

“POTENTIAL” DOWNSTREAM MARKETS IN EUROPEAN ANTITRUST LAW: A CONCEPT IN NEED OF LIMITING PRINCIPLES

John Temple Lang

Cleary Gottlieb

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ABSTRACT

Under European Union competition law, a dominant company has a duty to provide important inputs to its competitors. The leading cases involved vertically integrated dominant companies, which operated both harbors and car ferry companies. They were ordered to give access to their downstream competitors, the other car ferry companies that needed access to the harbors. In these cases it was clear that there were two markets: a market for the supply of harbor services to ferry companies, and a separate market for the supply of ferry services to travelers. If all the other conditions for a duty to contract are fulfilled, the dominant company cannot avoid the duty merely by arguing that it has never granted access before. This led to the statement that it is enough if there is a “potential market” for the supply of the input in question by the dominant company, if the other conditions are fulfilled.

This phrase has led to arguments by competitors requesting one of several products sold only in combination by the dominant company, or one specific input out of the dominant company’s integrated operations, or the dominant company’s principal competitive advantage.

In some cases competitors have claimed the right to use the dominant company’s intellectual property rights, to produce or use the dominant company’s products. In all these cases one important question is whether there is in any sense a “market” for an input that is used by the dominant company in the course of its activities. Since not everything that could be licensed or sold must be licensed or sold, there must be principles limiting the rights of competitors to demand access to the parts of a dominant company’s operations that they need.

A number of substantive questions, and some procedural questions, arise in such cases. The European Commission’s Guidance paper on exclusionary abuses makes it clear that there must be an “upstream” and a “downstream” market, but does not discuss or even fully list the other conditions of a duty to contract. This article argues that the “potential market” phrase means only that it is not a defense to show that the dominant company has never before made a contract of the kind suggested. If there is only one market on which the dominant company sells, a potential competitor has no right to insist on being given access to whatever inputs it needs to compete effectively on that market.

Access may be ordered only if an identifiable abuse of the dominant position has been committed. To prove an abuse, harm to consumers, and not only to competitors, must be shown. The duty to contract must be the appropriate remedy to put an end to the abuse. If no duty to contract can be shown, there cannot be a duty to contract on the basis of a tying argument, among other reasons because in tying cases the competitor wants to sell its products to third parties, and complains that tying prevents it from doing so. In the cases discussed here, the competitor itself wants to be supplied, so that it can produce the products that it wants to make.

* Cleary Gottlieb Steen and Hamilton, Brussels and London; Professor, Trinity College, Dublin; Senior Visiting Research Fellow, Oxford. Financial support from IBM is gratefully acknowledged by the author.

A number of cases have recently arisen in which competitors have sought access to inputs controlled by supposedly dominant companies to which the dominant companies have never previously given access. Competitors rely on the argument that the inputs could be the subject of a “potential market” under EU competition law. In some of these cases the dominant company sells a combination of two products that must work together, and the competitor wants to buy or to get the right to produce one of them, for sale together with its version of the other product. In other cases the competitor needs to obtain one specific input from what appears to be unified seamless production or distribution operations of the company that is said to be dominant. In what may be regarded as a third group of cases, the competitor wants the right to use the dominant company’s principal competitive advantage, to use it in combination with other inputs already available to the competitor. This article considers the implications of the idea of “potential markets” in the context of EU competition law principles on the duty of dominant companies to contract.

Related questions arise under European competition law when a competitor or potential competitor of a company that is said to be dominant claims to be entitled to a compulsory license of an input consisting essentially of intellectual property rights, in order to use products or services produced by the dominant company. This article also considers some of those questions, in particular those which arise before the validity of the intellectual property rights in question is finally determined.

These questions may arise in proceedings for patent infringement brought by the company that is said to be dominant, or in a competition procedure before the European Commission or a national competition authority of an EU or EEA Member State. Some of the questions discussed here arise primarily because some courts that have jurisdiction to decide patent infringement cases have no jurisdiction to decide the validity of the intellectual property rights that are the subject of the proceedings. Corresponding questions arise in procedures before competition authorities, none of which have competence to decide the validity of intellectual property rights.¹

Under certain circumstances, not yet very clearly or fully defined in the judgments of the European Court of Justice in several well-known cases, European competition law imposes on a company that has been

found to be dominant a duty to grant a compulsory license of intellectual property rights.² If those circumstances do not exist, European competition law imposes no obligation to license (except in standards cases under Article 101 TFEU, which raise different issues, not considered here³), and the conflict between the supposed intellectual property right and European competition law does not arise.

National competition law under Regulation 1/2003 may be stricter than Article 102 TFEU, that is, it may impose more onerous obligations on a dominant company than those imposed by EU law.⁴ But even in a Member State with stricter rules on unilateral conduct of dominant companies, the issues discussed here are likely to arise.

I. “POTENTIAL MARKETS”

The duty to contract is normally considered to arise primarily in situations in which there is an upstream market producing inputs, services, or raw materials, which are then sold to companies for use in a separate downstream market. The original examples were harbor operations that provided harbor facilities to car ferry companies and other transport operations.⁵ In such cases the two markets are clearly distinct: they involve different products and services, and the buyers in the two markets are different.

These cases, in which the phrase “essential facility” was first used officially in European competition law, were all cases in which the abuse alleged consisted essentially of discrimination by the harbor operator in favour of car ferry or other shipping companies associated with it. It was not until later that cases arose in which a competitor wanted access to something that the vertically integrated company had never before supplied outside its own group. These cases involved the Commission applying Article 102(b) TFEU (on foreclosure) instead of Article 102(c) TFEU (on discrimination), but the significance of this does not seem to have been fully understood. The Commission paid little attention to abuse of dominant positions until the Discussion Paper was adopted in 2005.⁶

Cases of first refusal to contract had been approached without an adequate intellectual framework.

The idea of a “potential market” arose in situations in which it was said that a dominant company had operations which, although at first sight appeared unified, should be analyzed as consisting of an upstream stage producing an input or facility and a downstream stage using the input or facility.⁷ Competitors wishing to enter the supposed downstream market, or to obtain advantages for use in that market, argued that the fact that the dominant company in question had never given access to the input or facility to any user not associated with it should not be a defense. The difficulty, of course, is that many companies that are not usually thought of as vertically integrated have operations that consist essentially of producing a raw material, an intermediate product, or a component for incorporation in a final product; combining hardware and software; or selling a complex final product, such as a car, consisting of a great number of components designed, manufactured and assembled in a particular way.

Some cases were relatively clear. The fact that one particular dominant harbour operator had never given access to any car ferry company that was not associated with it would not be a justification for refusing access if the other conditions required by Article 102 were fulfilled, because many other harbour operators do so (and also because the two markets are so clearly distinct). But if no company resembling the supposedly dominant company had ever given access to outside interests anywhere in the world, and if the operations producing the supposed input had never been considered separate or downstream from the rest of the company’s activities, it was not easy to see what principles, if any, should be applied.

A) IMS HEALTH

The facts of the IMS Health case are well known, and have garnered much commentary.⁸ IMS Health had compiled a specialized map of Germany designed to relate the places where pharmaceutical products are prescribed to the places in which they are bought. Pharmaceutical companies used this map to estimate the effectiveness of their sales representatives, who talk to doctors and hospitals, and not to the patients who buy the medicines. The sales data analyzed using this map were available to any company that wanted them, but NDC Health, a competitor, complained that the map was copyrighted and that the pharmaceutical companies preferred the IMS map to any other. IMS Health had never given a copyright license to anyone.

The question was whether it could have any obligation under what is now Article 102 TFEU to do so.

Advocate General Tizzano first recalled that in RTE-ITP⁹ and Bronner¹⁰ the supposedly dominant companies had never previously sold or licensed the input requested separately. He said,

“Thus in applying the case law cited on the refusal to grant a license I consider it to be sufficient that it is possible to identify a market in upstream inputs, even where the market is a ‘potential’ one only, in the sense that operating within it is a monopoly undertaking which decides not to market independently the inputs in question (notwithstanding that there is an actual demand for them) but to assert exclusive rights over a downstream market by restricting or eliminating all competition on that market.

“To take a classic example of the essential facility doctrine, it is instructive to consider the case where access to a port is indispensable in order to be able to provide maritime services in a given geographical market. For the purposes of such a case it may be assumed that the owner of the port uses that infrastructure on an exclusive basis in order to secure a monopoly over the market for maritime transport services refusing without any objective justification to provide the necessary port services to arms’-length undertakings... In such a case the case law on the refusal to grant a license must apply irrespective of the fact that the port services are not offered on the market... by its conduct it would be eliminating any competition on the secondary market.”¹¹

Tizzano continues:

“Since... in order to be able to identify a market for upstream inputs it is not necessary for them to be marketed independently by the undertaking controlling them.... [S]uch a market may always be identified where (a) the inputs in question are essential (since they cannot be substituted or duplicated) to operating on a given market (b) there is an actual demand for them on the part of undertakings seeking to operate on the market for which those inputs are essential.”¹²

He goes on to say that there is no duty to license when the competitor plans only to produce goods or services duplicating those of the dominant company. The Court of Justice said,

*"It appears therefore, as the Advocate General set out in points 56 to 59 of his Opinion, that, for the purposes of the application of the earlier case law, it is sufficient that a potential market or even a hypothetical market can be identified. Such 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 they are indispensable. Accordingly 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."*¹³

A paragraph in a judgment in a case under Article 267 TFEU should not be treated as if it were legislation. Judgments in Article 267 cases serve only to answer the specific question that has been asked, in the context of the specific facts from which the question has come before the Court. In Article 267 cases the Court does not usually set out to state the law comprehensively, and certainly not on issues that have not been argued and that do not need to be decided. It seems clear that it would be too simple, and indeed unjustifiable, to suggest that there are only three conditions for a duty to supply. These three conditions, (1) two interconnected stages of production; (2) indispensability; and (3) actual demand, would ignore other requirements that are equally well established in the case law of the Court.

It would be surprising if every input that resulted from a first "stage" of production could be demanded by any competitor or complainant who needed the input.

B) SUBSTANTIVE QUESTIONS

The Commission's Guidance paper¹⁴ on the Commission's enforcement priorities in applying what is now Article 102 TFEU says that,

*"Typically competition problems arise when the dominant undertaking competes on the 'downstream' market with the buyer whom it refuses to supply. The term 'downstream market' is used to refer to the market for which the refused input is needed. . . . This section deals only with this type of refusal."*¹⁵

Having established that it is dealing only with two market situations, the Guidance goes on to say that the

Commission will regard a refusal to supply case as a priority if:

- (1) the refusal relates to a product or service that is objectively necessary to compete effectively on a "downstream" market;
- (2) the refusal is likely to lead to the elimination of effective competition on the downstream market; and
- (3) the refusal is likely to lead to harm to consumers.¹⁶

Although the Guidance paper clearly does not exhaustively list the conditions that are required for a refusal to contract to be contrary to Article 102, it is convenient to begin by discussing the conditions discussed in the Guidance paper.¹⁷

C) THE EXISTENCE OF A DOWNSTREAM MARKET: TWO PRODUCTS AND TWO STAGES OF PRODUCTION

The typical case involves a vertically integrated company that supplies an input for its own downstream operations, and is then also asked to supply the same input to a potential competitor of the dominant company's downstream operations. There must therefore be both a market for the supply of the input and a distinct market for which that input is necessary.

The Guidance paper identifies the possibility of an abuse even if the product or service refused has never been traded, if there is a "potential market."¹⁸ This phrase requires explanation. The Court in *IMS Health*¹⁹ did not need to explain it, because it was writing only in the specific context of that case, but the Commission should have done so, as the Guidance paper is intended to be generally applicable. Almost anything can, in theory, be leased, licensed or sold, and therefore anything might be a "potential market." Any owner of moveable or immovable property could sell, license or lease it, if it made sense for it to do so, but this cannot mean that there is a "potential market" for competition law purposes in every item of property in all circumstances. The mere existence of a demand cannot automatically create a duty to supply. If it did, the greater the competitive advantage given by the input in question, the greater would be the duty to supply it and share it with competitors, which would be irrational. Thus limiting principles are needed to identify true potential markets.²⁰

The Court's words "two different stages of production" are helpful. There must be two separate and identifiable stages, rather than a continuous process. There must be an identifiable product or service at the end of the first "stage" that could be and usually is sold or licensed separately.

But the law must also answer the question of how to treat situations in which two components are produced simultaneously and then put together and sold in combination.

It would be irrational if there were a duty when the "stages" were consecutive, but not when they are simultaneous. The way that the manufacturing process is organized can hardly be the crucial question. Also, it cannot be enough that the end of the first "stage" is an intellectual property right. If it were enough, dominant companies would always be obliged to license all their intellectual property rights to every competitor that needed them, which could not be correct. A more precise or more limited concept is needed of the kind of input that can be a "potential market."

The key issue, it is suggested, is whether it would make sense—that is, whether it would objectively be economically rational—for the owner of the input requested, in the context of the business in which the owner is engaged and the use that it is making of the input, to sell it or license it to third parties. It may be rational to share the cost of an upstream facility, even with downstream competitors, particularly if the capacity of the facility is greater than is needed for the dominant company's downstream operations, or if the product to be sold or licensed is a by-product ancillary to the main activities of the company.²¹ It is not normally economically rational for a company to supply an asset that is used in its business to a "horizontal" competitor, that is, a direct competitor in the same market. A downstream market is needed for Article 102 to apply in refusal to supply cases because the dominant company's operations must consist of two separate stages: the supply of the input that is required, and its use to provide other, different, products or services to other buyers. In such situations the refusal may enable it to monopolize the downstream market.

If a company operates in only one market and has only one unbroken manufacturing process, however complicated, and only one product or set of products, there is no meaningful sense in which there is a "potential market" for sharing its assets or inputs with its direct competitors.

Common sense and case law confirm that there might be a potential market for sharing a byproduct of the dominant company's principal activities, or sharing the use of a facility with spare capacity, but not its most important inputs. In RTE-ITP, the information needed by the magazine was an incidental result of the television broadcasting, not the television companies' main activities. The information needed could be easily provided (and indeed, was being provided to daily newspapers) because the Magill magazine was in a market entirely different from that for television broadcasting.²²

In Microsoft,²³ the information that it was ordered to provide concerned only interoperability, and not the core functions of the Microsoft products.

Because there is no duty to supply or license if there is no separate downstream market, a complainant needs to prove that the supposedly dominant company's operations consist of two parts. That situation might arise in a case not considered by the Guidance paper, in which the dominant company is horizontally integrated, producing two products or services that are linked to one another, and sells them both to the same buyers. Suppose that these two (or more) products or services are both needed by users for simultaneous use: neither works without the other. And suppose that the complainant plans to provide its version of one of these products, but wants to buy the other from the dominant company, or get a license to produce the latter product, using the dominant company's technology.

Again, the key question is whether there is in any sense a separate "market" for the latter product when it is produced by the dominant company. The answer seems clear. It is not normally economically rational for a company that sells a combination of two products to its customers to sell one of them to a competitor (or to license the competitor to produce it) merely to allow the competitor to combine it with the competitor's own version of the other product. That would make sense only in the context of a joint venture, or if the supposedly dominant company had a shortage of production capacity, or in anticipation of a merger.

So a horizontally integrated company is not in a situation essentially different from that of a vertically integrated company for competition law purposes, in this respect.

What may be another way of arriving at the same conclusion is to say that a duty to contract may not be imposed, even if the dominant company is vertically or horizontally integrated, if it would oblige the dominant company to share its principal competitive advantage and to lose its incentive to invest in the asset or input being shared.²⁴

It could not be right to say that a competitor has a right to select the dominant company's principal competitive advantage or its principal asset and insist on getting the right to use it. That would mean that competitors would have the right progressively to take away the dominance of the company in question, which Article 102 clearly does not allow. This seems to be a more useful test than trying to analyze the stages of production in the dominant company's operations.²⁵ This approach is confirmed by considering the enormous difficulties of devising an appropriate payment if a dominant company's principal advantage was being shared on a compulsory basis, initially with one competitor, later perhaps also with others (because of the duty not to discriminate).

How much difference would it make if the only input needed was a license of an intellectual property right? Since the economic significance of a license would be to enable the complainant to use an asset or technology owned by the dominant company, the fact that formally only a license would be required would be unimportant. The license would simply be the means of giving access to the asset or technology in question.

Apparently similar issues can arise in the pharmaceutical industry with compound medicines, which are medicines that consist of two effective ingredients taken together. A complainant producing one ingredient may claim that the other ingredient is an essential facility, and is therefore needed to enable it to produce the compound medicine.

However, a distinction must be drawn between the case where a complainant wants supplies of a single product that is already produced and sold by the dominant company, and cases in which it wants a part of the dominant company's product or production process which is not sold separately, and for which there is therefore at first sight no identifiable market in existence.

The mere fact that the dominant company sells a combination of two products and that a rival is able to produce only one of them is not an abuse, and no order to contract can be made.

A fortiori, it is not an abuse for a dominant company merely to refuse to share an asset

or other part of its overall operations just because the competitor is unable to obtain the part it needs for its own activities.

The conclusion suggested is that if the "potential market" concept merely means that it is not a defense for a dominant company to show that it has never granted a license before, it is certainly correct. This is what the Advocate General said in *IMS Health*. Yet if the phrase is thought to mean more than that, it is hard to see what it could mean, and some limiting principles would clearly be needed. Any other meaning would be inconsistent with legal certainty.

II. ELIMINATION OF EFFECTIVE COMPETITION

In theory, if there is no "downstream" or other separate market for which the product or service is an input, the second condition stated by the Commission—the elimination of effective competition in that market—does not arise. It is nevertheless useful to analyze the connection between the refusal to license and competition. The refusal to supply or license may eliminate all competition from the complainant, if the input truly is essential to its operations. But the dominant company may be exposed to competition in the market in which it sells, even if that market is for the combination of two products, from other companies that produce them both. The question in refusal to license cases is not whether competition from the complainant is eliminated by the refusal, but whether all competition from all sources is eliminated.²⁶ If other companies individually or together produce, or have access to, the input that is said to be essential for the complainant, or to satisfactory alternative inputs, it is clear from the *Bronner* judgment that there is no duty to contract.²⁷ A dominant company is never obliged to remedy weaknesses in an individual competitor's business plan unless the dominant company has caused those weaknesses in some way.

If there is clearly only one market on which the dominant company sells, and there is no competition in that market, a potential competitor has no right to insist on being given access to whatever inputs it needs to compete effectively in that market. This is obvious, once it is stated. But its omission in the Commission's Guidance paper makes its conclusions seriously incomplete.

It is well-established in the EU case law that it is not an abuse to refuse to license an intellectual property right: there must be some "additional abusive conduct," a separate abuse.²⁸ This is so even if the effect of exercising the intellectual property rights is the creation of a monopoly. The fact that there will be no competition if a license of intellectual property rights is refused is not "additional abusive conduct," nor is it an "exceptional circumstance" justifying an order to license, as mistakenly determined by the Commission in its IMS Health interim measures decision.

A) HARM TO CONSUMERS DUE TO THE REFUSAL

Article 102(b), which is the principal and probably the only legal basis for the prohibition of foreclosure and exclusionary abuses (as distinct from discrimination cases) expressly applies only if there is harm to consumers. It is not sufficient for the complainant to claim that if it got a license or a contract, there would be one more competitor. If that were enough, there would always be a duty to license, which runs counter to established law. To say that one more competitor would be enough to justify a compulsory license would be to look only at static competition.

*In all refusal to contract cases, it is essential to look at dynamic competition.*²⁹

Any duty to contract inevitably has implications for the incentives for further investment of both the dominant company and the companies with which it may be obliged to contract. It discourages the dominant company from investing, since the company will fear that success will require sharing the fruits of its investment. A duty to contract also discourages the companies contracting with the dominant company from investing, because such companies no longer need to invest in developing alternatives; instead, they can "free-ride." An important finding by the Commission

in the Microsoft case was that compulsory disclosure of interoperability information would not reduce the incentives of Microsoft to invest, since Microsoft was obliged to disclose only the information needed for interoperability, and could continue to develop its systems. Nor would disclosure reduce the incentives of other companies to invest, because they would continue to be under competitive pressure from Microsoft and rival firms.³⁰

Several of the leading judgments have considered whether the complainant can show that it plans to produce a new kind of product or service for which there is a clear and unsatisfied demand, which the dominant company is unable or unwilling to produce. This was the situation in the RTE-ITP case, involving an integrated weekly television programs guide.³¹ It was not the situation in Bronner³² or in IMS Health.³³

If the complainant can make such a showing, the harm to consumers caused by preventing the development of the new kind of product is sufficient to constitute an abuse, provided the other conditions are met.

However, if the complainant plans to produce only a combination or a product that is essentially a copy of the dominant company's product, there is insufficient harm to consumers. Similarly, if there is no scope for non-price competition in the downstream market, there is no justification for a duty to contract. Harm to consumers must always be proved under Article 102(b) TFEU if the abuse consists of foreclosure or exclusion of a competitor. Yet it is important to recognize that harm to consumers, if it is serious, may be enough to create an abuse. So in RTE-ITP, the mere refusal to provide television program information was an abuse, because it made it impossible to provide consumers with a product for which there was a clear and unsatisfied demand.³⁴

B) ARTICLE 102(b) TFEU: FORECLOSURE AND EXCLUSIONARY ABUSES

Article 102(b) TFEU prohibits conduct limiting the production, markets or technical development of competitors³⁵ of the dominant company, if consumers are harmed. This is the Treaty definition of foreclosure and exclusionary abuse. Similarly, the Court in Microsoft said that this clause is not limited to cases involving a new kind of product, but also applies when, in effect, the dominant company's conduct imposes a permanent handicap on its competitors.³⁶

The Court in the GlaxoSmithKline case³⁷ under Article 102 TFEU also relied on Article 102(b). If this handicap limits competition in a market for a new or improved product that competitors were already producing (or would produce, if the evidence that they would do so is strong enough), and which they would be under continuing competitive pressure to improve, there may be an abuse. It seems clear that a dominant company never has a duty to share, or part with, its principal competitive advantage, since that would deprive both it and its competitors of their respective incentives to invest and innovate.

But it is nonetheless difficult, if not impossible, to visualize an abuse for which the appropriate remedy would be an order to share the dominant company's principal competitive advantage.

An instance in which such a permanent handicap would be imposed is if a dominant company regularly makes changes in its products that causes them to work unsatisfactorily with competitors' products, and then refuses to provide new interoperability information promptly. This was found to be the situation in the Decca Navigator case,³⁸ and was thought to be the situation in the original IBM case brought by the European Commission.³⁹ Similar handicaps were imposed, according to the Commission, by AstraZeneca on its generic competitors by the withdrawal of the listings for some of its patents.⁴⁰

C) NO DUTY TO CONTRACT WITHOUT AN IDENTIFIABLE ABUSE

Although it has been insufficiently emphasized by both the Commission and the Court, it is important to note that Article 102(b) can impose a duty to contract only when an abuse has been committed.⁴¹ It prohibits only conduct creating a handicap or difficulty to which the competitors would not otherwise be subject. It does not create a duty to help competitors to overcome difficulties not caused or increased by the conduct of the dominant company. It is not illegal foreclosure merely to refuse to help a competitor.

In Bayer⁴² the Court said:

"Under Article [102], refusal to supply, even where it is total, is prohibited only if it constitutes an abuse. The case law of the

Court indirectly recognises the importance of safeguarding free enterprise when applying the competition rules of the Treaty where it expressly acknowledges that even an undertaking in a dominant position may, in certain cases, refuse to sell or change its supply or delivery policy without falling under the prohibition laid down in Article [102]."

This failure to distinguish between free enterprise and abuse is one of the most important omissions from the statements made by the Court in IMS Health⁴³ and by the Commission in the Guidance paper.

It is elementary, and it should be obvious, that Article 102 TFEU applies only when an abuse has been committed. No compulsory license or other remedy can be ordered under Article 102 TFEU unless an identifiable abuse has been proved. There is no duty to license merely to create one more competitor. It is not an abuse to refuse to license merely because there may otherwise be no competition in the short term, because that may often be the result in cases involving intellectual property rights.

If the dominant company has done nothing to make the market less competitive, it cannot be ordered to make it more competitive, and obtaining intellectual property rights for one's own inventions does not make the market less competitive. If the dominant company has done nothing to create a handicap or difficulty for competitors to which they would not otherwise have been subject, there cannot be a duty to contract. In other words, anticompetitive foreclosure must be proved before any remedy can be ordered, and the mere refusal to help a competitor is not anticompetitive.

Intellectual property rights cases, more so than in any other kind of case, recognize that the mere refusal to license a property right is not an infringement of Article 102 TFEU. There must be some "additional abusive conduct"⁴⁴ that constitutes a distinct and separate abuse, distinct from, and in addition to, the refusal to license.

D) A DUTY TO CONTRACT ONLY AS A REMEDY FOR AN IDENTIFIABLE ABUSE

This important and undeniable principle suggests another and better approach of looking at the case law that goes far to put everything into perspective. The first question to ask is whether an abuse exists.

Once an abuse has been identified and proved, it is easier to answer the next question, which is whether a duty to contract—whether to sell, license or lease—would be the appropriate and proportional remedy for the abuse in question. This explains RTE-ITP,⁴⁵ Commercial Solvents,⁴⁶ and the discrimination cases. It entirely avoids the insuperable difficulties of basing all crucial distinctions on the nature of the “stages” in the production process.

There are a number of arguments based in law, economics and policy for this approach, which cumulatively are extremely strong:⁴⁷

- This approach is based on the express words of Article 102(b): “limitation” (of the possibilities of rivals) and “prejudice” to consumers. Conduct which limits possibilities of rivals only in ways in which they would be limited anyway cannot be illegal. Rivals are already limited by having to respect intellectual property rights. The approach involves no new rules or concepts.

- It provides a rational, coherent and comprehensive basis for the relevant legal and economic principles, which should be broadly acceptable to competition lawyers and economists, and to intellectual property lawyers.

- It confines the concept of “abuse” under Article 102 to the three correct, useful and traditional categories under European competition law: exploitative abuses (Article 102(a), foreclosure of competitors (Article 102(b)), and unjustified discrimination between companies not otherwise associated with the dominant company (Article 102(c)).

- It seems reasonable to say that an abuse always involves some conduct of the dominant company. Mere inaction is not an abuse. Therefore a remedy must offset or eliminate the consequences of some positive action.

- It answers the following two questions: what “additional abusive conduct” is enough? If refusal to give access is only illegal when linked to such conduct, why not simply prohibit the separate abuse? The answer is that a compulsory license, when appropriate, is a more effective remedy.

- It avoids the insuperable difficulties of “balancing” the incentives to invest of the dominant company and its downstream competitors in the future. The Court in Microsoft carefully avoided undertaking this task, and it seems wise to avoid it.

- It harmonizes the interpretation of Article 102 TFEU with the well-established duty of parties to patent pools, joint ventures and standard setting agreements to license essential patents to non-parties.⁴⁸

- It encourages use of a market-based remedy requiring little competition law supervision.

- It states a rule with built-in limiting principles, which are needed because of the vagueness and potentially broad scope of the concept of “potential markets.” There would be no new concept of abuse and, as in the case of any other remedy for an abuse under Article 102 TFEU, the remedy must be an appropriate, proportionate and effective remedy to put an end to the abuse. The question of the appropriateness of a remedy arises on any view of the law. A remedy must be enough to put an end to the abuse effectively, but go no further.

- It provides a basis for distinguishing three types of cases from each other. The first is where the dominant company developed the property itself, when normally no duty arises to give a first license, and there is no duty except under Article 102(c) TFEU. The second category of cases is when a dominant company acquired the property and then deprived its competitors of access to it. In this group of cases, a duty to license is appropriate if the dominant company is substantially restricting competition.

The third group is dynamic competition cases, where the dominant company harms consumers by foreclosing potential competition to protect itself against technical development or against a new kind of product for which there is a clear and unsatisfied consumer demand.

- It gives the phrase “additional abusive conduct” a clear meaning, that of “abuse.”

- It confirms that, in principle, it is never illegal in itself to refuse to license an intellectual property right, as the Court has repeatedly affirmed.⁴⁹

- It has the important advantage of avoiding consequences contrary to policy. It would not lead to protecting competitors rather than competition, using competition law for regulatory purposes, or discouraging investment or innovation. These are serious risks to which European Union law has been exposed in recent years.

- It provides a rational basis for saying that a dominant company has no duty to facilitate companies which wish to copy, add on or imitate devices, unless it has taken steps to exclude them or create difficulties or handicaps for them.

- It allows a variety of justifications for refusal to license (including the defense that the dominant company will soon produce the new kind of product itself).

- It seems to be an approach on which European and US law could agree. This is important because it is often said that intellectual property rights are an area on which the two jurisdictions diverge.⁵⁰

- It allows a distinction to be drawn between a compulsory license in a single market situation—which can be appropriate only if the abuse is in that market and which requires a very strong justification (since it would lessen dominance, as distinct from ending abuse)—and a compulsory license in a second distinct market, which is more likely to be proportional.

- It does not involve trying to use competition law to correct any defects which may be thought to exist in intellectual property law.⁵¹

- It provides a relatively uncontroversial rationale for the results in RTE-ITP52 and Microsoft.⁵³

- As Mr. Justice Laddie said in *Philips Electronics v. Ingman and Video Duplicating*,

“The existence of the intellectual property rights may facilitate anti-competitive behaviour, but such behaviour consists of abusive interference with the market for a product... In prohibiting the conduct the court may have the power to intervene in the manner in which the intellectual property rights are exploited by the proprietor. This is to ensure that the proprietor does not continue the abusive conduct in relation to the products by the back door route of using the intellectual property rights.”⁵⁴

In short, a refusal to contract or to license is never an abuse in itself, but a duty to contract may be the correct remedy for some other abuse, once the abuse has been identified and proved. All the cases in EU law in which access has been ordered have involved identifiable abuses.

The abuse, once identified, and the duty to contract must be related in some way.

The only way in which they could be related is when the duty is a remedy to end the abuse. Imposing a duty to contract, even if no abuse had been committed, merely to create more competition, would be a regulatory rule unjustified by competition law principles.

This approach has another advantage. It largely avoids weighing up the effect of imposing a duty to contract on the incentives to innovate of the dominant company and of the competitors. Under this approach, such an inquiry arises only when the competition authority is considering whether an order to contract is proportional. It is easier and more appropriate in a judicial context to answer that question than to try to weigh up what sounds like a policy question of the relative importance of the two sets of incentives in the future.⁵⁵

E) ACQUIRING THE ONLY EFFECTIVE ALTERNATIVE TECHNOLOGY

Two cases in which a duty to contract may be appropriate, but which fall outside the types of cases discussed above, should be mentioned.

The principle that a duty to contract must be the appropriate remedy for an identified abuse is illustrated by a situation in which a dominant company acquires the only effective technology which is an alternative to its own technology, or the only useful alternative input, and the acquisition is an abuse.⁵⁶ Competition, or potential competition, is suppressed. The dominant company may wish to suppress the alternative technology, or to use it to strengthen its own dominance. Even if the alternative were not used, its existence might constrain the dominant company, provided that it was owned by a non-associated company. So if a dominant company acquires the only significant alternative technology, the appropriate remedy is to order the company to sell or license it to a direct competitor. The dominant company might also need to be ordered not to use it for its own purposes.

F) LIMITING SUPPLIES IN ORDER TO RESTRAIN PARALLEL IMPORTS

In the *GlaxoSmithKline* judgment⁵⁷ under Article 102 TFEU, the Court held that a dominant supplier of medicinal products was not entitled to refuse to meet ordinary orders from wholesalers in order to prevent parallel imports into higher price countries.

The dominant supplier could only refuse to meet orders that are “out of the ordinary in terms of quantity.” It could therefore be ordered, if necessary, to supply ordinary quantities, on the grounds that a refusal to sell would limit markets to the prejudice of consumers and would amount to discrimination that might ultimately eliminate a trading party from the market.

III. ARE THERE DIFFERENT RULES FOR INTELLECTUAL PROPERTY AND OTHER KINDS OF PROPERTY?

The question arises whether there are different legal rules on the duty to contract for intellectual property. The basis for such a distinction rests on the Court’s repeated statement that a refusal to license an intellectual property right is not an abuse, and that there must be additional abusive conduct if there is to be a duty to license. The Court has not been required to articulate what differences, if any, there may be for other kinds of property. It is understandable that the Court’s comments concerned only intellectual property rights, since they formed the subject of the cases involving first refusals to contract.⁵⁸ Intellectual property rights create legal monopolies (though not necessarily economic monopolies), and it is obvious that if there were always a duty to license an intellectual property right that created a legal or an economic monopoly, the rights given by intellectual property legislation would be completely transformed into mere rights to royalties. The Court thus needed to say that refusal to license such a right was not, in itself, an abuse. But that left unanswered the question whether corresponding rules apply to other kinds of property.

This question is easier to answer in the light of the fundamental rule explained above, that there is never a duty to contract or license unless it has been proved that an identifiable abuse, contrary to Article 102 TFEU, has been committed. If the abuse is discrimination, contrary to Article 102(c) TFEU,

the duty to end the discrimination may involve a duty to grant access on the same terms as those on which access has already been given.

In this respect, there is no reason to differentiate between intellectual property and other kinds of property.⁵⁹

Cases of first refusal to give access to property or inputs other than intellectual property rights are unusual, simply because other kinds of property or inputs do not usually involve anything resembling a monopoly. But *Commercial Solvents*⁶⁰ and *Bronner*⁶¹ did involve what were said to be monopolies, and RTE-ITP involved a monopoly of the television program information (and only incidentally a copyright).⁶²

In *Bronner* the Court held that there was no duty to contract because the complainant had not proved that no alternative economic distribution system could be set up,⁶³ but the judgment seems to imply that if no other system were possible (and if the other conditions for a duty to contract were fulfilled), there would have been foreclosure, and a duty to contract.

In *Commercial Solvents*⁶⁴ and *RTE-ITP*⁶⁵ the Court held that abuses had been committed, and although the words were not used, it is easy to see that in each case they were foreclosure or exclusionary abuses. In *Microsoft*⁶⁶ the relevant duty was to provide the information needed for interoperability and, as in *RTE-ITP*, the intellectual property right was merely incidental.⁶⁷ There is nothing in any of these judgments to suggest that a refusal to give access to any kind of property, input or service can be an abuse in itself, without proof of any other abuse.

Almost all the reasons outlined above for saying that a refusal to license an intellectual property right is not in itself an abuse apply also to refusals to give access to all other kinds of property. The conclusion therefore is that intellectual property is not a special case, and that the rules discussed here apply equally to all kinds of property and inputs. Certainly, as far as “potential markets” are concerned, it is equally appropriate to use the concept in connection with both kinds of property. Intellectual property rights are no more or less easily sold or licensed than other kinds of property.

When the supposed abuse is foreclosure rather than discrimination, Article 102(b) TFEU does not suggest that different kinds of property should be differently treated.⁶⁸ Mere ownership of property, normally giving the dominant company an exclusive right to use it, is not an abuse, because it does not “limit” the markets, production or technical development of competitors.

IV. TERMINATION OF EXISTING SUPPLY ARRANGEMENTS

In cases involving termination of existing supply arrangements, since the dominant company has already supplied or licensed in the past, there are two stages in the production chain, and there is no need for an analysis of “potential” markets. Previous contracts show that there is both a market for the supply of the input and a market where that input is used in a distinct product.

The Commission’s Guidance paper says that the Commission will apply the same criteria in cases of termination of existing supply arrangements as in cases where the dominant company refuses to supply a good or service which it not previously supplied to others.⁶⁹ It adds, however, that the termination of an existing supply arrangement will more likely be found an abuse of a dominant position than a de novo refusal to supply.

The Guidance paper gives two unconvincing reasons for treating a termination of existing supply more strictly than a de novo refusal to supply.

First, the company previously supplied could have made relationship-specific investments. This argument cannot be accepted, since it is not a competition law consideration, but a commercial or contractual one. Termination of supply could be a breach of contract and the contracting party could request damages for its investments, but this does not mean that it is necessarily easier to find an abuse from a competition law perspective.

The second argument in the Guidance paper is that in the past, the owner of essential input has found it in its interest to supply. According to the Commission, this indicates that supplying the input does not imply any risk that the owner receives inadequate compensation for the original investment.

The argument of inadequate remuneration for the dominant company could be a justification for termination, if it was objectively shown, but it does not explain why termination would be illegal in the absence of inadequate remuneration. The mere fact of having supplied once cannot create a duty under competition law to continue supplying indefinitely.

Under competition law, the effects of the termination on competition and on consumers should be the criteria for assessing whether or not the termination constitutes an abuse of dominance.

These cases can arise under Article 102(b) TFEU (foreclosure) or 102(c) TFEU (discrimination). If the complainant is the only one cut off from supplies, there may be discrimination. If everyone is cut off, there may be foreclosure on the downstream market. There may be ill effects for justifications for competition and for consumers, but whether the termination is justified will depend on the dominant company’s reason for the termination.

Certainly, it should not be presumed that a refusal to supply is an abuse merely because a contract has been made already, as the Commission seems to believe. Such a result implies that a dominant company could be locked into a contractual arrangement. This would discourage such a company from supplying in the first place, which would be damaging to the economy.⁷⁰

There are, however, some differences between de novo refusal to deal cases and termination of supply cases.

A) ELIMINATION OF EFFECTIVE COMPETITION FROM STOPPING SUPPLY

Clearly, existing competition is different from potential competition. If the dominant company stops supplying a player in the downstream market, there will be one fewer competitor on that market, if the input is essential and there is no other source of supply.

It could be harder for the dominant company to prove a valid business justification for the termination of the supply than it would be in cases of a de novo refusal to deal, since the dominant company found it economically rational to supply the complainant in the past.

But keeping an inefficient competitor in the market, or mere duplication or imitation of an existing product, is not sufficient to create a duty to resume supplies. The fact that it is sometimes pro-competitive to deal with a competitor does not mean that to stop doing so is necessarily anti-competitive.

B) HARM TO CONSUMERS DUE TO REFUSAL

A duty to resume supply should only be ordered if there would otherwise be harm to consumers.

In termination of existing supply cases it is appropriate first to look at the effect on existing (static) competition. There will always be some lessening of competition, if the dominant company cuts off supplies to at least one competitor in the downstream market. If many competitors remain in the downstream market, the consequences of the termination of one might be negligible.

If it is useful to look at dynamic competition, the effect of the termination on competition in the future is not likely to be significantly different from that in cases of first refusal to contract.

C) JUSTIFICATIONS FOR STOPPING SUPPLY

The mere fact that the company is dominant and terminates a contract, whether or not in accordance with contractual rules, is not sufficient to constitute an abuse. Either a separate positive act or the factual circumstances surrounding the termination can constitute the abuse.

The dominant company will always have a specific reason to terminate the contract. There might be acceptable reasons to terminate an existing supply arrangement, but it is also possible that the dominant company's motive is to reinforce its dominance or to extend it into the downstream market, as occurred in *Commercial Solvents*.⁷¹

If a dominant company wants to integrate forward and penetrate the downstream market, it is likely to commit an abuse if it wishes to monopolize the downstream market and, by terminating the contracts, is trying to eliminate its competitor(s) in this market. If the dominant company is already present in the downstream market, it might want to cut off supplies from its main competitor in the downstream market. In other words, if the only reason for termination is to eliminate competition in the downstream market, the termination is illegal.⁷²

D) JUSTIFICATIONS DUE TO CHANGED POLICIES, TECHNOLOGIES OR CIRCUMSTANCES

There can be a wide variety of changed circumstances which lead the dominant company to terminate the existing arrangements. If refusal to make a first contract were justified, termination would normally be lawful under competition law. Any other approach would imply a presumption that termination is contrary to competition law, an unjustified conclusion.

One key problem arises where the dominant company wishes to terminate because it wants to go into the downstream market, and there is little scope for competition between it and the other contracting party. This would mean that if it continues to supply the input, the dominant company would need to avoid imposing a margin squeeze on the other party.⁷³ Since in those circumstances consumers would not benefit from significant competition between the companies, it seems unlikely that competition law should impose a duty to continue to supply.

Another set of issues arises if the dominant company wants to integrate forward into the downstream market, but lacks sufficient capacity to produce the input for both companies. It is generally assumed that a dominant company never has an obligation to expand its production to supply a downstream competitor. The analysis might depend on whether the total demand in the downstream market for the end product was stable (in which case the dominant company would take away some of the competitor's sales even if it continued to supply), or was likely to expand. In the latter case the dominant company might presumably use its total production of the input for its own sales, leaving its competitor with nothing, but consumers would presumably benefit from the expansion of the market.

A second type of case arises when the dominant company has developed a new and better technology, or a new or cheaper input for use in the downstream market. If it is not obliged to give the other party a contract to supply the more efficient input, under the principles applying to first contracts,

it seems unlikely that competition law should impose a duty to continue supplying the less efficient input,

since a company relying on it will leave the market anyway in due course. This would also be the position if the dominant company adopted a new more efficient technology under which there were no longer two production stages. Another situation arises if the dominant company develops a new use for the input, and the other party's use of it would endanger the new use. In a U.K. Office of Fair Trading case, *Du Pont v. Op Graphics (Holography)*⁷⁴ a refusal to continue supplying a firm for graphics arts purposes was held to be justified, because Du Pont was withdrawing from the graphic arts market in order to use the technology only for security purposes, which might have been endangered if the same technology was also being used for graphic arts by companies unconcerned with security issues.

Termination would be justified if, without any other change of circumstances, it became clear that the other party's activities threatened the efficiency of the dominant company's operations in either market or interfered with their expansion or development, if continued production of the input was no longer economic, or if the other party is no longer creditworthy or no longer has the expertise needed to share the facility.

Similarly, if there is a fall in the supply of a raw material needed for the production of the input in question, the dominant company may give preference to customers with long-term contracts, and presumably also to its own downstream operations with which it has permanent relationships.⁷⁵

E) REMEDIES

The appropriate remedy in cases of unjustified termination of supply could be an order to resume supply. In termination of supply cases, it will be easier to determine the price of the input, and reasonable and non-discriminatory terms of the supply, since there used to be a business relationship indicating what the normal terms of the contract might be. The dominant company should, however, always have the possibility to prove that circumstances have changed in the meantime.⁷⁶

1. When Is There a Right to Imitate a Dominant Company's Product?

As explained above, there is normally no right to copy the product of a dominant company.⁷⁷

This analysis is confirmed by the Commission's action on one feature of the Microsoft case. Sun initially asked both for interoperability information, and for the right to use programs written by Microsoft together with operating systems on Solaris. The Commission refused the second claim because it would have created software copying Microsoft's platform on the basis of Solaris. In other words, the claim was for the right to produce a copy of the Microsoft product, and not merely for interoperability. It was therefore unjustified. The key distinction is between making the competitor's product work with the dominant company's product, when that is necessary, and being able to copy the dominant company's product itself.

In *IMS Health*, a competitor claimed a right to an intellectual property license to enable it to copy the product of the supposedly dominant company. The Court of Justice said,

*"the refusal by an undertaking in a dominant position to allow access to a product protected by an intellectual property right, where that product is indispensable for operating on a secondary market, may be regarded as abusive only where the undertaking which requested the license does not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the intellectual property right, but intends to produce new goods or services not offered by the owner of the right and for which there is a potential customer demand."*⁷⁸

The Advocate General in the same case made the same points.⁷⁹ However, the Court of First Instance in *Microsoft* went a little further. It said,

*"The circumstance relating to the appearance of a new product, as envisaged in Magill and IMS Health, cannot be the only parameter which determines whether a refusal to license an intellectual property right is capable of causing prejudice to consumers within the meaning of Article [102(b)]. As that provision states, such prejudice may arise where there is a limitation not only of production or markets, but also of technical development."*⁸⁰

It would usually be difficult for a competitor to argue that its technical development was improperly limited merely by being prevented from copying the dominant company's products, and that consumers were harmed, in the absence of any "additional abusive conduct" other than the refusal to license.

This conclusion would be further reinforced when, as in some situations, two compulsory licenses would be needed. If the downstream products or services that the competitor wishes to produce infringe intellectual property rights of the dominant company, there could be no purpose for a compulsory license of part of the capital equipment to enable the competitor to produce the infringing products, unless there were also a right to a compulsory license of the rights over the products. Competition law cannot prohibit enforcement of intellectual property rights unless there is a duty to license them. Competition law allows foreclosure of a product that is being unlawfully sold.

2. Can There Be a Duty to Supply, If There is No Duty to License?

Assuming in a given situation that there is no duty to license competitors to use intellectual property rights, could there instead be a duty to supply the competitors with the products to which those rights apply? The competitors' argument would be that there can be a duty to supply products, even if they happen to be patented, and even if there is no "additional abusive conduct" necessary for a duty to license the intellectual property itself.

This argument raises the question whether the rules on compulsory access to intellectual property are the same as those regulating access to other kinds of property, mentioned above.

At first sight, it would be odd and irrational if there were a duty to supply a competitor with the dominant company's finished products if there was no legal duty to license the same competitor to manufacture similar products itself.

If there is no right to make a copy, there can be no right to buy the original.

In both situations, the intellectual property right would be transformed into a right to receive payment. This leads to the problem of how much a direct horizontal competitor should pay would arise, and whether the dominant company would be obliged to provide the competitor with a minimum gross profit margin, and if so, on what that margin could be based. The basic principle that there must be some identifiable conduct other than the refusal itself for there to be an abuse, and

for a dominant patent owner to have a duty to share the benefit of its property, applies equally to both situations. With the possible exception of "additional abusive conduct," all the requirements for a duty to contract are likely to apply equally in both.

The fact that the competitors would benefit similarly from a duty to supply and from a duty to license suggests that the legal requirements for a duty should be the same in both cases.

There could hardly be a benefit to consumers from imposing a duty to supply patented products, since consumers can already buy them from the dominant company without paying for an intermediary. Neither consumers nor competition would benefit more from a duty to supply than from a duty to license.

In fact, they would generally benefit less, for several reasons. If there was scope for substantial competition in the downstream market (presumably in related services if the competitor planned to copy the dominant company's product), there would be less competition if the competitors were buying the products than if they were getting a license to manufacture the products themselves.

The scope for "follow-on" innovation, or for product differentiation, by a competitor buying the dominant company's product would be less than if it obtained a license of the relevant technology. A competitor buying the products could not take advantage of having lower production costs, which might be relevant if it were entitled to a license.

In short, if there is no duty to license to enable the competitor to produce certain products, it is difficult to imagine circumstances in which there would be a legal duty to supply the products themselves.

The economic arguments do not depend on the legal nature of the contract desired by the competitor. This conclusion does not depend on the rules for intellectual property and other property being the same.

V. IF THERE IS NO DUTY TO LICENSE OR TO SUPPLY, CAN THERE BE ILLEGAL TYING OR BUNDLING AS A RESULT OF REFUSAL TO SUPPLY SEPARATELY?⁸¹ FORECLOSURE IN TYING CASES

The competitors might argue that the requirements for the abuse of exclusionary tying or bundling are less strict than the requirements for the abuse of refusal to license or to supply, and that the dominant company's conduct constitutes illegal tying or bundling.

In theory, tying can be illegal only if the two products are distinct. At least two tests of distinctiveness can be suggested. The first test asks if there is an independent demand for the tied product to be sold separately. The second test looks to see if there is a demand for the tying product to be sold separately. According to the Court in *Microsoft*, the first question correctly suggests that only when the advantages of tying or bundling are outweighed by the benefits of choice will consumers make separate purchases, if they are able to do so.⁸² The Court said, "... the distinctness of products for the purposes of an analysis under Article 82 EC has to be assessed by reference to customer demand ... in the absence of independent demand for the allegedly tied product, there can be no question of separate products and no abusive tying."⁸³ Under the second test, even if there were no demand for the tying product to be sold alone, tying it with the dominant company's tied product might force the consumer to buy, thereby denying choice to the consumer. Thus the second test is not the right approach, when the issue is foreclosure. Tying can be unlawful for two distinct reasons: that it is exclusionary foreclosure, keeping competing suppliers of the tied product from selling it, and that it is exploitative, forcing buyers to pay for the tied product that they do not want to buy from the dominant company⁸⁴ or perhaps at all.

There cannot be illegal tying or bundling unless the products are separate, but the key questions in most tying cases are whether there is illegal foreclosure and, if there is, whether there is sufficient justification. Foreclosure in this context must have the same meaning as in exclusionary abuse cases under Article 102(b)⁸⁵: has the conduct of the dominant company created or

increased a handicap or difficulty for competitors to which they would not otherwise have been subject? In the context of tying as elsewhere, mere failure or refusal to help a competitor is not illegal foreclosure, and does not need a justification.

It is of course correct that the requirements of the abuse of tying or bundling are different from those for a compulsory license. According to the Commission's Guidance paper⁸⁶, tying is illegal if the company is dominant, the products are distinct, the tying is likely to lead to "anticompetitive foreclosure" (that is, it is exclusionary), and there is no objective justification for tying. Complementary products (products that must be used together, such as nail guns and nails) can be separate products if there is a separate demand from consumers for competitors' versions of the complementary products. However, if the products in question are purely functional and the competitors' products are identical to those of the dominant company, it is not clear why there would be a separate demand for them from consumers, except for price reasons. If there is no reason for a separate demand for the tied product, tying is not exclusionary.

Unfortunately, the Commission has not explained or defined "anticompetitive foreclosure," except in the specific and unusual circumstances of the *Microsoft* tying case, and has not relied on what is in effect a definition of anticompetitive foreclosure in Article 102(b).

"Foreclosure" is not necessarily "anticompetitive."

Unfortunately, the Commission has not explained or defined "anticompetitive foreclosure," except in the specific and unusual circumstances of the *Microsoft* tying case, and has not relied on what is in effect a definition of anticompetitive foreclosure in Article 102(b).

Competitors may be legitimately foreclosed, that is, progressively pushed out of the market, if the dominant company consistently sells better products or charges lower prices than they do. Foreclosure can be anticompetitive only if the conduct causing it is not merely offering better bargains or some other result of procompetitive conduct, but if it involves creating a handicap or difficulty for competitors without any corresponding or off-setting benefit to consumers or competition.

In Microsoft, the Court concluded that there was illegal foreclosure as a result of tying on a series of factual grounds⁸⁷:

- The company sold Windows only bundled with Windows Media Player;
- There was no extra charge for the Media Player;
- It was not possible to remove the Media Player;
- OEMs were understandably reluctant to add a second media player, increasing the price and using additional capacity;
- The Media Player automatically got the benefit of the worldwide market penetration of the Windows operating system, without having to compete on its merits as a media player;
- Downloading via the internet was less effective as a method of distribution than pre-installation by OEMs;
- Competitors' products were at a disadvantage even if they were better than Microsoft's product;
- The bundling increased the barriers to entry of competitors;
- Bundling allowed Microsoft to expand its position in adjacent media-related software markets; and
- Content providers and software developers primarily used the Media Player because that allowed them to reach the largest number of PC users in the world.⁸⁸

In short, competitors were foreclosed for a number of reasons, all due directly or indirectly to Microsoft's conduct, that were not the direct results of Microsoft's intellectual property rights and not the result of Microsoft offering better products or lower prices. These factors taken together created a handicap for competitors, to which they would not otherwise have been subject, with no off-setting advantages for competition, consumers or competitors.

A) "DISTINCT PRODUCTS" IN TYING CASES

On distinct products, the Guidance says "whether the products will be considered . . . to be distinct depends on customer demand." Products are distinct if, in the

absence of tying or bundling, "a substantial number of customers" would buy the tying product without buying the tied product from the same supplier. There may be indirect evidence of distinctness if there are companies specialized in manufacturing or selling the tied product without the tying product or without "each of the products bundled by the dominant undertaking," or if companies with little market power tend not to tie or bundle the products.

This description of "distinct" products is less useful if the dominant company has never sold the supposedly distinct products separately.

In particular, if new companies are set up to manufacture the tied product without the tying product, their emergence could hardly be enough in itself to make the dominant company's conduct illegal, even if they allege that they are unable to sell their new ("tied") products because the dominant company is selling its version of those products with the tying product. If customers have never had an opportunity to buy the tying product without the tied product, it is difficult and perhaps impossible to say whether a "substantial number" of them would choose to buy the tying product without buying the other product from the same source.

According to the Guidance, the competition authority may:

- (a) Decide whether a substantial number of customers would buy the products separately, in circumstances that have never arisen;
- (b) Deduce from its answer to this hypothetical question whether the products are or ought to be considered "distinct";
- (c) Then determine whether there is "anticompetitive" foreclosure as a result of the sale of the two products together; and
- (d) Assess the possible efficiency or other justifications for the conduct.

If the dominant company had never sold the tied products without the tying products, this exercise would be undesirably speculative. There would be a risk that the competition authority, without evidence about

what customers would do, would form its own opinion about whether the products ought to be considered distinct, and therefore whether customers ought to be enabled to choose whether to buy them separately. It is difficult to state the issues without using language about “tying” and “tied” products that begs the question by implying that they are in some sense separate products. Furthermore, this approach is likely to lead to regulatory action rather than actions based on competition law. Regulatory action, if duly authorized by legislation, allows regulatory authorities to impose new obligations to make a lawful but uncompetitive market more competitive. Competition law, on the other hand, allows official action only to end identifiable infringements.

The Microsoft Court identifies an additional complication: “the IT and communications industry is an industry in constant and rapid evolution, so that what initially appear to be separate products may subsequently be regarded as forming a single product, both from the technological aspect and from the aspect of the competition rules.”⁸⁹

The Guidance paper asserts that if there are not enough customers to buy the tied product separately, tying can lead to higher prices.⁹⁰ Although this comment appears in the context of anticompetitive foreclosure, it seems more relevant to the question of distinctness. Regardless of its application, the comment seems incorrect, because in that situation tying would provide economies of scale.

The practical conclusion seems to be that if the dominant company has never sold the tying product without the tied product, the products should not be considered distinct, unless there is clear evidence that other companies previously sold the products separately, and that there is a significant consumer demand for separate sales. Even if there were such evidence, it would be necessary to consider whether “constant and rapid evolution” had made them into a single product. If it seemed that such evolution had occurred, the question of distinctness would merge into the question of the reasons for the evolution. The word “justification” is not appropriate unless there is some apparently unlawful conduct that needs justifying.

B) “THESE ARE NOT NORMAL TYING CASES

It is important to be clear about the difference between the situations discussed here and a normal tying or bundling case.

In these situations the competitor wishes to buy the goods in question from the dominant company, and is arguing that it has a legal right to be supplied with them. In a normal tying case, the competitor wants to sell its own product to third parties, and complains that it cannot do so because the third party is obliged to buy that product from the dominant company. In short, these situations are in fact duty to supply cases, not tying cases.

Alternatively, the competitor might claim that it does not need to buy the product in question itself, provided that the dominant company offers its other product separately to third parties. That would help the competitor to sell whichever of the two products it was able to produce. But it would do nothing to enable the competitor to offer a package consisting of both products if it is not able to provide them both. The competitor needs to buy from the dominant company in order to offer a combined package. Therefore, once again, this is a duty to supply situation, not a tying case.

If the principal or only difficulty for competitors is due to the fact that the dominant company has intellectual property rights, bundling or tying (if those words were thought appropriate) of goods produced using those rights would not be anticompetitive foreclosure.

It is legitimate competition for a dominant company to obtain and exercise intellectual property rights for its own invention, even if it may be an abuse for it to acquire exclusive rights to the only effective competing technology.

If the intellectual property rights were legitimately acquired, and provided that there is no other abusive conduct, it is lawful for the dominant company to exercise them.

This is essentially merely another way of stating three general points made previously in this paper. First, conduct forecloses illegally only if it is not “competition on the merits”⁹¹—i.e., the conduct does not offer better bargains—and if it creates a handicap which competitors would not otherwise have been under. Second, a competitor cannot have a right to sell products that infringe intellectual property rights, unless it has a right to a compulsory license of those rights, under either Article 101 (in standard cases, not discussed

here) or Article 102. Third, there is no duty to supply the dominant company's finished products to competitors for simple resale.

C) EFFICIENCY BENEFITS IN TYING AND BUNDLING CASES

Efficiency benefits in tying and bundling cases are essentially economies of scale or scope, either in production, consumption, or use. However, such benefits can often be obtained without tying or bundling, whether contractual or technological.

The Advocate General in Tetra Pak I said,

*"the undertaking in a dominant position may... strive through its efforts to improve its market position and pursue its legitimate interests. But in doing so it may employ only such methods as are necessary to pursue those legitimate aims. In particular it may not act in a way which, foreseeably, will limit competition more than necessary."*⁹²

In short, a justification, if one is needed, must be objective, proportionate, and appropriate. The requirement of appropriateness might mean that the justification in a tying case might not be quite the same as a justification in a case involving refusal to supply or to license, but there is no reason to think that justifications would be easier or harder to prove in a tying case. Both the Commission and the Court should try to be consistent across the whole range of abuses under Article 102.

D) "BALANCING" IN TYING CASES

On this analysis it is not necessary, as it sometimes may be in tying or bundling cases, to "balance" exclusionary or anticompetitive effects of the conduct in question against procompetitive effects, although it is very difficult to develop a convincing way of offsetting or balancing them. The supposedly anticompetitive effects are merely the result of the exercise of intellectual property rights, which cannot, without "additional abusive conduct," be contrary to Article 102. The exercise of intellectual property rights in itself is, as a result of legal principle, presumed to be procompetitive, because they are created by legislation to promote innovation in the long term. In the situation under discussion, therefore, there are no anticompetitive effects, and no anticompetitive foreclosure.

This analysis is therefore consistent with the more complicated factual analysis of the Microsoft case by the Court, which also carefully avoided "balancing" anticompetitive and procompetitive effects, although the Commission had claimed to balance them.

The only situation in which "balancing" might perhaps be necessary would be if the competitors wanted to be licensed for or supplied with products that were necessary for the supply of services.

Again, the question would be whether the competitors would be offering essentially the same kinds of services as the dominant company. If there were little scope for added value in the services market, the competitors would presumably be offering the same, or almost the same, kinds of services as the dominant company. It might then be necessary to see whether the competitors had advantages that the dominant company lacked, of which consumers would be deprived if the competitors were unable to provide the products needed. It would presumably be necessary to see whether these advantages were sufficient to outweigh the dominant company's economies of scale and scope, and the advantages of bundling for consumers.

The principal efficiency that might need to be taken into account in carrying out a balancing test would be the economies of scale and scope of the dominant company. A dominant company almost always has economies that are not available to competitors. This is particularly likely to be true of spare parts, but it is also likely to apply to production of consumables.⁹³

One objection to the idea of "balancing" on these lines (apart from the difficulty of doing it in any objective way) was stated by the Court in Deutsche Telekom.⁹⁴ The Court said,

"If the lawfulness of the pricing practices of the dominant undertaking depended on the particular situation of competing undertakings, particularly, their cost structure, - information which is generally not known to the dominant undertaking - the latter would not be in a position to assess the lawfulness of its own activities."

This principle cannot be confined to the pricing practices of the dominant company. It must apply to all possibly abusive conduct. The principle of legal certainty

means that the law must not prohibit conduct which is unlawful only because of something that the dominant company cannot be expected to know.

Strictly speaking, when two kinds of goods are sold together because they are linked by their nature or by normal commercial usage, there is no “tying,” and therefore no need for efficiency justifications. However, tying cases are not easily or satisfactorily resolved by arguments about how separate the products are, and

it seems more useful to look directly at the effects of the products being sold together,

as is done here, and for any justifications that may need to be considered.

The conclusion reached is that if the dominant company has intellectual property rights and has no duty to license them or to supply the products, it is not illegally tying if it exercises its intellectual property rights and refuses to sell the products separately. There is no “additional abusive element” because there is nothing that causes foreclosure except the exercise of the intellectual property rights itself.

E) IS HARM TO CONSUMERS NECESSARY IN TYING CASES?

Article 102 expressly requires harm to consumers as a necessary element in exclusionary abuses involving “limiting production, markets or technical development.” However, harm to consumers is not expressly required for “unfair” purchase prices, discrimination, or tying under Article 102(d).

There are a number of strong reasons for believing that harm to consumers should be regarded as a necessary element in all abuses under Article 102.⁹⁵ Harm to consumers is always relevant under Article 101. The Advocate General in Bronner said, “the primary purpose of Article [102] is to prevent distortion of competition and in particular to safeguard the interests of consumers rather than to protect the position of particular competitors.”⁹⁶ The Commission and the Court in Microsoft both considered it necessary to assess carefully the effect of Microsoft’s conduct on consumers. It would produce odd and irrational results if harm to consumers was needed in some kinds of abuses but not in others. In discrimination it is particularly important to distinguish cases where there is harm to consumers from cases where it is procompetitive.

Whether tying in any particular case is regarded as exclusionary and harmful to competition or as coercion of customers, harm to consumers seems essential to consider. The fact that tying is lawful if there is insufficient demand from consumers for the tied product to be sold separately also shows that harm to consumers is a crucial question in tying and bundling cases. When the objection to tying is that it causes foreclosure, harm to consumers must be necessary as it is in all other foreclosure cases.

F) THE PRICING ISSUE

If the tying argument were accepted, the dominant company would be obliged to sell the products separately. It would presumably wish to sell the secondary products to its competitors at the same price at which it sold them to its customers. This would raise the difficulty mentioned above, that customers would have no reason to buy the secondary products from competitors when they could get them from the dominant company directly. To provide a benefit to consumers, and indeed to provide an advantage to the competitors, the dominant company would have to be ordered to sell to the competitors at a reduced price, to provide them with a profit margin. But there does not seem to be any basis in competition law for ordering a dominant company sell its final product to a direct horizontal competitor at a reduced price. (Margin squeeze cases concern sales of an input to a downstream competitor.) In other words, the tying argument would be open to all the same objections as the argument that there is a duty to license or a duty to supply. The practical problems would be identical, even though the legal arguments would be different.

G) THE COMMISSION’S DISCUSSION PAPER IN 2005 AND ITS GUIDANCE PAPER IN 2009

The Commission in its Discussion paper in 2005 wrote:

“If a dominant position on an aftermarket has been established... the Commission presumes that it is abusive for the dominant company to reserve the aftermarket for itself by excluding competitors from that market. Such exclusion is mostly done through either tying or a refusal to deal. The tying can come about in the various ways described in the section on tying. The refusal to deal may, for instance, involve a refusal to supply information or products needed to provide products or services in the aftermarket; a refusal

to license intellectual property rights; or a refusal to supply spare parts needed in order to provide aftermarket services.”

This statement has probably been superseded by the Commission’s later Guidance paper, and is certainly surprising. Such a presumption would, as O’Donoghue and Padilla have pointed out,⁹⁷ lead to a standard on tying in aftermarkets that is stricter than the tests applied in Hilti, Tetra Pak, and very fully and carefully by both the Commission and the Court in Microsoft.

As tying is usually procompetitive, abuse cannot be presumed or established without careful analysis. The comment on tying in aftermarkets is not even consistent with the Discussion paper’s own comments on tying in other kinds of markets. The statement quoted is inconsistent with the Commission’s later Guidance paper, which says nothing about aftermarkets, and which suggests a much more careful economic analysis of tying, where a series of factors “are generally of particular importance for identifying cases of likely or actual anti-competitive foreclosure.”⁹⁸ This indicates that

the sweeping and unexplained presumption suggested by the Discussion paper has been abandoned.

The Guidance paper expressly contemplates the possibility of efficiencies, which was not even mentioned in the earlier paper. It seems that the Commission has now accepted that the Discussion paper was wrong, which is the correct position. However, the factors mentioned by the Commission in the Guidance paper are not especially helpful because they concern the extent of the economic effects of the conduct, rather than whether it is anticompetitive for foreclosure, which is the key issue. The factors are: whether the dominant company’s tying or bundling strategy is lasting; whether it is dominant for more than one of the products, and; “if there is not a sufficient number of customers who will buy the tied product alone to sustain competitors of the dominant undertaking in the tied product, the tying can lead to those customers facing higher prices.”⁹⁹ But if there are not enough customers who want to buy the tied product separately, that suggests either that the products are not really separate or that there is no consumer harm resulting from the tying. In addition, companies cease to produce products for which there are not enough buyers.

VI. THE PROCEDURAL POSITION OF THE COMPANY SAID TO BE DOMINANT: INTERIM MEASURES

A dominant company is free to acquire and exercise intellectual property rights for inventions that it has developed. Except in very rare circumstances outlined in ITT Promedia,¹⁰⁰ the company could not be accused of vexatious litigation if it brings proceedings for infringement of its rights. The competition authority cannot prevent the dominant company from exercising its rights unless the authority finds that their exercise, or the refusal to license them, is an abuse. In theory, the competition authority might adopt an interim measures decision to prevent their exercise, but there are a number of reasons why this would be inappropriate (except perhaps in discrimination cases).

First, the President of the Court of First Instance in IMS Health ruled that interim measures to prevent the exercise of intellectual property rights are rarely justified.¹⁰¹ Second, it would be inappropriate to order a compulsory license on an interim basis, because of the inconvenience and confusion that would result if it were finally determined that no license was justified.

Third, with the possible exception of discrimination cases, the conditions making it appropriate to impose a duty to contract are so difficult to apply, even in cases in which it seems likely that there is a duty to contract, that it is unwise and inappropriate to deal with them in an interim measures decision. The IMS Health interim measures decision shows how badly a competition authority can go wrong in an interim measures decision (and the Commission has adopted hardly any interim measures decisions, in spite of its power to adopt interim measures under Regulation 1/2003).¹⁰² Fourth, it would clearly be inappropriate to adopt an interim measures decision finding that a dominant company was engaged in vexatious litigation, since the conditions for such a finding are not clear, and are rarely fulfilled. The national court dealing with the litigation would be much better placed than the competition authority to decide whether the infringement claim was justified or not. Fifth, as explained above, the mere exercise of an intellectual property right is never an abuse in itself. There must be some other identifiable conduct that constitutes an abuse, and for which a compulsory license or an order to contract is the appropriate remedy.

An interim measures decision, therefore, would have to consider whether another abuse had been committed, and if so, whether an order to contract was the right remedy for that abuse.

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That would involve a substantial analysis of the facts, which would be inappropriate in an interim measures procedure. Sixth, any duty to contract must specify the terms of the contract. That would be difficult enough in a definitive decision, but inappropriate in an interim measures decision. The Commission's interim decision in IMS Health, which merely said the terms should be "reasonable and non-discriminatory,"¹⁰³ was clearly an abandonment of the Commission's responsibilities.

A) PROCEDURAL ISSUES

Since neither the Commission nor a national competition authority has any competence to decide the validity of intellectual property rights, a ruling entity has several possibilities when deciding how to deal with the request for a compulsory license, if the validity of the intellectual property right has not been finally determined. It could simply adjourn the case, without doing anything, and wait for the final result of the litigation to determine the validity of the right. That is a straightforward approach, and would normally be correct.

In at least some cases, the complainant may in effect be seeking two contracts from the dominant company: a license of the intellectual property right, if it is valid, and access to information or something else in the possession of the dominant company, which would not become available automatically even if the intellectual property right was declared invalid. In RTE-ITP,¹⁰⁴ the magazine Magill needed each of the television stations to provide details of the programs to be broadcast each week. The television companies argued that these programs were protected by copyright under U.K. and Irish law. The Court decided that even if that were correct, the companies still had a duty to give Magill the information, on reasonable terms as the Commission had required.

The point made here is that even if it had been clear that there was no copyright in the weekly program lists, Magill would still have needed, and been entitled to, the information.

Therefore the competition authority confronts two questions. The first question is whether, even if the intellectual property right is not valid, there is a duty to give access to the information or whatever else it is that the complainant says it needs. The second is whether, if the intellectual property right is valid, the dominant company has a duty to license it. Generally, if there is no duty to provide access, there will be no duty to license either. It is impossible to think of a situation in which there might be a duty to grant a license even if there was no duty to provide access, although there are of course situations in which the information is already public, and only a license of the right to use it is needed.

It follows that the competition authority might consider that it should answer the first question. If there is no duty to provide access, the second question does not arise. If there is a duty to grant access, there may be a duty to grant a license of any intellectual property rights that may be needed to make the access effectively available. In at least some cases the two questions are not really separate. The RTE-ITP case was unusual because the information was what was sought, and the copyright license was merely incidental. The issues in that case could have been separated.¹⁰⁵ In other cases such as IMS Health,¹⁰⁶ the only thing that is really needed is the license of the intellectual property right. If there is no valid right, there is no need for a license (and nothing to license). So the first question is, in effect, whether there is a duty to license the right, assuming that it is valid. That question is not a procedural question, but one of substance.

B) REMEDIES IN A DEFINITIVE DECISION BY A COMPETITION AUTHORITY

In theory, a competition authority might adopt a definitive decision determining whether there had been an abuse, contrary to Article 102 TFEU, for which a duty to contract was the correct remedy, independently of whether or not the intellectual property right was ultimately determined to be valid by a competent court. As already explained, if the authority decides that there is no abuse and therefore no duty to contract, which would dispose of the case. However, if the authority intends to find that there is a duty to contract, it would

be difficult to state the terms of the contract if the authority did not know whether the intellectual property right was valid. In practice, the authority would find it wise to adjourn the case.

If the right is finally held to be invalid, in theory, competitors are free to use the invention royalty-free. But if the competitors need something in addition to the right to use the invention, the authority would need to determine exactly what they were entitled to get access to. In the RTE-ITP case, there was no difficulty in defining that what the magazine needed from each television company was merely the next week's programs.¹⁰⁷ But in a more complicated case, this finding would be much more difficult.

It would be particularly difficult in a "potential market" case, in which no contract of the kind in question had ever been entered into by anyone.

Even if there were a "potential" downstream market, the authority would need to determine exactly what it consisted of, what should be made available, and on what terms. Also, it would be difficult, if not impossible, to decide what one direct competitor should pay to another for an important input or competitive advantage, as a matter of competition law. It might be easier under a regulatory regime, in which the regulatory authority could impose new obligations, and is free to act on new policy aims. But competition law is not a regulatory regime in this sense.¹⁰⁸

Further complications are likely to arise in a market in which the dominant company sells two products to be used in combination. The competition authority would have to determine what information had to be given with the products to be delivered to the complainant. The dominant company might have contracted with buyers of the combination that they would not use either product together with competitors' versions of the other. Since the two products, in the kind of situations visualized, have to work with one another, such a restriction on use would probably be valid, and certainly the competition authority could not declare it invalid merely to facilitate the order to contract with, or supply to, the complainant. If the patents were valid, a license to customers to use each of the combined products only with the other would be a field of use restriction, and almost certainly valid (a limited license of an intellectual property right is not subject to the same constraints

under competition law as a contractual restriction that may fall under Article 101 TFEU).

The competitors would presumably argue that a dominant company cannot use its refusal to allow customers to use one of its products with competitors' versions of the other as an indirect way of enforcing its intellectual property rights. The questions are nevertheless almost certain to be distinct. The competitor wishes to get the right to use the dominant company's intellectual property rights so that it can supply a competing version of one of the dominant company's products. If there was an alternative source of the other product, the competitor could combine its product with that of the third party. But if the competitor needs to combine its product with the other product produced by the dominant company, the latter is surely entitled to insist by contract that its customers use only a combination that it can guarantee will work properly; it has always been recognized as a justification for refusal to contract to show that use of the competitor's product would lessen the efficiency of the dominant company's products or services. The authority could override this insistence only if it could be certain that the two companies' products would work satisfactorily in combination.

The justification for the contractual limitation on customers would be entirely independent of the question of the duty to contract with competitors.

This seems likely to be the result in most if not all of the range of situations considered here. In *Consten-Grundig*,¹⁰⁹ the Court held that companies cannot use intellectual property rights to reinforce illegal contractual restrictions on parallel imports with their competitors, when the trademarks in question had been created artificially for that purpose. Companies cannot defend a restrictive agreement merely on the grounds that it restricts the other competitor no more than it is restricted anyway by intellectual property rights. But situations like *Consten-Grundig* are quite different from the cases discussed here. In the circumstances considered in this article, the intellectual property rights are not obtained artificially or collusively, and the supposedly restrictive agreements are with third parties, the customers of the dominant company. If the agreements with the customers were field of use restrictions, it would be even more clear that they

could be found invalid, if at all, only on entirely different grounds, which are difficult to imagine.

C) COMMITMENT DECISIONS

As the law is relatively complicated, a competition authority may be tempted to send a dominant company a short and superficial “preliminary assessment” of its “concerns,” for the purpose of getting the company to negotiate a commitment that would make it unnecessary for the competition authority to analyze the case thoroughly. But the phrases quoted from Article 9 of Regulation 1/2003 are not intended to allow the company concerned to be deprived of the right to know clearly the arguments against it. Indeed, they are intended to ensure that the company gets something substantially equivalent to a statement of objections. A distinction should therefore be drawn. In any refusal to contract case, the company should insist on getting a carefully written and fully reasoned statement of objections, to see whether all the conditions discussed above are fulfilled and an identifiable abuse has been committed. However, if there has been an abuse, and if a duty to contract seems to be the appropriate remedy, it might be appropriate to negotiate the terms of the contract and to embody them in a commitment decision, if necessary. A competition authority should certainly be expected to write a detailed and clear statement of objections, or the equivalent, but may be excused if it prefers to work out the detailed terms of a duty to contract in the form of a commitment, once it has been proved that a duty to contract exists.

VII. A COMPREHENSIVE SUMMARY OF THE LEGAL RULES

In the light of this analysis, the legal rules on the duty to contract under Article 102 TFEU are more restrictive and more complicated than appears from the Commission’s Guidance paper. They can be summarized as follows.

(1) A duty to contract under Article 102 TFEU can arise only when an identifiable abuse has been found. At least in the case of an intellectual property right, and probably in all cases, there must be an abuse in addition to the refusal to license.

(2) Under Article 102(b) TFEU, it is foreclosure and an abuse to “limit” the markets, production or technical development of competitors of the dominant company, if harm is caused to consumers. The mere exercise of intellectual property rights is never an abuse. Under Article 102(c) TFEU, it may also be an abuse for a dominant company to discriminate unjustifiably, if harm is caused to consumers. It may be contrary to both clauses of Article 102 TFEU to supply less than “ordinary” quantities to wholesalers, in order to prevent parallel imports. A dominant company is not obliged to confer an advantage on competitors, but it must not impose a handicap.

(3) As in the case of all other abuses, harm to consumers resulting from the abuse identified, must be shown. That harm may be preventing the development of a new kind of product for which there is a clear and unsatisfied demand, or imposing a continuing handicap on competitors in a dynamic market. Preventing a competitor from producing what would essentially be a copy or duplicate of the dominant company’s product or service is not sufficient to justify a duty to contract. It is also an abuse to acquire the only competitive alternative to the dominant company’s technology in order to suppress it or to use it to reinforce dominance, because it can be assumed that the alternative would otherwise be used to create competition.

(4) There must be two identifiable and separate markets, for an input and for an end- or “downstream” product. However, the fact that the dominant company in question has itself never made the input available to anyone is not a defense.

(5) If an abuse has been committed, a duty to contract may be the appropriate and proportionate remedy. There must be a link between the abuse and the duty to contract, which makes the duty the appropriate remedy for the abuse. However, no duty to contract may be imposed that would oblige the dominant company to share its principal competitive advantage, or deprive it of the incentive to invest in its principal activities, because that would end its dominance, an unjustifiable outcome under EU competition law.

(6) A duty to contract can arise only when competition would otherwise be eliminated. The fact that competition might otherwise be more difficult is not enough, as the Court made clear in *Bronner*.¹¹⁰

(7) Therefore there can be a duty to contract only when the product or service to be provided is objectively essential for competition in an identified market, and cannot be produced or otherwise obtained by any competitor or combination of competitors.

(8) There must be scope for non-price competition in the downstream market. This is more likely if the input required is a relatively small proportion of the total cost of producing the products or services for the downstream market, so that there can be effective competition using, or in connection with, the other factors of production.

(9) There may be justifications for refusal to contract that might make the conduct lawful, or that might make an order to contract an inappropriate remedy, even if an abuse had been committed.

(10) There is no duty to contract merely to create one more competitor. Nor is there a duty merely because competitors are unable to obtain or produce an input that they need elsewhere

(11) The terms of a duty to contract are relatively clear when the abuse is discrimination: the duty is to give access on non-discriminatory terms. If the abuse was unjustified termination of supply, the remedy would be an order to resume supply, presumably on the same or similar terms to be adjusted as necessary. In the case of a first contract or license, terms are much more difficult to determine. A competition authority cannot avoid its responsibilities by ordering a contract on "reasonable and non-discriminatory" terms, without giving proper guidance. An order in such vague terms would be void for legal uncertainty, particularly in the case of first refusal, when the "non-discriminatory" obligation would be meaningless.

(12) If there is no duty to license a competitor to produce a product, there is no duty to supply the product, and it is not illegal trying to sell the product only together with another product. Article 102 should be interpreted and applied consistently across the whole range of possible abuses..

1 Herbert Hovenkamp, Mark D. Janis & Mark A. Lemley, *Unilateral Refusals to License*, 2 J.L. & ECON. 1 (2006); Brian Sher & Daniel Wall, *Is Intellectual Property Just Property? Refusals to License IPRs in the U.S. and Europe*, International Bar Association Conference, San Francisco 2003. Daniel Beard in his article *Microsoft: What Sort of Landmark*, 4(1) *Competition Pol'y Int'l* 33, 48 (Spring 2008) says that the IMS test has led to "inevitable uncertainty as to when dominant undertakings will be required to supply IPRs and other sensitive information."

2 See, e.g., Joined Cases C-241/91 P and C-242/91 P, RTE and ITP ("Magill"), 1995 E.C.R. I-743. These cases are distinct from those involving consumables and spare parts—Case 22/78, Hugin v. Commission, 1979 E.C.R. 1869; Case C-53/928, Hilti v. Commission, 1994 E.C.R. I-667; Case C-333/948, Tetra Pak v. Commission, 1996 E.C.R. I-5951—which raise issues about tying and handling, discussed below.

3 John Temple Lang, *Eight Important Questions on Standards under European Competition Law*, 7 *COMP. POL'Y INT'L* 32 (Spring 2011); John Temple Lang, *Abuse Under Article 82 EC: Fundamental Issues and Standard Cases*, in *NEUESTE ENTWICKLUNGEN IM EUROPÄISCHEN UND INTERNATIONALEN KARTELLRECHT* 95 (Carl Baudenbacher ed., 2007).

4 Council Regulation (EC) No. 1/2003, 2003 O.J. (L 1) 1, at art. 3(2).

5 See, e.g., *Sea Containers Ltd v. Stena Sealink*, 1994 O.J. L15/8, 1995 4 CMLR 84; *Port of Rodby v. Denmark*, 1994 O.J. L55/52, 1994 5 CMLR 457; and *Morlaix (Port of Roscoff)*, 1995 5 CMLR 177. See generally ROBERT O'DONOGHUE & A. JORGE PADILLA, *THE LAW AND ECONOMICS OF ARTICLE 82 EC* ch. 8 (2006); John Temple Lang, *Anticompetitive Non-Pricing Abuses under European and National Antitrust Law*, in *ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE: INTERNATIONAL ANTITRUST LAW & POLICY* 2003, 235-40 (B.E. Hawk ed., 2004).

6 *The Application Of Article 82 of the Treaty to Exclusionary Abuses* (DG Competition, Discussion Paper December 2005).

7 Luca Prete, *From Magill to IMS: Dominant Firms' Duty to License Competitors*, 15(5) *EUR. BUS. L. REV.* 1071, 1080 and 1083 (2004).

8 See Maurits Dolmans & Nicholas Levy, *EC Commission v. Microsoft: Win, Lose or Tie?*, *COMMERCIAL LAWYER*, January 2002, 1-5; O'DONOGHUE & PADILLA, *supra* note 5. The case is reported as Case C-418/01, *IMS Health v. NDC Health*, 2004 E.C.R. I-5039; Case T-184/01R, *IMS Health v. Commission*, 2001 E.C.R. II-3193; and Case C-481/01 PR, 2002 E.C.R. T-3405.

The IMS Health case has given rise to a great deal of comment and criticism. See Andreas Schwarze, *Der Schutz des geistigen Eigentums im europäischen Wettbewerbsrecht*, *EUZW* 75-81 (2002); Pitovsky et al., *The Essential Facilities Doctrine Under US Antitrust Law*, 70 *ANTITRUST L.J.* 443 (2002); Paul D. Marquardt & Mark Leddy, *The Essential Facilities Doctrine and Intellectual Property Rights: A Response to Pitovsky*, *Patterson & Hooks*, 70 *ANTITRUST L.J.* 847, 847-873 (2002); Estelle Derclaye, *Abus de position dominante et droits de propriété intellectuelle dans la jurisprudence de la Communauté européenne: IMS surviva-t-elle au monstre du Dr. Frankenstein?*, 15 *LES CAHIERS DE PROPRIÉTÉ INTELLECTUELLE* 21, 21-55 (2002); CHRISTIAN KOENIG, ANDREAS BARTOSCH & JENS-DANIEL BRAUN, *EC COMPETITION AND TELECOMMUNICATIONS LAW* 133-134, 151-157 (1st ed. 2002); Sergio Baches 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?* 11 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 409, 409-506 (2001); David W. Hull, James R. Atwood & James B. Perrine, *Compulsory Licensing*, *EUR. ANTITRUST REV.* 36-39 (2002). Matthias Casper, *Die wettbewerbsrechtliche Begründung von Zwangslizenzen*, *ZHR* 166, 685-707 (2002); Donna M. Gitter, *The Conflict in the European Community Between Competition Law and Intellectual Property Rights: A Call for Legislative Clarification of the Essential Facility Doctrine*, 40 *AM. BUS. L.J.* 217 (2003);

Maurits Dolmans & Daniel Ilan, *A Health Warning for IP Owners: The Advocate General's Opinion in IMS and Its Implications for Compulsory Licensing*, 11 *COMP. L.I.* 12 (2003); Alessandra Narciso, *IMS Health or the Question Whether Intellectual Property Still Deserves a Specific Approach in a Free Market Economy*, 4 *I.P.Q.* 445 (2003); Estelle Derclaye, *Abuses of Dominant Position and Intellectual Property Rights: A Suggestion to Reconcile the Community Courts Case Law*, 26 *WORLD COMPETITION* 685 (2003); Bruno Lebrun, *IMS v. NDC: Advocate General Tizzano's Opinion*, 26(2) *E.I.P.R.* 84 (2004); David Aitman & Alison Jones, *Competition Law and Copyright: Has the Copyright Owner Lost the Ability to Control His Copyright?* 26(3) *E.I.P.R.* 137 (2004); Beatriz Conde Gallego & Dimitris Riziotis, Comment, 5 *INT'L REV. INTELL. PROP. & COMP. L.* 564 (2004).

- 9 RTE-ITP, 1995 E.C.R. I-743.
- 10 Case C-7/97, Oscar Bronner, 1998 E.C.R. I-7791.
- 11 IMS Health, 2004 E.C.R. I-5039 at ¶ 57.
- 12 *Id.* at ¶ 59.
- 13 *Id.* at ¶ 44-45.
- 14 Communication from the Commission—Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, O.J. No. C-45/7 (Feb. 24, 2009).
- 15 *Id.* at ¶ 76.
- 16 *Id.* at ¶ 81.
- 17 John Vickers said that the Microsoft case needed “robust limiting principles,” and that the Commission should provide them. John Vickers, *A Tale of Two EC Cases: IBM and Microsoft*, 4(1) *COMP. POL'Y INT'L* 3, 23 (Spring 2008). Unfortunately it did not do so.
- 18 Guidance on the Commission's Enforcement Priorities, *supra* note 14, at ¶ 79.
- 19 IMS Health, 2004 E.C.R. I-5039.
- 20 Dolmans & Ilan, *supra* note 8, at 14.
- 21 Purple Parking v. Heathrow Airport, 2011 E.W.H.C. 987 at ¶¶ 168-178.
- 22 RTE-ITP, 1995 E.C.R. I-743 at ¶ 47; Burton Ong, *Anti-competitive Refusals to Grant Copyright Licenses: Reflections on the IMS Saga*, 26(11) *E.I.P.R.* 505, 507 (2004).
- 23 Case T-201/04, Microsoft v. Commission, 2007 E.C.R. II-3601 at ¶¶ 241 and 657.
- 24 Yet another way of reaching the same conclusion may be to say that there is no duty to contract if the purpose is to make the competitor merely produce a copy of the dominant company's product or service. This question is discussed below.
- 25 Dolmans & Ilan, *supra* note 8, at 14.
- 26 Maurits Dolmans, Paul-John Loewenthal & Robert O'Donoghue, *Article 82 EC and Intellectual Property: The State of the Law Pending the Judgment in Microsoft v. Commission*, 3(1) *COMP. POL'Y INT'L* 106, 129 (2007). In discrimination cases under Art. 102(c) there can be an abuse if competition is distorted even if it is not eliminated, see Purple Parking, 2011 E.W.H.C. 987.
- 27 Bronner, 1998 E.C.R. I-7791 at ¶¶ 41-47; Prete, *supra* note 7, at 1075 and 1081.
- 28 See e.g. RTE and ITP, [1995] E.C.R. I-743 at ¶¶ 49-50; Case T-198/98, Micro Leader Business v. Commission, 1999 E.C.R. II-03989 at ¶¶ 56-57; and IMS Health v. NDC Health, 2001 E.C.R. II-3193 at ¶¶ 34-35.
- 29 Cristophe Humpe & Cyril Ritter, *Refusal to Deal*, GCLC Research Papers on Article 82 EC, 4-5 (July 2005).

- 30 Microsoft, 2007 E.C.R. II-3601, at ¶¶ 657, 697 and 702.
- 31 RTE-ITP, 1995 E.C.R. I-743 at ¶ 54.
- 32 Bronner, 1998 E.C.R. I-7791
- 33 IMS Health, 2004 E.C.R. I-5039.
- 34 RTE-ITP, 1995 E.C.R. I-743 at ¶¶ 52-54 and Ong, *supra* note 22, at 507.
- 35 The cases in which it has been held that Art. 102(b) prohibits limiting the possibilities open to competitors are listed in Temple Lang, *supra* note 3, at 99.
- 36 Microsoft, 2007 E.C.R. II-3601, at ¶¶ 647-649, 659 and 665.
- 37 Joined Cases C-468/06 to C-478/06, Léloucq v. GlaxoSmithKline, 2008 E.C.R. I-7139.
- 38 Commission decision of 21 December 1988, Decca Navigator System, 1989 O.J. L. 43/27.
- 39 See Commission's Fourteenth Report on Competition Policy, at ¶¶ 94-95 (1984); Steven Anderman, *Does the Microsoft Case Offer a New Paradigm for the 'Exceptional Circumstances Test and Compulsory Copyright Licenses Under EC Competition Law?*, 1(2) COMP. L. REV. 7, 17 (2004).
- 40 Case T-321/05, AstraZeneca v. Commission, 2010 E.C.R. II-____; BELLAMY & CHILD: EUROPEAN COMMUNITY LAW OF COMPETITION 1-1679, 1028-1029 (Peter Roth QC & Vivien Rose eds., 2007).
- 41 Dolmans, Loewenthal & O'Donoghue, *supra* note 26, at 123 and 125.
- 42 Case T-41/96, Bayer AG v. Commission, 2000 E.C.T. II-3383 at ¶ 180.
- 43 IMS Health, 2004 E.C.R. I-5039.
- 44 RTE-ITP, 1995 E.C.R. I-743.
- 45 *Id.*
- 46 Joined Cases C-6/73 and C-7/73, Istituto Chemioterapico Italiano SpA and Commercial Solvents Corp v. Commission, 1974 E.C.R. 223.
- 47 John Temple Lang, *European Competition Law and Compulsory Licensing – A Comprehensive Principle*, 4 EUROPARÄTTSLIG TIDSKRIFT 558, 558-588 (2004); Temple Lang, *supra* note 5; John Temple Lang, *European Competition Law and Intellectual Property Rights - A New Analysis*, 11 ERA FORUM 411, 411-437 (2010).
- 48 Commission Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements, 2011 O.J. C. 11 ch. 7; see Commission of the European Communities, Eleventh report on competition policy, ¶ 94 on IGR Stereo Television ("Salora"), (1982).
- 49 See, e.g., RTE-ITP, 1995 E.C.R. I-743 at ¶ 49.
- 50 Coco Rita, *Antitrust Liability for Refusal to License Intellectual Property: A Comparative Analysis and the International Setting*, 12(1) MARQ. INTELL. PROP. L. REV. 1 (2008).
- 51 Wolfgang Kerber & Claudia Schmidt, Microsoft, *Refusal to License Intellectual Property Rights, and the Incentives Balance Test of the EU Commission* 19-20 (Working Paper, November 8, 2008), available at <http://ssrn.com/abstract=1297939> (Kerber & Schmidt, however, favor a test balancing incentives).
- 52 RTE-ITP, 1995 E.C.R. I-743.
- 53 Microsoft, 2007 E.C.R. II-3601.
- 54 Philips Electronics v. Ingman and Video Duplicating, (1998) Ch. 1997 P.No. 4100 at ¶ 37.

- 55 Anneleen Straetemans, *The EU Microsoft Case – Not as Soft a Case*, 44(4) *JURA FALC.* 563, 580-581 (2007-2008).
- 56 Case T-83/91, *Tetra Pak International SA v. Commission*, 1994 E.C.R. II-755 at ¶¶ 212-213; *cf.* *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195 (2d Cir. 1981).
- 57 *GlaxoSmithKline*, 2008 E.C.R. I-7139 at ¶¶ 49, 70-71 and 77.
- 58 *See, e.g.*, Case 53/87, *CICRA v. Renault* (“*Volvo v. Veng*”), 1988 E.C.R. 6039.
- 59 Humpe & Ritter, *supra* note 29, at 10-11.
- 60 *Commercial Solvents Corp.*, 1974 E.C.R. 223.
- 61 *Bronner*, 1998 E.C.R. I-7791.
- 62 RTE-ITP, 1995 E.C.R. I-743 and Ong, *supra* note 22, at 507.
- 63 *Bronner*, 1998 E.C.R. I-7791 at ¶¶ 41-48 and *Sher & Wall*, *supra* note 1, at 13.
- 64 *Commercial Solvents Corp.*, 1974 E.C.R. 223.
- 65 RTE-ITP, 1995 E.C.R. I-743.
- 66 *Microsoft*, 2007 E.C.R. II-3601.
- 67 RTE-ITP, 1995 E.C.R. I-743; *Dolmans & Ilan*, *supra* note 8, at 15; and Ong, *supra* note 22, at 507.
- 68 *Contra Estelle Derclaye, The IMS Health Decision: A Triple Victory*, 27(3) *WORLD COMPET.* 397, 403 (2004).
- 69 *Guidance on the Commission’s Enforcement Priorities*, *supra* note 14, at ¶ 84.
- 70 Cyril Ritter, *Refusal to Deal and “Essential Facilities”: Does Intellectual Property Require Special Deference Compared to Tangible Property?*, 28(3) *WORLD COMPET.* 281, 284-285 (2003).
- 71 *Commercial Solvents Corp.*, 1974 E.C.R. 223.
- 72 *Anderman*, *supra* note 39, at 7 and 16; *Bellamy & Child*, *supra* note 40, at 1006.
- 73 *See Case C-52/09, Konkurrensverket v. TeliaSonera AB*, 2011 ECR I-____ (Feb 18) (a margin squeeze may be an abuse even if there is no duty to supply).
- 74 *Case CP/1761/02, E.I. du Pont de Nemours & Co. and Op. Graphics (Holography) Ltd.*, Decision of the Office of Fair Trading on Sept. 9, 2003, at ¶¶ 34-35.
- 75 *See Case 77/77, BP v. Commission*, 1978 E.C.R. 1513.
- 76 Ritter, *supra* note 70, at 285.
- 77 *IMS Health*, 2004 E.C.R. I-5039 at ¶ 49.
- 78 *Id.*
- 79 *IMS Health*, 2004 E.C.R. I-5039 at ¶¶ 62 and 66.
- 80 *Microsoft*, 2007 E.C.R. II-3601 at ¶ 647.
- 81 *See O’Donoghue & Padilla*, *supra* note 5, at 508-509 and ch. 9 generally. The leading cases are *Case C-53/928, Hilti v. Commission*, 1994 E.C.R. I-667 and *Tetra Pak II*, 1996 E.C.R. I-5951. Neither deals with technological tying (product integration).

- 82 Kelyn Bacon, Tying after Microsoft: the Step Forward and Two Steps Back, 4(1) COMP. POL'Y INT'L 65 (Spring 2008).
- 83 Microsoft, 2007 E.C.R. II-3601 at ¶¶ 917-918. However, competition may be restricted even if there is no direct harm to consumers as a result of the tying, see ¶ 960 ff.
- 84 *Id.* at ¶¶ 865, 962-963. At ¶ 867 the Court said, ". . . in principle conduct will be regarded as abusive only if it is capable of restricting competition." In any case, one would expect the basic requirements for all kinds of abuses to be the same.
- 85 Kai-Uwe Kühn, Robert Stillman & Christina Caffara, *Economic Theories of Bundling and Their Policy Implications in Abuse Cases: An Assessment in the Light of the Microsoft Case*, 1 EUR. COMP. J. 85, 86 (2005) say "[t]he most important criticism of the European Commission in cases like Tetra Laval/Sidel and GE/Honeywell has been that the specific and competitive mechanism was never clearly identified and therefore that there was no clear set of evidence that could have led to the conclusion that bundling was anti-competitive."
- 86 Guidance on the Commission's Enforcement Priorities, *supra* note 14, at ¶ 47-62.
- 87 Eleanor M. Fox, *Microsoft (EC) and Duty to Deal: Exceptionality and the Transatlantic Divide*, 4(1) COMP. POL'Y INT'L 25 (Spring 2008) (criticizing the Microsoft judgment for relying too heavily on facts without clearly stating principles).
- 88 The Court summarized its agreement with the Commission that the bundling had anticompetitive effects at ¶ 1088. See also ¶ 1038-1054.
- 89 Microsoft, 2007 E.C.R. II-3601 at ¶ 913.
- 90 Guidance on the Commission's Enforcement Priorities, *supra* note 14, at ¶ 55.
- 91 AstraZeneca v. Commission, 2010 E.C.R. II-____ at ¶¶ 335, 812, 817, 824, 845.
- 92 Case T-51/89, Tetra Pak International SA v. Commission, 1990 E.C.R. II-312 at ¶ 68.
- 93 Herbert Hovenkamp, Tying Noncompetitive Goods (U Iowa Legal Studies, Research Paper No. 11-19, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1785586.
- 94 Case T-271/03, Deutsche Telekom AG v. Commission, 2008 E.C.R. II-477 at ¶ 192.
- 95 O'Donoghue & Padilla, *supra* note 5, at 224-225; Temple Lang, *supra* note 5, at 235-340, 245, 250-253, 311-315.
- 96 Oscar Bronner, 1998 E.C.R. I-7791 at ¶ 58.
- 97 O'Donoghue & Padilla, *supra* note 5, at 508-509.
- 98 Guidance on the Commission's Enforcement Priorities, *supra* note 14, at ¶ 52. See Centre for European Policy Studies Task Force, Treatment of Exclusionary Abuses under Article 82 of the EC Treaty 58-66 (2009).
- 99 Guidance on the Commission's Enforcement Priorities, *supra* note 14, at ¶ 55.
- 100 Case T-111/96, ITT Promedia NV v. Commission, 1998 E.C.R. II-2937 at ¶¶ 72-73.
- 101 IMS Health, 2001 E.C.R. I-3193 at ¶ 144.
- 102 Atwood, Hull & Perrine, *supra* note 8, at 38.
- 103 Case COMP D3/38.044, NDC Health v. IMS Health, 2002 O.J. L59, 18 and Christopher Stothers, The End of Exclusivity?: Abuse of Intellectual Property Rights in the E.U., 2 EUR. INTELLECT. PROP. REV. 86, 90 (2002).
- 104 RTE-ITP, 1995 E.C.R. I-743.
- 105 *Id.*
- 106 IMS Health, 2004 E.C.R. I-5039.

- 107 RTE-ITP, 1995 E.C.R. I-743.
- 108 JOHN TEMPLE LANG, EUROPEAN COMPETITION POLICY AND REGULATION: DIFFERENCES, OVERLAPS AND CONSTRAINTS, IN ANTITRUST AND REGULATION IN THE EU AND US: LEGAL AND ECONOMIC PERSPECTIVES 20 (François Lévêque & Howard Shelanski eds., 2009).
- 109 Joined cases 56/64 and 58/64, Consten SA and Grundig-Verkaufs-GmbH v. Commission, 1966 E.C.R. 299.
- 110 Oscar Bronner, 1998 E.C.R. I-7791 at ¶¶ 38-45; Prete, *supra* note 7, at 1075 and 1081.