MICROSOFT IN EUROPE*

1. Introduction

Over the years the DOJ and the European Commission have worked together in a number of parallel cases in the information technology sector. In the 1980s it was IBM[1]. In the 1990s it was Microsoft[2]. In the 2000s it seems once again to be Microsoft. The Microsoft cases in the most recent round however have concerned two different types of software in relation to the Windows platform. The Microsoft case in the USA involved inter alia the web browser market. The Microsoft case in Europe focuses on the server market. On 3 August 2000, the Commission issued a Statement of Objections after investigating a complaint by Sun Microsystems alleging that Microsoft was providing inadequate information about interface codes for Sun to equip its servers to interoperate smoothly with Microsoft's Windows platform. The Commission also alleged that Microsoft was refusing to license its software to Sun while at the same time giving such licenses to Sun's rivals.[3] A further statement of

* Steve Anderman, Professor of Law, University of Essex, England.
Thanks to Professor Rudolph Peritz of New York Law School for many discussions in this field of enquiry.
[1] IBM [1984] OJ L 118/24 [1984] 2 CMLR 342.
[2] Microsoft IP (94) 643 [1994] 5 CMLR 143.
[3] IP/00/906.

objections was issued by the Commission on 30 August 2001[4] which merged with the earlier procedure. A statement of objections, in the Commission's own words, is a formal step in European antitrust procedure and does not prejudge the final outcome.

A decision is awaited from the Commission. The facts as alleged in the case, however, offer a useful hypothetical to examine the way EC competition law currently strikes a balance between its attempts to ensure that effective competition is maintained on markets and the entitlement of IP right holders to exercise their rights. In principle in the information technology sector these two fields of law are often thought to be reconcilable because each in its own way contributes to consumer welfare and innovation[5]. However, in the case law of the European Court of Justice, the Court of First Instance and in the decisions of the European Commission, it appears that at points of conflict the logic of the reward/incentive function of intellectual property rights tends on occasion to be subordinated to the logic of preserving effective competition on "markets."

In the wake of the Microsoft case in the USA, economists have frequently observed that the industries in the new economy have different characteristics than those in the old. Products competing in the new economy, often relying on information technology and often heavily protected by intellectual property rights, tend to produce strong market leaders often achieving the position of de facto industrial standards.[6]

[4] IP/01/1232. This statement also alleged that Microsoft may have acted illegally by incorporating its new Media Player produce into its Windows PC operating system.
[5] See e.g. *Atari Games Corp. v. Nintendo of America, Inc.,* 897 F.2d 1572, 1576 (Fed. Cir. 1990).
[6] Katz, Michael L. and Shapiro, Carl. "Antitrust in Software Markets," in J. A. Eisenach, ed., *Competition, innovation and the Microsoft monopoly.* New York: Kluwer, 1999, pp. 29-81.

Yet Schmalansee and others have argued that competition in markets in the new economy takes the form of competition *for* the market rather than the traditional form of competition *in* the market.[7] The point has eloquently been made that competition in high technology markets in which rival products can leapfrog each other either by offering greater functionality at a lower price or by producing the next new product offers a type of market that more closely corresponds to the Schumpeterian notion of "creative destruction."[8] The conclusion has also been drawn that although monopolies or market dominance may be inevitable in such markets, such concentrations of market power are inherently "fragile."[9] Indeed, on occasion, this argument has been combined with the point that innovation helps to create a strong element of *self correction* making such markets workably competitive even where markets shares are high, as they invariably tend to be and where barriers to entry are strong in part because of the use of intellectual property rights protection.[10] It is true that one can point to succeeding generations of standard products disappearing and being replaced by competitors.

In the European perspective, however, much of the argument that the inherent fragility of market leadership does away with the need for regulation of markets by the competition authorities has not been viewed as altogether credible. The European Commission's view is that even if creative destruction may take place eventually, there are periods where "fragile" market power sustains itself for years. Even during transitional periods, the conduct of

---

[7] R. Schmalensee, "Antitrust Issues in Schumpeterian Industries" 90 Am. Econ. Rev. (Papers and Proceedings) 192 at 193 (2000)
[8] Ibid.
[9] Ibid.
[10] See e.g. Teece and Coleman, "The Meaning of Monopoly: Antitrust Analysis in High Technology" Industries, Antitrust Bull 801 (1998).

dominant undertakings with extensive market power needs to be regulated using the usual measures of competition policy[11].

Moreover, the European Commission, along with the DoJ and the FTC, has taken careful note that new economy industries are often based on combinations of complementary products rather than single products and these complementary products produce “systems effects” and indirect “network externalities” which entail that increases in demand for and supply of one of a system of two or more related products, can set off a mutually reinforcing process which snowballs and eventually “tips” markets in favour of one system of complementary products over another. In such cases competing products can end up being ejected from the market irrespective of their technical superiority. The Betamax/VHS rivalry offers a good example.[12]

Consequently, while market dominance may ultimately be at risk owing to the process of competition for markets, the presence of indirect network effects resulting from complementary products in systems, represents a new type of competition concern particularly where dominance of one product in a system is shored up by an applications barrier or impediment to entry. During the pre-tipping stage, there is a risk that alliances may be struck which unfairly affect competition on the merits and the Merger Task Force of the European commission has used its merger policy to prevent the acquisition of gatekeeper status to secondary related markets and thereby foreclose entry to such markets[13]. After the tipping stage the Commission has accepted that the dominance of the market leader can be

---

[11] See e.g. M. Monti *"Barriers to Cyberspace"* Kangaroo Group Brussels 18 September 2000.
[12] See e.g. W Brian Arthur, “Competing Technologies, Increasing Returns, and Lock-In by Historical Events” 99 Econ. J. 116 (1989); but see too for a different view S. Liebowitz& S. Margolis, WINNERS,LOSERS &MICROSOFT< (1999) at 120-127.
[13] See e.g. S. Anderman, “EC Competition Law and Intellectual Property Rights In The New Economy” (2002, Antitrust Bulletin, forthcoming).

reinforced by an applications barrier to entry as well as the resources, including the IPR resources, of the incumbent firm because dominance as such is not illegal under European law. In such a case however, the dominant firm is subject to the limitations on abusive conduct in Article 82 of the Treaty. Under Article 82 moreover the regulation of the conduct of dominant firms is not restricted to the market in which the firm is dominant but canextend to conduct in *secondary dependent markets.* The analysis of this legal framework throws much light on the way in information technology markets, as in many others, the entitlement of IP right holders to exercise their rights fully in accordance with intellectual property law gets caught at times in the crossfire of competition concerns. As Mr Monti, the European Commissioner for Competition, put it in the 3 August 2000 press release on the Microsoft case:

> "The Commission welcomes all genuine innovation and advances in computer technology wherever they come from - as highly positive developments for consumers and industry alike. Effective protection of copyrights and patents is most important for technological progress. However, we will not tolerate the extension of existing dominance into adjacent markets through the leveraging of market power by anti-competitive means and under the pretext of copyright protection. All companies that want to do business in the European union must play by its antitrust rules and I'm determined to act for their rigorous enforcement."[14]

What precisely are those antitrust rules that all companies must play by?

2. Article 82 of the European Treaty

2.1 Introduction

[14] See statement by M. Monti in Press Release 3 August 2000 IP/00/906.

Article 82 of the Treaty, the counterpart of Section 2 of the Sherman Act, regulates the conduct of firms which have already achieved a position of market dominance to ensure that they are not abusing the rules of fair competition during their period of market power. Achieving dominance is not itself unlawful but once a firm (or firms) achieve(s) dominance in a market, it has a "special responsibility" not to act abusively towards its competitors as well as customers, i.e. "not to hinder the maintenance or development of comopetition on markets which has already been weakened by the existence of a dominant firm."[15]

Article 82 prohibits a range of abuses of dominant market positions relevant to IPR owners such as tie ins, predatory and discriminatory pricing, refusals to supply and license. It is enforced by the Directorate General Competition (DG Comp) of the European Commission with a power to levy a fine of up to 10% of world-wide turnover of an "undertaking," which can mean an entire multinational corporation such as Microsoft. It can also make remedial orders including orders for compulsory licensing and compulsory access to interface information.

It has long been argued by IP specialists that there should be a core or irreducible minimum right of exercise of *each* intellectual property right which in principle should be impervious to the measures of competition policy. In the EC context this core has variously been conceptualised as the "existence" or "specific subject matter" or "essential function" of the intellectual property right.[16] The case law of the European Court of Justice and latterly the Court of First Instance however indicate that such arguments have not been fully accepted though the point has been taken that conpetition law will not interfere with the exercise of

[15] *Michelin v Commission* [1983] ECR 3461

IPRs in normal circumstances. If, however, in exceptional circumstances the exercise of an intellectual property right conflicts with Article 82 then it may be curbed to the extent that it is in conflict with that Treaty provision.[17] Hence to determine the full scope of the freedom to exercise an intellectual property right it is necessary to appreciate the detailed contours of the Treaty provisions as well as the IPR legislation itself.

The cases interpreting Article 82 have recognized the legitimacy of the internal logic of intellectual property rights legislation but have not given the exercise of IPRs by right holders a complete immunity from competition measures. The overall judicial and administrative view is that competition law can only act in "exceptional circumstances" to place a limit on the lawful exercise of intellectual rights but the flip side of that proposition is that in very carefully defined exceptional cases competition law can be used to curb the full exercise of an intellectual property right as defined by its granting legislation.

2.2 Article 82 and the Exercise of Intellectual Property Rights

Article 82 of the Treaty prohibits any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it. The examples of abuse given in Article 82 include (a) unfair pricing, (c) discriminatory pricing and (d) tie-ins. However, Article 82 also extends to such abuses as exclusive dealing, predatory pricing, refusals to supply and license under Article 82(b).

[16] See discussion in I. GOVAERE, THE USE AND ABUSE OF INTELLECTUAL PROPERTY RIGHTS IN EC LAW (Sweet &Maxwell 1996)

[17] See S. ANDERMAN, EC COMPETITION LAW AND INTELLECTUAL PROPERTY RIGHTS (Oxford University Press 1998 and 2000).

A finding of an abuse of refusing to supply or license, or refusing to provide full interfact information, abuses which are particularly applicable to IPR holders, can be based on Article 82 (b) which declares it to be an abuse to limit “production, markets or technical development to the prejudice of consumers.” It can also be based on Article 82(c) which provides that it can be an abuse to apply “dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage.”

Under Article 82 the competition authorities often deal with a market that has “tipped.” Once a market has tipped and the firm has achieved market dominance by establishing what is effectively a market standard, the competition concern is that the firm may use its power in the market to unfairly exclude competitors in the market in which it is dominant or *to leverage its dominance improperly in a secondary dependent market*.[18] Hence, under Article 82, the definition of markets is crucial to the definition of *abuse* in the exercise of intellectual property rights as well as the more traditional issue of whether the IPR holder is *dominant* in a particular market.

3. Article 82 and the Concept of Dominance

3.1 The Relevant Market, Dominance and IPRS

Under EC law, the DG Comp of the European Commission measures dominance on a particular market, the “relevant market.” A relevant market is defined by choosing a product

[18] In either case, a dominant firm, whether the dominance is reinforced by an IPR or not, may compete on the merits even if such a marketing strategy results in increased levels of dominance in both markets This would certainly be true if the dominant firm wins custom by low but non-predatory prices reflecting efficiencies. See e.g. *AKZO v Commission* [1991] ECR 1-3359.

and determining whether other products are substitutable or interchangeable with that product and therefore within the same market. If the relevant product is a single product say a banana[19]or a rubber tire[20] or Vitamin A[21] then the Commission applies a test of substitutability including the familiar SSNIP test as a method of determining whether other products are in the same market.

If however a product is a complex product, such as a web browser integrated with a windows desktop platform or a server designed to interoperate with the Windows desktop platform or a commercially designed "system" consisting of component parts, there is an initial issue of discretion in determining whether the relevant product with which to begin the process of defining a market. Is the starting point for investigation, i.e. the "relevant product," to be the "system", or will each component be taken as a relevant product with which to start the investigation of the relevant market?

To the extent that DG Comp opts to start its market definition with components as separate products rather than systems of products, it defines markets narrowly and naturally makes it easier to find dominance. The Commission's practice of defining markets narrowly is not directed specifically at the IP right holders. It is part of a wider tendency to regulate essential infrastructures which create dependency relationships or "lock ins" in neighbouring markets. Its actions, as openly argued by the Commission in the *Magill* case[22], are in part prompted by a desire to use Article 82 to supervise effective competition in markets in the new economy of information technology and telecommunications. The Commission has also been open about

[19] *United Brands v Commission* [1978] ECR 207
[20] *Michelin v Commission* [1983] ECR 3461
[21] *Hoffman La Roche v Commission [1978] ECR 1137*
[22] [1991]ECR II-485

the way its choice of relevant product market has been influenced by "… the nature of the abuse being alleged and of the particular manner in which competition is impaired in the case in question."[23] Although this approach could be said to be reasoning backwards and conflating supervision issues with jurisdictional issues, the Commission has on occasion appeared to define markets with a view to controlling abuse and particularly abuse by holders of de facto monopolies which amount to essential infrastructures or inputs for another related market.[24]

3.2 Dominance and De Facto Monopoly

Even if the consequence is incidental rather than intended, the fact remains that in narrowly defined markets IPRs can be more frequently be placed in the position of being diagnosed as real economic barriers to entry thereby reinforcing a finding of dominance. This is particularly true where the IP protection applies to a component for which there are no substitutes. A good example is offered in *Volvo v Veng (UK) Ltd*[25] where Volvo's design right over its front wing panels, a product for which form and function were inseparable, gave it a complete monopoly over the supply of such a product. It can also be true where network externalities produce applications barriers to entry as was held by the District Court in the Microsoft case and would also apply to Microsoft in Europe.

Criticism that in such cases the finding of dominance might be based on an arbitrary administrative "unbundling" of an integrated complex product by the Commission, has not

[23] See *ICI v Solvay* OJ L 152/21 [1991] para 42

[24] See e.g. *Hilti v Commission* [1994] ECR I-667*; Tetra Pak v Commission* [1990] ECR II-309; see further discussion by John Temple Lang "Defining Legitimate Competition: Companies Duties to Supply Competitors and Access to Essential Facilities" [1994] Fordham Corp. Law Inst. 245

necessarily discredited the finding on appeal.[26] That is because the Court of First Instance and the European Court of Justice have allowed the Commission considerable discretion in narrowly defining the relevant market by its initial choice of "relevant product" as a starting point for investigation. This is in deference to the Commission's role as finder of fact.[27]

Consequently, in the Microsoft case, the Commission will be able to operate on the presumption that there are three separate but complementary markets: the market for personal computer operating systems, the server market and the applications market and that Microsoft enjoys a practically undisputed market dominance in the market for personal computer operating systems.

4. Article 82 and the Concept of Abuse and IPRs

As mentioned, the narrow definition of "markets" under Article 82 has also influenced the conceptualization of abuse and this has been particularly true in the case of the exercise of IPRs.

Where IPRs coincide with an essential infrastructure or input, it has been accepted by the ECJ that the normal exercise of IPRs is not an abuse. There must be "exceptional circumstances". In *Volvo*, a major starting point for analyzing the interface between competition law and intellectual property rights, the ECJ held that although Volvo was dominant in the market for Volvo spare parts, it was not abusive to refuse to license other manufacturers to *make* spare

[25] [1988] ECR 6211.
[26] See response of the ECJ to the opinion of Advocate General Jacobs in *Hilti v Commission* [1004] ECR I-667 at para. 10
[27] Id.

parts in that market. The exclusive right to make and sell its IP protected product right was the *substance* of the IP right and competition law would not circumscribe that right.[28] However, the Court added the important caveat that, if Volvo were to abuse that right in the downstream market by arbitrarily refusing to supply spare parts to independent repairers of Volvo cars that could be an abuse under Article 82.[29] This case set the stage for different levels of comity for the exercise of IPRs under Article 82 depending upon the market in which the dominant IP right holder was operating.

This tendency to differentiate the concept of abuse in relation to copyright depending on whether the market was primary or secondary was reinforced in the next landmark case of *"Magill"*or *RTE, BBC and ITV v Commission*.[30] Magill was a compiler of a comprehensive weekly TV guide combining the contents of the three individual weekly TV guides sold separately by the respective TV companies. After losing an copyright infringement action at the national level, Magill successfully made a complaint to the Commission on the grounds that the TV companies refusal to license the program listings was abusive conduct under Article 82 and won an order for a compulsory license of the listings material from the TV companies to produce the guide. The case, a cause celebre, went to the Court of First Instance which affirmed the Commission's order. On further appeal to the ECJ, the TV companies were supported in their arguments by the IPO representing software makers internationally. The appeal resulted in a lengthy opinion by the Advocate General recommending reversal. The ECJ however decided that the order for a compulsory license should stand. The Court held that copyright itself did not justify a refusal to license in the "exceptional circumstances" where there was consumer demand for the new product, where the TV companies had a de

[28] [1988] ECR 6211 at para 8
[29] Ibid at para 9

facto monopoly over the listings by virtue of their scheduling of TV programs, where a license of the listings was an indispensable input for the comprehensive TV guide and where they were not themselves supplying the product to consumers. The Court went on to say that an owner of de facto monopoly over a product such as TV listings for which there were no substitutes and which was indispensable to the provision of another product in a secondary market could not use its monopoly in one market to eliminate competition in the second market reserving that second market for itself.

After *Magill*, the "exceptional circumstances" doctrine seemed initially as if it might extend to at least two different types of cases. First, an IP right holder, who enjoyed a de facto monopoly of an indispensible input, and who refused to supply or license where it would have the effect of foreclosing access to a secondary market to, and thereby hindering, a competitor seeking to introduce a new product could be committing an abuse.

Secondly, where a dominant firm with a de facto monopoly in the form of an indispensible input refuses to supply or license a competitor in a second dependent market with a view to reserving that secondary market for itself, that might constitute an abuse even in the absence of a new product by the third party. This conclusion derived from earlier cases involving a cutting off of supplies and/or licenses to *existing* customers but its inclusion in *Magill* made it possible to regard it as extending to a refusal to supply to or possibly even license a *new* customer or competitor. There was some language in the case suggesting that these conditions were cumulative and not separate[31] but it was not entirely clear whether this was because of

[30] [1995] ECR I-743

[31] Ibid at para 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 …*".

the facts or was the view of the Court about the minimum requirements of the exceptional circumstances test more generally.

The *Magill* case itself offered little guidance to the question of what defense the IP rightholder could put forward to this abuse. In its treatment of the issue of "justification" for refusal to license, the ECJ in *Magill* made clear that the mere ownership of an IPR would not as such justify a refusal to license in exceptional circumstances. It also indicated that the mere fact that the owner had never dealt with the competitor before was not such a justification. However, it offered no guidance about the positive grounds for justification for a refusal to supply or license which has the effect of blocking a downstream market.

The obvious contenders for justification under the reasoning of other Article 82 cases were where the firm seeking compulsory access was a credit risk, where there were objective grounds to worry about quality control and where there were health and safety risks, all sound commercial objections which would need to be proved to be well founded[32] in the sense that the grounds were established as factual and that the resort to refusal was proportionate to the threat.[33] What was apparently not built into the justification test under EC competition law was a positive intellectual property right justification that recognized that the reward to invention is exclusive exploitation in the second market as freely as in the first.

[32] See e.g. *Tetrapak Int'l SA v Commission* [1996] ECR-1-5 951 para 37.
[33] *S*ee e.g., *Sega and Nintendo* EC Commission 1997

In the subsequent case law, the ECJ and the CFI made it a point to reiterate that a refusal to license by a dominant firm would only be abusive in the strict conditions of the exceptional circumstances test as articulated in *Magill.* Thus, in *Tierce Ladbroke v Commission*,[34] the Court of First Instance held that the Commission could properly refuse to grant a compulsory license of video recordings of horse races to a betting chain on the grounds that the chain already had a strong presence in the secondary betting market and was not attempting to develop a new product. Nor was the right holder present in the secondary market or using its intellectual property to eliminate competition in that market. The Court of First Instance also implied that the *Magill* definition of exceptional circumstances could be read disjunctively, i.e. the abuse could consist of a refusal to supply which ' concerned a product or service which was *either* essential for the activity in question, in that there was no real or potential substitute or was a new product whose introduction might be prevented, despite specific, constant and regular potential demand on the part of customers.'[35]

Then, in *Oscar Bronner v Mediapoint*[36] the ECJ reiterated the importance of a proper test of dominance, stressing the need for it to reflect "essential facilities" criteria. The ECJ held that where a newspaper proprietor asked for access to another proprietor's home delivery service, a finding of abusive refusal of access using *Magill* as a precedent for the limits to the exercise of *any* property right, including an intellectual property right, could not be made unless (i) the refusal of the service in the home delivery market would be *likely to eliminate all competition in that market on the part of the person requesting the service* (ii) there was no objective justification for the refusal and (iii) that there was the service in itself was *indispensable* to carrying on that person's business, inasmuch as there is no actual or potential substitute in

[34] [1997] ECR II-923
[35] Ibid. at para. 131 (emphasis added)

existence for the home delivery scheme.[37] The lack of substitutes had to be strictly proved and the test of indispensability was not be confused with mere economic non-viability owing to the small size of the competitor.[38]

In *IMS Health Inc v Commission,*[39] the issue resurfaced of whether the Magill criteria were cumulative or could be taken separately. In *IMS* the Commission ordered a compulsory license of information contained in an 1860 brick structure which provided a format for storing regularly updated information about the sales of pharmaceutical products in Germany region by region. The beneficiaries of the compulsory licenses consisted of firms started inter alia by former senior management to market regional sales data services based on the brick structure. The Commission distinguished between the brick structure, which was copyright protected, and the related market of regional sales data services. It then found that the IMS 1860 brick structure was an essential facility because it had become a market standard demanded by customers including the wholesalers as well as the pharmaceutical companies. It also found that it was not economical for competitors in the second market to reproduce it. It also found that the refusal to license was abusive because the Magill criteria, following Tierce Ladbroke, could be applied separately and that once the tests of essential facility and two markets were met, the new product rule was not an indispensable component of the test. IMS appealed to the Court of First Instance which stayed the order of compulsory license pending the result of the appeal because there was a serious doubt that the decision would be upheld on appeal in part because the Commission had not considered whether all conditions of *Magill* had to be met before there was an abuse and, in particular, had proceeded on the

---

[36] *Oscar Bronner GMbH & Co.KG V. Mediaprint* [1998] ECR 1-7791.
[37] Ibid at para 41.
[38] Ibid at para 45.
[39] Case T-184/OIR (2001).

supposition that the new product requirement was not an indispensable condition of the exceptional circumstances test.

4.1 The New Product Requirement and Refusals to License

This view of the Court of First Instance in its interim judgement in *IMS* raises the possibility that the exceptional circumstances test could itself could be interpreted to require all three elements of the Magill test and therefore require that the competitor in the downstream market provides "follow up" innovation and does not merely replicate the IPR holder's own product in the secondary market. This interpretation would certainly be consistent with the actual facts of *Magill.* It might also offer a basis upon which to distinguish the facts of *IMS* from the facts of *Magill* and thereby come to a different result in the eventual CFI judgement. Furthermore, it would seem at first sight to offer an intriguing reconciliation between competition law and intellectual property rights based on their mutual interest in innovation.
by stressing that "exceptional circumstances" include only cases of new products or "follow up" innovation and not "me too" competition.

Even if the CFI were to hold in IMS that this is the case, the three conditions of Magill would not provide an *exhaustive* account of the "exceptional circumstances" in which Article 82, as interpreted by the European Court of Justice, will apply to exercise of intellectual property rights. Article 82 will also apply to cases of predatory conduct by a dominant firm when it uses its dominance to disrupt its supply of information or its exclusive copyright to refuse to license to an *existing* contractor/competitor in the secondary market with the purpose of foreclosing that market. This would be particularly true where that competitor is an innovating competitor.. In such a case the dominant firm would be the one with the "me too" product and it would be entering the market by anti-competitive means rather than "competition based on performance." If the dominant firm chose performance-based competition it would continue to license or inform its existing customer(now competitor). As well as introduce its own product on the market. When the ECJ stated in *Magill*," it can be an abuse for a dominant undertaking with a de facto monopoly to reserve for itself a secondary market by excluding all competition on that market by denying access to the basic information which was indispensable to the publication of the guide,"[41] it could not have intended to restrict this principle solely to competitors with *new* products in the secondary market. For, that would rule out a case, such as the above, where a dominant firm refuses to license a firm with which it has been dealing essentially as a pretext for anticompetitive conduct.[42]

The principle of *Commercial Solvents* and related cases applies to new cases where a downstream competitor has already been established in that market, has a contractual relationship with a dominant firm that provides product on an upstream or indispensable input market and the owner of the essential infrastructure/input in the upstream market refuses to supply or license so that it can eliminate that competitor from the market and enter the field itself. That type of predatory conduct by a dominant firm is likely to be an abuse whether or not the indispensable input is protected by an IP right. The crucial point is that the dominant firm is not prevented from competing on the merits with the firm on the second market by entering that market itself. The abuse consists of using its dominance, really its monopoly of

[41] at para 56
[42] cf DoJ/FTC Antitrust Guidelines to Intellectual Property Licensing S 3.1 n 14

an indispensable input or infrastructure for the purpose of eliminating the innovative competitor in the second market.

In other words, the test of exceptional circumstances must continue to include refusals to supply or license *existing* downstream operators with predatory intent, as was the case with *Commercial Solvents*, and subsequent ECJ decisions, [43]even if it should be held to excludes cases of refusal to license *new* downstream competitors who are merely replicating the product already offered by the incumbent essential facility holder in the downstream market. This would mark a break with the analysis in the cases of essential facilities involving purely tangible property, e.g. the port/ferry cases such as *Sealink*[44] which would use essential facilities analysis to require dominant firms to deal with new operators in downstream markets. It would however preserve the core principle embedded in *Commercial Solvents* to the effect that it is an abuse for a dominant firm to stop supply of a dependent company already in the downstream market and thereby eliminate all competition in order to enter the field itself.[45] It would also be an appropriate way of defining the exceptional circumstances in which Article 82 might place limits on the exercise of intellectual property rights such as copyright.

[43] See e.g. *Centre Belge d'Etudes de Marche(CBEM) v Telemarketing* [1985] ECR 3261. See too *Otter Tail* in the USA.

[44] *Sea Containers v Stena Sealink* [1995] 1 CMLR 84.

[45] See e.g. *Centre Belge d'Etudes de Marche (CBEM) v Telemarketing* [1985] ECR 3261; see too R. Subbioto, "The Right to Deal with whom one pleases under EEC Competition Law: A small Contribution to the Current Debate" (1992) ECLR 234.

4.2 Refusals to License and Supply Interface Information as Discrimination under Article 82(c)

The facts alleged in the *Microsoft* case in Europe raised another important issue about the role of competition law in limiting the full exercise of intellectual property rights. Microsoft's refusal to license Sun was allegedly coupled with a willingness to license software to Sun's rivals on a friend/enemy basis. Similarly, Microsoft has allegedly withheld information from Sun which would have enabled its server to interoperate with Microsoft Windows 2000. This conduct allegedly discriminated in favour of Microsoft's own server.

As we have seen, Article 82(c) provides that it can be an abuse to apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage." Under Article 82(c) a failure to provide access comparable to that provided by the dominant firm to its own subsidiary can be abusive conduct. . For example in the IBM case in 1984 the Commission found that by delaying disclosure of interface information on new IBM products while taking orders for them, IBM had created an artificial advantage for itself and denied its competitors an opportunity to adapt their products to the new IBM mainframe computers. The Commission accepted IBM's undertakings particularly in relation to interface information.[46] IBM was a settlement, not a Commission Decision. Nevertheless it seemed to reach that settlement based on a theory that there was a duty on IBM, as a dominant firm with the equivalent of an essential facility, to enable producers of compatible products to continue to compete with IBM in secondary markets. Moreover, IBM was charged with discriminating between different users of IBM software and refusing to supply

[46] *IBM* [1984] OJ L 118/24 2 CMLR 342.

certain software installation services to non-IBM central processor units. In the circumstance of the Microsoft in Europe case, the alleged refusal of Microsoft to license Sun and provide information to allow full interoperability between the Sun server and Windows 2000 could, if proved, also be held to amount to abusive conduct under Article 82(c) because Microsoft has been accused of distinguishing between Sun and other server makers.[47]

4.3 Refusals to Supply Interface Information and Article 82(b) Further Thoughts

The alleged refusal, if there indeed proves to be one, to supply the interface information to allow Sun to be fully interoperable with the Windows platforms may have been viewed by Microsoft as within its copyright prerogative since Microsoft had copyright protection for its software and its Windows platforms. In any case, in principle, there may be a distinction to draw between copyright in the source codes ofsoftware and copyright in the access codes of software. Under the Computer Software Directive[48] Article 6(1), software users are entitled to reproduce and translate a software program even without the right holder's authorization when such acts are "indispensable to obtain the information necessary to write and produce a new program which will be interoperable with the protected program but will be independent

[47] Under 82(c), a lower level of dominance than de facto monopoly might be enough to find abusive certain forms of discrimination by dominant IP right holders in downstream markets in favour of t.he dominant firm's own product in the downstream market. In that case, if the downstream operator has been dependent upon the dominant firm in the sense of being locked in and faced with heavy switching costs to change, it might be found to be abusive to discriminate by a firm with lower levels of dominance than market standard or tipped dominance in the primary market. Cf. United Brands

of it." This provision permits decompilation of a program for the limited purpose of creating a program which is not itself an infringement of the decompiled program. While there are ambiguities in the terms used in the Directive, it is noteworthy in that it applies independently of a finding of dominance. Of course if the firm owning the copyright in a program and refusing the interface code information or a license is dominant, Article 82 might strengthen the competitor's rights under Article 6.[49] This might be an even stronger case where the dominant right holder was itself operating in the downstream market.[50] Nevertheless, this legislation operates essentially in the domain of copyright law rather than competition law

5. The Concept of Remedies

Once the Commission finds that there has been an infringement of Article 82 it has the power to require the undertaking engaging in abusive conduct to bring that infringement to an end.[51] In *Magill* the remedy chosen by the Commission was a compulsory license on terms which were reasonable and non-discriminatory. It chose this remedy only because an order to supply the information in the listings would not have allowed their use and therefore would not have ended the infringement. The only way the Commission could be sure that Magill could publish the new product in the secondary market and the parties to end the infringement was to require a license to publish along with the supply of the listings.

In the *IBM* case and in the first *Microsoft* case the Commission accepted undertakings to provide full interface information on a par with the subsidiary of the dominant undertaking

---

[48] 91/250/EEC
[49] T Vinje, " Comment: The Final Word on Magill" (1995) 6 EIPR 297 at 302
[50] S. Anderman, *EC Competition Law and Intellectual Property Rights* (Clarendon, Oxford 1998 and 2000).

operating in a downstream market. The purpose of that settlement was to ensure that the dominant firm, particularly where it operated in a downstream market adhered to the principle of fair and non-discriminatory treatment of competitors in that market. Although these are not decisions it could still be open to the Commission in the current case of Microsoft, should Microsoft be found to have infringed Article 82(b) or (c), to order Microsoft to provide interface information sufficient to remedy the infringement.

6. Conclusions

The competition policy of the Commission under Article 82 continues to function as a second tier of regulation of the exercise of intellectual property rights in general and in the information technology field in particular. This occurs because the commercial strategy chosen to exploit the IPR protected product occasionally gets caught in the crossfire of the measures used by competition policy to maintain competitive markets.

Under Article 82, the existence of intellectual property rights is regarded as incidental to the market power of the undertaking in the primary market. If the actual market power of a firm in one market is reinforced by an intellectual property right, as well as indirect network effects it will be treated as if its intangible property rights are no different than its tangible property rights. The negative effect of this type of curb on innovation or the incentives to innovation is thought to be counterbalanced by the maintenance of access to markets by competitors.

---

[51] Article 3 of Council Regulation No. 17

The reason why competition law continues to be accorded priority in such cases is partly constitutional. EC competition law has a central place in the Treaty whereas intellectual property rights are still based mainly on national law.

Even if we were to reach the stage of Community wide intellectual property rights, however, it would be difficult to imagine a different scenario. In the course of this relationship, EC competition law has evolved into a role as residual protector of the function of *diffusion* of intellectual property rights in the economy. As we know, intellectual property rights have their own internal checks and balances between *protection* of exclusive rights and *diffusion* for follow through innovation taking the form e.g. of publishing the patent claim during the protected period and limiting the protected period of exclusive use to 20 years and rights of fair use of copyright protected matter. Along with this internal balance within IPR legislation, however, EC competition law can be viewed as having assumed the role of an external protector of the diffusion element of innovation because of its own logic of preventing foreclosure of competition in markets.