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Legitimate Intrusions in the Use
and Exploitation of IPRs by
Dominant Undertakings
- Even More Power to the EU Authorities?

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Summary

The exercise of intellectual property within the internal market is not immune from Union competition legislation. A possession of IPR should under normal circumstances not be subject for restrictions as this deviates from the general rule of exclusivity. In situations where the exploitation of intellectual property however exceeds the very subject matter of the legal right derived from national legislation, restrictions may legally be imposed. The jurisprudence by the Union authorities shows a tendency to extend the elements of certain Treaty articles in order to legitimate intrusions in dominant undertakings use of IPRs to preserve efficient competition within the internal market. Article 101(3) TFEU could be invoked by the parties to a license agreement, which cannot be modified to fit within the TTR. Under this article the Commission makes an individual assessment of the claimed efficiencies of the agreement weighed against its negative impact on the market. The examination has received much criticism for being made too arbitrarily and for interpreting the different elements of the article in a very extensive manner. This has created a lack of legal certainty as to the validity of those agreements and is argued to potentially hamper the creation of licence agreements that despite its restrictive nature would have created benefits for the consumers and be of value for an efficient market.

Article 102 TFEU has also become very comprehensive in its application by the Union authorities. The Commission is almost unrestrained to interpret the different elements of the article to create a larger application for the prohibition. Under circumstances where the use of IPR by a dominant undertaking does not satisfy the criteria set forth in the article, jurisprudence has introduced the principle of special responsibility. The principle is setting the outer limits on how unilateral use of IPR may be permitted under EU law and is invoked by the Courts to safeguard free competition by condemning behaviour that does not violate neither primary nor secondary law. Companies' possession of intellectual property could further be subject for compulsory licensing under the EFD, which also is not dependent on an establishment of abuse for its appliance. Case law has failed to provide the doctrine with a clear guidance and it has been applied inconsistently by the different legal instances within the EU. Thus, it is virtually impossible for undertakings to predict under which circumstances intrusions in the possession of IPR will be conducted. The development in jurisprudence has extended the current legislation in favour of increasing the Union authorities possibilities of maintaining control over market leaders and to assure the existence of competition. The aim of preserving free competition seems however be thwarted in case law where lack of precision has blurred the distinction between legitimate intrusions and illegitimate interference in the exploitation of IPR. The extension of the current competition legislation could hence have a severe adverse effect on undertakings future business conducts and create detriments for the existence of efficient competition and for the continuation of transparency within the internal market.

Abbreviations

Advocate General	AG
Court of Justice of the European Union	CJEU
General Court	GC
Essential Facility Doctrine	EFD
European Commission	Commission
European Union	EU
Intellectual Property Right	IPR
Research and development	R&D
Small but Significant and Non-transitory Increase in Price	SSNIP
Technology Transfer Regulation	TTR
Treaty on the Functioning of the European Union	TFEU
United States	US

1 Introduction

1.1 General introduction of the thesis

The general rationale for undertakings who acquires intellectual property rights (IPRs) under domestic legislation is that companies are entitled to exercise that right without restrictions. Any deviation from this common rule could undermine companies' incentive to continue to invest and innovate, which ultimately hampers efficient competition within the internal market to the prejudice of consumers.¹ The potential conflict that occurs between national protection governing intellectual property and Union competition law is always imminent due to the exclusivity that is granted the proprietor, which most likely creates a dominant position on a specific market. For the duration of such rights, firms are protected against improper use.² The possibilities for undertakings to exercise its IPR have long been restricted in the jurisprudence by the Union authorities.

Bilateral licensing agreements falls under the application of the Commission Regulation (EC) No 772/2004 on technology transfer agreements³ (TTR). There are many benefits within a block exemption, for instance the agreement becomes automatically valid and enforceable.⁴ When a licensing agreement cannot be modified to fit within the TTR, the parties could argue that their agreement qualifies for an individual exemption under Article 101(3) of the Treaty on the Functioning of the European Union (TFEU). Unlike the TTR, the article does not provide for automatic validity and its application is dependent on evidence supported by the parties that the agreement meets the four cumulative criteria in the paragraph. The individual exemption is subject for evaluation by the European Commission (Commission), who has become unhindered to interpret the different elements extensively.

Constraints have further been put on prospective unilateral use of IPR by undertakings. The Union authorities have interpreted Article 102 TFEU very extensively, which prohibits abusive behaviour to be conducted within the internal market by a company in a dominant position. For the article to become applicable it is not enough to merely be the owner of an IPR, the intellectual property must in addition be exercised in such a way that creates

¹ G. Monti, *EC Competition Law*, (Oxford, Cambridge University Press 2007) p. 38.

² J. Houdijk, *The IMS Health Ruling: Some thoughts on its Significance for legal practice and its Consequences for future Cases such as Microsoft*, (European Business Organisation Law Review, Volume 6, 2005) p. 472.

³ Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements.

⁴ Commission Notice: Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), art. 2.

severe entry-barriers for competitors.⁵ When dominance is established, the undertaking has a special responsibility not to disrupt effective competition within the Union. The principle of special responsibility derives from jurisprudence and can be invoked by the Courts when the conditions in Article 102 TFEU are not fulfilled.⁶

A refusal to supply long-standing costumers of IPR protected products are infringing Article 102 TFEU if the costumers abides by regular commercial practice and the orders are ordinary. When there is no prior relationship between the parties, the undertaking has the right to refuse to supply by the use of an objective selective distribution system. If the company cannot demonstrate any justifications for its refusal, the practice is deemed to be abusive if it is accompanied by exceptional circumstances.⁷ The adoption by the Court of Justice of the European Union (CJEU) of the essential facility doctrine (EFD) has extended the possibilities for companies to become the subject of compulsory licensing. The doctrine has been invoked by the Union authorities on IPRs in three cases: *RTE, ITP, BBC v. Commission*⁸, *IMS Health GmbH & CO v. NDC Health GmbH & CO*⁹ and *Microsoft Corp v. Commission*¹⁰. The EFD is used in circumstances where a facility on an upstream market is indispensable for the development of a new product on the secondary market for which there is an unsatisfied consumer demand. Case law indicates that applicants who requires access to an essential facility present on a primary market have a high burden of proof to demonstrate its intention to use the license as an incentive to produce a new product on the secondary market and not as a mean to make unnecessary infringements in the undertaking's competitive advantage.¹¹

1.2 Purpose

The thesis will analyse how jurisprudence has put limitations on undertakings possibilities to exploit IPR by either conducting unilateral behaviour or by the concluding of license agreements with third parties by answering two questions. The first question to be discussed is whether the current Union competition legislation has been extended to the degree where the Union authorities are almost unrestrained to make legitimate intrusions on the exercise and exploitation of IPR by dominant undertakings? The

⁵ J.D.C Turner, *Intellectual Property and EU Competition Law*, (Oxford, Oxford University Press 2010) p. 81.

⁶ 322/81 *Michelin v Commission* [1983] ECR 2015, para. 9.

⁷ E. Elhauge and D. Geradin, *Global Competition Law and Economics*, (Oxford, Portland and Oregon, Hart Publishing 2007) p. 410.

⁸ C-241/91 *RTE, ITP, BBC v Commission* [1995] ECR 743.

⁹ C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* [2004] ECR 5039.

¹⁰ T-201/04 *Microsoft Corp. v Commission* [2007] ECR 4463.

¹¹ E. Buttigieg, *Competition Law: Safeguarding the Consumer Interest – A Comparative Analysis of US Antitrust Law and EC Competition Law*, (The Netherlands, Kluwer Law International BV 2009) p. 246.

second question addresses what the potential effects of this extension of power developed through case law have on undertakings incentives to innovate and invest? The essay will reveal and argue that even though the Courts case law is clear, the exploitation and utilization of the possession of IPR remains uncertain and unchallenged to the prejudice of a transparent market and efficient competition.

1.3 Delimitations

The reader of this essay is presumed to have a developed knowledge in Article 101 TFEU and therefore the scope of coverage of the full article will not be presented. The third paragraph is however discussed and its different elements are analyzed due to companies' possibilities to invoke the stipulation in order to safeguard license agreements that falls outside the scope of the TTR. In terms of licensing agreements, Article 101 TFEU and the block exemption are only analysed with regard to such agreements. This thesis will not elaborate on what constitutes IPR and under what conditions such rights are acquired under domestic legislation. The notion of intellectual property is used as a generic term for all the security-relevant categories. Article 102 TFEU will be evaluated in its entirety. The description of the different requirements of the article aims to demonstrate the inconsistencies in the application of the elements and how the terms have been extended in its scope of coverage. Further, the thesis will not discuss circumstances where undertakings are abusing its intellectual property by unfair pricing, the creation of patent pools, patent-thickets, cross-licensing and other direct and indirect abuses as this is beyond the intention of the essay. The matter of compulsory licensing will be discussed on the basis of the EFD and the principle of special responsibility. Other situations when compulsory licensing might become applicable have been deliberately omitted. To understand the development of the doctrine a presentation of its origin in the US antitrust law could be of interest. However, this is excluded due to the regard that the American system is not of interest to highlight issues addressed in the thesis. Focus will instead be on the impact the EFD has had on jurisprudence by the Union Courts and the potential alarming effect it could have on future competitive behaviour by dominant companies within the internal market.

1.4 Method and material

Before starting to write an essay in the field of exploitation of IPR within the internal market, a case study was required in order to get a deeper understanding for the developments in jurisprudence. The thesis is based on a traditional legal method, which means applicable Union legislation, statutory legislative acts, case law and doctrine. The traditional legal method relates to the use of relevant principles of interpretation and the use of given material. The EU competition law is discussed on the basis of both primary

and secondary law with focus on Article 101 and 102 TFEU with its explanatory Regulations. The reported jurisprudence has been selected due to its contribution of creating restrictions on potential use and exploitation of intellectual property by its rights-holders. The case law has in some situations been recited in more than one legal instance in order to demonstrate inconsistencies in the application of the EFD. Articles have been used primarily to convey arguments provided by scholars in terms of the consequences that potentially could occur by applying the doctrine too subjective and arbitrary.

1.5 Disposition

The second chapter concerns licensing agreements and what options undertakings, that holds IPR, have in terms of concluding bilateral agreements that does not infringe Article 101(1) TFEU. When a license agreement does not fall within the TTR, an individual assessment of the agreement is conducted under Article 101(3) TFEU. The intention is to discuss license agreements as such, when the current system works and what the consequences are for the proprietors of IPR when it does not. The implications of the Commission's interpretation of the cumulative requisites in the article will be discussed and challenged. The third chapter provides a full description of the different elements of Article 102 TFEU. This chapter has its aim of providing the reader with an introduction to the contradictions that has been made by the Courts when interpreting the requisites of the article. The fourth chapter describes what constitutes abusive practice by a dominant undertaking. The chapter establishes when a refusal to supply a long-standing customer is deemed to be abusive and in breach of Article 102 TFEU. The fifth chapter analyses the principles established in regard of refusal to license. The doctrine on refusal to license was extended with the adoption of the EFD, which could oblige undertakings that hold IPRs on primary markets to be subject for mandatory licensing to actors on neighbouring related markets.

In chapter six the essay is summarized in an analysis, which questions the persistent development in jurisprudence that has put severe restraints on undertakings possibilities to use its intellectual property. The seventh chapter completes the thesis with a conclusion that will reveal that Union authorities may well extend the current legislation in favour of principles that creates lack of reliability and predictability, which could hamper companies' incentives to innovate and invest in the creation of intellectual property.

2 License agreements regarding intellectual property rights

2.1 Introduction to the relationship between national legislation on intellectual property and Union competition law

The landmark case of *Consten & Grundig*¹² provides an important distinction made between the existence of national legislative acts concerning IPRs and the exercise of which that could potentially conflict with competition legislation. The CJEU declared in its ruling that an infringement of Article 101(1) TFEU had occurred due to the attempt by the licensor to isolate the markets for Grundig products and thereby preventing parallel trade between the different markets of the Member States.¹³ The existence of intellectual property derives on the basis of domestic law and the exercise of that legally obtained right could hence fall within the application of the EU competition rules due to its possibility of limiting efficient competition within the internal market.¹⁴ Subsequent case law such as *Nungesser KG & Kurt 2 Eisele v. Commission*¹⁵ reaffirmed the CJEU's jurisprudence and emphasized the distinction to be made between license agreement that have 'open' exclusivity or 'absolute territorial protection'.¹⁶ Open exclusivity emerges when a single licensee is appointed within a specific geographic area and is as such not prohibited by the Treaty. A license agreement that provides for absolute territorial protection are deemed to have as its object to prevent parallel trade of the products in question and is presumed to infringe Article 101 TFEU.¹⁷

The potential conflict between national legislation governing the acquisition of intellectual property and the Union laws on competition has been resolved in favour of the later, which was confirmed in the *Parke Davis & Company v. Probel and others*¹⁸. The IPR legislation found in the Member States national acts is creating a protection for the rights-holder from unauthorized use. The aim behind intellectual property protection is to prevent the inventor from being restricted in its exploitation of the IPR. A

¹² 56/64 & 58/64 *Consten & Grundig* [1966] ECR 429.

¹³ A.a. para. 343.

¹⁴ M. Glader et al. *Competition Classics*, (Lund, Lund University 2011) p. 157.

¹⁵ 258/78 *Nungesser KG & Kurt Eisele v Commission* [1982] ECR 2015.

¹⁶ A.a. para. 11.

¹⁷ M. Glader et al. *Competition Classics*, (Lund, Lund University 2011) p. 271.

¹⁸ 24/67 *Parke Davis & Company v Probel and others* [1968] ECR 55, para. 71.

lack of protection could have the effect of reducing dynamic competition and decrease undertakings incentives to innovate. Further, the protection shall also ensure that the proprietor receives appropriate compensation for the financial investment.¹⁹

2.2 Licensing of intellectual property rights

A license agreement is an agreement where the proprietor of intellectual property or know-how allows third parties to exploit and use that right under the standards of a license.²⁰ Licensing is assumed to have pro-competitive effects for the internal market since it increases the consumer interest by enhancing the options for the final consumers.²¹ A license agreement could contain restrictions for the licensee on how to exploit the input. These restrictions are justifiable with regard to the licensor's ability to attain the surplus inherent in their financial investment.²² Prior to the judgement in *Grundig*²³ an exclusive license agreement was not presumed to have anti-competitive effects on the market as long as the agreement remained within the scope of the intellectual property. Thus, it was justified under the application of Article 101 TFEU to put restrictions in license agreements if the restraints did not go beyond the range of the rights that has been granted the licensor.²⁴

The judgement in *Grundig* altered the legal situations in terms of licensing of IPR due to the increasing awareness that such agreements could be used for restricting efficient competition on the relevant market.²⁵ Anti-competitive clauses may for instances relate to price-fixing or divide the markets within the Union and thereby create entry barriers for potential competitors on the affected market.²⁶ In order to determine whether the licensing agreement is legitimate or if it is concluded with the aim of conducting anti-competitive practice is to establish the relationship between the licensor and licensee. If the relationship is vertical the agreement is deemed to be less likely to restrict efficient competition than a horizontal agreement, due to the later is alleged to have more advantages to gain by misusing intellectual property in agreements with third parties. The

¹⁹ M. Glader et al. *Competition Classics*, (Lund, Lund University 2011) p. 267.

²⁰ A.a. p. 269.

²¹ E. Buttigieg, *Competition Law: Safeguarding the Consumer Interest – A Comparative Analysis of US Antitrust Law and EC Competition Law*, (The Netherlands, Kluwer Law International BV 2009) p. 124.

²² P. Regibeau et al. *Assessment of potential anticompetitive conduct in the field of intellectual property rights and assessment of the interplay between competition policy and IPR protection*, (Competition Reports, contract COMP/2010/16) p. 11.

²³ 56/64 & 58/64 *Consten & Grundig* [1966] ECR 429.

²⁴ G. Monti, *EC Competition Law*, (Oxford, Cambridge University Press 2007) p. 52.

²⁵ A.a. p. 55.

²⁶ E. Buttigieg, *Competition Law: Analysis of US Antitrust Law and EC Competition Law*, (The Netherlands, Kluwer Law International BV 2009) p. 124.

establishment of the parties' relationship is a guide to be used when determining the real purpose behind the agreement and should be applied only as an indicator as vertical license agreements are not always pro-competitive and horizontal license agreements are not always anti-competitive.²⁷ A licensing agreement is either non-severable or severable. A non-severable agreement is an agreement where the licensed product or technology cannot be used by the licensee without infringing the licensors original IPR, and in contrast a severable agreement allows the innovation to be used without infringing the licensors initial intellectual property.²⁸

In *Windsurfing International Inc. v. Commission*²⁹ licenses was granted by Windsurfing of its patent to numerous different licensees. The agreement contained several anti-competitive clauses, which constrained the potential use of the intellectual property by the parties. The main concern in the case was the question of what should constitute the very specific subject matter of the patent acquired.³⁰ Windsurfing argued that the scope of the intellectual property falls outside the Commission's competence since the IPR was created under national legislation. The CJEU concluded that even though under normal circumstances the Commission is not competent to evaluate the legality of IPRs it must be able to do such an examination when the result from which constitutes the basis for determining whether an infringement of Article 101 TFEU or Article 102 TFEU had taken place. The Court emphasized that the anti-competitive individual restraints in the licensing agreement could not be justified in terms of clauses that was not covered by the IPR. Therefore it should not be possible to rely on a patent in order to obtain a greater protection than what is actually provided by the acquisition of the intellectual property.³¹

2.3 The block exemptions

The Commission has under delegated authority from the European Council issued block exemptions, which are found in various Regulations.³² The concluding of block exemptions originates from the aspiration to enhance administrative efficiency for the Commission by significantly reducing the requests of exemption from undertakings. Agreements that are covered by block exemptions become automatically legally valid and enforceable even if the agreement contains clauses that restrict competition.³³ In order for an agreement to benefit from a block exemption the agreement in question must fall into a specific category of block exemption and meet certain

²⁷ Ibid.

²⁸ G. Monti, *EC Competition Law*, (Oxford, Cambridge University Press 2007) p. 55.

²⁹ 193/83 *Windsurfing International Inc. v Commission* [1986] ECR 611.

³⁰ A.a. para. 45.

³¹ A.a. para. 85.

³² G. Monti, *EC Competition Law*, (Oxford, Cambridge University Press 2007) p. 35.

³³ Commission Notice: Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), art. 2.

conditions provided for in this particular Regulation.³⁴ If the requirements in a specific block exemption are fulfilled, the exemption applies on the entire agreement for as long as the licensed asset has not lapsed, expired or been declared invalid. The CJEU emphasized in *Stergios Delimitris v. Henninger Brau AG*³⁵ the importance of interpreting block exemptions with moderate restraints. Not all licensing agreements can be modified to fit within an existing block exemption and the problem of conforming agreements to the Regulations has resulted in the creation of the non-opposition procedure.³⁶ This procedure provides undertakings with the opportunity to gain the approval by the Commission for individual clauses in agreements that otherwise might hinder the qualification for a block exemption.³⁷ Where under circumstances a licensing agreement fulfils the fixed terms of a block exemption, the parties to the agreement are relieved from the burden of proof provided for in Regulation 1/2003³⁸ of having to provide evidence that their agreement satisfies the cumulative criteria in Article 101(3) TFEU. The undertakings however still have to ascertain that the restrictive license agreement in question should benefit from a specific block exemption.³⁹

2.4 Regulation No 772/2004 Technology transfer agreements

The TTR should be applied with the purpose of ensuring effective competition within the internal market and providing for adequate legal security for undertakings. Agreements that concern licensing of IPR fall under the TTR and can be drafted in many different ways. Licensing agreements under the Regulation should be analysed according to the terms in the agreement together with any potential future anti-competitive effects that could occur due to the existing restraints in the agreement.⁴⁰ Technology transfer agreements concluded between more than two undertakings are not covered by the Regulation. Thus, the TTR only applies on bilateral agreements. The Guidelines⁴¹ provide standards used for assessing the validity of technology transfer agreement under Article 101 TFEU and it also provides guidance on how to apply the TTR to technology transfer agreement that falls outside the scope of the Regulation.⁴² An evaluation should be executed in each individual situation and determine the

³⁴ G. Monti, *EC Competition Law*, (Oxford, Cambridge University Press 2007) p. 37.

³⁵ C-234/89 *Stergios Delimitris v Henninger Brau AG* [1991] ECR I-935, para. 55.

³⁶ G. Monti, *EC Competition Law*, (Oxford, Cambridge University Press 2007) p. 38.

³⁷ *Ibid.*

³⁸ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, art. 2.

³⁹ Commission Notice: Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), art. 35.

⁴⁰ Commission Notice: Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, art. 133.

⁴¹ *Ibid.*

⁴² *Ibid.*

agreements conformity with the Guidelines, which should be applied on reasonable and proportionate terms.⁴³

2.4.1 The scope of application for the TTR

The preamble to the TTR stresses that technology transfer agreements usually improves economic efficiency and are pro-competitive as they ‘*reduce duplication of research and development, strengthen the incentive for the initial research and development, spur incremental innovation, facilitate diffusion and generate product market competition*’.⁴⁴ The first step in establishing whether an agreement has pro-competitive or anti-competitive effects on the market is to determine and assess the relationship between the parties.⁴⁵ If the parties are competitors on the same relevant market it is presumed that if the combined market shares of the undertakings do not exceed 20 per cent, the agreement does not contain any severely restrictive anti-competitive clauses, the collaboration will generally improve the production and distribution of technology.⁴⁶ If the parties to the agreement are non-competitors on the relevant market, the agreement will be assumed to be pro-competitive if the undertakings individual market shares do not exceed 30 per cent on that particular market and the agreement does not contain any hardcore restrictions.⁴⁷ In situations where the undertakings’ market shares do not exceed the regulatory limits in the TTR and the agreement does not contain any serious restraints of competition, the exemption is applicable on the whole agreement. In the reverse situation where the firms’ market shares does exceed the thresholds in the Regulation an individual evaluation of the agreement must be executed in accordance with Article 101(3) TFEU.⁴⁸ The undertakings market shares are calculated both with regard to the relevant product market and the relevant technology market. If the license agreement concerns technology rather than products, the relevant technology market must be determined by the use of the same principles that are used in order to establish the relevant product market. One must determine whether alternatives to the technology exist and if a small but permanent increase in the pricing will make consumers purchase substitutable technology instead.

An additional aspect to take into consideration, and which distinguishes the establishment of the relevant technology market from the relevant product market is that potential competition also must be included in the evaluation.⁴⁹ Undertakings which are in possession of similar technology

⁴³ A.a. art. 3.

⁴⁴ Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, Preamble, art. 5.

⁴⁵ M. Glader et al. *Competition Classics*, (Lund, Lund University 2011) p. 281.

⁴⁶ Commission Notice: Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, art. 10.

⁴⁷ A.a. art. 11.

⁴⁸ CM. Gölstam, *Licensavtalet och konkurrensrätten*, (Uppsala, Iustus Förlag 2007) p. 134.

⁴⁹ Commission Notice: Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, art. 30.

and which might not currently be licensing it could decide to change its business strategy and enter the technology market by licensing third parties. The possibly rapid change in the structure of the relevant technology market is considered to have effects on the behaviour of existing competitors on that particular market.⁵⁰ Market shares on the technology market are calculated on the basis of the presence of the licensed technology.⁵¹ For the licensor, the market share is calculated on the sales of the products that incorporate the licensed technology.⁵² For the licensee the market share is calculated on the sales of the products that incorporate the licensor's technology and the sales of competing products on the market.⁵³ The determination of market shares under the TTR is hence concluded on the basis of market sales.⁵⁴

The TTR provides a list of restrictions that are excluded from its applicability and offers the Commission the possibility to individually assess an agreement that contains certain types of anti-competitive clauses.⁵⁵ The inclusion in an agreement of any restriction enclosed in Article 5 of the Regulation does not prevent the application of the TTR to apply on the rest of the agreement.⁵⁶ According to the first paragraph in the mentioned article the Regulation shall not apply on stipulations that for instances restricts the licensee's ability to grant exclusive licenses to the licensor or to third parties. The aim of mandating the Commission to withdraw any benefits provided for by the Regulation is to prevent the block exemption from being applied on agreements that could potentially reduce the licensees' incentive to innovate and are therefore incompatible with Article 101(3) TFEU.⁵⁷ The 2004 Technology Transfer Regulation remains valid until the year of 2014.

2.4.2 The prohibition against severely anti-competitive clauses

Article 4 of the TTR prohibits technology transfer agreements to include clauses that have severe restrictive effects. The Guidelines define hardcore stipulations as including any clauses that by their very nature restrict competition. If a technology transfer agreement incorporate hardcore restrictions it follows from the article that the entire agreement should be

⁵⁰ CM. Gölstam, *Licensavtalet och konkurrensrätten*, (Uppsala, Iustus Förlag 2007) p. 134.

⁵¹ Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, art. 3(3).

⁵² Ibid.

⁵³ Commission Notice: Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, art. 71.

⁵⁴ Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, art. 8.

⁵⁵ A.a. art. 5.

⁵⁶ Commission Notice: Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, art. 107.

⁵⁷ A.a. art. 108.

excluded from the scope of the TTR.⁵⁸ Doctrine has stated that the mere including of severe anti-competitive stipulations in an agreement is equivalent with the intention to restrict competition and as such the restrictive clauses are very unlikely to satisfy the requirements set forth in Article 101(3) TFEU.⁵⁹ Article 4 of the Regulation applies differently depending on whether the parties of the agreement are competitors or non-competitors, which makes an establishment of the relationship between the undertakings necessary in order to apply the article. The distinction to be drawn between competitors and non-competitors are defined in the Guidelines. The parties competitive relationship is established by making an assessment of what the relationship between the undertakings actually or potentially would have been in the absence of the conclusion of the agreement. If the examination reveals that the companies would not have been actual or potential competitors on the relevant market they are deemed to be non-competitors for the application of the article.⁶⁰ Actual competitors are established when the parties are active on the same specific market without the undertakings infringes the intellectual property of the other party.⁶¹

Article 4(1) of the TTR lists prohibited hardcore restrictions for license agreements between competitors. Paragraph (a) of the article concerns licenses that determine the pricing of products sold to third parties, including products incorporating the licensed technology. The second paragraph prohibits reciprocal output restrictions, which means that limitations on the parties' possibilities to produce and distribute is not allowed. It is further not permissible to include clauses that allocate the markets and costumers.⁶² In terms of non-reciprocal agreements, it is not considered as hardcore restrictions to grant the licensee a specific exclusive territory or to forbid the licensee to produce the contracted products.⁶³ The Regulation further prohibits restrictive clauses where the licensee is limited in his ability to either use or license his own technology to third parties.⁶⁴

The second paragraph in Article 4 TTR lists hardcore restrictions in technology transfer agreements between parties that are non-competitors. The stipulation establishes that the Regulation shall not apply on agreements, which for instances limits the parties' ability to act outside the agreement, determines sales prices for the licensee when selling the licensed technology to third parties and restrictions under certain circumstances to passively sell the products under the contract to consumers. The TTR

⁵⁸ Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, Preamble, art. 13.

⁵⁹ M. Glader et al. *Competition Classics*, (Lund, Lund University 2011) p. 282.

⁶⁰ Commission Notice: Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, art. 27.

⁶¹ A.a. art. 28.

⁶² Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, art 4(1)(c).

⁶³ Commission Notice: Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, art. 86.

⁶⁴ Ibid.

further prohibits clauses that have as their direct or indirect object to establish the fixing of the retail price when selling products to third parties or the creation of obstacles that hinders passive sell by the licensee.⁶⁵ The Regulation also exempts restrictions where the licensee is limited in active and passive sales into exclusive territories or to exclusive consumer groups reserved for the licensor.⁶⁶

2.5 Article 101(3) TFEU

In circumstances where an agreement has failed to fulfil the requirements of Article 101(1) TFEU and it cannot be modified to fall within a block exemption, the undertakings could invoke the third paragraph of the mentioned article as an exemption.⁶⁷ According to Article 2 of the Regulation 1/2003⁶⁸ the burden of proof under Article 101(3) TFEU rests on the party that invokes the benefit of the exception rule. The judgement in *Walt Wilhelm v. Bundeskartellamt*⁶⁹ emphasizes the aim behind the article, which is to protect a harmonious development and effective competition within the internal market and sets the rationale for under which circumstances restrictive agreements could be permitted under EU legislation.⁷⁰ If an agreement satisfies the four cumulative conditions set forth in the article, the agreement can be exempted by virtue of the third paragraph and become legally valid and enforceable without having to authorise the competition authorities. In theory, all licensing agreement could be eligible for exemption under Article 101(3) TFEU irrespective of how severe its anti-competitiveness is.⁷¹ In order for a technology transfer agreement to fall under the exemption it is presupposed that the agreement does not contain any severely anti-competitive stipulations. The four conditions states that the agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress, consumers must receive a fair share of the resulting benefits, the restrictions must be indispensable to the attainment of these objectives and the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question. When these four requisites are satisfied the agreement is assumed to enhance competition within the relevant market due to its effect of providing for benefits for end-consumer by the creation of lower prices and

⁶⁵ A.a. art. 4(2)(a).

⁶⁶ Commission Notice: Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, art. 100.

⁶⁷ Commission Notice: Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), art. 40.

⁶⁸ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

⁶⁹ 14/68 *Walt Wilhelm v Bundeskartellamt* [1969] ECR 1.

⁷⁰ E. Buttigieg, *Competition Law: Safeguarding the Consumer Interest – A Comparative Analysis of US Antitrust Law and EC Competition Law*, (The Netherlands, Kluwer Law International BV 2009) p. 128.

⁷¹ F. Alese, *Federal Antitrust and EC Competition Law Analysis*, (Cornwall, TJU Digital 2008) p. 30.

better quality, compensating the later for any adverse effects on competition.⁷² The exception rule in Article 101(3) TFEU applies on the agreement for as long as the conditions are fulfilled and ceases to apply when that is no longer the case.⁷³ If the conditions established in the article are not satisfied the agreement is null and void provided that the hardcore restrictions are not severable from the agreement as a whole.⁷⁴

2.5.1 Market improvement and the promotion of technical or economic progress

The first criterion in Article 101(3) TFEU requires the agreement under consideration to ‘*contribute to improving the production or distribution of goods or to promoting technical or economic progress*’. This condition implies that those agreements that restrict competition could potentially fall within the exemption provided the agreement has indisputably advantages, which outweighs any disadvantages for efficient competition. The CJEU clarified in *Grundig*⁷⁵ that this criterion should be used in line with the purpose behind Article 101 TFEU and not be applied in a manner that circumvents the stipulations of contributions made by the agreement that solely is beneficial for the parties involved.⁷⁶ The judgement further established that only objective benefits could be taken into consideration and efficiencies should not be assessed based on subjective indications.⁷⁷ The aim of the analysis is to ascertain what the objective benefits created by the agreement are and what is the economic importance of such efficiencies.⁷⁸ There must be a sufficient direct causal connection between the restrictive agreement and the claimed benefits in order to satisfy the criterion.

2.5.2 Fair share for consumers

The second criterion in Article 101(3) TFEU states that an agreement could be considered for exemption under the provision if it allows ‘*consumers a fair share of the resulting benefit*’. The notion of ‘consumer’ should be interpreted in a broad manner and encompasses all direct or indirect users of the products covered by the agreement, including producers that use the

⁷² E. Buttigieg, *Competition Law: Safeguarding the Consumer Interest – A Comparative Analysis of US Antitrust Law and EC Competition Law*, (The Netherlands, Kluwer Law International BV 2009) p. 130.

⁷³ Commission Notice: Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), art. 44.

⁷⁴ A.a. art. 41.

⁷⁵ 56/64 & 58/64 *Consten & Grundig* [1966] ECR 429.

⁷⁶ F. Alese, *Federal Antitrust and EC Competition Law Analysis*, (Cornwall, TJU Digital 2008) p. 32.

⁷⁷ Commission Notice: Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, art. 49.

⁷⁸ A.a. art. 50.

product as an input, wholesalers, retailers and final end-consumers.⁷⁹ The concept of fair share implies that consumers must receive a reasonable amount of the efficiencies generated by the restrictive agreement, which at least must compensate for any actual or likely negative effects that could arise from the license agreement.⁸⁰ When an analysis of the benefits for the consumer is conducted, the potential structural impediment that might restrict the benefits in favour of the parties to the agreement must also be considered.⁸¹ It has not been established in jurisprudence the extent of the benefits, which must occur for the consumers in order to satisfy this criterion.

2.5.3 Indispensability of the restrictions

The third criterion in Article 101(3) TFEU requires the agreement not to *'impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives'*. This stipulation implies a two-fold test where first the restrictive agreement must be examined in order to determine whether it is reasonably necessary in order to achieve the efficiencies, and second, if the individual restrictions of competition within the agreement are indispensable for the attainment of these benefits.⁸² It must be assessed whether the restrictive clauses in a particular agreement are objectively necessary or if they go far beyond what could be constituted as reasonable and proportionate for achieving the purpose behind the agreement. Hence, the principle of proportionality seems to have relevance for this criterion.⁸³ Every restrictive clause in the agreement must demonstrate a causal connection to the benefits it sets out to satisfy.⁸⁴ The assessment of indispensability is made within the actual context in which the agreement operates and must in particular take into account the structure of the market and the economic risks related to the conclusion of the agreement.⁸⁵

2.5.4 No elimination of competition

The final criterion for the purpose of obtaining the exemption in Article 101(3) TFEU is that the agreement shall not provide the undertakings concerned with *'the possibility of eliminating competition in respect of a substantial part of the product in question'*. The concept of elimination of

⁷⁹ F. Alese, *Federal Antitrust and EC Competition Law Analysis*, (Cornwall, TJU Digital 2008) p. 33.

⁸⁰ Commission Notice: Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, art. 85.

⁸¹ A.a. art. 129.

⁸² A.a. art. 73.

⁸³ A.a. art. 74.

⁸⁴ F. Alese, *Federal Antitrust and EC Competition Law Analysis*, (Cornwall, TJU Digital 2008) p. 34.

⁸⁵ Commission Notice: Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, art. 80.

competition in respect of a substantial part of the products concerned is specific for Article 101(3) TFEU.⁸⁶ The requirement seems to relate to the potential acquisition of a dominant position on the relevant market or the strengthening of such a position.⁸⁷ The condition presupposes an analysis of the remaining competitive pressure on the market and the impact the agreement has on competition. The aim behind the provision is to guarantee that the agreement does not contribute to hinder the continuation of effective competition on the internal market. Even agreements between parties that hold large market shares seems to satisfy the requirement as long as the elimination of competition is achieved by some sort of economic integration that produces economic gains, which other firms on the relevant market could not possibly have the opportunity to acquire.⁸⁸

2.6 Concluding remarks

The judgement in *Windsurfing* established the Commission's competence to evaluate the legality of IPRs acquired under national law when the exercise of that right is infringing either Article 101 TFEU or Article 102 TFEU. The protection provided by domestic legislation concerning intellectual property should be restricted and only justify for anti-competitive restraints for individual clauses in license agreement where the restrictions falls within what constitutes the very subject matter of that right. Hence, undertakings should not have the possibility to use its IPR in order to achieve a greater protection than what is actually granted by the acquisition of such a right.

When a license agreement fulfils the conditions set forth in the TTR, the parties are relieved from the burden of providing evidence that their agreement fulfils the cumulative criteria in Article 101(3) TFEU. The Commission is given the authority to withdraw any benefits provided by the TTR by making individual assessments of certain restrictive clauses in license agreements conformability with the mentioned article. This may result in the removal of anti-competitive clauses while the rest of the agreement remains valid in its entirety. The notion of 'potential' competitors has been introduced as a concept to observe when the relevant technology market is being established. The stipulation has not been provided with any requirements to its intended application and has created uncertainty as to the establishment of the parties' relationship.

The Regulation exempts agreements from its application that contain severely restrictive anti-competitive clauses. Where such clauses are found the entire agreement falls outside the scope of the Regulation and the parties must demonstrate that the agreement qualifies for an individual exception under Article 101(3) TFEU. If the conditions in the article are satisfied the

⁸⁶ A.a. art. 106.

⁸⁷ Ibid.

⁸⁸ F. Alese, *Federal Antitrust and EC Competition Law Analysis*, (Cornwall, TJU Digital 2008) p. 35.

Commission will exempt the agreement, which becomes legally valid and enforceable due to the establishment of the direct link between the restrictive clauses and the claimed efficiencies. The evaluation of the elements has been criticized for being too arbitrary and creating an excessive scope for the individual assessment made by the Commission. For instance has the notion of 'consumer' received a wide application, which almost seems to include all actors present on the relevant market. Further has the stipulation of 'fair share for consumer' not been defined to the level of benefits that must accrue the consumers in order for the criterion to be satisfied.

3 Article 102 TFEU

3.1 Introduction to Article 102 TFEU

Article 102 TFEU establishes how dominant firms may conduct its business within the internal market without infringing competition legislation. The provision is protecting the Union by making it illegal for dominant undertakings to conduct unilateral abusive behaviour that have a profound adverse effect on genuine and effective competition. Article 102(b) TFEU specifically prohibits restrictions in technology or on innovation as it forbids unilateral limitation of markets and technical development. The coverage and application of the article can be determined by an analogical interpretation of the Commission's Guidance for Article 82.⁸⁹ The Guidelines made for the predecessor of Article 102 TFEU assists the Commission to determine under which circumstances of abusive exclusionary conduct taken by dominant companies that should fall within the scope of the Regulation. It is customary for the Commission to determine which method to use in its assessment by applying the Guidelines.⁹⁰ Article 102 TFEU emphasizes that the mere holding of dominance on the relevant market is not by itself enough to infringe the provision. A breach will occur when the dominant position is being exercised in a way that is affecting trade between Member States.⁹¹

3.2 The relevant market

The relevant market is established by examining two separate subsections – the product market and the geographic market. After defining the relevant market, an assessment of the undertaking's potential dominant position on that particular market must be assessed and scrutinized.⁹² The definition of the relevant market is dependent on the products relationship with the geographic market and the firm's position on that market and the position of its competitors. The aim of determining the relevant market is to specify which actors are present in specific markets and which competitors that could potentially have the capability of creating severe entry barriers for potential competitors or preventing existing competition from behaving independently and unrestricted on the market.⁹³

⁸⁹ Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings.

⁹⁰ A. Ezrachi, *Article 82 EC – Reflections on its Recent Development*, (Oregon, Hart Publishing 2009) p. 55.

⁹¹ J.D.C Turner, *Intellectual Property and EU Competition Law*, (Oxford, Oxford University Press 2010) p. 81.

⁹² M. Glader et al. *Competition Classics*, (Lund, Lund University 2011) p. 322.

⁹³ A.a. p. 321.

3.2.1 The relevant product market

In order to determine the relevant product market, the interchangeability or the substitutability of the product must be analysed from a consumer perspective. The *United Brands v. Commission*⁹⁴ demonstrates how characteristics, prices and intended use of the product should be evaluated. The result from the examination is used as guidance when determining whether or not the product is sufficiently divergent from other similar product markets. The influence for the method of assessing the product market is taken from economic theories, which is shown in the application of the SSNIP-test⁹⁵. The SSNIP is used to identify the smallest relevant market within a hypothetical monopolist market by imposing a significant increase in price and examining how this influences the behaviour of the consumers. The method of raising the prices is conducted by widening the specific market by adding substitutable products until a hypothetical monopolist is found that is able to increase the price of its product profitability.⁹⁶ When defining the relevant market the most important element to observe is demand substitution.⁹⁷ The 1997 Notice on definition of the relevant market⁹⁸ describes that the product market ‘*comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use*’. The market is hence reliant on the interchangeability or the substitutability of the product viewed from the perception by the consumers.⁹⁹ Whether or not certain products are interchangeable with other products is determined by the use of relevant criteria such as competitive conditions and the structure of supply and demand. In *United Brands* the relevant product market was deemed to be the banana market due to the fruits distinction from other fresh fruits. When reaching this conclusion, the CJEU used controversial requisites. For instance it determined that a distinct group of consumers – the young, the old and the sick – would not find other fruits equally substitutable for bananas since the later is an easier fruit to eat.

3.2.2 The relevant geographic market

According to the 1997 Notice on definition of the relevant market¹⁰⁰ the geographic market comprises of an area where the ‘*conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because the conditions of competition are*

⁹⁴ 27/76 *United Brands v Commission* [1978] ECR 207.

⁹⁵ Small but Significant and Non-transitory Increase in Price-test or the hypothetical monopolist test.

⁹⁶ G. Monti, *EC Competition Law*, (Oxford, Cambridge University Press 2007) p. 132.

⁹⁷ M. Glader et al. *Competition Classics*, (Lund, Lund University 2011) p. 322.

⁹⁸ Commission Notice on the definition of the relevant market for the purposes of Community competition law.

⁹⁹ M. Glader et al. *Competition Classics*, (Lund, Lund University 2011) p. 326.

¹⁰⁰ Commission Notice on the definition of the relevant market for the purposes of Community competition law.

*appreciable different in those areas*¹⁰¹. The delineation for the geographic market is an area where the possibilities for competition are the same for all actors active on a particular market. It is declared in Article 102 TFEU that the geographic market could comprise of the entire internal market or a substantial part of it. A dominant position could hence be held within the entire Union or being just a part of it. The provision does not provide any clarification on how restricted the area could be, nor does it provide any additional requirements that govern the concept of it.¹⁰² The *United Brands* provides an important clarification to the term substantial part and entailed that Germany, Denmark, Ireland, the Netherlands and the Benelux countries were large territories that fulfil the criterion. The jurisprudence has emphasized that the geographic market should consist of an area where the company is involved in the supply and demand of products or services, and where the conditions for competition are sufficiently homogenous in order to distinguish it from other similar markets. The distinction between neighbouring markets is made by the use of the requisite that the possibilities for competition must be appreciably different on those markets.¹⁰³ The inconsistency in the interpretation of what should constitute a substantial part can be seen in the jurisprudence¹⁰⁴ from the CJEU where for instances a large port and a large airport were regarded as fulfilling the requisite.

3.2.3 The time requirement

Time-factor is an additional aspect to be considered when the relevant market is being established.¹⁰⁵ The *Tetra Pak International v. Commission*¹⁰⁶ emphasized that the potential for a change in the consumer purchasing behaviour in terms of evaluating substitutable products can only be determined rightfully when this is studied over a longer period of time. Making a determination of the range of products, which from the consumer perspective could possibly be a substitute for the product, can assess what should be included in the demand substitution.¹⁰⁷ The relevant market and the products that belong to that specific market have then been recognized.

¹⁰¹ Ibid.

¹⁰² S.D Anderman and H. Schmidt, *EU Competition Law and Intellectual Property Rights – the Regulation of Innovation*, 2nd edn, (Oxford, Oxford University Press 2011) p. 183.

¹⁰³ 27/76 *United Brands v Commission* [1978] ECR 207, paras. 44-53.

¹⁰⁴ 92/213/EEC *British Midland v Aer Lingus* [1987] CMLR 465, T-128/98 *Aéroports de Paris v Commission* [2000] ECR 3929.

¹⁰⁵ T-83/91 *Tetra Pak International v Commission* [1996] ECR I-5951, para. 67.

¹⁰⁶ Ibid.

¹⁰⁷ M. Glader et al. *Competition Classics*, (Lund, Lund University 2011) p. 331.

3.3 Dominant position

When defining the relevant market one must assess the undertaking in question in order to determine if it holds a dominant position on that specific market. The notion of ‘undertaking’ in Article 102 TFEU implies that it does not only apply to single company dominance. There is no requirement that in order to acquire dominance, an undertaking must occupy a pure monopoly position with a 100 per cent market share. The case of *AKZO Chemie BV v. Commission*¹⁰⁸ established that a holding of market shares of 50 per cent or more should be regarded as prima-facie evidence for dominance. Market shares are a strong indication for market power but it does not provide a precise measure.¹⁰⁹ When a market share reaches a certain level it shall become equivalent to dominance and likewise a low market share shall become equated that dominance cannot be claimed.¹¹⁰ The holding of a dominant position is an indication of a certain degree of market power, which must be greater than those of its competitors and which could be exercised in a way that is creating detriment on the market.¹¹¹

The CJEU has demonstrated in its case law how dominance can be characterised by the use of different requisites.¹¹² For instance, the Court has examined the independence of the firm and its economic strength in order to evaluate if it could enable it to hinder genuine and effective competition on the relevant market.¹¹³ In situations where an undertaking holds a market share between 35-50 per cent, dominance can be difficult to establish and the Court is deemed to make a determination on a case-by-case basis. The Commission has become more eager to identify dominance by emphasizing undertakings’ market power based on economic theories.¹¹⁴ The focus on independence and economic strength has become a *de facto* standard test for identifying dominance and is used frequently in case law¹¹⁵. In *United Brands* the CJEU described dominance as being derived from a situation where a company is not faced with competition that put restraints on its possibility to decide on price and output.¹¹⁶ The Court went further and emphasized that in order for a firm to gain dominance, the undertaking does not first have to eliminate all potential competition on that market.¹¹⁷ The

¹⁰⁸ 62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359, para. 21.

¹⁰⁹ G. Monti, *EC Competition Law*, (Oxford, Cambridge University Press 2007) p. 143.

¹¹⁰ M. Glader et al. *Competition Classics*, (Lund, Lund University 2011) p. 332.

¹¹¹ Ibid.

¹¹² 85/76 *Hoffman La Roche v Commission* [1978] ECR 1139, and 27/76 *United Brands v Commission* [1978] ECR 207, para. 7.

¹¹³ 78/70 *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Grossmarkete GmbH & CO* [1971] ECR 487, paras. 17-19.

¹¹⁴ G. Monti, *EC Competition Law*, (Oxford, Cambridge University Press 2007) p. 127.

¹¹⁵ See for instances 85/76 *Hoffman La Roche v Commission* [1978] ECR 1139, 27/76 *United Brands v Commission* [1978] ECR 207, and 322/81 *Michelin v Commission* [1983] ECR 2015.

¹¹⁶ F. Alese, *Federal Antitrust and EC Competition Law Analysis*, (Cornwall, TJU Digital 2008) p. 188.

¹¹⁷ 27/76 *United Brands v Commission* [1978] ECR 207, para. 113.

position was subsequently reaffirmed in *Hoffman-La Roche v. Commission*¹¹⁸ where the CJEU stated that a dominant position on the relevant market is established when a firm has the possibility to act to a considerable extent independently of its competitors, costumers and consumers on the market.¹¹⁹ *Europemballage Corporation and Continental Can Company Inc. v. Commission*¹²⁰ provides clarification on the scope of Article 102 TFEU and determined that the article is applicable on unilateral activity taken by one or more undertakings.¹²¹

3.3.1 Single undertaking dominance

The essential factor for determining single undertaking dominance is the company in questions possibilities to behave independently on the market without having to take regard to other actors on the market or consumers.¹²² Other important requisites for determining a position of single dominance was established in the *United Brands* where the CJEU focused on the United Brand's business structure and the competitive situation it was faced to on the relevant market. The Court stressed the importance of not making companies' economic strength solely measured by its profitability. A loss of profit over a certain period of time is not inconsistent with a dominant position, and equivalent a significant profit is not correspondent to a situation where there is a clear lack of genuine competition.

3.3.2 Collective dominance

Collective dominance is equated to a situation where several undertakings that are economically independent act together in order to prevent or create obstacles for competition.¹²³ The situation where companies together hold a large market share is not enough to establish a position of collective dominance.¹²⁴ Independent companies, which are not tied together by economic links, can collectively hold a dominant position against other actors on the specific market. A collective dominance can only be determined when the circumstances reveal a stronger connection between the parties than is required under Article 101 TFEU. The links may be of economic nature, which might not lead to shared ownership, but a joint control over intellectual property. Collective dominance may be established where the undertakings have had a long-lasting collaboration, which not is

¹¹⁸ 85/76 *Hoffman La Roche v Commission* [1978] ECR 1139, paras. 38-41.

¹¹⁹ A.a. para. 5.

¹²⁰ 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission* [1973] ECR 215.

¹²¹ A.a. para. 25.

¹²² 27/76 *United Brands v Commission* [1978] ECR 207, para. 65.

¹²³ See for instances 22/71 *Beguelin Import Co. v S.A.G.L Import Export* [1971] ECR 949, and 170/83 *Hydrotherm Geratebau GmbH v Compact de Drott: Ing. Mario Andreoli e C. Sas* [1984] ECR 2999.

¹²⁴ M. Glader et al. *Competition Classics*, (Lund, Lund University 2011) p. 344.

based on ownership.¹²⁵ The conduct by a subsidiary firm can in certain circumstances be attributed to the parent undertaking and create a situation of collective dominance. *Irish Sugar plc v. Commission*¹²⁶ suggests that the position of collective dominance does not have to abuse its dominance collectively, abusive behaviour by one company designed to safeguard the collectively dominant position falls under the scope of the provision.¹²⁷ To analyse a potential situation of collective dominance both the present situation on the relevant market and the potential future changes on the market must be regarded.¹²⁸

3.3.3 The element of affecting trade

Once a dominant position on the relevant market is found, the conduct by that undertaking must be analysed in order to evaluate if the behaviour is affecting trade between Member States. In *Michelin v. Commission*¹²⁹ it was established that in situations where the conduct by a dominant firm is creating substantial entry barrier for potential competitors, it does not make any difference whether the behaviour is confined to a single Member State if the behaviour could affect trade and competition within the internal market.¹³⁰ The criterion has in jurisprudence been interpreted broadly to include any appreciable restriction of competition that direct or indirect, actually or potentially, has an influence on the trade of goods or services between Member States.¹³¹ The vague criteria of potentially affect trade was established in *Höfnér and Elser v. Macrotron*¹³² where the CJEU determined that there is no absolute requirement that the abusive behaviour must have an affect on trade in order for Article 102 TFEU to be applied.¹³³ Case law¹³⁴ has further established that abusive behaviour conducted by a dominant firm directed at third parties, can also be under the scope of the provision if the conduct is affecting trade and competition between Member States.

3.4 The use of intellectual property and the application of Article 102 TFEU

Article 102 TFEU becomes applicable in circumstances where the use of IPR is amounting to distortion of effective competition on the relevant market. The general aspect for rights-holders of intellectual property is that

¹²⁵ Ibid.

¹²⁶ T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969.

¹²⁷ A.a. para. 66.

¹²⁸ Ibid.

¹²⁹ 322/81 *Michelin v Commission* [1983] ECR 2015.

¹³⁰ M. Glader et al. *Competition Classics*, (Lund, Lund University 2011) p. 345.

¹³¹ 56/65 *Société La Technique Minière v Maschinenbau Um GmbH* [1966] ECR 235.

¹³² C-41/90 *Höfnér and Elser v Macrotron* [1991] ECR I-1979.

¹³³ A.a. para. 32.

¹³⁴ 7/73 *Commercial Solvents v Commission* [1974] ECR 223.

they should not be governed by restraints when exercising their exclusivity.¹³⁵ Exceptions to undertakings right to exploit its assets could have a profound effect on companies' incentives to continue to invest and innovate, which subsequently could disrupt genuine competition on the relevant market and ultimately cause damage for the final consumer.¹³⁶ There is a natural coherence between intellectual property and competition legislation because of the likely monopoly position the IPR grant its proprietor. By possessing an intellectual property a position of dominance could hence be created.¹³⁷ The *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmarkete GmbH & CO*¹³⁸ confirms this principle and clarifies that the mere use of an IPR does not *per se* create a dominant position and that the mere existence of an IPR is not automatically abusive. *Hoffman-La Roche* contains an important affirmation and the CJEU identified the use of intellectual property as a possible 'instrument of abuse', which dominant firms could exploit in order to create obstacles for competition. The landmark cases of *Volvo v. Veng*¹³⁹, *Commercial Solvents v. Commission*¹⁴⁰, *Magill*¹⁴¹ and *IMS Health*¹⁴² is setting the parameters on how licensing and exploitation of IPR can be exercised in order to not disrupt genuine and effective competition on the internal market. Hence, jurisprudence is providing guidelines of how exercise of intellectual property might be conducted without the risk of being scrutinized under competition legislation. In *Michelin* the CJEU made a principal declaration when it determined that irrespective of the reasons for why an undertaking holds a dominant position, the firm concerned has a special responsibility not to conduct in a way that is impairing genuine undistorted competition within the internal market.¹⁴³

3.5 Concluding remarks

The jurisprudence by the CJEU demonstrates how Article 102 TFEU is being exercised in order to safeguard the Union from conduct that threatens effective and genuine competition. Case law demonstrates the large amount of power that is given the Commission who has become unrestrained to depart from previous rulings when initiating proceedings. This prospect has

¹³⁵ S. Bishop and M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*. 3rd edn, (Cornwall, Thomson Reuters Limited 2010) p. 322.

¹³⁶ Ibid.

¹³⁷ J. Houdijk, *The IMS Health Ruling: Some thoughts on its Significance for legal practice and its Consequences for future Cases such as Microsoft*, (European Business Organisation Law Review, Volume 6, 2005) p. 472.

¹³⁸ 78/70 *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Grossmarkete GmbH & CO* [1971] ECR 487, para. 19.

¹³⁹ 238/87 *Volvo v Veng* [1988] ECR 6211.

¹⁴⁰ 7/73 *Commercial Solvents v Commission* [1974] ECR 223.

¹⁴¹ C-241/91 *RTE, ITP, BBC v Commission* [1995] ECR 743.

¹⁴² C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* [2004] ECR 5039.

¹⁴³ 322/81 *Michelin v Commission* [1983] ECR 2015, para. 9.

been developed due to the circumstance that the Commission is the one to initiate an investigation of potential infringement under the provision.

The relevant product market consists of products that are interchangeable or substitutable from a consumer perspective. The *United Brands* judgement indicates the Court use of controversial factors when determining the relevant product market, which make this assessment unpredictable for undertakings to make by themselves. The risk of defining the relevant product market is that the market may be drawn too narrowly, which thereby leads to an exaggeration of the undertaking's market power. In terms of establishing the relevant geographic market, the market must be possible to distinguish from neighbouring markets by being sufficiently homogenous and provide the same level of competition for all actors on the market. What should be regarded as a substantial part is not defined by the use of fixed requisites or established in the Courts jurisprudence.

A further ambiguous requisite is the criterion of affecting trade between Member States. The *Michelin* judgement demonstrates that even conduct that potentially could affect trade is enough for fulfilling the condition. The vague definition of 'could affect' is not further elaborated by the CJEU, which creates a lack of guidance for its fulfilment. The undertakings could abuse their dominance by for instance creating entry barriers that prevent the emerging of new products entering the market, which could be in competition with their own products. This conduct is making it possible for firms to persistently hold prices above costs, which ultimately is causing damage for the consumers who have to spend excessively more money on a product than they would if competition was present on the market. Dominant undertakings could also behave abusively on the market by distorting competition by constraining the continuation of existing competition. Dominance is found in cases where a company holds a very high market share and equivalent, dominance is not found in circumstances where an undertaking holds a very low market share. When the market share does not fulfil the presumptions, the Commission makes an individual assessment where parameters such as independence, economic strength and the company's ability to act to an appreciable extent independently of its competitors and consumers are examined. The issue for companies to predict its market shares in circumstances when it is eligible for individual assessment is creating legal uncertainty and together with the unpredictability of the application of the different elements of Article 102 TFEU it could lead to a profound adverse effect on companies' behaviour on the market. This is the potential result of the absence of objective criteria, which could ensure precise uncontroversial market delimitation.

4 Abuse of dominance

4.1 The concept of abusive conduct

Jurisprudence¹⁴⁴ has established that the notion of ‘abuse’ is an objective concept, which relates to conducts by dominant undertakings that influences the structure within the internal market. It was recognized by the CJEU in *Continental Can*¹⁴⁵ that the list of abuses in Article 102 TFEU are merely examples and not an exhausted enumeration of the sort of abuses that is prohibited by the Treaty.¹⁴⁶ Through the holding of a dominant position on a specific market companies might be provided with the opportunity to control that market structure.¹⁴⁷ The principle of special responsibility was established in *Michelin*¹⁴⁸ and declares that dominant firms have a special responsibility not to allow its conduct to impair genuine and efficient competition within the internal market. The special responsibility can make companies mandated to supply competitors and costumers to whom they ordinary would have refused. The combination of acquisition of IPR and excessive pricing could amount to abusive behaviour if the IPR is exercised in a way that eliminates competition.¹⁴⁹ The *Commercial Solvents*¹⁵⁰ determines the important issue of whether or not a dominant undertaking could stop supplying a former costumer. The CJEU ruled that a dominant company could not cease to supply a long-standing costumer if the company thereby eliminated competition. The assessment of dominance can be used as an intermediary step in the analysis of alleged abuse of dominant position.¹⁵¹

4.2 Refusal to supply by a dominant undertaking

Case law¹⁵² established that situations may occur where a refusal to supply the market amounts to abusive practice, which could infringe Article 102 TFEU. A refusal to supply by companies holding a dominant position has been held by the Union Courts to fall under the general prohibition in the

¹⁴⁴ C-52/07 *Kanal 5 Ltd v Föreningen Svenska Tonsattaers Internationella Musikbyrå (STIM) upa* [2008] ECR I-9275, para. 25.

¹⁴⁵ 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215.

¹⁴⁶ A.a. para. 245.

¹⁴⁷ 27/76 *United Brands v Commission* [1978] ECR 207.

¹⁴⁸ 322/81 *Nederlandsche Banden-Industrie Michelin NV v Commission* [1983] ECR 2015

¹⁴⁹ S.D Anderman and H. Schmidt, *EU Competition Law and Intellectual Property Rights – the Regulation of Innovation*, 2nd edn, (Oxford, Oxford University Press 2011) p. 203.

¹⁵⁰ 7/73 *Commercial Solvents v Commission* [1974] ECR 223.

¹⁵¹ A. Ezrachi, *Article 82 EC – Reflections on its Recent Development*, (Oregon, Hart Publishing 2009) p. 3.

¹⁵² 7/73 *Commercial Solvents v Commission* [1974] ECR 223, and 27/76 *United Brands v Commission* [1978] ECR 207.

Treaty under certain circumstances. When these specific situations occur the dominant undertaking must provide objective justifications for its refusal to supply. The general rule is that a refusal to supply third parties does not constitute by itself abusive behaviour that is in breach of competition legislation. The conduct by the dominant company must be accompanied by exceptional circumstances to be characterised as an abusive practice.¹⁵³

4.2.1 Refusal to supply products to long-standing costumers

The *Commercial Solvents* stresses that just because a company decides to change its marketing strategy, a dominant undertaking may not cease to supply a long-standing costumer if it thereby potentially eliminates efficient competition within the relevant market.¹⁵⁴ This is in line with the ruling in *United Brands* where an undertaking was not allowed to arbitrarily stop supplying a distributor even if that costumer also acted in the interest of competitors.¹⁵⁵ In *Hugin*¹⁵⁶ the question was whether Hugin had an obligation to supply spare-parts to independent repairers when the company normally provided this service itself. As in line with previous case law, emphasis was held on the contractual relationship between the parties.¹⁵⁷ A dominant firm shall be entitled to sell its products by using a consistent policy of selecting sellers based on objective conditions. The selective distribution policy has been accepted as a reasonable measure for the undertaking to refuse to supply certain costumers. However, a selective system might not be justifiable if the policy is used in order to circumvent the doctrine of refusal to supply as a way to adopt new marketing strategies, which includes the elimination of competitors.¹⁵⁸ The refusal to supply can also not be acceptable if the conduct is placing competitors at a disadvantage where for instance the product is consisting of a raw material that might be difficult to substitute because there are no equal satisfactory sources of supply.¹⁵⁹

4.2.1.1 Commercial Solvents

The *Commercial Solvents*¹⁶⁰ concerned a decision made by a dominant firm to stop supplying former costumers of a raw material used in the manufacturing of ethambutol. The reason for the refusal was that Commercial Solvents wanted to enter the market by themselves and thereby

¹⁵³ E. Elhauge and D. Geradin, *Global Competition Law and Economics*, (Oxford, Portland and Oregon, Hart Publishing 2007) p. 410.

¹⁵⁴ M. Glader et al. *Competition Classics*, (Lund, Lund University 2011) p. 357.

¹⁵⁵ A.a. p. 358.

¹⁵⁶ 22/78 *Hugin Kassaregister AB v Commission* [1979] ECR 1869.

¹⁵⁷ A.a. para. 17.

¹⁵⁸ M. Glader et al. *Competition Classics*, (Lund, Lund University 2011) p. 358.

¹⁵⁹ 7/73 *Commercial Solvents v Commission* [1974] ECR 223.

¹⁶⁰ A.a. para. 23.

eliminate existing competition on that particular market.¹⁶¹ The question to be answered by the CJEU was if an undertaking in a dominant position could discontinue supplying a long-standing customer with the justification that the firm itself intended to enter the same relevant product market as its customers. The Court concluded that the conduct was not justified and it is not permissible to stop supplying former customers of a raw material just to reserve the market for themselves. A dominant company that has the possibility to control the supply to manufacturers of derivatives could not act in such a way as to remove their competition, which would result in the eliminating one of the principal manufacturers of ethambutol within the internal market.¹⁶² It follows that an undertaking, which has a dominant position in the market of raw material and which refuses to supply customers and therefore risks eliminating all competition is abusing its dominant position.¹⁶³ The customers could not obtain the necessary inputs from any other source of supply and the Commission imposed a fine on Commercial Solvents and ordered it to resume the supply of the raw material to its customers. The Commission's decision was subsequently confirmed by the CJEU who emphasized in its ruling that the termination of contractual obligations under an agreement by the decision to discontinue supplying customers is infringing Article 102 TFEU.¹⁶⁴

4.2.1.2 United Brands

In *United Brands*¹⁶⁵, United Brands discontinued supplies of its branded banana Chiquita to customers situated in Denmark. United Brands claimed that the Danish dealers had breached their contractual obligations by obtaining supplies from competing brands. The Commission decided that the conduct of refusal to supply an existing customer could result in discouragement for other customers to sell competing brands and participating in advertisement and sales promotion of rival suppliers. The CJEU concluded that the conduct of terminating a dealer from its products on the ground that the distributor did not want to comply with the requirements put forward by United Brands could deter other distributors from deviating from the demands of dominant undertakings. The result could ultimately lead to the consolidating of companies in dominant positions maintaining its control over the distribution system.¹⁶⁶ The ruling states that the refusal to supply was not just a threat for other dealers who sold United Brands bananas to comply with their requests, it also had the effect of consolidating United Brands position of dominance on the relevant product market.¹⁶⁷ The Court further recognized the right dominant undertakings have in terms of protecting its own commercial interest if the company is being threatened. This right cannot however justify

¹⁶¹ A.a. para. 25.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ A.a. para. 49.

¹⁶⁵ 27/76 *United Brands v Commission* [1978] ECR 207.

¹⁶⁶ A.a. para. 192.

¹⁶⁷ Ibid.

discontinuing of supplying existing customer if the sole purpose behind the refusal is to strengthen its dominant position on the relevant market.¹⁶⁸ The refusal is inconsistent with the objectives behind the Treaty since the conduct is creating limitations on the number of competitors active on the relevant market to the prejudice of consumers.¹⁶⁹ The CJEU emphasized its previous jurisprudence and stated that an undertaking in a dominant position for the purpose of marketing a product cannot stop supplying customers who abide by regular commercial practice if the orders placed by the customers are ordinary.

4.2.1.3 GlaxoSmithKline

The case of *Sot. Lelos kai Sia EE and others v. GlaxoSmithKline AEVE Farmakejftikon Proionton*¹⁷⁰ concerned a refusal to supply patent protected products to dealers that intended to parallel export part of the quantities to other Member States. The Greek legislation required holders of market authorization for pharmaceutical products to obtain a license, which allows the undertaking to supply a defined geographic area regularly with the products the authorization relates to.¹⁷¹ The Greek subsidiary of GlaxoSmithKline, GSK AEVE, imports and distributes pharmaceutical products in Greece. The appellants in the main proceedings were customers to GSK AEVE and had bought pharmaceutical products in order to distribute the goods both in the Greek market and in the markets of other Member States. GSK AEVE made an alteration of its distribution policy due to its customer's intent of parallel export and it began stop meeting orders. The new policy made the undertaking entering the distribution market itself and it began delivering pharmaceutical products to Greek pharmacies and hospitals. The appellants applied to the Greek competition authority for a declaration that the refusal to supply by GSK AEVE amounted to abuse of dominance within the meaning of Article 102 TFEU. The Greek competition authority asked in a preliminary ruling if there is '*an abuse of a dominant position contrary to Article 102 TFEU if a pharmaceutical company occupying such a position on the national market for certain medicinal products refuses to meet orders sent to it by wholesalers on account of the fact that those wholesalers are involved in parallel exports of those products to other Member States?*'

It is common ground in the case that the conduct of stop supplying is aimed at preventing parallel export by wholesalers to the markets of other Member States where the selling prices of the products in question are significantly higher.¹⁷² The CJEU began to assess whether the refusal to supply falls under the prohibition in Article 102 TFEU and whether the decision could

¹⁶⁸ A.a. para. 189.

¹⁶⁹ A.a. para. 183.

¹⁷⁰ C-468/06 to C-478/06 *Sot. Lelos kai Sia EE and others v GlaxoSmithKline AEVE Farmakejftikon Proionton* [2008] ECR I-7139.

¹⁷¹ Ibid.

¹⁷² A.a. para. 36.

be objectively justified.¹⁷³ The Court stressed the importance for companies to have the possibility of taking reasonable and proportionate actions in order to protect its commercial interests.¹⁷⁴ In order to determine whether the refusal to supply distributors involved in parallel exports constitutes reasonable and proportionate measures in relation to the threat that those exports represent to its legitimate commercial interests, it must be assessed whether the orders from the wholesalers are ordinary or not.¹⁷⁵ Hence, it is not permissible for dominant undertakings to cease to supply ordinary orders of existing costumers for the sole purpose that they plans to export part of the quantities ordered to other Member States with higher prices.¹⁷⁶ The CJEU came to the conclusion that it is for the referring court to examine whether the orders placed by the wholesalers are out of the ordinary in the light of previous business relations between the pharmaceutical company and the wholesalers. The size of the orders must be put in relation to the requirements of the market in the Member States concerned.¹⁷⁷

4.3 Concluding remarks

The objective notion of ‘abuse’ in Article 102 TFEU is left without any fixed parameters or precise point of reference for identifying the limits of the prohibition. The list of unilateral abuses by dominant undertakings in the article is merely examples why it is difficult to grasp the scope of application for the article due to its extended use in jurisprudence. The establishment of special responsibility derived from *Michelin* further creates restrictions on dominant undertakings conduct within the internal market. The principle becomes applicable in situations when the cumulative conditions in Article 102 TFEU are not satisfied and it provides the Union authorities with an additional opportunity to control the behaviour by market leaders. The Commission has for instance used the principle in order to legitimate compulsory licensing of intellectual property when a refusal is considered to have the profound effect of eliminating existing and potential competition. The uncertainty as to the application of the principle of special responsibility provides an indicator that even normal competitive practice by dominant firms could be considered as abusive even though the conduct in itself does not violate the Treaty.

A refusal to supply by a dominant undertaking could under certain circumstances be deemed to fall within the prohibition of Article 102 TFEU. In order for the refusal to be characterised as abusive, the conduct must be accompanied by exceptional circumstances. The CJEU has not given any precise definition for the constituent elements and has left the matter to be interpreted by national courts. In *Hugin* it was stated that undertakings have

¹⁷³ A.a. para. 39.

¹⁷⁴ A.a. para. 69.

¹⁷⁵ A.a. para. 70.

¹⁷⁶ A.a. para. 71.

¹⁷⁷ A.a. para. 73.

the right to use a selective distribution system and under such a system it is justifiable to refuse to supply independent repairer for as long as the measure is deemed to be reasonable and proportional. However, there exist situations where dominant firms have an obligation to meet the orders from the market. In *Commercial Solvents* it was established by the CJEU that when the refusal to supply concerns a raw material for which there is no equal source of supply, a refusal to supply a long-term customer without providing any objective justification is contrary to Article 102 TFEU. The customers had no possibility to obtain substitute for the raw material and the refusal to supply was consequently deemed to be abusive.

The ruling was reaffirmed in *United Brands* where the CJEU clarified that in functioning markets dealers should not be restricted in its possibilities to obtain products from different companies and encouraged a wider range of products in favour for the final consumer. It was emphasized by the Court that in situations where a contractual obligation has been breached the dominant undertaking could under reasonable measures take actions in order to protect its commercial interests. Such a method is justified as long as the practice is not taken with the sole purpose of limiting competition on a particular market to the prejudice of consumers. The right for dominant undertakings to take actions against threats to its legitimate commercial interest was confirmed in *GlaxoSmithKline* where an undertaking stopped meeting orders due to the wholesalers' intention of parallel export large quantities to other markets. The CJEU did however not find the measure to be reasonable and proportionate since the conduct was liable to eliminate existing customers as competitors within the relevant market.

5 Refusal to license and compulsory licensing of intellectual property rights

5.1 Refusal to license intellectual property rights

Under ordinary circumstances the owners of intellectual property have an exclusive right to its protected product and have no responsibility to license it to competitors or other third parties. The General Court (GC) indicated in *Micro Leader Business v. Commission*¹⁷⁸ that the exercise of IPR should not be immune from competition legislation. It has been emphasized in jurisprudence that it is not abusive conduct *per se* by dominant firms not to grant access of its IPR to competitors. The Court will only impose an obligation to license when there exist exceptional circumstances due to the presumption that a preservation of the option to license on the undertaking to decide ultimately generates benefits for the economy.¹⁷⁹ The wide approach to compelling supplies, which for instances are shown in *Commercial Solvents*¹⁸⁰ and *United Brands*¹⁸¹, have not in general been extended in the same manner to issues relating to IPRs. This might be because Article 102 TFEU does not presume that firms holding intellectual property are automatically in a position of dominance for products entailing such rights, or that the scope of IPRs does not necessarily transcends to the relevant market for the concerned product.¹⁸² There may be substitutes in the form of other intellectual property protected products and unprotected products that equally could satisfy the needs of the market without interfering on undertakings competitive advantages.¹⁸³

In *Volvo/Veng*¹⁸⁴, Volvo was the rights-holder of certain design rights for motor vehicle spare-parts under domestic legislation. Volvo refused to license third parties its IPR protected product and the CJEU had to make an assessment of whether the refusal was infringing Article 102 TFEU or not.¹⁸⁵ It was emphasized by the Court that the very subject matter of the exclusive right provided by the acquisition of IPR is to grant the rights-holder protection against third parties from manufacturing, selling or importing products that incorporates the intellectual property. The

¹⁷⁸ T-198/98 *Micro Leader Business v Commission* [1999] ECR II-3989, para.56.

¹⁷⁹ G. Monti, *EC Competition Law*, (Oxford, Cambridge University Press 2007) p. 228.

¹⁸⁰ 7/73 *Commercial Solvents v Commission* [1974] ECR 223.

¹⁸¹ 27/76 *United Brands v Commission* [1978] ECR 207.

¹⁸² F. Alese, *Federal Antitrust and EC Competition Law Analysis*, (Cornwall, TJU Digital 2008) p. 284.

¹⁸³ *Ibid.*

¹⁸⁴ 238/87 *Volvo v Veng* [1988] ECR 6211.

¹⁸⁵ A.a. para. 4.

obligation on an undertaking to provide access to third parties of products that incorporates the IPR would lead to the deprivation for the rights-holders of the very substance of his exclusive right. For this reason, the refusal to license independent repairers by Volvo is not in itself abuse of dominance.¹⁸⁶ The Court determined that in the absence of a harmonized legislation it is for the national courts to determine the extent of the protection provided by the acquisition of IPR derived from their domestic law.¹⁸⁷ The CJEU made a reservation in its ruling and declared that the exercise of such an exclusive right could be prohibited according to Article 102 TFEU if the refusal involves certain abusive conduct, for instance where the refusal to license is deemed to be arbitrary.¹⁸⁸ It was emphasized that a firm that applies for a license of IPR must demonstrate that there exist exceptional circumstances that would justify such a request.¹⁸⁹ The ruling in *Volvo/Veng* was subsequently confirmed in *Consortio Italiano Della Componentistica Di Ricambio Autoveicoli & Maxicar v. Régie Nationale des Usines Renault*¹⁹⁰.

5.2 The adoption of the essential facility doctrine within the European Union

The EFD is invoked in situations where a dominant undertaking on an upstream market is holding an essential facility and is obliged to grant licenses of that facility to third parties present on downstream markets.¹⁹¹ The doctrine defines the different requisites that need to be fulfilled in order for a dominant company to be mandated to supply its indispensable resource. An essential facility is distinguished from a non-essential facility by evaluating the potential impact the refusal has on effective competition and on consumers in related markets.¹⁹² The Commission defined an essential facility in *Sealink/B&I Holyhead*¹⁹³ to be any 'facility or infrastructure without access to which competitors cannot provide services to their costumers'.¹⁹⁴ Holyhead was a port owned by the company of Stena Link Seaports. The Commission determined that the port should be regarded as an essential facility and that Stena Link Seaport violated Article 102 TFEU by refusing to grant access to the port for competing undertakings. The practice imposed severe competitive disadvantages for competitors,

¹⁸⁶ A.a. para. 8.

¹⁸⁷ A.a. para. 7.

¹⁸⁸ A.a. para. 9.

¹⁸⁹ Ibid.

¹⁹⁰ 53/87 *Consortio Italiano Della Componentistica Di Ricambio Autoveicoli & Maxicar v Régie Nationale des Usines Renault* [1988] ECR 6039.

¹⁹¹ V. Hagenfeldt, *EC Competition Law – The Essential Facility Doctrine*, (Munich, GRIN Verlag 2011) p. 3.

¹⁹² S. Bishop and M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*, 3rd edn, (Cornwall, Thomson Reuters Limited 2010) p. 325.

¹⁹³ 94/19/EEC *Sealink/B&I Holyhead: Interim Measures* [1992] CMLR 255.

¹⁹⁴ A.a. para. 51.

which was prejudicing for consumers.¹⁹⁵ The decision further established that for the application of the EFD, same principles that are being used for investigating refusal to supply should apply on the conduct by owners of essential facilities. The exercise of an indispensable asset by an undertaking in a dominant position could therefore be scrutinized under Article 102 TFEU.¹⁹⁶ In *Oscar Bronner GmbH & Co KG v. Mediaprint Zeitung*¹⁹⁷ the CJEU stated that a facility should be regarded as essential if an entrant on the secondary market can prove that it is not possible to duplicate or to get access to an alternative facility.¹⁹⁸ The test of indispensability is objective, and should not be based on the needs of the applicant undertaking. If it cannot be supported that the product is indispensable and there are other equal sources of supply available on the markets, the EFD could not be invoked to provide access to facilities by third parties.¹⁹⁹ For situations where the essential facility consist of IPR, the doctrine deviates on the undertakings right to exercise its monopoly and should only be invoked in situations where it is justified due to the existence of exceptional circumstances. The EFD should apply on IPR when the rights-holder uses its intellectual property beyond what constitutes its essential function and exploits the monopoly position to seek exclusivity in a market separate from that to which the IPR primarily relates.

The EFD was first addressed indirectly by the CJEU in the judgement of *Commercial Solvents*, where a refusal to supply an essential raw material eliminated all competition on the secondary market and therefore affected the entire structure within the internal market.²⁰⁰ The test for determining whether there exist exceptional circumstances was established by the CJEU in *Magill*. The Court took a restrictive approach when determining that an obligation to license essential facilities by a dominant firm will only occur after the fulfilment of certain conditions: the refusal must be likely to eliminate all competition on the ancillary market, the facility must be indispensable for the creation of a new product and finally, the refusal cannot be objectively justified.²⁰¹ The requisites in *Magill* could be argued to create the external parameters of the principle of special responsibility and the corresponding duty to abstain from conducting any unilateral behaviour that would eliminate potential competition from the relevant market.²⁰² A too liberal application of the EFD is presumed to have the

¹⁹⁵ A.a. para. 41.

¹⁹⁶ V. Hagenfeldt, *EC Competition Law – The Essential Facility Doctrine*, (Munich, GRIN Verlag 2011) p. 3.

¹⁹⁷ C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint Zeitung* [1999] ECR 7791 paras. 45-46.

¹⁹⁸ J. Maliszewska-Nienartowitz, *The abuse of dominant position within the internal market of the European Community: From theoretical assumptions to practice*, (Interdisciplinary Management Research, Volume 3, 2007) p. 444.

¹⁹⁹ Policy Roundtables – *The Essential Facility Concept*, 1996. (OCDE/GD(96)113) p. 9.

²⁰⁰ A. Ezrachi, *Article 82 EC – Reflections on its Recent Development*, (Oregon, Hart Publishing 2009) p. 89.

²⁰¹ C-241/91 and C-242/91 *Radio Telefis Eireann and Independent Television Publications Ltd v Commission* [1995] ECR 743 para. 41.

²⁰² G. Monti, *EC Competition Law*, (Oxford, Cambridge University Press 2007) p. 40.

effect of ultimately harming the consumers rather than safeguarding them.²⁰³ The main importance when applying Union competition law is to protect the consumers rather than protecting competitors, which for instance was expressly emphasized by Advocate General Jacobs in *Oscar Bronner*²⁰⁴. The GC in *Tiercé Ladbroke v. Commission*²⁰⁵ limited the potential use of the test derived from *Magill* to only apply where there exists truly exceptional circumstances. A truly exceptional circumstance could for instance be found where the owner of an essential facility tries to prevent the emerging of a new product on the secondary market in order to attempt filling the demand from the consumers themselves, which are not being met.²⁰⁶

5.2.1 Magill

The broadcasting TV-channels BBC, RTE and ITV in Ireland and Northern Ireland had acquired national copyright protection for weekly program listings. The undertakings published their TV programmes in separate magazines and allowed daily newspaper the right to publish TV-listings one day in advance. Magill TV Guide Ltd, a magazine publisher, wanted to start publish a weekly magazine that would contain programs from all the three TV channels but was refused with regard to the companies' IPR protection. Consequently, consumers who demanded a comprehensive TV guide were forced to purchase numerous magazines. The Commission held that the refusal to license the IPR amounted to abuse of dominance by the broadcasters and ordered them to license third parties on non-discriminatory terms.²⁰⁷

The GC confirmed the legality of the Commission's decision and concluded that the TV channels were abusing its dominant position by reserving the exclusive right to publish weekly programme listings and thereby preventing the creation of a new product on the market likely to be in competition with their own product.²⁰⁸ Thus, the appellants were using its IPR to secure a monopoly position on the secondary market of weekly programme listings in Ireland and Northern Ireland.²⁰⁹ The judgement by the Court was based on the fact that the product Magill wanted to produce by the use of the TV-channels IPR would be different from the existing weekly guides as it was comprehensive and ultimately created financial benefits for the final consumers. The conduct taken by the TV-channels was deemed to go beyond what was necessary in order to fulfil the essential

²⁰³ E. Buttigieg, *Competition Law: Safeguarding the Consumer Interest – A Comparative Analysis of US Antitrust Law and EC Competition Law*, (The Netherlands, Kluwer Law International BV 2009) p. 246.

²⁰⁴ Advocate General Jacobs in *C-7/97 Oscar Bronner GmbH & Co KG v Mediaprint Zeitung* [1999] ECR 7791, opinion delivered on 28 May 1998, para. 58.

²⁰⁵ T-504/93 *Tiercé Ladbroke v Commission* [1997] ECR II-923.

²⁰⁶ *Ibid.*

²⁰⁷ 89/205/EEC *Magill TV Guide/ITP, BBC and RTE* [1989] OJ L78/43.

²⁰⁸ T-69-70/89 *Magill v RTE* [1991] ECR 485, para. 54.

²⁰⁹ A.a. para. 52.

function of the intellectual property and the practice could therefore not be objectively justified. This case may be distinguished from the circumstances in *Volvo/Veng* by the fact that the IPR protected product was being traded on the ancillary market by the undertakings.²¹⁰

The CJEU confirmed the ruling by the GC, and concluded that the new product would satisfy the demands from consumers, which was not offered by the appellants. The reservation of the secondary market for themselves and thereby refusing to license potential competitors was not considered as an objective justification for the refusal. The Court formulated a test consisting of four requisites that should be used in order to determine whether a refusal to license IPR to third parties on secondary related markets amount to abuse of dominance. The conditions include the elements of indispensability, intention to develop a new product, excludes all competition on a particular market and there are no objective justifications for the refusal.²¹¹ The CJEU did not discuss any potential objective justifications that could have been raised by the TV-channels under these circumstances that would justify the refusal.²¹²

5.2.2 IMS Health

*IMS Health*²¹³ confirms the principles that were established in *Magill*. The case concerned German data-protection legislation, which hindered sales information at a local level to be provided to groups of undertakings consisting of less than three pharmacies. Pharmaceutical companies and IMS Health created the '1860 brick structure' that divides the German territories into 1860 different geographic areas. The dominant position held by IMS Health was the result of the possibility to arrange information according to a geographical set of criteria over which it had copyright. Pharmaceutical undertakings could only purchase the market input when it was arranged according to that brick structure.²¹⁴ The Commission stated that existed exceptional circumstances existed due to the fact that the brick structure had become industry standard for the relevant market and mandated IMS Health to supply competitors in return for royalties.²¹⁵ IMS Health argued that the requirements established in *Magill* were not fulfilled, as the refusal to license did not prevent the emerging of a new product on the ancillary market.²¹⁶

²¹⁰ C-241/91 and C-242/91 *Radio Telefis Eireann and Independent Television Publications Ltd v Commission* [1995] ECR 743.

²¹¹ J. Maliszewska-Nienartowitz, *The abuse of dominant position within the internal market of the European Community: From theoretical assumptions to practice*, (Interdisciplinary Management Research, Volume 3, 2007) p. 468.

²¹² Ibid.

²¹³ C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* [2004] ECR 5039.

²¹⁴ A.a. para. 12.

²¹⁵ 2002/165/EC *NDC Health / IMS Health: Interim measures* [2002] OJ L59 paras. 18-49.

²¹⁶ K. Glazer, *The IMS Health Case: A U.S. Perspective*, (George Mason Law Review, Volume 13, 2006) p. 1203.

The CJEU confirmed the Commission's decision and emphasized the importance for undertakings that applies for a license to provide evidence that confirms their intention to produce a new product on the neighbouring market. Where no such evidence is provided there are no legal grounds for using the EFD to rule on mandatory licensing by dominant companies. The Court concentrated its ruling on the third criteria derived from *Magill*, which states that the refusal shall not have the effect of excluding potential or existing competition on a secondary market. The question to evaluate was whether the structure was indispensable for the creation of a new product on the downstream market for which there is a potential consumer demand. The case referred back to *Oscar Bronner* where a copyright protected system were deemed to be indispensable for a particular business activity if the undertaking applying for the license not reasonably alone or in collaboration could operate a distribution system on equal satisfactory economic terms.²¹⁷ Substitutable products can be deemed to exist even if it means that the products are more expensive or less favourable for competitors.²¹⁸ The *Oscar Bronner* judgement made another important contribution to the establishment of the relevant market when the Court declared that a relevant market is found even under circumstances where the market is either potential or hypothetical. The CJEU emphasized the importance to distinguish two separate stages of production when a product on the upstream market is indispensable for the creation of a new product on that particular market.²¹⁹ The evaluation for determining whether the brick structure on the upstream market is indispensable in the downstream market of data on sales of pharmaceuticals was left for the national court to determine.²²⁰

5.2.3 Microsoft

In *Microsoft*²²¹, the Commission determined that Microsoft had conducted unilateral abusive practice that violated Article 102 TFEU by refusing to license its interoperability information to competitors. The refusal to license strengthened Microsoft's dominant position on the relevant market and hindered competitors from developing products that could work interoperable with its product. Thus, the information was indispensable for creating products that could be in competition with the products offered by Microsoft.²²² The Commission determined that it has not been exhausted in jurisprudence when exceptional circumstances are deemed to exist and

²¹⁷ C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint Zeitung* [1999] ECR 7791, para. 37.

²¹⁸ A.a. para. 28.

²¹⁹ C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* [2004] ECR 5039, para. 44.

²²⁰ K. Glazer, *The IMS Health Case: A U.S. Perspective*, (George Mason Law Review, Volume 13, 2006) p. 1204.

²²¹ T-201/04 *Microsoft Corp. v Commission* [2007] ECR 4463.

²²² 2007/53/EC *Microsoft*. [2004] COMP/C-3/37.792.

made an addition to its application when deciding that all factors of exceptional nature must be taken into account. The assessment should include the totality of each individual case. Hence, the Commission launched its own theory on how the notion of ‘exceptional circumstances’ should be analysed and did not try to fit the principles established in case law to the circumstances in this particular case.²²³

Microsoft appealed the decision to the GC who avoided reflecting over the Commissions new test of balancing the totality of the situation at hand. Instead the Court emphasized that the refusal to license should only constitute a form of abuse in special situations where, as in practice observed, the specific criteria for ‘exceptional circumstances’ are met.²²⁴ The GC concluded that the mere circumstance that the interoperability information was protected by intellectual property could not by itself constitute objective justification for a refusal to license when that refusal creates obstacles for efficient competition within the internal market. It is the responsibility of Microsoft to provide arguments and supporting evidence that mandatory licensing would have a negative impact on its incentive to innovate.²²⁵ Microsoft argued that the test from *Magill* should not apply due to the appellants’ intention of developing products that would be introduced on the same relevant market as the one the information is present on. The relevant market would therefore not be separated. The GC determined that just because the indispensable product is not market separate, it does not exclude from the outset the possibility of identifying separate markets. In *IMS Health* it was established that it is sufficient that a potential or hypothetical market can be established on which the interoperability information is of significant competitive importance.²²⁶ The Court further contended that the system is indispensable for the competitors’ business activity and there is actual consumer demand, which could justify the intrusion in Microsoft’s legal protection based on the IPR. The refusal to supply was deemed to be abusive according to the GC, as the practice was creating a potential elimination of existing competition and could potentially create entry barriers for new competitors on the market. Hence, the Court clarifies that there is no requirement that competition on a secondary market has been eliminated or that its elimination is imminent.²²⁷ Microsoft has after the judgement by the GC declared that they will not appeal the outcome to the CJEU.²²⁸

²²³ A.a. paras. 558-559.

²²⁴ T-201/04 *Microsoft Corp. v Commission* [2007] ECR 4463, paras. 331-333.

²²⁵ A.a. para. 688.

²²⁶ A.a. para. 1336.

²²⁷ A.a. para. 457.

²²⁸ Press Release: Commission ensures compliance with 2004 Decision against Microsoft, IP/07/1567, Brussels, the 22nd October 2007.

5.3 Concluding remarks

In *Volvo/Veng* it was emphasized that rights-holders of IPR have the right to use a selective distribution system based on objective criteria. A refusal made on such justifiable objectives is not considered as infringing competition legislation. If there are no objective reasons for a refusal, the conduct by the undertaking could be characterised as abusive if it is accompanied by exceptional circumstances. The notion of ‘exceptional circumstances’ in terms of refusal to supply has not been provided with a precise definition, however case law has described arbitrary refusal as an example. The burden of proof for demonstrating that the stipulation is fulfilled and which legitimate the request of compulsory licensing rests on the applicant of the license.

The determination of finding a facility ‘essential’ is based on a case-by-case assessment of the particular circumstances in each individual case. Jurisprudence has provided guidance to define essential as an input, which cannot be duplicated and there are no equal satisfactory substitutes existing on the market. The scope of coverage for the doctrine has expanded in the case law by the CJEU where the relevant market was extended to include even potential or hypothetical markets. In situations where the essential facility consists of IPR concerns has been raised by the proprietors due to the financial loss that could accrue the undertakings if mandatory licensing were issued. In *Commercial Solvents* apprehension was declared by the CJEU of the possibility to exercise a monopoly position on the primary market to exclude competition on a secondary market. *Magill* sets out four cumulative conditions that must be fulfilled in order for the doctrine to apply. The Court concluded that the refusal to license by the TV companies was an attempt to secure the maintaining of monopoly on the ancillary market and was deemed to be abusive as the consumer demand on that market was not met. Subsequent case law has restricted the principles from *Magill* to apply only where truly exceptional circumstances are found.

The *IMS Health* determined that the conditions for finding exceptional circumstances are cumulative. The Commission tried to apply the conditions from *Magill* separately and made an overall assessment of the circumstances surrounding the case and its impact on competitors rather than establishing that the four elements actually are met. The GC and the CJEU condemned the new test by the Commission and determined that the refusal to license had the effect of excluding competition on the ancillary market. The test of exceptional circumstances requires the product that incorporates the intellectual property to be present both on the upstream and the downstream market and be an indispensable input for the ancillary market. In *Microsoft*, the Commission tried once again to establish a test on how to interpret the different criteria for the EFD to apply. When an assessment of the exceptional circumstances is made, the totality of the situation should also be taken into account. The GC emphasized that only when all the elements established in *Magill* are fulfilled exceptional circumstances can be found, and again condemned the new theory by the Commission.

6 Summative analysis

6.1 Introduction to the summative analysis

Early jurisprudence by the CJEU established the distinction between the existence of IPR derived from national legislation and the exercise of such rights within the internal market, which potentially could violate Union competition law. Hence, the use of intellectual property by undertakings is not immune from the scope of EU legislation, which imposes on companies with large market shares to observe the potential impact of the position it possesses and the special responsibility that follows from dominance. The national legislative acts governing IPRs are aimed at providing protection for the proprietor of unauthorized use of its legally obtained right. The purpose behind the legislation on intellectual property is to motivate the creation of IPRs since innovation constitutes an essential and dynamic component for a transparent and efficient market. A rights-holder of intellectual property has the right to determine how to exploit and use its resource in order to gain a competitive advantage towards its competitors without facing unnecessary restrictions. *Windsurfing* established the Commission's competence to evaluate the legality of intellectual property derived from Member States domestic legislation where the use of that right is potentially violating Article 101 TFEU or Article 102 TFEU.

6.2 Licensing agreements containing intellectual property rights

Article 101 TFEU prohibit undertakings from limiting efficient competition by concluding agreements that have anti-competitive effects. The acquiring of IPR should only protect the very subject matter of the intellectual property and it should not be possible for the owner to use its acquisition in order to gain a larger protection than what is actually granted under national law. The exploitation of IPR may for instance include license a third party the right to use the intellectual property under the standards of an agreement. The licensor can legally restrict the licensee's ability to exercise the IPR due to the imminent risk that the intellectual property could be misused, which thereby reduces the asset surplus value and create severe detriment for the rights-holder. The concluding of license agreements could have the underlying objective of isolating markets within the Union to create an absolute territorial protection for the licensor. Thus, agreements could be used as a mean to provide the proprietor with the power to influence the structure of the different markets and create severe entry-barriers for potential competition. The conclusion of non-sincere agreements are believed to be greater in situations where the undertakings of the

agreement have a horizontal relationship, due to which they are being met with more suspicion and are governed more strictly in legislative acts than vertical agreements.

The Commission has issued block exemptions under which agreements could become legally valid and enforceable if certain fixed requirements in a specific category of block exemption are fulfilled. The creation of block exemptions has eased the task for practitioners to draft agreements and is providing legal certainty as to the validity of such agreements. The block exemptions are both timesaving for companies and its applicable facilitates for the undertaking as they become exempted from the heavy burden of proof that would otherwise apply to restrictive agreements that cannot be modified to fit within an existing block exemption. Bilateral license agreements on IPR between competitors and non-competitors fall under the application of the TTR. If the conditions set forth in the Regulation are fulfilled, the exemption applies on the license agreement for as long as the IPR contained in the agreement remains valid. The TTR sets out market share thresholds on the parties, which may not be exceeded on the relevant market in order for the Regulation to apply. For competitors, their combined market share may not exceed 20 per cent and for non-competitors the individual market share of each of the parties cannot exceed a limit of 30 per cent. The TTR further prohibits licensing agreements to contain any hardcore restrictions, as an inclusion of such an anti-competitive clause is deemed equivalent with the intention of conducting abusive practice. The Regulation aims to ensure that only restrictive licensing agreements as may reasonably satisfy the requirements of Article 101(3) TFEU are block exempted. The TTR has authorized the Commission to analyse individual clauses relation to Article 101 TFEU and withdraw any benefits provided for by the application of the Regulation in lack of conformability. Where inconsistency is revealed, the restrictive clause inherent in the agreement is null and void while the remaining agreement remains legally valid under the condition that the clause is severable from the agreement. If the clause is non-severable, the entire agreement becomes invalid. The TTR is criticized for its introduction of the notion of 'potential' competitors, which is creating an extension for a more restrictive treatment of restraints in licensing agreements. This could be of detriment for undertakings when drafting agreements as the past practice of the Regulation shows a clear tendency to interpret license agreements restrictively. The notion could further be discussed to contradict jurisprudence where it has been emphasized the importance to interpret block exemptions with moderate restraints.

When the market shares of the parties to the license agreement have passed the allowable level in the TTR, the undertakings could seek individual exemption for their agreement under Article 101(3) TFEU. The article is applied when an agreement fails to fulfil the elements of Article 101(1) TFEU or cannot be modified to fit within a block exemption. The third paragraph in Article 101 TFEU is setting the outer limits for under which restrictive license agreements could be permitted under EU legislation after an individual assessment conducted by the Commission. The evaluation is

dependent on the fulfilment of four cumulative requisites set forth in the article, which serves to assure that any disadvantages created under the license is outweighed by its benefits. The party that invokes the exemption is given a high burden of proof for gathering supporting evidence that their agreement fulfils the elements of Article 101(3) TFEU. The Commission's use of the article is considered too arbitrary and unpredictable, which has resulted in reduced transparency within the internal market in terms of exploiting intellectual property in agreements with third parties. The criticism aims primarily at the inconsistency in the interpretation of the different elements in the article and how it is being exercised. For instance has the notion of 'consumer' been extended beyond what usually is referred to as a consumer and is including virtually all actors present on the specific market. Further, the requirement of providing a 'fair share for consumers' has failed to be defined as to the level of benefits that must accrue the consumers in order for the criterion to be satisfied. The ambiguity of the Commission's assessment could hamper the creation of licensing agreements that despite its restrictive nature could be contemplated by its benefits for the end consumer and the internal market. Hence, it is preferable for undertakings to follow the standards of a block exemption rather than relying on the exemption provided for in Article 101(1) TFEU due to the high burden of proof that rests on the undertakings and the uncertainty to how the Commission will interpret the agreements impact on the specific market. The individual assessment of the agreement is thus conducted by the use of a wide application of primary law, which fails to provide sufficient legal guidance for the drafting of agreements that falls outside the scope of the TTR.

6.3 The extended application of Article 102 TFEU

Companies could further be subject for examination under Article 102 TFEU, which prohibits unilateral abusive behaviour by undertakings in a dominant position. The article does not prohibit as such monopolies or the holding of a dominant position as long as the undertaking does not conduct exclusionary practice that prevents competitors from entering the market. There is a natural coherence between the ownership of intellectual property and dominance due to the monopoly position the proprietor is granted on a specific market. The jurisprudence by the CJEU established that the mere holding of a dominant position is not enough for the article to become applicable on the conduct taken by that company. Hence, dominance must be exerted with the aim of creating substantial entry-barriers for potential competitors or constraining the continuation of existing competition. A dominant position is presumed when certain market share thresholds are exceeded and equivalent dominance is not found where the undertakings market shares are too low. When the presumption is not fulfilled the Commission makes an individual assessment of potential dominance by using certain parameters such the undertakings economic strength and the

ability to act independently of its competitors and consumers. Firms' possibilities to assess their market shares in situations where it is eligible for scrutinization by the Commission has led to legal uncertainty as companies could have profound difficulties predicting the outcome of such an examination based on subjective requisites.

Article 102 TFEU sets out cumulative conditions that must be fulfilled in order for the prohibition to apply. The article is extended in jurisprudence, which has made the Commission unrestrained to depart from previous rulings when initiating proceedings. Article 102 TFEU requires that the relevant market and the competitors' position on that market to be established. *United Brands* demonstrates a lack of clarity in the application of the cumulative requisites by the decision of the CJEU to use controversial measures when determining the relevant product market for bananas. The ruling was argued to create unpredictability to the evaluation of undertakings deemed present on a particular market, which could lead to companies holding a dominant position without possibly knowing it and thereby act according to current legislation. The result of establishing a too narrow product market leads to an exaggeration of undertakings market power, which in turn could condemn companies' behaviour that in general would be regarded as innocent or as having pro-competitive effects on that specific market. This extended interpretation of the undertakings market shares creates disadvantages for free competition and makes illegitimate interference on firms' business conduct.

Once the relevant product market is identified the assessment must be accompanied by an evaluation of what constitutes the relevant geographic market, which according to Article 102 TFEU consists of the internal market or a substantial part of it. The notion of 'substantial part' has received much criticism due to its excessive scope of application, which for instance is satisfied when the market is confined to one Member State. The lack of objective criteria for defining the relevant market is not ensuring the competitors' precise uncontroversial market delimitation. A further element of the article that has become ambiguous is the requirement that the conduct must affect trade between Member States. After the judgement in *Michelin* the criterion is extended to include a variety of situations where the behaviour by a dominant company potentially *could* result in affecting trade. The vague definition was not further elaborated by the CJEU and was left without a clear guidance for its fulfilment, which provides the article with a larger area for its application. The criterion of abusive practice entails that in order for dominant undertakings to fall within the scope of the article, the undertaking must conduct abusive business practice. The list of unilateral abuses by dominant undertakings in Article 102 TFEU are merely examples and therefore it is difficult to grasp the scope of application for the elements due to its extended application in jurisprudence. In situations where the cumulative conditions in the article are not fulfilled, the behaviour by a dominant undertaking still faces restrictions by the introduction of the principle of special responsibility derived from *Michelin*. The principle states that companies who hold a dominant position are responsible for

arranging their business behaviour on the market so that it does not prevent the existence of free competition and transparency within the internal market. The principle provides the Union authorities with yet another possibility to control the influence and structure of market leaders and is issued for instance to legitimate compulsory licensing of intellectual property where a refusal to license was presumed to eliminate existing and potential competition on a specific market. The potential use of the principle provides an indication that once a dominant position is established, even normal competitive behaviour could be deemed to be abusive. Hence, the application of the principle is not dependent on a breach of primary or secondary law. The establishment of the principle in jurisprudence rather demonstrates the Union authorities possibilities to expand its competence by the use of supplementary law, which it then invokes in order to safeguard competition within the Union.

The different applicability of Article 102 TFEU on the use of IPR has made it necessary to distinguish between the primary and the secondary market. The primary market consists of the market where the undertaking mainly is present and where it holds a dominant position while the secondary market consists of close neighbouring markets, which are dependent on the products present on an upstream market. A refusal to supply the market could fall within the prohibition of Article 102 TFEU when certain conditions are met. The CJEU considered the refusal to supply before it ruled in the matter of refusal to license, why it is important to examine the legal situation regarding such situations. One of the first cases involving refusal to supply was the *Commercial Solvents*, which concerned a refusal to supply a raw material to long-standing costumers in order to eliminate competition on a specific market that the undertaking itself wanted to enter. The CJEU established that when the refusal concerns a raw material for which there is no equal source of supply, a refusal to supply a long-term costumer without providing any objective justification for the refusal is violating Article 102 TFEU. The costumers were not given the possibility to obtain substitute for the raw material, which ultimately would eliminate the production of the costumers' products in prejudice for the consumers. The Court indirectly answered the question on how the refusal to supply would have been perceived if the material would not consist of a raw material. In such circumstances the refusal to supply a long-standing costumer constitutes an abusive practice if the costumers abides by regular commercial practice and the orders are ordinary.

The subsequent case of *United Brands* affirmed the ruling in *Commercial Solvents* where a refusal to supply was the result of the costumers breach of controversial obligations in the agreement, which prohibited the dealer from receiving supplies from competing brands. The CJEU ruled that in situations where a contractual obligation has been violated the dominant undertaking could under reasonable measures take actions in order to protect its commercial interests. Such methods are justifiable as long as the practice is not taken with the sole purpose of limiting competition on a particular market. The decision by the United Brands to stop supplying by reason of a

breach of a contractual commitment was not reasonable and could not be objectively justified in terms of protecting its commercial interest. The case of *GlaxoSmithKline* concerned the refusal to supply existing costumers who had the intention of exporting part of the quantities to the markets of other Member States. The CJEU determined that the decision to stop supplying could only be justified under circumstances where the orders are out of the ordinary. What constitutes 'ordinary orders' has not been elaborated upon in jurisprudence and the Court has deliberately left the question of what it entails for evaluation by national courts by examining the parties former business relationship and the demands from the relevant market. The judgement contributed to the existing jurisprudence governing refusal to supply by not making any distinction between products consisting of intellectual property and products that do not. The case law provides a strong understanding that distribution agreements should not easily be waived by the change of marketing strategies by dominant undertakings that have the result of eliminating competition, which ultimately create detrimental effects within the internal market and thus for consumers.

The principles established in terms of refusal to supply have not had the same impact in terms of refusal to license intellectual property. The potential adoption of the principles of refusal to supply on situations concerning refusal to license would have created severe constraints on the licensors right to exercise its intellectual property as a competitive advantage and therefore limit the possibilities for the undertakings to receive remuneration for its financial investment. Mandatory licensing is limited to exceptional circumstances due to the fact that third parties might have the possibility to obtain substitutable products or technologies that are equally satisfactory as the input owned by the rights-holder. Unlike the doctrine of refusal to supply, in terms of refusal to license IPR protected products it is immaterial whether the rights-holder of intellectual property has a previous business relationship with the applicant or not. In *Volvo/Veng*, and subsequently reaffirmed in *Hugin*, it was established that undertakings have the right to use a selective distribution system when licensing products that contains intellectual property to third parties. The judgements emphasizes that under such a system it is objectively justified to refuse to license independent repairers as long as the practice is based on objective criteria and the measure is reasonable and proportional. An obligation to license under such circumstances would deprive the undertaking with the very substance of its exclusive right and the refusal by itself was not deemed to be a unilateral abusive practice contrary to the Union competition legislation. The mere refusal to license IPR can never be abuse of dominance. The essence of intellectual property is the protection it provides the proprietor to prevent third parties from making unauthorized intrusions of its IPR.

In order for a refusal to be characterised as abusive it must be accompanied by exceptional circumstances. What constitutes an exceptional circumstance has not been clearly defined neither in legislation nor in jurisprudence. Hence, companies that acquire IPRs cannot possibly predict which

situations that make the undertaking subject for mandatory licensing. A case-by-case evaluation of the impact the refusal has on competition within the relevant market is conducted by the CJEU. The case law creates legal uncertainty in this area of law where it seems almost impossible for dominant undertakings to exploit an advantage of competitive benefit against its competitors without being scrutinized under Article 102 TFEU or under the principle of special responsibility. The CJEU determined that in the absence of harmonized legislation at a Union level in relation to intellectual property; it is for the national courts to determine the extent to which these rights are current. The Court stressed the importance in its jurisprudence for undertakings that applies for a license of IPR to provide evidence that there exist exceptional circumstances that justifies the intrusion in the exclusivity associated with the holding of IPR and motivates compulsory licensing. The ruling in *Volvo/Veng* introduced the discussion of abusive conduct by dominant undertakings on neighbouring related markets.

6.4 The essential facility doctrine

The established jurisprudence on refusal to license was extended with the adoption by the Union authorities of the EFD. The doctrine has had considerable impact on the principles established in terms of refusal to license and has expanded the later principle to be applied on a new variety of circumstances. The EFD is used to legitimate compulsory licensing of essential facilities where the exercise of a facility by an undertaking present on an upstream market is preventing the emerging of a new product on the secondary market for which there is potential consumer demand. In order to evaluate whether a facility is essential an individual assessment of the particular circumstances in a specific case is examined. Hence, there are no statutory requirements or a clear definition provided by the Union authorities that reveals the exact extent of the notion. The CJEU has however provided guidance in *Oscar Bronner* where it was emphasized that a facility should only be regarded as essential when the asset is not possible to duplicate and there are no equal satisfactory sources of supply present on the specific market. Refusal to license actors on neighbouring markets under such circumstances amounts to abusive behaviour that infringes Article 102 TFEU if the undertaking that holds the essential facility cannot provide objective justifications for its refusal. The conduct is regarded as going beyond the owner's initial right to protection when a refusal is not objectively justified and when a competitor cannot legitimate competition *on the merits*, for instance when the owner conducts its behaviour to maintain or create a monopoly position on the ancillary market in the prejudice for consumers by not meeting the demands from that particular market.

The CJEU indirectly applied the EFD in *Commercial Solvents*, and subsequently reaffirmed the principles of the doctrine in *Magill*. The jurisprudence has raised concerns as to the doctrines applicability in

circumstances where the essential facility consist of intellectual property, as mandatory licensing of such assets could damage the value of the IPR by disclosing it and making it publicly assessable. The doctrine has answered the question of how to assess the conduct by undertakings that holds a monopoly position on an upstream market, and uses its position to exclude competition from an ancillary market. In *Magill* a test was established that determines whether there exist exceptional circumstances that could justify obligatory licensing under the EFD. The case concerned a refusal to license program listings by the three largest TV stations in Ireland and Northern Ireland, which was protected by copyright, to a publisher that wanted to publish a weekly TV guide by the use of the facility. The case is argued to set the external parameters of the principle of special responsibility, which correspond to the duty for dominant undertakings to abstain from conducting unilateral abusive behaviour that could have the effect of excluding potential competition from the relevant market. The refusal to license by the dominant undertakings was an attempt by the firms to maintain their monopoly position on the adjacent market. The CJEU determined that the refusal to license was not objectively justified and mandated the TV companies to license its essential facility after the examination revealed that the needs of the consumers outweighed the protection provided by the acquisition of the IPR. The Court established four requisites that should be used for determining if the EFD is applicable on refusal to license by dominant undertakings. The principles include the notions of 'indispensable', 'new product', 'exclusion of all competition' and 'objective justifications for the refusal to license'. The Court did not elaborate on what could constitute objective justifications under these circumstances and later jurisprudence has also failed to do so.

The CJEU has stressed in its case law that in order for actors on secondary markets to gain access to essential facilities from companies on upstream markets, there must be evidence supporting the intention to use the license in order to develop a new product for which there is an unsatisfied consumer demand. The possibility that a refusal will disrupt genuine competition on a secondary market can only arise if that market is not already subject for effective competition. Mandatory licensing cannot be applicable in cases where there is no evidence supporting the deviation from the general rule of exclusivity of IPR. Hence, it is not sufficient that an undertaking on the ancillary market suffers competitive disadvantages for compulsory public access of the facility to be mandated. *Magill* is distinguished from *Volvo/Veng* by the fact that the protected product was traded on the ancillary market by the broadcasting undertakings. The CJEU did not discuss in *Magill* whether the conditions for the EFD to apply are cumulative requirements or not. The question did however get a positive answer in the later judgement of *IMS Health*. The principles set forth in the case have subsequently been restricted in *Tiercé Ladbroke* to apply in truly exceptional circumstances due to its effect of protecting competitors rather than consumers.

IMS Health addressed the four conditions set out in *Magill* where the Commission adopted its own theory on how to interpret the different elements. The Commission found that the system owned by IMS Health had become a *de facto* standard on the market and it was therefore legitimate by the use of the doctrine to impose compulsory licensing. The decision could be criticized for its finding that when a product is deemed indispensable for the pursue of a specific business activity, there is no need to assess whether the applicants of the IPR has any intention of pursuing business on the ancillary market. Both the GC and the CJEU rejected the Commission's approach and established that the criteria from *Magill* are cumulative. It is therefore not possible to use the EFD by way of mandating compulsory licensing in situations where not all conditions are fulfilled, as this would be an unnecessary intrusion in the rights-holders right to exploit its IPR. The CJEU found the structure to be indispensable for the business activity conducted by the appellants on the secondary market and referred to the case of *Oscar Bronner* where it was established that a system protected by IPR was assumed to be indispensable for a specific business activity if the undertakings that applies for the license not reasonably alone or in collaboration could operate a distribution system on equal satisfactory economic terms. The structure was deemed indispensable for the intended business activity by the appellants on the secondary market and the Court stressed that companies did not have the economic means to operate a system that was as efficient as the one controlled by IMS Health. The CJEU argued that the EFD requires a balance to be struck between the proprietor's interest and the protection of IPR against the importance of preserving free competition and transparency within the Union. The Court stated that the later should prevail only where refusal to license reduces the development of efficient competition on a specific market, which ultimately leads to detriment for the consumers. Case law has held that the relevant market could consist of a potential or hypothetical market, which in this case was interpreted to include two separate stages of production where a product on the upstream market is indispensable for the creation of a new product on the same relevant market. The criterion of 'new product' was not elaborated by the CJEU in its ruling, which seem to indicate that for the notion to be satisfied it is sufficient that the intellectual property is indispensable for the commencement of a business activity which is slightly different from the one offered by the dominant undertaking. The question of whether the criterion of indispensability of the upstream product on the downstream market was left to be answered by the national courts.

The judgement in *Microsoft* establishes that compulsory licensing should only occur when the consumer demand for the new product is substantiated and appear necessary. The refusal by Microsoft to license its interoperability system to its competitors was deemed to be abusive by its effect of eliminating competition on the relevant technology market. By not licensing the information, the creation of alternative products to Microsoft's design did not occur due to the essential function the system had of making the products work interoperability with each other. The Commission took once again the opportunity to make an independent interpretation of how the

criteria from *Magill* should be applied. The test by the Commission was deemed to go beyond the scope of the EFD by weighing Microsoft's rights against how the entire industry is affected by the refusal to license. The GC confirmed previous jurisprudence and concluded that the upstream market and the downstream market could exist on the same relevant market if the products are market separate and the dominant undertaking's product is of significant competitive importance for the business conduct by a company on the ancillary market for which there is an unsatisfied consumer demand. The Court further stressed that there is no requirement that competition on the secondary market must be eliminated as long as there has been established that there is a *risk* of such an elimination. The notion of 'risk' was not further elaborated upon in the ruling, which leaves the term without any fixed requisites as to its application. The stipulation merely indicates the extension of the scope of application for the EFD, which increases the possibilities for dominant undertakings to be subject of compulsory licensing and access to the monopolist property could be granted in a non-discriminatory manner.

The Commission has acted *ex ante* in *IMS Health* and *Microsoft* to guarantee that potential competitors have market access by allowing the doctrine to be applied in favour of improving competition rather than protecting consumer interest. The implications of these decisions are that the Commission advocates that the EFD should be used to safeguard competitors while the GC and the CJEU advocates it to be applied with the primary objective to satisfy the demand among consumers. There must be an established lack of efficient competition on a downstream market and a reasonable expectation that mandating access will significantly improve that level of competition for the doctrine to become applicable. Without objective justifications for the intrusion, severe adverse effects on competition will become apparent and lead to serious disturbance within the internal market. A too liberal application of compulsory licensing could convert IPR from a significant competitive benefit into a mere income-generating financial investment. Thus, there is a clear lack of reliability for the use of the doctrine as its application is not defined in neither primary nor secondary EU law and the Courts have further failed to provide a clear definition in supplementary legislation as well.

7 Conclusion

Initially I asked two questions of whether the current Union competition legislation has been extended to the degree where the Union authorities are almost unrestrained to make legitimate intrusions on the exercise and exploitation of IPR by dominant undertakings, and if so, what effect could this extension of power developed through case law have on companies' incentives to innovate and invest? The issues have been in the forefront of the entire thesis and are the basis for the analysis in Chapter 6.

Limitations on undertakings possibilities to exploit and use IPRs are always imminent. Intellectual property does not have immunity from Union competition law in the regard that the rights-holders use of the asset must be proportionate and reasonable as to its impact within the internal market. Exercise of the exclusivity that exceeds the very subject matter of the intellectual property limits the protection granted the proprietor derived under domestic legislation. The jurisprudence by the Union authorities demonstrates a persistent extension of the interpretations of different elements within certain Treaty articles. The expansion of the stipulations initial meaning has made the Commission virtually unrestrained when initiating proceedings under Article 102 TFEU or when assessing restrictive license agreements under Article 101(3) TFEU. It is under the situations when a license agreement does not fulfil the requirements set forth in the TTR that unpredictability as to the validity of the agreement could be expected. Under these circumstances the parties are subject to a high burden of proof to provide evidence that their agreement satisfies the cumulative conditions of Article 101(3) TFEU, which allows the Commission to conduct an individual assessment. The Commissions flexible use of the different elements in the article varies from case-to-case and the evaluation has been left without any clear references to its intended application. This has created a serious lack of transparency for license agreement that cannot be modified to fit within a block exemption and ultimately hampers the creation of such agreements that despite its restrictive nature is contemplated by its benefits for the final consumers and for the continuation of free and efficient competition.

In terms of Article 102 TFEU, the very extended interpretation of its elements allows severe restrictions to be put on corporate use of intellectual property. The Commission's authority to depart from previous rulings by continuing to interpret the constituent requisites individually in each case has created a larger leeway of its initial powers. Undertakings that do not hold a monopoly position could find it difficult to assess whether their market share equates to dominance or not. Once dominance is established, the undertaking has a further responsibility not to conduct its practice to disrupt efficient competition. This special responsibility was created in supplementary law and indicates the Courts willingness to create measures for safeguarding the Union even against conducts that do not violate neither

primary nor secondary law. Hence, the principle could be invoked to condemn normal competitive business practice and making inconsistent intrusions in the exercise and exploitation of IPR by dominant undertakings.

If there are no objective justifications for a refusal to supply a long-standing customer, the conduct is deemed abusive if it is accompanied by exceptional circumstances. A definition of what constitutes *exceptional circumstances* has not become statutory in legislative acts or in jurisprudence. This lack of fixed parameters of intended use illustrates once again the authorities will to retain and extend their powers to control how competition is exerted on the markets. Mandatory access to essential facilities is a deviation from the general rule on exclusivity and should only be taken when it is necessary in order to protect a serious threat on genuine and effective competition within the internal market. The aim of protecting competition was expanded even further with the adoption of the EFD. The doctrine empowers the Commission to impose obligations to allow access to intellectual property without having to find an infringement of the Treaty articles. The use of the EFD in the Union judiciary is far from consistent where the Commission has proven relatively willing to require access while the Courts advocates a more restrictive approach. The doctrine creates legal uncertainty as it could arguably be used to circumvent the exclusive protection accruing the proprietor by being relied on by companies who lacks the intention of using the facility to create a new product. This potential result of a too wide application of the EFD clearly demonstrates the importance to interpret the doctrine with moderate restraints.

The result of the introduction of the EFD together with the existing restrictions elaborated in primary law and supplementary law have blurred the borderline between what constitutes legitimate intrusions in the exclusivity of IPR and what should be regarded as illegitimate interference. The jurisprudence by the Union Courts is clear in its rulings, but it is nevertheless still uncertain as to how the use and exercise of IPR may be exploited on the markets without being challenged by the Union authorities. The creation of more space for individual assessments of undertakings behaviour on the market can be assumed to correspond with the aim of protecting a harmonious and transparent market. The result of the legal uncertainty could be that competitors become reluctant to innovate as they could benefit from dominant undertaking's accomplishments without their own contribution to innovation. If competitors were recognized to share competitive advantages that are deemed indispensable, competition would rather be discouraged than promoted. Hence, undertakings might become cautious to innovate and invest in the creation of intellectual property because of this alleged unpredictability of the current legal position and the possibility that the EFD allows competitors to free ride on other undertakings' financial investments. Unless restrictions are put on the Union authorities possibilities to extend its powers, the consequences within the internal market could be devastating to the prejudice of free competition and thus thwart the objective of maintaining a transparent internal market that encourage innovation.

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