP of its infringing conduct. The second procedural requirement means that it is the SEP holder who is the party who first needs to present a proposal for a licensing agreement based on FRAND terms. This should be regarded as reasonable, particularly in situations where, as the ECJ pointed out at paragraph 64 of the judgment, the SEP proprietor has earlier entered licensing agreements with other competitors that are kept confidential or where there is an absence of public standardized licensing agreements. In such circumstances, the SEP holder is better placed than the alleged infringer to determine whether its offer to the willing licensee complies with the condition of non-discrimination.

Another significant aspect of *Huawei* is that the ECJ created a ‘safe harbour’ that will become applicable if the SEP holder abides the specific negotiation procedure requirements. In a play of semantics, it can be argued that the Court, in effect, has identified a set of circumstances in which the proprietor of the SEP could be objectively justified in initiating an injunction proceeding. Since the ECJ does not explicitly refer this ‘safe harbour’ under the more general principle of objective justification, it remains uncertain if it is appropriate to categorize the specific negotiation procedure requirements as circumstances that will objectively justify the SEP holder’s refusal to license its essential patent or its commencement of injunction proceedings. Nevertheless, the effect of providing a ‘safe harbour’ has the same consequence as if the procedural requirements could be regarded as a collection of circumstances objectively justifying the dominant undertaking’s conduct, namely that the practice will in either way avoid infringing article 102 TFEU.

### **3.6 The Approach to Refusal to Supply and License in the Guidance Paper**

The section of the Guidance Paper dealing with refusal to supply or license is limited to those situations in which a vertically integrated dominant undertaking competes on the downstream market with a competitor with whom it refuses to supply or license. The term ‘downstream market’ is referring to the market for which the refused input is needed in order to manufacture a product or provide a service. The section does not deal with any other varieties of refusals except of this scenario.<sup>260</sup>

The refusal to supply section in the Guidance Paper begins with the principle statement that any undertaking (whether dominant or not) has the right to choose its trading partners and to dispose freely of its property. The Commission acknowledges that the imposition of an obligation to supply (or license) may undermine undertakings’ incentives to invest and innovate and thus possibly harm consumers.<sup>261</sup> It is also conceded that a duty to supply may tempt competitors to free ride on investments made by the dominant undertaking and that neither of these consequences are (in the long run) in the interest of consumers.<sup>262</sup>

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<sup>260</sup> The Guidance Paper, para. 76.

<sup>261</sup> *Ibid.*, para. 75.

<sup>262</sup> *Ibid.*.

The Guidance Paper does not make a distinction between refusal to license and other kinds of refusals. The Commission states that the concept of refusal to supply covers a broad range of practices, such as (i) refusal to supply products to existing or new customers, (ii) refusal to license intellectual property rights, including when the license is necessary to provide interface information, or (iii) refusal to grant access to an essential facility or a network.<sup>263</sup> The concept of refusal to supply encompasses both actual refusals to supply and ‘constructive’ refusals. The Guidance Paper exemplifies that a constructive refusal to supply or license can take the form of unduly delaying or otherwise degrading the supply of the product or involve the imposition of unreasonable conditions to enter an agreement.<sup>264</sup>

By reflecting the case law of the European courts, the Guidance Paper provides a test for when a refusal to supply or license will be considered an enforcement priority for the Commission. The test comprises three cumulative conditions.<sup>265</sup>

(a) the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market,

(b) the refusal is likely to lead to the elimination of effective competition on the downstream market, and

(c) the refusal is likely to lead to consumer harm.

On condition (a), the objective necessity of the product or service, the Commission relies on *Microsoft* by stating that the criterion does not mean that, without the refused input, no competitor could ever enter or survive on the downstream market. Rather, the assessment of whether condition (a) is satisfied or not takes the form of whether the input is indispensable. According to the Commission, an input is indispensable when there is no actual or potential substitute on which competitors in the downstream market could rely on so as to counter the negative consequences of the refusal. Therefore, the test is whether an alternative source of efficient supply is available and capable of allowing

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<sup>263</sup> Ibid., para. 78.

<sup>264</sup> Ibid., para. 79.

<sup>265</sup> Ibid., para. 81.

competitors to exert a competitive constraint on the dominant undertaking in the downstream market.<sup>266</sup>

On condition (b), elimination of effective competition, the Commission considers that if the objective necessity criterion is satisfied the refusal to supply or license is generally liable to eliminate, either immediately or over time, effective competition in the downstream market.<sup>267</sup> The Commission identifies a number of factors which affect the likelihood of effective competition being eliminated, including high market shares of the dominant undertaking in the downstream market, the degree of substitutability between the dominant undertaking's output and that of its downstream competitors, and the proportion of competitors in the downstream market affected by the refusal.

On the (c) criterion, the impact on consumer harm, the Commission holds that it will normally pursue a case if the likely negative consequences of the refusal to supply or license in the relevant market outweigh over time the negative consequences of imposing an obligation to supply or license.<sup>268</sup> Furthermore, by making references to the case law on refusal to license, the Commission considers that consumer harm may arise where the competitors that the dominant undertaking is trying to foreclose are prevented from bringing innovative goods or services to the market or where follow-on innovation is likely to be stifled as a result of the refusal.<sup>269</sup> In the Commission's view, this is particularly the case when the requesting undertaking 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 and market new products for which there is potential consumer demand or is likely to contribute to technical development.<sup>270</sup>

The Guidance Paper also states that the Commission will consider claims on part of a dominant undertaking arguing that the refusal in question was justified due to efficiency gains. The Commission states that it will take into regard claims that the refusal was necessary to realise an adequate return on the investments required to develop its input business, thus generating incentives to continue to invest in the future.<sup>271</sup> In regard to objective justification in general, the Guidance Paper notes that whether a *prima facie* abusive conduct is objectively necessary must be determined on the basis of factors

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<sup>266</sup> Ibid., para. 83.

<sup>267</sup> Ibid., para. 85.

<sup>268</sup> Ibid., para. 86.

<sup>269</sup> Ibid., para. 87.

<sup>270</sup> Ibid..

<sup>271</sup> Ibid., para. 89.

external to the dominant undertaking.<sup>272</sup> Also, when discussing efficiencies in general terms, the Commission notes that an exclusionary abuse (such as a refusal to license) may be justified on the ground of efficiencies that are sufficient to guarantee that no net harm to consumers is likely to arise.<sup>273</sup> In this context, the dominant undertaking will be expected to demonstrate four cumulative conditions in order to present a successful efficiency claim: (i) the efficiencies haven been or are likely to be realised as a result of the conduct, (ii) the conduct is indispensable to the realisation of those efficiencies, (iii) the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare on the affected markets, and (iv) the conduct does not eliminate effective competition by removing all or most existing sources of actual or potential competition.

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<sup>272</sup> Ibid., para. 29.

<sup>273</sup> Ibid., para. 30.

## 4. Post-Huawei: Where Does Europe Stand in Refusal to License Cases?

### 4.1 General Observations

The evolution of the ‘exceptional circumstances’ doctrine as a legal standard to examine a dominant enterprise’s refusal to license its intellectual property rights has had a rather long and adventurous road from when it was first introduced in *Magill* to the most recent outcome in *Huawei*. Several question marks were raised after the judgment in *Magill*: first, whether the circumstances of exceptional character in that case were cumulative, and necessary, conditions for finding an abuse; secondly, how differentiated or novel character a ‘new product’ had to have in order to be considered ‘new’ and thirdly, how should the assessment be carried out to determine whether an input is ‘indispensable’ for the production of another product? The doctrine of ‘exceptional circumstances’ has gradually progressed through cases where the European courts have expressed their view on the interpretation of the requirements in the doctrine, primarily in *Bronner* and *IMS Health* and ultimately in *Microsoft* and *Huawei*. This series of case law establishes that it is *sufficient* if, at a minimum, these four cumulative conditions are present:

- (a) the refusal denies access to a product or service that is ‘indispensable’ for carrying out a particular business,
- (b) the refusal prevents the emergence of a ‘new product’ for which there is potential consumer demand,
- (c) the refusal is ‘likely to eliminate any competition on a secondary market’, and
- (d) absence of ‘objective considerations’ to justify the refusal.

As the Commission’s argumentation in the *Microsoft* case indicates, and which follows implicitly from the ECJ’s judgment in *IMS Health*, the presence of these four cumulative conditions will render a refusal to license as an abuse. But, since the existence of these circumstances is only ‘sufficient’ for finding an abuse, a linguistic interpretation implies

that also other circumstances can be relevant and have ‘exceptional’ character. Therefore, it can be summarized, and should be acknowledged, that the door is neither entirely closed nor wide open to take into regard other circumstances than those listed in (a)-(d) above.

The following sections of the thesis will make an attempt to clarify and summarize how each of the ‘*sufficient*’ conditions for finding the existence of ‘exceptional circumstances’ have been interpreted through the long journey of cases from the European courts and will also present observations and reflections made by legal scholars and practitioners. In addition, the potential impact and implications of the *Huawei* ruling on the understanding of the ‘exceptional circumstances’ doctrine will also be discussed.

## 4.2 Indispensability

The condition of indispensability was first mentioned in *Magill* and further elaborated in *Bronner*. In *Magill*, it was the basic information consisting in programme scheduling that constituted the raw material indispensable for the compilation of the comprehensive weekly TV guide that Magill intended to put on the market. In this case, the broadcasting companies utilized their national copyrights in the television listings to deny Magill access to the indispensable material. Thus, there were no other substitutable sources of supply from which Magill could gain access to the indispensable raw material. The ECJ continued to elaborate on the ‘indispensability’ criterion in *Bronner*. In that case, the Court stated that, in order for the nationwide home-delivery service to be indispensable for Bronner to continue operating its business, there must not be “any actual or potential substitute in existence for the home-delivery scheme”.<sup>274</sup> For this purpose, the ECJ considered that it had to be established that ‘technical, legal or economic obstacles were capable of making it impossible or unreasonably difficult’ for any other publisher and distributor of daily newspapers to create its own home-delivery service, either individually or in collaboration with others. Furthermore, the Court identified the existence of several alternative methods of distributing daily newspapers, such as sales in shops or kiosks, even if they were less favourable or advantageous. In addition, in order for access to be regarded as indispensable, the Court agreed with AG Jacobs that it was necessary to establish that it would not be economically viable to create a second home-delivery service of a comparable capacity to the existing one. These findings were

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<sup>274</sup> Case C-7/91, *Bronner* [1998] E.C.R. I-7791, para. 41.

subsequently confirmed in *IMS Health*. For the purpose of determining indispensability, the ECJ stated in *IMS Health* that a relevant factor to take into account was the fact that the pharmaceutical industry had participated in developing the brick structure, which gradually had become the actual industry standard and created a dependency among users, which were reluctant to adapt their administrative systems to other structures.

However, in *Microsoft* the GC adopted a method to examine the indispensability criterion in a slightly different fashion in comparison to the precedent. In *Microsoft*, the GC upheld the Commission's conclusion that, in order for Microsoft's rivals to compete viably on the market, access to the interoperability information was indispensable for the competitors in order for their work group server operating systems to be able to interoperate as seamlessly with Windows operating system as Microsoft's own products. The GC came to this conclusion even though a number of fringe competitors unable of achieving such interoperability were operating on the market. Furthermore, as the Windows operating system had progressed to become the *de facto* standard for client personal computers, non-Windows work group server operating systems could not continue to be marketed if they were incapable of achieving a high degree of interoperability with Windows. According to the GC, the absence of such interoperability with the Windows domain architecture would have the effect of reinforcing Microsoft's competitive position on the work group server operating systems market.

Furthermore, in *Huawei*, the ECJ held that the patent at issue was essential to a standard established by a standardization body, which rendered its use indispensable for every competitor that envisaged manufacturing products that incorporate and comply with the standard to which the patent is linked. According to the ECJ, the indispensable nature of the SEP distinguishes it from non-essential patents, which normally allow third parties to develop competing products since they can diverge from the non-SEP "without compromising the essential functions of the product in question". In the Court's view, the situation changes in situations involving SEP:s since products conforming to the standard can only be manufactured by integrating the technology protected by the SEP.

Vesterdorf holds that the GC's approach to assess the indispensability criterion in *Microsoft* deviates from earlier case law.<sup>275</sup> In his opinion, the GC rejected Microsoft's argumentation on the premise that "the indispensability criteria is not a technical,

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<sup>275</sup> Vesterdorf, *Article 82 EC: Where Do We Stand After the Microsoft Judgment?*, Global Antitrust Review, 2008, p. 7.

objective criteria but must be based on an appreciation of ‘economic viability’”.<sup>276</sup> Vesterdorf points out that in earlier case law such as *Magill* and *IMS Health*, indispensability was examined in the light of whether there existed actual or potential substitutes to the product or service to which access was demanded. In this regard, he emphasizes that “in those cases, access was technically and objectively indispensable. Without access, there was no way at all for other undertakings to stay on or enter the market in the first place”. Vesterdorf summarizes by concluding that “[w]ith the [GC’s] acceptance of the Commission’s approach in *Microsoft*, the concept of indispensability has now been broadened to also cover ‘economic indispensability’, which in future cases leaves the Commission with the possibility of applying its traditional wide margin of appreciation to the question of whether or not access to a license of an IPR is ‘economically indispensable’”.<sup>277</sup>

Vesterdorf is accompanied by Korah and Maggiolino, who consider that the GC “widened the notion of indispensability” and that its interpretation “not only lowered the threshold for intervention, but arguably also introduced uncertainty”.<sup>278</sup> Kwok expresses his concerns in a similar manner by first pointing out that “indispensability used to be a stringent requirement” but that since *Microsoft* “it has been degraded to require only competitive disadvantage on the complainant’s part”.<sup>279</sup> Killick agrees with Vesterdorf that the GC’s judgment differs from previous case law, especially with reference to how the indispensability criterion was interpreted by the ECJ in *IMS Health*. According to Killick, the ‘exceptional circumstances’ doctrine “does not require that optimal access to the market is granted” but “that it is necessary to examine whether there are alternative solutions, even if they are less advantageous”.<sup>280</sup> Killick concludes by holding that “[i]n *Microsoft*, the Commission admits that such alternatives exist but argues that they are so disadvantageous as to not in reality constitute alternatives”.<sup>281</sup> In the view of Dolmans, O’Donoghue and Loewenthal, “[i]ndispensability implies that the input or information in question is essential for the exercise of a viable activity on the market for which access is sought” and that it therefore must be assessed “whether competitors can turn to any

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<sup>276</sup> Ibid..

<sup>277</sup> Ibid. (emphasis added).

<sup>278</sup> Korah & Maggiolino, p. 602.

<sup>279</sup> Kwok, p. 264.

<sup>280</sup> Killick, *IMS and Microsoft Judged in the Cold Light of IMS*, *The Competition Law Review*, 2004, p. 41.

<sup>281</sup> Ibid..

workable alternative technology or workaround the [intellectual property] right in question in such a way that they can remain effective competitors without the supply”.<sup>282</sup>

### 4.3 New Product

The ‘new product’ requirement was initially introduced by the ECJ in *Magill* and further established in *IMS Health* and subsequently in *Microsoft*. In *Magill*, one of the ‘exceptional’ circumstances that the ECJ found was that the dominant undertaking’s refusal to grant a copyright license prevented the emergence of a new product, which the dominant firms did not themselves manufacture, and for which there was potential consumer demand. In that case, the new product took the form of a weekly television guide that comprised all programmes broadcasted by the three television companies. This shall stand in comparison with the TV guide that each of the broadcasting companies themselves offered separately, which covered exclusively the TV programmes broadcasted by the company itself. The novel feature in *Magill*’s TV guide was thus its comprehensiveness and that the TV audience could purchase one comprehensive weekly TV guide covering all programmes instead of buying three separate guides.

Important clarifications on the meaning of the ‘new product’ requirement were offered by the ECJ in *IMS Health*. In this case, the ECJ stated that the assessment of the condition is a matter of whether the requesting undertaking would intend to limit itself to essentially duplicating the goods or services already offered by the dominant undertaking, or if it intends to produce new goods or services not offered by the dominant firm and for which there is potential consumer demand. According to the Court, this consideration relates to a balancing act in which the interest in protection of free competition can only prevail the interest in protection of the intellectual property right and the economic freedom of its owner when the refusal to grant a license prevents the development of the secondary market to the detriment of consumers.

Ultimately, in the *Microsoft* case, the GC introduced an interpretation of the ‘new product’ criteria that was unfamiliar with the method utilized in earlier case law. In *Microsoft*, the GC initially emphasized that the fact that the dominant undertaking’s conduct prevents the appearance of a new product on the market falls to be considered under article 102(2)(b) TFEU, which prohibits abusive practices consisting in limiting production, markets or technical development to the prejudice of consumers. The GC

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<sup>282</sup> Dolmans, O’Donoghue & Loewenthal, p. 127-128.

then progressed in its reasoning, maintaining that “[t]he 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 102 TFEU]”.<sup>283</sup> Accordingly, in the GC’s view, the Commission was correct to consider that the appraisal included products emerging from innovation by the competitors which would not occur if the rivals left the market or were incapable of developing software that achieved full interoperability with the Windows operating system. The insufficiency of interoperability with competing work group server operating systems meant that consumers were locked to a homogenous Microsoft solution. Furthermore, the GC agreed with the Commission’s view that the competitors would not have any interest in merely ‘cloning’ or reproducing Microsoft’s products, but that they would be stimulated to develop differentiated and improved products.<sup>284</sup>

Elaborating on the ‘new product’ requirement in his Opinion in the *IMS Health* case, AG Tizzano considered that the criteria is fulfilled if the requesting undertaking “intends to produce goods or services of a different nature which, although in competition with those of the owner of the [intellectual property] right, answer specific consumer requirements not satisfied by existing goods or services”.<sup>285</sup>

However, some commentators have expressed their concern in regard to the vagueness of the concept. Geradin asserts that “the practical application of this ‘new product’ condition creates substantial conceptual and practical difficulties” and directs criticism at the ECJ, stressing that the Court failed in *IMS Health* to “specify what is to be precisely understood by ‘new product’, a term that is not subject to any well received legal [...] definition”.<sup>286</sup> Geradin asks rhetorically whether the Court considers that the concept of a ‘new product’ encompasses a product that is entirely different from the product already offered by the intellectual property right holder, or if it incorporates a product that represents mere improvements of the existing product which is already available on the market. By advocating for an alternative solution, Geradin considers it unfortunate that “the Court chose to refer to such a soft concept such as ‘new’ rather than to a well-established and clearly defined competition law concept, such as the notion of

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<sup>283</sup> Case T-201/04, *Microsoft v. Commission (Microsoft)* [2007] E.C.R. II-3601, para. 647.

<sup>284</sup> *Ibid.*, para. 658.

<sup>285</sup> Opinion of AG Tizzano, para. 62, in Case C-418/01, *IMS Health* [2004] E.C.R. I-5039.

<sup>286</sup> Geradin, p. 1527 and 1531.

substitution. From that standpoint, two options can be envisaged. Either the test of the Court requires that the new product be non-substitutable to the existing product, thereby creating a new product market” or it is “sufficient that the new product presents some novel features while remaining substitutable with the existing product”.<sup>287</sup> Summarizing his criticism, Geradin concludes that “the Court has moved from an interpretation of [article 102 TFEU] designed to prevent harm to competition [...] to an interpretation designed to ensure that a dominant firm’s competitors gain access to the inputs they need to compete on a level playing field with the dominant firm. Instead of protecting competition, this new interpretation protects competitors.”<sup>288</sup> According to Prete, the ‘new product’ condition “does not require the firm requesting access to the IPR to create a totally new product” but rather that the new product “presents elements of novelty which allow the producer to meet consumers’ demands previously unsatisfied, and which is not essentially a duplication of the existing product”.<sup>289</sup> Following the outcome in *IMS Health*, Prete draws the conclusion that “[t]he vague language used by the Court appears to endorse a rather wide interpretation of this concept”.

In Drexl’s opinion, the ‘new product’ rule of the ECJ “seems to illustrate the distinction between competition by imitation and competition by substitution”.<sup>290</sup> His interpretation of the case law suggests that “the competitor who simply intends to imitate the achievements of the right holder does not deserve protection by [article 102 TFEU], in contrast to a competitor who would be prevented from placing a new product on the market without the grant of the license”. Consequently, Drexl draws the conclusion that “[i]ntervention under [article 102 TFEU] may only be justified in cases of a restriction of competition by substitution, but not in cases of a restriction of mere competition by imitation”.<sup>291</sup> It appears that Drexl’s observations are shared by Forrester and Czapracka in their reflections on the ruling in *IMS Health*, noting that while the ECJ did not “comment on the degree to which the new product must be different from the products offered by the IP holder and whether the two products could be substitutable, the

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<sup>287</sup> Ibid., p. 1531-1532.

<sup>288</sup> Ibid., p. 1532.

<sup>289</sup> Prete, p. 1083.

<sup>290</sup> Drexl, *Abuse of Dominance in Licensing and Refusal to License: A ‘More Economic Approach’ to Competition by Imitation and to Competition by Substitution*, European Competition Law Annual, 2005, p. 653.

<sup>291</sup> Ibid..

judgment reflects a policy choice in favour of a system based on competition by substitution and not on competition by imitation”.<sup>292</sup>

In Forrester’s and Czapracka’s point of view, “the significance of the new product condition has changed from case to case” and they point out that the concept was used rather “formalistically” in *Magill*, while in *Microsoft* it was utilized to “analyse dynamic competition considerations”.<sup>293</sup> In similar fashion, Kwok states that the ‘new product’ requirement has been “gradually relaxed” since *Magill*.<sup>294</sup> As a comment on the outcome in *Microsoft*, Kwok considers that the GC deviated from earlier case law “by construing the new product requirement against [article 102 TFEU] to embrace technical development”.<sup>295</sup> Vesterdorf interprets the *Microsoft* case as meaning that “it is no longer a *conditio sine qua non* that the refusal prevents the emergence of a new product in a strict sense: also the prevention of technical development may be abusive”.<sup>296</sup> However, Langer takes a critical position in relation to the evolution of ‘limitation of technical development’ as a sub-category to the general notion of ‘prevention of the emergence of a new product’. He states that if abusive practice under article 102 TFEU “is defined as the prevention of technical development, then every refusal to license would satisfy the [GC’s] condition as any product manufactured with the license would arguably constitute technical development”.<sup>297</sup>

Dolmans, O’Donoghue and Loewenthal, however, appear to share the GC’s view in *Microsoft* that the ‘new product’ criterion is not the only relevant parameter. They seem to subsume the ‘new product’ requirement under a broader notion of ‘consumer harm’. From their perspective, the case law of the European courts does not require that the refusal “always prevent[s] the emergence of a product that has not existed before in any form. The situation where consumers are deprived of a specific new product for which they have present unsatisfied demand [...] is but one example of a limitation of innovation to the prejudice of consumers”.<sup>298</sup> According to them, it must be emphasized that “prejudice to consumers can occur in a variety of factual settings” and that “each refusal to deal or instance of non-disclosure must be reviewed on its merits in the light of

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<sup>292</sup> Forrester & Czapracka, *Compulsory Licensing in European Competition Law: The Power of the Adjective*, p. 156, in Anderman & Ezrachi.

<sup>293</sup> *Ibid.*, p. 157.

<sup>294</sup> Kwok, p. 265.

<sup>295</sup> *Ibid.*.

<sup>296</sup> Vesterdorf, p. 9.

<sup>297</sup> Langer, *The Court of First Instance’s Microsoft Decision: Just an Orthodox Ruling in an On-Orthodox Case*, *Legal Issues of Economic Integration*, 2008, p. 192.

<sup>298</sup> Dolmans, O’Donoghue & Loewenthal, p. 131.

the details of the market under consideration, the scope for harm to consumers on that market, and possible proportionate justifications”.<sup>299</sup> In this regard, Dolmans, O’Donoghue and Loewenthal argue that the ‘new product’ requirement “must be understood as a proxy to identify conduct that stifles innovation and reduces consumer welfare” and stress that “[r]estriction of innovation [...] can prejudice consumers even if there are no new products yet, but incentives and opportunity to innovate are stifled to such an extent that rivals who in the past have shown a propensity to innovate are being cut out of the market”.<sup>300</sup>

#### **4.4 Elimination of Competition on a Secondary Market**

The ECJ instituted the notion of ‘elimination of competition on a secondary market’ as one exceptional circumstance in its ruling in *Magill* and gave more guidance on its interpretation in *IMS Health*. In the *Magill* judgment, the ECJ considered that, by refusing to grant Magill access to the copyright protected programme listings constituting the indispensable input for the compilation of a comprehensive weekly TV guide, the broadcasting companies had reserved to themselves the secondary market of weekly television guides by excluding all competition on that particular market. In the *Magill* case, the Court therefore seems to have associated the ‘elimination of competition’ criteria with the dominant undertakings’ refusal to provide the downstream competitor with the indispensable input it needed to create the new product. By denying access to the indispensable raw material, the broadcasting companies had cut off Magill’s possibilities to enter the secondary (downstream) market for comprehensive weekly TV guides.

The *Bronner* case did not provide much assistance in amplifying the understanding of the ‘elimination of competition’ requirement set out in *Magill*. However, in *Bronner*, the Court specified that, in order for Mediaprint’s refusal to provide the home-delivery service to be considered an abuse, that act had to “be *likely* to eliminate all competition in the daily newspaper market *on the part of the person requesting the service*”.<sup>301</sup>

The ECJ gave its most substantive interpretation of the criterion in the *IMS Health* judgment. In this case the Court manifested that one of the three cumulative conditions sufficient to find the presence of exceptional circumstances was whether the refusal was

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<sup>299</sup> Ibid..

<sup>300</sup> Ibid., p. 131 and 133.

<sup>301</sup> Case C-7/97, *Bronner* [1998] E.C.R. I-7791, para. 41 (emphasis added).

“likely to exclude *any* competition on a secondary market”.<sup>302</sup> In this regard, the ECJ held that it was sufficient to identify a potential or even hypothetical (upstream) market. According to the Court, “it is determinative that two different stages of production may be identified and that they are interconnected, inasmuch as the upstream product is indispensable for the supply of the downstream product”.<sup>303</sup>

In the *Microsoft* case, the GC interpreted this precondition as meaning that it is not necessary that all competition on the market is excluded, but that it is satisfactory if the refusal to license *risks* eliminating *effective* competition on the secondary (downstream) market.<sup>304</sup> The GC considered that competitors retaining a marginal presence in certain niche markets did not substantiate to the existence of ‘effective competition’. A second observation made by the GC was that it was sufficient if the Commission could demonstrate merely a ‘risk’ of effective competition being eliminated from the secondary market. The GC therefore rejected Microsoft’s argumentation that there is a substantial semantic difference between “risk of”, “likely to” and “high probability of” competition being eliminated.<sup>305</sup> Accordingly, the GC supported the Commission that it enforced article 102 TFEU by intervening “before the elimination of competition on the work group server operating systems market had become a reality because the market [was] characterised by significant network effects and because the elimination of competition would therefore be difficult to reverse”.<sup>306</sup>

AG Jacobs expressed his view in relation to the ‘elimination of competition’ criterion in his Opinion in *Bronner*, stating that the refusal to provide access to a necessary input or grant a license must entail the “elimination or substantial reduction of competition to the detriment of consumers in both the short and long term” and explains that such is the case in situations where “access [...] is a precondition for competition on a related market for goods or services for which there is a limited degree of interchangeability”.<sup>307</sup>

Vesterdorf stresses that it was clarified after *IMS Health* and *Magill* that a refusal to license would constitute abusive conduct if it would lead to elimination of all competition on the secondary market. His conclusions after the *Microsoft* judgement submit that “it is elimination of all *effective competition*, namely competition which might present a real

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<sup>302</sup> Case C-418/01, *IMS Health* [2004] E.C.R. I-5039, para. 38 (emphasis added).

<sup>303</sup> *Ibid.*, para. 45.

<sup>304</sup> Case T-201/04, *Microsoft v. Commission (Microsoft)* [2007] E.C.R. II-3601, para. 563.

<sup>305</sup> *Ibid.*, para. 560-561.

<sup>306</sup> *Ibid.*, para. 562.

<sup>307</sup> Opinion of AG Jacobs, para. 61, in Case C-7/97, *Bronner* [1998] E.C.R. I-7791.

constraint or a real competitive challenge to the dominant undertaking. This shift from elimination of all competition to elimination of effective competition appears to have on the same time rendered the conditions for finding an infringement of [article 102 TFEU] less strict by loosening the conditions for finding an abuse in these situations”.<sup>308</sup> He stresses that “this shift is probably well-founded, as what is necessary is that there is room for some effective and not just some, however toothless, competition”.<sup>309</sup>

As a comment on the *Microsoft* case and the distinction between ‘likelihood’ and ‘risk’ of elimination of competition, Anderman points out that “technically there is a considerable difference between the standards of proof: ‘liable to’ and ‘likely to’ eliminate competition. The [GC’s] judgment appeared to wish to emphasise that the test of [article 102 TFEU] is not concerned with the proofs of effects, but rather with proof of conduct that *could possibly* produce effects. This is in line with previous ECJ case law on [article 102 TFEU].”<sup>310</sup> In contrast, Kwok remains unimpressed by the GC’s non-responsiveness in *Microsoft* to distinguish between the ‘risk’ and ‘likelihood’ of eliminating competition. In Kwok’s opinion, the notion of ‘risk’ implies “a mere possibility” or “5-10 per cent chance” of competition being eliminated, as opposed to “a genuine likelihood” of such an effect, which (in his opinion) is a higher threshold indicating that it is at least more probable that competition will be eliminated than that it will not.<sup>311</sup> According to Kwok, “a risk of elimination almost inevitably follows from the input being indispensable” and holds that “[t]he substantial overlap between the two questions effectively means that the Commission has one less ‘exceptional’ circumstance to satisfy”.<sup>312</sup> In turn, Killick argues that the European courts have applied different standards in reviewing the ‘elimination of competition’ criterion. According to Killick, the refusal to license in *Magill* and *IMS Health* had immediate or near-instant foreclosing effects on the competitive constraints by the dominant firms’ rivals, while in *Microsoft* the refusal to provide access to the interoperability information did not have any such immediate effect.<sup>313</sup> Killick therefore argues that a lower and less stringent approach was adopted in *Microsoft* in comparison to *Magill* and *IMS Health*.

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<sup>308</sup> Vesterdorf, p. 8.

<sup>309</sup> Ibid..

<sup>310</sup> Anderman, *Microsoft v. Commission and the Interoperability Issue*, E.I.P.R., 2008, p. 396.

<sup>311</sup> Kwok, p. 265.

<sup>312</sup> Ibid..

<sup>313</sup> Killick, p. 39-40.

From the standpoint of Dolmans, O’Donoghue and Loewenthal, the ‘elimination of competition’ requirement “is the corollary of the condition that the dominant firm’s input is indispensable for competition: if the input is not indispensable, the refusal to share would not have substantial effects on competition. Conversely, if an input is essential for competition, it would, ultimately, allow the firm [...] that own or control it to exclude all competition on the relevant downstream market”.<sup>314</sup> They share the view that the Commission expressed in its *Microsoft* decision by opining that “the relevant legal test is not whether each and every competitor has irreversibly exited, but whether there is some present basis for identifying a ‘serious risk of foreclosing and stifling innovation’”.<sup>315</sup> Dolmans, O’Donoghue and Loewenthal appear to agree with the General Court’s observation in *Microsoft* that the relevant standard should be whether there is a risk of ‘effective competition’ being eliminated by the refusal and they argue, in similar terms as the GC in *Microsoft*, that marginalized competitors in niche markets are not equivalent to ‘effective competition’. In their opinion, effective competition “implies a meaningful process of competition whereby firms have an effective opportunity to compete on the merits on the basis of price, quality, and innovation” and, as a concluding remark, they emphasize the fact that “[c]ompetitors that are marginalized in dynamic markets and that are unable – or deprived of further incentives – to engage in viable competitive innovation are effectively the same as no competition in those areas”.<sup>316</sup>

In regard to the issue concerning that the refusal eliminates competition on a ‘secondary market’, the ECJ stated in *IMS Health* that it was not necessary to identify an actual upstream market, but that it is sufficient if that market is potential or hypothetical. As such, the Court considered that it was enough to designate two different and interconnected stages of production, with an upstream (primary) market including the indispensable product and a downstream (secondary) market where the essential upstream product is indispensable for the supply of the downstream product. By applying this distinction of two separate markets to the concrete circumstances in *IMS Health*, Ong argues that the copyright protected ‘1860 brick structure’ constituted the indispensable upstream product or service and that the secondary market encompassed the service of providing sales reports to the pharmaceutical industry in Germany.<sup>317</sup> The same

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<sup>314</sup> Dolmans, O’Donoghue & Loewenthal, p. 129.

<sup>315</sup> *Ibid.*, p. 130.

<sup>316</sup> *Ibid.*, p. 130-131.

<sup>317</sup> Ong, *Building Brick Barricades and Other Barriers to Entry: Abusing a Dominant Position by Refusing to License Intellectual Property Rights*, E.C.L.R., 2005, p. 220.

conclusion was drawn by AG Tizzano in his Opinion to the *IMS Health* case, where he added that “it is not hard to identify an upstream market for access to the brick structure (monopolised by the owner of the copyright) and a secondary market for the sale of the studies”.<sup>318</sup> Killick criticizes the ECJ’s notion that is sufficient to locate a potential or hypothetical upstream market by claiming that “if the Court accepts a hypothetical market for the intellectual property itself, then the criterion of a secondary market would become meaningless, as it would be met in all or almost all cases. The secondary market would simply be the hypothetical one for the licensing of the intellectual property right that is the subject of the compulsory license”.<sup>319</sup> Ezrachi and Maggiolino opines that the “finding of a ‘fictional’ downstream market is significant, as it may result in compulsory licensing from a dominant undertaking to its horizontal, rather than vertical, competitor”.<sup>320</sup> In a similar line of reasoning, and as a reflection of the outcome in *Microsoft*, Vesterdorf holds that the ‘secondary market’ criterion “covers a secondary market where the dominant undertaking is active and it must accept to grant licenses to competitors of an IPR on an upstream market to allow the competitors to compete more effectively using a product representing a technical development of the dominant undertaking’s product on the downstream market”.<sup>321</sup>

#### 4.5 Objective Justification

The principle of ‘objective justification’ as an instrument of neutralizing potential anti-competitive effects and ‘escaping’ competition law liability is well established in the case law of the European courts. However, case law in general, and cases involving refusal to license intellectual property rights in particular, tend to be extremely void of explaining what kind of defence a dominant undertaking may put forward in order to objectively justify its (alleged) abusive conduct. As for an illustrative example, by utilizing abstract and general terms, the ECJ held in *Magill* that “there was no justification” for the broadcasting companies to refuse to grant Magill a license. Another instance is the Court’s statements in the preliminary reference case *IMS Health*, where it held that it was up to the national court to determine, in the light of the facts before it, whether the refusal

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<sup>318</sup> Opinion of AG Tizzano, para. 60, in Case C-418/01, *IMS Health* [2004] E.C.R. I-5039.

<sup>319</sup> Killick, p. 27-28.

<sup>320</sup> Ezrachi & Maggiolino, p. 602.

<sup>321</sup> Vesterdorf, p. 13.

of the request for a license was justified by objective considerations.<sup>322</sup> In *Microsoft*, the GC rejected Microsoft's plea for objective justification when it argued that the fact that the technology in question was protected by intellectual property rights constituted an objective consideration that should justify the refusal. Neither the claim that a remedy of compulsory license would have negative impact on Microsoft's future incentives to innovate and invest in developing innovative products was sufficient to put forward a successful plea for objective justification.

The European courts have thus been incapable of seizing the opportunity and in affirmative terms clarify what circumstances or considerations may establish 'objective justification'. Stothers has identified this issue and stresses that "what constitutes objective justification does remain unclear and this has rightly been criticised".<sup>323</sup> Stothers continues his reasoning by suggesting that one consideration that should "at the very least" amount to an objective justification is when a dominant undertaking refuses to license its intellectual property rights due to "concern[s] about the proposed licensee's solvency or intended use of the rights".<sup>324</sup> Vesterdorf presents two suggestions of when a dominant firm may<sup>325</sup> be objectively justified to refuse to license its intellectual property rights. The first scenario that Vesterdorf mentions is when the dominant undertaking itself has "just start[ed] to rely on the IPR concerned to develop a new product of the type that the applicant for a license is claiming he would introduce on the secondary market". The second potential situation that Vesterdorf argues might amount to an objective consideration is that "the IPR concerned is the only and fundamental basis for [the dominant undertaking's] production and that, if a license were to be given to create competition *vis-à-vis* the dominant undertaking, [...] might deprive the undertaking of its very economic basis".<sup>326</sup> Temple Lang proposes four suggestions of potential successful pleas for objective justification, namely if providing license to the intellectual property right (i) would interfere with the improvement, expansion or development of the intellectual property right, (ii) would interfere with technical, safety or efficiency standards (e.g. by causing undue congestion or compatibility problems in the operation of software), or (iii) if the owner can prove genuine and objective advantages of vertical or horizontal integration which could not be achieved by reasonably close cooperation with

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<sup>322</sup> Case C-418/01, *IMS Health* [2004] E.C.R. I-5039, para. 51.

<sup>323</sup> Stothers, *IMS Health and its Implications for Compulsory Licensing in Europe*, E.I.P.R., 2004, p. 471.

<sup>324</sup> *Ibid.*.

<sup>325</sup> Vesterdorf, p. 10.

<sup>326</sup> *Ibid.*.

an independent company and (iv) the potential licensee was not creditworthy or has not got the professional and technical skills needed to share or utilize the technology protected by intellectual property right.<sup>327</sup>

#### **4.6 Impacts of Huawei on Refusal to License Cases**

As the judgment in *Huawei* appears to indicate, other circumstances than those typically categorized under the ‘exceptional circumstances’ doctrine can be relevant when examining the compatibility of a refusal to license a SEP on FRAND terms with article 102 TFEU. The ECJ identified two ‘exceptional circumstances’ in *Huawei*: (i) the essential nature of the SEP to a standard established by a SSO rendered access to the patent as ‘indispensable’ in order for competitors to manufacture products that are interoperable with the industry standard and (ii) the patent in question obtained its SEP status only in return for the proprietor’s irrevocable pledge to license the SEP to third parties on FRAND terms. The first (i) ‘exceptional circumstance’ originates from earlier case law on refusal to license and is linked to the indispensable character of the standard-essential patent for third parties who are intending to develop products that need to acquire a sufficient degree of functionality with the market standard. Interestingly, the Court did not assess the indispensability criterion in any closer detail and the ruling gives the impression that the criterion is embedded in the very nature of the SEP. Therefore, the judgment implies that the determination of a patent as a SEP virtually mechanically establish the presence of the ‘indispensability’ criterion. In contrast, the second (ii) ‘exceptional circumstance’ cannot be recognized from previous cases on refusal to license and illustrates a unique development of the ‘exceptional circumstances’ doctrine in the SEP context. The ECJ held that Huawei’s commitment created ‘legitimate expectations’ among third parties that they would be granted licenses to the patent on FRAND terms and that Huawei’s essential patent acquired SEP status due to its irrevocable FRAND commitment. As a logical consequence, a refusal to license the SEP on FRAND terms to a willing licensee breaches the SEP holder’s original commitment and neglects the legitimate expectations of third parties. This ‘exceptional circumstance’ will almost exclusively be identified in situations where the intellectual property right in question has obtained a ‘standard-essential’ status. To this end, an important matter that future case

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<sup>327</sup> Temple Lang, *Anticompetitive Abuses under Article 82 Involving Intellectual Property Rights*, European Competition Law Annual, 2003, p. 624.

law will need to provide guidance with is to what extent the rationale of the preliminary ruling is applicable to standards which are not formally set by a SSO.

In a comment to the ruling, Petit describes *Huawei* as a “conservative judgment” and argues that “[i]t only extends by a razor-thin margin the zone of antitrust liability for patent owners”.<sup>328</sup> In addition, Petit contends that the ECJ was “reluctant to relax its traditional case law that affirms antitrust liability on patent owners only in ‘exceptional circumstances’” and he interprets the outcome of the case as meaning that a SEP holder’s FRAND commitment generates “particular circumstances which justify an extension of antitrust liability”.<sup>329</sup> Petit identifies an anti-competitive leveraging theory in the ECJ’s reasoning in *Huawei* and considers that “an actual or potential degree of vertical integration in manufacturing by the SEP holder is necessary to trigger a finding of abuse”.<sup>330</sup> On the other hand, Vestager is of the opinion that the ECJ’s holding in *Huawei* has more far-reaching consequences and argues that FRAND commitments have the potential of generating competition law accountability regardless of whether the SEP holder is vertically integrated or not.<sup>331</sup> However, Vesterdorf seems to occupy a rather sceptic stance in relation to the proposed argument by the ECJ that the possession of a SEP and the communication of a FRAND commitment to a SSO should qualify as ‘exceptional circumstances’ since that would “imply that whole sectors of industry might find themselves in so-called exceptional circumstances, which could be considered somewhat bizarre”.<sup>332</sup>

In an attempt to discuss the scope of the *Huawei* ruling to standards not formalistically instituted by a standardization body, Jakobs and Hübener hold that “[a] standard can also be established within the market process, because of the superiority of the respective technology that simply leaves no room for alternatives” and argue that “from a public welfare perspective [...], the access to this standard might be equally desirable as in the formal SEP setting”.<sup>333</sup> They mean that the SEP holder’s assurance to grant a license to third parties on FRAND terms “derive[s] from the idea that an *ex ante* commitment can

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<sup>328</sup> Petit, *Huawei v. ZTE: Judicial Conservatism at the Patent-Antitrust Intersection*, Competition Policy International Antitrust Chronicles, 2015.

<sup>329</sup> *Ibid.*.

<sup>330</sup> *Ibid.*.

<sup>331</sup> Speech of Vestager, Commissioner of Directorate General for Competition, 19<sup>th</sup> IBA Conference, Florence, September 2015, available at: [https://ec.europa.eu/commission/2014-2019/vestager/announcements/intellectual-property-and-competition\\_en](https://ec.europa.eu/commission/2014-2019/vestager/announcements/intellectual-property-and-competition_en).

<sup>332</sup> Vesterdorf, *IP Rights and Competition Law Enforcement Questions*, Journal of European Competition Law & Practice, 2013, p. 110.

<sup>333</sup> Jakobs & Hübener, *SEP or no SEP? Open Questions after Huawei/ZTE*, E.C.L.R., 2016, p. 37.

reduce *ex post* opportunism of the SEP holder”.<sup>334</sup> Jakobs and Hübener conclude by stating that it is possible that market players agree on a standard *ex ante* and outside of the framework of a SSO and emphasize that in this instance “[t]he only difference to formal SEP setting is that there is usually no *ex ante* commitment to [grant a license on] FRAND [terms]”.<sup>335</sup> Banasevic holds that FRAND commitments on part of SEP holders are grounded in a competition context, since they “[are] designed to ensure access to the standard, subject to reasonable remuneration for the patent holder, but in such a way that the patent holder is not able to exploit a position of dominance arising from the standard that he would not have had absent the standard (for instance, by charging unjustifiably high prices or by extracting other unreasonable licensing terms)”.<sup>336</sup>

Heinemann argues that it is necessary to distinguish *Huawei* from the previous cases involving refusal to license intellectual property rights since that case did not concern the imposition of a compulsory license on Huawei. He contends that in *Huawei*, “the obligation of the patent proprietor to enter into a licensing agreement follow[ed] from its own FRAND commitment” and that the pledge to license on FRAND terms should be considered as a binding contract under civil law.<sup>337</sup> Heinemann therefore states that *Huawei* did not involve a compulsory license, but rather the fulfilment of a private, autonomous commitment. In his opinion, this diverges from the case of a mandatory license under EU competition law, “where refusal to grant a license is considered a violation of competition law and where freedom to contract is restricted under exceptional circumstances. Where a compulsory license under competition law is concerned, the abuse therefore arises in the refusal to grant a license”.<sup>338</sup> However, Emanuelson is of an opposite opinion and holds that it may be argued that “the mere fact of having given a FRAND commitment [...] could also qualify as an ‘exceptional circumstance’”.<sup>339</sup> In turn, Petit states that ‘FRAND disputes’ similar to the one in *Huawei* “will typically occur because the patent holder has offered the defendant a license to its patents on terms that the defendant does not consider to be FRAND” and suggests

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<sup>334</sup> *Ibid.*, p. 34.

<sup>335</sup> *Ibid.*, p. 37.

<sup>336</sup> Banasevic, *The Implications of the Court of Justice’s Huawei/ZTE Judgment*, *Journal of European Competition Law & Practice*, 2015, p. 463.

<sup>337</sup> Heinemann, *Standard-Essential Patents in Standard Setting Organizations: Competition Law and the Realization of Licensing Commitments*, *Journal of Intellectual Property Law & Practice*, 2015, p. 949.

<sup>338</sup> *Ibid.*.

<sup>339</sup> Emanuelson, *Standardisation Agreements in the Context of the New Horizontal Guidelines*, *E.C.L.R.*, 2012, p. 75.

that a subsequent action for injunction by the patent holder could be envisioned as an implied refusal to deal or as a constructive refusal to license.<sup>340</sup>

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<sup>340</sup> Petit, *Injunctions for FRAND-Pledged SEPs: The Quest for an Appropriate Test of Abuse under Article 102 TFEU*, *European Competition Journal*, 2013, p. 682.

## **5. Analysis**

### **5.1 Introductory Remarks**

The series of case law of the European courts dealing with refusal to license intellectual property rights establish that a dominant undertaking's refusal to share its intellectual endeavour with third parties does not in itself constitute abusive conduct contrary to article 102 TFEU. The ECJ has on multiple occasions firmly reiterated that a 'simple' refusal to license on part of a firm occupying a dominant position cannot amount to an abuse. In order for such refusal to be considered as a prohibited abusive practice, the presence of 'exceptional circumstances' is required. The conception of an 'exceptional circumstances' doctrine as a legal framework in EU competition law necessitates two observations to be clarified. First, the utilization of 'exceptional' is a term in legal phraseology signalling strong restrictiveness when applying the criteria in concrete and practical situations. The use of this terminology is a clear indication from the ECJ that EU competition law does not stipulate a presumption or impose a general obligation on dominant undertakings to share their intellectual property rights with horizontal or vertical competitors. The possibility of ordering a compulsory license to remedy or neutralize potential anti-competitive effects due to a refusal to license is therefore limited to situations where the refusal forecloses competitors from neighbouring secondary markets and where the development of product differentiation or cumulative follow-on innovation is hampered. Secondly, by implementing such an ambiguous and elastic standard as 'exceptional circumstances', the ECJ has reserved itself flexibility when dealing with cases involving refusal to license intellectual property rights. Naturally, this has both positive and negative consequences. On the one hand, it allows the European courts to examine each case on its own merits and enables them to take into consideration the particular circumstances surrounding that specific instance of a refusal to license. However, on the other hand, the adoption of a case-by-case approach and the possibility of exercising discretion when interpreting the doctrine, insinuates a risk that businesses might be incapable of knowing beforehand what particular circumstances may render an act of refusal to license an abuse. In order to safeguard legal certainty and predictability and empowering undertakings wishing to adapt their business and commercial strategies by establishing compliance programs, it is essential that EU

competition policy-makers, primarily the European courts and the Commission, establish predictable legal agendas and provide well-defined guidance to affected industries.

Settled case law from the ECJ establish that the existence of these four cumulative conditions is *sufficient* for finding a refusal to license as an abuse of dominance:

(a) the refusal to grant a license denies a third party access to a product or service ‘*indispensable*’ for carrying out a particular business on a secondary market,

(b) the refusal prevents the emergence of a ‘*new product*’ for which there is potential consumer demand,

(c) the refusal is such as to ‘*likely eliminate any competition on a secondary market*’, and

(d) absence of ‘*objective considerations*’ capable of justifying the refusal.

Since the ECJ explicitly stated in *IMS Health* that these conditions are ‘sufficient’ in order to establish the presence of ‘exceptional circumstances’, and which was also pointed out by the GC in *Microsoft*, the catalogue (a)-(d) above does most probably not illustrate an exhaustive list of circumstances with ‘exceptional’ qualities. The phraseology by the EU courts, in combination with the Commission’s decision in *Microsoft* where it maintained that the entirety of the circumstances surrounding an instance of refusal to license had to be taken into account, robustly indicate that also other circumstances may be factors influencing the calculation. This is also a view advocated in doctrine and articles written by legal academics and practitioners. However, thus far in the jurisprudence, only the presence of the circumstances mentioned in (a)-(d) have rendered a refusal to license an abuse of dominant position. The EU institutions have not shed any light in order to make it possible to analyse what characteristics other circumstances must possess to be regarded as ‘exceptional’. Before future antitrust litigations and references for preliminary rulings provide us with conclusive answers, one may only speculate what other circumstances that the European courts and the Commission will incorporate into the ‘exceptional circumstances’ doctrine.

Still, the Commission’s and the GC’s extensive and nuanced interpretation of the conditions (a)-(d) in *Microsoft* have contributed to uncertainty and raises the questions

whether (for instance) ‘limitation of technical development’ is sufficient to fulfil the ‘new product’ requirement or if it is enough that the refusal to grant a license is likely to eliminate only ‘effective’ competition (and not ‘any’ competition) on a secondary market. As has been presented above in the thesis, there is a common understanding among legal scholars and practitioners that the GC utilized such an expansive interpretation of the ‘exceptional circumstances’ doctrine in *Microsoft* that a majority of the prerequisites in the doctrine were given a substantively new meaning.

## 5.2 The ‘Exceptional Circumstances’ Doctrine

### 5.2.1 Indispensability

The ECJ stated in *Bronner* that the assessment of the indispensability requirement is a question of whether there exists any actual or potential substitutes (even if they are less advantageous) for the product or service that the requesting undertaking alleges is indispensable for the creation of the new product. For this purpose, it needs to be established if technical, legal or economic obstacles are making it impossible or unreasonably difficult for the requesting undertaking to continue operating its business on the secondary market. In *IMS Health*, the ECJ confirmed that the fact that the pharmaceutical industry had participated in developing the ‘1860 brick structure’, which progressively had become the *de facto* market standard and had created dependency among IMS’s clients, was a relevant factor when determining the indispensability criterion. In the *Microsoft* case, the GC found that the interoperability information was indispensable on the ground that Microsoft’s competitors would not be capable of competing viably on the work group server operating systems market if their software did not achieve interoperability with the Windows operating system as seamlessly as Microsoft’s own products.

The application of the indispensability condition has varied in the case law of the EU courts, and particularly GC’s reasoning in *Microsoft* departs from the principles set out by the ECJ in *Magill*, *Bronner* and *IMS Health*. Take the case in *Magill* as an instance, where there is not much room for criticism in regard to the finding of indispensability. In this case, *Magill* was seeking a copyright license from three (dominant) broadcasting companies for their television programme schedules for the purpose of compiling a comprehensive weekly TV guide, but the television companies refused. The dominant

undertakings were thus denying Magill access to the basic information by relying on their national copyrights and were at the same time the only source of supply for the raw material. Consequently, the competitive constraint constituted by Magill's potential entrance on the market for comprehensive weekly TV guides was foreclosed. By applying the *Bronner* and *IMS Health* criteria on the circumstances in *Magill*, it can be concluded that Magill did not have any other alternative sources of supply in order to gain access to the television listings. Magill was also facing a legal obstacle, namely the risk of infringing the broadcasting firms' copyrights in case it utilized the subject matter without the consent of the right-holders (which Magill in fact did). This shall stand in comparison to the appraisal of the indispensability criterion in *Microsoft*. In this case, the GC adopted a two-step approach by first determining what degree of interoperability non-Windows work group server operating systems had to achieve with the Windows operating system in order to compete viably and, secondly, whether the interoperability information that Microsoft denied to disclose was indispensable for the attainment of that degree of interoperability. The GC argued (unconvincingly) that, while it was not necessary that the competing non-Windows work group server operating systems functioned in every respect as Microsoft's own software, the rivaling products had to be able to interoperate with the Windows domain architecture on 'an equal footing' as Microsoft's products. This is an unpersuasive line of argumentation by the GC. On the indispensability issue the GC concluded that, due to the dominant (quasi-monopoly) presence of Windows operating systems on client personal computers, competing work group server operating systems could not be marketed if they were incapable of achieving a high degree of interoperability with Windows and that interoperability with the Windows environment constituted a key factor in the uptake of Windows work group server operating systems. Microsoft argued that several rivals were present and competing on the market and had consistently gained market shares. These allegations were quashed by the GC, who stated that, ever since Microsoft started operating on the market, its market shares had rapidly increased on the same time as the competitors' shares fell significantly. According to the GC, the fact that competition was eliminated gradually and not immediately did not contradict the finding of indispensability. Bearing these lines of reasoning in mind, it seems that the matter of indispensability in *Microsoft* synchronized with the competitors' possibilities to compete viably. Microsoft's work group server operating systems had the competitive advantage that they could function more or less perfectly with the Windows environment, while the competing software were functioning with Windows but not

equally as effective. The finding of indispensability in *Microsoft* was thus based on the fact that the functionality that Microsoft's products achieved with the Windows operating system had put the competitors on a competitive disadvantage *vis-à-vis* Microsoft. This is apparently not in line with the criteria that the ECJ established in *Bronner* and *IMS Health*. In relation to the standards set out in these couple of cases, the relevant questions that the GC had to ask itself was (i) whether the competitors could have achieved interoperability by other means than by having the operability information disclosed by Microsoft and (ii) whether the competitors were facing technical, legal or economic obstacles that made it impossible or unreasonably difficult for them to continue operating on the market for work group server operating systems. In regard to the first (i) question, the existence of substitutable sources of supply or alternative methods of achieving the necessary degree of interoperability with the Windows operating system had to be determined. For instance, did the competitors have the professional and technical skills to utilize reverse engineering as a method to achieve interoperability, and would it have been an economically viable option? This might be interrelated with the second (ii) question as well. Another aspect is whether it was so fundamental to achieve interoperability specifically with the Windows operative system? This last question is naturally correlated with the fact that, at the time of the legal proceedings, Windows was practically *the* operative system on client personal computers and was the *de facto* standard. So it would probably have been difficult to operate a profitable and sustainable business by developing work group server operating systems for other computer operating systems than Windows.

As the above has indicated, the ECJ developed and established in *Bronner* and *IMS Health* that substitutable sources of supply or alternative methods as well as technical, legal and economic obstacles are parameters that are relevant in determining whether a product or service is indispensable for the creation of another (new) product. However, the reasoning of the GC in *Microsoft*, which suggests that a certain degree of competitive disadvantage is sufficient to satisfy the indispensability requirement, raises the question whether the parameters identified by the ECJ in *Bronner* and *IMS Health* are still applicable or if they have been replaced by the 'competitive disadvantage' standard utilized by the GC? Another possible outcome of the *Microsoft* case is that these parameters have 'merged', in that all of them have to be considered when making the appraisal.

In conclusion, the thesis holds that the GC applied a lower threshold in *Microsoft* for finding indispensability in comparison to the standard implemented by the ECJ in *Magill*, *Bronner* and *IMS Health*. This thesis also argues that, for the purpose of providing legal certainty and predictability, it would have been more effective if the GC had followed the path of the ECJ. Instead, by deviating from earlier case law, the ruling in *Microsoft* has added an increased (and avoidable) uncertainty to the interpretation of the indispensability requirement.

### 5.2.2 New Product

One of the exceptional circumstances that the ECJ identified in *Magill* was that the refusal to license the copyright protected television programme listings prevented the emergence of a new product, namely the comprehensive weekly TV guide. The Court elaborated further on the criterion in *IMS Health*, where it clarified that for satisfying the requirement it is necessary that the requesting undertaking does not intend to limit itself to essentially duplicating the product or service already offered by the dominant undertaking, but intends to produce new goods or services not offered by the dominant undertaking and for which there is potential consumer demand. Two criteria may be identified from these statements: (i) the product or service may not essentially duplicate an already existent product, but has to incorporate novel features which differentiates it from the older product or service and (ii) there has to be at least a potential demand on part of consumers.

As has been demonstrated in previous sections of this thesis, one of the most complex issues with the 'exceptional circumstances' doctrine is to determine the level of novelty that a 'new product' has to feature in order to be regarded 'new'. Nevertheless, several observations can be made in this regard. First, the ECJ emphasized in *IMS Health* that a mere duplication or imitation of an existent product does not deserve the protection of article 102 TFEU. A potential licensee can therefore not rely on competition law to secure a license from a dominant licensor if he solely plans to reproduce the product or service which is already present on the market. Furthermore, this statement reinforces the reflection made by Drexler,<sup>341</sup> namely that the ECJ (implicitly) distinguishes between 'competition by imitation' and 'competition by substitution'. As Drexler argues, intervention under article 102 TFEU in the context of refusal to license cases can be

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<sup>341</sup> Presented in section 4.3, p. 75 of the thesis.

justified in scenarios where the refusal restricts ‘competition by substitution’, since such restriction impedes the innovative progress on the market and limits the diversity of products, either with respect to quality, price or intended use.

Secondly, the level of novelty that is required to be considered ‘new’ does not seem to necessitate that a completely different product or service is designed or provided. This understanding lies probably closest to the reflections made by AG Tizzano in his Opinion in *IMS Health*, where he held that it should be sufficient that the new product is of a different nature, although it might be in competition with the product or service offered by the holder of the intellectual property right. Such an interpretation of the novelty criterion would, however, not advocate that the new and old products should be substitutable or completely homogenous in terms of functionality or characteristics. The ultimate illustration of this interpretation is *Magill*. The novel features that Magill’s TV guide offered in comparison to those that already existed was its comprehensiveness, in that it included all TV programs that were broadcasted by the television companies. Magill’s TV guide had an improved functionality for the TV audience, since that guide enabled them to plan their leisure activities with the help of one single guide instead of three separate guides. Magill’s guide was possibly also a more economical alternative for the consumers.

Surprisingly, the GC embraced a rather dissimilar and more nuanced principle in *Microsoft* by holding that the prevention of the appearance of a new product (as envisaged in *Magill* and *IMS Health*) could not be the only parameter which determines whether a refusal to license is capable of causing prejudice to consumers. The GC came to this conclusion by utilizing article 102(2)(b) TFEU as the legal basis. The GC therefore held that also limitation of technical development is capable of being injurious to consumer welfare. The most interesting aspect in this part of the GC’s reasoning is that it observed the ‘new product’ criterion as being embedded in a more general and broader notion of prejudice to consumers. It therefore appears that the GC considers that the relevant criteria is (or at least should be) ‘limitation of innovation to the prejudice of consumers’ and that it incorporates numerous effects that are harmful to the consumer collective. This argumentation corresponds with the line of reasoning that the Commission utilized in its *Microsoft* decision.

It is apparent that the GC utilized an excessively expansive interpretation of the ‘new product’ criterion in *Microsoft*. The question is, however, whether it was necessary to

expand the criteria to unfamiliar territory in order to find that the criterion was satisfied? If Sun and the other competitors of Microsoft were technically improving their work group server operating systems but were hindered due to Microsoft's non-disclosure of the interoperability information, it could without difficulty be argued that the refusal to disclose the information prevented the emergence of a new product. Depending on the novel character of the possible technical improvement(s), the upgraded version of the work group server operating system could very well have satisfied the 'new product' criterion.

In conclusion, and similarly to the indispensability criterion, the judgment in *Microsoft* differs rather radically in comparison to the case law established in *Magill* and *IMS Health*. The GC broadened the interpretation of the 'new product' condition and opened the door to a more general concept embracing 'limitation of innovation to the prejudice of consumers' as the relevant legal standard. This thesis argues that the nonconformity of the GC's appraisal of the 'new product' requirement with previous ECJ case law strengthens the picture of an incoherent application and interpretation of the 'exceptional circumstances' doctrine.

### **5.2.3 Elimination of Competition on a Secondary Market**

In *Magill*, the fact that the refusal to license had the effect of eliminating competition on the secondary market was identified by the ECJ as one of the circumstances with 'exceptional' character. In this case, the ECJ argued that the broadcasting companies, by refusing to license *Magill* their copyright protected television programme listings which constituted the indispensable raw material for the compilation of its new product, had reserved to themselves the secondary market for comprehensive weekly TV guides by excluding all competition on that secondary market. The finding of elimination of competition was therefore closely connected with the conclusion that the basic raw material was indispensable. By denying *Magill* access to the programme listings, the television companies had cut off its possibilities to penetrate the secondary market.

The *Bronner* judgment did not elaborate on the 'elimination of competition' condition in detail, but the ECJ clarified that, in order for *Mediaprint's* refusal to provide access to the home-delivery service to amount to an abuse, it was necessary that the refusal was *likely* to eliminate competition *on the part of the person requesting the service*. The decision of adding 'likely' signals that it is not necessary that competitors have *de facto* been driven

out of or eliminated from the market, but that the alleged abusive act has an inherent potential of causing such effect. The ruling also specified that it is the competition represented by the requestor who needs to be subjected to the exclusion from the secondary market. However, an inconsistency appeared in *IMS Health*. In this case the ECJ held that the relevant criteria was whether the refusal was likely to exclude *any* competition from the secondary market. A potential explanation to this discrepancy is that *Bronner* concerned a refusal to grant access to a facility (physical property), while *IMS Health* involved the refusal to provide a third party a license to the dominant undertaking's intellectual (intangible) property. The accuracy of this rationale might be reinforced by the fact that also the 'new product' requirement appears exclusively in cases involving refusal to license intellectual property rights.

In *Microsoft*, the GC interpreted this requirement as meaning that the refusal to license needs to give rise to a *risk of effective competition* being eliminated from the secondary market. One may wonder what separates the expressions 'likely to' and 'risk of' in terminological terms? Anderman and Kwok have argued that 'likely to' constitutes a more sophisticated threshold than 'risk of'. The notion of 'effective' competition is also deemed to give rise to difficulties when applying it in concrete situations. The GC considered that the mere presence of marginalized competitors in niche markets did not prove the existence of 'effective' competition. According to the GC, the Commission had every reason to enforce article 102 TFEU before the (imminent) elimination of competitors on the work group server operating systems market, particularly due to the presence of significant network effects on that market and Microsoft's close monopoly position on the market for operative systems for client personal computers. Additionally, the GC noted that, once Microsoft started operating on the (downstream) market for work group server operating systems, its market share increased significantly at the same time that the rivals saw their shares fell rapidly. Thus, by calculating the historical changes of market shares, the GC adopted a rather formalistic approach to examine whether the 'elimination of competition' condition was satisfied in *Microsoft*. However, it must be acknowledged that the GC was correct to take the network effects into consideration when determining the criterion.

The matter of identifying two separate but interconnected upstream and downstream markets should also be addressed. In *Magill*, the secondary market comprised the comprehensive weekly TV guide offered by Magill, while the primary market was

constituted by the basic raw material indispensable for the compilation of the downstream television guide. In comparable fashion, the primary market in *IMS Health* covered the copyrighted '1860 brick structure', which was indispensable for the downstream supply of regional sales data on pharmaceutical products. Similarly, in *Microsoft*, it was argued that Microsoft leveraged its quasi-monopoly power from the primary market for the interoperability information with its Windows operating system on the secondary market for the manufacture of compatible work group server operating systems. One aspect combining all these cases is the fact that the upstream (primary) market is reflected by the intellectual property right in question. As the ECJ stated in *IMS Health*, it is not necessary to pinpoint an existing or authentic upstream market, but rather, it is sufficient if that market is potential or hypothetical. This indicates that the hurdle to locate a primary market will be relatively comfortable to jump over since almost any intellectual property right is capable of constituting a hypothetical upstream market for the supply or provision of a downstream product or service.

One additional and final observation to point out is that the 'elimination of competition' criterion is closely interconnected with the requirement of indispensability. If access of a certain input is indispensable in order for a business to compete viably on the market, it becomes quite natural that a refusal to provide such access will, either immediately or in the foreseeable future, have the effect of eliminating all effective competition on the secondary market. It goes without saying that, in practice, these two requirements synchronize, thus leaving the 'elimination of competition' requirement devoid of any practical substance.

#### **5.2.4 Objective Justification**

The 'objective justification' criterion is without reservation the most underdeveloped part of the 'exceptional circumstance' doctrine. The European courts are yet to define in affirmative terms what kinds of considerations that may objectively justify a refusal to license. As seen in *Microsoft*, the very fact that the interoperability information was protected by intellectual property rights or constituted trade secret did not constitute an 'objective justification'. Neither the potential negative impact that a compulsory license would have on Microsoft's future incentives to invest in innovation could justify its refusal.

As of today, the Commission's Guidance Paper is the primary source of inspiration to identify potential arguments for a successful plea for objective justification. The Guidance Paper states that a dominant undertaking may put forward a claim that the refusal should be justified due to the efficiency gains that it achieves. For this purpose, the Guidance Paper requires that the following four cumulative conditions are satisfied: (i) the efficiencies have been or are likely to be realised as a result of the conduct, (ii) the conduct is indispensable to the realisation of those efficiencies, (iii) the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare on the affected markets, and (iv) the conduct does not eliminate effective competition by removing all or most existing sources of actual or potential competition. Hypothetically, if the 'elimination of competition' criterion in the 'exceptional circumstances' doctrine is fulfilled, it will be practically impossible to satisfy requirement (iv) in the Guidance Paper. The only logical consequence of this finding is that it will be virtually impossible for a dominant undertaking to successfully put forward a plea based on efficiency gains.

The Guidance Paper does also mention that factors external to the dominant undertaking may constitute objective considerations that could possibly justify the refusal. However, the Commission does not provide any examples on the nature of such 'external factors'. The terminology seems to correspond with factors that normally constitute *force majeure* in contractual relations and that are beyond the control of the parties, for instance war, strikes, earthquakes and various forms of extreme weather.

In conclusion, the potential lines of argumentation that a dominant undertaking can present in order to objectively justify its refusal to license is united with a significant degree of uncertainty. As previous case law has ascertained, this criterion is perhaps the most difficult one to fulfil. The responsibility lies in the hands of the European courts to provide businesses with sufficient guidance and thereby increase legal certainty and predictability.

### **5.3 Future Implications of the Huawei Judgment on the 'Exceptional Circumstances' Doctrine**

The circumstances in *Huawei* diverged from the 'traditional' line of cases involving refusal to license intellectual property rights in which the ECJ had established its 'exceptional circumstances' doctrine. Still, the ECJ examined the anti-competitive and

foreclosure effects of a SEP holder's refusal to grant a license to its patent on FRAND terms and identified two 'exceptional circumstances' in *Huawei* which could, in principal, render the refusal to license a SEP as an abuse of dominant position.

The first circumstance with 'exceptional' characteristics was the essential nature of Huawei's patent to the LTE and 4G standards established by a standardization body and for which access was indispensable for competitors who pursued to manufacture products complying with the standard. The Court's discussion concerning the patent's indispensable nature is an accustomed reasoning and originates from the refusal to license case law. It can be argued that the 'indispensability' criterion is virtually inherited in the very composition of the SEP. Since market actors have agreed on adopting a certain standard within the framework of a SSO, it will be practically impossible to manufacture products or provide services without 'compromising the essential functions' of the standardized technology. Or, by utilizing *Bronner* and *IMS Health* line of reasoning, the technical and economic barriers represented by the SEP would have made it unreasonably difficult for competitors to develop interoperable products without having access to the SEP. The first 'exceptional circumstance' identified by the ECJ in *Huawei* therefore seems to be conform and consistent with the way in which the Court has interpreted the 'indispensability' criterion in previous cases.

The second circumstance with 'exceptional' qualities was that the fact that the patent had obtained its status as a SEP due to the patent holder's (Huawei's) irrevocable FRAND commitment to the SSO. According to the Court, this FRAND assurance had created legitimate expectations among third parties that Huawei would license its SEP on fair, reasonable and non-discriminatory terms. This second 'exceptional circumstance' is unique for the SEP context and does not feature in earlier case law on refusal to license intellectual property rights. However, there is risk for some logical irregularities with categorizing a FRAND commitment as an 'exceptional circumstance'. As Vesterdorf pointed out, such an argumentation implies that whole sectors of industries where the existence of standardization technology is common could (potentially) find themselves in 'exceptional circumstances' and be at risk of infringing article 102 TFEU. Rephrasing Vesterdorf, such a reality would be "somewhat bizarre".

Nevertheless, since FRAND commitments can only be found within the framework of standard-setting organizations, this 'exceptional circumstance' will, in practice, only be applicable in the SEP context and not in situations involving non-standard-essential intellectual property rights. Another important aspect to point out is that a FRAND

commitment is normally a fundamental precondition for a patent to obtain a SEP status by a standardization body. Consequently, this ‘exceptional circumstance’ will start to exist as soon as the patent obtains its SEP status.

When setting out the relevant criteria for examining the abusive nature of a refusal to grant a license to a standard-essential patent, the Court did not mention the necessity of demonstrating that the refusal prevents the emergence of a new product or is likely to eliminate competition on a secondary market. These two requirements have been an integral part of ECJ’s refusal to license jurisprudence since *Magill* but were not included in *Huawei*. The omission of the ‘new product’ and ‘elimination of competition’ requirements reflects an inconsistency in the ECJ’s interpretation of the ‘exceptional circumstances’ doctrine and seems to suggest that the Court adopts an appreciably dissimilar standard to assess SEP:s than other kinds of intellectual property rights. It remains uncertain whether the exclusion of these two prerequisites was an accidental lapse by the Court or a reflection of its measured intention to distinguish the applicable legal framework on SEP:s from non-standard-essential intellectual property rights.

The implementation of a multi-step negotiation procedure according to which the SEP holder and the alleged unlicensed user of the SEP may avoid competition law and IP liability, respectively, represents a ‘safe harbour’ for the parties of the SEP licensing negotiation. For the possessor of the SEP to ‘escape’ antitrust liability, it has to abide two specific procedural steps at the same time that the unlicensed SEP user fails to comply with its own specific procedural requirements: at a preliminary stage, the SEP holder must alert the alleged infringer, designate the relevant SEP and specify the manner in which it considers that the SEP is infringed. As a second step of the negotiation process, and following the potential licensee’s declaration of being willing to enter a licensing agreement on FRAND terms, the SEP holder must present a specific, written offer for a license based on FRAND terms that stipulates the level of the royalty fee and which contains the technique according to which the royalty is to be calculated. Without stating it explicitly, the ECJ has in effect spelled out a set of circumstances that will objectively justify the *prima facie* abusive action for injunction or refusal to license. By holding in which circumstances the SEP holder may avoid infringing article 102 TFEU, the Court has in affirmative words explained what could constitute objective considerations in order to justify a *prima facie* abusive conduct.

## 5.4 Conclusions

An act on part of a dominant undertaking consisting in a refusal to license its intellectual property rights to a third party does not in itself constitute an abuse in the meaning of article 102 TFEU. In order to amount to an abusive practice, the refusal to license has to be adjoined with the presence of several exceptional circumstances. The main rule in EU competition law is consequently that dominant undertakings are not under a general obligation to grant a license to third parties requesting access to their intellectual property rights. As an exception to the main rule, a duty to license may materialize if the refusal is united with the existence of exceptional circumstances. The jurisprudence of primarily the ECJ has established that is sufficient if at least four cumulative conditions are fulfilled, namely: (a) the refusal to license denies a third party access to a product or service which is 'indispensable' for carrying out a particular business on a secondary market, (b) the refusal prevents the appearance of a 'new product' for which there is potential consumer demand, (c) the refusal is such as to 'likely eliminate any competition on the secondary market', and (d) the refusal is incapable of being 'objectively justified'. The existence of these four prerequisites will establish that the refusal to license amounts to an abusive conduct contrary to the provision in article 102 TFEU. The jurisprudence from the EU courts and the decisional practice of the Commission does, however, indicate that it remains possible to identify other considerations which constitute 'exceptional circumstances'. This was especially highlighted in *Huawei*, where the ECJ introduced an entirely new 'exceptional circumstance' within the SEP context. In this case, the Court stated that the fact that the SEP holder had given its irrevocable FRAND commitment to the standardized body had created 'legitimate expectations' among competitors. According to the ECJ, this FRAND commitment constituted an 'exceptional' circumstance.

The application of the 'exceptional circumstances' doctrine and in particular the interpretation of prerequisites (a) and (b) has demonstrated a high level of inconsistency in the jurisprudence of the European courts. This uncertainty is predominantly a result of the GC's 'acrobatic' application of the 'exceptional circumstances' doctrine in its *Microsoft* case. The GC utilized an extensive interpretation of the doctrine in order to identify the presence of exceptional circumstances and practically gave the 'new product' criterion a completely new meaning. The legal framework that primarily the ECJ has developed through a series of cases to assess the abusive character of conduct involving

refusal to license intellectual property rights has provided the Court with a flexible instrument and enabled it to adopt a case-by-case approach. In parallel, the terminological ambiguity of the ‘exceptional circumstances’ doctrine has caused difficulties to apply the framework in practical situations and has resulted in an unsystematic and imbalanced interpretation of the four conditions sufficient to find the presence of exceptional circumstances. After the ruling in *Microsoft*, it is fundamental that the ECJ provides clarifications on numerous matters in future cases. Particularly the complication concerning the GC’s decision to apply a general notion of consumer harm as the relevant criteria, instead of the narrower ‘new product’ criterion, is in need of explanation. With regard to the omission of conditions (b) and (c) in *Huawei*, the ECJ did not take the opportunity to clarify whether the GC’s interpretation of these requirements in *Microsoft* also mirrors the Court’s understanding. The exclusion of conditions (b) and (c) in *Huawei* also adds uncertainty as to whether these prerequisites are relevant in the SEP context. If the omission reflects the direct intentions of the ECJ, it would suggest that the Court adopts two different legal standards depending on whether the refusal to license relates to an intellectual property right that is either standard-essential or a ‘normal’ intellectual property right.

As the law stands today, it is assembled with a significant degree of uncertainty and a jurisprudence characterized by unconformity.

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