Fordham International Law Journal

Volume 28, *Issue* 4 2004 *Article* 3

Article 82: Remedies in Search of Theories?

Ian S. Forrester*

*

Article 82: Remedies in Search of Theories?

Ian S. Forrester

Abstract

I submit that over the last two or three years, we may observe troubling signs that Article 82 of the EC Treaty is being used more as an adjunct to industrial policy than as a pure competition law tool. This is especially evident in refusal to deal cases. The intervention of antitrust in a situation of refusal to deal is a critical pointer of how an antitrust enforcer perceives itself and of what kind of competition law is in force. At a time when ten new agencies have joined the family, it is especially desirable to approach controversies in a sober manner. It would be unfortunate if EC law as applied in Brussels appeared to be presenting a misleading example. It is difficult to deny the existence of a clear divergence in this area between the more liberal or minimalist approach which prevails in the United States and has recently been celebrated by the Supreme Court in Verizon Communications, Inc. v. Law Offices of Curtis Trinko, and the more formalistic or maximalist approach of the Commission. The Commission attributes comparatively lower weight to a dominant player's freedom to run its own business, and comparatively more weight to the protection of competitors than U.S. courts. It may also reflect a longstanding transatlantic difference as to the risk of the negative consequences for the economy of unsound intervention. The Trinko judgment was the counterpart of Bronner, standing for the principle that only in the rarest circumstances should a dominant player be obliged to do business against its will. I will center my analysis and criticism of the Commision's controversial new thinking by referring to these two very revent cases, in both of which I am involved.

ARTICLES

ARTICLE 82: REMEDIES IN SEARCH OF THEORIES?

*Ian S. Forrester, QC**

I. *ARTICLE 82 NEVER SLEEPS*

Article 82 of the EC Treaty[1] has always offered European lawyers a certain *frisson* of excitement. When it was first enforced by the Commission in the early 1970s, it seemed to be the awakening of a hitherto sleeping beast, part monster, part keeper of the peace. Until then, Article 82 of the EC Treaty[2] had been considered an exceptional curiosity on paper rather than a real constraint upon the business conduct of monopolists. While in the last forty years our — and indeed the Commission's — understanding of Article 82 and of its enforcement is more mature, the prohibition of abuse of a dominant position still remains the major source of suspense in EC competition law enforcement. My first visit to the European Court was to attend (as a young spectator) the argument in *Commercial Solvents & Others v. Commission.*[3] I can still remember the sense of moral disapproval of the bullying tactics of the accused company.[4] That moral element in the application of Article 82 has not disappeared; its presence is distinctively European. It can lend confusion to the analysis when the question is whether and how far a

* Queen's Counsel at the Scots Bar, Visiting Professor, University of Glasgow; White & Case, Brussels. Warm thanks are expressed to my colleague Assimakis Komninos of the Athens Bar for his contribution to this paper. The opinions expressed are wholly personal. Reference is made herein to court proceedings which occurred on September 30 and October 1, 2004, and to an Advocate-General's opinion dated October 28, so this article is a contribution to a continuing debate, certainly not the last word.

1. *See* Treaty establishing the European Community, O.J. C 325/33 (2002) [hereinafter EC Treaty].

2. Article 86 of the Treaty establishing the European Economic Community, as it then was.

3. Joined Cases 6-7/73, [1974] E.C.R. 223 [hereinafter *Commercial Solvents*].

4. I recall the Commission's assertion that its conclusion on the cutting-off of supplies was based imprecisely on a few phone calls to possible alternative sources, but I was convinced that the plaintiff, Zoja, had indeed been wronged.

dominant company is obliged to assist its competitors. While the European Commission confidently rejects any suggestion that it concerns itself more with the protection of competitors than with the maintenance of the competitive process, I believe that there is basis for criticism.[5] The Commission of course replies that keeping alive one weaker competitor in the face of abuse will enhance the viability of the competitive process weakened by the large player's huge market power.

I submit that over the last two or three years, we may observe troubling signs that Article 82 of the EC Treaty is being used more as an adjunct to industrial policy than as a pure competition law tool. This is especially evident in *refusal to deal* cases. The intervention of antitrust in a situation of refusal to deal is a critical pointer of how an antitrust enforcer perceives itself and of what kind of competition law is in force. At a time when ten new agencies have joined the family, it is especially desirable to approach controversies in a sober manner. It would be unfortunate if EC law as applied in Brussels appeared to be presenting a misleading example. It is difficult to deny the existence of a clear divergence in this area between the more liberal or minimalist[6] approach which prevails in the United States and has recently been celebrated by the Supreme Court in *Verizon Communications, Inc. v. Law Offices of Curtis Trinko*,[7] and the more formalistic or maximalist approach of the Commission. The Commission attributes comparatively lower weight to a dominant player's freedom to run its own business, and comparatively more weight to the protection of competitors than U.S. courts. It may also reflect a longstanding transatlantic difference as to the risk of the negative consequences for the economy of unsound intervention.

Since there are rather few Article 82 cases, and since I have

---

5. *See* RICHARD WHISH, COMPETITION LAW 175 (2003); *see also* William J. Kolasky, *What Is Competition? A Comparison of US and European Perspectives*, 49 ANTITRUST BULL. 29 (2004).

6. William Kolasky has recently referred approvingly to the approach of the U.S. authorities in antitrust enforcement, as opposed to the European Commission's policy. *See* Wilmer, Cutler, Pickering, Hale & Dorr LLP, *The Article 82 EC Abuse Concept: What Scope is there for Modernization?*, ANTITRUST & COMPETITION L. UPDATE, Nov. 24, 2004, at 5 (reviewing the presentations of panelists at "The Article 82 EC Abuse Concept" Conference in Brussels, September 30, 2004).

7. 540 U.S. 398 (2004). For further analysis, see the *Verizon v. Trinko* roundtable discussion in 7(2) GLOBAL COMPETITION REV. 16 (2004).

been personally involved in two recent controversies, I wish to be cautious about identifying the imminent apocalypse too readily.[8] In February 2004, I considered that the *Trinko* judgment was the American counterpart of *Bronner*,[9] standing for the principle that only in the rarest circumstances should a dominant player be obliged to do business against its will. It is generally undesirable for a company to be compelled to share its resources. However, only two months later, in the Microsoft Decision, the Commission ordered a company to draw up a detailed description of its own technology in order to deliver to competitors the means of replicating that technology in their own products.[10] And four months later, the Commission contended to the European Court of Justice that a pharmaceutical company was duty-bound to supply exporting wholesalers with whatever quantities of a patented medicine they desired, since to limit deliveries to them would constitute a restriction of their economic freedom.[11] Both initiatives should encourage us to reflect.

Very detailed, long-lasting and far-reaching remedies notionally right past alleged abusive behavior by dominant firms, but in reality dictate specific business policies. Such policies, a

---

8. I have been involved as an advocate in Commission Decision 89/205/EEC, O.J. L 78/43 (1989) [hereinafter *Magill*], upheld by the Court of First Instance ("CFI") in *Radio Telefis Eireann v. Commission*, Case T-69/89,[1991] E.C.R. II-485 [hereinafter *RTE I*], upheld on appeal by the Court of Justice of the European Communities ("ECJ") in *Radio Telefis Eireann and Independent Television Publications Ltd. v. Commission*, Joined Cases 241 & 242/91, [1995] E.C.R. I-743 [hereinafter *RTE II*]; in Commission Decision 2002/165/EC, O.J. L 59/18 (2002)[hereinafter *NDC*], withdrawn by Commission Decision 2003/741/EC, O.J. L 268/69 (2003) [hereinafter *NDC/IMS*]; *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, Case C-418/01 (not yet reported) [hereinafter *IMS*]; and, in 2004, in *Microsoft*, Commission Decision of 24 March 2004, Case COMP/ C-3/37.792 [hereinafter *Microsoft Decision*], *available at* http://europa.eu.int/comm/ competition; Microsoft Corp. v. Commission, Case T-201/04 (pending). There is a wise tradition which counsels prudence to those who have been engaged as advocates; in this article I shall try to respect that tradition. At the same time, the events are very recent and there is a high interest in them, so I have elected to offer more robust sentiments than I normally would in an academic piece. Others have offered copious alternative theories, so the prudent reader will study several opinions before drawing a conclusion.

9. Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG & Others, Case C-7/97, [1998] E.C.R. I-7791, ¶ 76 [hereinafter *Bronner*].

10. *Microsoft Decision*, Case COMP/C-3/37.792, art. 5(a)-(e), at 299-300 (2004).

11. Opinion of Advocate General Jacobs, Synetairismos Farmakopoion Aitolias & Akarnanias and Others v. Glaxosmithkline AEVE, Case C-53/03, ¶¶ 8, 11, (2003) (pending) [hereinafter *Syfait Opinion*].

sort of regulatory micro-managing hardly suitable for an antitrust authority, almost never make business sense. I respectfully submit that the remedy appears to arise from looking forward at the desired conduct rather than looking backward and ensuring the discontinuation of the abuse. The link between the compelled conduct and the infringing act may, indeed, be rather imperceptible, although the compelled conduct may have great political or industrial symbolism. To put matters rather severely, but not necessarily unfairly, the analysis sometimes seems to start with the desired remedy rather than with the theory of the abuse. Hence the title of this article.

I am undecided about how serious is the consequent degree of uncertainty for business in Europe. While I accept the proposition that legal uncertainty is, indeed, inherent in antitrust,[12] and have myself mocked the claims to need legal certainty in the context of notifications, stability in enforcement patterns helps business to grow and prosper. We need to provide for an enforcement framework that rewards business acumen and innovation at the expense of timidity and inefficiency. We do not want to create an ethos of passivity among market players, who may be tempted to rely on the "benevolent" intervention of the government. Such an atmosphere of paternalism, redolent of centrally planned regimes in the 1960s, is the worst service public authorities can offer to the market.

European competition law was unique in the world in recognizing the distortive consequences of State intervention in the marketplace. The Commission has taken huge steps to prune State distortion of normal market forces. Encouraging risk-taking and initiative by the private sector must be the prime goals not just of our industrial policy, but also of our competition policy. The Commission seems to be very eager to support research and development; it also aims at making private investment in research and development more attractive.[13] But its declarations

12. *See* Barry E. Hawk & Nathalie Denaeijer, *The Development of Articles 81 and 82 EC Treaty: Legal Certainty*, *in* EUR. COMPETITION L. ANNUAL 2000: THE MODERNISATION OF EC ANTITRUST POLICY 137, 140, 230 (Claus Dieter Ehlermann & Isabela Atanasiu eds., 2001).

13. *See* Communication from the Commission: Investing in Research: An Action Plan for Europe, COM (2003) 226 Final/2, *available at* http://europa.eu.int/eur-lex/en/com/cnc/2003/com2003_0226en02.pdf. The objective set by the March 2002 Barcelona European Council is to increase the average research investment level from 1.9% of GDP (current levels) to 3% of GDP by 2010, of which 2/3 should be founded

on supporting research and development ("R&D") need to be balanced by recognizing that over-eager expansion of antitrust liability theories may reduce incentives to innovate.[14]

The European Commission has recently advocated or imposed extraordinary remedies, one as to pharmaceuticals and one as to software. If it were not that the addressee of the latter is Microsoft, we would be astounded by an order addressed to companies to create a new product of lesser quality and place it on the market even if there may be no consumer demand, or to supply competitors with secret technical information in order to enable a better "degree" of competition from those competitors. Behind such remedies lie some highly creative theories. I will centre my analysis and criticism of the Commission's controversial new thinking by referring to these two very recent cases, in both of which I am involved.

II. *PHARMACEUTICALS AND COMPUTER SOFTWARE: HOW FAR CAN A DUTY TO DEAL GO?*

In my view, in EC competition law, we can observe three strands to the obligation-to-deal cases: essential facilities cases involving ports and bridges;[15] elimination of competition cases involving the cancellation of deliveries which would allegedly

---

by the private sector). The action plan calls, *inter alia*, for "improving the environment of research and technological innovation in Europe: intellectual property protection, regulation of product markets and related standards, *competition rules*, financial markets, the fiscal environment, and the treatment of research in companies' management and reporting practices." *Id.* at 4, 10 (emphasis added). The Commission boasts that "the recent overhaul of EU anti-trust law gives more emphasis to economic assessment" and stresses that innovation considerations should take a prominent part in antitrust analysis. *Id.* at 23.

14. *See* Commission Staff Working Paper: Investing in Research: an Action Plan for Europe, SEC (2003) 489, *available at* http://europa.eu.int/comm/research/era/3pct/pdf/com2003-annex.pdf. It mentions competition policy as one of the major policies influencing the environment for innovation. *Id.* at 17-18. The Federal Trade Commission reached the same conclusion in its *Report To Promote Innovation: the Proper Balance of Competition and Patent Policy*, Ch. 1, *available at* http://www.ftc.gov/os/2003/10/innovationrpt.pdf.

15. *See, e.g.*, Commission Decision 94/19/EC, O.J. L 15/8 (1994) [hereinafter *Stena*]; Commission Decision 94/119/EC, O.J. L 55/52 (1994) [hereinafter *Rodby*]; Commission Decision 98/190/EC, O.J. L 72/30, (1998) [hereinafter *FAG*]. Telecommunications wires and cables may also be capable of being essential facilities. *See* Commission Notice on the application of the competition rules to access agreements in the telecommunications sector — framework, relevant market, and principles, O.J. C 265/2 (1998), at 49-53, 87-98 [hereinafter *Competition Rules*]. I personally do not accept that intellectual resources can credibly be described as constituting an essential facility.

render the victim bankrupt (*Commercial Solvents*,[16] *Ladbroke*,[17] *Bronner*,[18] and now *Syfait*),[19] and compulsory licensing cases like *Volvo/Veng*,[20] *Magill*,[21] *IMS*,[22] and *Microsoft*.[23]

III. *PHARMACEUTICALS*

A. *The Facts*

The first case that I will examine deals with the question of whether competition authorities and courts may use Article 82 of the EC Treaty with the goal of encouraging the growth of exports of patented products from Member States where prices are set at low levels to Member States where prices are set at higher levels. The European Commission may not have been the enforcer in this case, which was a reference from the Hellenic Competition Committee, but it submitted forceful observations during the preliminary reference procedure before the European Court of Justice.

Pharmaceuticals, whose prices are effectively set by the national public authorities (which are both their largest buyer and their price-setter), have perpetually presented controversies where traditional Commission doctrines about the merits of parallel trade contradicted economic gravity. The price discrepancies between the Member States are often large. Sales of pharmaceuticals to export-oriented wholesalers in low-price countries fuel patterns of trade to high-price countries, patterns which are regarded as artificial by the pharmaceutical manufacturer. Though they are a source of astonishingly rich profits for parallel traders, these sales confer zero or minimal benefits on Europe's patients and health care systems. (This is a dense version of a much more complex statement, as in each Member State the power to set prices and make reimbursement to pa-

16. *Commercial Solvents*, Joined Cases 6-7/73, [1974] E.C.R. 223.

17. Tiercé Ladbroke SA v. Commission, Case T-504/93, [1997] E.C.R. II-923 [hereinafter *Ladbroke*].

18. *Bronner*, Case C-7/97, [1998] E.C.R. I-7791.

19. *Syfait Opinion*, Case C-53/03 (2003) (pending).

20. AB Volvo v. Erik Veng (UK) Ltd., Case 238/87, [1988] E.C.R. 6211 [hereinfater *Volvo/Veng*].

21. *Magill*, O.J. L 78/43 (1989), *upheld* by the CFI in *RTE I*, [1991] E.C.R. II-485, *upheld on appeal* by the ECJ in *RTE II*, [1995] E.C.R. I-743.

22. *IMS*, Case C-418/01 (not yet reported).

23. *Microsoft Decision*, Case COMP/C-3/37.792, *on appeal* Microsoft Corp. v. Commission, Case T-201/04 (pending).

tients is structured differently, and the precise figures vary from time to time.) The pharmaceutical companies deal with the problems caused by parallel trade using a variety of supply policies based on historical supplies, or by giving priority to customers selling on the national market. Under these systems, pharmaceutical companies typically supply quantities that are more than sufficient to satisfy the demand of patients in each national market, while the wholesalers remain free to export all their purchases, or to serve their national market first and export only the remaining surplus quantities.

In the late 1990s, deliveries to wholesalers in Greece of certain pharmaceutical products were several times higher than the national Greek demand for those products. For every tablet swallowed by Greek patients, six tablets were delivered to the Greek marketplace. Five went to Germany, the UK, or the Netherlands, and one was consumed in Greece. The export activities of the Greek wholesalers led to shortages of products in the Greek market, as well as reducing the earnings of manufacturers, affiliated companies in other Member States, who bore the duties and the costs of public-service responsibilities for the product, but sold only small volumes to their local wholesalers.[24] In 2000, Glaxosmithkline ("GSK") unilaterally decided to adjust the product quantities supplied to the Greek market, so to meet the prescription needs of the national market plus a surplus each month. Complaints were made by disappointed wholesalers, who opposed any limit to their capacity to purchase the few "fashionable" products.[25] The Greek Competition Committee issued an interim decision, in which it found that GSK had abused its dominant position, and ordered GSK to supply *unlimited quantities* of three of its products to all wholesalers and cooperatives. There then ensued twelve months of proceedings before the Competition Committee, during which there was copious examination of the facts and extensive debate (in Greek and in English) concerning the relevant law. The Greek authority decided to postpone a final decision, and referred a number of preliminary questions to the European Court of Justice.[26]

The theory of dominance advanced by GSK's critics was that

24. *Id.* ¶ 29.
25. *Id.* ¶ 6.
26. *See Syfait Opinion*, Case 53/03 (2003) (pending).

each pharmaceutical product protected by a patent was a unique product (albeit one with therapeutic competitors). One consequence of this market definition is that unsuccessful patented products are equally as dominant as successful patented products. Thus, there were a number of arguments as to whether and how a pharmaceutical company could enjoy a dominant position, given the distinctive characteristics of the pharmaceutical marketplace. Most of the debate in Luxembourg related to whether there was an abuse. The main substantive question was whether the refusal of a dominant company to satisfy fully the orders of wholesalers constitutes *per se* abuse within the meaning of Article 82 EC, if this refusal is due to the undertaking's intention to plan the distribution of its products efficiently, while limiting the export activity of the wholesalers, and thereby the harm caused to it by parallel trade.

B. *The Extraordinary Remedy and the Law*

The *Syfait* case was heard in May 2004. In its observations before the Court of Justice, the Commission pleaded in favor of the finding of an abuse of dominant position and, thus, by implication, in favor of the unprecedented remedy to satisfy all orders.[27] Delivering limited quantities was, according to the Commission, equivalent to a prohibition of exports, and led to a partitioning of the markets concerned.[28] But this was not all. GSK was also accused of interfering with the commercial freedom of the wholesalers. Supplying their orders would, according to the Commission, guarantee a second source of supply that creates intra-brand competition in high-priced countries.[29]

Before examining the *Syfait* case as an antitrust case, we must acknowledge the political and institutional context. As I have noted elsewhere,[30] the cult of parallel trade as a factor enhancing market integration is akin to a civil religion, for the respect of whose integrity the European Commission is the principal prophet. The principle is that market integration is good for Europe, good for consumers, good for competition. Reproaches

27. *See id.* ¶¶ 48-50.

28. *See id.* ¶ 50.

29. *Id.*

30. *See* Ian Forrester, *The EFTA Court Confronts Re-labelling: Paranova AS v. Merck & Co., Inc. and Others, Judgment of the EFTA Court of 8 July 2003, Case E-3/02*, 7-8 EUR. L. REP. 278 (2003).

against parallel traders as free riders have been rejected in a string of cases over twenty-five years. The pharmaceutical industry asserts that market integration will not be enhanced by parallel trade since governments, who are the chief payers for prescription medicines, do not need parallel trade to bring down prices. They can simply order price reductions on their own initiative by virtue of the power of their public authority. The Commission admits that governmental involvement in price-setting is pervasive, but asserts the companies have freedom of maneuver in that they can decide to launch or not to launch a product, and further denies that the industry is impotent in price negotiations.[31]

Let us start from the interim remedy imposed by the Greek competition authority, and — most curiously — apparently endorsed by the Commission. The remedy is extraordinary: GSK, a pharmaceutical company, is under an affirmative duty to supply unlimited orders from wholesalers active in the trade of certain prescription drugs from low-price to high-priced Member States.[32] Can this be sound antitrust enforcement policy? Should antitrust authorities ought not be involved in the determination of how much a company should supply to wholesalers, in order to believe that its conduct is not abusive or anti-competitive?[33]

It was alleged that limiting deliveries in Greece would restrict or preclude intra-brand competition in the United Kingdom. For doctors and patients in the United Kingdom, however, the two products (sold directly to UK wholesalers by the manufacturer or sold in Greece then imported via a UK wholesaler) are identical in characteristics, price, and appearance. It was said that as a result of the constraint upon supply, high purchase prices were maintained, to the detriment of consumers in the United Kingdom. Yet UK consumers pay a flat rate prescription fee, regardless of whether they are prescribed a locally-delivered or a parallel-traded product.

The European Courts have on several occasions indicated that there is no abuse in refusing supplies to a customer who

31. *Syfait Opinion*, Case C-53/03 (2003) (pending), ¶ 93-94.

32. *Id.* ¶ 8.

33. Speaking at a conference, a senior Commission official had, indeed, gone as far as indicating what margin (30%) above national prescription needs would make quota systems acceptable to the Commission.

does not depend on those supplies for survival.[34] The *Syfait* case was not a classic refusal to supply case, because GSK was not refusing to supply wholesalers, and, indeed, was supplying them with quantities more than sufficient to cover the needs of the Greek market. But the classic refusal to supply cases of the European Courts are important, because they suggest that in order to be abusive, the conduct of the dominant firm must jeopardize the customer's continued existence.[35] The European Commission has a legitimate concern to protect downstream undertakings from being put out of the market through abusive behavior by a dominant upstream firm, and has justified its interventions as being necessary to keep the customer alive. In my submission, once the downstream firm ceases to be dependent on the dominant upstream firm, Article 82 EC becomes inapplicable.[36] The Greek wholesalers said they were dependent on the company for delivery of specific patented drugs, of which it was the sole source; but they were not dependent for their *survival*, as they could find other pharmaceutical products in which to deal. There was no evidence that any Greek wholesaler or parallel trader went out of business. On the contrary, the wholesalers continued to make high profits.

According to the critics of the industry, a pharmaceutical company had a choice between two contrasting options: (1) the company should not market its products in low price countries in order to avoid parallel trade (bad luck for Greek patients whose doctors want a new medicine with which to treat their patients); or (2) once it has chosen to sell in a low-price country, its affiliates in low price countries must supply unlimited quantities, since otherwise they are hindering the economic freedom of those who wish to deal with them.

34. In *Tierce Ladbroke SA v. Commission*, the CFI indicated that there is no abuse in refusing supplies to a customer, who does not depend on those supplies for his survival: ". . . unless it concerned a product or service which was either essential for the exercise of 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 consumers . . . ." Case T-504/93, [1997] E.C.R. II-923, ¶ 131.

35. *See* Benzine Petroleum Handelmaatschappij BV v. Commission, Case 77/77, [1978] E.C.R. 1513, ¶ 20.

36. The Commission in *BBI/Boosey & Hawkes* wanted to ensure that the "applicants are not put out of business." Commission Decision of 29 July 1987, BBI Boosey & Hawkes, O.J. L 286/36 (1987), ¶ 19 [hereinafter *BBI*].

Such dogma conflicts with conventional notions whereby a dominant undertaking is permitted to defend its commercial interests, provided that the measures it takes are proportionate to the threat which the conduct of the trading partner poses to the interests of the dominant undertaking.[37] The Court has considered that even a refusal to supply, exercised by a dominant undertaking, may be reasonable unless it exceeds what might be objectively contemplated in the case at issue.[38] It is indeed curious to contemplate that a supplier is accused of refusing to supply, when it furnishes significantly more than national demand but declines to deliver limitless volumes.

The analysis of many competition questions in Europe is distorted by the unique significance attached to market integration under our competition law. Pursuing the civil religion by honoring cross-border trade more than other economic activity is a well-established phenomenon. The question is whether that doctrine should override conventional notions of abuse of a dominant position. Can restrictions on parallel trade, as such, be always considered a *per se* abuse of dominant position?[39] In *Bayer*, the CFI clarified that

> provided [a manufacturer acts] *without abusing a dominant position*, and there is no concurrence of wills between him and his wholesalers, [he] may adopt the supply policy which he considers necessary, even if, by the very nature of its aim, for example, *to hinder parallel imports, the implementation of that policy may entail restrictions on competition and affect trade between Member States.*[40]

The Court of Justice has on another occasion confirmed the "non-sacred" status of parallel trade for EC competition law. In *Commission v. Belgium*, it has stated that

37. United Brands v. Commission, Case 27/76, [1978] E.C.R. 207, ¶ 189; Irish Sugar v. Commission, Case T-228/97, [1999] E.C.R. II-2969, ¶ 112 [hereinafter *United Brands*]. This principle was repeated, *inter alia*, in the *BBI/Boosey & Hawkes* decision, where the Commission stated that "a dominant undertaking may always take reasonable steps to protect its commercial interests, but such measures must be fair and proportional to the threat." *BBI*, O.J. L 286/36 (1987), ¶ 19.

38. *United Brands*, [1978] E.C.R. 207, ¶ 191.

39. Of course, there is no consensus that the concept of *per se* abuse exists. *See, e.g.*, Richard Whish, *Should There Be per se Abuses Under Article 82 EC?*, Kommentar, 51(10) WIRTSCHAFT UND WETTBEWERB (2001).

40. Bayer AG v. Commission, Case T-41/96, [2000] E.C.R. II-3383, ¶ 176 (emphasis added).

> differences in the price of the same product, from one Member State to another, may be accounted for by the commercial strategy of the manufacturing undertaking, and a hindrance to imports may not be inferred from the mere fact that an undertaking abandons the marketing of a given product on the market of a Member State on the ground that the maximum price imposed on it is inadequate. *It may be observed, for example, that, in order to avoid parallel exports, an undertaking may have an interest in not marketing its products in a Member State at a price which it considers to be insufficiently remunerative.*[41]

One may legitimately infer that if an undertaking can choose not to market, it can choose how much to market.

The wholesalers, supported by the Commission, argued that commercial freedom in Greece was being hindered in that they were not getting desired quantities. Now, any company could argue that commercial freedom is restricted if it does not get all it desires out of a relationship. Yet no sensible business partner would enter into an open-ended and unlimited obligation to supply to patients outside Greece products at the low Greek price. Every pharmaceutical company must also plan its distribution policy in terms of public service legal obligations to ensure delivery to patients.[42] No manufacturer from Greece could subcontract its legal obligations in Germany, by saying that parallel importers would take delivery. Simultaneously, the company would not fulfill its legal obligation under Greek law if it did not address export-driven shortages on the Greek market.[43]

The *Syfait* case shows that certain elderly dogmas of European competition policy have remarkable vigor even though they have exceeded their useful life. The opinon of Advocate General Jacobs, rendered on October 28, 2004, is likely to be regarded as a landmark judicial contribution to the debate about the nature of the pharmaceutical industry and the regulatory context within which it operates, and even more so about whether it is an abuse of a dominant position to supply a trader with less product than desired. In short, the Advocate General argues that a pharmaceutical undertaking holding a dominant

41. Commission v. Belgium, Case C-249/88, [1991] E.C.R. I-1275, ¶ 20.

42. These public service obligations are imposed by sectoral regulation, in order to guarantee that patients get served on a steady basis through pharmacies.

43. *Syfait Opinion*, Case C-53/03 (2003) (pending), ¶ 81.

position does not necessarily abuse that position by refusing to meet in full the orders sent to it by pharmaceutical wholesalers merely because it aims to limit parallel trade.[44] Moreover, the refusal to meet such orders is objectively justifiable, and thus does not constitute an abuse, where the price differential driving the parallel trade is the result of State intervention in the low-price export jurisdiction fixing the price there lower than that which prevails in the higher-price importing Member State.[45] A restriction of supply by a dominant pharmaceutical undertaking in order to limit parallel trade is thus capable of justification as a reasonable and proportionate measure in defense of that undertaking's commercial interests.[46]

The Advocate General concludes that when pharmaceutical undertakings attempt to block parallel trade, they are not thereby seeking to entrench price differentials of their own making, but rather to avoid the consequences which would follow if the very low prices imposed upon them in some Member States were generalized across the Community.[47]

It remains to be seen whether the Court's judgment will follow the Advocate General's approach, and what the Commission will do thereafter. As to this controversy, the tide may have turned.

IV. *MICROSOFT*

A. *IP v. Antitrust in EC Competition Law*

The second case raises similarly important questions as to the extent to which a competition authority may impose an obligation to deal upon a dominant and highly successful company. The similarity with *Syfait* lies in the extraordinary nature of the remedies contemplated. However, what distinguishes *Microsoft* is that the remedy imposed represents the most expansive inroad of EC competition law enforcement into the protection of intellectual property rights in Community legal history.

The interrelationship between intellectual property rights and competition law has always been an interesting theme for antitrust enforcers, practitioners and academics. The standard

44. *Id.* ¶ 69.
45. *Id.* ¶ 100.
46. *Id.*
47. *Id.* ¶¶ 78, 100.

theory is that the two are not in conflict, but that they converge in the pursuit of the same objective, the creation of a competitive market led by technological innovation for the benefit of consumers.[48] Naturally, it is those few exceptional situations of conflict which have attracted most attention.

That there is convergence between intellectual property rights and competition law, is widely recognized by most competition law specialists, as well as by the European Commission itself, which stresses the following in its recent Guidelines on the application of Article 81 EC to technology transfer agreements:

> [B]oth bodies of law share the same basic objective of promoting consumer welfare and an efficient allocation of resources. Innovation constitutes an essential and dynamic component of an open and competitive market economy. Intellectual property rights promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes. So does competition by putting pressure on undertakings to innovate. Therefore, both intellectual property rights and competition are necessary to promote innovation and ensure a competitive exploitation thereof.[49]

In the specific context of the abuse of a dominant position, the analysis remains the same. The purpose of intellectual property protection is to provide firms, whether dominant or not, with incentives to innovate, including the ability to use their innovations to their own competitive advantage and prevent competitors from misappropriating the benefits of their investments in research and development. The invocation by a dominant company of intellectual property rights, cannot, in principle, lead to an abuse, otherwise there would have been two kinds of intellectual property: for dominant and non-dominant enterprises.

Nonetheless, the European Courts have ruled that a dominant undertaking can be obliged in "exceptional circumstances" to license its intellectual property to third parties. Any time an innovator has to share with competitors the fruits of its innova-

48. *See, e.g.*, Lucas Peeperkorn, *IP Licences and Competition Rules: Striking the Right Balance*, 26 WORLD COMPETITION 527, 528 (2003).

49. Commission Notice Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, O.J. C 101/2 (2004), ¶ 7 [hereinafter Article 81 Guidelines].

tions, competitors will have "enriched" themselves to the detriment of the innovator's own creative efforts.

It is very easy for the discussion to move rapidly from sobriety to zealotry. The opposing arguments are easy to state, even to caricature by slogans. The rightholder will rely on his private property and incentives to innovate; the skill, money and time invested in creative effort; and claim that any encroachment endangers all other persons similarly situated. Such enrichment and detriment respectively would not be remedied by royalties.[50] On the other hand, the "infringer" might rely on the foreclosure of competition due to the right, the lack of R&D involved, the improbable nature of the right, the unreasonable or capricious behavior of the dominant player, and the very moderate nature of the contemplated compulsion. There have been very few cases from which to derive conclusions about the general law. The intervention of Article 82 EC has been sanctioned by the Courts in particularly exceptional circumstances of exclusionary conduct. The challenge for the antitrust enforcer is to identify those exceptional circumstances and use its best judgment in order to intervene with utmost prudence. Decisions can be very difficult because of the extent of the encroachment and the difficulty of setting limiting principles.

Volvo/Veng was the first case in which the European Court considered with proper care whether a simple refusal to license could be abusive. Via an IP right, the rightholder controlled what we would now call an after-market, for the making of replacement parts for its own products. Volvo held a registered design over the front wing panels of Volvo 200 cars, which in effect gave it a monopoly in the UK over a utilitarian three-dimensional shape which presented no patentable features. Veng imported these products, manufactured without authority from

---

50. In *IMS*, the Commission had argued that IMS's temporal deprivation of its IP right was compensated by reasonable royalties. *See* IMS Health Inc. v. Commission, Case T-184/01 R1, [2001] E.C.R. II-3193, ¶ 142. This argument, however, did not impress the Court, which stressed in the following paragraph:

> [i]t is important initially to recall that the *public interest in respect for property rights in general and for intellectual property rights in particular* is expressly reflected in Articles 30 EC and 295 EC. The mere fact that the applicant has invoked and sought to enforce its copyright in the 1 860 brick structure for economic reasons does not lessen its entitlement to rely upon the exclusive right granted by national law for *the very purpose of rewarding innovation.*

Id. ¶ 143 (emphasis added).

Volvo, and marketed them in the United Kingdom. Volvo instituted proceedings against Veng for infringement of its UK registered design rights, and the case was referred to the European Court of Justice. There are two famous paragraphs, maybe drafted by different judges, more probably by the same judge, which state the basic principles. The Court exercised caution in order not to deprive the rightholder of the substance of the registered design right too casually,[51] while also not preventing companies from relying on competition law to attack a refusal to license an IP right in what we would now call "exceptional circumstances."[52] In the end, the Court found that the circumstances justifying liability under Article 82 were not present:

> *[T]he refusal* by the proprietor of a registered design in respect of body panels *to grant* to third parties, even in return for reasonable royalties, *a licence* for the supply of parts incorporating the design *cannot in itself be regarded as an abuse of a dominant position* within the meaning of Article 86 [now 82].[53] (emphasis added)

So a refusal to license can cease to be part of the core bundle of rights, and can become abusive, if special factors are present of which some examples (presumably illustrative but not exhaustive) were given. While *Volvo/Veng* was regarded as a triumph for the car companies which asserted the legality of their freedom to license potential competitors to make the product, it was nevertheless somewhat Delphic. The Court was able to please every-

---

51. *Volvo/Veng*, Case 238/87, [1988] E.C.R. 6211, ¶ 8 ("It must also be emphasized that the right of the proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without its consent, products incorporating the design constitutes the very subject-matter of his exclusive right. It follows that an obligation imposed upon the proprietor of a protected design to grant to third parties, even in return for a reasonable royalty, a licence for the supply of products incorporating the design would lead to the proprietor thereof being deprived of the substance of his exclusive right, and that a refusal to grant such a licence cannot in itself constitute an abuse of a dominant position.").

52. *Id.* ¶ 9 ("It must however be noted that the exercise of an exclusive right by the proprietor of a registered design in respect of car body panels may be prohibited by Article 86 [now 82] 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 even though many cars of that model are still in circulation, provided that such conduct is liable to affect trade between Member States.").

53. *Id.* ¶ 11.

one by a judgment which said "on the one hand, and on the other hand . . . ."

In *Magill*, however, the Commission had to make a decision. The broadcasters in the United Kingdom and Ireland issued lists of their future program times to every newspaper publisher in the United Kingdom and Ireland, with permission (indeed encouragement) to publish these times free of charge on a daily basis (the lists could be published two days at a time on weekends). Reproduction of the times on a weekly basis was forbidden in order to avoid competition with each broadcaster's own respective weekly guide, the only source of information on a weekly basis about upcoming programs. To be fully informed, the Irish television addict would need three separate magazines each week. The broadcasters collectively enjoined Magill from publishing a multi-channel guide showing all three broadcasters' programs side-by-side. During the interlocutory proceedings in Ireland and before a judgment by the Irish courts on the merits, the Commission decided to act on Magill's complaint of abuse of dominant position, and ordered the broadcasters to begin negotiations with Magill for a royalty-bearing license. The Commission's Decision was appealed to the Court of First Instance.

Ultimately, the Court of First Instance produced an extremely robust judgment, finding in favor of the Commission:

> Conduct of that type – characterized by preventing the production and marketing of a new product, for which there is potential consumer demand, on the ancillary market of television magazines and thereby excluding all competition from that market solely in order to secure the applicant's monopoly – clearly goes beyond what is necessary to fulfill the essential function of the copyright as permitted in Community law . . . The applicant's conduct cannot, therefore, be covered in Community law by the protection conferred by its copyright in the programme listings.[54]

The refusal to license an IP right could, in the very particular circumstances of the case, constitute an abuse. Nevertheless, the judgment, like the Decision, was heavily criticized, and there were a number of interventions on appeal to the ECJ by those

54. *RTE I*, [1989] E.C.R. II-483, ¶ 73. "Essential function" is a term developed in free movement of goods cases as a means of defining those instances where Articles 28 and 30 required that the national right had to give way to Community goals.

voicing concerns of principle. The Court of Justice also agreed with the Commission and the CFI that "exceptional circumstances" were present.[55]

The facts of *Magill* led commentators in Europe to the view that this was a case that was explained by those facts, and that this was just one exceptional "encroachment" of EC competition law upon intellectual property rights.

The 2001 Commission Decision in *IMS* (at interim measures) was the first time since the landmark initiative in *Magill* twelve years previously that the same doctrine was applied. As in *Magill*, the Commission's intervention was requested to moderate the otherwise fatal consequences of a dominant player's successfully invoking at an interlocutory stage an improbable national IP right. IMS is the world leader in gathering and supplying data on deliveries to pharmacies by wholesalers of pharmaceuticals. Pharmaceutical companies use this data to measure the effectiveness of their promotional efforts in each town and district. On the German market a geographic format for presenting this data had been developed by IMS and its customers (the pharmaceutical companies) and had become the *de facto* industry standard. This structure divides the map of Germany into 1,860 zones or "bricks" corresponding to postcode boundaries, by reference to which marketing data describing deliveries, prices and volumes in those zones is compiled and analyzed. When significant competitors appeared on the German market, IMS relied on copyright to prevent them operating. The customers said that presenting the marketing data in any other geographic format was not acceptable as they paid their employees and observed numbers of prescription sales by reference to the 1,860 zones. The competitors challenged before the German courts the use of copyright to prevent them competing, and also complained to the Commission. NDC was the most prominent complainant.

The Commission found that there was no possibility for companies wishing to offer pharmaceutical sales data in Germany to employ any convention for ascribing sales data geographically other than the convention used by IMS. In order to supply usable marketing data to customers, that data had to describe sales in geographic zones as their customers delineated

55. *RTE II*, [1995] E.C.R. I-743, ¶¶ 51-56.

them. There were no substitutes or alternatives to reporting sales along the same geographic lines as the map of postcodes as arranged by IMS, which, IMS was successfully claiming, constituted a breach of its copyright. The Commission found that IMS's bringing of copyright infringement actions was an abuse of its dominant position. The Commission considered that the litigation was likely to eliminate all competition, and that the refusal to grant a license lacked "objective justification." The Commission did not base its attack on the possibility that IMS had hijacked an industry standard.

The Commission's decision in *IMS* was, as in *Magill*, widely criticized on intellectual property grounds, since it was thought contrary to "well-established legal principles" and because it risked to "discourage investment in intellectual property".[56] Again, as in *Magill*, *IMS* was suspended by the President of the Court of First Instance.[57] National litigation in Germany culminated in a preliminary reference ruling of the Court of Justice on April 29, 2004, which constitutes the most authoritative pronouncement of the European judicature to this date on compulsory licensing of intellectual property rights.[58]

The ruling of the Court of Justice, drawing from *Magill* and *Bronner*, stated or recapitulated the four conditions under which a dominant undertaking may be ordered to license its intellectual property rights:

(a) the product or service to which access is sought must be indispensable for carrying on a particular business;
(b) the refusal is such as to exclude any competition on a secondary market;
(c) it prevents the emergence of a new product for which there is a potential consumer demand; and
(d) the refusal is not justified by objective considerations.[59]

These conditions are cumulative[60] and are likely to be inter-

56. *See, e.g.*, John Temple Lang, *European Community Competition Policy – How Far Does It Benefit Consumers?*, 18 BOLETÍN LATINOAMERICANO DE COMPETENCIA 129 (2004), *available at* http://europa.eu.int/comm/competition/international/others.

57. *See* IMS Health Inc. v. Commission, Case T-184/01 R1, [2001] E.C.R. II-3193.

58. *See IMS*, Case C-418/01 (not yet reported).

59. *Id.* ¶¶ 37-38.

60. Opinion of Advocate General Poiares Maduro, KPN Telecom BV v. Onafhankelijke Post en Telecommunicatie Autoriteit (OPTA), Case C-109/03 (2004) (judgment currently pending), ¶ 35.

preted restrictively and applied with extreme caution. As Advocate General Poiares Maduro has recently acknowledged:

> a duty under Article 82 EC for a dominant undertaking to aid its competitors should not be assumed too lightly and refusal to supply a competitor is not automatically considered abusive just because the inputs in question are necessary to compete on a secondary market. A balance should be kept between the interest in preserving or creating free competition in a particular market and the interest in not deterring investment and innovation by demanding that the fruits of commercial success be shared with competitors.[61]

I note here a point of detail. Comparing the Advocate General's Opinion and the Court's judgment in *IMS*, I see a certain "divergence" in the legal reasoning. Whereas Advocate General Tizzano started his analysis from *Commercial Solvents* and *Télémarketing*[62] (true refusal-to-deal cases) before going on to the IP cases *Volvo/Veng* and *Magill*, as well as to *Bronner*,[63] the Court chose to start its analysis directly from *Volvo/Veng* and *Magill*, which made up, in the Court's view, the relevant case law.[64] This "divergence" of analysis in such a celebrated case must mean that the Court intended to stress the "exceptional circumstances" aspect of compulsory IPR licensing cases, which stand over and above the general refusal-to-deal cases.

The distinction between intellectual property rights and other property rights for the purposes of the imposition of a duty to deal under EC competition law is not just formalism. Such a distinction is necessary. The difficulty is the identification of limiting principles. It cannot be the law that, every time an IP right confers a monopoly, there arises a duty to license. IP rights are intended to confer an exceptional privilege upon individuals. So judging the legality of not licensing them by reference to the "pro-monopoly" consequences of the right's invocation will never yield good results.[65] Indeed, the exceptionalness

61. *Id.* ¶ 39.

62. Télémarketing v. CLT and IPB, Case 311/84, [1985] E.C.R 3261.

63. *See* Opinion of Advocate General Tizzano, *IMS*, Case C-418/01 (not yet reported), ¶¶ 48, 49.

64. *IMS*, Case C-418/01 (not yet reported), ¶¶ 34-39.

65. *See* John Temple Lang, The Application of the Essential Facility Doctrine to Intellectual Property Rights under European Competition Law, Speech Made at the Antitrust, Patent and Copyright Conference Organized by Ecole des Mines de Paris, Cerna and University of California at Berkeley School of Law (Jan. 15-16, 2004), at 4,

of IP rights has two facets. One is an innovation facet. Intellectual property rights are one of the locomotives of innovation, rightholders use them to their own competitive advantage and, in the long-term, the consumers' constant need for new technologically-advanced products is better served by the incentive to innovate given to the right holder.[66] The second is an EU law facet. Article 295 of the EC Treaty protects private property, as recognized by the national legal systems of the EU, and this includes intellectual property.[67] Article 295 does not confer immunity upon holders of IP rights: it may be said to confirm the proposition that Community policies must be pursued while giving proper respect to private property interests.

B. *The Microsoft Decision*

Microsoft is a huge company with large resources. It has attracted a substantial degree of criticism and it has had a long history of antitrust litigation in the United States. The European case, or rather the bringing of the US case before the European fora, began in December 1998 with a complaint by Sun Microsystems, a US manufacturer of hardware which also supplies server operating systems that run on its hardware. Sun alleged that Microsoft had not supplied it with Microsoft technology, needed to enable its server operating systems to achieve integrated interoperation with Windows client operating systems. Sun's complaint was not limited to software interfaces exposed by Windows client operating systems, but extended to "integrated technologies" in Windows server operating systems, which Sun asked that Microsoft disclose and make available for use. Sun asserted that Microsoft's proprietary interfaces and integrated technologies were an "essential facility."[68]

The Commission's Decision in *Microsoft* was issued at the conclusion of a five-year investigation of Microsoft, during which

---

available at http://www.cerna.ensmp.fr/cerna_regulation/Documents/ColloqueAntitrust2004/TempleLang.pdf.

66. *Id.*

67. Aside from Article 295 of the EC Treaty, Article 30 of the EC Treaty refers to "the protection of industrial and commercial property." E.C. Treaty, *supra* note 1, arts. 30, 295, O.J. C 325/1 (2002).

68. Sun and Microsoft finally settled their differences and entered into a wide-ranging technical cooperation agreement in 2004, involving mutual assistance in the development of products.

the Commission issued three Statements of Objections (as well as a further clarification of its theories in the form of a letter sent from DG Competition to Microsoft shortly before the Decision was issued). The reproaches and remedies evolved considerably during the proceedings. Brief mention was made in the Second Statement of Objections in 2001 of the inclusion of additional features into Windows, in the form of video streaming capacity, and by the Third Statement of Objections in 2003 that had become one-half of the case against Microsoft, the other half being the "refusal to supply" of interoperability information. A number of other theories were raised but discarded.

On March 24, 2004, the Commission adopted its final Decision finding two abuses of a dominant position by Microsoft Corporation.[69] First, Microsoft was accused of having refused from October 1998 to supply "interoperability information"[70] to its competitors and to allow the use of such technology for the purpose of their developing and marketing operating systems for server computers performing so-called work-group functions.[71] Second, Microsoft is accused of having integrated improved media functionality into its Windows personal computer operating systems from May 1999 without simultaneously offering, at the same price if it so chose, a version of Windows without that media functionality. The violation was not adding the new features, but the failure to offer at the same time a version lacking those features, even at the same price as the more advanced version.

For these two infringements, the Commission imposed the largest fine (_497 million) in competition law history. As a remedy for the first infringement, Microsoft is ordered to draw up detailed descriptions of the communications protocols[72] by

69. *See Microsoft Decision*, Case COMP/C-3/37.792, art. 2(a), at 300.

70. "Interoperability information" is according to Article 1(1) of the Commission Decision "the complete and accurate specifications for all the Protocols implemented in Windows Work Group Server Operating Systems and that are used by Windows Work Group Server to deliver file and print services and group and user administration services, including the Windows Domain Controller Services, Active Directory services, and Group Policy services, to Windows Work Group Networks." *Id.* art. 1(1).

71. According to Article 5 of the Commission Decision, Microsoft must "make the Interoperability Information available to any undertaking having an interest in developing and distributing work group sever operating system products . . . ." *Id.* art. 5.

72. A "protocol" means, according to Article 1(2) of the Commission Decision, "a set of rules of interconnection and interaction between various instances of Windows Group Server Operating Systems and Windows Client PC Operating Systems running on different computers in a Windows Work Group Network." *Id.* art. 1(2).

which Microsoft's operating systems communicate with one another — referred to as "specifications" — and then to license competitors to use those specifications for the purpose of developing their own products. As a remedy for the second infringement, Microsoft is ordered to develop a version of Windows from which some media functionality has been removed (186 files in the Windows operating system) and offer it to customers in Europe on terms which do not discourage their taking it seriously.

I will deal mainly with the first alleged infringement, the one which leads to compulsory licensing of IP rights. The information to be delivered to competitors was said by Microsoft to be secret, protected by copyright and covered by patents, and the fruit of years of engineering effort. Vendors of operating systems compete intensely in developing successful communications protocols, which support a variety of operating system features. In ordering the compulsory licensing of specifications for Microsoft's proprietary communications protocols the Decision was, said Microsoft, fundamentally at odds with sound precedents and principles.

The Commission Decision gives an immense mass of facts (over 280 pages), while dedicating only twenty to thirty pages to legal theory. Although the Decision makes no written mention of the theory of "super-dominance," at the oral argument on October 1, 2004, that notion was advanced by the Commission as relevant. We have to assume, however, that the doctrines set forth in the Decision of March 24 are applicable to every other dominant company. One test used by the Decision entails an *ad hoc* balancing of the "general public good" against a dominant undertaking's right to deal with whom it pleases.[73] This open-ended test creates, in my submission, an extraordinary amount of unpredictability and legal uncertainty.[74] How can a large player know in the future whether it risks condemnation for not saying yes in the past to a request for assistance? The law needs a

73. *Microsoft Decision,* Case COMP/C-3/37.792, ¶ 711.

74. Compare the critical remarks of Derek Ridyard in his intervention in the conference on "The Article 82 EC Abuse Concept," in Brussels, Belgium, on September 30, 2004. Ridyard accuses the Commission's *Microsoft* Decision of "elastic manipulation of the legal concepts" and considers its balancing test that is based on hazy notions of the general "public interest" as detrimental to predictability and legal certainty. *Id.*

coherent way of separating sheep from goats, the good refusals to help from the bad refusals to help.

C. *The IMS Test and Microsoft*

Before dealing with the Microsoft Decision of March 24, 2004 in light of the *IMS* judgment of April 29, 2004, I would like to return to my observation above on the divergence between Advocate General Tizzano and the Court. The legal argumentation of the Court of Justice makes clear that compulsory licensing of intellectual property is only a very exceptional remedy in antitrust, subject to its own restrictive conditions (the *IMS* test). The Commission's Decision sought to reduce the exceptionality of compulsory licensing by using theories based on refusal-to-supply cases.

The exceptional nature of the compulsory licensing remedy in the Microsoft Decision is striking. For the first time in European (world?) competition law history, a competition authority has imposed on a dominant undertaking an obligation of indefinite duration to draw up a description of its technology for the sole purpose of delivering that description to an unidentified number of competitors, and then to license its competitors to exploit the technology so they may improve their own products.

I have never been persuaded that European competition law would accord an identical level of deference to every national right. It is not a coincidence that *Volvo/Veng*, *Magill* and *IMS*, each a difficult case where the outcome was not obvious, concerned rights at the "thin" end of the spectrum of rights. The compulsory licenses in *Magill* and *IMS* could be seen as very rare correctives for the consequences of invoking aberrant national rights in a manner which foreclosed competition.[75]

Does that mean that some intellectual property rights can be disregarded by competition law if they lack "merit"? No. A

---

75. *See* Ian Forrester, *EC Competition Law as a Limitation on The Use of IP Rights in Europe: Is There a Reason to Panic?*, *in* EUROPEAN COMPETITION LAW ANNUAL 2003: WHAT IS AN ABUSE OF A DOMINANT POSITION? (Claus Dieter Ehlermann and Isabela Atanasiu eds., 2005), *available at* http://www.iue.it/RSCAS/Research/Competition/2003(papers).sht,ml; *see also* Ian Forrester, Compulsory Licensing in Europe: A Rare Cure to Aberrant National Intellectual Property, Presentation at the Department of Justice/Federal Trade Commission Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy: Comparative Law Topics, (May 22, 2002), *available at* http://www.ftc.gov/opp/intellect/020522forrester.pdf [hereinafter Forrester, Compulsory Licensing in Europe].

legal right is a legal right. If a legal system or, *a fortiori*, international law instruments protect it, that protection must in principle be honored, and any encroachment upon it has to be capable of being analyzed, justified and defended without embarrassment. However, if the Court of Justice pronounced itself so cautiously in *Magill* and *IMS*, where the intellectual right concerned was quirky, not the most obvious textbook example, the conditions for compulsory IP licensing must be no less restrictive where the right protects that which society intends to protect and reward, namely innovation. In other words, the *IMS* test represents a necessary *minimum* for compulsory licensing. It is arguable that IP rights in more innovation-driven industries should be subject to even more restrictive and exceptional conditions before compulsory licensing can be contemplated.

Recall the previous cases. In *Magill*, the information at stake was the order in which television programs were to be shown in the forthcoming week. In *IMS*, the information at stake was a pattern which divided up the German map into territories whose frontiers corresponded to German postal code boundaries. In both cases, the information was widely known in the industry: in *Magill*, the TV listings were given free-of-charge to hundreds of newspapers every week, and in *IMS* the map had been drawn up with the participation of industry members and was used as the industry standard for presenting data. It is not surprising that the eligibility of such information for copyright protection under national law was hotly disputed in both cases. Indeed, in *Magill* the Commission had – until the Irish High Court pronounced - doubted that copyright could cover television program listings. The first question of the CFI judges at the *Magill* hearing was whether the Commission conceded that copyright did indeed subsist in the licensed material. The CFI noted that, according to the Commission, it was necessary to appraise the legal and economic "value" and "well-foundedness" of the copyright in the weekly listings in the present case, having regard to the objectives normally attributed to such a right. In that light, it asserted that it was necessary to take into consideration the nature of the property protected from the technological, cultural or innovative point of view, together with the purpose and justification in domestic law of the copyright in listings. Applying those criteria, the Commission found the program listings not to be in themselves "secret, innovative or related to research."[76] Advocate General Jacobs in *Bronner* did not miss this point and stressed that "the provision of copyright protection for program listings was difficult to justify in terms of rewarding or providing an incentive for creative effort."[77]

Likewise, Former Advocate General Tesauro, speaking about the Commission's interim measures Decision in *IMS*, stresses:

> This point, in fact, is to do with the very tension existing between antitrust and property rights, in particular intellectual property rights. In its decision the Commission does not explicitly put into question the value of the copyright at stake. However, one of the factual elements which is thoroughly explored by the Commission is the origin of the brick structure. From the evidence collected by the Commission, one has the feeling that the creation of the industry standard is more to do with the contribution and the involvement of the pharmaceutical companies than with a genuine, independent, creative effort entirely coming from the right holder. Thus, these arguments could have been a factor militating in favor of less stringent protection of such a copyright.[78]

Thus, there was authoritative doubt about the extent to which *Magill* and *IMS* could betoken a broad-ranging vulnerability of mainstream rights to the application of Article 82.

Let me now go back to the *IMS* judgment. Unfortunately for the Commission, this most authoritative statement on compulsory licensing emerged five weeks after the *Microsoft* Decision on March 24. I submit that the Commission's own test in the aggregate is in reality new competition doctrine and that it cannot survive scrutiny under the *IMS* criteria.

The first condition of the *IMS* test is *indispensability*. Is the material to be delivered to Microsoft's competitors indispensable for them to compete in the supply of what the Decision refers to as "work group" server operating systems? Conventional principles of competition law (*Bronner*[79] and *Tierce Ladbroke*[80] in partic-

76. *RTE I*, Case T-69/89, [1991] E.C.R. II-485, ¶¶ 45-46.

77. Opinion of Advocate General Jacobs, Bronner v. Mediaprint Case C-7/97, [1998] E.C.R. I-2291, ¶ 63.

78. *See* Giuseppe Tesauro, *The Essential Facility Doctrine: Latest Developments in EC Competition Law*, *in* EU COMPETITION LAW AND POLICY, DEVELOPMENTS AND PRIORITIES 100 (Hellenic Competition Committee ed., 2002).

79. *See* Bronner v. Mediaprint, Case C-7/97, [1998] E.C.R. I-7791 [hereinafter *Bronner*].

ular) make clear that access to intellectual property is not indispensable, if a dominant undertaking's competitors can develop and market their products without access to the intellectual property, even if it would be more convenient for them to have it. Work group server operating systems are offered by various suppliers throughout Europe.[81] They can interoperate with Microsoft operating systems through a variety of means, including their own communications protocols. The question is what is meant by interoperability.

There was fierce debate concerning whether the goal should be the notion of interoperability as set forth in the Software Directive[82] (though that definition was itself controversial) so that two heterogeneous products could communicate with each other, or whether the goal should be that one product could replace the other. Servers do talk to servers routinely and reliably using industry standard protocols, without possessing each other's private communications protocols. Two products can — argued Microsoft — interoperate without the need for one to be a "plug replacement" for the other. However, the more ambitious goal of the Decision was to endow the licensed server operating system with the capacity of functioning in place of one Windows server in a network of Windows servers. Thus, the Decision focused not on the ability of two operating systems to work together, but on the ability of a non-Microsoft server operating system to perform as if it was a perfect replication of a Windows server operating system in the delivery of certain services (delivered by a cluster of servers, each running the same operating system).[83]

---

80. *See* Tierce Ladbroke v. Commission, Case T-504/93, [1997] E.C.R. II-923 [hereinafter *Ladbroke*].

81. The *Microsoft Decision* itself identified Apple, IBM, Novell, Sun, and Linux vendors such as RedHat and SuSE, as competitors in the supply of "work group" server operating systems. *See Microsoft Decision*, Case COMP/C-3/37.792 (2004), ¶¶ 93-106.

82. Council Directive of 14 May 1991 on the legal protection of computer programs, 91/250/EEC, O.J. L 122/42 (1991).

83. The Microsoft Decision states at Paragraph 669:

> As regards the use of open industry standards implemented in Windows, interoperability within a Windows work group network largely depends on specifications that are proprietary or are extended versions of standard protocols. Therefore, open industry standards fall short of *enabling competitors to achieve the same degree of interoperability with the Windows domain architecture as Windows work group server operating systems do.* Since all major work group server operating system vendors already support most of the open industry standards supported

The second condition is the *emergence of a new product for which there is unmet consumer demand*.[84] The existence of any intellectual property right will commonly involve the existence of a legal monopoly. The challenge for competition law is to establish a realistic and predictable framework to determine those rare circumstances where the holder of the legal monopoly must share the intellectual property right with others. There is nothing intrinsically wrong in a right holder saying no to a licensee. That principle goes back to *Volvo/Veng*[85] and is consistent with the general principles established in *Ladbroke*[86] and *Bronner*.[87] Dominant players are not under a particular duty to help their competitors by supplying goods or services to them. The *Magill* judgment established parameters which should be present before a compulsory license must be granted. *IMS* provided for more clarity, by insisting that protection of competition should prevail over intellectual property rights only where a refusal to license prevents the emergence of a *new* product on a secondary market for which there is unmet consumer demand. According to *IMS*, essentially "duplicating the goods or services already offered on the secondary market by the owner of the copyright" is not sufficient.[88] A company wishing to receive a license must "intend to offer new goods or services not offered by the owner of the right and for which there is potential consumer demand."[89]

Now in *Bronner*, the Court did not expressly mention this condition when setting out the test it considered was applicable (delivery of papers did not present the problem). *IMS*, therefore, sets a marginally stricter test than *Bronner*. The *Microsoft* Decision expressed concern about the possibility that competitors are discouraged from developing new products because they

---

> in Windows, it can be concluded that this degree of interoperability proves to be insufficient for them to viably compete in the market. Therefore, reliance on open industry standards cannot be considered to be at present a realistic substitute to disclosures by Microsoft.

Microsoft Decision, Case COMP/C-3/37.792 (2004), ¶ 669 (emphasis added).

84. *IMS*, Case 418/01 (not yet reported), ¶ 38.

85. *Volvo/Veng*, Case 238/87, [1988] E.C.R. 6211, ¶ 8, [1989] 4 C.M.L.R. 122.

86. [1997] E.C.R. II-923.

87. [1998] E.C.R. I-7791.

88. *IMS*, Case C-418/01, ¶ 49.

89. *Id.*

do not have access to Microsoft's secrets.[90] It does not, however, suggest finding that recipients of Microsoft's technology will produce new products not currently offered by Microsoft. It merely refers to "innovative features" in "work group" server operating systems that Microsoft's competitors might bring to market.[91] Thus, new products may emerge when the competitive advantage has been eliminated.

On the third condition, *elimination of competition*, the Court's test in *IMS* speaks of "elimination of all competition."[92] By contrast, the test of March 24, 2004, is the "risk of elimination of competition," a test[93] based on probabilities, and more specifically on the declining share of one competitor, Novell, and the rationalization of the success of a new entrant, Linux.[94] To support its test, the Commission relies on general cases on refusal to supply (*Commercial Solvents* and *Télémarketing*), thus presenting the compulsory licensing case as a refusal to supply.[95] However, in each of those cases the prospect of eliminating competition was immediate and real, because there were no alternative sources of supply. In *Microsoft*, it remains true that competition in work group servers and the operating systems which control them has not been eliminated some five-and-a-half years after the alleged refusal to supply. There are still several competing systems.[96]

The Commission seems to admit this and does not claim "that competition is already eliminated in the market for work group server operating systems, or that it would be impossible to achieve even some partial interoperability with Windows client

90. *Microsoft Decision*, Case COMP/C-3/37.792, (2004), ¶ 694.

91. *Id.*

92. *IMS*, Case C-418/01, ¶ 52.

93. This seems to contradict the established rule that in Article 82 EC the burden of proof rests on the Commission. Article 2 of the new Regulation 1/2003 does not make any distinction in the case of Article 82 EC as it does with Article 81 EC, and provides that "the burden of proving an infringement *of Article 81(1) or of Article 82* of the Treaty shall rest on the party or the authority alleging the infringement." Council Regulation No. 1/2003, art. 2, O.J. L 1/1, (2003) (emphasis added).

94. *Microsoft Decision*, Case COMP/C-3/37.792, (2004), ¶ 585.

95. *Id.*

96. Indeed, during that time period there has been a successful entrant – Linux – which went from being too small to be tracked separately to obtaining 6% of the total server operating system market and 11% of the narrow "work group" server operating systems. *See id.*

PC and work group server operating system."[97]

It then states that "some partial interoperability" is possible, also due to "previous disclosures made by Microsoft."[98] However, according to the Commission, "the degree of interoperability that can be achieved on the basis of Microsoft's disclosures is insufficient to enable competitors to viably stay in the market."[99] The goal of the Decision thus appears to be delivering a "sufficient" degree of supply of interoperability, and thus, by implication, a "sufficient" degree of competition. This sort of "planning" also echoes a system of *ex ante* enforcement (such as in merger control), rather than of *ex post* enforcement, as it currently happens with Articles 81 and 82 of the E.C. Treaty. Likewise, as to the other half of the case, the goal of the Decision is to achieve greater penetration by media players supplied by companies other than Microsoft. The remedy has been defended by the Commission's services on the basis that if even 5% of new PCs were equipped with a media player other than Microsoft's player, this will encourage software developers to write applications for that player.[100] This appears to confirm that the *remedy* is intended to fragment the Windows platform. Whether or not that is to be regarded as a desirable goal (Microsoft would deny that it is desirable), the advantage to be gained from the remedy is that a significant number of new PCs will lack certain integrated functionalities. This seems to be market engineering on a grand scale.

Article 82 imposes special duties upon dominant companies. The *Microsoft* case involves the imposition on the company of remedies which are not behavioral but structural. The company is under a permanent duty to change how it behaves, once by forcing the licensing of its technology, once by redesigning its product. The former is imposed as the remedy for the response by the company to a request for wide revelation of technology. The latter is the penalty for including, without extra charge in Windows in 1999, video streaming as well as the already available video downloading and audio streaming.[101] Thus, the addressee

97. *Microsoft Decision*, Case COMP/C-3/37.792 (2004), ¶ 589 n.712.

98. *Id.*

99. *Id.*

100. *See id.*

101. Although the "tying" part of the Commission's Decision is not the focus of this contribution, one cannot help stressing the equally extraordinary nature of the

of the Decision is ordered to reorganize its affairs as the penalty for two novel infringements.

The fourth condition is *objective justification.* Must objective justification always be affirmatively present as a pre-condition for a company to be able to exploit its intellectual property rights? This cannot be so, otherwise we would reach the perverse conclusion that dominant companies could never safely rely upon their valuable IP, *unless* they can objectively justify that reliance. What the test will mean in practice will require some more argument and reflection. Any dominant company is objectively justified in not disclosing its intellectual property to a major competitor to assist it in seeking to displace its products in the market. So, it seems that the objective justification condition is relevant to cases in which there is some other affirmative exclusionary element in the conduct of a dominant undertaking that leads to the elimination of competition. A bare refusal to license should not be abusive, as we have known since *Volvo/Veng.*

Therefore, this is an appropriate occasion to address the accompanying abuses of which the Commission accuses Microsoft. The Commission alleges that Microsoft has disrupted previous levels of supply and that disclosure of interoperability information was Microsoft's initial policy but was later discontinued in order to hurt competitors.[102] Thus, by not disclosing the new interface specifications that organize the Windows 2000 domain, while it previously disclosed part of the corresponding interface specifications for the Windows NT domain, Microsoft was disrupting a prior pattern of making supplies.[103] On this line of theory, it is *Commercial Solvents* which is the relevant precedent.

It is not appropriate in an academic paper to go too deeply

remedy imposed under this part. The Commission, there, has taken the view that integrating new functionalities into a dominant product in the technology sphere constitutes tying because it confers incremental distribution advantages and raises a theoretical possibility of market tipping. As a remedy, the Commission has ordered Microsoft to put onto the market an additional degraded version of its Windows product lacking the media functionality. It seems not to be disputed that today all operating systems offer media functionality, and that there is no demand for an operating system without media functionality. There is a demand for media players and most consumers install several. The purpose of ordering Microsoft to offer the special version of its flagship product is to weaken the ubiquitous availability of an attractive feature, in the hope that consumers or the computer manufacturers form which they buy will be tempted to install other media players. This is market engineering on a bold scale.

102. *Microsoft Decision,* Case COMP/C-3/37.792 (2004), ¶¶ 579-84.

103. *Id.* ¶ 584.

into facts about which only the parties are able to have an independent view. In short, the parties agree that from 1994 to 2000 a broad range of technology was made available by Microsoft to one licensee, AT&T, which granted a number of sub-licenses on the basis of which many products in use today were developed; the parties agreed to end their licensing arrangement in the late 1990s. Microsoft states that a company cannot be obliged to license every new version of its technology to the world in general once it has licensed to one party different technology. As to the controversy with Sun Microsystems, it is agreed that a broad request was made for a range of information about Microsoft's future products, much broader than the communications protocols which are the subject of the remedy imposed by the Decision. The nexus between the alleged refusal to supply and the compulsory IP licensing remedy is not evident. The scope of what Microsoft must deliver by license to its competitors is much narrower than what it supposedly declined to deliver in 1998.

The Commission rejected these justifications by applying a new balancing test, which weighs Microsoft's incentives to innovate against the incentives of the whole industry to innovate were Microsoft required to make its technology available for license.[104] This balancing test appears to be extraordinarily imprecise. It cannot be prudent for the law to suggest that when a possibly dominant company receives a request for help of a technological kind from a competitor or anyone else, it is at risk of abusing Article 82 if its refusal seems likely to damage the public good, or for a compulsory license to be justified on the ground that forcing the licensee to share one technology will encourage it to develop new ones. Pruning shrubs in spring promotes growth, but it seems doubtful if technology will respond in the same way as horticultural assets. There is no objective standard against which a dominant company can decide whether it is obliged to license or not.

One consequence is that a dominant undertaking is at risk of reaching a point in the development of its product, incapable of being identified in advance, when suddenly it will be under a positive duty to deliver valuable intellectual property to competitors wishing to duplicate its products, and its inclusion of new functionalities at no extra cost in its standard product will be

104. *Id.* ¶ 669.

regarded as an illegal tie, rather than as the enhancement of an integrated product. If it makes the analysis wrongly, it risks a colossal fine.

V. *EPILOGUE*

The *Microsoft* case is and will remain a celebrated conflict. It remains to be seen whether it represents the drama of an aberrational one-off case or the awakenings of a new doctrine in EC competition law, which has been called "the doctrine of convenient facilities".[105] The system of free competition in the market, the system that rewards success and punishes failure, becomes blurred by an excessive degree of paternalism. The U.S. Supreme Court in *Trinko*[106] was unequivocal in condemning this approach and held that "enforced sharing . . . requires antitrust courts to act as central planners, identifying the proper price, quantity and other terms of dealing – a role for which they are ill-suited."[107]

I submit that the Commission Decision in *Microsoft* constitutes a huge piece of legal innovation. The two abuses defined there are different from all previous abuses. The two remedies are not less remarkable. There is a deep transatlantic gap as to *Microsoft*; the gap as to pharmaceuticals may seem less profound because of the difference in social and regulatory context. In both cases, however, the competition enforcer is pursuing a policy goal for the sake of specific beneficiaries, rather than classically discernible notions of pure competition.

---

105. *See* Ridyard, *supra* note 33.

106. Verizon Communications, Inc. v. Law Offices of Curtis Trinko, 540 U.S. 398 (2004).

107. *Id.* at 408.