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Abstract

This Article focuses on some of AG Jacobs' opinions regarding matters of competition, starting with his contributions on the meaning of "undertaking" in Höfner and AOK, under a combination of the Treaty Establishing the European Community ("EC Treaty") Articles 82 and 86 (special and exclusive rights), and Risparmio, under Articles 86 and 87 (State aids). It does not deal with many other opinions he wrote on the meaning of "undertaking," such as those in Albany and Pavlov. Finally, it discusses his opinions on refusals to deal in Bronner and Syfait, along with a selection of other judgments on the topic.

ADVOCATE GENERAL JACOBS' CONTRIBUTION TO COMPETITION LAW

*Valentine Korah**

INTRODUCTION

Francis Jacobs has made many outstanding contributions to European Community law as referendaire, barrister, Professor of European Law at King's College London, and, most recently and importantly, as Advocate General ("AG") at the European Court of Justice ("ECJ"). His opinions have been lucid and tightly written. He has shown a desirable way forward in many areas where the law was undeveloped, confused, or clearly wrong on grounds of European Community ("Community") policy. Invariably, he has provided cogent, theoretical underpinnings for his views, often starting from first principles and spelling out reasons of policy. Occasionally, he has referred to foreign law. Sometimes, the ECJ has followed his opinions, as in *Höfner*,[1] but not in *AOK*,[2] on the meaning of "undertaking," or in *Bronner*,[3] on a dominant firm's refusal to supply. In *Syfait*,[4] the ECJ refused jurisdiction, leaving the opinion with some authority on substance and sound theoretical arguments on policy related to basic Community principles. In *Jégo-Quéré*[5] and other cases, the ECJ endorsed his views on policy, but left reform to the legislature. That accords with the civil law tradition that courts should not usurp legislative power. Nevertheless, the Community courts have done much to advance Community policy and I welcome AG Jacobs'

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* Professor Emeritus of Competition Law at University College London, formerly, Visiting Professor at Fordham Law School for fourteen spring semesters. I am grateful to my colleague at University College London, Ioannis Lianos, for reading a draft of this paper and for making many helpful comments. Naturally, I remain responsible for errors; he has not even seen the final version.

1. Höfner v. Macrotron GmbH, Case C-41/90, [1991] E.C.R. I-1979, [1993] 4 C.M.L.R. 306.

2. AOK Bundesverband v. Ichthyol-Gesellschaft Cordes, Hermani & Co., Joined Cases C-264/01, C-306/01, C-354/01 & C-355/01, [2004] E.C.R. I-2493, [2004] 4 C.M.L.R. 1261.

3. Oscar Bronner GmbH & Co. KG v. Mediaprint Seitungs-und Zeitschriftenverlag GmbH & Co. KG, Case C-7/97, [1998] E.C.R. I-7791, [1999] 4 C.M.L.R. 112.

4. *See* Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) v. GlaxoSmithKline plc, Case C-53/03, [2005] E.C.R. I-4609, [2005] 5 C.M.L.R. 7.

5. *See* Commission v. Jégo-Quéré & Cie SA, Case C-263/02 P, [2004] E.C.R. I-3425, [2004] 2 C.M.L.R. 266.

contribution to developing Community law sensibly and by reference to principles.

I shall confine this Article to some of AG Jacobs' opinions on matters of competition, starting with his contributions on the meaning of "undertaking" in *Höfner*[6] and *AOK*,[7] under a combination of the Treaty Establishing the European Community ("EC Treaty") Articles 82 and 86 (special and exclusive rights),[8] and *Risparmio*,[9] under Articles 86 and 87 (State aids).[10] I will not deal with many other opinions he wrote on the meaning of "undertaking," however, such as those in *Albany*[11] and *Pavlov*.[12] Finally, I shall discuss his opinions on refusals to deal in *Bronner*[13] and *Syfait*,[14] along with a selection of other judgments on the topic.

I. *THE MEANING OF "UNDERTAKING" UNDER ARTICLE 86 (EX 90)*

The EC Treaty is neutral as between public and private property, and the public sector of several Member States is large. So, it is hardly surprising that the fathers of the EC Treaty should have wished to control anti-competitive State measures. On the other hand, curbing State powers is a highly sensitive political act. The EC Treaty left the extent to which public bodies were subject to its provisions largely to the ECJ,[15] which has been

6. *See* Opinion of Advocate General Jacobs, *Höfner*, Case C-41/90, [1991] E.C.R. I-1979, [1993] 4 C.M.L.R. 306.

7. *See* Opinion of Advocate General Jacobs, *AOK*, Joined Cases C-264/01, C-306/01, C-354/01 & C-355/01, [2004] E.C.R. I-2493, [2004] 4 C.M.L.R. 1261.

8. *See* Consolidated Version of the Treaty Establishing the European Community arts. 82, 86, O.J. C 325/33 (2002), at 65-66 [hereinafter EC Treaty].

9. *See* Opinion of Advocate General Jacobs, Ministero dell'Economia e delle Finanze v. Cassa di Risparmio di Firenze SpA, Case C-222/04 (ECJ Jan. 10, 2006) (not yet reported).

10. *See* EC Treaty, *supra* note 8, arts. 86-87, O.J. C 325/33, at 66-67 (2002).

11. *See* Opinion of Advocate General Jacobs, Albany Int'l BV v. Stichting Bedrijfspensioenfonds Textielindustrie, Joined Cases C-67/96, C-115-17/97 & C-219/97, [1999] E.C.R. I-5751, [2000] 4 C.M.L.R. 446.

12. *See* Opinion of Advocate General Jacobs, Pavlov v. Stichting Pensioenfonds Medische Specialisten, Joined Cases C-180-84/98, [2000] E.C.R. I-6451, [2001] 4 C.M.L.R. 30.

13. *See* Opinion of Advocate General Jacobs, *Bronner*, Case C-7/97, [1998] E.C.R. I-7791, [1999] 4 C.M.L.R. 112.

14. *See* Opinion of Advocate General Jacobs, *Syfait*, Case C-53/03, [2005] E.C.R. I-4609, [2005] 5 C.M.L.R. 7.

15. *See* EC Treaty, *supra* note 8, arts. 86, 220, 295, O.J. C 325/33, at 66, 122, 148

struggling under the tension of conflicting Community objectives of policy. Measures to implement social and environmental policies of the Community may be perceived as barriers to entry and anticompetitive. Should one policy objective prevail over the others or should each give way to the others only insofar as is necessary and proportionate?

Article 86 (formerly 90) provides:

> 1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.
>
> 2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.[16]

The prohibitions in Articles 82 and 86(1) in combination, as well as the exception in Article 86(2), apply only to "undertakings," a term that refers to an economic unit rather than a person.[17]

When trying to reconcile the competition rules with other Community policies, such as social or environmental measures, there is a temptation, to which the judges in some later cases have succumbed,[18] to find that public bodies implementing

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(2002). Throughout this Article, I shall use the numbering of the articles adopted by the Treaty of Amsterdam, even when referring to a period before the Treaty took effect.

16. *Id.* art. 86(1)-(2).

17. Hydrotherm Gerätebau GmbH v. Compact de Dott. Ing. Mario Andreoli & C.S.A.S., Case 170/83, [1984] E.C.R. 2999, 3016, ¶¶ 11-12, [1985] 3 C.M.L.R. 224, 242.

18. *See* Diego Calì & Figli Srl v. Servizi Ecologici Porto di Genova SpA (SEPG), Case C-343/95, [1997] E.C.R. I-1547, I-1588-89, ¶ 23, [1997] 5 C.M.L.R. 484, 519 (finding that an anti-pollution surveillance was a public interest and not an economic interest that would fall under the rules of the Treaty); *see also* SAT Fluggesellschaft mbH v. European Org. for the Safety of Air Navigation (Eurocontrol), Case C-364/92, [1994] E.C.R. I-43, I-63-64, ¶ 30, [1994] 5 C.M.L.R. 208, 225 (finding that a service controlling airline traffic was not a service of economic character); Poucet v. Assurances Generales de France (AGF), Joined Cases C-159/91 & C-160/91, [1993] E.C.R. I-637, I-670, ¶¶ 18-19 (finding that organizations involved in the management of a public social security system fulfill an exclusively social function).

other Community policies are not undertakings. Then, the social or environmental policy prevails over competition policy, whether or not it was necessary for competition law to give way altogether. There is no limitation of measures implementing the other policies to those that are necessary and proportionate. If, however, a body subject to public law is held to be an undertaking, Article 86(2) allows a derogation from competition policy to the extent that is necessary and proportionate.[19] The question concerning whether a body constitutes an undertaking is, therefore, very important.

A. Höfner

In *Höfner*, two private firms that had provided headhunting services sued for their contractual fees. The defendant claimed that the contract in the private sector was illegal and void because, under German law, only the State-owned labor office may legally provide such services. Because the labor exchange was unable to fill more than twenty-eight percent of the demand for executives, however, it encouraged private firms to infringe the German rules and do so.[20] Consequently, the labor office competed with them,[21] but made no charges for its services.[22]

Under Article 234, the Higher Regional Court in Munich asked the ECJ whether the rules of the EC Treaty, on the free movement of services and competition, applied to the labor office.[23]

AG Jacobs found that Article 59 (on the free movement of services)[24] did not apply and dwelt longer on Articles 82 and 86.[25] He had no difficulty in accepting the plaintiffs' argument

19. Ferring SA v. Agence Centrale des Organismes de Securite Sociale, Case C-53/00, [2001] E.C.R. I-9067, 9111, ¶ 31, [2003] 1 C.M.L.R. 1001, 1036.

20. *See* Opinion of Advocate General Jacobs, *Höfner*, Case C-41/90, [1991] E.C.R. I-1979, I-1997, ¶ 13, [1993] 4 C.M.L.R. 306, 317.

21. Advocate General Poiares Maduro has subsequently made this point in *FENIN*. Opinion of Advocate General Poiares Maduro, Federación Española de Empresas de Tecnología Sanitaria (FENIN), Case C-205/03 P, ¶ 28 (ECJ Nov. 10, 2005) (not yet reported).

22. *See* Opinion of Advocate General Jacobs, *Höfner*, [1991] E.C.R. at I-1996-97, ¶¶ 10, 13, [1993] 4 C.M.L.R. at 316-17.

23. *See Höfner*, [1991] E.C.R. at I-2014, ¶ 12, [1993] 4 C.M.L.R. at 331-32.

24. Treaty Establishing the European Economic Community art. 59, Mar. 25, 1957, 298 U.N.T.S. 11, 58.

25. *See* Opinion of Advocate General Jacobs, *Höfner*, [1991] E.C.R. at I-2002, I-2003-08, ¶¶ 30, 32-53, [1993] 4 C.M.L.R. at 322-29.

that the labor office was a public undertaking within the meaning of Articles 82 and 86(1) and "an undertaking entrusted with the operation of services of general economic interest" within the meaning of Article 86(2).[26] He added that, with a statutory monopoly, the office was clearly dominant over the market for employment procurement services throughout Germany.[27]

He rejected the view that a Member State conferring a greater monopoly than was required in the public interest constituted the abuse of a dominant position.[28] Article 295 (formerly 222) clearly states that Member States may decide how far to nationalize or privatize particular sectors of the economy.[29]

Although the labor office had encouraged headhunters to compete with it, the combined effect of the legislation conferring the exclusive right and the failure of the office to meet demand resulted in consumers being unable to obtain services they would expect in conditions of free competition. An employer seeking an executive would be in the same position as the owner of a Volvo car unable to obtain a replacement front-wing panel.[30] "Abuse" has been held in many judgments[31] to be an objective concept, not depending on intent. AG Jacobs considered that the failure to supply might affect trade among Member States and would amount to the abuse of its dominant position.[32] Consequently, the exclusive rights would be ineffective unless

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26. *See id.* at I-2004, ¶ 40, [1993] 4 C.M.L.R. at 324.

27. *See id.* at I-2004, ¶ 41, [1993] 4 C.M.L.R. at 324-25. The statement that the holder of a statutory exclusive right enjoys a dominant position has been repeated many times since, but does not apply to intellectual property rights, for which there may be substitutes. *See, e.g.*, Deutsche Grammophon v. Metro, Case 78/70, [1971] E.C.R. 487, 500, ¶ 13, [1971] C.M.L.R. 631, 657-58. States are unlikely to grant special or exclusive rights directly unless they confer considerable market power. The situation of the labor office, which supplied only twenty-eight percent of headhunting services, was anomolous. Without a statutory monopoly, such a market share would not have sufficed for a finding that the office was dominant. The fact that it was able to meet such a small proportion of the demand resulted in it having to compete with private firms. There was a market for head hunting services to find executives.

28. *See* Opinion of Advocate General Jacobs, *Höfner*, [1991] E.C.R. at I-2005, ¶ 43, [1993] 4 C.M.L.R. at 325.

29. EC Treaty, *supra* note 8, art. 295, O.J. C 325/33, at 148 (2002).

30. *See* AB Volvo v. Erik Veng (UK) Ltd., Case 238/87, [1988] E.C.R. 6211, [1989] 4 C.M.L.R. 122 (concerning when refusals to deal or license might amount to the abuse of a dominant position).

31. This definition originated with *Hoffman-La Roche & Co. AG v. Commission*, Case 85/76, [1979] E.C.R. 461, 520, ¶ 38.

32. *See* Opinion of Advocate General Jacobs, *Höfner*, [1991] E.C.R. at I-2006, ¶ 46, [1993] 4 C.M.L.R. at 326.

the derogation of Article 86(2) applied.[33] That was a factual issue for the referring court.[34]

The judgment followed the opinion of AG Jacobs. The judgment specifically addressed the issue of what constitutes an undertaking without giving reasons:

> It must be observed, in the context of competition law, first that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity.[35]

It is the nature of the activity that must be economic, whether or not it is paid for commercially.[36] This idea has been repeated in many subsequent judgments of the ECJ.[37]

The ECJ confirmed that the derogation in Article 86(2) might still apply.[38] Everyone, including the employment office, agreed that the latter was unable to meet demand.[39] Consequently, social policy did not require a breach of the competition rules. In holding that the employment office might constitute an undertaking, the ECJ and AG Jacobs ensured that the competition rules would be ineffective only to the extent that the entity entrusted with the operation of services of general economic interest could not perform its task without infringing the competition rules.[40]

B. AOK

One case where AG Jacobs and the ECJ differed was *AOK*.[41] German law required most employees to belong to the State insurance system. The system was funded by compulsory contributions from employees and employers and based partly on social

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33. *See id.* at I-2006-07, ¶ 47, [1993] 4 C.M.L.R. at 327-28.

34. *See id.* at I-1994, ¶ 1, [1993] 4 C.M.L.R. at 314.

35. *Höfner*, [1991] E.C.R. I-1979, I-2016, ¶ 21, [1993] 4 C.M.L.R. 306, 333.

36. *See id.* at I-2016-17, ¶¶ 22-23, [1993] 4 C.M.L.R. at 333.

37. *See, e.g.*, Compagnie Maritime Belge Transports SA v. Commission, Case 395/96, [2000] E.C.R. I-1365, [2000] 4 C.M.L.R. 1076.

38. *See Höfner*, [1991] E.C.R. at I-2017, ¶ 27, [1993] 4 C.M.L.R. at 334.

39. *See* Opinion of Advocate General Jacobs, *Höfner*, [1991] E.C.R. at I-1997-98, ¶ 14(i), [1993] 4 C.M.L.R. at 317.

40. *See id.* at I-2003, ¶ 36, [1993] 4 C.M.L.R. at 323-24; *see also Höfner*, [1991] E.C.R. at I-2020, ¶ 28, [1993] 4 C.M.L.R. at 334.

41. *AOK*, Joined Cases C-264/01, C-306/01, C-354/01 & C-355/01, [2004] E.C.R. I-2493, [2004] 4 C.M.L.R. 1261.

solidarity, the healthy subsidizing the sick or disabled. Sickness funds provided the care itself, not just insurance. Most sickness funds were governed by public law. The funds were organized by region and sector through associations.

The various sickness funds in Germany entered into a buying cartel. Under statutory powers, their association decided which medical products would have fixed maximum payments and the amount they would reimburse for these products. To the extent that the maximum was exceeded, the patient had to pay. The scheme had been amended after the main proceedings were commenced to permit the funds some discretion when setting the amounts and the funds competed in attracting members. Questions arose regarding whether the funds were undertakings subject to the competition rules, whether decisions of their leading associations were capable of infringing Article 81, and, if so, whether the derogation of Article 86(2) might apply.

AG Jacobs first considered whether the sickness funds were undertakings.[42] The test is functional in that it depends on the type of activity rather than on the characteristic of the actors which perform it. It was irrelevant that the funds were subject to public law or were part of the State administration. Nor did the social or general interest objectives prevent the funds from being undertakings.

> In assessing whether an activity is economic in character, the basic test appears to me to be whether it could, at least in principle, be carried on by a private undertaking in order to make profits. If there were no possibility of a private undertaking carrying on a given activity, there would be no purpose in applying the competition rules to it.[43]

Next, AG Jacobs considered the somewhat inconsistent judgments of the ECJ in the field of social policy versus competition.[44] The ECJ had occasionally held that, where there was a large element of solidarity in sickness insurance, as in *Poucet and Pistre*,[45] the entity was not an undertaking. AG Jacobs distinguished such schemes from those with a capital fund into which

42. *See id.* at 1272-76, ¶¶ 25-46.

43. *Id.* at 1272, ¶ 27.

44. *See id.* at 1272-76, ¶¶ 25-46.

45. Poucet v. Assurances Generales de France (AGF), Joined Cases C-159/91 & C-160/91, [1993] E.C.R. I-637, I-670, ¶¶ 18-20.

contributions are paid and under which benefits are related to contributions, which, at least in principle, are subject to the competition rules, despite some element of solidarity.[46] Classification is a matter of degree.[47]

AG Jacobs distinguished earlier cases where the sickness funds in *AOK* enjoyed some autonomy, even though it was limited. The funds did actually compete with each other both for those required to insure under the statutory scheme and for those not so required.[48] AG Jacobs concluded that, in agreeing on the fixed amounts, the funds were acting within the sphere of their economic activity.[49] He also accepted the appellants' argument that if the funds were "undertakings," then their individual associations were acting as associations of undertakings when setting the fixed amounts.[50]

In AG Jacobs's view, Article 86(1) in combination with Article 81 was applicable.[51] It was for the national court to decide whether the act of State defense applied.[52] Citing several judgments, he accepted, however, that the derogation in Article 86(2) applied.[53] The method for setting the fixed amounts was not disproportionate. Community law accords Member States discretion in organizing a social security system and the German system was less invasive than some others.

On this view, governments can provide a service entirely with State resources, which are not subject to the competition rules; they can privatize an activity that will remain subject to them. If governments take an intermediate position and let a State entity compete with private firms, the entity has an opportunity to justify its conduct under Article 86(2).

The ECJ, however, decided that the funds were not undertakings because they were exercising a social function.[54] Consequently, Article 86(1) did not apply and there was no need to

46. *See* Opinion of Advocate General Jacobs, *AOK*, [2004] E.C.R. I-2493, ¶ 34, [2004] 4 C.M.L.R. 1261, 1273-74.

47. *See id.* at 1274, ¶ 35.

48. *See id.* at 1275, ¶¶ 37-42.

49. *See id.* at 1275-76, ¶¶ 43-46.

50. *See id.* at 1276-79, ¶¶ 47-56.

51. *See id.* at 1280-81, ¶¶ 67-72.

52. *See id.* at 1281-84, ¶¶ 73-85.

53. *See id.* at 1284-87, ¶¶ 86-102.

54. *See AOK*, Joined Cases C-264/01, C-306/01, C-354/01 & C-355/01, [2004] E.C.R. I-2493, ¶¶ 45-66, [2004] 4 C.M.L.R. 1261, 1297-1300.

consider whether the interference with competition was proportionate to the social need.[55] To the parties, the difference between AG Jacobs and the ECJ may not matter. I regret that the ECJ held that the funds were not undertakings, however, as in later cases and in relation to different kinds of social policy or environmental protection, competition law will be ousted, whether or not the measures are proportionate.

C. FENIN

We still await the judgment of the ECJ in *FENIN*.[56] In this case, the public bodies responsible for the provision of health care under the Spanish national health system bought medical instruments to enable it to provide the care free of charge.[57] Was their conduct subject to the competition rules?

AG Poiares Maduro started by applying the functional test—adopted since AG Jacobs' opinion in *Höfner*—irrespective of the way the entity is financed.[58] This test is harder to apply, however, where there is no competitive market to compare—almost any activity is capable of being carried out by a profit making undertaking.[59] He went on to suggest that the labor office was held to be an undertaking in *Höfner*, because it was competing with the private sector.[60]

AG Poiares Maduro distinguished various cases where the competition rules did not apply to non-economic activities, because they were part of the essential function of the State and suggested that, although provision of health care was somewhat more competitive than the control of navigation involved in in *Eurocontrol*[61] and the environmental control in an Italian harbor

55. *See id.* at 1300, ¶ 66.

56. Federación Española de Empresas de Tecnología Sanitaria (FENIN), Case C-205/03 P (ECJ) (not yet reported). The other major question was whether buying the goods needed to perform a service downstream could be treated as an economic activity, either together with the sale of the service or independently. I will not consider the question. We await the judgment of the ECJ, but in November 2005, AG Poiares Maduro delivered his opinion. *See* Opinion of Advocate General Poiares Maduro, *FENIN*, Case C-205/03 P (ECJ Nov. 10, 2005) (not yet reported).

57. Federación Nacional de Empresas, Instrumentación Científica, Médica, Técnica y Dental (FENIN) v. Commission, Case T-319/99, [2003] E.C.R. II-357, II-361-62, ¶¶ 1-2.

58. Opinion of Advocate General Poiares Maduro, *FENIN*, ¶ 11.

59. *Id.* ¶ 12.

60. *Id.* ¶¶ 13, 28.

61. *Eurocontrol*, Case C-364/92, [1994] E.C.R. I-43, [1994] 5 C.M.L.R. 208.

in *Diego Calì & Figli*,[62] health care might be treated as a function of State where solidarity predominated. He recommended that the extent of solidarity excluding the competition rules could be assessed as follows:

(a) an obligation of universal service implies solidarity in so far as cost differentials are ignored, but not sufficiently, in itself, to prevent the service being economic; (b) a higher level of solidarity is achieved when the relevant service is supplied free of charge; (c) if public and private entities provide the same services, any analysis will have to be undertaken under Article 86(2)—in other words, the public entity must be an undertaking if in competition with private firms; and (d) where the services can be delivered only by bodies controlled by the State, which must supply anyone free of charge, there can be no question of market forces being involved—in other words, the entity does not amount to an undertaking.[63]

AG Poiares Maduro's attitude to the first two situations does not contradict AG Jacobs's position,[64] but provides more detail. The third situation goes further and states that, where the State and private individual provide the same service, the State entity must be an "undertaking,"[65] which also goes further than AG Jacobs. AG Poiares Maduro says, "free of charge."[66] Payment was not relevant in *Höfner*.[67] Thus, the statement may envisage State functions similar to those in *Eurocontrol*.[68]

AG Poiares Maduro concluded, however, that it would be more fruitful to consider the application of the competition rules through the application of Article 86(2) than through a formal definition of the concept of "undertaking."[69] This clearly follows the attitude of AG Jacobs.

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62. Diego Calì & Figli Srl v. Servizi Ecologici Porto di Genova SpA (SEPG), Case C-343/95, [1997] E.C.R. I-1547, [1997] 5 C.M.L.R. 484.

63. *See* Opinion of Advocate General Poiares Maduro, *FENIN*, ¶ 31.

64. *See* Opinion of Advocate General Jacobs, *AOK*, Joined Cases C-264/01, C-306/01, C-354/01 & C-355/01, [2004] E.C.R. I-2493, ¶ 35, [2004] 4 C.M.L.R. 1261, 1274 (stating that solidarity was a matter of degree).

65. Opinion of Advocate General Poiares Maduro, *FENIN*, ¶ 31.

66. *Id.*

67. *See generally Höfner*, Case C-41/90, [1991] E.C.R. I-1979, [1993] 4 C.M.L.R. 306.

68. *Eurocontrol*, Case C-364/92, [1994] E.C.R. I-43, [1994] 5 C.M.L.R. 208.

69. Opinion of Advocate General Poiares Maduro, *FENIN*, Case C-205/03 P, ¶ 47.

D. Risparmio

In *Ministero dell'Economia e delle Finanze v. Cassa di Risparmio di Firenze SpA*, the ECJ, following AG Jacobs, extended the concept of undertaking to cover an entity "not only when it offers goods and services on the market but also when it carries out other activities which are economic in nature and which could lead to distortions in a market where competition exists."[70]

The ECJ held that an entity that holds controlling shareholdings in companies engaged in banking and that, by use of its authority, directly participates in administering those companies, must be regarded as an undertaking engaged in an economic activity for the purposes of Article 87(1) (State aid).[71] Thus, the EC rules on State aid applied. AG Jacobs referred to case law relating to the Sixth VAT directive[72] and, in my view, the judgment applies to Articles 82 combined with 86, as well as to Article 87.

Both AG Jacobs and the ECJ were concerned that the rules on State aid might otherwise be avoided by splitting an entity—one part operating on a market and the other, which received the aid, controlling the first entity.[73] Both concluded that, where a banking foundation actually exercised control over subsidiaries that traded on a market, the foundations were subject to the competition rules unless they qualified under Article 86(2).[74] I am delighted that the ECJ spelled out reasons of policy for its conclusions and did not merely apply rules formalistically. It makes it easier for us to understand where the law may be going and may influence the direction.

The ECJ has not yet been called upon to decide whether an undertaking not "entrusted with the operation of services of general economic interest" is an undertaking subject to Article

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70. Opinion of Advocate General Jacobs, *Risparmio*, Case C-222/04, ¶ 78 (ECJ Oct. 27, 2005) (not yet reported).

71. *Id.* ¶¶ 87-93.

72. *Id.* ¶ 88. AG Jacobs said that:

> [F]or the sake of coherence and uniformity, the same concepts in different areas of Community law should, as a general rule, be given identical meaning, unless otherwise justified by the nature or specific features of the area in which that concept is being inserted and which may warrant an ad hoc reading.

Id. ¶ 88 n.26.

73. *Id.* ¶ 84.

74. *Id.* ¶ 134.

86(1). In such a case, holding that it is an undertaking would leave no obvious way to exclude the competition rules even to the extent necessary to enable other Community policies to apply. That problem did not arise in *Risparmio* and it is difficult to envisage such a case.

E. *Conclusion on the Meaning of "Undertaking"*

AG Jacobs's opinion in *Höfner* has been very influential. He started by defining "undertaking" in terms of "being engaged in an economic activity." In later cases involving public health insurance or care, the ECJ was unwilling to apply competition policy to trump provisions for health care and started to look to the criterion of solidarity to protect rules of social security from it. In *AOK*, Mr. Jacobs tried, without immediate success, to preserve the application of the competition rules, to the extent that they were not inconsistent with other Community polices, through the use of Article 86(2). We await the judgment of the ECJ in *FENIN*. Followed by the ECJ in *Risparmio*, AG Jacobs extended the case-law under Article 86(2) to State aid and to situations where statutory power controls over an affiliate were actually exercised to control the activities of the affiliate. AG Jacobs has given his views in most of the cases defining the concept of "undertaking."

II. *REFUSALS TO SUPPLY*

AG Jacobs has been extremely influential also in limiting the obligation of a dominant firm to supply anyone who wants access to an essential facility.[75] Where some firms are supplied on more advantageous terms than others, the abuse within the meaning of Article 82 may consist of discrimination contrary to Article 82(c) and, thus, there is no need to establish harm to consumers, but there are other limitations.[76] This Article, how-

75. Although this Article will not consider all the important judgments in this area, there are far fuller analyses citing more authority. *See, e.g.*, John Temple Lang, *The Application of the Essential Facility Doctrine to Intellectual Property Rights Under European Competition Law, in* ANTITRUST, PATENTS AND COPYRIGHT: EU AND US PERSPECTIVES 56–84 (Francois Leveque & Howard Shelanski eds., 2005); Thomas Eilmansberger, *The Essential Facilities Doctrine Under Art. 82: What is the State of Affairs After* IMS Health *and* Microsoft?, 16 K.C.L.R. 329 (2005); VALENTINE KORAH, INTELLECTUAL PROPERTY RIGHTS AND THE EC COMPETITION RULES (2006).

76. EC Treaty, *supra* note 8, art. 82(c), O.J. C 325/33, at 65 (2002) ("applying

ever, only discusses the application of Article 82(b),[77] infringement of which requires harm to consumers and is more in line with the European Commission's ("Commission") current concern to protect consumers rather than competitors.

AG Jacobs has stressed the need for an incentive for the incumbent to invest in the original facility, an incentive for the newcomer to reproduce it where this is possible, and detailed regulation when setting the compensation for granting compulsory access. He has insisted that, for the newcomer to be entitled to access, the incumbent must have a stranglehold downstream.

A. Commercial Solvents *and the Early Decisions of the Commission*

The obligation of a dominant firm to supply a former customer with products he needs to carry on business in a neighboring market stems from the early 1970s. In *Commercial Solvents*,[78] the ECJ held that it was contrary to Article 82 for a dominant firm to refuse to supply a former customer of raw materials and, thereby, eliminate its competition downstream.[79] Commercial Solvents was the only firm in the world that could make aminobutanol on a commercial sale.[80] When its half-owned joint venture started to use aminobutanol to produce a cure for tuberculosis, called ethambutol, Commercial Solvents refused to supply Zoja, its competitor downstream and former customer,[81] with the raw materials.[82]

The ECJ confirmed the Commission's decision to require supply but did not distinguish between free and fair competi-

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dissimilar conditions to equivalent transactions with other trading partners, thereby putting them at a competitive disadvantage").

77. *Id.* art. 82(b), at 65 ("[L]imiting production, markets or technical development to the prejudice of consumers.").

78. Istituto Chemioterapico Italiano SpA and Commercial Solvents Corp. v. Commission, Joined Cases 6/73 & 7/73, [1974] E.C.R. 223, [1974] 1 C.M.L.R. 309 [hereinafter *Commercial Solvents*].

79. *Id.* at 250-51, ¶ 25, [1974] 1 C.M.L.R. at 340-41.

80. *Id.* at 247, ¶ 9, [1974] 1 C.M.L.R. at 337. Its patents had expired, but it benefited from secret expertise. These days, expertise is being treated more like an intellectual property right. So it may be wrong to treat this case as relating to a refusal to supply goods and not to a refusal to license an intellectual property right.

81. Zoja had asked for the contract of supply to be terminated. *Id.* at 250, ¶ 23, [1974] 1 C.M.L.R. at 340. When aminobutanol ceased to be available cheaply on the market, Zoja wanted the contract revived. *Id.*

82. *Id.*

tion,[83] although one of the judges, Pierre Pescatore, has stated in public that the ECJ had to come to the help of a small producer, Zoja. Currently, the Commission states that it is protecting competition rather than competitors.[84] Thus, justification for not supplying a competitor should not be required when consumers are not harmed.[85]

The ECJ confirmed a duty to supply goods and services in several other cases, such as *United Brands*[86] and *Télémarketing*.[87] In a series of decisions in the early 1990s, the Commission required that the operators of sea and airports grant access to ferry operators that competed with the port operator's ferries. Some of the markets were very narrow—just a single port and the routes it served. Competition practitioners became very worried about the reduction of the original incentive to develop a facility.

B. Magill

In *Magill*, the Commission and courts limited the right to withhold supply to a competitor downstream.[88] Each of the three television stations franchised to transmit programs that could be received in Ireland and Northern Ireland (separate Member States) published its own weekly guide of programs in advance.[89] When Magill started to publish a comprehensive weekly guide to the three stations, each sued it successfully for copyright infringement.[90] The Commission, however, adopted a decision stating that this amounted to abuse of the stations'

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83. *Id.* at 256, ¶¶ 46-47, [1974] 1 C.M.L.R. at 345.

84. *See* EUROPEAN COMMISSION, DG COMPETITION DISCUSSION PAPER ON THE APPLICATION OF ARTICLE 82 OF THE TREATY TO EXCLUSIONARY ABUSES 17 (Dec. 2005), *available at* http://europa.eu.int/comm/competition/antitrust/others/discpaper2005.pdf; *see also* Commission Notice, ¶ 13, O.J. C 101/97, at 98 (2004) (Guidelines on the application of Article 81(3) of the Treaty).

85. Also remember that Article 82(b) is infringed only if there is harm to consumers. *See id.*

86. United Brands Co. & United Brands Continentaal BV v. Commission, Case 27/76, [1978] E.C.R. 207, [1978] 1 C.M.L.R. 429.

87. Centre Belge d'Etudes du Marché-Télémarketing SA (CBEM) v. Compagnie Luxembourgeoise de Télédiffusion, Case 311/84, [1985] E.C.R. 3261, [1986] 2 C.M.L.R. 558.

88. *See* Radio Telefis Eireann (RTE) v. Commission, Case T-69/89, [1991] E.C.R. II-485 and Joined Cases C-241/91 P & C-242/91 P, [1995] E.C.R. I-743 [hereinafter *Magill*].

89. *See id.* at I-811-12, ¶¶ 7, 9.

90. *See id.* at I-812, ¶ 10.

dominant positions and required each to supply Magill with the information needed to publish the weekly guide.[91] The Court of First Instance ("CFI") and the ECJ confirmed because of the special circumstances of the case.[92]

Although the ECJ had confirmed several earlier rulings that held that mere ownership of an intellectual property right does not confer a dominant position,[93] it found that the stations each enjoyed a dominant position over that information because they were the only source of program information for a company publishing a comprehensive guide to television programs. The ECJ also confirmed that "the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct."[94]

The ECJ found that the exercise of copyright against Magill was abusive.[95] There were no substitutes for the information.[96] The CFI had found that the weekly highlights and daily programs in the newspapers or the individual weekly guides published by the stations were not sufficient and that the ECJ had no jurisdiction on questions of fact.

The producer of a comprehensive weekly guide was dependent on the stations:

> The appellants' refusal to provide basic information by relying on national copyright provisions thus prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the appellants did not offer and for which there was a potential consumer demand. Such refusal constitutes an abuse under heading (b) of the second paragraph of Article [82] of the [Consolidated EC] Treaty.[97]

The refusal was not justified and enabled the stations to reserve the market for weekly television guides for themselves.[98] In the light of all these circumstances, the ECJ held that the CFI had not erred in law.[99]

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91. *See id.* at I-812, ¶ 12.
92. *See id.* at I-836, ¶¶ 100-01.
93. *See id.* at I-822, ¶ 46.
94. *See id.* at I-823, ¶ 50.
95. *See id.* at I-825, ¶ 57.
96. *See id.* at I-823, ¶ 52.
97. *Id.* at I-824, ¶ 54.
98. *See id.* at I-824, ¶¶ 55-56.
99. *See id.* at I-836, ¶ 101.

Magill was only the second case in which the ECJ confirmed a duty to license intellectual property rights, the other was *AB Volvo v. Erik Veng (UK) Ltd.*[100] In *Magill*, the Court stated that the duty arises only in exceptional circumstances.[101] Thus, some people have inferred that it is harder to establish a duty to license intellectual property rights than to supply goods or services.[102]

How far the judgment went was controversial. What was exceptional? If the stations had been treated as dominant based on their franchises to transmit, the ECJ could have avoided the difficult questions relating to intellectual property rights[103] and whether the abuse was a refusal to license or to supply information.[104]

Were the three conditions of paragraph 54 cumulative, as indicated by the conjunction, "and," or alternative?[105] Were they exhaustive or were there other special circumstances? Clearly, the exclusion of a new kind of product is more serious than the exclusion of a firm that will supply virtually the same product, but I would be sorry if novelty was a condition of access. It is an imprecise concept and, in *AB Volvo*,[106] the ECJ had confirmed, in principle, that the refusal to grant a copyright license to manufacture or import spare parts for Volvo cars on reasonable terms was not abusive,[107] but suggested three circumstances in which it might be.[108] Novelty is not always desirable. In *Volvo*, the desired spare parts would have been useless if they did not fit the car. John Temple Lang suggests that novelty applies only to a new type of product.[109] It seems to me that this test is stricter

100. *AB Volvo*, Case 238/87, [1988] E.C.R. 6211, [1989] 4 C.M.L.R. 122.

101. *See Magill*, [1995] E.C.R. I-743, I-823, ¶ 50.

102. *See, e.g.*, Eilmansberger, *supra* note 75, at 332-34; Temple Lang, *supra* note 75, at 64-65.

103. It is not clear that there was an infringement of copyright, although the CFI had held that there was. *See Magill*, Case T-69/89, [1991] E.C.R. II-485, II-529, ¶ 98.

104. As Sir Jeremy Lever said at the Fordham International Intellectual Property Conference in 2005, the stations must have had licenses to transmit, so probably were dominant, but the Court relied on their being the only source of the information about program times a week ahead. *See* Sir Jeremy Lever, Address at the Fordham International Intellectual Property Conference (Apr. 1, 2005).

105. *See Magill*, [1995] E.C.R. I-743, I-824, ¶ 54.

106. *AB Volvo*, [1988] E.C.R. 6211, [1989] 4 C.M.L.R. 122.

107. *See id.* at 6236, ¶ 11, [1989] 4 C.M.L.R. at 136.

108. *See id.* at 6235, ¶ 9, [1989] 4 C.M.L.R. at 135-36.

109. Temple Lang, *supra* note 75, at 61, 65.

than some, but no more precise.

As AG Jacobs observed in *Bronner*, few Member States grant copyright in information.[110] Such a copyright gives too broad an exclusive right.[111] The stations needed consumers to be aware of their programs and did not need any copyright protection to induce them to publish their own guides.[112] The United Kingdom law of copyright was changed in 1988 to require a statutory license.

C. Oscar Bronner

The law went far in requiring a dominant firm to supply a competitor downstream, but the opinion of AG Jacobs in *Bronner*[113] stemmed the tide considerably. A newspaper proprietor required access to the only national home delivery service in Austria.[114] Media Print's delivery service was not protected by any intellectual property right.[115] Both the judgment and opinion were important and were cited by the ECJ in *IMS*,[116] by AG Jacobs in *Syfait*, and by the Commission in *Microsoft*.[117] They have been influential. In *Bronner*, after describing the way that American courts had drawn back from applying their essential facilities doctrine, AG Jacobs made several important general points:

> 56. First, it is apparent that the right to choose one's trading partners and freely to dispose of one's property are generally recognised principles in the laws of the Member States, in

110. *See* Opinion of Advocate General Jacobs, *Bronner*, Case C-7/97, [1998] E.C.R. I-7794, I-7812, ¶ 62, [1999] 4 C.M.L.R. 112, 133.

111. Originally, the data protection directive gave no exclusive right to information, but there was a dispute in Parliament and the actual text does protect it. *See generally* European Parliament and Council Directive No. 96/9/EC, O.J. L 77/20 (1996).

112. *See* Panel Discussion of *Magill*, *in* 2 INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY 36-1, 36-3 (Hugh C. Hansen ed., 1998) (commenting on Ian S. Forrester, Magill, "A Famous Victory"? Third Party Access to Intellectual Property Rights, in *id.* at 35-1); *see also* Opinion of Advocate General Jacobs, *Bronner*, [1998] E.C.R. at I-7812, ¶ 63, [1999] 4 C.M.L.R. at 133.

113. Opinion of Advocate General Jacobs, *Bronner*, Case C-7/97, [1998] E.C.R. I-7794, [1999] 4 C.M.L.R. 112.

114. *See Bronner*, [1998] E.C.R. I-7794, I-7820-21, ¶¶ 4-9, [1999] 4 C.M.L.R. 112, 137-38.

115. *See id.*

116. *See* IMS Health GmbH & Co. KG v. NDC Health, Case C-418/01, [2004] E.C.R. I-5039, ¶ 27-28, [2004] 4 C.M.L.R. 28, 1556.

117. Commission Decision of 24 March 2004 (Microsoft), *available at* http://ec.europa.eu/comm/competition/antitrust/cases/decisions/37792/en.pdf.

> some cases with constitutional status. Incursions on those rights require careful justification.
>
> 57. Secondly, the justification in terms of competition policy for interfering with a dominant undertaking's freedom to contract often requires a careful balancing of conflicting considerations. In the long term it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business. For example, if access to a production, purchasing or distribution facility were allowed too easily there would be no incentive for a competitor to develop competing facilities. Thus while competition was increased in the short term it would be reduced in the long term. Moreover, the incentive for a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits. Thus the mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it.
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> 58. Thirdly, in assessing this issue it is important not to lose sight of the fact that the primary purpose of Article [82] is to prevent distortion of competition — and in particular to safeguard the interests of consumers—rather than to protect the position of particular competitors. It may therefore, for example, be unsatisfactory, in a case in which a competitor demands access to a raw material in order to be able to compete with the dominant undertaking on a downstream market in a final product, to focus solely on the latter's market power on the upstream market and conclude that its conduct in reserving to itself the downstream market is automatically an abuse. Such conduct will not have an adverse impact on consumers unless the dominant undertaking's final product is sufficiently insulated from competition to give it market power.[118]

After analyzing the Community case law, AG Jacobs added that a duty to supply was justified only when there was "a genuine stranglehold on the related market."[119] The cost of duplication could be enough to make access indispensable, especially if the original investment had been made under non-competitive conditions, for instance, partly through public funding.

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118. Opinion of Advocate General Jacobs, *Bronner*, Case C-7/97, [1998] E.C.R. I-7794, I-7811, ¶¶ 56-58, [1999] 4 C.M.L.R. 112, 132-33.

119. *Id.* at I-7813, ¶ 65, [1999] 4 C.M.L.R. at 134.

He insisted that, because the owner does not want to grant access, someone would have to assess the amount of compensation which would, therefore, require detailed regulation.[120] One might add that such regulation would have to be continuing. Moreover, the amount could be anywhere between the cost of granting access (usually minimal) and the opportunity cost of doing so—the income foregone by admitting a competitor. The task would be difficult for a regulator, who would have better information about the regulated market, and even more difficult for a court or general competition authority.

AG Jacobs may be implying that a refusal to deal is not, in itself, abusive, but may be abusive when coupled with another abuse, such as tying or denying access to an adjacent market.[121] John Temple Lang has repeated this view.[122]

The judgment of the ECJ was shorter than the opinion of AG Jacobs. The ECJ said that:

> *[E]ven if that case-law on the exercise of an intellectual property right were applicable to the exercise of any property right whatever,* it would still be necessary, for the *Magill* judgment to be effectively relied upon in order to plead the existence of an abuse within the meaning of Article [82] of the [Consolidated EC] Treaty in a situation such as that which forms the subject-matter of the first question, not only that the refusal of the service comprised in home delivery be likely to eliminate all competition in the daily newspaper market *on the part of the person requesting the service* and that such refusal be *incapable of being objectively justified,* but also that the service in itself be *indispensable* to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence for that home-delivery scheme.[123]

The ECJ suggests that the cases on refusal to license may be distinguished from the earlier judgments on refusals to give access to goods or services. It is widely thought that the holder of intellectual property rights should have a wider discretion to deny access. Otherwise, intellectual property rights would have no value and would not induce investment in research and develop-

120. *See id.* at I-7814-15, ¶ 69, [1999] 4 C.M.L.R. at 135.

121. *See id.* at I-7815, ¶ 73, [1999] 4 C.M.L.R. at 136.

122. *See* Temple Lang, *supra* note 75, at 67.

123. *Bronner*, Case C-7/97, [1998] E.C.R. I-7794, I-7831, ¶ 41, [1999] 4 C.M.L.R. 112, 144-45 (emphasis added).

ment.[124] Whether or not intellectual property rights are involved, it is not enough for the newcomer to show that access is desirable; it must establish that it is necessary.[125] The ECJ was not required to state when access is required; it sufficed to indicate that access was not required when there were other ways of delivering newspapers[126] or when other publishers were capable of creating a similar facility.[127] This implies that, where two undertakings are able to compete in the neighboring market, there may be no requirement to give access to a third. This is contrary to the facts of the original judgment in *Commercial Solvents*,[128] where both Istituto and Cyanamid Italiano, as well as Zoja, were making and selling ethambutol, the product downstream.

In *Bronner*, the ECJ reverted to the old test that, to be abusive, the refusal must exclude a particular firm (not everyone) from the market downstream.[129] In my view, that was sensible. If the newcomer had to show that no one but the dominant firm had access, the dominant firm might provide access to someone unlikely to compete aggressively and avoid enabling a vigorous competitor to enter the market.

Neither AG Jacobs nor the ECJ discussed whether Bronner's newspaper was a new product. There were other Austrian newspapers, but presumably they attracted different groups of readers. The complainant failed on the ground that, because there were other ways to deliver the paper, access was not necessary.[130] Whether the product was sufficiently new did not have to be decided in this case.

In several recent judgments, the CFI has required the Commission to find that the business downstream could not be car-

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124. *Magill* was only the second case to deal with information protected by copyright and the ECJ stressed that the circumstances were exceptional. Several authors have notice how unusual this case was. *See* Temple Lang, *supra* note 75, at 65 n.28; *see also* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 4 (Apr. 6, 1995) ("Nor does such market power impose on the intellectual property owner an obligation to license the use of their property to others.").

125. *Bronner*, [1998] E.C.R. at I-7831-32, ¶¶ 41, 45, [1999] 4 C.M.L.R. at 144-45.

126. The application of the test to the facts was a matter for the national court that had requested a reference. *See id.* at I-7831, ¶ 43, [1999] 4 C.M.L.R. at 145.

127. *Id.* at I-7831, ¶ 44, [1999] 4 C.M.L.R. at 145.

128. Istituto Chemioterapico Italiano SpA and Commercial Solvents Corp. v. Commission, Joined Cases 6/73 & 7/73, [1974] E.C.R. 223, [1974] 1 C.M.L.R. 309.

129. *See Bronner*, [1998] E.C.R. at I-7831, ¶ 41, [1999] 4 C.M.L.R. at 144-45.

130. *See id.* at I-7831-32, ¶¶ 43-47, [1999] 4 C.M.L.R. at 1.

ried on without access to the facility.[131] In *Bronner*, AG Jacobs argued that where a facility has been created in conditions that were not competitive, for instance, if it were paid for by the State, it would be particularly difficult for a new entrant to duplicate the facility.[132] One might add that in a quasi-public situation, where the incumbent was protected by special or exclusive rights and not subject to close competition, the need for an incentive to investment is less important. The many decisions of the Commission requiring port authorities not to discriminate in favor of their own sailings could have been based on their exclusive franchise at the time the port was developed, but this is not expressly mentioned. In the United Kingdom statutory undertakings that are given exclusive rights to exploit a situation, such as a water or gas resources, are normally required to supply everyone in the area on non-discriminatory terms.[133] When nationalized undertakings are liberalized, a national regulator is often established with power to control prices, and thereby relieving the courts of a task to which they are ill suited.[134]

Since the judgment and opinion in *Bronner*, the whole attitude toward refusal to grant access has become less interventionist and establishing an abuse has become more difficult.

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131. *See, e.g.*, European Night Servs. (ENS) v. Commission, Joined Cases T-374, 375, 384 & 388/94, [1998] E.C.R. II-3141, II-3222-28, ¶¶ 205-21, [1998] 5 C.M.L.R. 718, 778-82; Tiercé Ladbroke v. Commission, Case T-504/93, [1997] E.C.R. II-923, [1997] 5 C.M.L.R. 309.

132. *See* Opinion of Advocate General Jacobs, *Bronner*, Case C-7/97, [1998] E.C.R. I-7794, I-7813-14, ¶ 66, [1999] 4 C.M.L.R. 112, 134.

133. *See* Office of Water Servs. (U.K.), Water Act 2003 Water Supply Licensing: Water Undertakers' New Conditions of Appointment, Licence Conditions for Water Supply Licencees, Policy Proposals on Exceptions Regulations and Exemptions 19 (Dec. 21, 2004) (noting a duty to prevent undue preference or discrimination against customers).

134. In certain situations, however, the Commission may still intervene. *See* Commission Decision No. 2003/707/EC, O.J. L 263/9 (2003) (Deutsche Telekom). The Commission imposed a fine on Deutsche Telekom for squeezing the margins of competitors who wanted access to the local loop, even though its prices had been approved by the national reguatory authority. The decision has been appealed in *Deutsche Telekom v. Commission*, Case T-271/03, O.J. C 264/29 (2003). The Court of First Instance ("CFI") will have to decide whether compliance with regulation takes conduct outside the competition rules. In the U.S. case, *Verizon Commc'n Inc. v. Law Offices of Curtis V. Trinco, L.L.P.*, 540 U.S. 398 (2004), the U.S. Supreme Court recently raised the question whether detailed regulation excludes antitrust scrutiny, so as to avoid conflicting views.

D. IMS

An interim decision of the Commission required IMS to license its copyright in what the Commission found was a de facto industry standard, a set of maps on the basis of which IMS provided localized data about their distributors to its clients—the pharmaceutical laboratories.[135] IMS had obtained an interim injunction from a German court to restrain NDC and another from infringing its copyright in the maps. The decision suggests that where a de facto industry standard is protected by an intellectual property right and prevents all competition in a neighboring market, the holder is required to grant a license. Where use of an industry standard is necessary for a newcomer to enter a market and is protected by an intellectual property right, it may be sensible to require a license even if there was no fraud in establishing the standard, but this remains to be decided by the courts. IMS appealed against the interim decisions and requested interim relief. That case was withdrawn, however, when a German court of appeals quashed the injunction on the ground that IMS did not enjoy any copyright protection, but had a right only to prevent slavish imitation.

Meanwhile, the German court of first instance, which had granted the injunction, had asked the ECJ for a preliminary ruling to ascertain whether IMS had infringed Article 82 by refusing to license. Thus, the ECJ had to consider whether there was a duty to grant access even if IMS enjoyed copyright protection. The *IMS* judgment[136] followed *Magill* closely and did not refer to policy. The judgment did narrow the conditions in which access might be compulsory, however, possibly as a result of AG Jacobs' opinion in *Bronner*. It stated that the conditions listed in paragraph 54 of *Magill* were cumulative and exhaustive.[137] It added there is an abuse only where:

> . . . the undertaking which requested the licence does not

135. *See* Commission Decision No. 2001/165/EC, O.J. L 59/18 (2002) (IMS Interim Measures).

136. *See IMS*, Case C-418/01, [2004] E.C.R. I-5039, ¶ 48-50, [2004] 4 C.M.L.R. 1543, 1581; *see also* Opinion of Advocate General Tizzano, *IMS*, Case C-418/01, [2004] E.C.R. I-5039, ¶ 61-63, [2004] 4 C.M.L.R. 1543, 1565-67. The Advocate General merely cites earlier judgments; the Court's judgment is even shorter.

137. *See IMS*, Case C-418/01, ¶ 38, [2004] 4 C.M.L.R. at 1579 (citing *Magill*, Case T-69/89, [1991] E.C.R. II-485, and Joined Cases C-241/91 P & C-242/91 P, [1995] E.C.R. I-743, I-824, ¶ 54).

> intend to limit itself essentially to duplicating the goods or service already offered on the secondary market by the owner of the copyright but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand.[138]

This confirms the narrow view of paragraph 54 of *Magill*. For an obligation to license to arise, the potential licensee must intend to introduce a new product for which there is consumer demand and which is not offered by the holder of the right—presumably, case law will have to decide how different and superior the product demanded is from products already supplied.

There is considerable controversy about the requirement that the undertaking requiring access must intend to produce something new.[139] Not only is the concept of novelty imprecise, but "intention" is also a slippery word. Perhaps a minor change to an existing product is not enough, but there must be a new kind of product.[140] Moreover, novelty is not always desirable. In *Volvo*, the ECJ had indicated circumstances that might be abusive, such as refusing to license a repairer to make or import spare parts coupled with a refusal to supply.[141] Spare parts that must fit the design of a vehicle cannot be new because they would not fit.

In *Microsoft*,[142] a decision adopted shortly before the judgment in *IMS*, the Commission relied on there being other possible exceptional circumstances. In cases dealing with an open ex-

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138. *IMS*, Case C-418/01, ¶ 49, [2004] 4 C.M.L.R. at 1581.

139. *Compare* Derek Ridyard, *Compulsory Access Under EC Competition Law—A New Doctrine of "Convenient Facilities" and the Case for Price Regulation*, 11 EUR. COMPETITION L. REV. 669 (2004) (fearing that even minor changes intended by the newcomer would create a duty to give access), *with* Christian Ahlborn et al., *The Logic & Limits of the "Exceptional Circumstances Test" in* Magill & IMS Health, 28 FORDHAM INT'L L.J. 1109, 1112 (2005) ("We say a product is 'new' for the purposes of the implementation of the ECJ test if it satisfies a potential demand by meeting the needs of consumers in ways that existing products fail to do. That is, a new product *expands* the market at current prices by bringing in consumers whose demands were not previously satisfied.") (emphasis added).

140. John Temple Lang suggested that paragraph 54 in *Magill* related to a new kind of product and not just a new product. *See* John Temple Lang, Address at the University of Antwerp and LECG Conference (June 10, 2005). This distinction is not easier to draw, but may move the goalposts toward products not being considered sufficiently new.

141. *See AB Volvo*, Case 238/87, [1988] E.C.R. 6211, [1989] 4 C.M.L.R. 122.

142. *See* Microsoft Corp. v. Commission, Case T-201/04 R, [2004] E.C.R. II-2977, ¶ 55, [2005] 4 C.M.L.R. 406, 431.

clusive license, the Commission never found that a product was new, even if it was the best available, but this concept of novelty was rejected by the ECJ in the *Maize Seed* case,[143] a case on the meaning of an "open exclusive licence," where the Commission had found that the improved varieties were not new.[144]

For the reasons that AG Jacobs presented in *Oscar Bronner*, I hope that refusals to license rarely amount to an abuse. There does not seem to be any good reasons to limit the doctrine to cases where the newcomer wants to make a new product, although the degree of novelty should be considered when making an economic appraisal to establish benefits to consumers. In my view, it is unfortunate that the ECJ attempted to define the criteria of special circumstances in a short phrase.

In *IMS*, the ECJ, following constant case law, repeated that, for the refusal of access to amount to an abuse, access must be essential.[145] Whether access was essential is a matter for the national court.[146] AG Tizzano went a little further and stated that, if there were exceptional switching costs for the customers of the firms wanting access, access would be necessary.[147] This could depend on the extent to which the customers had helped IMS to create a standard and IMS had adapted their organization to the standard.

AG Tizzano said that access must not only be essential to the complainant, but the refusal must eliminate all competition on the secondary market,[148] a phrase used also in the judgment.[149] Until the judgment in *IMS* was delivered, many judgments referred to eliminating all competition *on the part of the person requesting the service or license.* That is true in the early cases on refusal to supply goods[150] and also in *Bronner.*[151] In *Magill*, the

143. Nungesser (LG) KG v. Commission, Case 258/78, [1982] E.C.R. 2015, 2068, ¶ 53, [1983] 1 C.M.L.R. 278, 352.

144. Commission Decision 78/823/EEC, O.J. L 286/23 (1978) (Breeders' Righ ts—Maize Seed).

145. *See IMS*, Case C-418/01, [2004] E.C.R. I-5039, ¶¶ 40-45, [2004] 4 C.M.L.R. 1543, 1579-80.

146. *See id.* at 1580.

147. *See* Opinion of Advocate General Tizzano, *IMS*, Case C-418/01, [2004] E.C.R. I-5039, ¶¶ 84-86, [2004] 4 C.M.L.R. 1543, 1570.

148. *See id.* at 1565-66, ¶ 61. In *Magill*, Joined Cases C-241/91 P & C-242/91 P, [1995] E.C.R. I-743, I-824, ¶ 56, the ECJ referred to the dominant firms reserving the secondary market for themselves, which amounts to the same thing.

149. *See IMS*, Case C-418/01, ¶ 52, [2004] 4 C.M.L.R. 1543, 1581.

150. *See* Istituto Chemioterapico Italiano SpA and Commercial Solvents Corp. v.

ECJ referred to the dominant firm reserving the market to itself or its subsidiary,[152] but in *Télémarketing*, it referred to this phrase as meaning eliminating all competition *on the part of the person requesting the service.*[153]

If the opinion of AG Tizzano in *IMS* has settled the matter, a duty to supply may be reduced by supplying an undertaking that is not likely to act very aggressively. There is always a risk, however, that, if the price for supply remains high or the ECJ views access as only theoretical (to avoid a duty to supply), the ECJ could refer back to other cases, such as *Bronner*.

The ECJ accepted that the duty to supply arises only if there are two separate markets—one upstream and the other downstream. The ECJ followed AG Tizzano,[154] however, and added that "it is sufficient that a potential market or even a hypothetical market can be identified"[155]—a question for the national court to answer. This view delights me—requiring only a potential or hypothetical market seems to me to be a polite way of rejecting the doctrine that, for a duty to supply to arise, there must be two markets where transactions are being concluded. It does, however, enable the holder of the essential asset to exploit the primary market.

No specific observations were made to the ECJ about whether the refusal was justified. As in many earlier cases, however, the ECJ said that there is abuse if the refusal is not justified by objective considerations.[156]

E. Syfait

In *Syfait*,[157] the Greek competition authority asked the ECJ for a preliminary ruling. Greek wholesalers had complained

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Commission, Joined Cases 6/73 & 7/73, [1974] E.C.R. 223, 250-51, ¶ 25, [1974] 1 C.M.L.R. 309, 340-41.

151. *Bronner*, Case C-7/97, [1998] E.C.R. I-7791, [1999] 4 C.M.L.R. 112.

152. *See Magill*, Case C-241/91, [1995] E.C.R. I-743, I-824, ¶ 56, [1995] 4 C.M.L.R. 718, 791.

153. *See* Centre Belge d'Etudes du Marché-Télémarketing SA (CBEM) v. Compagnie Luxembourgeoise de Télédiffusion, Case 311/84, [1985] E.C.R. 3261, ¶¶ 26-27, [1986] 2 C.M.L.R. 558.

154. *See* Opinion of Advocate General Tizzano, *IMS*, Case C-418/01, ¶¶ 56-59, [2004] 4 C.M.L.R. 1543, 1564-65.

155. *IMS*, Case C-418/01, ¶ 44, [2004] 4 C.M.L.R. at 1580.

156. *See id.* at 1582, ¶ 52.

157. *Syfait*, Case C-53/03, [2005] E.C.R. I-4609, [2005] 5 C.M.L.R. 7.

that GlaxoSmithKline ("GSK") had ceased to meet in full their orders for three medicines over which it held a dominant position and that GSK had stated that it would supply hospitals and pharmacies directly.[158] GSK alleged that parallel exports by the wholesalers had led to significant shortages on the Greek market. The questions from the Greek authority assumed that GSK enjoyed a dominant position over the three medicines, and it observed that all the Member States fix the prices or profits of pharmaceutical products within their territories.[159] Prices in Greece were consistently the lowest in any Member State.[160]

Eventually, the ECJ declined jurisdiction on the ground that the Greek authority was subject to ministerial influence and, consequently, was not an independent court or tribunal entitled to obtain a preliminary ruling. AG Jacobs had perceptively analyzed the case law and the economic context of the refusal to supply, however, and his opinion will be influential in the future. He accepted that, on occasion, a dominant firm may be under an obligation to supply goods or services—for instance, when an interruption would disrupt competition downstream between the incumbent and its customer or, in a narrow range of circumstances, it may have to supply a third party for the first time to avoid exceptional harm to competition.[161] AG Jacobs noted the difference between the earlier case law on refusals to supply goods and the later decisions since *Volvo*.

Nevertheless, the ECJ had consistently limited the obligation to supply or license by reference to the possibility of objective justification. Consequently, AG Jacobs insisted that a duty to give access does not arise easily or automatically:[162] "[A] dominant pharmaceutical undertaking which restricts the supply of its products does not necessarily abuse its dominant position within the meaning of Art.82 EC merely because of its intention thereby to limit parallel trade."[163]

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158. *See id.* ¶ 5-21, [2005] 5 C.M.L.R. at 35-38.

159. *See id.* at 37, ¶ 20.

160. *See id.*

161. *See* Opinion of Advocate General Jacobs, *Syfait*, Case C-53/03, ¶ 69, [2005] 5 C.M.L.R. 7, 24.

162. An opinion which he also expressed in *Bronner*. *See* Opinion of Advocate General Jacobs, *Bronner*, Case 7/97, [1998] E.C.R. I-7791, I-7813, ¶ 73, [1999] 4 C.M.L.R. 112, 134.

163. *See* Opinion of Advocate General Jacobs, *Syfait*, Case C-53/03, ¶ 69, [2005] 5 C.M.L.R. at 25.

AG Jacobs concluded that an intention to limit parallel trade might plausibly be one of the relevant circumstances, which would ordinarily render a refusal to supply abusive.[164] Nevertheless, such conduct was capable of objective justification.[165] The facts of the case were extreme owing to the control over prices and distribution exercised in differing ways by Member States:

(a) National law imposed price differences—the common market was not partitioned by the dominant firm, but by varying kinds of control over price and distribution imposed by Member States.[166]

(b) If parallel imports were permitted, it would be impossible for the pharmaceutical companies to ensure adequate supplies in each Member State because the whole common market would be sourced from the country where the maximum price was lowest. Moreover, the pharmaceutical companies were subject to regulation by national law that restrained suppliers from withdrawing a drug once introduced.[167]

(c) The national regulations were segregated. Thus, a duty to supply any quantity demanded might lead to the medicines not being supplied at all in the countries where the maximum price was low, or at least to supply being delayed.[168]

These arguments had been raised and dismissed by the ECJ in the early cases on exhaustion under the Community policy of free movement, but the Commission is now looking more to economic arguments. AG Jacobs is well respected and his opinion cogent. He restricted the application of his view strictly, which may make it more acceptable.

AG Jacobs analyzed the economics of the innovative pharmaceutical industry, with substantial investment in high fixed costs, which were mostly sunk—of little use save for developing the particular drug—and relatively low-variable costs.[169] This

164. *See id.* ¶ 70. This confirms the idea at which he hinted in his opinion in *Bronner* that a refusal to supply is not an abuse unless accompanied by a further abuse, such as tying, or reserving an adjacent market to oneself. *See* Opinion of Advocate General Jacobs, *Bronner*, [1998] E.C.R. at I-7813, ¶ 73, [1999] 4 C.M.L.R. at 134.

165. *See* Opinion of Advocate General Jacobs, *Syfait*, ¶ 69, [2005] 5 C.M.L.R. at 25.

166. *See id.* at 26-28, ¶ 84.

167. *See id.* at 29, ¶ 86.

168. *See id.* at 29-30, ¶ 87, 91.

169. *See id.* at 30, ¶ 89-91.

made it rational for the pharmaceutical companies to sell wherever they could cover their variable cost. The mere fact that this could be possible does not ensure that a producer could recover its total costs if that price were generalized throughout the Community.[170] This statement impliedly accepts that unilateral discriminatory pricing does not necessarily infringe Article 82. This theory is widely accepted by economists, most of whom advocate "Ramsey pricing."[171]

The regulatory negotiation of prices in the low-priced countries would be made more difficult, and there would be more pressure for prices to be raised if they were to apply throughout the common market.[172] The revenue of the pharmaceutical companies would be reduced and the incentive for research and development would, to that extent, be reduced.[173] If the pharmaceutical companies were unable to raise prices in the low-priced countries, they could withhold supplies or, at least, delay their introduction.[174]

Usually, parallel trade leads to consumers in the low-priced countries paying less, but that is not the case for medicines, where the government normally bears the cost. In some Member States, the government pays as much for medicines subject to parallel trade as for those bought by wholesalers directly from the producer at a higher price.[175]

AG Jacobs concluded, therefore, that for a pharmaceutical producer to restrict supplies:

> [T]o limit parallel trade is capable of justification as a reasonable and proportional measure in defence of that undertaking's commercial interests. Such a restriction does not protect price disparities which are of the undertaking's own mak-

170. *See id.* at 31, ¶ 94.

171. F.P. Ramsey, *A Contribution to the Theory of Taxation*, 37 ECON. J. 47, 47-61 (1927). Provided that no price is below variable cost, no one is worse off if most of the sunken overhead is recovered from those willing to pay more and most buyers are better off. In the low-priced market, supplies will be available for those able and willing to pay the variable cost, and this may even provide some contribution to the overhead, which would benefit those who have to pay more. All economists generalize the theory and argue that supply will be most efficient if the overhead is recovered from different markets in inverse proportion to the elasticity of demand.

172. *See* Opinion of Advocate General Jacobs, *Syfait*, Case C-53/03, [2005] E.C.R. I-4609, ¶ 92, [2005] 5 C.M.L.R. at 30-31.

173. *See id.* at 31, ¶ 93.

174. *See id.*

175. *See id.* at 31-32, ¶¶ 97-98.

> ing, not does it directly impede trade, which is rather blocked by public service obligations imposed by the Member States. To require the undertaking to supply all export orders placed with it would in many cases impose a disproportionate burden given the moral and legal obligations on it to maintain supplies in all Member States. Given the specific economic characteristics of the pharmaceutical industry, a requirement to supply would not necessarily promote either free movement or competition, and might harm the incentive for pharmaceutical undertakings to innovate. Moreover, it cannot be assumed that parallel trade would in fact benefit either the ultimate consumers of pharmaceutical products or the Member States, as primary purchasers of such products.[176]

The opinion is clearly limited to markets subject to specific controls, such as those exercised by Member States over the pharmaceutical industry. National control over prices and distribution distorts competition. The reasons for desiring Ramsey pricing in this industry are also clearly set out. I hope that this Article will encourage the institutions to follow AG Jacobs—he has not fired a broadside against the free movement of goods.

The opinion may be of wider importance. It is the first case where the ECJ has considered whether what might ordinarily be abusive can be justified. AG Jacobs has stated that the justification in *Syfait* is reasonable and proportional. Hopefully, this will be picked up generally and not only under Article 86(2).

The Greek competition authority probably should apply the opinion of AG Jacobs, because it is the best available authority. If this results in approving of GSK's policy of restricting supply, the Greek dealers who pressed the competition authority to request a reference may well appeal the decision to a court, which may well seek a preliminary ruling. Meanwhile, AG Jacobs has retired from the ECJ and the term of many of the judges will have expired. The judicial work will have to be redone, but, doubtless, AG Jacobs's opinion will be studied and not wasted.

In two cases concerning rationing of medicines by companies dominant over the exploitation of patented pharmaceuticals, decided before the opinion of AG Jacobs, the court of first instance in Athens held that there was no abuse on much the

176. *Id.* at 32-33, ¶ 100.

same grounds as AG Jacobs advocated later.[177] I regret that the Athenian court did not make an immediate reference.

CONCLUSION

If the opinion is followed, there are now four situations when a duty for a dominant firm to supply may arise:

(a) when access is required by a former customer to prevent a dominant firm extending its dominance to a neighboring market and access is essential if the former customer is to carry on its business (the early cases, from *Commercial Solvents*[178] to *Télémarketing*[179] and *Tetra Pak International SA v. Commission*).[180] Either consumer harm within Article 82(b) or discrimination as between equivalent transactions contrary to Article 82(c) would have to be established;

(b) when access is required by an undertaking, not necessarily a former customer, who intends to make a new product for which there is actual or potential demand, provided that the input is essential for producing such a product (*Volvo*,[181] *Magill*,[182] *Bronner*,[183] *IMS*).[184] In this case, discrimination is unlikely and consumer harm should be established under Article 82(b). It may be that, where a patent or copyright protects the essential facility, it will be more difficult to establish indispensability;[185]

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177. *See* Polimeles Protodikio Athinon, Decisions 519/2003 & 609/2003. For a description and comment see eCompetition Bulletin, http://concurrences.fr.

178. Istituto Chemioterapico Italiano SpA and Commercial Solvents Corp. v. Commission, Joined Cases 6/73 & 7/73, [1974] E.C.R. 223, 250-51, ¶ 25, [1974] 1 C.M.L.R. 309, 342.

179. Centre Belge d'Etudes du Marché-Télémarketing SA (CBEM) v. Compagnie Luxembourgeoise de Télédiffusion, Case 311/84, [1985] E.C.R. 3261, 3278, ¶ 26, [1986] 2 C.M.L.R. 558, 573.

180. Tetra Pak Int'l SA v. Commission, Case C-333/94 P, [1996] E.C.R. I-5951, I-6008, ¶ 27, [1997] 4 C.M.L.R. 662, 721.

181. *AB Volvo*, Case 238/87, [1988] E.C.R. 6211, 6235, ¶ 8, [1989] 4 C.M.L.R. 122, 135.

182. *Magill*, 1995 E.C.R. at I-834, ¶ 91.

183. *Bronner*, Case 7/97, [1998] E.C.R. I-7791, I-7831, ¶ 41, [1999] 4 C.M.L.R. 112, 144.

184. *IMS*, Case C-418/01, [2004] E.C.R. I-5039, [2004] 4 C.M.L.R. 1543.

185. This clearly would not apply to trademarks. If it did, consumers would be confused. It might apply to data protection and any other intellectual property right designed to induce investment. *See Volvo*, [1988] E.C.R. at 6235, ¶ 8, [1989] 4 C.M.L.R. at 135; *see also Magill*, 1995 E.C.R. at I–834, ¶ 91; *Bronner*, [1998] E.C.R. at I-7831, ¶ 41, [1999] 4 C.M.L.R. at 144.

(c) when supply is limited with an intention to limit parallel trade (*Syfait*); and

(d) when it can be plausibly argued that the obligation arises where a legal or de facto industry standard is protected by intellectual property rights. This seems to be the view of the Commission in its decisions in *IMS* and *Microsoft*.[186]

These categories are probably not closed. According to dicta in many judgments, the Commission's decisions in *IMS* and *Microsoft*, and from the opinion in *Syfait*, it may also be argued that all four classes of refusal may be objectively justified in the light of the specific circumstances of the industry, provided that they are reasonable and proportional. The justifications vary depending on the specific facts of the case.

A refusal to supply may also be abusive when used as retaliation against competition when a restriction of that competition would be illegal.

While at the ECJ, most recently as the senior Advocate General, Mr. Jacobs, now the right honourable Sir Francis Jacobs KCMG, PC, earned a great reputation. He was a pragmatist and often persuaded the ECJ to reconsider policy considerations expressly. He, himself, made a point of expressing them clearly and in few words. They were not buried in the secrecy of the deliberations of the judges, but remain publicly available to influence practitioners and the ECJ. His views tallied with the far greater emphasis recently placed by the Commission and sometimes by the courts on protecting consumers and on economic analysis rather than formalism. If the European economy becomes more flexible and vital as a result, our debt to his many years at the ECJ is great.

We should not begrudge him his retirement. He will not only be tending his garden. He is returning as professor to King's College London and his availability to give speeches and encourage debate there and elsewhere remains. Long may he be active and continue to open up our prejudices to rational argument! He is one of the great men of Europe.

186. I shall not consider the decision in *Microsoft* in this Article. Many of the issues dealt with here arise in that controversial decision. An appeal to the CFI has been lodged and a hearing started on April 24.