



FACULTY OF LAW
Lund University

Sahar Torabi

IPR – the intangible asset that confuses the European Union

JAEM01 Master Thesis

European Business Law
15 higher education credits

Supervisor: Justin Pierce

Term: Spring 2017

Table of contents

Summary	3
Preface.....	4
Abbreviations	5
1. Introduction	6
Background	6
1.1.1 Purpose and delimitations.....	8
1.1.2 Method and material.....	8
1.1.3 Outline	8
2. The legal framework	10
The EU approach	10
1.1.4 <i>Magill</i> and the ‘exceptional circumstances’	11
1.1.5 The ECJ judgment.....	12
1.1.6 Post-Magill decision.....	13
1.1.7 <i>Oscar Bronner</i>	15
1.1.8 The ECJ judgment.....	15
1.1.9 Post- <i>Oscar Bronner</i> decision.....	17
1.1.10 <i>IMS Health</i>	18
1.1.11 The ECJ judgment.....	20
1.1.12 Post-IMS judgment	21
1.1.13 <i>Microsoft</i>	22
1.1.14 The General Court judgment	26
1.1.15 Post- <i>Microsoft</i> decision	28
1.1.16 Guidance on the Commission’s Enforcement Priorities in Applying Article 82	30
3. Is it possible to strike a balance between IPR and Competition law?	32
4. Is the EU perspective on IPR the right perspective?	37
5. Conclusion.....	40
Bibliography.....	41
Legislation.....	41
Literature	41
Journals.....	42
Official documents of the EU	43
Internet sources	44
Table of cases.....	44

Summary

This thesis will be concerned with one of the main concerns and highly discussed topics in the relationship between Article 102 TFEU and Intellectual Property Rights. Predominately, it will focus on the enforcement of IPR(s) as an abusive practise of dominance and whether a dominant undertaking has the ability to protect its IPR by refusing to licence its IPR to a third party.

The main purpose will be to analyse the legal framework from previous case law and the development of ‘exceptional circumstances’ doctrine. The thesis will argue that the ECJ and the General Court have expanded its flexibility by widening the doctrine to an extent that has contributed to uncertainty in its application. Additionally, the development of a case-by-case approach in the most recent judgment in *Microsoft* has left some unanswered questions, which may have a significant impact on future cases. Lastly, there has been a shift in the approach of consumer harm in the cumulative criteria, which illustrates the attempt to advance the effect of the doctrine by considering it as a key factor in the assessment of refusal to licence.

The focus of this thesis will be on the development of the doctrine stretching from *Volvo v. Veng* leading up to *Microsoft*, with support from the opinions and views of scholars and debaters on the various cases, and how each case have impacted the following judgments. In addition to this, the thesis will show that as the law stands today, there is an imbalance between the two legal areas. Since, the more the EU Authorities continue to widen the ‘exceptional circumstances’ doctrine the more superior will Competition law become against IPR. Subsequently, the thesis will argue that the EU Authorities’ approach in protecting the consumer welfare could potential have the opposite effect on the inventors by not acknowledging that innovation is more than money.

With that said, it is concluded that the European Courts’ judgments, in the cases within, have contributed to an inconsistent application of the ‘exceptional circumstances’ that has resulted in the law becoming imbalanced, inconsistent and unclear.

Preface

I would like to take this opportunity to say thank you to the two most important people in my life. *Alexander*, thank you for continuously giving me unconditional love and support, for always believing in me, when I needed it the most, and for the endless amounts of encouragements to always follow my dreams. And last but not least, to the strongest woman I know. *Mum*, thank you for always inspiring me to aim higher, for giving me the confidence to stand on my own two feet and for always giving me everything that a daughter could ever wish for.

I will be forever grateful for having you in my life.

23rd of May 2017, Malmö, Sweden.

Sahar Torabi

Abbreviations

AG	Advocate General
Commission	European Commission
CJEU	Court of Justice of the European Union
EU Authorities	Collectively referring to the European Commission, The National Competition Authorities, The General Court and the Court of Justice of the European Union
ECJ or the Court	European Court of Justice
EU	European Union
European courts	European Court of Justice and General Court
GC	General Court
GEP	Article 102 Guidance on Enforcement Priorities
IPO	Initial Public Offering (Stock market)
IPR(s)	Intellectual Property Right(s)
R&D	Research and Development
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TTBER	Technology Transfer Block Exemption Regulation, revised in 2014

1. Introduction

Background

The relationship between antitrust law and patent policy has proved to be a source of endless confusion and controversy since the enactment of the Sherman Act in 1890.¹ This is down to the concept, that the two are generally viewed as completely opposed principles. IPR creates monopolies whilst the main purpose of Competition law is to prevent them.² However, the motivating notion behind granting IPR is to create an incentive for the innovator to create more innovations by being provided the exclusive protection for its innovative accomplishments.³ By granting a patent, for example, provides the inventor the protection for scientific innovations for a restricted period of time, normally for twenty years. Whereas, copyright grants the creator the exclusive rights to commercially exploit their works of authorship, which generally is extended beyond the lifetime of the author.⁴ In the United States, patent and copyright protection is constitutionally guaranteed⁵ and has been a part of the federal law since 1789⁶. Whereas, in Europe, the law surrounding patents and copyrights is largely a result from national law as harmonised by Council Directives.⁷

Furthermore, the underlying rationale with antitrust/and competition law is to encourage competition between rivals, since non-abusive competition between rivals could result in maximising consumer welfare in terms of lower prices and better quality products.⁸ Thus, in order to achieve non-abusive competition in the market, the law places limits on practises on firms whom have market power. Therefore, section 2 of US Sherman Act condemns ‘every person who shall monopolize, or attempt to monopolize...any part of trade or commerce among several States’, and similarly, Article 102 TFEU states that ‘[a]ny abuse by one or more undertaking of dominant position...in so far as it may affect trade between Member

¹ L. Kaplow, “*The Patent-Antitrust Intersection: A Reappraisal*”, (97 Harvard Law Review, 1984) at 1815

² M. Angelov, *The “Exceptional Circumstances” Test: Implications for FRAND commitments from the essential facilities doctrine under Article 102 TFEU*, (European Competition Journal, 2014) at 38

³ K. Wok, *A New Approach to Resolving Refusal to Licence Intellectual Property Right Disputes*, World Competition, 2011 at 262-263

⁴ *ibid* at 262

⁵ See Article I, s.8 US Constitution

⁶ See Copyright Act 1790; Patent Act of 1790

⁷ K. Wok, *A New Approach to Resolving Refusal to Licence Intellectual Property Right Disputes*, World Competition, 2011 at 262

⁸ *ibid* at 262

States' shall be prohibited as incompatible with the internal market.⁹ Even though the CJEU has clarified that solely being an owner of an IPR will not be considered as conferring a dominant position in the market despite the fact that the IPR facilitates the formation of legal barriers to entry. Rather, it is the practise of refusing to licence IPRs or charging excessively expensive royalties which may result in excluding others from exploiting the IPR. Hence, it has the potential of abusing market power and even creating monopoly by limiting the secondary market¹⁰ since the exclusive right of use prevents competitors from free riding on the inventor's patented idea(s).

Nevertheless, it is important to identify that IP law and competition law have the same goals to uphold but they achieve them through different means. Hence, looking at both areas of law in general terms, the aim is to advance and promote consumer welfare.¹¹ The objective of IP law is to promote technical progress to the ultimate benefit of consumers and providing sufficient reward to ensure that the inventor is benefitted from its inventive efforts.¹² Therefore, it is important for the Competition Authorities to find the right balance where the initial proprietor is entitled to exercise his or her right to IP whilst upholding an open and free market where the economic efficiency is not hindered.¹³ Thus, the Competition Authorities must consider a proper balance between static and dynamic efficiency, where static efficiency considerations consist of the effects of the proprietor's actions in the current market and, where dynamic efficiency involves the long-term effects of a particular behaviour. This is because, static efficiency requires a minimal IPRs protection, whilst, dynamic efficiency demands stronger and it has generally been accepted to have greater capacity to increase social welfare by producing higher quality products and lower price levels in the future than static efficiency alone.¹⁴

⁹ K. Wok, "A New Approach to Resolving Refusal to Licence Intellectual Property Right Disputes, World Competition", 2011 at 262

¹⁰ M. Angelov, "The "Exceptional Circumstances" Test: Implications for FRAND commitments from the essential facilities doctrine under Article 102 TFEU", (European Competition Journal, 2014) at 39

¹¹ Luc Peeperkorn, 'IP licences and Competition Rules: Striking the Right balance', (World Competition 26, 2003) at 528

¹² *ibid* at 528

¹³ M. Angelov, "The "Exceptional Circumstances" Test: Implications for FRAND commitments from the essential facilities doctrine under Article 102 TFEU", (European Competition Journal, 2014) at 40

¹⁴ A. Ezrachi, M. Maggolino, "EU Competition, Compulsory licensing and innovation", (Journal of Competition Law & Economics, 8(3), 2012)) at 596

1.1.1 Purpose and delimitations

The purpose of this thesis is to illustrate whether the relationship between the rules of European Competition law and Intellectual Property is balance, coherent and consistent. As well as analyse the European Court's judgments on refusal to supply and licence IPR and what the implications have been and will be in the future. Consequently, the thesis will analyse whether the EU perspective on IPR is for the benefit of the consumers or if it actually harms the consumers by limiting the dominant undertakings' practise.

This thesis will predominately examine the legal implications within IPR in the European Community context. However, since the topic affects different areas of business and regions, it will consider the economic aspects, Article 101 TFEU, and the US opinions, but in a limited version. Finally, in order to provide an overview of the implications of the relationship between the two areas of law, this thesis will only speak on a more overview considering the different forms of IPR(s).

1.1.2 Method and material

This thesis will focus on four cases, *Magill*, *Oscar Bronner*, *IMS Health* and *Microsoft*. It will structure the cases with background information concerning the case, the courts judgment as well as the implications and impacts resulting from the judgment. The methods and arguments will be heavily supported by opinions and views of scholars, government officials and practitioners whom are active within the areas of law. Furthermore, as part of the legal framework, the Guidance paper will be analysed in order to identify the Commissions perspective relating to the area of refusal to supply and licence IPR(s). This material has been selected in order to give an overview on the legal tensions and to provide varied arguments from different sources.

1.1.3 Outline

Chapter two will provide the reader with the legal framework and the development of the 'exceptional circumstances' doctrine throughout the years and ending with *Microsoft*.

Chapter three will be more analytical concerning the relationship between the two areas of law and if it is possible to establish a fair balance, which benefits both the consumers and the inventors.

Chapter four questions whether the EU perspective for moving forward is the right perspective for the development of innovation and encouraging competition. Additionally, personal experiences will be shared and alternative perspective will be suggested.

Finally, Chapter five, a brief conclusion is given.

2. The legal framework

The EU approach

The reasoning behind Article 102 TFEU is to prohibit any dominant undertakings from abusing and exploiting their position within the internal market by for example charging unfair prices or by limiting production to the prejudice of consumers.¹⁵ Since a dominant position is a mixture of economic assessments and legal considerations,¹⁶ the main focus is therefore to protect the consumer welfare from actions, which could lead to seriously disturbing the competitive structure of the market.¹⁷ So, in order for Article 102 TFEU to arise in IPRs matters, an undertaking must enjoy a dominant position whilst taking into account of variables such as relevant product and geographical market as well as temporal factor.¹⁸

Following the decisions in *Magill*,¹⁹ *IMS*²⁰ and *Microsoft*²¹, and with the support from Article 102 Guidance on Enforcement Priorities (GEP)²², the EU Authorities have been able to create a list of ‘exceptional circumstances’ where a refusal to licence could lead to an abuse under Article 102 TFEU:²³

- i) Indispensability or objective necessity of the refused input;
- ii) Likelihood or liability or risk of excluding all or effective competition;
- iii) Emergence of a new or improved product or technical development being impeded, or simply consumer harm;
- iv) No objective justification

¹⁵ A. Jones, B. Sufrin, “*EU Competition law: Text, Cases and Materials*”, (OCL, 2016) at 258

¹⁶ P. Wymystowski, “*From innovation to Domination: Exercising IPR as abuse of art.102 TFEU*”, (Lund University 2014) at 9

¹⁷ Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215 at paragraph 20

¹⁸ Slaughter and May, “*The EU competition rules on intellectual property licensing*”, (June 2016) at 17

¹⁹ Case C-241-1/91 *RTE & ITP v Commission* [1995] I-743

²⁰ Case C-418/01, *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co KG* [2004] ECR I-5039

²¹ Case T-201/04, *Microsoft v Commission* [2007] ECR-II-3601

²² Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, (2009, C-45/7)

²³ K. Wok, “*A New Approach to Resolving Refusal to Licence Intellectual Property Right Disputes, World Competition*”, 2011, at 263

1.1.4 *Magill*²⁴ and the ‘exceptional circumstances’

The case concerned British and Irish television companies’ refusal to licence their copyright protected television programme schedule. RTE (Irish State Broadcaster) was able to enjoy statutory monopoly television broadcasting in Ireland and BBC and IBA had a statutory duopoly in the United Kingdom (UK), since under the national UK and Irish legislation, copyright protected literary and artistic work as well as compilations of information such as listing of programmes to be TV-broadcasted.²⁵ Hence, the majority of the households in Republic of Ireland and roughly two-fifths of Northern Irish homes were able to receive television programmes broadcast through the RTE, ITV (acting through a subsidiary, Independent Television Publications “ITP”) and the BBC (the ‘broadcasting companies’). Since the broadcasting companies owned the copyright programme listings for their own respective channels, they would publish their own individual weekly TV guide containing only their own programmes listings. This resulted in that household audiences who wished to plan their TV-consumption for the upcoming week were forced to purchase each individual TV guide separately since there was no comprehensive weekly listing guide. However, the broadcasting companies did, on request, provide the daily or periodical newspapers the listing information to be published free of charge but they had to follow a strictly enforced licensing conditions. Because of this, an Irish publisher, Magill, decided to start publishing a comprehensive weekly guide, which included all programmes that were available through all three broadcasting companies. However, the broadcasting companies argued that the comprehensive TV guide was infringing their copyrights and therefore initiated legal proceedings in domestic court by obtaining injunctions in order to hinder Magill’s actions from producing and publishing the compilation of information. Consequently, Magill complained to the Commission by stating that the broadcasting companies were in fact abusing their dominant position by refusing to give out reliable advance listings information and protecting their listings by enforcing their copyright, thus infringing Article 102 TFEU.²⁶

Following this, the Commission held that the broadcasting companies were abusing their dominant position and therefore acting contrary to Article 102 TFEU. It stated that all three

²⁴ Joined cases C-241-1/91 P and C-242/91 P, *RTE & ITP v Commission* [1995] I-743

²⁵ H. Catovic, ‘*Refusal to Licence Intellectual Property Rights as Abuse of Dominant Position in EU Competition Law*’, (Stockholm University, 2015) at 37

²⁶ A. Jones, B. Sufrin, ‘*EU Competition Law: Text, cases & Materials*’, (OUP Oxford, 2011) at 500

the broadcasting companies were each dominant in the market for weekly listing and due to their policies, it limited the availability for the compilation of information, and therefore it was seen as an abusive practise where the aim was to protect their own individual weekly guides. Consequently the Commission ordered the companies to supply Magill, on a non-discriminatory basis, the advanced weekly programme listing and allowing Magill to reproduce such information.²⁷ The General Court upheld the Commission's decision by proclaiming that its judgments was supported by the concept of trade between Member States and it had been affected by limiting potential commercial exchanges between Ireland and the United Kingdom and therefore it must be dismissed.²⁸ As a result, RTE and ITP appealed the decision to ECJ, where ECJ confirmed the finding of abuse but it held that its judgment was strikingly narrow.²⁹

1.1.5 The ECJ judgment

The Court held that when considering the existence of a dominant position under Article 102 TFEU, 'the mere ownership of an intellectual property right cannot confer such a position'³⁰ and that a refusal to grant a licence to reproduce information, 'even if it is the act of an undertaking holding a dominant position, cannot in itself constitute as an abuse of a dominant position (*Volvo v. Veng*, paragraphs 7 and 8)'.³¹ The Court supported its decision from *Volvo*³² and established that the exercise of an exclusive right by the proprietor may constitute an abusive conduct in "exceptional circumstances"³³, whereas in this case four the exceptional circumstance were identified:³⁴

- I. there was no substitute for a composite weekly television guide, for which there was a specific, constant, and regular potential demand on the part of consumers;

²⁷ Commission Decision 89/205/EEC, *Magill TV Guide/ITP, BBC and RTE* [1988, L 78/43, paragraph 26-27

²⁸ The Commission delivered the decision in three separate judgments but containing the same information: see *RTE v Commission*, paragraph. 71, *BBC v Commission*, paragraph 58, *ITP v Commission*, paragraph 56

²⁹ A. Jones, B. Sufrin, 'EU Competition Law: Text, cases & Materials', (OUP Oxford, 2011) at 500

³⁰ Joined cases C-241-1/91 P and C-242/91 P, *RTE & ITP v. Commission* [1995] I-743 at paragraph 46

³¹ *ibid* at paragraph 49

³² Case 238/87 *AB Volvo v Erik Veng (UK) Ltd* [1988]

³³ Joined cases C-241-1/91 P and C-242/91 P, *RTE & ITP v. Commission* [1995] I-743 at paragraph 50

³⁴ A. Jones, B. Sufrin, 'EU Competition Law: Text, cases & Materials', (OUP Oxford, 2011) at 502

- II. by refusing to supply the information prevented the creation of a new product for which there was a potential consumer demand (constituted as an abuse under Article 102(b) TFEU).
- III. there was no objective justification for such refusal.
- IV. the appellants were reserving the secondary market of weekly television guides to themselves by excluding all competition on the market.

Accordingly, the ECJ supported the Commission's decision and held that practises and its policies, which the three broadcasting companies had adopted, constituted as an abuse of dominant position, thus infringing Article 102 TFEU. As a result of this decision, the Court issued a compulsory licence as a remedy in order to cease the infringement and forced the broadcasting companies to provide Magill with the compilation of information for the television programme listings.³⁵

1.1.6 Post-Magill decision

Following the decision in *Magill*, the 'list' of 'exceptional circumstances' gained great significance³⁶ and the application of the doctrine to IPR constituted a significant landmark in the debate on the interference between the two areas of law.³⁷ Even though the Court decided that the mere ownership of an IPR does not create the existence of a dominant position, it provided a "list" in which a refusal to a licence could amount to an abuse. However, it has been unclear whether the list of exceptional circumstances should be viewed as cumulatively necessary, cumulatively sufficient, or individual sufficient. In particular, whether a hindrance of a new product should be considered separately or a necessity, and a sufficient ground in order for it to be viewed as abusive if an undertaking refuse to supply.³⁸ For example, Jones and Sufrin questioned if the broadcasting companies had already produced a composite guide by cross-licensing each other, then the composite guide of a third party, such as Magill, would not have been new product. However, the broadcasting companies would still have reserved themselves the special position on the secondary

³⁵ H. Catovic, '*Refusal to Licence Intellectual Property Rights as Abuse of Dominant Position in EU Competition Law*', (Stockholm University, 2015) at 39

³⁶ A. Jones, B. Sufrin, '*EU Competition Law: Text, cases & Materials*', (OUP Oxford, 2011) at 502

³⁷ A. Ezrachi, M. Maggolino, "*EU Competition, Compulsory licensing and innovation*", (Journal of Competition Law & Economics, 8(3), 2012)) at 600

³⁸ A. Jones, B. Sufrin, '*EU Competition Law: Text, cases & Materials*', (OUP Oxford, 2011) at 502

market and the third party's like Magill would not have been able to introduce the new product.

Moreover, the Court noted in *Magill* and *Volvo v. Veng*, that a dominant undertaking's refusal to grant a licence to its IPR(s) does not in itself establish an abuse of dominance. Meaning that if Article 102 TFEU should arise in an IPR matter, the refusal to licence must be combined with an added element and 'exceptional circumstances.' Therefore, the underlying notion in EU competition law following the *Magill*'s judgment is that a dominant undertaking are not under a general obligation to licence its intellectual property, but there might be exceptions, where such a duty may arise in 'exceptional circumstances'.³⁹ Furthermore, an element in *Magill* judgment was the fact that the ECJ utilised Article 102(b) TFEU as the legal basis⁴⁰ in that an abuse can involve 'limiting production, markets or technical development to the prejudice of consumers'. With that said, the list of abusive practises found in Article 102(b) TFEU is not exhaustive and authorities whom enforce the EU competition rules have the right to oppose against practises which do not necessarily fall within one of the sections in the provision. Because of this, the effect that the Court had when it relied on Article 102(b) TFEU has proven to have created significant consequences in subsequent cases, notably in *Microsoft*,⁴¹ where the General Court applied a broad interpretation of the 'exceptional circumstances' doctrine by building its argumentation around Article 102(b) TFEU.⁴² I will address the case of *Microsoft* later on in this thesis.

The special circumstances in *Magill*, which swung the balancing favour of an obligation to licence, were later emphasised and limited in the case of *Oscar Bronner*.⁴³

³⁹ H. Catovic, 'Refusal to Licence Intellectual Property Rights as Abuse of Dominant Position in EU Competition Law', (Stockholm University, 2015) at 40

⁴⁰ Joined cases C-241-1/91 P and C-242/91 P, *RTE & ITP v. Commission* [1995] I-743 at paragraph 54

⁴¹ Case T-201/04, *Microsoft v Commission* [2007] ECR-II-3601

⁴² H. Catovic, 'Refusal to Licence Intellectual Property Rights as Abuse of Dominant Position in EU Competition Law', (Stockholm University, 2015) at 41

⁴³ Opinion of Advocate General Jacobs, Case C-7/97, *Oscar Bronner* [1998] E.C.R I-07791 (delivered on 28 May 1998) at paragraph 63

1.1.7 *Oscar Bronner*⁴⁴

In *Oscar Bronner*, the ECJ repeated the ‘exceptional circumstances’ from the *Magill* judgment, whilst it did not strictly concern IPR, the judgment did offer a new perspective and further clarification regarding the ‘exceptional circumstances’.

The case concerned a preliminary ruling from an Austrian court involving two newspaper publishers and distributors, Mediaprint and Bronner. Bronner published and distributed the daily newspaper called *Der Standard*, which covered roughly 3,6 per cent of the newspaper market. Mediaprint published and distributed two daily newspapers, which combined had market coverage of 71 per cent. Furthermore, Mediaprint had established a nationwide home delivery service, and Bronner argued that Mediaprint had abused its dominant position by not including *Der Standard* in Mediaprint’s delivery scheme. Therefore, Bronner sought an order from an Austrian court to cease the alleged abuse by including *Der Standard* in the delivery scheme in return for a reasonable remuneration since it would have been unprofitable for Bronner to construct its own home delivery service.⁴⁵

1.1.8 The ECJ judgment

In order for the ECJ to decide whether the refusal to include Bonners newspaper in its home delivery scheme constituted as an abuse of a dominant position, the ECJ sought guidance⁴⁶ from previous case law in *Commercial Solvents*⁴⁷ and *Magill*.⁴⁸ The Court did not explicitly confirm that the criteria, which it had established in relation to refusal to licence intellectual property rights in *Magill*, could be directly applicable to a refusal of a home delivery service.⁴⁹ However, the Court highlighted that it is necessary to effectively rely on the *Magill* judgment in order to plead the existence of an abuse within the meaning of Article

⁴⁴ Case C-7/97, *Oscar Bronner GmbH Co. KG v. Mediaprint*, 1998 E.C.R I-7791, [1999] 4 C.M.L.R 112

⁴⁵ H. Catovic, ‘*Refusal to Licence Intellectual Property Rights as Abuse of Dominant Position in EU Competition Law*’, (Stockholm University, 2015) at 42

⁴⁶ Case C-7/97, *Oscar Bronner GmbH Co. KG v. Mediaprint*, 1998 E.C.R I-7791, [1999] 4 C.M.L.R 112 at paragraph 38-39

⁴⁷ 7/73 *Commercial Solvents v. Commission* [1974] ECR 223

⁴⁸ Case C-241-1/91 *RTE & ITP v Commission* [1995] I-743

⁴⁹ H. Catovic, ‘*Refusal to Licence Intellectual Property Rights as Abuse of Dominant Position in EU Competition Law*’, (Stockholm University, 2015) at 42

102 TFEU.⁵⁰ As result, the ECJ outlined three factors which where relevant whilst determining whether Mediaprint's refusal was an abusive act within the meaning of Article 102 TFEU;

- I. the refusal of the service comprised in home delivery must be likely to eliminate all competition in the daily newspaper market;
- II. the refusal is incapable of being objectively justified and;
- III. the service in itself be indispensable to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence for that home-delivery scheme.⁵¹

In addition to this, the Court established that the parties had already acknowledged that there were other existing distribution methods available for daily newspapers, such as using postal services and/or through sale in shops and at kiosks. Whilst it may have been considered as a less of an advantageous method for distribution of certain newspapers, irregardless, they did exist and they were being used by other daily newspaper publishers.⁵² Additionally, ECJ noted that the refusal did not appear to have any technical, legal nor economic obstacles for making it impossible, or even unreasonably difficult, for any other publisher to establish their own nationwide home delivery schemes and to use that established scheme to distribute their own newspapers.⁵³ Therefore, the Court highlighted the Advocate General Jacobs opinion in that for such an access to be considered as indispensable it is necessary to demonstrate that it would not be economically viable to create a second home delivery scheme for the distribution of circulation daily newspapers with a circulation comparable to the existing scheme.⁵⁴

Thus, the Court concluded that it was not enough for the Bronner to argue that the creation of their own home delivery scheme would not be economically viable for the small circulation of the daily newspapers, as well as, that there were already several substitutable

⁵⁰ Case C-7/97, *Oscar Bronner GmbH Co. KG v. Mediaprint*, 1998 E.C.R I-7791, [1999] 4 C.M.L.R 112 at paragraph 41

⁵¹ *ibid* at paragraph 41

⁵² Case C-7/97, *Oscar Bronner GmbH Co. KG v. Mediaprint*, 1998 E.C.R I-7791, [1999] 4 C.M.L.R 112 at paragraph 43

⁵³ *ibid* at paragraph 45

⁵⁴ Case C-7/97, *Oscar Bronner GmbH Co. KG v. Mediaprint*, 1998 E.C.R I-7791, [1999] 4 C.M.L.R 112 at paragraph 46

delivery methods available for Bronner to use and therefore Mediaprint's refusal was not considered to be an abuse of its dominant position.

1.1.9 Post-Oscar Bronner decision

The *Oscar Bronner* dealt with the issue regarding tangible property unlike in the cases of *Magill* and *Volvo Veng* where the matter involved licensing intangible property (IPR). However, as shown in *Oscar Bronner*, assessing the refusal of an intangible and tangible property was practically identical in either situation. The main difference between the two is that whilst assessing a refusal to provide access to IPR, the refusal must prevent the emergence of a new product.⁵⁵ However, by clarifying the 'exceptional circumstances' in the *Bronner* judgment, it seems that it limited the enforcement boundaries of Article 102 TFEU. Its main focus was on the need for the balancing of considerations before analysing the dominant undertaking's freedom to contract.⁵⁶ As Advocate General Jacobs argued, in the long term, it will mostly depend on pro-competitively and in the interest of the consumers to allow a company to retain for its own use of facilities, which they have invested in and developed for the purpose of furthering their own business.⁵⁷ In his opinion, the incentive for the dominant undertaking to invest in new efficient facilities would be reduced if its competitors were to have the opportunity to request the access to their facilities. However, even if it is clear that in some situations a refusal of access may cause elimination or substantial reduction of competition, which has the risk to be detrimental to the consumers in both short and long term,⁵⁸ the level of assessment for such a risk should reflect that 'in assessing such conflicting interests particular care is required where the goods or services or facilities to which access is demanded represent the fruit of substantial investment. That may be true in particular in relation to refusal to licence intellectual property rights'.⁵⁹

Furthermore, since the ECJ heavily relied on the 'indispensability' criteria, it can be argued that when the Court established that the access to the home delivery scheme was not

⁵⁵ H. Catovic, 'Refusal to Licence Intellectual Property Rights as Abuse of Dominant Position in EU Competition Law', (Stockholm University, 2015) at 43

⁵⁶ A. Ezrachi, M. Maggolino, "EU Competition, Compulsory licensing and innovation", (Journal of Competition Law & Economics, 8(3), 2012)) at 601

⁵⁷ Opinion of Advocate General Jacobs, Case C-7/97, *Oscar Bronner* [1998] E.C.R I-07791 (delivered on 28 May 1998) at paragraph 57

⁵⁸ *ibid* at paragraph at 61

⁵⁹ Opinion of Advocate General Jacobs, Case C-7/97, *Oscar Bronner* [1998] E.C.R I-07791 (delivered on 28 May 1998) at paragraph 62

considered to be as indispensable, it did not proceed to reflect on the two remaining factors. Although, the Court did, however, emphasised that the refusal must be ‘likely to eliminate all competition’ from the requesting undertaking. Despite this, the Court did not provide interpretation for the term ‘likely’, but it can be suggested that the interpretation should be considered as it is not necessary for the competition to be eliminated, but rather proving that there can be a risk for such an effect.⁶⁰

However, the *Bronner* balancing formula did not survive for long and has then been eroded in subsequent cases.⁶¹

1.1.10 *IMS Health*⁶²

Similarly to the Court’s judgment in *Bronner*, the ECJ repeated its ruling from *Magill*, and it reiterated the formulation from *Bronner* in regards to the ‘exceptional circumstances’, thereby confirming the course set, away from the initial position in *Volvo*,⁶³ in refusal to licenses cases concerning IPR.⁶⁴

The case concerned a reference to the German court concerning a dispute between IMS and NDC regarding the use of IMS’s ‘1,860 brick structure’ by NDC. IMS had developed a system, which provided data on regional sales of pharmaceutical products within the German territory. The system was based on segmentation structure that divided the territory into small geographical segments (bricks) which was based on factors such as postal codes, political boundaries and the location of pharmacies and doctors. Furthermore, the system was marketed and distributed free of charge to pharmacies and doctor’s surgeries which allowed IMS to collect pharmaceutical sales information and provide that information to its customers (pharmaceutical companies). According to the national court, the practise helped

⁶⁰ H. Catovic, ‘Refusal to Licence Intellectual Property Rights as Abuse of Dominant Position in EU Competition Law’, (Stockholm University, 2015) at 44

⁶¹ A. Ezrachi, M. Maggiolino, “EU Competition, Compulsory licensing and innovation”, (Journal of Competition Law & Economics, 8(3), 2012)) at 601

⁶² Case C-418/01, *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co KG* [2004] ECR I-5039, [2004] C.M.L.R 28

⁶³ Case 238/87 *AB Volvo v Erik Veng (UK) Ltd* [1988] ECR 6211

⁶⁴ M. Angelov, *The “Exceptional Circumstances” Test: Implications for FRAND commitments from the essential facilities doctrine under Article 102 TFEU*, (European Competition Journal, 2014) at 47

those structures to become the normal industry standards⁶⁵ to which its clients adapted their information and distribution systems after. Since the system was so well received within the market, competitors to IMS tried to create similar brick structures. However, since IMS had copyrights on regional pharmaceutical sales reports, it created the opportunity for IMS to seek interim injunctions in domestic court for infringement against its competitors.

The company PII, which was later acquired by NDC, were also active within the same market as IMS, by marketing regional data on pharmaceutical products in Germany by using a brick structure that was similar to the IMS product. As a result, IMS applied to German court for an interlocutory order prohibiting NDC from using any brick structure systems, which derived from the IMS 1,860 brick structure.⁶⁶ The German court granted the order and based its reasoning on that the brick structure used by IMS is a database which has the capability of being protected by copyright. Following this, NDC and the Commission argued that IMS's refusal to licence its copyright-protected system, may be considered as an abusive practice, by referring to the judgment in *Bronner*⁶⁷, that the criterion for determining whether that structure is indispensable or not is dependant on whether a competitor can create a viable alternative.⁶⁸ Following this, the Commission reiterated the 'exceptional circumstances' doctrine and established that IMS structure was 1) indispensable for NDC to continue moving forward with its business model since respecting the legal and technical constraints would be far too significant in the creation of a new structure⁶⁹, 2) IMS had no objective justification not to licence to NDC.⁷⁰ As a result, the Commission found that the test was fulfilled and ordered an interim measure requiring IMS to grant NDC a licence the 1860-brick structure on non-discriminatory basis.⁷¹

⁶⁵ Case C-418/01, *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co KG* [2004] ECR I-5039, [2004] C.M.L.R 28 at paragraph 6

⁶⁶ A. Ezrachi, '*EU Competition Law: An analytical Guide to the Leading Cases*', (Bloomsbury Publishing, 2014) at 259

⁶⁷ Case C-7/97, *Oscar Bronner GmbH Co. KG v. Mediaprint*, 1998 E.C.R I-7791, [1999] 4 C.M.L.R 112

⁶⁸ Case C-418/01, *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co KG* [2004] ECR I-5039, [2004] C.M.L.R 28 at paragraph at 27

⁶⁹ 2002/165/EC: Commission Decision of 3 July 2001 – (Case Comp D3/38.044 – NDC Health/IMS Health: interim measures) at paragraph 127-131

⁷⁰ *ibid* at paragraph 174

⁷¹ *ibid* at paragraph 215

1.1.11 The ECJ judgment

The judgment largely followed the Opinion of Advocate General Tizzano with support from settled principles established in *Volvo v. Veng* and *Magill*. The ECJ reiterated that the act of a dominant undertaking that refuses to licence its intellectual property does not solely constitute as an abuse of a dominant position but in some 'exceptional circumstances' the practise of an exclusive right could amount to an abusive conduct.⁷² In addition to this, the ECJ tried to reconcile the rulings from *Magill* and *Bronner* and it confirmed that it is sufficient that three cumulative conditions are satisfied; i) that the refusal is preventing the emergence of a new product for which there is a potential consumer demand, ii) it is unjustified and iii) the refusal excludes any competition on a secondary market.⁷³ Since the first criteria was already established in *Magill*, the ECJ took the opportunity to further elaborate the issue by clarifying that where the product is indispensable for operating on a secondary market, the refusal may only be regarded as abusive if 'the undertaking which requested the licence does not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the intellectual property right, but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand.'⁷⁴ However, as the Advocate General pointed out, whilst it is important to acknowledge the balancing of interest in the protection of IPR and economic freedom, the vital factor with the condition is that the refusal should not prevent the development of the secondary market, which would lead to the detriment of consumers.⁷⁵ Hence, the first criteria established that it is not a necessity for the new product to be considered as a new innovation but solely different to what is already being provided by the proprietary holder and the outcome should be in the interest of protecting consumers. As for the second criteria, the Court decided to take a more cautious approach by stating that no specific observations had been made and it held that it is for the national courts to examine the justifications, in the light of the facts, whether the refusal of the request could be justified by objective consideration.⁷⁶ Finally, the third criteria, the Court reiterated its method in *Bronner* and established that it is appropriate to differentiate between an upstream

⁷² Case C-418/01, *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co KG* [2004] ECR I-5039, [2004] C.M.L.R 28 at paragraph 4-35

⁷³ *ibid* at paragraph 38

⁷⁴ Case C-418/01, *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co KG* [2004] ECR I-5039, [2004] C.M.L.R 28 at paragraph 49

⁷⁵ *ibid* at paragraph 48

⁷⁶ *ibid* at paragraph 51

market, established by the indispensable product or service, and a secondary market, which the product or service is developed for the production of another product or the supply of another service.⁷⁷ Even though the Court did not clarify what the Court meant with the reference to a secondary market, they did however provide clarification that if it were possible to identify a potential separate market, even if it was hypothetical, then it would be sufficient.⁷⁸ Thus, if a refusal to licence has the ability to limit potential competition on an imaginary secondary market, then such practise could constitute as a violation.

To conclude, the Court referred the case back to the national court without any indication as to whether the requirements were in facts were satisfied in the case, unlike in *Bronner*, where it held that conditions were not satisfied.

1.1.12 Post-IMS judgment

Even though the judgment in *IMS* concerned with a preliminary ruling under Article 267, the Court did not provide a ruling on the merits of the case. However the Court did take the opportunity to provide clarity and legal certainty since it was almost ten years after the *Magill* judgment. The judgment provided a further understanding as to what is to be considered as the ‘exceptional circumstances’ doctrine, reaffirmed that IPR are different from other forms of property, and most importantly, clarified that it would be sufficient if four cumulative conditions were fulfilled in order to establish that the refusal to licence to be considered as an abuse.

The *IMS* judgment clarified that copyright is safeguarded and only ‘where a refusal to grant a licence prevents the development of a secondary market to the detriment of consumers’⁷⁹; competition law will retake its rights. Thus, it established that when a competitor requests to use the copyrighted work in order to develop a second derived product, which solely reproduces the proprietor’s product, copyright should prevail.⁸⁰ Meaning that, if there is a consumer demand for a new product, the competitor should not be prohibited in developing

⁷⁷ H. Catovic, ‘Refusal to Licence Intellectual Property Rights as Abuse of Dominant Position in EU Competition Law’, (Stockholm University, 2015) at 47

⁷⁸ Case C-418/01, *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co KG* [2004] ECR I-5039, [2004] C.M.L.R 28 at paragraph 43- 44

⁷⁹ *ibid* at paragraph 48

⁸⁰ E. Derclaye, *The IMS Health Decision: A Triple Victory*, (World Competition 27(3), 2004) at 403

a better product, which may have the ability to promote and enhance social welfare. But if the competitors' intention is to merely develop a product, which aims to duplicate or imitated the already existing product offered by the proprietor, then the refusal to licence would not be regarded as an abuse.⁸¹ As a result, the Court managed to reconcile the aims of both competition and copyright laws.⁸²

Whilst, the decision clarified a few important matters, it did, however, fail to provide legal certainty as what is meant by a “new” product. The lack of clarity could have the potential risk of being interpreted as the same product, but if it is offered at a cheaper price or with better conditions, it would not be identical nor the “same” product and thus differing from the original product and therefore having the ability to be identified as “new” product. Consequently, the uncertainty in its interpretation creates the opportunity for competitors to be granted a compulsory licence if they could successfully argue that the refusal has led to the limitation of creating a product which could be considered as a “new” product.

1.1.13 *Microsoft*⁸³

Some scholars argue that there are some inconsistencies in the CJEU's judgment in both *Magill* and *IMS*, but the Commission has continued to develop a broader interpretation regarding circumstances where a refusal may be contrary to Article 102 TFEU. The Commission decided that the three conditions of ‘exceptional circumstances’, developed in *Magill* that there are three distinct abuses rather than a single cumulative set of conditions, which the CJEU developed in *IMS*.⁸⁴ Although, the *Microsoft* case is a particular kind of refusal to supply, which arises in the information technology sector in respect of ‘interface information’, meaning that software developers need to have access to interface information in order to make products that are compatible with other systems and programs. This is often referred to as ‘interoperability’ and it has the ability to be protected by intellectual property rights as copyright.⁸⁵ Whilst the information can be accessible by using reverse-engineering, it has been shown that in some situations reverse-engineering attempts, are neither

⁸¹ H. Catovic, ‘*Refusal to Licence Intellectual Property Rights as Abuse of Dominant Position in EU Competition Law*’, (Stockholm University, 2015) at 49

⁸² E. Derclaye, *The IMS Health Decision: A Triple Victory*, (World Competition 27(3), 2004) at 403

⁸³ COMP/C-3/37.792, *Commission v. Microsoft* [2004] 4 CMLR 965

⁸⁴ P. Wymystowski, *From innovation to Domination: Exercising IPR as abuse of art.102 TFEU*, (Lund University 2014) at 22

⁸⁵ A. Jones, B. Sufrin, *EU Competition Law: Text, cases & Materials*, (OUP Oxford, 2011) at 509

successful nor economically feasible.⁸⁶ Therefore, when an undertaking has significant market power within the software market, it may be essential that other providers develop their products in order to be compatible with the dominant undertakings' products.

The issue first arose in 1984 when the Commission dealt with a number of IBM's practises, the world's biggest computer manufacturer. In the Statement of Objections, The Commission argued that IBM had been abusing its position in the market by failing to supply other competitive manufactures with interface information which was required in order to successfully develop products which was compatible with IBM's System/370. IBM sought to immediately challenge the validity of the Commission's action but the application was dismissed. Thus, in a written reply to the Statement of Objections, IBM denied that they have a dominant position nor were they committing any of the alleged abuses. As well as, IBM had already informed the Commission that they had taken steps to make IPOs available to all users of its software and they were unbundling all software. While not admitting the existence of a dominant position nor any abuse thereof, IBM agreed to disclose sufficient information, which enabled competitors to develop their own soft- and hardware products and attach it to IBM System/370, because IBM had the effect of substantially improving the position of both users and competitor in the markets for System/370.⁸⁷

Following this, the Commission began an investigation into the software company, Microsoft, after a complaint had been filed by Sun Microsystems ("Sun"). Microsoft had over 90 per cent of the PC operating systems market and the Commission defined this as approaching a position of complete monopoly, which was said to be an overwhelmingly dominant position.⁸⁸ As a result, Sun complained that Microsoft was not providing them, and others who provided server operating systems, with sufficient interoperability information in order for them to be able to develop workgroup server operating systems, which were compatible with Microsoft's Windows desktop and server operating systems ("WGOS"). During previous years, Microsoft had supplied full interoperability information to server manufacturers but had decided to limit the information that they supplied since their incentives had changed since they entered the market themselves. Therefore, in 2004, the Commission concluded that Microsoft held a dominant position on both the client PC operating systems market and the WGOS markets and thus it had committed an abuse by

⁸⁶ *ibid* at 509

⁸⁷ XIVth Report on Competition Policy (Commission, 1984) at paragraphs 94-95

⁸⁸ COMP/C-3/37.792, *Commission v. Microsoft* [2004] 4 CMLR 965 at paragraph 435

refusing to supply the interoperability information, since it had the risk of eliminating competition, hence infringing Article 102 TFEU.⁸⁹ As a result, Microsoft was fined €497,196,304 and the Commission ordered that within 120 days the applicable information should be made available to undertakings whom are on the WGOS market and that they should guarantee that the information was regularly updated in a timely manner.⁹⁰

The Commission examined whether the *Bronner* and *Magill* criteria were fulfilled since the case considered the disruption of previous levels of supply, unlike *Bronner* and *Magill*, and therefore, Microsoft argued that the Commission could not prove any of the elements. However, it was established that the criteria's were satisfied, but they elaborated that on a general note the 'exceptional circumstances' in previous cases did not specify that it was limited from considering other circumstances of exceptional character and that 'there is no persuasiveness to an approach that would advocate for an exhaustive checklist of exceptional circumstances',⁹¹ meaning that refusals to supply should be examined on a case-by-case basis so that refusals that did not fall within the criteria have the ability to be held as an abusive practise. For example, the Commission recognised circumstances, which fell outside the *Magill* criteria such as; 1) Microsoft's dominance over the client PC operating system has a significant impact on the adjacent secondary market for WGOS which could eliminate and exclude competitors⁹² and 2) that the case was concerned with the disruption of previous levels of supply⁹³. Consequently, the Commission held that case-law of the European Courts suggests that the Commission must analyse the entirety of the circumstances surrounding a specific instance of a refusal to supply and assess its decision based on the results from its examination.⁹⁴ As a result, the Commission followed the 'effects-based' approach in relation to the application of Article 102 TFEU, which it established the following year in the Discussion Paper⁹⁵. It considered the facts of the case, acknowledged the effects, which it could have on the consumers as well as the issues of incentives to innovation.⁹⁶ It established that the information was in fact indispensable by adopting a two-stage approach. Firstly, it examined the level of interoperability that was

⁸⁹ COMP/C-3/37.792, *Commission v. Microsoft* [2004] 4 CMLR 965 at paragraph 692

⁹⁰ A. Jones, B. Sufrin, *EU Competition Law: Text, cases & Materials*, (OUP Oxford, 2011) at 509

⁹¹ COMP/C-3/37.792, *Commission v. Microsoft* [2004] 4 CMLR 965 at paragraph 555

⁹² *ibid* at paragraph 526

⁹³ COMP/C-3/37.792, *Commission v. Microsoft* [2004] 4 CMLR 965 at paragraph 556

⁹⁴ *ibid* at paragraph 558

⁹⁵ DG Competition Paper on the application of Article 82 of the Treaty to exclusionary abuses, Brussels, December 2005

⁹⁶ A. Jones, B. Sufrin, *EU Competition Law: Text, cases & Materials*, (OUP Oxford, 2011) at 509

required for Windows non-Microsoft WGOS in order for the competitors to be able to remain viably on the market and secondly, whether the information that Microsoft refused to supply was indispensable to attaining such viability. Following the results from a customer survey, the Commission identified that even though the customers enjoyed features and functionalities with the competitors' systems to those of Microsoft, this was overlooked by the experience of achieving full interoperability with Windows. Therefore, the Commission were able to conclude that the competitors' system had to have access to the interoperability information from Microsoft in order for the competitors to compete viably. Especially, considering that there were no substitutes for such disclosure by Microsoft.⁹⁷ However, Microsoft sought to argue that reverse-engineering provided an alternative route for its competitors for accessing information necessary for interoperability with the Windows domain architecture.⁹⁸ Nevertheless, the Commission established that the reverse-engineering of the interfaces of a program, as voluminous as Windows, required considerable efforts with uncertain chances of success. Even if the reverse-engineering was thought to be of a less compressive set of interfaces, its competitor would still have had difficulties in locating the adequate points of connections, which are buried in the over 30 million lines of code of Windows and that the viability of products produced by reverse-engineering depended on Microsoft not breaking the compatibility.⁹⁹ Therefore, in regards to the risk of eliminating competition, the Commission held that the refusal to supply could impact the technical development to the prejudice of consumers, contrary to Article 102(b) TFEU, since it would in the longer-term perspective make the competitors confined to niche existences or not be viable at all.¹⁰⁰ Thus, there would be little scope for innovation for the competitors and the disappearance of competitors would diminish Microsoft's incentives to innovate.¹⁰¹ However, Microsoft sought to argue that its refusal was justified since the information was information was protected under IPR and that forced disclosure would lessen its incentives to innovate. But, the Commission rejected the plea by establishing that the negative impact on Microsoft's incentives to innovate was outweighed by its positive impact on the level of innovation of the whole industry.¹⁰²

⁹⁷ A. Jones, B. Sufrin, *EU Competition Law: Text, cases & Materials*, (OUP Oxford, 2011) at 510

⁹⁸ COMP/C-3/37.792, *Commission v. Microsoft* [2004] 4 CMLR 965 at paragraph 683

⁹⁹ *ibid* at paragraph 685-686

¹⁰⁰ COMP/C-3/37.792, *Commission v. Microsoft* [2004] 4 CMLR 965 at paragraph 700

¹⁰¹ *ibid* at paragraph 725

¹⁰² COMP/C-3/37.792, *Commission v. Microsoft* [2004] 4 CMLR 965 at paragraph 783

Following the Commissions' decision, Microsoft brought an action by application to the General Court for annulment.

1.1.14 The General Court judgment¹⁰³

In the General Court, the Commission argued that applying an automatic application of the criteria laid down in *IMS* would cause problems in the case. Therefore, in order to examine whether such practise could be seen as abusive, it had to take into account all the circumstances surrounding that refusal.¹⁰⁴ Thus, the Commission identified that three characteristics which allowed it to be considered as abusive; i) the information which Microsoft refused to disclosed to its competitors related to interoperability, 'a matter to which the Community legislature attaches particular importance', ii) that Microsoft used its extraordinary power in the client PC operating systems to eliminate competition on the adjacent WGOS, iii) it involved the disruption of previous levels of supply.¹⁰⁵ Due to this, the Commission contended that the criteria recognised in *Magill* and *IMS* were also satisfied in this case. Following this, the General Court observed that even though undertakings have the freedom to choose their business partners, in certain circumstances, a refusal to supply on the part of a dominant undertaking may constitute as an abuse of a dominant position within the meaning of Article 102 TFEU.¹⁰⁶ Therefore, the General Court reiterated previous settled case law by confirming that the a refusal to licence a product which is covered by intellectual property rights cannot in itself amount to an abuse, however, in exceptional circumstance such an exercise of the exclusive right by the owner may give rise to such an abuse under Article 102 TFEU.¹⁰⁷ Thus, the General Court interpreted the 'exceptional circumstances' doctrine by providing three circumstances which had to be considered to be exceptional: i) the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market; ii) the refusal is of such a kind as to exclude any effective competition on that neighbouring market; iii) the refusal prevents the appearance of a new product for which there is potential consumer demand. When the three circumstances had been established, the refusal to grant a licence may infringe Article 102

¹⁰³ Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3601

¹⁰⁴ *ibid* at paragraph 316

¹⁰⁵ Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3601 at paragraph 317

¹⁰⁶ *ibid* at paragraph 319

¹⁰⁷ Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3601 at paragraph 331

TFEU, unless the refusal was objectively justified.¹⁰⁸ It was also noted that the circumstance that the refusal prevents the development of a new product is only found in the case law on the exercise of IPR.¹⁰⁹

Consequently, the General Court held that the Commission was correct in finding that the interoperability information was indispensable and rejected Microsoft's argument that other alternative operating systems, such as Linux, were competing effectively on the market, by concluding that 'the growth of Linux products on the work group server operating systems market was only modest'.¹¹⁰ Secondly, regarding the elimination of competition, the General Court held that the Commission is entitled to bring an action under Article 102 TFEU where there is a 'risk of elimination of competition' and 'likely to eliminate competition' by relying on 'accurate, reliable and coherent evidence'. Without such capability, the Commission would not be able to safeguard the competition that still exists on the relevant market.¹¹¹ Thus, the General Court upheld the Commission's argument and the criteria were satisfied. Thirdly, in relation to the interpretation of the new product requirement, the General Court observed that the Commission was correct in its examination by establishing that the refusal prevented its competitors from developing WGOS which as a result impacted the consumer's behaviour into purchasing a standardised Windows solution.¹¹² Thus, the limitation that was placed on consumers' choice was far more damaging to consumers, especially since they considered that non-Microsoft WGOS worked better than Windows WGOS.¹¹³ Therefore, the General Court held that the Commission was correct to consider that the artificial advantage retained by its refusal discouraged its competitors from developing WGOS with innovative features.¹¹⁴ In addition to this, the General Court noted that even if the competitors were to have access to the interoperability information, they would not be able to clone or reproduce its product solely based on such information, nor would they have the incentive to merely reproduce Windows WGOS, since implementing specifications is a difficult task which would require significant investment in money and time.¹¹⁵ Lastly, Microsoft relied that its refusal was objectively justified based on two separate grounds; i) the technology was protected by intellectual property rights and

¹⁰⁸ Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3601 at paragraphs 331-333

¹⁰⁹ *ibid* at paragraph 334

¹¹⁰ Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3601 at paragraph 432

¹¹¹ *ibid* at paragraphs 561-564

¹¹² Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3601 at paragraph 651

¹¹³ *ibid* at paragraph 652

¹¹⁴ Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3601 at paragraph 653

¹¹⁵ *ibid* at paragraph 658

constituted trade secrets and that ii) an order of compulsory licence would eliminate or prejudice its future incentives to invest in the development new technology. However, the General Court rejected Microsoft's plea relating to the interoperability information being protected by intellectual property right, since accepting such a ground to objectively justify a refusal to licence would consequently amount to never being able to apply case-law which is in favour of free competition.¹¹⁶ Furthermore, the General Court dismissed the defence regarding trade secrets and claimed that 'there is no reason why secret technology should enjoy a higher level of protection, than, for example, technology which has necessarily been disclosed to the public by its inventor in a patent-application procedure'.¹¹⁷ As well as, Microsoft defence concerning the negative impact on its incentives to innovate were also dismissed since it failed to provide initial burden of proof of such impact and the General Court found the plea to be 'vague, general and theoretical arguments'.¹¹⁸

In conclusion, the General Court held that the exceptional circumstances, identified by the Court of Justice in *Magill* and *IMS*, has been satisfied and therefore it rejected Microsoft's plea as wholly unfounded.¹¹⁹

1.1.15 Post-*Microsoft* decision

The Microsoft case was an extremely crucial case for the Commission since they were provided the opportunity to highlight its authority and its position of power in relation to dominant firms across the world. Thus, the *Microsoft* decision resulted in that the *Magill* criteria's were stretched following the extensive interpretation of the 'exceptional circumstances' doctrine. Most importantly, the decision clarified that the criteria was not exhaustive but rather that it merely provided a list of circumstances, which was sufficient to satisfy. However, it has been argued by Ahlborn and Evans that the *Microsoft's* judgment embraces the *Bronner/Magill/IMS* test, but, it significantly weakness the presumption that dominant firms have the freedom to chose their trading partners. They argue that in *Magill*, for example, the firm claimed that they could not offer a weekly television guide without having access to the television listings that the stations broadcast in Ireland. Therefore, it was argued that the listings were indispensable for the of making the weekly guide since

¹¹⁶ Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3601 at paragraph 690

¹¹⁷ *ibid* at paragraph 693

¹¹⁸ Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3601 at paragraph 698

¹¹⁹ *ibid* at paragraph 712

access to the listing would have created the emergence of a weekly television guide, which would have been a new product in Ireland at the time. Unlike the situation in *Magill*, the competitors in *Microsoft* were in a different position when Sun complained to the Commission. At the time, Microsoft had a 60 per cent share of the WGOS market and a 27 per cent share when the judgment was made and the manufactures that entered the market following Sun's letter, had a 5-15 per cent share of the WGOS market in 2003 as a result from Linux open source operating system.¹²⁰ Hence, competition had not been eliminated even if the Commission had the ability to act when it found that there might be a risk for elimination in the future. Therefore, the criteria's that was established in *Magill* were stretched from being a concept of new product test to the concept of the potential risk of eliminating competition. As a result, Ahlborn and Evans argued that the General Court had added the new product test element for refusal to licence intellectual property on an already rigorous indispensability and elimination of competition test for physical property. Thus, it required evidence to demonstrate that the practise would not only eliminate competition but also that the practise would eliminate a new product that consumers can benefit from.¹²¹ Hence, limiting technical development to the prejudice of consumers in accordance with Article 102(2)(b) TFEU.¹²²

Catovic argues that the General Court should have developed the traditional approach by furthering the new product criterion instead of creating an entirely new and uncertain area by introducing a new restriction, which considered the 'limitation on technical development'. Since the General Court had already established that the competitors would not limit themselves simply by reproducing Microsoft's WGOS, but that rather having the incentive to develop an improved and distinguishable product, hence reaching a similar conclusion in *Magill* and *IMS* criteria.¹²³ Consequently, this would have limited the creation of uncertainty with the doctrine and contributed towards a more uniformed interpretation of the 'exceptional circumstances' doctrine.

¹²⁰ C. Ahlborn, D. Evans, *The Microsoft Judgment and its implications fro Competition Policy towards Dominant Firms in Europe*, (Antitrust Law Journal, Vol. 75, No 3, 2009) at 9-10

¹²¹ *ibid* at 19

¹²² Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3601 at paragraph 665

¹²³ H. Catovic, *Refusal to Licence Intellectual Property Rights as Abuse of Dominant Position in EU Competition Law*, (Stockholm University, 2015) at 57

1.1.16 Guidance on the Commission's Enforcement Priorities in Applying Article 82¹²⁴

Long after the ruling in *Microsoft*, the GEP was released in February 2009, which introduced new concepts and explanations, whilst still reflecting the principles from previous case law. The purpose of GEP was to set forth the enforcement priorities, which would guide the Commission's practise in applying Article 102 TFEU to exclusionary conduct by dominant undertakings. The intention with the document was to provide greater clarity and predictability as regards to the general framework of analysis in which the Commission takes into account when measuring various forms of exclusionary conduct and providing assistance to undertakings in assessing whether certain behaviour has the capability to result in intervention by the Commission under Article 102 TFEU.¹²⁵ Specifically, paragraph 75 covers the section on refusal to supply and margin squeeze and it establishes that any undertaking shall have the right to freely select its trading partners and to dispose freely of its property, however, a dominant undertaking has an obligation to supply. A consequent of this obligation may lead to the dominant undertaking to invest less or minimise its investments, as well as, it has the possibility to create a free ride for competitors to lean on the dominant undertakings investments instead of investing themselves. Hence, the Commission has the reasonability to avoid such events since both of them has the ability to harm consumers. It should be noted, however, that the section will only apply to the 'downstream market', which refers to the market for which the refused input is needed in order to manufacture a product or provide a service.¹²⁶

Furthermore, when assessing a dominant undertakings refusal to supply, the Commission will consider a range of practise such as the refusal to supply products to exiting or new customers, refusal to licence IPR, including the licence which is necessary to provide interface information and/or refusal to grant access to an essential facility or a network.¹²⁷ In addition, the GEP provides a test, which reflects previous case law, for the Commission to consider when assessing whether a practise should be considered as an enforcement priority.

¹²⁴ Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, (2009, C-45/7) now applying to Article 102 TFEU

¹²⁵ *ibid* at paragraph 2

¹²⁶ Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, (2009, C-45/7) at paragraph 75

¹²⁷ *ibid* at paragraph 78

The enforcement priority will be confirmed when the three cumulative conditions are satisfied;¹²⁸

- i. the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market,
- ii. the refusal is likely to lead to the elimination of effective competition on the downstream market, and
- iii. the refusal is likely to lead to consumer harm.

Whilst it is recognised in the GEP that the Commission will consider claims by the dominant undertaking that a refusal to supply was necessary in order to create incentives to continue to invest in the future and taking the potential risk of failed future projects. As well as, the obligation to supply could have the potential negative effect on the dominant undertaking innovations, it is however, established that the burden of proof lies on the dominant undertaking to demonstrate any negative impact which an obligation to supply is likely to have on its own level of innovation.¹²⁹ With that said, it is argued that the responsibility that the dominant undertaking is subjected is too unpredictable and too difficult to justify since it rather impossible to assume future predicaments. Which as a result leads to further confusion regarding the level of intervention by the Commission.

¹²⁸ Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, (2009, C-45/7) at paragraph 81

¹²⁹ *ibid* at paragraphs 89-90

3. Is it possible to strike a balance between IPR and Competition law?

The tension between the two areas of law has developed over the years as a result of the EU Authorities arguing that IP law is domineering because it enables behaviour, which undermines effective competition, thus having an immense effect on consumer welfare. But as technology develops and innovation becomes more important for a companies success, it is crucial to establish a fair balance between competition law and IPR. In fact, on 24 may 2016, Commissioner Vestager delivered a speech where she identified that both competition and IP have a vital role in business development. Without competition, competitors would not seek to continuously innovate in order to stay ahead of their rivals and without innovation; competitors would not be able to get ahead of their rivals. Hence, “to encourage innovation, you need both competition and a reward for innovators” (emphasis added).¹³⁰

Following the demonstrated case law, it is clear that the practise of dominant undertaking whom refuse to licence IPR with a competitor or a third party will not solely be considered as an abusive conduct contrary to Article 102 TFEU. However, following the GEP, there appears to be a change from competitors to consumers in regards to when the Commission would interfere with the possibility of anti-competitive behaviour. The emphasis on consumer harm in the cumulative criteria's, established in paragraph 81 in GEP, signals the attempt to advance an effect-oriented approach by introducing consumer welfare as a key factor in the assessment. Since it is a new condition, one can argue, that the Commission will balance the likelihood of a negative consequences of refusal to supply on consumer welfare, against the consequences of ordering an obligation on the dominant undertaking to provide access to its innovation. Whilst the prevention of innovation is generally considered to be harmful to the consumer welfare, it has not been identified in the condition, thus it creates uncertainty for future developments, as well as it enables the Commission the ability to expanded the condition as cases develop further. However, if the changed development could be structured in a fully manageable condition, it has the potential to provide a useful

¹³⁰ Commissioner Vestager speech delivered on 24 may 2016, https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/how-competition-supports-innovation_en [accessed on 21 may 2017]

limiting principle since it would only be triggered where consumer harm is proven rather than illustrating the exclusion of competitors.¹³¹

Furthermore, it has been established that for practise to amount as an abusive act it must have the added element of it being considered as ‘exceptional circumstance’. This notion has the ability to function as an important stage in the assessment of a refusal, since it highlights the need for proportionality and it restrains the application of competition law.¹³² But, the usage of the term ‘exceptional’ signals a strong restrictiveness as to how the Courts should apply the criteria in concrete and practical situations, and it indicates a clear guideline from the ECJ that the EU competition law does not create an automatic presumption nor does it impose an obligation on dominant undertakings to share their IPR. However, it also provides the opportunity in ordering a compulsory licence in order rectify or to prevent the anti-competitive behaviour, which may encumber growth for competitors on secondary market and where the development of product differentiation or cumulative follow-on innovation is hindered.¹³³ On the other hand, ‘exceptional circumstances’ doctrine provides the ECJ with flexibility for assessing cases involving refusals to licence IPR, which as result could create both positive and a negative consequences. The flexibility has the ability to produce uncertainty for dominant undertaking since it has not been established as to how broadly the ECJ can the interpret what should be considered an ‘exceptional circumstance’, as well as the adoption of a case-by-base approach creates limitations for dominant undertakings in order to be able to avoid a particular situation which may render an act of refusal to licence as an abuse. Likewise, the flexibility has also the ability to provide the ECJ with sufficient authority to examine each case individually, based on its own facts, thus enabling the ECJ to consider particular reasoning and actions for that specific refusal to licence. Therefore, it has the potential to serve as a balancing tool, even in cases such as *Microsoft*, where the Court widened the realm of competition law.¹³⁴

Furthermore, Peeperkorn argues that Competition policy should not be used as an instrument to systematically develop a balance between IPR, but rather be applied to situations where

¹³¹ A. Ezrachi, M. Maggiolino, “*EU Competition, Compulsory licensing and innovation*”, (Journal of Competition Law & Economics, 8(3), 2012)) at 607-608

¹³² *ibid* at 608

¹³³ H. Catovic, ‘*Refusal to Licence Intellectual Property Rights as Abuse of Dominant Position in EU Competition Law*’, (Stockholm University, 2015) at 87

¹³⁴ A. Ezrachi, M. Maggiolino, “*EU Competition, Compulsory licensing and innovation*”, (Journal of Competition Law & Economics, 8(3), 2012)) at 608

IPRs are exploited. The European Courts have created the distinction between the existence of an IPR, which cannot be affected by the Treaty rules of free movement and competition, whilst the exercise of the IPR can be affected by the free movement and competition provisions of the Treaty.¹³⁵ It is evident that the Courts and the Commission try to narrowly define the existence of an IPR since it enables the proprietor exclusivity to licence and ask for royalties during a certain period of time and within a certain market. Therefore, the flexibility is crucial for the Commission have the ability to be supported by Article 102 TFEU in order to protect the free competition.

With that said, it is important to assess how the Commission views the evolvement of the relationship between competition law and IP. In the recent Technology Transfer Block Exemption Regulation (“TTBER”), it clarifies the Commissions current position by stating that both legal disciplines “are necessary to promote innovation and ensure a competitive exploitation thereof”.¹³⁶ Whilst it is questionable in how that principle is supposed to be applied in the block exemption regulations, the underlying issue is that the three areas of exclusive grant-back restrictions; no-challenge clauses; and obligations relating to the use of competing technology or further reach and development, has been excluded from the the new TTBER compared to the previous regulation.¹³⁷ The three areas will be briefly discussed herein.

Grant-back restrictions

Generally, licensors require licensees to grant-back to the licensor if any improvements has been made to the licensed technology. However, under the new TTBER, exclusive grant-back obligations are not block exempted because such obligation is likely to reduce the licensee’s incentive to innovate since it hinders the licensee in exploiting the improvements, including by way of licensing to third parties.¹³⁸ Consequently, this would result in falling within the scope of the prohibition in Article 101(1) and thus requiring individual assessment of the grant-back under Article 101(3). However, non-exclusive grant-back

¹³⁵ L. Peepkorn, ‘*IP licences and Competition Rules: Striking the Right balance*’, (World Competition 26, 2003) at 531

¹³⁶ TTBER at paragraph 7

¹³⁷ P. Treacy, N. Watson-Doig, ‘*Competition policy v IP – Striking a balance is a tricky exercise*’, (Competition Law Insight, July 2016) [accessed 21 may 2017]
<http://www.lexology.com/library/detail.aspx?g=74a55853-270d-46b7-a87f-1b209fbc9fc0>

¹³⁸ TTBER at paragraph 129

obligations are block exempted since, by contrast to exclusive grant-back, it allows the licensee to benefit from the improvements to the licenced technology and therefore it creates the incentive for licensees to innovate.¹³⁹

No-Challenge clauses

A no-challenge clause prevents the licensee from challenging the validity of the IPR(s). Previously, a termination based on challenge provisions were acceptable, however, these are now only exempted if the licence is exclusive. Meaning that if the licence is non-exclusive, such clauses will be considered as excluded from the block exemptions, thus having the likelihood to be considered within the prohibition of Article 101(1) TFEU, as well as, requiring an individual assessment under Article 101(3) TFEU. The consequence that may occur from such actions is that it might have an adverse effect on innovation resulting from the maintenance of invalid IPR(s), which may act as a barrier to both product entry and to innovation.¹⁴⁰

Limitations on the licensee's use of its own technology and engaging in further R&D

The reasoning behind such limitation is understandable; it creates the incentive to engage in further innovation and the ability exploit already developed technology rights are protected under Competition law. However, Treacy argues that such restrictions are quite stringent, regardless if the parties are competitors or not. Since the limitations have the capability to limit the proprietors' freedom to negotiate their own terms and conditions on which it will licence its technology.

Furthermore, it has been widely accepted that the Commission's approach to competition and IP has been in favoured within the pharmaceutical sector. It acknowledges that the procedure for development can be quite lengthy, the success-rate is fairly low, and when the procedure has been successful and placed on the market it could be replicated at lower cost. Therefore, it is especially important to implement an effective IP protection since it is vital

¹³⁹ P. Treacy, N. Watson-Doig, 'Competition policy v IP – Striking a balance is a tricky exercise', (Competition Law Insight, July 2016) [accessed 21 may 2017]
<http://www.lexology.com/library/detail.aspx?g=74a55853-270d-46b7-a87f-1b209fbc9fc0>

¹⁴⁰ *ibid*

factor for a companies' commercial success and for furthering the motivation to innovate and research.

As a result, in order to strike a balance within the two legal disciplines, the objectives for the balance must allow those who wish to undertake further research to be motivated to continue developing attractive products and services which will benefit the consumers and it will be rewarding for the inventors, whilst ensuring that the objectives does not result in preventing further growth due to the IP protection. With that said, it is not an easy task for the European Authorities to find a balance between the two legal areas since it cannot favour one specific sector more or less, a uniformity is extremely crucial in order prevent future implications. Thus, establishing policies that have the ability to both protect IPR(s) and creating the incentive for innovation, whilst managing the policies surrounding competition law as well as cross boarder trade, is truly difficult.

4. Is the EU perspective on IPR the right perspective?

It is clear from the past cases that the line between competition law and enjoying the exclusivity of IPR is not always a visible one. However, it should be questioned whether the interference with competition law actually affects the incentives to innovate. If we are suppose to look at the direct link between the two legal areas, the application of competition law may limit the width of the protection that IPR should provide, however, it does not eliminate the fundamental motivation to wanting to innovate more, whereas the impact of strong IPR has the ability to eliminate competitors and distort the free market. Despite this, the relationship between IPR and competition creates a lot tension, however, it does not seem as if the widening of the criteria of ‘exceptional circumstances’ has been subject to floodgates, nor an increase in competition challenges that IP holders may be subjected to. In addition to this, Ezrachi argues that, even if there is an ongoing competitive pressure within innovation driven sectors, the challenges from past litigation will not be sufficient to severely affect their innovation rate. Since dominant undertakings that are facing challenges from competition law will most likely continue to research and develop products and services in order to maintain their market position.¹⁴¹

However, it cannot be denied that the Commission’s intervention in IP law has the potential to impact innovation on national level as well as elsewhere. Following the *Microsoft* case, Neelie Kroes¹⁴² expressed her satisfaction with the General Courts judgment in that it had upheld the most vital factors in the Commission’s decision, which was aimed towards the consumers and providing them additional and alternative choices within the WGOS market as well continuing motivating the companies to innovate within these market to the benefit of consumers. During her speech,¹⁴³ she highlighted that the Court had confirmed that Microsoft could no longer prevent the market from performing properly and the importance of interoperability for consumer choice and the ability to benefit from competitive prices. However, whilst the ruling was welcomed for its confirmation of the Commission’s decision and its underlying policy, she proclaimed, that the case was still “bitter-sweet since it

¹⁴¹ A. Ezrachi, M. Maggolino, “*EU Competition, Compulsory licensing and innovation*”, (Journal of Competition Law & Economics, 8(3), 2012)) at 610

¹⁴² The European Commissioner for Competition Policy during the time of *Microsoft* judgment.

¹⁴³ SPEECH/07/539, N. Kroes, ‘Introductory remarks on CFI ruling on Microsoft’s abuse of dominant market position’, (Brussels, 17th September 2007)

illustrated how the consumers were suffering by Microsoft's actions. But, she pointed out that since the Commission's investigation began, Microsoft's market share had increased from 40 per cent to 80 per cent for WGOS. As well as there had been innovations in high technology market, but mainly in areas where Microsoft was not dominate. Whilst, that may have been the result in the *Microsoft*, I do question whether the emphasis concerning the "harm" which the dominant undertakings may potentially could cause the consumers, if this the right approach forward? If there is not any noticeable consumer harm, then firms, including the dominant undertakings, should be encouraged to compete vigorously rather than being questioned and challenged about their dominance within a specific market. As Thomas O. Barnett¹⁴⁴ mentioned in his press release¹⁴⁵ regarding his concerns following the *Microsoft* case, the US Court would recognise the potential benefit to consumers when a company, including a dominant company, makes unilateral business decisions, for example by adding features to its popular products or licence its intellectual property to its rival or if they wish to refuse to licence to its rivals. Therefore, I strongly argue that limiting a dominant undertaking may have the opposite effect on the firms since their growth is dependant on good customer relationships and the constant strive to be better than their rivals. In addition to this, the amount of exposure that dominant undertaking are subjected to following a complaint from the Commission could have the potential outcome that their investors would view them as too much of a liability and as result they would step back. Consequently, the accumulation of varies events can result in suffering in research and development by limiting resources which ultimately harms the consumers.

In addition to this, when the Commission orders a compulsory licence, it seem to overlook a extremely crucial practical challenges which impacts the licensor to consider. Ezrachi and Maggiolino has identified five factors which may cause the licensor difficulties:¹⁴⁶

- i. *Identification problems*, which are connected to the definition of the content and terms of the licence and are aggravated when the refusal does not interrupt a pre-existing business relationship;

¹⁴⁴ The assistant Attorney General for Anti-trust division of the US Department of Justice

¹⁴⁵ Immediate release, issues statement on European Microsoft decision, 17th September 2007, [accessed on 23 may 2017 at https://www.justice.gov/archive/atr/public/press_releases/2007/226070.htm]

¹⁴⁶ A. Ezrachi, M. Maggiolino, "*EU Competition, Compulsory licensing and innovation*", (Journal of Competition Law & Economics, 8(3), 2012)) at 612

- ii. *Administrability problems*, regarding the management of the licences over time including disputes concerning terms of access and pricing issues which call for expert input and technical commitments;
- iii. *Generalisation problems*, caused by the habit of morphing compulsory licences into tools for market regulation.
- iv. *Collusion danger*, once cooperating via a compulsory licence, the parties will start to collude with the other and finally;
- v. *The risk of the burdening problem*, the risk of depressing entrepreneurs' innovation spirits more than the refusal already does.

For me, the fifth factor is the most crucial element, which does not receive enough credibility. Working with IP and entrepreneurs, I understand that the amount research, time and money, they spend on developing for new technology, which they later file for an application in order to protect their “work”. Far too often, I meet inventors who would “like” to gain more revenue based on their inventions but it is not their first instinct. With that said, I argue that the EU seeks to encourage start-ups to be more creative and innovative, however, when they have reached a certain stage where they are becoming dominant on the market based market percentage, the perspective of the EU becomes a lot more stringent. Where as I believe that each company has been in a start-up position and after a lot hard work, determination and great customer relationship has resulted in them become a superpower, which should be praised rather than discouraged. Therefore, I don't think that the EU's approach is the right approach, because the encouragement to develop businesses should receive the same level of support even if you are a dominant undertaking. Since an undertaking would not seek to “harm” their consumers, in fact, it is the quite opposite since the business would not be successful if the consumers did not enjoy their products or services.

5. Conclusion

In conclusion, it has been established that the act to refuse a licence of IPR will not in itself constitute as an abuse contrary to Article 102 TFEU. However, if that act is linked with the non-exhaustive list of exceptional circumstances, then it may have the potential to be considered as an abusive act, if it cannot be objectively justified. Nonetheless, the ‘exceptional circumstances’ doctrine has been criticised for being inconsistent and uncertain, especially following the widening of the doctrine by the General Court in *Microsoft*. The legal framework that has been established by the ECJ has provided a lot flexibility for the EU Authorities to assess the abusive practise by implementing a case-by-case approach, however, the approach has also caused vagueness to the framework since the four condition has been applied irregularly to the cases, thus, expanding the criteria’s. The EU Authorities are so concern with protecting the consumer welfare and competition on the market that they forget that their stringent approach can cause unwillingness and discouragement on them who are our inventors in our market. As a result, competition law is overpowering IPR and causing an imbalance between the legal areas since even if the IPR is lawful under Intellectual Property it can become unlawful when competition intervenes. As a result, the *Microsoft* case left some unanswered questions behind such as, what will amount to an “new product”, and is it even possible for a dominant undertaking to argue objective justification if all criteria’s have been satisfied? Unfortunately, these questions will not be answered in this thesis and they will remain unanswered until a new case arises but until then, the law will be imbalanced, inconsistent and unclear.

Bibliography

Legislation

Copyright Act 1790

Patent Act of 1790

Treaty on the European Union, Consolidated version, signed on 13 December 2007

Treaty on the Functioning of the European Union, Consolidated version signed on 13 December 2007

US Sherman Act 1890

Literature

Ariel Ezrachi, *EU Competition Law: An analytical Guide to the Leading Cases*, (Bloomsbury Publishing, 2014)

Alison Jones, Brenda Sufrin, *EU Competition Law: Text, cases & Materials*, (OUP Oxford, 2011)

Alison Jones, Brenda Sufrin, *EU Competition law: Text, Cases and Materials*, (OCL, 2016)

Paul Craig, Gráinne De Búrca, *EU Law text, cases and materials*, (sixth edition, Oxford University Press, 2015)

WIPO, *Successful Technology Licensing*, (World Intellectual Property Organization, 2015)

WIPO, *Exchanging value, negotiation technology, licensing agreements, a training manual*, (World Intellectual Property Organization)

Journals

Ariel Ezrachi, Mariatresa Maggiolino, *EU Competition, Compulsory licensing and innovation*, (Journal of Competition Law & Economics, 8(3), 2012))

Alexandra Svetlicinii, Marco Botta, *Article 102 TFEU as a tool for market regulation: "excessive enforcement" against "excessive prices" in the new EU Member States and Candidate Countries*, (European Competition Journal 2012)

Alexandre L.D Pereira, *Software Interoperability, Intellectual Property and Competition law – compulsory licenses for abuse of market dominance*, (Computer law & Security review 27, 2011)

Allen & Overy, *Article 102 and Innovation: the Journey since Microsoft*, (September 2012)
Christian Ahlborn, David S. Evans, *'The Microsoft Judgment and its implications for Competition Policy towards Dominant Firms in Europe'*, (Antitrust Law Journal, Vol. 75, No 3, 2009)

Donna M. Gitter, *Strong Medicine for Competition ills: the Judgment of the European Court of Justice in the IMS Health action and its Implications for Microsoft corporation*, (15 Duke J. Comp & Int'l L. 153 2004-2005)

Estelle Derclaye, *The IMS Health Decision: A Triple Victory*, (World Competition 27(3), 2004)

Haris Catovic, *Refusal to Licence Intellectual Property Rights as Abuse of Dominant Position in EU Competition Law*, (Stockholm University, 2015)

Joseph Straus, *Patent Application: Obstacle for innovation and Abuse of Dominant Position under Article 102 TFEU*, (Journal of European Competition law, 2010, Vol. 1, No 3)

Kelvin Hiu Fai Wok, *A New Approach to Resolving Refusal to Licence Intellectual Property Right Disputes*, (Kluwer Law international, 2011)

Louis Kaplow, *The Patent-Antitrust Intersection: A Reappraisal*, (97 Harvard Law Review, 1984)

Luc Peeperkorn, *IP licences and Competition Rules: Striking the Right balance*, (World Competition 26, 2003)

Martin Angelov, *The "Exceptional Circumstances" Test: Implications for FRAND commitments from the essential facilities doctrine under Article 102 TFEU*, (European Competition Journal, 2014)

Melanie J. Reichenberger, *The Role of Compulsory Licensing in Unilateral Refusals to Deal: Have the United States and European Approaches Grown Further Apart after IMS?*, (The Journal of Corporation law, 2006)

Patryk Wymystowski, *From innovation to Domination: Exercising IPR as abuse of art.102 TFEU*, (Lund University 2014)

Slaughter and May, *The EU competition rules on intellectual property licensing*, (June 2016)

Thomas Hoppner, *Competition law in intellectual property litigation: the case for a compulsory licence defence under article 102 TFEU*, (European Competition Journal, 2011)

Official documents of the EU

2002/165/EC: Commission Decision of 3 July 2001 – (Case Comp D3/38.044 – NDC Health/IMS Health: interim measures)

Commission Decision 89/205/EEC, *Magill TV Guide/ITP, BBC and RTE* [1988, L 78/43]

DG Competition Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses, Brussels, December 2005

Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, (2009, C-45/7)

Opinion of Advocate General Jacobs, Case C-7/97, *Oscar Bronner* [1998] E.C.R I-07791 (delivered on 28 May 1998)

SPEECH/07/539, N. Kroes, 'Introductory remarks on CFI ruling on Microsoft's abuse of dominant market position', (Brussels, 17th September 2007)

XIVth Report on Competition Policy (Commission, 1984)

Internet sources

Pat Treacy, Noel Watson-Doig, 'Competition policy v IP – Striking a balance is a tricky exercise', (Competition Law Insight, July 2016)
<http://www.lexology.com/library/detail.aspx?g=74a55853-270d-46b7-a87f-1b209fbc9fc0>

Thomas O. Barnett – 'Immediate release, issues statement on European Microsoft decision', 17th September 2007,
https://www.justice.gov/archive/atr/public/press_releases/2007/226070.htm

Margrethe Vestager, Commissioner of Directorate General for Competition, speech at Regulation4Innovation, Brussels, 24th May 2016
https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/how-competition-supports-innovation_en

Table of cases

Case C-241-1/91 *RTE & ITP v Commission* [1995] I-743

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

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

Case 238/87 *AB Volvo v Erik Veng (UK) Ltd* [1988] ECR 6211

Case C-418/01, *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co KG* [2004] ECR I-5039, [2004] C.M.L.R 28

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

Case T-201/04, *Microsoft v Commission* [2007] ECR-II-3601

COMP/C-3/37.792, *Commission v. Microsoft* [2004] 24 March 2004