

# Industrial property rights – abuse of a dominant position

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This chapter considers intellectual property rights and the potentially dominant position they confer by their very nature. After a general discussion two situations will be scrutinized: Firstly – to what extent it can be regarded as an abuse if a dominant company is in-licensing important property rights on an exclusive basis. Secondly, the question of whether a dominant company – which carries a special responsibility – may have an obligation in certain situations to grant a license.

## 1.1. General abuse of a dominant position based on industrial property rights

An industrial property right confers a monopoly position on the rights-holder. Is this statutory monopoly position to be equated with a dominant position under Article 82 EC? On its face, it might not appear wholly unreasonable to suggest that the rights-holder with a unique and well-protected product can behave in an independent way, disregarding his competitors and customers.

### 1.1.1. Industrial property rights does not confer dominance

Probel in the mid 60s bought a generic version of a patented pharmaceutical product in Italy and imported it into to Holland. Parke Davis, the rights holder, objected to the parallel trade. One question referred to the ECJ was whether Parke Davis was infringing Article 82 in invoking its industrial property rights. The ECJ held that Article 82 EC was not automatically applicable.<sup>1</sup> Even if a patent confers special protection, it does not follow that the exercise of the right so conferred implies the existence of the three elements mentioned in Article 82 EC. It could only do so if the utilisation of the patent had degenerated into an improper exploitation of the protection. A high price on a patented product compared to a non-patented product did not necessarily constitute an abuse.

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<sup>1</sup> ECJ, Case 24/67, *Parke Davis & Company v Probel and others*, 29 February 1968, [1968] ECR 55.

## 1.1.2. Industrial property rights and *de facto* dominance

This early position has been followed in subsequent cases. In *Magill*,<sup>2</sup> the Court concluded that the unique type of copy-right protection granted in Ireland and United Kingdom for simple TV-listings did not in of itself confer a dominant position:

[46] So far as dominant position is concerned, it is to be remembered at the outset that mere ownership of an intellectual property right cannot confer such a position.

[47] However, the basic information as to the channel, day, time and title of programmes is the necessary result of programming by television stations, which are thus the only source of such information for an undertaking, like *Magill*, which wishes to publish it together with commentaries or pictures. By force of circumstance, RTE and ITP, as the agent of ITV, enjoy, along with the BBC, a *de facto* monopoly over the information used to compile listings for the television programmes received in most households in Ireland and 30% to 40% of households in Northern Ireland. The appellants are thus in a position to prevent effective competition on the market in weekly television magazines. The Court of First Instance was therefore right in confirming the Commission's assessment that the appellants occupied a dominant position.<sup>3</sup>

What is the difference between a monopoly position deriving from industrial property rights and a *de facto* monopoly? Again the Court appears to be balancing between the need to recognise and upholding the "existence" of non-discriminatory national provisions on the one hand and the need to prevent the "exercise" of these provisions creating obstacles to unimpaired competition in the Community. Nothing prevents the granting of sometimes dubious national rights<sup>4</sup>, but the "exercise" of the right may be called into question. The end point of this position is unclear. Indeed, when the exercise affects a secondary market the monopoly translates into a dominant position under Article 82 EC, which may be abused.

The case-law does not primarily deal with the question whether reliance on industrial property creates the dominant position or whether other factors

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<sup>2</sup> Joined Cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann & Independent Television Publication Limited v EC Commission* ("*Magill*"), 6 April 1995, [1995] ECR I-743.

<sup>3</sup> ECJ, Case 322/81, *Nederlandsche Banden Industrie Michelin v EC Commission* ("*Michelin*"), [1983] ECR 3461, paragraph [30].

<sup>4</sup> ECJ, Case 35/87, *Thetford v Fiamma*, 30 June 1988, [1988] ECR 3585.

are more determinative. In a number of cases relating to the distribution of music the ECJ has taken a position on copyright holders and their exercise of this right. This it did in *Tournier*<sup>5</sup>:

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JUDGMENT OF THE COURT OF JUSTICE  
OF THE EUROPEAN COMMUNITIES

Case 395/87

*“Tournier”*

Ministère public v Jean-Louis Tournier

13 July 1989

[1989] ECR 2521, [1981] 4 CMLR 248

*Background*

The discothèque at Juan-les-Pins instituted criminal proceedings against Jean-Louis Tournier, director of "Sacem" which manages copyright in musical works in France. Damages were claimed on the ground that Sacem had required Juan-les-Pins to make excessive, unfair or undue payments for the performance of protected musical works on its premises, thereby infringing certain provisions of French criminal law. According to Juan-les-Pins, the practices constituted an abuse of the dominant position held by Sacem. The level of royalties was appreciably higher than that applied in other Member States. Moreover, the rates charged to discothèques bore no relation to those charged to other large-scale users of recorded music, such as television and radio stations.

Royalties were charged at a fixed rate of 8.25% of the turnover of the discothèque in question. The discothèques had to pay royalties to obtain access to the whole of Sacem's repertoire, even though only music of Anglo-American origin was of interest to them; Sacem had always refused to grant them access to just part of the repertoire, and they could not deal directly with the copyright-management societies in other countries since the latter were bound by "reciprocal representation contracts" with Sacem and accordingly refused to grant direct access to their repertoires.

The cour d' appel observed that Sacem's conduct affected trade between Member States. It then stated that Sacem held a dominant position on French territory since it held in fact, if not in law, an absolute monopoly over the management of its members' rights and was

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<sup>5</sup> ECJ, Case 395/87, *Ministère public v Jean-Louis Tournier* (*“Tournier”*), 13 July 1989, [1989] ECR 2521. Reference for a preliminary ruling from Cour d'appel d'Aix-en-Provence, France.

empowered by its foreign counterparts to manage their repertoires of musical works in France on the same conditions as its own. Finally, the cour d' appel observed that it was undisputed that, whilst the authority thus granted was not exclusive, no French discothèque or other undertaking whatsoever was in a position to establish direct contractual relations with a foreign copyright society.

The national court asked the ECJ several questions relating to copyright and dominant position.

### *Quotations from the legal grounds*

#### The fifth question – distinction between performance and reproduction

[10] The fifth question raises two separate problems: first, whether Articles 28 and 49 EC<sup>#</sup> prohibit the application of national legislation which treats as an infringement of copyright the public performance of protected musical works by means of sound recordings without the payment of royalties, where royalties have already been paid to the author, for the reproduction of the work, in another Member State; and secondly, the extent to which the answer to be given will be influenced by the rates of the royalties in question.

[11] According to the judgment in *GEMA*,<sup>6</sup> a copyright-management society acting on behalf of the copyright owner or his licensee may not rely on the exclusive exploitation right conferred by copyright to prevent or restrict the importation of sound recordings which have been lawfully marketed in another Member State by the owner himself or with his consent. No provision of national legislation may permit an undertaking which is responsible for copyright management and has a *de facto* monopoly on the territory of a Member State to charge a levy on products from another Member State where they have been put into circulation by the copyright owner or with his consent and thus to impose a charge on the importation of sound recordings which are already in free circulation in the common market as a result of the fact that they cross an internal frontier.

[12] The problems, in relation to the requirements of the Treaty, involved in the observance of copyright in musical works made available to the public through their performance are not the same as those which arise where the act of making a work available to the public is inseparable from the circulation of the physical medium on which it is recorded. In the former case the copyright owner and the persons claiming through him have a legitimate interest in calculating the fees due in respect of the authorization to present the work on the basis of the actual or probable number of performances, as the Court held in *Coditel v Ciné Vog Films*.<sup>7</sup>

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<sup>6</sup> ECJ, Joined Cases 55/80 and Case 57/80, *Musik-Vertrieb Membran and K-tel International v GEMA*, 20 January 1981, [1981] ECR 147.

<sup>7</sup> ECJ, Case 62/79, *Coditel v Ciné Vog Films*, 18 March 1980, [1980] ECR 881.

[13] It is true that the present case raises the specific question of the distinction between the conditions applicable to those two situations, in so far as sound-recordings are products covered by the provisions on the free movement of goods contained in Article 28 EC<sup>#</sup> et seq. but are also capable of being used for public performance of the musical work in question. In such circumstances, the requirements relating to the free movement of goods and the freedom to provide services and those deriving from the observance of copyright must be reconciled in such a way that the copyright owners, or the societies empowered to act as their agents, may invoke their exclusive rights in order to require the payment of royalties for music played in public by means of a sound-recording, even though the marketing of that recording cannot give rise to the charging of any royalty in the country where the music is played in public.

[14] As regards the abusive or discriminatory nature of the rate of royalty, that rate, which is fixed independently by Sacem, must be appraised in relation to the competition rules contained in Articles 81 and 82 EC<sup>#</sup>. The rate of royalty is not a matter to be taken into account in considering the compatibility of the national legislation in question with Articles 28 and 49 EC<sup>#</sup>.

[15] Accordingly, it must be stated in reply to the fifth question that Articles 28 and 49 EC<sup>#</sup> must be interpreted as not preventing the application of national legislation which treats as an infringement of copyright the public performance of a protected musical work by means of sound recordings without payment of royalties, where royalties have already been paid to the author, for the reproduction of the work, in another Member State. ....

The fourth question – only full repertoire...

The first and third questions – unfair trading terms

[34] It must be observed at the outset that by virtue of the very terms of Articles 82 EC<sup>#</sup>, the imposition of any unfair trading conditions by an undertaking holding a dominant position constitutes an abuse of that position.

[35] The first question seeks to determine what criteria must be applied in order to determine whether a national copyright-management society which holds a dominant position in a substantial part of the common market is imposing unfair trading conditions; it emphasizes the point that the conditions are not negotiable and are unfair. The third question asks more specifically whether a reply to the first question may be based on the criterion to which much importance is attached by the disothèque operators, and which is embodied in the wording of the question, namely the relationship between the rate applied in France and that applied by the copyright-management societies in other Member States. ...

[38] When an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in other Member States and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position. In such a case it is for the undertaking in question to justify the difference by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all the other Member States.

[39] Sacem has claimed that certain circumstances justify that difference. It referred to the high prices charged by discothèques in France, the traditionally high level of protection provided by copyright in France, and the peculiar features of French legislation whereby the playing of recorded musical works is subject not only to a performing right but also to a supplementary mechanical reproduction fee.

[40] Circumstances of that kind cannot account for a very appreciable difference between the rates of royalty charged in the various Member States. The high level of prices charged by discothèques in a particular Member State, even if substantiated, may be the result of several factors, one of which might, in turn, be the high level of royalties payable for the use of recorded music. As regards the level of protection provided by national legislation, it must be noted that copyright in musical works includes in general a performing right and a reproduction right, and the fact that a "supplementary reproduction fee" is payable in some Member States, including France, in the event of public dissemination does not imply that the level of protection is different. As the Court held in its judgment in *Basset v Sacem*, the supplementary reproduction fee may be seen, disregarding the concepts used by French legislation and practice, as constituting part of the payment for an author's rights over the public performance of a recorded musical work and therefore fulfils a function equivalent to that of the performing right charged on the same occasion in another Member State.

[41] Sacem also contends that the customary methods of collection are different, in that certain copyright-management societies in the Member States tend not to insist on collecting royalties of small amounts from small users spread over the country, such as discothèque operators, dance organizers and café proprietors. The opposite tradition has developed in France, in view of the wish of authors to have their rights fully observed.

[42] That argument cannot be accepted. It is apparent from the documents before the Court that one of the most marked differences between the copyright-management societies in the various Member States lies in the level of operating expenses. Where - as appears to be the case here, according to the record of the proceedings before the national court - the staff of a management society is much larger than that of its counterparts in other Member States and, moreover, the proportion of receipts taken up by collection, administration and distribution expenses rather than by payments

to copyright holders is considerably higher, the possibility cannot be ruled out that it is precisely the lack of competition on the market in question that accounts for the heavy burden of administration and hence the high level of royalties.

[43] It must therefore be concluded that a comparison with the situation in other Member States may provide useful indications regarding the possible abuse of a dominant position by a national copyright-management society. Accordingly, the answer to the third question must be in the affirmative. ...

[46] By virtue of the foregoing, it must be stated in reply to the first and third questions that Articles 82 EC<sup>#</sup> must be interpreted as meaning that a national copyright-management society holding a dominant position in a substantial part of the common market imposes unfair trading conditions where the royalties which it charges to discothèques are appreciably higher than those charged in other Member States, the rates being compared on a consistent basis. That would not be the case if the copyright-management society in question were able to justify such a difference by reference to objective and relevant dissimilarities between copyright management in the Member State concerned and copyright management in the other Member States.

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The case-law on copyright confirms that the copy-right management society holds a dominant position by virtue of the fact that the underlying rights have been assigned to them for exercise. The question is not whether they are dominant or not. That is a given and irrespective of whether that dominance is an outflow of the industrial property rights or the fact that there are no real competitors on the market – a *de facto* dominance. This appears logical, but the fact is then that the right confers a dominant position and that there is no real need for a fictitious theory distinguishing between the existence of the right and its exercise - other than to underline that the right is not called into question.

### 1.1.3. Limited economic reasoning

A company occupying a dominant position has a special responsibility.<sup>8</sup> The Court in *Tournier* did not believe that this requirement obligated the rights-holder always to comply with every requests of the customer.

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<sup>8</sup> See Case 322/81, *Michelin*, fn. 3.

Accordingly, the disothèque could not pick and chose from the repertoire of SACEM. For reasons of economic efficiency it had to accept the full offer of SACEM even if the interest of the buyer was limited to only a portion of what was available. If the customer is asking for a service, but this would create objectively verifiable obstacles and increased costs for the dominant company, it does not have an obligation to meet this demand. The Court does not seem to require a balancing of the increased cost of the management society with the advantages of the user. Accordingly, a society appears to be able to rebut a presumption of abuse by showing increased costs in the control or monitoring of the protected works. On the other hand, if a comparison based on the situation in other countries or comparable environments e.g. the situation for other large-scale users such as radio or television stations, indicates that prices are excessive and the dominant company cannot justify them, this may be considered an abuse.<sup>9</sup> The logic of United Brands, where cost rather than international comparison was at the forefront, seems to be on its head. The bottom line is that not a single factor, but rather a balancing of the different arguments is required to determine if a price should be regarded as excessive.

## 1.2. Can in-licensing be an abuse?

The group exemptions on technology transfer have not made a distinction between licensing with or without substantial market power. The 1994 draft Technology Transfer Regulation suggested thresholds in order to prevent automatic application. This idea was heavily criticised by industry and in 1996 replaced with a right for the Commission to withdraw the block exemption in case of strong market power.

However, after having introduced the notion of threshold firmly in the Vertical Regulation, the Commission could revert to the concept in the 2004 Technology Transfer Regulation. The threshold concept reflects the attitudes for horizontal and vertical agreements. A 20% threshold is applied for collaboration between competitors whereas a 30% level should govern otherwise.<sup>10</sup>

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<sup>9</sup> Contrast Case 24/67, *Parke Davis*, fn. 1.

<sup>10</sup> Commission Regulation 772/2004/EC of 27 April 2004 on the application of Article 81(3) EC<sup>#</sup> to categories of technology transfer agreements (“2004 Technology Transfer Regulation”), OJ 2004 L 123/11.

## 1.2.1. Can block-exemptions shield a dominant company?

Generally, it was assumed that a dominant company, which acquired an exclusive license, could rely on the group exemptions – but in 1990 this assumption was challenged in the *Tetra Pak BTG-license* case.<sup>11</sup>

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THE COURT OF FIRST INSTANCE

CASE T-51/89

***Tetra Pak***

Tetra Pak Rausing SA v EC Commission

10 July 1990

Reports of cases 1990 pages II-0309

### *Background*

Tetra Pak - the successful company created by the Rausing family in Lund - had over a period of 25 years created a powerful market position with respect to aseptic milk cartons. The company acquired an exclusive license (as a result of a corporate acquisition) to a new sterilisation technology, which would help it to preserve a competitive edge in its field of business. The license agreement had carefully been designed to fit under the conditions of the 1984 Patent Regulation.<sup>12</sup>

The competitor - Elopak - complained to the Commission, but before any formal decision was made, Tetra Pak informed the Commission that it abandoned all claims for exclusivity. Yet the Commission made a formal decision, setting out the reasons, which would have allowed it to withdraw the benefits of the 1984 Patent Regulation and concluded that Tetra Pak had abused its dominant position. No fine was imposed, but Tetra Pak sought annulment of the decision based on three principle submissions: (i) a schematic analysis of the Treaty and its secondary legislation; (ii.) the principle of legal certainty; and

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<sup>11</sup> ECJ, Case T-51/89, *Tetra Pak Rausing SA v EC Commission* (“*Tetra Pak - BTG licence*”), 10 July 1990, [1990] ECR II-309. Application for a declaration that Commission, Decision 88/501/EEC, 26 July 1988, OJ 1988 L 272/27, relating to a proceeding under Articles 81 and 82 EC, is void.

<sup>12</sup> Commission Regulation 2349/84/EEC of 23 July 1984 on the application of Article 81(3) EC# to certain categories of patent licensing agreements (“1984 Patent Regulation”), OJ L 84/219, (now replaced by the 2004 Technology Transfer Regulation).

(iii.) the principle of uniformity emphasising the first of these. Tetra Pak accepted the allegation that it was dominant without prejudice to a parallel procedure – (*Tetra Pak II*).

*Quotations from the legal grounds*

(a) Schematic analysis of Articles 81 and 82 EC<sup>#</sup> and of Secondary legislation

[15] The applicant maintains that the Commission cannot apply Articles 82 EC<sup>#</sup> to behaviour exempt under Article 81(3) EC<sup>#</sup> because Articles 81 and 82 EC<sup>#</sup> both pursue the same objective. The applicant relies on the judgment of the Court of Justice in *Continental Can* where it was stated that 'Articles 81 and 82 EC<sup>#</sup> cannot be interpreted in such a way that they contradict each other, because they serve to achieve the same aim'.<sup>13</sup> Conduct cannot both be expressly authorized under Article 81(3) EC<sup>#</sup> and prohibited under Articles 82 EC<sup>#</sup> since exemption involves 'positive action', as the Court put it in Case 14/68 *Walt Wilhelm*<sup>14</sup>, though that case was concerned with the relationship between Article 81(3) EC<sup>#</sup> and national rules on competition....

[21] This Court notes at the outset that the problem of reconciling application of Articles 82 EC<sup>#</sup> with enjoyment of block exemption, which is the crux of the present case and arises because of the need for logical coherence in the implementation of Articles 81 and 82 EC<sup>#</sup>, has not yet been expressly determined by the Community Court. However, it must be borne in mind that the relationship between Articles 81 and 82 EC<sup>#</sup> has, to an extent, been clarified by the Court of Justice, in that the Court has expressly said that the applicability to an agreement of Article 81 EC<sup>#</sup> does not preclude application of Articles 82 EC<sup>#</sup>. The Court held that in such a case the Commission may apply either of the two provisions to the act in question: 'the fact that agreements... might fall within Article 81 EC<sup>#</sup> and in particular within paragraph 3 thereof does not preclude the application of Articles 82 EC<sup>#</sup>... so that in such cases the Commission is entitled, taking into account the nature of the reciprocal undertakings entered into and the competitive position of the various contracting parties on the market or markets on which they operate, to proceed on the basis of Article 81 EC<sup>#</sup> or Articles 82 EC<sup>#</sup>'. The Court of Justice confirmed that position in *Ahmed Saeed* where it said that, in certain circumstances, 'the possibility that Articles 81 and 82 EC<sup>#</sup> may both be applicable cannot be ruled out'.<sup>15</sup> But the problem raised in *Ahmed Saeed*, as far as the relationship between Articles 81 and 82 EC<sup>#</sup> is concerned, was the question of principle as to whether implementation of an agreement capable of falling under Article 81(1) EC<sup>#</sup>

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<sup>13</sup> ECJ, Case 6/72, *Europemballage Corp. & Continental Can Co. Inc. v EC Commission*, 21 February 1973, 1973 (ECR) 215, paragraph [25].

<sup>14</sup> ECJ, Case 14/68, *Walt Wilhelm v. Bundeskartellamt*, 13 February 1969, [1969] ECR 1, paragraph [5].

<sup>15</sup> ECJ, Case 66/86, *Ahmed Saeed*, 11 April 1989, [1989] ECR 803, paragraph [37].

can also constitute abuse of a dominant position (paragraph 34). The relationship between exemption under Article 81(3) EC<sup>#</sup> and the applicability of Articles 82 EC<sup>#</sup> was not at issue.

[22] Resolution of the problem of reconciling application of Articles 82 EC<sup>#</sup> with exemption under Article 81(3) EC<sup>#</sup> must therefore start from the Treaty system for the protection of competition, in particular as laid down by those two articles of the Treaty and their implementing regulations. Articles 81 and 82 EC<sup>#</sup> are complementary inasmuch as they pursue a common general objective, set out in Article 3(1)(g) EC<sup>#</sup>, which provides that the activities of the Community are to include 'the institution of a system ensuring that competition in the common market is not distorted'. But they none the less constitute, in the scheme of the Treaty, two independent legal instruments addressing different situations. This was emphasized by the Court of Justice in *Continental Can* where, having said that 'Article 81 EC<sup>#</sup> concerns agreements between undertakings, decisions of associations of undertakings and concerted practices, while Articles 82 EC<sup>#</sup> concerns unilateral activity of one or more undertakings', the Court held that 'Articles 81 and 82 EC<sup>#</sup> seek to achieve the same aim on different levels, namely, the maintenance of effective competition within the common market'.<sup>16</sup>

[23] Turning to the specific nature of the conduct whose compatibility with Articles 82 EC<sup>#</sup> is considered in the Decision, this Court holds that the mere fact that an undertaking in a dominant position acquires an exclusive licence does not per se constitute abuse within the meaning of Articles 82 EC<sup>#</sup>. For the purpose of applying Articles 82 EC<sup>#</sup>, the circumstances surrounding the acquisition, and in particular its effects on the structure of competition in the relevant market, must be taken into account. This interpretation is borne out by the case-law of the Court of Justice, in which the concept of abuse is defined as 'an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition'.<sup>17</sup> So, here, the Commission was right not to put in issue the exclusive licence as such, but rather to object specifically under Articles 82 EC<sup>#</sup> to the anti-competitive effect of its being acquired by the applicant. It is plain from the reasoning and conclusions of the Decision that the infringement of Articles 82 EC<sup>#</sup> found by the Commission stemmed precisely from Tetra Pak's acquisition of the exclusive licence 'in the specific circumstances of this case'. The specific context to which the Commission refers is expressly characterized as being

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<sup>16</sup> Case 6/72, *Europemballage*, fn.13, paragraph [25].

<sup>17</sup> ECJ, Case 85/76, *Hoffmann-La Roche*, [1979] ECR 461, paragraph [91].

the fact that acquisition of the exclusivity of the licence not only 'strengthened Tetra's very considerable dominance but also had the effect of preventing, or at the very least considerably delaying, the entry of a new competitor into a market where very little if any competition is found'.<sup>18</sup> The decisive factor in the finding that acquisition of the exclusive licence constituted an abuse therefore lay quite specifically in the applicant's position in the relevant market and in particular, as appears from the Decision (point 27), in the fact that at the material time the right to use the process protected by the BTG licence was alone capable of giving an undertaking the means of competing effectively with the applicant in the field of the aseptic packaging of milk. The takeover of Liquipak was no more than the means - to which the Commission has attached no particular significance in applying Articles 82 EC<sup>#</sup> - by which the applicant acquired the exclusivity of the BTG licence, the effect of which was to deprive other undertakings of the means of competing with the applicant.

[24] Similarly, the applicant's argument that there must be a supplementary element, external to the agreement, cannot be accepted. In this connection, it is relevant to note that in *Ahmed Saeed*, to which the applicant refers, the Court Justice held that 'the application of tariffs for scheduled flights on the basis of bilateral or multilateral agreements may, in certain circumstances, constitute an abuse of a dominant position on the market in question, in particular where an undertaking in a dominant position has succeeded in imposing on other carriers the application of excessively high or excessively low tariffs or the exclusive application of only one tariff'<sup>19</sup> It is true that the Court of Justice justified the concurrent application of Articles 81 and 82 EC<sup>#</sup> to the tariff agreements there at issue by referring to the existence of a supplementary element, which in that case took the form of pressure brought to bear by the undertaking on its competitors. But the Decision in the present case does refer to the additional element that constituted an abuse within the meaning of Articles 82 EC<sup>#</sup> and justified its application. The additional element lies in the very context of the case - in the fact that Tetra Pak's acquisition of the exclusive licence had the practical effect of precluding all competition in the relevant market. This was emphasized in the Decision and was not put in issue by the applicant.

[25] In these circumstances, this Court holds that in the scheme for the protection of competition established by the Treaty the grant of exemption, whether individual or block exemption, under Article 81(3) EC<sup>#</sup> cannot be such as to render inapplicable the prohibition set out in Articles 82 EC<sup>#</sup>. This principle follows both from the wording of Article 81(3) EC<sup>#</sup> which permits derogation, through a declaration of inapplicability, only from the prohibition of agreements, decisions and concerted practices set out in Article 81(1) EC<sup>#</sup>, and also from the general scheme of Articles 81 and 82

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<sup>18</sup> Reference to point [45] and point [60] of the Decision.

<sup>19</sup> Case 66/86, *Ahmed Saeed*, fn.15, paragraph [46].

EC<sup>#</sup> which, as noted above, are independent and complementary provisions designed, in general, to regulate distinct situations by different rules. Application of Article 81 EC<sup>#</sup> involves two stages: a finding that Article 81(1) EC<sup>#</sup> has been infringed followed, where appropriate, by exemption from that prohibition if the agreement, decision or concerted practice in question satisfies the conditions laid down in Article 81(3) EC<sup>#</sup>. Articles 82 EC<sup>#</sup>, on the other hand, by reason of its very subject-matter (abuse), precludes any possible exception to the prohibition it lays down.<sup>20</sup> If the Commission were required in every case to take a decision withdrawing exemption before applying Articles 82 EC<sup>#</sup>, this would be tantamount, in view of the non-retroactive nature of the withdrawal of exemption, to accepting that an exemption under Article 81(3) EC<sup>#</sup> operates in reality as a concurrent exemption from the prohibition of abuse of a dominant position. For the reasons just given, that would not be consistent with the very nature of the infringement prohibited by Articles 82 EC<sup>#</sup>. Moreover, in view of the principles governing the hierarchical relationship of legal rules, grant of exemption under secondary legislation could not, in the absence of any enabling provision in the Treaty, derogate from a provision of the Treaty, in this case Articles 82 EC<sup>#</sup>.

[26] Having established that, in principle, the grant of exemption cannot preclude application of Articles 82 EC<sup>#</sup>, the question remains whether, in practice, findings made with a view to the grant of exemption under Article 81(3) EC<sup>#</sup> preclude application of Articles 82 EC<sup>#</sup>.

[27] Under Article 81(3) EC<sup>#</sup>, the prohibition laid down in Article 81(1) EC<sup>#</sup> may be declared inapplicable to agreements, decisions or concerted practices, or to categories thereof, which fulfil the conditions set out in Article 81(3) EC<sup>#</sup>. Article 81(3) EC<sup>#</sup> provides inter alia that the agreement must not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

[28] The way in which the question of exemption arises may in practice be different depending on whether an individual or block exemption is involved. The grant of individual exemption presupposes that the Commission has found that the agreement in question complies with the conditions set out in Article 81(3) EC<sup>#</sup>. So, where an individual exemption decision has been taken, characteristics of the agreement which would also be relevant in applying Articles 82 EC<sup>#</sup> may be taken to have been established. Consequently, in applying Articles 82 EC<sup>#</sup>, the Commission must take account, unless the factual and legal circumstances have altered, of the earlier findings made when exemption was granted under Article 81(3) EC<sup>#</sup>.

[29] Now it is true that regulations granting block exemption, like individual exemption decisions, apply only to agreements which, in

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<sup>20</sup> Id., paragraph [32].

principle, satisfy the conditions set out in Article 81(3) EC<sup>#</sup>. But unlike individual exemptions, block exemptions are, by definition, not dependent on a case-by-case examination to establish that the conditions for exemption laid down in the Treaty are in fact satisfied. In order to qualify for a block exemption, an agreement has only to satisfy the criteria laid down in the relevant block-exemption regulation. The agreement itself is not subject to any positive assessment with regard to the conditions set out in Article 81(3) EC<sup>#</sup>. So a block exemption cannot, generally speaking, be construed as having effects similar to negative clearance in relation to Articles 82 EC<sup>#</sup>. The result is that, where agreements to which undertakings in a dominant position are parties fall within the scope of a block-exemption regulation (that is, where the regulation is unlimited in scope), the effects of block exemption on the applicability of Articles 82 EC<sup>#</sup> must be assessed solely in the context of the scheme of Articles 82 EC<sup>#</sup>.

[30] Lastly, the possibility of applying Articles 82 EC<sup>#</sup> to an agreement covered by a block exemption is confirmed by analysis of the scheme of the block-exemption regulations. First, those regulations do not, in principle, exclude undertakings in a dominant position from qualifying for exemption and therefore do not take account of the position on the relevant markets of the parties to any given agreement. That is particularly so in the case of Regulation No 2349/84 on exemptions in respect of patent licensing agreements (cited above) which is relevant in this case. Second, the possibility of applying Article 81(3) EC<sup>#</sup> and Articles 82 EC<sup>#</sup> concurrently is expressly confirmed by certain of the block-exemption regulations where it is provided that enjoyment of block exemption does not preclude application of Articles 82 EC<sup>#</sup> - in particular, the three block-exemption regulations in the field of air transport adopted by the Commission on 26 July 1988....

(b) The principle of legal certainty ...

(c) The principle of the uniform application of Community law ...

[44] In the light of all of the foregoing considerations, the application must be dismissed.

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Even if one of the main purposes of block exemptions is to secure legal certainty for parties to an agreement this fact does not, according to the Court, discharge the dominant undertaking from an obligation to comply with Article 82. Any undertaking in a dominant position has a special responsibility not to allow its conduct to impair competition on the common

market.<sup>21</sup> They cannot rely on any alleged unpredictability to escape this fact.

The Court further underlined that the prohibition of Articles 82 has a direct effect and confers on interested parties rights, which the national courts must safeguard. Unlike what was held in the case of *Walt Wilhelm*, the application of Articles 82 to conduct covered by an exemption under Article 81(3), did not call into question the principles of the primacy and uniformity of Community law. On the contrary the national courts are acting as Community courts of general jurisdiction. They apply the principles of Community law governing the relationship between Article 81(3) and Article 82 EC. The uniform application of Community law is guaranteed by the procedure for reference.

According to the Court of First Instance, the mere fact that an undertaking in a dominant position acquires an exclusive license did not "*per se*" constitute an abuse of the dominant position. Other factors regarding the market structure and circumstances surrounding the acquisition had also to be taken into account. However, and this is the point of the case, the fact that the agreement benefits from a block exemption does not mean that Article 82 cannot be applied. In spite of the well-structured and forceful argument presented by Tetra Pak, the Court of First Instance held that it was not necessary that the Commission should withdraw a block exemption in accordance with its Article 7 before it applied Article 82 EC.

The conclusion must therefore be that dominant companies must be careful in accepting exclusive in-licensing agreements.

### 1.3. Can refusal to out-license be an abuse?

It can be an abuse of a dominant position to acquire an exclusive license irrespective of whether the licensor is a dominant or non-dominant company. What about the situation where the licensor is the dominant entity and the potential licensee a non-dominant company? Could it be an abuse to refuse to grant a license? Does the holder of an intellectual or industrial property right have an obligation under competition law to grant licenses to third parties?

From an economic perspective the question is highly relevant. Naturally, a company which has invested time, money and skills in developing new

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<sup>21</sup>Case 322/81, *Michelin*, fn. 3.

knowledge worthy of protection would also expect that it is entitled to decide if it should retain this development for its own exploitation. Likewise it expects to have the right to decide if the result should be assigned or licensed to third parties – but then, of course, only to parties with whom the rights-holder is prepared to contract.

Even if this starting point is recognised as legitimate, it is also true that there are a number of situations where the basic principle can be called into question. The IPR legislation foresees a number of situations where the principle can be set aside. During recent periods the debate has been particularly intense with respect to the patenting of biotechnology substances. The human genome project has resulted in patents which prevent continued research and development in the fields covered by the original discoveries.<sup>22</sup> The question is whether there is not a need to balance the monopoly interests of the rights-holder against other needs.

Perhaps more important is the impact competition law may have. A distinction must be made between directly affected markets and where the market is an essential facility for a down-stream secondary market.

### 1.3.1. IPR legislation protects the rights-holder

IPR-legislation grants a monopoly to its holder without distinguishing between small or large companies, non-dominant or dominant. The reward for disclosing the result of the creative effort is the right to charge monopoly prices. The extent this may be possible is affected by the uniqueness of the protected right. Further, the rights-holder may decide if he will exploit the right himself or not.

Only a few provisions in ordinary IPR legislation deal with exploitation. As to assignment and licensing the law basically confines itself to stipulating that there are alternatives and possible options. In no case is a difference made depending on the size or the market power of the company.

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<sup>22</sup> Man has some 65-70.000 genes. Two of them - BRCA 1 and BRAC 2 - have been patented and are owned by Myriad Genetics Inc. They appear to be highly relevant for breast cancer and Myriad requires that any clinical testing be undertaken in their labs and that the company is entitled to royalties. The result has been that other entities have stopped working with these genes in spite of promising results. A further result appears to be that basic academic research is now performed under stricter confidentiality in order to achieve patent protection before the result is commercialised. Olsson, H., Kommersialiseringen av gener – patent på bröstcancergener pilotfall. Läkartidningen 1999 p. 3920.

Complementary provisions are found in general contract and purchasing law – none of which add mandatory requirements on how to perform licensing. A rights-holder is therefore free to determine his strategy and with whom or under what conditions he will contract.

### Compulsory licensing

The only restriction to be found in IPR legislation relates to compulsory licensing and has its base in Article 4quater of the Paris Convention.<sup>23</sup> The general norm appears to be that a third party may request a non-exclusive compulsory license against payment of royalty for a specific territory if the rights-holder unduly should not have exploited his right within a given period of time. Case law has established that the rights are limited to the licensed territory and cannot be used outside that territory – nor can products produced under the compulsory license benefit from the exhaustion theory and the free movement of goods in the Community.<sup>24</sup>

## 1.3.2. Competition law addresses refusal to out-license

Competition law opposes monopoly power and aims at recreating balanced and competitive market conditions. It does not affect the existence of the property right legislation or the individual property right, but may affect the exercise of the same. Again, the crucial question becomes where to draw the line.

*Micro Leader*<sup>25</sup> was engaged in the wholesale marketing of office and computer equipment i.a. products manufactured by Microsoft Corporation,

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<sup>23</sup> Paris Convention for the Protection of Industrial Property of March 20, 1983 as subsequently revised. Article 4quater A (4) stipulates "A compulsory license may not be applied for on the ground of failure to work or insufficient working before the expiration of a period of four years from the date of filing ... it shall be refused if the patentee justifies his inaction by legitimate reasons ..."

<sup>24</sup> ECJ, Case 19/84, *Pharmon v. Hoechst*, 19 July 1985, [1985] ECR 2281; Case 434/85, *Allen & Hanburys Ltd v Generics (UK) Ltd*, 3 March 1988, [1988] ECR 1245; Case C-30/90, *EC Commission v Great Britain ("Compulsory Patent Licenses")*, 18 February 1992, [1992] I ECR 777; Case C-191/90, *Generics and Harris Pharmaceuticals v SK&F*, 27 October 1992, [1992] ECR I-5335.

<sup>25</sup> CFI, Case T-198/98, *Micro Leader Business v EC Commission*, 16 December 1999, [1999] ECR II-3989.

USA (MC). Micro Leader sold, in France, French-language products marketed by MC in Canada, identical or similar to products marketed in France by Microsoft France (MF).

MF informed its dealers in France that 'The importation of French-language Canadian products will in future be illegal, which lead Micro Leader to lodge a complaint with the Commission alleging that the conduct of MF and MC created obstacles to the freedom to set prices in conflict with the competition rules in Article 81 and 82 of the Treaty.

The Commission informed the applicant that the information obtained was insufficient for the Commission to uphold its complaint and sent the applicant its decision rejecting the complaint, expressing the view that there had been no breach of Articles 81 and 82 of the Treaty. Micro Leader appealed and claimed that the Court should annul the Commission's decision.

The CFI held that the Commission is under a duty to consider carefully the factual and legal issues brought to its attention by the complainant. However, the Commission could, according to CFI, not be accused of having committed an error of law or a manifest error of assessment with respect to infringement of Article 81. Even if MC did prevented Canadian distributors to sell their products outside Canada, MC would merely have been enforcing the copyright it holds over its products under Community law. The marketing in Canada of copies of MC software did not exhaust MC's copyright over its products since that right is exhausted only when the products have been put on the market in the Community by the owner of that right or with his consent. In addition, MC and MF formed a single economic unit within which MF does not enjoy real autonomy in determining its course of action in the market. The prohibition laid down by Article 81(1) of the Treaty cannot apply to decisions taken within a corporate group.

With respect to a potential infringement of Article 82, the Commission had informed Micro Leader that it had not convincingly proved Microsoft's pre-eminent position on the software market and in particular its significant share of the market in operating systems for microprocessors. In addition,

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APPLICATION for annulment of the Commission's decision of 15 October 1998 (Case IV/36.219 Micro Leader/Microsoft) definitively rejecting the applicant's complaint that the actions of Microsoft France and Microsoft Corporation in seeking to prevent French-language editions of Microsoft software packages marketed in Canada from being imported into France are contrary to Articles 85 and 86 of the EC Treaty (now Articles 81 and 82 EC). (Competition - Complaint - Rejection - Articles 85 and 86 of the EC Treaty (now Articles 81 and 82 EC) - Prohibition on importing software marketed in a third country - Exhaustion of copyright - Directive 91/250/EEC)

the prohibition by the Microsoft group on the importation of copies of French-language software marketed in Canada fell within the lawful enforcement of its copyright. Micro Leader had furnished no evidence of the wrongful exercise of that right. Such exercise could have consisted in Microsoft's charging lower prices on the Canadian market than on the European market for equivalent transactions, if European prices were, in addition, excessive.

On this last point, however, the CFI held that the Commission decision contained a manifest error of assessment.

56. It is clear from the case-law that whilst, as a rule, the enforcement of copyright by its holder, as in the case of the prohibition on importing certain products from outside the Community in to a Member State of the Community, is not in itself a breach of Article 86 of the Treaty, such enforcement may, in exceptional circumstances, involve abusive conduct.<sup>26</sup>

57. In the present case, therefore, the Commission could not argue, without undertaking further investigation into the complaint, that the information in its possession at the time it adopted the contested decision did not constitute evidence of abusive conduct by Microsoft. In view of the obligations incumbent on it when responding to a complaint ..., it ought, at the very least, to have ascertained whether or not the information put forward by the applicant on the basis of documents not devoid of probative value, was substantiated or not and checked, where appropriate, whether the particular circumstances of the case pointed to a breach of Article 81 of the Treaty.

If a rights-holder reserves the right to exploit his protected invention, design, trademark or copyright to himself, it is generally assumed that he should be entitled to do so under ordinary competition rules.<sup>27</sup> The question may, however, become sensitive in new technological fields where patents may serve as an unwanted obstacle to continued research. If these matters are not properly addressed in IPR legislation, it may well become necessary to open up closed markets by reference to general competition requirements.

In special circumstances, competition law has been discussed but only restrictively used. In *Volvo v Veng*,<sup>28</sup> Volvo refused to grant Veng a license to design rights for certain motor vehicle spare parts. The question was whether it could be considered an abuse of a dominant position to refuse such license.

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<sup>26</sup> (Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission* [1995] ECR I-743, paragraphs 49 and 50)

<sup>27</sup> Commission notice on *Lederle-Praxis Biologicals*, 1994 EC Commission, Report on Competition Policy, Annex 2 at page 353. Compare Commission notice on *Info-Lab/Ricoh*, January 7, 1999. Comp. News Letter 1999:1 p. 35.

<sup>28</sup> ECJ, Case 237/87, *Volvo AB v. Erik Veng (U.K.) Ltd.*, 5 October 1988, [1988] ECR 6211.

The ECJ emphasised that the right of the proprietor of a protected design to prevent third parties from manufacturing and selling or importing products incorporating the design constitutes the very subject matter of his exclusive right. It followed that an obligation imposed upon the proprietor of a protected design to grant to third parties a license for the supply of products incorporating the design would lead to the proprietor being deprived of the substance of his exclusive right. A refusal to grant such a license could not in itself constitute an abuse of a dominant position.

The ECJ made an important reservation: "[T]he exercise of an exclusive right by the proprietor of a registered design in respect of car body panels may be prohibited by Articles 82 EC<sup>#</sup> if it involves, on the part of an undertaking holding a dominant position, certain abusive conduct such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model ... provided that such conduct is liable to affect trade between Member States."<sup>29</sup>

The Court took a similar position in *Mexicar v Renault*.<sup>30</sup> In *Lederle*<sup>31</sup> the Commission did not force pharmaceutical companies to grant rights to the third party competitor.

The conclusion appears to be that under normal conditions a rights-holder should not have to give up his rights. He may, of course, based on the conditions established in the national patent legislation, be subjected to compulsory licensing if he does not exploit his monopoly right within stipulated time-limits.<sup>32</sup> Licensing could equally be required when the dominant company arbitrarily refuses to supply spare-parts to independent repairers, if it is charging excessive prices for the products or if it stops producing such products.

In contrast to the ordinary patent procedure handling compulsory licensing, the draw-back with the alternatives built upon competition considerations is that no mechanism exists for a prior determination whether the third party can validly claim a right to benefit from the property right.

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<sup>29</sup> *Id.*, paragraph [9].

<sup>30</sup> ECJ, Case 53/87, *Consortio Italiano Della Componentistica Di Ricambio Autoveicoli & Maxicar v Régie Nationale des Usines Renault ("Mexicar v Renault")*, 5 October 1988, [1988] ECR 6039.

<sup>31</sup> Complaints by *Lederle-Praxis Biologicals*, fn. 27.

<sup>32</sup> Under the Paris Convention, Article 4quater(2): Each member state is allowed to stipulate rules on compulsory licensing to prevent abuses "which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work." Normally exploitation shall commence within three years from the grant of the patent.

He will have to deliberately infringe the right and argue his case in a subsequent infringement procedure – with all the risks and disadvantages involved.

### Essential facilities

What happens if the rights-holder by his refusal is not protecting the product covered by the specific right, but rather a secondary, down-stream market? The product may be an "essential facility" on this market, which the rights-holder thereby can reserve for himself. In *Commercial Solvents*<sup>33</sup> the Court made clear that a dominant company could not abuse its dominant position and refuse to supply - or at least stop the further supply of - an essential raw material when this affected the structure of the market. A related problem occurred in *Magill*.<sup>34</sup>

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THE COURT OF JUSTICE  
OF THE EUROPEAN COMMUNITIES  
Joined Cases C-241/91 P and C-242/91 P

***"Magill"***

*Radio Telefis Eireann (RTE) and Independent Television Publications Ltd  
(ITP) v EC Commission*

6 April 1995

Reports of Cases 1995 pages I-743

### *Background*

Most households in Ireland and some 40% of the households in Northern Ireland received the major broadcasting channels in Ireland (BBC, RTE and ITV). The TV-channels published their weekly program listings in separate magazines and allowed under their copyright protection daily newspapers a right to publish such listings a day in advance.

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<sup>33</sup> ECJ, Case 6 & 7/73, *Istituto Chemioterapico Italiano & Commercial Solvents Corp. v. EC Commission* ("Commercial Solvents"), 6 March 1974, [1974] ECR 223.

<sup>34</sup> ECJ, Case C-241/91, *Magill*, fn. 2.

Magill attempted to publish a weekly magazine containing programs from all three channels, but was prevented by a court order. On complaint from Magill the Commission held that the TV-channels were abusing their dominant position.<sup>35</sup> The CFI basically concurred with the Commission<sup>36</sup> and the matter was appealed to the ECJ by RTE and ITV.

The CFI had determined that ITP enjoyed, as a consequence of its copyright in ITV and Channel 4 programme listings, which had been transferred to it by the television companies broadcasting on those channels, the exclusive right to reproduce and market those listings. It was thus able, at the material time, to secure a monopoly over the publication of its weekly listings in the TV Times, a magazine specialising in the programmes of ITV and Channel 4'. So far as the existence of an abuse of that dominant position was concerned, CFI considered that it was necessary to interpret Articles 82 in the light of copyright in programme listings. It pointed out that, in the absence of harmonisation of national rules or Community standardisation, determination of the conditions and procedures under which copyright was protected was a matter for national rules

CFI had also noted that the applicants, by reserving the exclusive right to publish their weekly television programme listings, were preventing the emergence on the market of a new product, namely a general television magazine likely to compete with their own magazines. The applicants were thus using their copyright in the programme listings produced as part of the activity of broadcasting in order to secure a monopoly in the derivative market of weekly television guides in Ireland and Northern Ireland. CFI also regarded it as significant in that regard that the applicants had authorised, free of charge, the publication of their daily listings and highlights of their weekly programmes in the press in both Ireland and the United Kingdom.

The conduct prevented the production and marketing of a new product, for which there was potential consumer demand, on the ancillary market of weekly television guides and thereby excluded all competition from that market solely in order to secure the applicants' respective monopolies. CFI held that this conduct went beyond what was necessary to fulfil the essential function of the copyright. The applicants' refusal to authorise third parties to publish their weekly listings was arbitrary and not justified. It was thus possible for the applicants to adapt to the conditions of a television magazine market, which was open to competition in order to ensure the commercial viability of their weekly publications.

CFI concluded that, although the programme listings were protected by national copyright, the conduct could not qualify for protection considering reconciliation between intellectual property rights and the free movement of goods and freedom of competition. The aim of that conduct was clearly incompatible with the objectives of Articles 82 EC.

### *Quotations from the legal grounds*

#### (b) Existence of abuse

[48] With regard to the issue of abuse, the arguments of the appellants and IPO wrongly presuppose that where the conduct of an undertaking in a

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<sup>35</sup> Commission, Decision, 89/205/EEG, *Magill TV Guide Limited v. Independent Television Publication Limited, British Broadcasting Corporation & Radio Telefis Eireann*, 21 December 1988, OJ 1989 L78/43.

<sup>36</sup> CFI, Case T-76/89, *Independent Television Publication Limited v EC Commission* ("ITP"), 10 July 1991, [1991] II ECR 575.

dominant position consists of the exercise of a right classified by national law as 'copyright', such conduct can never be reviewed in relation to Articles 82 EC<sup>#</sup>.

[49] Admittedly, in the absence of Community standardization or harmonization of laws, determination of the conditions and procedures for granting protection of an intellectual property right is a matter for national rules. Further, the exclusive right of reproduction forms part of the author's rights, so that refusal to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of a dominant position.<sup>37</sup>

[50] However, it is also clear from that judgment (paragraph 9) that the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct.

[51] In the present case, the conduct objected to is the appellants' reliance on copyright conferred by national legislation so as to prevent Magill - or any other undertaking having the same intention - from publishing on a weekly basis information (channel, day, time and title of programmes) together with commentaries and pictures obtained independently of the appellants.

[52] Among the circumstances taken into account by the Court of First Instance in concluding that such conduct was abusive was, first, the fact that there was, according to the findings of the Court of First Instance, no actual or potential substitute for a weekly television guide offering information on the programmes for the week ahead. On this point, the Court of First Instance confirmed the Commission's finding that the complete lists of programmes for a 24-hour period - and for a 48-hour period at weekends and before public holidays - published in certain daily and Sunday newspapers, and the television sections of certain magazines covering, in addition, 'highlights' of the week's programmes, were only to a limited extent substitutable for advance information to viewers on all the week's programmes. Only weekly television guides containing comprehensive listings for the week ahead would enable users to decide in advance which programmes they wished to follow and arrange their leisure activities for the week accordingly. The Court of First Instance also established that there was a specific, constant and regular potential demand on the part of consumers.<sup>38</sup>

[53] Thus the appellants - who were, by force of circumstance, the only sources of the basic information on programme scheduling which is the indispensable raw material for compiling a weekly television guide - gave viewers wishing to obtain information on the choice of programmes for the

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<sup>37</sup> Case 238/87 Volvo, fn.28, paragraphs [7 – 8].

<sup>38</sup> CFI, Case T-76/89, *ITP*, fn. 36, paragraph [48].

week ahead no choice but to buy the weekly guides for each station and draw from each of them the information they needed to make comparisons.

[54] The appellants' refusal to provide basic information by relying on national copyright provisions thus prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the appellants did not offer and for which there was a potential consumer demand. Such refusal constitutes an abuse under heading (b) of the second paragraph of Articles 82 EC<sup>#</sup>.

[55] Second, there was no justification for such refusal either in the activity of television broadcasting or in that of publishing television magazines.<sup>39</sup>

[56] Third, and finally, as the Court of First Instance also held, the appellants, by their conduct, reserved to themselves the secondary market of weekly television guides by excluding all competition on that market<sup>40</sup> since they denied access to the basic information which is the raw material indispensable for the compilation of such a guide.

[57] In the light of all those circumstances, the Court of First Instance did not err in law in holding that the appellants' conduct was an abuse of a dominant position within the meaning of Articles 82 EC<sup>#</sup>.

[58] It follows that the plea in law alleging misapplication by the Court of First Instance of the concept of abuse of a dominant position must be dismissed as unfounded. It is therefore unnecessary to examine the reasoning of the contested judgments in so far as it is based on Article 30 EC<sup>#</sup>.

#### Effects on trade between Member States (second plea in the appeal in Case C-241/91 P)

[59] With regard to the effects on trade between Member States, the Court of First Instance first reviewed the case-law of the Court of Justice before finding that 'the applicant's conduct modified the structure of competition on the market for television guides in Ireland and Northern Ireland and thus affected potential trade flows between Ireland and the United Kingdom.'

[60] The reasons given by the Court of First Instance for this conclusion were based on the effects of RTE's refusal to authorize third parties to publish its weekly listings on the structure of competition in the territory of Ireland and Northern Ireland. These, the Court of First Instance found, excluded all potential competition on the market in question, 'thus in effect maintaining the partitioning of the markets... (of) Ireland and Northern Ireland respectively.' It found that the appreciable effect which the policy in question had on potential commercial exchanges between Ireland and the

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<sup>39</sup> Id., paragraph [58].

<sup>40</sup> Case 6 & 7/73, Commercial Solvents, fn.33, paragraph [25].

United Kingdom was evidenced by the specific demand for a general television magazine. The Court of First Instance added that 'the relevant geographical area, within which a single market in television broadcasting services has already been achieved, likewise represents a single market for information on television programmes, particularly since trade is greatly facilitated by a common language'....

[67] It is to be noted at the outset that the Court of Justice has consistently held that, pursuant to Article 225 EC<sup>#</sup> and Article 51 of the Statute of the Court of Justice of the EEC, an appeal may rely only on grounds relating to infringement of rules of law, to the exclusion of any appraisal of the facts.<sup>41</sup> The arguments relied on by RTE must therefore be rejected in so far as they question the appraisal of the facts by the Court of First Instance.

[68] Nevertheless, the condition that trade between Member States must be affected is a question of law and, as such, subject to review by the Court of Justice.

[69] In order to satisfy the condition that trade between Member States must be affected, it is not necessary that the conduct in question should in fact have substantially affected that trade. It is sufficient to establish that the conduct is capable of having such an effect.<sup>42</sup>

[70] In this case, the Court of First Instance found that the applicant had excluded all potential competitors on the geographical market consisting of one Member State (Ireland) and part of another Member State (Northern Ireland) and had thus modified the structure of competition on that market, thereby affecting potential commercial exchanges between Ireland and the United Kingdom. From this the Court of First Instance drew the proper conclusion that the condition that trade between Member States must be affected had been satisfied.

[71] It follows that the plea in law alleging misapplication by the Court of First Instance of the concept of trade between Member States being affected must be dismissed.

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<sup>41</sup> ECJ, Case C-53/92 P, *Hilti v EC Commission*, 2 March 1994, [1994] ECR I-667, paragraph [10].

<sup>42</sup> ECJ, Case C-41/90, *Höfner and Elser v Macrotron*, 23 April 1991, [1991] ECR I-1979, paragraph [32] and Case 322/81, *Michelin*, fn.3, paragraph [104].

Further arguments were investigated by the ECJ,<sup>43</sup> including that Article 3 of Regulation 17 enabled the Commission to impose compulsory licensing.<sup>44</sup> CFI had infringed the principle of proportionality as the decision removed not only ITP's exclusive right of reproduction, but also its right of first marketing. There was no reciprocity between ITP and the competitors to whom it is required to grant licences, particularly the national newspapers.

The ECJ observed that Article 3 of Regulation 17 might include an order to act or bring an end to certain acts, practices or situations which are contrary to the Treaty. The Commission was entitled under Article 3 to require the appellants to provide that information. The imposition of that obligation - with the possibility of making authorisation of publication dependent on certain conditions, including payment of royalties - was the only way of bringing the infringement to an end. The principle of proportionality means that the burdens imposed on undertakings in order to bring an infringement of competition law to an end must not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed. The order addressed to the applicant was an appropriate and necessary measure to bring the infringement to an end.

In 1994 the Commission was involved in a matter, which indicates the true significance of the problem. Lederle, which is an American vaccine producer, complained to the Commission that Pasteur Mérieux, Merck and SK&B abused their dominant positions by not supplying and licensing registration documents for a Hep B vaccine to Lederle. Lederle's intention was to make a combination product consisting of its own vaccine and that of the other companies.

The Commission did not support the complaint.<sup>45</sup> "[A]t the current stage of EC competition law, it is highly doubtful whether one could impose an

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<sup>43</sup> Article 9(1) of the Berne Convention was also considered. It confers an exclusive right of reproduction and Article 9(2) allows a signatory State to permit reproduction only in certain special cases, provided that such reproduction does not conflict with normal exploitation of the work and not unreasonably prejudice the legitimate interests of the author. However, an agreement concluded prior to entry into force of the Treaty or prior to a Member State's accession cannot be relied on in intra-Community relations if the rights of non-member countries are not involved. Furthermore, the Paris Act, which amended Article 9(1) and (2) of the Convention was ratified by the UK only after its accession to the Community and has still not been ratified by Ireland. The Convention cannot be relied on since the Treaty can be amended only in accordance with the procedure laid down in Article 236.

<sup>44</sup> Relying on ECJ, Case 144/81, *Keurkoop v Nancy Kean Gifts*, 14 September 1982, [1982] ECR 2853, ITP submitted that only the Parliaments of Ireland and the United Kingdom may take away or replace the copyrights which they have conferred.

<sup>45</sup> Complaints by *Lederle-Praxis Biologicals*, fn. 27.

obligation upon a dominant firm (in eventual bulk intermediate Hep B market), as a remedy to ensure effective competition in the national Hep B markets, to share its intellectual property rights with third parties to allow them to develop, produce and market the same products (i.e. multivalents containing the Hep B antigen) which the alleged dominant firm was seeking to develop, produce and market." According to the Commission the sector required high investments. Even a simple refusal to supply could not be regarded as an abuse. Lederle was not an existing customer, cut off from supply. There had been no prior relationship.

Any other result would have been difficult to defend. Also dominant companies should be allowed to determine strategies for products developed by themselves and should not have to run a risk that any non-dominant competitor could ask for a right to this development, claiming that the dominant company would otherwise reserve the secondary product market for itself.<sup>46</sup>

Subsequently the Court in *Oscar Bronner*<sup>47</sup> refused to apply the essential facility reasoning in a case concerning distribution of daily new papers.

[47] ... the refusal by a press undertaking which holds a very large share of the daily newspaper market in a Member State and operates the only nationwide newspaper home-delivery scheme in that Member State to allow the publisher of a rival newspaper, which by reason of its small circulation is unable either alone or in cooperation with other publishers to set up and operate its own home-delivery scheme in economically reasonable conditions, to have access to that scheme for appropriate remuneration does not constitute abuse of a dominant position within the meaning of Article 86 of the Treaty.

*Bronner* appeared to put an end to essential facility reasoning by limiting *Magill* to very special circumstances. Lately references to essential facility have, however, become frequent and it appears that the American concept may very well have a future in Europe despite the fact that European law contains the instrument of compulsory licensing which has no equivalent in the US. With the judgment in *IMS*<sup>48</sup>, the concept of essential facility reappeared and the Court developed the reasoning of *Magill* by holding:

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<sup>46</sup> As is clear from ECJ, Case 6 & 7/73, *Commercial Solvents*, fn. 33, the situation could well be different if a dominant company determines to break up existing relations.

<sup>47</sup> ECJ, Case C-7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag*, 26 November 1998, [1998] ECR I-7791.

<sup>48</sup> ECJ, Case C-418/01, *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG*, 29 April 2004, n.y.p\*. Reference to the Court under Article 234 EC by the Landgericht Frankfurt am Main (Germany) for a preliminary ruling in the proceedings pending before that court on the interpretation of Article 82 EC. (Competition – Article 82 EC – Abuse of a

30 The answer to the second and third questions must, therefore, be that, for the purposes of examining whether the refusal by an undertaking in a dominant position to grant a licence for a brick structure protected by copyright which it owns is abusive, the degree of participation by users in the development of that structure and the outlay, particularly in terms of cost, on the part of potential users in order to purchase studies on regional sales of pharmaceutical products presented on the basis of an alternative structure are factors which must be taken into consideration in order to determine whether the protected structure is indispensable to the marketing of studies of that kind.

...

38 It is clear from that case-law that, in order for the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it is sufficient that three cumulative conditions be satisfied, namely, that that refusal is preventing the emergence of a new product for which there is a potential consumer demand, that it is unjustified and such as to exclude any competition on a secondary market.

With respect to the three criteria the Court explained that in order to determine if all competition risked being eliminated both actual and potential markets had to be taken into account. If the company requiring a license limited itself to duplicating an already existing product on the secondary market it was at least doubtful if a new product had emerged. Likewise, what can be considered an objective justification for a refusal to license remains a matter which will require further considerations. The important *IMS* judgment raises as many questions as it resolves.

### 1.3.3. Selective out-licensing

The second question is whether the dominant company is abusing its position by only granting licensees to certain third parties on a restrictive basis but not to others?

In *Magill* the TV-companies allowed certain magazines access to the information on future TV-programs, but refused Magill the same right when it wanted to produce a comprehensive weekly magazine. The question was decided on an argument similar to an essential facility. There is no case-law which deals with refusal to license as such. The Commission has established that when companies co-ordinate their behaviour in patent-pools the

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dominant position – Brick structure used to supply regional sales data for pharmaceutical products in a Member State – Copyright – Refusal to grant a licence)

condition is that they allow third parties access to the result in a non-discriminatory way,<sup>49</sup> which indicates that the policy favours non-discrimination. In the case regarding Lederle's request for a license to a certain vaccine, the Commission said that even a simple refusal to supply could not be regarded as an abuse.

Generally, a dominant company should be allowed to exercise its industrial property rights itself as established in the case-law presented above. It should also be entitled to grant a third non-dominant company an exclusive right to exercise this right in a certain territory. Competition will normally not be affected in a negative way by such a grant if the general conditions in the 2004 Technology Transfer Regulation have been adhered to. The remaining question is whether the Commission's statement in Lederle makes good law. If a dominant company has decided to grant non-exclusive licenses as a part of its business strategy, it may be doubted that it should be allowed arbitrarily to decide with whom it shall enter into relations. It can easily amount to an unlawful discrimination if it prevents others from having access to the same technology on substantially similar terms as offered to others. Any refusal to license in such situations should be objectively justified and based on qualitative requirements rather than arbitrary considerations.

As the Commission noted in *Lederle*, certain requirements must apply if the dominant company has had a prior relation with a customer and intends to terminate this relation. Under such conditions, the general statement that a dominant company carries a special responsibility must apply.

The 2004 Technology Transfer Regulation block exempts agreements, which impose obligations on the licensee as to how he may sell the licensed products. Non-exclusive licensing does not create a problem. Exclusive or selective distribution systems can be imposed provided that they comply with the Vertical Regulation.<sup>50</sup> Accordingly the licensee must *i.a.* be free to sell both actively and passively into territories granted to other licensees. Each licensee is a separate supplier. When the products incorporating the licensed technology are sold under a common brand there may be efficiency reasons for applying the same types of restraints between licensees' distribution systems as within a single vertical distribution system. If the brand is conveying quality and other relevant information to the consumer,

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<sup>49</sup> Commission notice on *IGR Stereo*, 1991 EC Commission Report on Competition Policy, point 94 and 1994 EC Commission Report on Competition Policy, point 92.

<sup>50</sup> Commission Regulation 2790/1999/EC of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices ("Vertical Regulation"), OJ 1999 L 336/21.

the selective strategy will be respected also in licensing agreements. The Commission is unlikely to challenge such restraints.<sup>51</sup>

The recent Microsoft judgment is one of kind and contains many aspects:

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Judgment of the Court of First Instance in Case T-201/04

***Microsoft***

17 September 2007

### **A. Background**

On 24 March 2004 the European Commission adopted a decision<sup>52</sup> finding that Microsoft had infringed Article 82 EC by abusing its dominant position in the client PC operating system market by engaging in two separate types of conduct. The Commission also imposed a fine of EUR 497,196,304 on Microsoft.

*The first type of abusive conduct* was Microsoft's refusal to supply its competitors with "interoperability information"<sup>53</sup> and to authorise them to use that information to develop and distribute products competing with its own products on the work group server operating system market, between October 1998 and the date of adoption of the decision. By way of remedy, the Commission required Microsoft to disclose the "specifications" of its client/server and server/server communication protocols to any undertaking wishing to develop and distribute work group server operating systems.

*The second type of abusive conduct* was the tying of Windows Media Player with the Windows PC operating system. By way of remedy, the Commission required Microsoft to offer for sale a version of Windows without Windows Media Player.

In order to assist the Commission in monitoring Microsoft's compliance with the decision, a mechanism of a monitoring trustee was established.

On 7 June 2004 Microsoft brought an action before the CFI for annulment of the decision or for annulment or a substantial reduction of the fine imposed on it.

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<sup>51</sup> Commission Notice: Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, OJ 2004 C 101/2, points 63 and 64.

<sup>52</sup> European Commission Decision of 24/03/2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft), OJ 2007 L32/23.

<sup>53</sup> Interoperability information is the "complete and accurate specifications for all the protocols [implemented] in Windows work group server operating systems and ... used by Windows work group servers to deliver file and print services and group and user administrative services, including the Windows domain controller services, Active Directory services and Group Policy services to Windows work group networks" (Art. 1(1) of the contested decision, para. 37 of the judgment).

## **B. The refusal to supply and to authorise the use of interoperability information**

### *B.1. The criteria on which an undertaking in a dominant position may be compelled to grant a licence*

- 229 ... Article 82 EC deals with the conduct of one or more economic operators involving the abuse of a position of economic strength which enables the operator concerned to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers... Furthermore, whilst the finding of a dominant position does not in itself imply any criticism of the undertaking concerned, that undertaking has a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition on the common market... Should it be established in the present case that the existing degree of interoperability does not enable developers of non-Microsoft work group server operating systems to remain viably on the market for those operating systems, it follows that the maintenance of effective competition on that market is being hindered.
- 319 ... the Court observes that... although undertakings are, as a rule, free to choose their business partners, in certain circumstances a refusal to supply on the part of a dominant undertaking may constitute an abuse of a dominant position within the meaning of Article 82 EC unless it is objectively justified.
- 331 It follows from the case-law cited above that the refusal by an undertaking holding a dominant position to license a third party to use a product covered by an intellectual property right cannot in itself constitute an abuse of a dominant position within the meaning of Article 82 EC. It is only in exceptional circumstances that the exercise of the exclusive right by the owner of the intellectual property right may give rise to such an abuse.
- 332 It also follows from that case-law that the following circumstances, in particular, must be considered to be exceptional:
- in the first place, the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market;
  - in the second place, the refusal is of such a kind as to exclude any effective competition on that neighbouring market;
  - in the third place, the refusal prevents the appearance of a new product for which there is potential consumer demand.
- 333 Once it is established that such circumstances are present, the refusal by the holder of a dominant position to grant a licence may infringe Article 82 EC unless the refusal is objectively justified.

336 ... the Court considers that it is appropriate, first of all, to decide whether the circumstances identified in *Magill* and *IMS Health*... are also present in this case. Only if it finds that one or more of those circumstances are absent will the Court proceed to assess the particular circumstances invoked by the Commission...

*B.1.1. The indispensable nature of the interoperability information*

392 ... the Court finds first, that, in light of the very narrow technological and privileged links that Microsoft has established between its Windows client PC and work group server operating systems, and of the fact that Windows is present on virtually all client PCs installed within organisations, the Commission was correct to find... that Microsoft was able to impose the Windows domain architecture as the '*de facto* standard for work group computing'...

393 Second, as the Commission states..., various sources of evidence... show that interoperability with the Windows environment is a factor that plays a key role in the uptake of Windows work group server operating systems.

413 Third, the Court observes that... the Commission asserts that '[w]hen a [non-Windows] work group server is added to a Windows work group network, the degree of interoperability with the Windows domain architecture that such a work group server is able to achieve will have an impact on the efficiency with which that work group server delivers its services to the users of the network'.

421 It follows from all of the foregoing considerations that Microsoft has not established that the Commission made a manifest error when it considered that non-Microsoft work group server operating systems must be capable of interoperating with the Windows domain architecture on an equal footing with Windows work group server operating systems if they were to be marketed viably on the market.

422 The Court also concludes from those considerations that the absence of such interoperability with the Windows domain architecture has the effect of reinforcing Microsoft's competitive position on the work group server operating systems market, particularly because it induces consumers to use its work group server operating system in preference to its competitors', although its competitors' operating systems offer features to which consumers attach great importance.

*B.1.2. Elimination of competition*

561 The Court finds that Microsoft's complaint is purely one of terminology and is wholly irrelevant. The expressions 'risk of elimination of competition' and 'likely to eliminate competition' are used without distinction by the Community judicature to reflect the same idea, namely that Article 82 EC does not apply only from the time when there is no more, or practically no more, competition on the market. If the Commission were required to wait until competitors were eliminated from the market, or until their elimination

was sufficiently imminent, before being able to take action under Article 82 EC, that would clearly run counter to the objective of that provision, which is to maintain undistorted competition in the common market and, in particular, to safeguard the competition that still exists on the relevant market.

- 562 In this case, the Commission had all the more reason to apply Article 82 EC before the elimination of competition on the work group server operating systems market had become a reality because that market is characterised by significant network effects and because the elimination of competition would therefore be difficult to reverse...
- 563 Nor is it necessary to demonstrate that all competition on the market would be eliminated. What matters, for the purpose of establishing an infringement of Article 82 EC, is that the refusal at issue is liable to, or is likely to, eliminate all effective competition on the market. It must be made clear that the fact that the competitors of the dominant undertaking retain a marginal presence in certain niches on the market cannot suffice to substantiate the existence of such competition.
- 593 The above factors confirm that Microsoft's refusal has the consequence that its competitors' products are confined to marginal positions or even made unprofitable. The fact that there may be marginal competition between operators on the market cannot therefore invalidate the Commission's argument that all effective competition was at risk of being eliminated on that market.
- 619 The Commission had even more reason to conclude that there was a risk that competition would be eliminated on that market because the market has certain features which are likely to discourage organisations which have already taken up Windows for their work group servers from migrating to competing operating systems in the future...
- 620 The Court therefore concludes that the circumstance that the refusal at issue entailed the risk of elimination of competition is present in this case.

#### *B.1.3. The new product*

- 647 The circumstance relating to the appearance of a new product, as envisaged in *Magill* and *IMS Health*... cannot be the only parameter which determines whether a refusal to license an intellectual property right is capable of causing prejudice to consumers within the meaning of Article 82(b) EC. As that provision states, such prejudice may arise where there is a limitation not only of production or markets, but also of technical development.
- 651 It must be borne in mind that... Microsoft's refusal prevented its competitors from developing work group server operating systems capable of attaining a sufficient degree of interoperability with the Windows domain architecture, with the consequence that consumers' purchasing decisions in respect of work group server operating systems were channelled towards Microsoft's products. The Court has also already observed... that it was apparent from a

number of documents in the file that the technologies of the Windows 2000 range, in particular Active Directory, were increasingly being taken up by organisations. As interoperability problems arise more acutely with work group server operating systems in that range of products than with those of the preceding generation..., the increasing uptake of those systems merely reinforces the 'lock-in' effect referred to in the preceding paragraph.

- 652 The limitation thus placed on consumer choice is all the more damaging to consumers because... they consider that non-Microsoft work group server operating systems are better than Windows work group server operating systems with respect to a series of features to which they attach great importance, such as 'reliability/availability of the ... system' and 'security included with the server operating system'.
- 653 ... the Commission was correct to consider that the artificial advantage in terms of interoperability that Microsoft retained by its refusal discouraged its competitors from developing and marketing work group server operating systems with innovative features, to the prejudice, notably, of consumers... That refusal has the consequence that those competitors are placed at a disadvantage by comparison with Microsoft so far as the merits of their products are concerned, particularly with regard to parameters such as security, reliability, ease of use or operating performance speed...
- 657 It must be borne in mind, in that regard, that Microsoft's competitors would not be able to clone or reproduce its products solely by having access to the interoperability information covered by the contested decision. Apart from the fact that Microsoft itself acknowledges in its pleadings that the remedy prescribed by Article 5 of the contested decision would not allow such a result to be achieved..., it is appropriate to repeat that the information at issue does not extend to implementation details or to other features of Microsoft's source code... The Court also notes that the protocols whose specifications Microsoft is required to disclose in application of the contested decision represent only a minimum part of the entire set of protocols implemented in Windows work group server operating systems.
- 658 Nor would Microsoft's competitors have any interest in merely reproducing Windows work group server operating systems. Once they are able to use the information communicated to them to develop systems that are sufficiently interoperable with the Windows domain architecture, they will have no other choice, if they wish to take advantage of a competitive advantage over Microsoft and maintain a profitable presence on the market, than to differentiate their products from Microsoft's products with respect to certain parameters and certain features. It must be borne in mind that... the implementation of specifications is a difficult task which requires significant investment in money and time.
- 665 The Court concludes from all of the foregoing considerations that the Commission's finding to the effect that Microsoft's refusal limits technical development to the prejudice of consumers within the meaning of Article

82(b) EC is not manifestly incorrect. The Court therefore finds that the circumstance relating to the appearance of a new product is present in this case.

*B.1.4. The absence of objective justification*

- 690 The Court considers that... the fact that the communication protocols covered by the contested decision, or the specifications for those protocols, are covered by intellectual property rights cannot constitute objective justification within the meaning of *Magill* and *IMS Health*... Microsoft's argument is inconsistent with the *raison d'être* of the exception which that case-law thus recognises in favour of free competition, since if the mere fact of holding intellectual property rights could in itself constitute objective justification for the refusal to grant a licence, the exception established by the case-law could never apply. In other words, a refusal to license an intellectual property right could never be considered to constitute an infringement of Article 82 EC even though in *Magill* and *IMS Health*... the Court of Justice specifically stated the contrary.
- 691 It must be borne in mind that... the Community judicature considers that the fact that the holder of an intellectual property right can exploit that right solely for his own benefit constitutes the very substance of his exclusive right. Accordingly, a simple refusal, even on the part of an undertaking in a dominant position, to grant a licence to a third party cannot in itself constitute an abuse of a dominant position within the meaning of Article 82 EC. It is only when it is accompanied by exceptional circumstances such as those hitherto envisaged in the case-law that such a refusal can be characterised as abusive and that, accordingly, it is permissible, in the public interest in maintaining effective competition on the market, to encroach upon the exclusive right of the holder of the intellectual property right by requiring him to grant licences to third parties seeking to enter or remain on that market. It must be borne in mind that it has been established above that such exceptional circumstances were present in this case.
- 696 The Court further observes that in the contested decision the Commission did not simply reject Microsoft's assertion that the fact that the technology concerned was covered by intellectual property rights justified its refusal to disclose the relevant information. The Commission also examined the applicant's argument that if it were required to give third parties access to that technology there would be a negative impact on its incentives to innovate...
- 710 The Commission came to a negative conclusion but not by balancing the negative impact which the imposition of a requirement to supply the information at issue might have on Microsoft's incentives to innovate against the positive impact of that obligation on innovation in the industry as a whole, but after refuting Microsoft's arguments relating to the fear that its products might be cloned..., establishing that the disclosure of interoperability was widespread in the industry concerned... and showing

that IBM's commitment to the Commission in 1984 was not substantially different from what Microsoft was ordered to do in the contested decision... and that its approach was consistent with Directive 91/250...

- 711 It follows from all of the foregoing considerations that Microsoft has not demonstrated the existence of any objective justification for its refusal to disclose the interoperability at issue.
- 712 As the exceptional circumstances identified by the Court of Justice in *Magill* and *IMS Health*... were also present in this case, the first part of the plea must be rejected as wholly unfounded.

### ***B.2. Taking proper account of the obligations imposed on the Communities by the TRIPS Agreement***

- 798 The Court holds that the principle of consistent interpretation thus invoked by the Court of Justice applies only where the international agreement at issue prevails over the provision of Community law concerned. Since an international agreement, such as the TRIPS Agreement, does not prevail over primary Community law, that principle does not apply where, as here, the provision which falls to be interpreted is Article 82 EC.
- 801 It is settled case-law that, given their nature and structure, WTO agreements are not in principle among the rules in the light of which the Community judicature is to review the legality of measures adopted by the Community institutions...
- 802 It is only where the Community has intended to implement a particular obligation assumed under the WTO or where the Community measure refers expressly to specific provisions of the WTO agreements that the Community judicature must review the legality of the Community measure in question in the light of the WTO rules..
- 803 As the circumstances of the present case clearly do not correspond with either of the two situations described in the preceding paragraph, Microsoft cannot rely on Article 13 of the TRIPS Agreement in support of its claim for annulment of Articles 2, 4, 5 and 6 of the contested decision. Accordingly, there is no need to examine the arguments which Microsoft, supported by ACT, puts forward to substantiate its assertion that the conditions envisaged by Article 13 of the TRIPS Agreement are not satisfied in this case.
- 813 It follows that the single plea put forward in connection with the first issue must be rejected as unfounded in its entirety.

### **C. The bundling of Windows Media Player with the Windows client PC operating system**

#### ***C.1. Alleging infringement of Art. 82 EC***

- 859 The Court considers that the Commission's analysis of the constituent elements of bundling is correct and that it is consistent both with Article 82 EC and with the case-law. The Commission was correct to rely on the

factors set out at recital 794 to the contested decision<sup>54</sup> and on the fact that the tying was without objective justification in deciding whether Microsoft's conduct constituted abusive tying. Those factors can be deduced both from the very concept of bundling and from the case-law...

*C.1.1. The undertaking concerned is dominant in the tying product market*

854 ... the Commission first observes that Microsoft has a dominant position on the client PC operating systems market... The Court notes that Microsoft does not dispute that fact.

*C.1.2. The existence of two separate products*

917 First of all, it must be observed that... the distinctness of products for the purpose of an analysis under Article 82 EC has to be assessed by reference to customer demand...

922 In the case of complementary products, such as client PC operating systems and application software, it is quite possible that customers will wish to obtain the products together, but from different sources. For example, the fact that most client PC users want their client PC operating system to come with word-processing software does not transform those separate products into a single product for the purposes of Article 82 EC.

924 ... there exists a demand for client PC operating systems without streaming media players, for example by companies afraid that their staff might use them for non-work-related purposes. That fact is not disputed by Microsoft.

925 Next, the Court finds that a series of factors based on the nature and technical features of the products concerned, the facts observed on the market, the history of the development of the products concerned and also Microsoft's commercial practice demonstrate the existence of separate consumer demand for streaming media players.

944 The Court concludes from all of the foregoing considerations that the Commission was correct to find that client PC operating systems and streaming media players constituted separate products.

*C.1.3. Consumers are unable to choose to obtain the tying product without the tied product*

962 As the Commission correctly states... in most cases that coercion is applied primarily to OEMs, and is then passed on to consumers. OEMs, who assemble client PCs, install on those PCs a client PC operating system provided by a software producer or developed by themselves. OEMs who wish to install a Windows operating system on the client PCs which they

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<sup>54</sup> Recital 794 of the contested decision reads: "Tying prohibited under Article 82 of the Treaty requires the presence of the following elements: (i) the tying and tied goods are two separate products; (ii); (ii) the undertaking concerned does not give customers a choice to obtain the tying product without the tied product; and (iv) tying forecloses competition".

assemble must obtain a licence from Microsoft in order to do so. Under Microsoft's licensing system, it is not possible to obtain a licence on the Windows operating system without Windows Media Player. The Court notes, in that regard, that it is common ground that the vast majority of sales of Windows client PC operating systems are made through OEMs, that is to say, by means of licences purchased when a client PC is purchased, while only 10% of sales of those systems are generated by the sale of individual Windows licences.

- 963 The coercion thus applied to OEMs is not just contractual in nature, but also technical. In effect, it is common ground that it was not technically possible to uninstall Windows Media Player.
- 968 First, while it is true that Microsoft does not charge a separate price for Windows Media Player, it cannot be inferred that the media player is provided free of charge. As is evident from paragraph 232 of Microsoft's application, the price of Windows Media Player is included in the total price of the Windows client PC operating system.
- 969 Second, and in any event, it does not follow from either Article 82(d) EC or the case-law on bundling that consumers must necessarily pay a certain price for the tied product in order for it to be concluded that they are subject to supplementary obligations within the meaning of that provision.
- 970 Nor, in the second place, is it relevant for the purposes of the examination of the present condition that, as Microsoft claims, consumers are not obliged to use the Windows Media Player which they find pre-installed on their client PC and that they can install and use other undertakings' media players on their PCs. Again, neither Article 82(d) EC nor the case-law on bundling requires that consumers must be forced to use the tied product or prevented from using the same product supplied by a competitor of the dominant undertaking in order for the condition that the conclusion of contracts is made subject to acceptance of supplementary obligations to be capable of being regarded as satisfied...
- 971 The Court observes that, as will be explained in greater detail when it examines the condition relating to the restriction of competition on the market due to the bundling in question, first, OEMs are deterred from pre-installing a second streaming media player on client PCs and, second, consumers have an incentive to use Windows Media Player at the expense of competing media players, notwithstanding that the latter players are of better quality.
- 975 It follows from all of the foregoing considerations that the Commission was correct to find that the condition relating to the imposition of supplementary obligations was satisfied in the present case.

#### *C.1.4. The foreclosure of competition*

- 1046 Thus, the release of the bundled version of Windows and Windows Media Player as the only version of the Windows operating system capable of being

pre-installed by OEMs on new client PCs had the direct and immediate consequence of depriving OEMs of the possibility previously open to them of assembling the products which they deemed most attractive for consumers and, more particularly, of preventing them from choosing one of Windows Media Player's competitors as the only media player. On this last point, it must be borne in mind that at the time RealPlayer had a significant commercial advantage as market leader. As Microsoft itself acknowledges, it was only in 1999 that it succeeded in developing a streaming media player that performed well enough, given that its previous player, NetShow, 'was unpopular with customers because it did not work very well'... It must also be borne in mind that between August 1995 and July 1998 it was RealNetworks' products – first RealAudio Player, then RealPlayer – that were distributed with Windows. There is therefore good reason to conclude that if Microsoft had not adopted the impugned conduct competition between RealPlayer and Windows Media Player would have been decided on the basis of the intrinsic merits of the two products.

1047 Furthermore, even if developers of media players competing with Microsoft succeeded in reaching an agreement with OEMs for the pre-installation of their product, they would still be in a disadvantageous competitive position by comparison with Microsoft. First, as Windows Media Player cannot be removed by OEMs or by users from the package consisting of Windows and Windows Media Player, the third-party media player could never be the only media player on the client PC. In particular, the bundling prevents developers of third-party media players from competing with Microsoft for that purpose on the intrinsic merits of the products. Second, as the number of media players that OEMs are prepared to pre-install on client PCs is limited, developers of third-party media players compete with each other in order to have their products pre-installed, while, owing to the bundling, Microsoft evades that competition and the significant additional costs which it entails...

1048 It follows from those findings that the Commission was correct to conclude that 'the option of entering into agreements with OEMs [was] a less efficient and effective means of obtaining media player distribution in the face of Microsoft's tying' (recital 849 to the contested decision).

1049 ... the Court finds that the Commission was also correct to find that methods of distributing media players other than pre-installation by OEMs could not offset Windows Media Player's ubiquity...

1088 It follows from the foregoing considerations that the final conclusion which the Commission sets out at recitals 978 to 984 to the contested decision concerning the anti-competitive effects of the bundling is well founded. The Commission is correct to make the following findings:

- Microsoft uses Windows as a distribution channel to ensure for itself a significant competitive advantage on the media players market...

- because of the bundling, Microsoft’s competitors are a priori at a disadvantage even if their products are inherently better than Windows Media Player...
- Microsoft interferes with the normal competitive process which would benefit users by ensuring quicker cycles of innovation as a consequence of unfettered competition on the merits...
- the bundling increases the content and applications barriers to entry, which protect Windows, and facilitates the erection of such barriers for Windows Media Player ...
- Microsoft shields itself from effective competition from vendors of potentially more efficient media players who could challenge its position, and thus reduces the talent and capital invested in innovation of media players...
- by means of the bundling, Microsoft may expand its position in adjacent media-related software markets and weaken effective competition, to the detriment of consumers...
- by means of the bundling, Microsoft sends signals which deter innovation in any technologies in which it might conceivably take an interest and which it might tie with Windows in the future...

1090 It follows from all of the foregoing considerations that Microsoft has put forward no argument capable of vitiating the merits of the findings made by the Commission in the contested decision concerning the condition relating to the foreclosure of competition. The Court must therefore conclude that the Commission has demonstrated to the requisite legal standard that the condition was satisfied in the present case.

*C.1.5. The absence of objective justification*

1150 Thus, the Commission does not interfere with Microsoft’s business model in so far as that model includes the integration of a streaming media player in its client PC operating system or the possibility for that operating system to allow software developers and Internet site creators to take advantage of the benefits offered by the ‘stable and well-defined’ Windows platform. The Commission takes issue with the fact that Microsoft does not market the version of Windows that corresponds to its business model and at the same time a version of that system without Windows Media Player, thus permitting OEMs or end users wishing to do so to install the product of their choice on their client PC as the first streaming media player.

1152 As the Commission correctly observes... by such an argument Microsoft is in fact claiming that the integration of Windows Media Player in Windows and the marketing of Windows in that form alone lead to the de facto standardisation of the Windows Media Player platform, which has beneficial effects on the market. Although, generally, standardisation may effectively

present certain advantages, it cannot be allowed to be imposed unilaterally by an undertaking in a dominant position by means of tying.

- 1153 The Court further notes that it cannot be ruled out that third parties will not want the de facto standardisation advocated by Microsoft but will prefer it if different platforms continue to compete, on the ground that that will stimulate innovation between the various platforms.
- 1154 Furthermore, as the Commission and SIIA rightly submit, the other benefits on which Microsoft relies could just as easily be obtained in the absence of the impugned conduct.
- 1159 Last, the Court notes that... Microsoft does not show that the integration of Windows Media Player in Windows creates technical efficiencies or, in other words, that it 'lead[s] to superior technical product performance'...
- 1167 It follows from all of the foregoing considerations that Microsoft has not demonstrated the existence of any objective justification for the abusive bundling of Windows Media Player with the Windows client PC operating system.

### ***C.2 Failure to comply with the obligations imposed on the Communities by the TRIPS Agreement***

- 1189 However, as the Court has already stated at paragraph 801 above, it is settled case-law that, given their nature and structure, WTO Agreements are not in principle among the rules by reference to which the Community judicature will review the legality of measures adopted by the Community institutions.
- 1190 As the Court has also already observed at paragraph 802 above, it is only where the Community has intended to implement a particular obligation assumed under the WTO or where the Community measure refers expressly to specific provisions of the WTO Agreements that the Community judicature must review the legality of the Community measure in question in the light of the WTO rules. As the circumstances of the present case clearly do not correspond to either of those two situations, Microsoft cannot rely on the TRIPS Agreement, in particular its Articles 13, 17 and 20, in support of its application for annulment of the contested decision in so far as it concerns the bundling of Windows and Windows Media Player.
- 1191 It follows that this part of the first plea must be rejected without there being any need to examine the arguments which Microsoft has raised in support of it.
- 1192 In any event, there is nothing in the provisions of the TRIPS Agreement to prevent the competition authorities of the members of the WTO from imposing remedies which limit or regulate the exploitation of intellectual property rights held by an undertaking in a dominant position where that undertaking exercises those rights in an anti-competitive manner. Thus, as the Commission correctly observes, it follows expressly from Article 40(2) of the TRIPS Agreement that the members of the WTO are entitled to

regulate the abusive use of such rights in order to avoid effects which harm competition. Article 40(2) provides as follows:

‘Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.’

1193 It follows from all of the foregoing that the first plea must be rejected as unfounded in its entirety.

### ***C.3. Alleging breach of the principle of proportionality***

1223 Next, the Court considers that, far from being disproportionate, the remedy prescribed in Article 6(a) of the contested decision is an appropriate means of putting an end to the abuse in question and of resolving the competition issues identified, while causing the least possible inconvenience to Microsoft and its business model.

1224 Thus, the implementation of that measure does not entail any change in Microsoft’s current technical practice other than the development of the version of Windows imposed by Article 6(a) of the contested decision.

1225 In particular, Microsoft retains the right to continue to offer the bundle of Windows and Windows Media Player. It must be borne in mind that the Commission’s sole intention is to make it possible for consumers to obtain Windows without Windows Media Player.

1226 Furthermore, as the Commission correctly observes, the remedy does not affect Microsoft’s ability to market its media player and, in particular, to offer it for downloading over the Internet.

1227 Last, the Court finds that... the Commission was correct to consider that the measures taken by Microsoft pursuant to the United States settlement were not sufficient to put an end to the abuse and to resolve the competition issues identified.

1228 It follows from all of the foregoing considerations that the second plea must be rejected as unfounded.

### ***D. The independent monitoring trustee***

1268 The Court considers that by establishing a monitoring mechanism involving the appointment of an independent monitoring trustee as referred to in Article 7 of the contested decision, and charged with the functions set out, in particular, at recital 1048(iii) and (iv) to that decision, the Commission went far beyond the situation in which it retains its own external expert to provide

advice when it investigates the implementation of the remedies prescribed in Articles 4, 5 and 6 of the contested decision.

- 1269 In effect, by Article 7 of the contested decision, the Commission requires the appointment of a trustee who, in the performance of his tasks, is independent not only of Microsoft but also of the Commission itself, in so far as he is required to act on his own initiative and upon application by third parties in the exercise of his powers. As the Commission observes at recital 1043 to the contested decision, that requirement goes beyond a mere obligation to report to the Commission on Microsoft's actions.
- 1270 Furthermore, the role envisaged for the monitoring trustee is not limited to putting questions to Microsoft and reporting the answers to the Commission, or to advice concerning the implementation of the remedies. As regards the obligation imposed on Microsoft to allow the monitoring trustee, independently of the Commission, access to information, documents, premises and employees and also to the source code of its relevant products, the Court notes that no limit in time is envisaged for the continuing intervention of the monitoring trustee in monitoring Microsoft's activities related to the remedies. Furthermore, it is clear from recital 1002 to the contested decision that the Commission considers that the obligation to disclose interoperability information must apply 'in a prospective manner' to future generations of Microsoft's products.
- 1271 It follows that the Commission has no authority, in the exercise of its powers under Article 3 of Regulation No 17, to compel Microsoft to grant to an independent monitoring trustee powers which the Commission is not itself authorised to confer on a third party. The second subparagraph of Article 7 of the contested decision is therefore without legal basis, particularly in so far as it entails the delegation to the monitoring trustee of powers of investigation which the Commission alone can exercise pursuant to Regulation No 17.
- 1272 If, moreover, as the Commission maintains, its intention was to establish a purely consensual mechanism, there was no need to order such a mechanism in Article 7 of the contested decision.
- 1273 Last, the Commission exceeds its powers in so far as Article 7 of the contested decision, read with recital 1048(v) to that decision, makes Microsoft responsible for all the costs associated with the appointment of the monitoring trustee, including his remuneration and the expenditure incurred in carrying out his functions.
- 1274 There is no provision of Regulation No 17 that authorises the Commission to require an undertaking to bear the costs which the Commission incurs as a result of monitoring the implementation of remedies.
- 1278 It follows from all of the foregoing considerations that Article 7 of the contested decision has no legal basis in Regulation No 17 and therefore exceeds the Commission's powers of investigation and enforcement under

Regulation No 17 in so far as it orders Microsoft to submit a proposal for the establishment of a mechanism which must include the appointment of an independent monitoring trustee empowered to access, independently of the Commission, Microsoft's assistance, information, documents, premises and employees and also the source code of its relevant products and also provides that Microsoft is to bear all the costs of the appointment of the monitoring trustee, including his remuneration. The Commission cannot therefore retain the right to impose such a mechanism by adopting a decision in the event that it considers that the mechanism proposed by Microsoft is not suitable.