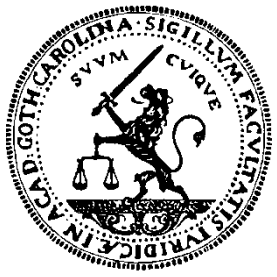

FACULTY OF LAW
Lund University

Joar Lindén

Refusal to License

Competitor or Non-competitor – Does it Matter?

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws program
30 higher education credits

Supervisor: Annegret Engel

Semester of graduation: Period 1 Autumn Semester 2021

Contents

Summary

Article 102 TFEU prohibits abuse of dominance, including refusal to license intellectual property rights (IPRs) in exceptional circumstances. The requirements for classifying a refusal to license as abusive have been established in cases about dominant undertakings' refusal to license their competitors. By exploring the assessment of refusals to license, this thesis examines whether and, if so, by what requirements a refusal to license non-competitors may be abusive. The thesis adopts a legal doctrinal method, accompanied by textual, contextual, and teleological interpretation.

This thesis finds that refusals to license non-competitors may be abusive. While a refusal to license competitors may be abusive, a refusal to license non-competitors is in general at least not more worthy of protection. Moreover, while the assessment of refusals to license IPRs and refusals to supply (refusal of non-IPR) essentially correspond, a refusal to supply non-competitors may be abusive. Thus, invariably allowing refusals to license non-competitors would not endorse legal consistency.

Additionally, this thesis concludes that refusal to license can be divided into two types of abuses, facing different requirements: refusals in relation to competitors and non-competitors, respectively. An additional distinction between refusals in relation to new and existing customers appears unjustified. As to the requirements, a refusal to license competitors is abusive if the IPR is indispensable and the refusal risks both eliminate effective competition and prevent market development. Disparately, a refusal to license non-competitors should be abusive already if it risks eliminating effective competition by the undertaking refused (corresponding to a requirement of indispensability) and preventing market development. Hence, the types of abuses would differ in whether elimination of all effective competition is required, or individual elimination suffices.

Sammanfattning

Artikel 102 FEUF förbjuder dominansmissbruk, vilket inkluderar vägran att licensiera immaterialrättigheter (IMR) under exceptionella omständigheter. Rekvisiten för att klassificera en licensvägran som missbruk har etablerats i mål om dominerande företags vägran att licensiera egna konkurrenter. Genom att utforska bedömningen av licensvägran ämnar denna uppsats utröna huruvida och, om så, mot vilka rekvisit en vägran att licensiera icke-konkurrenter kan utgöra missbruk. Uppsatsen anlägger en rättsdogmatisk metod, ackompanjerad av textuell, kontextuell, och teleologisk lagtolkning.

Uppsatsen utröner att vägran att licensiera icke-konkurrenter kan utgöra missbruk. Medan en vägran att licensiera konkurrenter kan utgöra missbruk, är vägran att licensiera icke-konkurrenter i vart fall inte mer skyddsvärd. Dessutom, medan bedömningen av licensvägran respektive leveransvägran (vägran av icke-IMR) väsentligen kongruerar, kan vägran att leverera icke-konkurrenter utgöra missbruk. Att ovillkorlig tillåta vägran att licensiera icke-konkurrenter skulle därför inte främja legal konsistens.

Uppsatsen utröner dessutom att licensvägran kan delas i två typer av missbruk, vilka underkastas olika rekvisit: vägran i relation till konkurrenter respektive icke-konkurrenter. En ytterligare delning mellan vägran i relation till existerande och nya kunder förefaller obefogad. Angående rekvisiten utgör en vägran att licensiera konkurrenter missbruk om relevant IMR är nödvändig samt vägran riskerar att både eliminera effektiv konkurrens samt förhindra marknadsutveckling. En vägran att licensiera icke-konkurrenter utgör däremot missbruk redan om vägran riskerar att eliminera effektiv konkurrens från det förvägrade företaget (motsvarande ett krav om nödvändighet) samt förhindra marknadsutveckling. Därför åtskiljs missbrukstyperna i huruvida missbruk kräver eliminering av all effektiv konkurrens, eller om individuell eliminering är tillräckligt.

Abbreviations and Definitions

AEC test	As efficient competitor test
AG	Advocate General.
Article 101(3) Guidelines	Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/97.
Article 102 guidelines	Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7.
CJ	Court of Justice.
CJEU	The Court of Justice of the European Union, which presently includes the Court of Justice and the General Court.
Defendant	The undertaking accused of an infringement of competition law.
Enforcement Directive	Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L 157/45.
EU	European Union.
FEUF	The Swedish counterpart to the abbreviation TFEU.
FRAND terms	Fair, reasonable, and non-discriminatory terms.
GC	General Court.
Horizontal Cooperation Guidelines	Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union

	to horizontal co-operation agreements [2011] OJ C 11/1.
IP law	Intellectual property law.
IPR	Intellectual property right.
Market Definition Notice	Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5.
OJ C	Official Journal of the European Union, C series.
OJ L	Official Journal of the European Union, L series
Refusal to deal	Collective concept for refusal to license and refusal to supply.
Refusal to license	Refusal to grant another undertaking a license to intellectual property rights.
Refusal to supply	Refusal to grant another undertaking access to resources not being intellectual property rights.
Reg. 1/2003	Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1.
SSRN	Social Science Research Network.
Technology Transfer Guidelines	Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements [2014] OJ C 89/3.
TEU	Treaty on European Union.

TFEU	Treaty on the Functioning of the European Union
The Charter	Charter of Fundamental Rights of the European Union [2012] C 326/392.
Trade Secret Directive	Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L 157/1.
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex IC of the Agreement Establishing the World Trade Organization, Marrakesh 15 April 1994.
Vertical Agreement Guidelines	Guidelines on Vertical Restraints [2010] OJ C 130/1.

1 Introduction

1.1 Background

Article 102 TFEU establishes a prohibition against anticompetitive (abusive) conduct by dominant undertakings.[1] For example, it is settled case law that refusals to deal with other companies may, under certain circumstances, constitute an abuse of dominance.[2] In some judgments, the prohibition of refusal to deal has been stretched to cover refusals of granting licenses to intellectual property rights (henceforth abbreviated "IPR").[3] In general, these prohibitions are controversial, because of the interference with the freedom of contract and the right to property.[4]

To date, there exist a few judgments by the EU courts establishing under what circumstances a refusal to license may be abusive. These have concerned refusals by a dominant undertaking to license its own competitors on a downstream market. In other words, the dominant undertakings have been vertically integrated to the same market as the undertakings refused.[5] Simultaneously, it is not possible to exclude the occurrence also of refusals

[1] See Alison Jones, Brenda Sufrin, and Niamh Dunne, *Jones & Sufrin's EU Competition Law: Text, Cases, and Materials* (7th edn, Oxford University Press 2019), 279f.; David Bailey and Laura Elizabeth John, 'Article 102' in Bailey D, and John LE (eds), *Bellamy & Child: European Union Law of Competition* (8th edn, Oxford University Press 2018), 859ff.; Richard Whish and David Bailey, *Competition Law* (8th edn, Oxford University Press 2018), 180ff.; Van Bael & Bellis, *Competition Law of the European Union* (6th edn, Kluwer Law International 2021), 799ff.; Miguel de la Mano, Renato Nazzini, and Hans Zenger, 'Article 102' in Faull J. and Nikpay A. (eds), *Faull & Nikpay: the EU law of competition* (3rd edn, Oxford University Press 2014), 330ff.

[2] See Jones, Sufrin, and Dunne (n 1), 484ff.; Van Bael & Bellis (n 1), 833ff.; Mano, Nazzini, and Zenger (n 1), 463ff.

[3] See Joined cases C-241/91 P and C-242/91 P *RTE and ITP v Commission* (henceforth referred to as *Magill*), ECLI:EU:C:1995:98; Case C-418/01 *IMS Health*, ECLI:EU:C:2004:257; Case T-201/04 *Microsoft v Commission*, ECLI:EU:T:2007:289; see also Jones, Sufrin, and Dunne (n 1), 503ff.; Van Bael & Bellis (n 1), 552 and 841ff.; Mano, Nazzini, and Zenger (n 1), 465f.

[4] See Articles 16 and 17 the Charter; Case C-165/19 P *Slovak Telekom v Commission*, ECLI:EU:C:2021:239, para 46; Jones, Sufrin, and Dunne (n 1), 484; Mano, Nazzini, and Zenger (n 1), 463.

[5] See for that effect C-241/91 P and C-242/91 P *Magill* (n 3); C-418/01 *IMS* (n 3)*;* T-201/04 *Microsoft* (n 3); the apparent exception is Case T-504/93 *Tiercé Ladbroke v Commission*, ECLI:EU:T:1997:84 – in this case, the GC made some ambiguous statements about refusal to license, which are explored in section 3.3.3.

to license non-competitors. Generally, it should be economically rational to license non-competitors. However, in some cases a refusal to license might be rational, for instance to prevent unqualified actors or to limit internal competition.[6] Additionally, licensing may be related to several risks;[7] for instance, licensing a trade secret can increase the spread of the knowledge and thus the risk of leaks eliminating its protection.[8] Also, another aspect to consider is that market actors cannot reasonably be expected to invariably act economically rationally.[9]

While refusals to license non-competitors may occur, it is not evident whether the assessment should correspond to the established case law about refusal in relation to competitors.[10] Thus, an interest assumptively exists in clarifying the approach to refusal to license non-competitors, at least for the sake of legal certainty. This interest is particularly strong considering the severe consequences that a finding of abuse may entail.[11] For instance, in the situation of a refusal to license, the IPR holder may be obliged to grant a license, which restricts that holder's freedom of contract and right to property.[12]

---

[6] See Liyang Hou, 'Refusal to Deal within EU Competition Law' (June 11, 2010), available at SSRN <https://ssrn.com/abstract=1623784>, accessed September 3, 2021, 3.
[7] See Emile Loza and others, 'Financial Considerations in International Intellectual Property Licensing Transaction', (2006) 40(1) International Lawyer (ABA) 67, 71.
[8] See Maxim V. Tsotsorin, 'Practical Considerations in Trade Secret Licensing' (October 1, 2012), available at SSRN: https://ssrn.com/abstract=2334060> accessed September 3, 2021, 11f.
[9] Comp for instance Sebastien J. Evrard, 'Essential Facilities in the European Union: Bronner and Beyond', (2004) 10(3) Columbia Journal of European Law 491, 504 – here discussing case T-504/93 *Tiercé Ladbroke*.
[10] Comp T-504/93 *Tiercé Ladbroke* (n 5), paras 130–133 – here indicating that a refusal to license non-competitors is not comparable to a refusal to licensing competitors.
[11] See about fines articles 23(2)(a) Reg. 1/2003; Articles 13 to 15 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L 11/3; see about facilitation of damage claims Case C-453/99 *Courage and Crehan*, ECLI:EU:C:2001:465, paras 26–28; Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1; Jones, Sufrin, and Dunne (n 1), 1033ff.; comp Case C-547/16 *Gasorba and Others*, ECLI:EU:C:2017:891, para 29; article 16 Reg. 1/2003.
[12] See, for that effect, joined cases C-241/91 P and C-242/91 P Magill (n 3); C-418/01 *IMS* (n 3); T-201/04 *Microsoft* (n 3); see also David Bailey and Laura Eliazbeth John, 'Intellectual Property Rights', in Bailey D and John LE (eds), *Bellamy & Child: European Union Law of Competition* (8th edn, Oxford University Press 2018), 801f.

1.2 Purpose and Research Question

The purpose is to illuminate the assessment under article 102 TFEU of abusive refusals by dominant undertakings to license IPRs. On this backdrop, the following research questions have been formulated:

1. The main question is under what requirements a refusal to license non-competitors may be abusive. Additionally, the following sub-questions are answered:
2. What are the requirements for declaring a refusal to license abusive under present case law and may the same approach be applied to refusals in relation to competitors and non-competitors alike?
3. If the approach to refusal to license non-competitors differs from that in relation to own competitors, may a refusal in the prior scenario be abusive at all?

1.3 Methodology and Material

As implied by the purpose and research questions, this thesis pursues a descriptive function. Therefore, a legal dogmatic (doctrinal) method is adopted.[13] Following the method, this thesis is limited to an internal perspective of the law; the thesis interprets and systemises the existing law with the legal system as a theoretical framework, to divulge de lege lata.[14] To ensure transparency – and to facilitate scrutiny of and the possibility to

[13] See about the legal dogmatic method pursuing a descriptive function Jan M. Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' in van Gestel R., Micklitz H., and Rubin E.L., *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press, 2017), 213ff. and 219ff.

[14] See about the legal dogmatic method Aleksander Peczenik, 'A Theory of Legal Doctrine' (2001) 14(1) Ratio Juris 75, 75f., 79f. and 82ff.; Pauline C. Westerman, 'Open or Autonomous: The Debate on Legal Methodology as a Reflection of the Debate on Law' (October 30, 2009), available at SSRN: <https://ssrn.com/abstract=1609575>, accessed August 30, 2021, 90 and 94 f.; Jan Kleinman, 'Rättsdogmatisk metod' in Nääv M., and Zamboni M. (eds), Juridisk Metodlära (2nd edn, Studentlitreratur AB, 2018), 21ff.; Smits (n 13), 210 ff.

recreate the conclusions in the thesis – this section describes the relevant legal system, including the relevant legal sources and interpretative methods.[15]

Firstly, the relevant legal system for the present thesis is that of EU law, and specifically EU competition law and EU intellectual property law. For this system, the relevant legal sources can be divided into laws – hard law and soft law – and supplementary sources.[16] Hard law covers primary and secondary law. Primary law holds the highest authority and is composed of the treaties and the Charter;[17] these sources are complemented by general principles of EU law.[18] Thereinafter follows secondary law which, expressed in hierarchical order, includes legislative, delegated, and implementing acts.[19] In contrast to hard law, soft law is in principle not binding;[20] exception-wise, soft law compliant with binding EU law may, because of the principles of equal treatment and legitimate expectations, bind the issuing institution.[21] Supplementary sources, including case law, opinions of AGs, legal literature, and travaux préparatoires, resemble soft law by not being formally binding. Still, non-binding soft law and supplementary sources, alike, may influence the understanding of existing law by being logical, nuancing, and

[15] See about recreation of results Nils Jansen, 'Making Doctrine for European Law' in van Gestel R., Micklitz H., and Rubin E.L., *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press, 2017), 234.; see about importance of outlining sources and interpretative methods Smits (n 13), 223ff.; Kleinman (n 14), 29ff.
[16] See about that division Eurlex, 'Sources of European Union Law', available at: < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l14534>, accessed August 31, 2021; see also, for section 1.3 in full, my earlier thesis where I similarly describe EU law Joar Lindén, 'Restriction By Object: A Restriction Based Purely on Experience or Also on Effects?' (LUB Student Papers, 2021), 10ff.
[17] See Paul Craig and Gráinne De Burca, *EU law: Text, Cases and Materials* (7th edn, Oxford University Press 2020), 141f.; Article 1 subparagraph 3 and Article 6(1) TEU; Article 263 TFEU; Jörgen Hettne and Ida Otken Eriksson (ed), EU-rättslig Metod: Teori och Genomslag i Svensk Rättstillämpning (2nd edn, Norstedts juridik 2011), 42f.
[18] See Craig and De Burca (n 17), 142ff.; Hettne and Eriksson (n 17), 73f.; Eurlex, 'Glossary of summaries: European Union (EU) Hierarchy of norms', available at: < https://eur-lex.europa.eu/summary/glossary/norms_hierarchy.html>, accessed August 31, 2021.
[19] See Craig and De Burca (n 17), 144ff.; Articles 288–291 TFEU.
[20] See Article 288 subparagraph 4 TFEU; Craig and De Burca (n 17), 140; Jones, Sufrin, and Dunne (n 1), 93f.
[21] See joined cases C-189/02, 202/02, 208/02, and 213/02 P *Dansk Rørindustri and Others v Commission*, ECLI:EU:C:2005:408, para 212; Jones, Sufrin, and Dunne (n 1), 94; Case C-226/11 *Expedia*, ECLI:EU:C:2012:795, para 38; Craig and De Burca (n 17), 594.

convincing.[22] Case law of the CJEU is particularly important; the CJEU is the ultimate interpreter of EU law and the judgments have developed into de facto precedents.[23]

Secondly, to fulfil the legal doctrinal method, the relevant legal sources should be used in accordance with the relevant interpretative methods.[24] For EU law, these are textual, contextual, and teleological interpretation.[25] Textual interpretation protects legal certainty but is problematic in EU law because of broad treaty formulations and the principle of linguistic equality.[26] Contextual interpretation seeks legal coherence and consistency; conflicts or duplications of norms should be avoided for ensuring harmony and efficiency in the legal system.[27] Teleological (i.e. purposive) interpretation serves a threefold function of facilitating effectiveness towards the objective pursued, preventing unreasonable consequences of laws, and filling gaps by remedying legal ambiguity and incompleteness.[28] To sum up, all three interpretative

[22] Comp Hettne and Eriksson (n 17), 113ff. – explain that, like other guiding (non-binding) sources, "a good travaux préparatoires that in a logical and convincing manner divulge the legislators intent deserves to work as a guiding source" (my own translation); comp about travaux préparatoires Koen Lenaerts and Jose A. Gutierrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2014) 20(2) Columbia Journal of European Law 3, 23ff.

[23] See about the interpreter of EU law Article 19(1) TEU – "It shall ensure that in the interpretation and application of the Treaties the law is observed"; see about de facto precedents Craig and De Burca (n 17), 530 and 537; joined cases C-46/93 and C-48/93 *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others*, ECLI:EU:C:1996:79, para 57; Case 283/81 *CILFIT v Ministero della Sanità*, ECLI:EU:C:1982:335, para 14; joined cases 28 to 30/62 *Da Costa en Schaake NV and Others v Administratie der Belastingen*, ECLI:EU:C:1963:6, 38.

[24] See about interpretative methods being important Kleinman (n 14), 29ff.; see, for my elaboration on interpretation under EU law in a previous work, Lindén (n 16), 11f.

[25] See Case 337/82 *St. Nikolaus Brennerei und Likörfabrik v Hauptzollamt Krefeld*, ECLI:EU:C:1984:69, para 10 – held that, for interpreting a provision, "it is necessary […] to consider its wording, its context and its aims."; Case 283/81 *CILFIT* (n 23), paras 16–20; David Bailey and Laura Elizabeth John, 'Competition Law and Policy in the EU' in Bailey D, and John LE (eds), *Bellamy & Child: European Union Law of Competition* (8th edn, Oxford University Press 2018), 10; Lionel Bently and others, *Intellectual property law* (5th edn, Oxford University Press 2018), 23ff.; Lenaerts and Gutiérrez-Fonz (n 22), 3ff.; Hettne and Eriksson (n 17), 159.

[26] See Lenaerts and Gutierrez-Fons (n 22), 8ff.; Case 283/81 *CILFIT* (n 23), para 18 – bringing up as an issue for textual interpretation that "Community legislation is drafted in several languages and that the different language versions are all equally authentic."; Hettne and Eriksson (n 17), 160f.

[27] See Lenaerts and Gutierrez-Fons (n 22), 17; Wolf Sauter, *Coherence in EU Competition Law* (Oxford University Press 2016), 15.

[28] See Hettne and Eriksson (n 17), 168f.; Lenaerts and Gutierrez-Fons (n 22), 32.

methods are complementary; for instance, a textual understanding should be measured against and may be adjusted because of contextual and teleological rationales.[29] On this backdrop, the court has expressed that preference should be given to the alternative interpretation that best ensures efficiency of a relevant provision, having regard to its context.[30]

Lastly, the above considerations may be complemented for EU competition law in specific. Competition law is concerned with market failures – that is, economic phenomena. Thus, while not necessarily being a source of law, economic theory constitutes a tool for legal argumentation, interpretation, and assessment.[31] Therefore, this thesis elaborates on economic theory while divulging de lege lata.

1.4 Delimitations

Firstly, this thesis is limited to interpreting EU law. EU law is an autonomous legal order with primacy over national law.[32] Translated to competition law, national law must in principle not allow conduct prohibited by article 101 or 102 TFEU.[33] A peculiarity for article 102 TFEU, however, is that national law may prohibit a wider scope of conduct, provided compliance with other EU laws.[34]

[29] Comp Lenaerts and Gutierrez-Fons (n 22), 3ff. and 61; Case 283/81 *CILFIT* (n 23), para 20; Bently and others (n 25), 23 – here explaining that contextual and teleological interpretation "has, on occasions, allowed the Court to interpret a word as meaning its apparent opposite"; Case C-292/00 *Davidoff*, ECLI:EU:C:2003:9, paras 24–30 – interpreting dissimilar as including also similar.
[30] See Case C-434/97 *Commission v France*, ECLI:EU:C:2000:98, para 21; Lenaerts and Gutierrez-Fons (n 22), 20; Peczenik (n 14), 82.
[31] See Bailey and John, 'Competition Law and Policy in the EU' (n 25), 11ff.; Jones, Sufrin, and Dunne (n 1), 56; Luc Peeperkorn and Vincent Verouden, 'The Economics of Competition' in Faull J. and Nikpay A. (eds), *Faull & Nikpay: the EU law of competition* (3rd edn, Oxford University Press 2014), 4; Hettne and Eriksson (n 17), 132.
[32] See Case C-6/64 *Costa v E.N.E.L.*, ECLI:EU:C:1964:66, 594; Bently and others (n 25), 23; Craig and De Burca (n 17), 303ff.; Case Opinion 2/13 *Accession of the European Union to the ECHR*, ECLI:EU:C:2014:2454, paras 157 and 166.
[33] See Article 3 Reg. 1/2003.
[34] See Article 3 Reg. 1/2003 – read especially Article 3(2) a contrario for discovering the allowance of more strict prohibitions than article 102 TFEU imposes; Jones, Sufrin, and Dunne (n 1), 1011f.

Secondly, this thesis is limited to assessing when a refusal as such is abusive. This means that the thesis does not examine abuses that are either unrelated to a refusal or that may be related to a refusal but are caused by circumstances other than the refusal per se, such as discriminatory abuse or margin squeeze.[35]

Thirdly, this thesis is limited to the definition of abuse by refusal to license under article 102 TFEU. It does neither consider procedural requirements nor other additional requirements for establishing abuse of dominance. With other additional requirements, I address the requirements that the defendant must be an undertaking with a dominant position on a substantial part of the internal market and that the abuse must affect trade between member states.[36]

Fourthly, this thesis does not explore objective justifications. Instead, the thesis only examines whether a prima facie abuse in need of an objective justification exists. Even if the requirements for a conduct to be prima facie abusive are met, it is additionally required for ultimately establishing an abuse that the conduct is not objectively justified.[37] If justified, there is no abuse of dominance, to begin with, meaning that the approach under article 102 TFEU can be described in terms of a rule of reason.[38] Simultaneously, the approach is similar to that under article 101 TFEU, which is not based on a rule of

[35] See, for further definition of refusal, section 2.1; see for further discussion on the delimitation between different types of abuses sections 3.1.6 and 3.3.2.1.
[36] See for the requirements Jones, Sufrin, and Dunne (n 1), 279 and 283ff.
[37] See about refusal to license T-201/04 *Microsoft* (n 3), para 333; C-418/01 *IMS* (n 3), para 38; joined cases C-241/91 P and C-242/91 P Magill (n 3), para 55; see analogously about refusal to supply joined cases C-468/06 to C-478/06 *Sot. Lelos Kai*, ECLI:EU:C:2008:504, para 39; Case 27/76 *United Brands v Commission*, ECLI:EU:C:1978:22, para 184; Case C-7/97 *Bronner*, ECLI:EU:C:1998:569, para 41.
[38] See Suzanne Kingston, 'Joined Cases C-468/06 to C-478/06, Sot. Lelos kai Sia EE, Farmakemporiki AE Emporias kai Dianomis Farmakeftikon Proionton and Others v. GlaxoSmithKline AEVE Farmakeftiko', (2009) 46(2) Common Market Law Review 683, 697 – here, the author describes the approach under article 102 as a "single-stage analysis" considering justification as a part in establishing an abuse rather than separately legitimising it; Tu Nguyen, Timo Minssen, and Xavier Groussot, 'The Rule of Reason under Article 82 EC after Sot Lelos Kai Sia' in in Lidgard H.H. (ed), *National Developments in the Intersection of IPR and Competition Law: From Maglite to Pirate Bay*, (Hart Publishing 2011), 283ff.; Hans Henrik Lidgard, 'Application of Article 82 EC to abusive exclusionary conduct – Refusal to supply or to license' (2009) 4 Europarättslig tidskrift 694, 706 and in particular footnote 67.

reason;[39] first it is for the responsible competition authority to prove a prima facie abuse[40] and only subsequently it falls on the defendant to prove a justification.[41] The similarity is increased since a central type of justification under article 102 TFEU – the efficiency defence – mainly corresponds to article 101(3) TFEU.[42] However, in terms of justification, there exist two anomalies under article 102; in addition to the efficiency defence, the defendant can claim either so-called objective necessity[43] or protection of its own commercial interest.[44] Examining objective justification may complement, but is not necessary for, this thesis.

1.5 Outline

Chapter 2 provides a general foundation, or context, for the remainder of the thesis. It explores the concept of refusal (section 2.1), the scope and purpose of intellectual property rights (section 2.2), and the objectives of competition

[39] See about article 101(1) and 101(3) TFEU being separated case C-382/12 P *MasterCard and Others v Commission*, ECLI:EU:C:2014:2201, para 93; case C-307/18 *Generics (UK) and Others*, ECLI:EU:C:2020:52, para 104; Case T-208/13 *Portugal Telecom v Commission*, ECLI:EU:T:2016:368, para 102.
[40] See Article 2, Reg. 1/2003.
[41] See T-201/04 *Microsoft* (n 3), para 688; Lidgard (n 38), 699; Wolfgang Kerber and Claudia Schmidt, 'Microsoft, Refusal to License Intellectual Property Rights, and the Incentives Balance Test of the EU Commission' (8 November 2008), available at SSRN: <https://ssrn.com/abstract=1297939>, accessed September 7, 2021, 15; Jones, Sufrin, and Dunne (n 1), 386 f.; Article 102 Guidelines, para 31; see analogously about Article 101(3) TFEU in Article 2 Reg. 1/2003.
[42] See about efficiency defence under article 102 TFEU case C-209/10 *Post Danmark* (henceforth referred to as *Post Danmark I)*, ECLI:EU:C:2012:172, para 41 and 42; case C-95/04 P *British Airways v Commission*, ECLI:EU:C:2007:166, para 86; case C-52/09 *TeliaSonera Sverige*, ECLI:EU:C:2011:83, para 76; Jones, Sufrin, and Dunne (n 1), 385f.; Article 102 Guidelines, para 30; see also about article 101(3) TFEU Jones, Sufrin, and Dunne (n 1), 261ff.; see about the efficiency defence for refusal to license possibly being limited to weighing only dynamic efficiencies T-201/04 *Microsoft* (n 3), paras 704–710; Simonetta Vezzoso 'The Incentives Balance Test in the EU Microsoft Case: A More 'Economics-Based' Approach?' (March 13, 2009), available at SSRN: <https://ssrn.com/abstract=1358924>, accessed September 7, 2021; Kerber and Schmidt (n 41); Jones, Sufrin, and Dunne (n 1), 518.
[43] See Case 311/84 *CBEM v CLT and IPB*, ECLI:EU:C:1985:394; C-209/10 *Post Danmark I* (n 42), para 41; Jones, Sufrin, and Dunne (n 1), 383ff.; Article 102 Guidelines, para 29; compare, however, about a more unclearly defined but possibly analogous exception from article 101(1) TFEU C-309/99 *Wouters and Others*, ECLI:EU:C:2002:98, para 97.
[44] See Case 27/76 *United Brands* (n 37), paras 189 and 190; joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37), paras 40 and 50; C-457/10 P *AstraZeneca v Commisson*, ECLI:EU:C:2012:770, paras 134 and 149; C-307/18 *Generics* (n 39), para 149; Jones, Sufrin, and Dunne (n 1), 388f.

law (section 2.3). On this backdrop, the chapter ends in an examination of the general relation between intellectual property law (henceforth abbreviated "IP law") and competition law (section 2.4).

While chapter 2 establishes a general foundation for the relationship between competition law and IP law, chapter 3 constitutes the central part of the thesis, probing into the assessment of refusal to license under article 102 TFEU.

Section 3.1 establishes a foundation for understanding refusal to license. In that section, I explore the conditions for finding a refusal to license to be abusive, based on existing case law about refusal to licence own competitors (sections 3.1.2 to 3.1.5). I conclude section 3.1 by explaining whether the approach to refusal to license competitors and supply competitors, respectively, are essentially homogeneous, and whether the conditions discerned should be understood as exhaustive (section 3.1.6).

In section 3.2, I examine whether refusal to license should be divided into different types of abuses. Firstly, I reason that there should be no distinction between refusals in relation to new and existing customers, respectively (section 3.2.2 and 3.2.3). Secondly, I explore whether there are, instead, reasons to distinguish between refusals in relation to own competitors and non-competitors (section 3.2.4).

Section 3.3 aims at divulging the approach under article 102 TFEU to refusals in relation to non-competitors, premised on a distinction against refusals in relation to competitors. The section comprises two main parts. First, and because of the similarities between refusal to supply and refusal to license, section 3.3.2 explores refusal to supply non-competitors. Subsequently, I elaborate on refusal to license non-competitors, examining whether it may be abusive at all and, if so, under what requirements (section 3.3.3).

I conclude the thesis by a pervasive and summarising analysis in chapter 4.

2 Concepts and Contextualisation

2.1 Refusal – What it is

This thesis concerns abuse of dominance by refusal to license IPRs. In general, it appears suitable to know what constitutes a refusal and an IPR, respectively, and to have a general understanding of IP law and competition law and their interrelation. This section discerns what may constitute a refusal, while IPRs, IP law and competition law are explained in the following sections of this chapter.

The concept of a refusal may be described by two general distinctions. Firstly, a refusal may be either total[45] or partial.[46] Secondly, a refusal may be either actual (in other words, outright or express) or constructive (in other words, implicit or de facto).[47] While total, partial, and actual refusals are easily understood, constructive refusals merit further remark.

The inclusion of constructive refusals appears sensible; a dominant undertaking could otherwise circumvent the concept of refusal by, instead of a straightforward express refusal of access to the disputed resource, requiring sufficiently unreasonable conditions for access as to achieve the same result. Importantly, for a refusal to arise, it is insufficient that access is granted on unfair terms – a constructive refusal could arise only if the conditions offered

[45] See for that effect e.g. C-418/01 *IMS* (n 3); joined cases C-241/91 P and C-242/91 P Magill (n 3); C-7/97 *Bronner* (n 37).
[46] See for that effect e.g. joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37).
[47] See about actual and constructive refusals Jones, Sufrin, and Dunne (n 1), 494 f.; Whish and Bailey (n 1), 716; *Telekomunikacja Polska* (Case COMP/39.525) Commission decision C(2011) 4378 final [2011], 803 (upheld on appeal in T-486/11 *Orange Polska v Commission*, ECLI:EU:T:2015:1002, and C-123/16 P *Orange Polska v Commission*, ECLI:EU:C:2018:590; Article 102 Guidelines, para 79 – it is not necessary for there to be actual refusal on the part of a dominant undertaking; 'constructive refusal' is sufficient.; Bailey and John, 'Article 102' (n 1), 953; European Commission, in OECD (2007) *Refusal to deal* (DAF/COMP(2007)46) 201, 203.

are such that they cannot be accepted.[48] Beyond being semantically sensible,[49] this strict understanding of a refusal is legally contextually rational. If access is granted, the holder of the resource is less worthy of protection as having waived its right to refuse access – a right that follows jointly from the freedom of contract and right to (intellectual) property.[50] Namely, the CJ has spelt out that actual granting of access albeit on unfair conditions "cannot be equated to a simple refusal to allow a competitor access to the infrastructure, since the competent competition authority or national court will not have to force the dominant undertaking to give access to its infrastructure, as that access has already been granted."[51] Consequently, a conduct which in itself causes access not to be granted may constitute a refusal; yet, arguably, the assessment is objective – for instance, a reasonable offer should not constitute a refusal irrespective of whether it is accepted by another undertaking or not.[52]

[48] See Whish and Bailey (n 1), 716; C-165/19 P *Slovak Telekom* (n 4), para 51.
[49] See, for definition of refuse, Merriam-Webster, 'Refuse', available at: https://www.merriam-webster.com/dictionary/refuse, accessed September 12, 2021 – "to not allow someone to have or do (something)".
[50] See about the rights Articles 16 and 17 the Charter; see about the rights and the varying degree of interference with fundamental rights C-165/19 P *Slovak Telekom* (n 4) para 46 and 51—at paragraph 46 explaining that, based on the freedom of contract and right to property, "an undertaking, even if dominant, remains, in principle, free to refuse to conclude contracts and to use the infrastructure it has developed for its own needs".
[51] See C-165/19 P *Slovak Telekom* (n 4), para 51; see for further elaboration about this distinction section 3.1.6 and n 321–324 and text thereto.
[52] Comp Whish and Bailey (n 1), 716 – describing constructive refusals as including the making of "an offer you cannot accept"; Article 102 Guidelines, para 79 – describing constructive refusal in objective terms as including conduct "unduly delaying or otherwise degrading the supply of the product or involve the imposition of unreasonable conditions in return for the supply."; see in general about abuse being an objective concept Case 85/76 *Hoffmann-La Roche v Commission*, ECLI:EU:C:1979:36, para 91; C-549/10 P *Tomra and Others v Commission*, ECLI:EU:C:2012:221, para 17; Jones, Sufrin, and Dunne (n 1), 370; See case T-612/17 *Google and Alphabet v Commission (Google Shopping)*, ECLI:EU:T:2021:763, para 234–336.

2.2 Intellectual Property Law

2.2.1 Scope of Intellectual Property Rights

EU law unquestionably recognises patents, trademarks, design rights, and copyrights as IPRs.[53] Additionally, some less prominent forms of IPRs exist under EU law, such as a sui generis protection for databases and software, and broadcaster rights.[54] Less certain, however, is how to classify trade secrets. The EU is, like all the member states of the EU, a party to the TRIPS agreement, which recognise undisclosed information, i.e. trade secrets, as an intellectual property right.[55] Consequential would thus be if trade secrets were considered IPRs under EU law.[56] However, the classification of trade secrets within the EU appears not to be consequential to TRIPS. Namely, the EU legislature has described trade secrets as a "complement or as an alternative to intellectual property rights"[57] for protecting the results, or rather expressions, of "innovation-related activities".[58] It appears that trade secrets, as mere undivulged ideas or information, differ from IPRs by not being considered to constitute property and by not conferring an exclusive right to the expression.[59] Thus, while IPRs directly protect the expression of an idea,

[53] See Jones, Sufrin, and Dunne (n 1), 811f.; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Making the most of the EU's innovative potential An intellectual property action plan to support the EU's recovery and resilience' (COM/2020/760 final), 1; Trade Secret Directive, recital 1; comp Bently and others (n 25), 2.
[54] See Jones, Sufrin, and Dunne (n 1), 812; Martin Husovec, ''The Essence of Intellectual Property Rights Under Article 17(2) of the EU Charter' (2019) 20(6) German Law Journal, 840, 841.
[55] See Article 1(2) TRIPS in relation to Article 39 TRIPS; Council Decision 94/800/EC of 22 December 2014 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) [1994] OJ L 336/1; Trade Secret Directive, recital 5.
[56] See in favour of that e.g. Gill Grassie, 'Trade Secrets: the new EU Enforcement regime', (2014) 9(8) Journal of Intellectual Property Law & Practice 677, 677.
[57] See Trade Secret Directive, recital 2; comp Bently and others (n 25), 1213.
[58] See Trade Secret Directive, Recital 1; Rambert Niebel, Lorenzo de Martinis, and Birgit Clark, 'The EU Trade Secrets Directive: all change for trade secret protection in Europe?' (2018) 13(6) Journal of Intellectual Property Law & Practice 445, 447.
[59] See Niebel, de Martinis, and Clark (n 58), 447f.; Grassie (n 56), 678; Bently and others (n 25), 1213.

trade secrets protect the idea (or rather the secrecy of the idea) and merely indirectly the expression of it.[60]

Despite this approach, the GC declared in *Microsoft* that the protocols, access to which were at dispute, "are covered by intellectual property rights or constitute trade secrets and that those secrets must be treated as equivalent to intellectual property rights."[61] This appears sensible. While trade secrets are not undisputedly worthy of protection, at least not as strong as for IPRs,[62] it would appear strange to invariably allow refusal to share trade secrets while prohibiting certain refusal to license IPRs. Simultaneously, trade secrets appear entitled to similar protection as IPRs under EU law, which justifies a similar approach to compulsory sharing.[63] Consequently, in the following presentation, what is said about IPRs and refusal to license applies equally to trade secrets, unless otherwise is explicated.

2.2.2 Purpose of Intellectual Property Rights

IPRs could be considered to ensure the moral or deontological right of innovators to their creations – the personal relation between creator and creation.[64] However, the most prominent purpose appears to be economic[65] and features both an individual and a utilitarian dimension. Individually, exclusive rights to intellectual creations allow the creators to harvest the fruits

[60] See Charlotte Waelde and others, *Contemporary Intellectual Property: Law and Policy* (4th edn, Oxford University Press 2016), 805.
[61] See T-201/04 *Microsoft* (n 3), para 289.
[62] See Trade Secret Directive, recital 6–9; Bently and others (n 25), 2.
[63] See Article 39 TRIPS; Trade Secret Directive; Case C-450/06 *Varec*, ECLI:EU:C:2008:91, para 49; Case C-1/11 *Interseroh Scrap and Metals Trading*, ECLI:EU:C:2012:194, para 43; T-201/04 *Microsoft* (n 3), para 289.
[64] See Husovec (n 54), 842f.; Peter Chrocziel and Wolrad Prinz zu Waldeck und Pyrmont, 'Introduction', in Prinz zu Waldeck und Pyrmont W., Lorenz M., and Chrocziel P., *Intellectual property and Competition Law* (Kluwer Law International, 2016), 4.; Waelde and others (n 60), 7; Justine Pila and Paul Torremans, *European Intellectual Property Law*, (2nd edn, Oxford University Press, 2019), 19.
[65] See Husovec (n 54), 843 – "the economic function of intellectual property is key in explaining why it exists."

of their labour,[66] including by receiving a reasonable compensation for licensing it.[67] Utilitarianly, exclusive rights may, firstly, incentivise innovation by preventing innovative activities from becoming economically unjustified – while innovative activity may be risky and costly, the results might be effortlessly copied.[68] Secondly, those rights, and in particular trademarks, may serve a communicative function, promoting consumer information.[69] These dimensions appear practically interrelated; the value of an intellectual property right typically rises with its reputation and distinction and the demand for its results (i.e. its usefulness), creating an incentive to innovate utilitarianly to reap the finest fruits.[70] In other words, IP law may facilitate the development of the market in the interest of the public, by

[66] See eg case C-92/92 *Collins and Patricia Im- und Export v Imtrat and EMI Electrola*, ECLI:EU:C:1993:847, para 20; C-469/17 *Funke Medien NRW*, ECLI:EU:C:2019:623, opinion of AG Szpunar, ECLI:EU:C:2018:870, para 38; Husovec (n 54), 842f; Bently and others (n 25), 5; Enforcement Directive, recital 2; Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L 77/20, Article 7(1).

[67] See joined cases C-403/08 and C-429/08 *Football Association Premier League and Others*, ECLI:EU:C:2011:631, para 107–109.

[68] See eg Case C-200/96 *Metronome Musik v Music Point Hokamp*, ECLI:EU:C:1998:172, para 24; Bently and others (n 25), 5f.; Chrocziel and Prinz zu Waldeck und Pyrmont, 'Introduction' (n 64), 4 f.; Waelde and others (n 60), 7; Husovec (n 54), 842f.; Enforcement Directive, recital 1 and 3.

[69] See case C-412/05 P *Alcon v OHIM*, ECLI:EU:C:2007:252, para 54; case C-48/09 P *Lego Juris v OHIM*, ECLI:EU:C:2010:516, para 38; Husovec (n 54), 843; Waelde and others (n 60), 560ff.; Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks [2015] OJ L 336/1, recital 31–32.

[70] See Marije Borghart, 'An Antitrust Perspective', in Lidgard H.H. and Atik J. (eds), *The intersection between IPR and competition law: A study of recent developments in U.S. and European law*, (Intellecta docysus 2008), 27 – here the author describes that "IPRs stimulate innovation by protecting inventors"; Patrick Wildgen, 'A Law And Economics Perspective', in Lidgard H.H. and Atik J. (eds), *The intersection between IPR and competition law: A study of recent developments in U.S. and European law*, (Intellecta docysus 2008), 55 – here expressing that the purpose of IPRs "is to incite investors to take risks and invest in innovation by providing them with a prospect of getting some return."; see similarly expressed in joined cases C-241/91 P and C-242/91 P *Magill* (n 3), opinion of AG Gulmann, ECLI:EU:C:1994:210, paras 34–37; Comp C-403/08 and C-429/08 *Premier league* (n 67), para 107–109 – describing a reasonable remuneration as interrelated with demand; Technology Transfer Guidelines, para 8; Waelde and others (n 60), 561 – describing trademarks as an investment; comp however Chrocziel and Prinz zu Waldeck und Pyrmont, 'Introduction' (n 64), 4f. – the authors indicate that they believe the individual right to a reward and the utilitarianly most effective reward not to necessarily coincide; Pila and Torremans (n 64), 588 – writing that "[o]nly when the market appreciates the innovation on its merits will the owner be rewarded and make a profit".

making innovative activities economically attractive for individual undertakings.[71]

2.3 Objectives of Competition Law

Article 101 and article 102 TFEU pursue the same objective.[72] What that objective is, however, is not uncontested. Opinions in literature are divided; does competition law pursue one sole objective – consumer welfare – or also additional objectives, such as protection of competitors, market integration, or public policy considerations?[73]

Contemplating case law, it appears tenable that consumer welfare constitutes the sole ultimate objective of competition law,[74] while public policy is not an objective at all.[75] Consumer welfare can be pursued not only directly but also

[71] See eg C-7/97 *Bronner* (n 37), opinion of AG Jacobs, ECLI:EU:C:1998:264, para 62; Case C-152/19 P *Deutsche Telekom v Commission*, ECLI:EU:C:2021:238, opinion of AG Saugmandsgaard ØE, ECLI:EU:C:2020:678, para 77; Article 7 TRIPS; see about incentive to invest in general (not only IPRs) C-165/19 P *Slovak Telekom* (n 4), para 47; see also about the functioning of IP law Valentine Korah, 'Patents and Antitrust', in OECD (1997), *Competition Policy and Intellectual Property Rights* (DAFFE/CLP(98)18) 375, 383 – "The purpose of patent and copyright law is to enable those devoting resources to innovation to obtain a reward as an incentive to creative activity."; Ariel Ezrachi and Mariateresa Maggiolino,'European Competition Law, Compulsory Licensing, and Innovation', (2012) 8(3) Journal of Competition Law and Economics 595, 598; see also Mariateresa Maggiolino, *Intellectual property and antitrust : a comparative economic analysis of US and EU law*, (Edvard Elgar Publishing 2011), 31–34; Pila and Torremans (n 64), 22 – "the idea emerges of IP as promoting individual and collective rights and interests simultaneously".

[72] See Case 6/72 *Europemballage Corporation and Continental Can Company v Commission*, ECLI:EU:C:1973:22, para 25; Jones, Sufrin, and Dunne (n 1), 42.

[73] See Ioannis Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' (January 1, 2013), CLES Working Paper Series 3/2013, available at SSRN: https://ssrn.com/abstract=2235875, accessed August 30, 2021, 3f.; Konstantinos Stylianou and Marios Iacovides, 'The Goals of EU Competition Law - A Comprehensive Empirical Investigation' (December 4, 2020), available at <SSRN:https://ssrn.com/abstract=3735795>, accessed August 30 , 2021, 5 and 13; Jones, Sufrin, and Dunne (n 1), 42ff.

[74] See Case 6/72 *Continental Can* (n 72), para 25; C-52/09 *TeliaSonera* (n 42), para 24; joined cases T-213/01 to 214/01 *Österreichische Postsparkasse v Commission*, ECLI:EU:T:2006:151, para 115; C-413/14 P *Intel v Commission*, *ECLI:EU:C:2017:632*, opinion of AG Wahl, ECLI:EU:C:2016:788, para 42; see also Article 101(3) Guidelines, para 13; Article 102 Guidelines, para 5.

[75] See Jones, Sufrin, and Dunne (n 1), 50f.

indirectly, through the protection of effective competition;[76] effective competition may entail inter alia lower prices, product diversity, better quality, and innovation.[77] Thus, effective competition may be construed as an intermediary objective.[78] Additionally, market integration and protection of competitors may be described as intermediary objectives, because of their relation to effective competition. Firstly, limiting integration between two markets, such as by restricting parallel trade, may artificially partition those markets and thus limit competition between them.[79] Secondly, protection of competitors is possible to equalise with the protection of fair competition; undertakings have a negative right to equal opportunities to compete on the merits. However, nothing prevents undertakings from eliminating each other through competition on the merits.[80] It follows that both market integration and protection of competitors comes back to effective competition on the merits, which in turn comes back to consumer welfare.

Since effective competition, leading to consumer welfare, is essential for competition law, one may wonder what effective competition is. Firstly, effective competition includes both static and dynamic competition.[81] Static competition pursues efficiency in a set moment (static efficiencies), including allocative and productive efficiency.[82] Differently, dynamic competition

[76] See Case 6/72 *Continental Can* (n 72), para 12 and 26; C-52/09 *TeliaSonera* (n 42), para 24; see also about protecting undistorted competition as being the main objective C-194/14 *AC-Treuhand v Commission*, ECLI:EU:C:2015:717, para 36.
[77] See Article 102 Guidelines, paras 5 and 6; Article 101(3) Guidelines, paras 16 and 105.
[78] See Jones, Sufrin, and Dunne (n 1), 27 – "Effective competition is therefore the means to an end, not the end itself."
[79] See, to that effect, joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37), para 33–38 – the case also exemplifies that a restriction of market integration is not prohibited per se but necessitates that there is a restriction on competition that is not justified; Case 27/76 *United Brands* (n 37), paras 228–234; comp Nguyen, Minssen, and Groussot (n 38) – about joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* and the rule of reason.
[80] See C-413/14 P *Intel* (n 74), paras 133 and 134; C-413/14 P *Intel* (n 74), opinion of AG Wahl (n 74), para 41; C-209/10 *Post Danmark I* (n 42), paras 21 and 22; see also Alfonso Lamadrid de Pablo, 'Competition Law as Fairness', (2017) 8/3) Journal of European Competition Law & Practice 147, 147f.;
[81] See C-7/97 *Bronner* (n 37), opinion of AG Jacobs (n 71), para 57; Jones, Sufrin, and Dunne (n 1), 8 and 271; Article 101(3) Guidelines, para 105; Article 102 Guidelines, para 30; Gunnar Niels, Helen Jenkins, and James Kavanagh, *Economics for competition lawyers* (2nd edn, Oxford University Press 2016), 147ff.; Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* (Routledge, 1994), 85.
[82] See Jones, Sufrin, and Dunne (n 1), 8.

pursues the development of markets through innovation (dynamic efficiency), capable of increasing the maximal static efficiency over time.[83] Secondly, effective competition may be distinguished from perfect competition. In perfect competition, productive and allocative efficiency is maximised,[84] which in principle is unrealistic and leaves no room for dynamic competition.[85] It follows that effective competition should be understood as a reasonable (attainable) degree of competition,[86] that strikes a balance between static and dynamic efficiencies.[87]

2.4 Relation Between Intellectual Property Law and Competition Law

Undisputedly, a conflict appears to exist between IP law and competition law. While IP law provides exclusive rights, competition law aims at enhancing competitiveness;[88] it is recognised that the prior may contradict the latter.[89] Consequently, it appears necessary to strike a fair balance between the legal areas, since they are protected under hierarchically equivalent legal sources.[90]

---

[83] See Maggiolino (n 71), 12 – describing dynamic efficiency as a measurement of "the rate of innovation"; Jones, Sufrin, and Dunne (n 1), 8.
[84] See Niels, Jenkins, and Kavanagh (n 81), 12; Jones, Sufrin, and Dunne (n 1), 7f.; See Simon Bishop and Mike Walter, *The Economics of EC Competition Law: concepts, application and measurement*, (Simon & Maxwell, 2010), 22ff.
[85] See Niels, Jenkins, and Kavanagh (n 81), 15 – "hardly any real-world market is perfectly competitive"; Maggiolino (n 71), 14 – "no firm would fight in order to smite its rivals via innovation if markets could not move from perfect competition to monopoly regimes."; Bishop and Walter (n 84), 31f. – about dynamic efficiency.
[86] See Bishop and Walter (n 84), 20f.– on page 21 writing that competition law is interested in "outcomes that are feasible for regulatory intervention to achieve"; see, to the effect of a limitation of competition not eliminating effective competition, case T-712/14 *CEAHR v Commission* ECLI:EU:T:2017:748, paras 104–118.
[87] See, for that effect, C-165/19 P *Slovak Telekom* (n 4), para 47; compare Bishop and Walter (n 84), 31f. and 50 – at page 50 stating that "assessing whether a market is effectively competitive or not requires an analysis of […] whether intervention is unlikely to increase consumer welfare taking into account both static and dynamic considerations."
[88] See Alison Jones and Renato Nazzini, 'The Effect of Competition Law on Patent Remedies' in Bradford Biddle C. and others, *Patent Remedies and Complex Products: Toward a Global Consensus* (Cambridge University Press 2019), 204; Chrocziel and Prinz zu Waldeck und Pyrmont, 'Introduction' (n 64), 2 and 16ff.; Waelde and others (n 60), 8ff.
[89] See for that effect eg joined cases C-241/91 P and C-242/91 P *Magill* (n 3); C-418/01 *IMS* (n 3); T-201/04 *Microsoft* (n 3); case C-170/13 *Huawei Technologies*, ECLI:EU:C:2015:477; C-307/18 *Generics* (n 39).
[90] See about fair balance case C-112/00 *Schmidberger*, ECLI:EU:C:2003:333, para 81; case C-341/05 *Laval un Partneri*, ECLI:EU:C:2007:809, para 105; case C-438/05 *The*

On the one hand, IPRs are granted protection under Article 17(2) of the Charter,[91] albeit not as an absolute right.[92] Trade secrets appear comparably protected based on general principles.[93] On the other hand, effective competition is pursued and protected under the TFEU.[94]

However, the EU courts appear not to recognise a general conflict that mandates a compromise between the legal areas as mutually applicable. The EU courts have expressed that the exercise of an exclusive intellectual property right cannot as such constitute a breach of EU competition law, indicating that IP law trumps competition law.[95] Simultaneously, if a restriction of competition is found, competition law appears to trump IP law, since the existence of intellectual property rights as such cannot justify a once established restriction.[96] The act of balancing thus appears to lie in the assessment of whether competition law is applicable, to begin with, rather than in whether an established restriction should entail a prohibition or not when weighed against IP law.[97] Decisive is whether the disputed conduct amounts to an exercise of an IPR in itself, or something additional.[98]

International Transport Workers' Federation and The Finnish Seamen's Union (henceforth referred to as *Viking Line*), ECLI:EU:C:2007:772, para 79; Bently and others (n 25), 24 – "where conflicting rights are engaged, a 'fair balance' must be sought."

[91] See eg case C-277/10 *Luksan*, ECLI:EU:C:2012:65, para 28; C-170/13 *Huawei* (n 89), paras 57–58; Bentley and others, 24ff.

[92] See case C-476/17 *Pelham and Others*, ECLI:EU:C:2019:624, para 33; case C-637/19 *BY (Preuve photographique)*, ECLI:EU:C:2020:863, para 32; Husovec (n 54), 855 and 863.

[93] See C-450/06 *Varec* (n 63), para 49; C-1/11 *Interseroh Scrap* (n 63), para 43; T-201/04 *Microsoft* (n 3), para 289.

[94] See principally Article 101 and 102 TFEU; see about equal hierarchical value Article 6 TEU; C-438/05 *Viking Line* (n 90), paras 44–46; C-112/00 *Schmidberger* (n 90), paras 77 and 81; Craig and De Burca (n 17), 141f.

[95] See about article 102 TFEU C-170/13 *Huawei* (n 89), para 46; C-307/18 *Generics* (n 39), para 150; see about article 101 TFEU C-403/08 and C-429/08 *Premier league* (n 67), para 137; Case 262/81 *Coditel v Ciné-Vog Films*, ECLI:EU:C:1982:334, para 15; Jones, Sufrin, and Dunne (n 1), 821 – "license agreements commonly contain provisions which go beyond a bare permission for the licensee to exploit the right. Competition law has to decide whether, and in what circumstances, these *further obligations* have the effect of restricting competition." (Emphasis added)

[96] See T-201/04 *Microsoft* (n 3), paras 690 and 712.

[97] See for that effect C-170/13 *Huawei* (n 89), paras 59–60.

[98] See n 95.

The approach by the court appears rational. While EU IP law is separate from EU competition law,[99] the two fields of law are widely considered to pursue ultimately similar or even aligned purposes – both ultimately aim at maximising consumer welfare.[100] Consumer welfare is increased through economic efficiency gains, which IP law pursues by facilitating innovation and thus dynamic efficiency.[101]

On this backdrop, it appears to be assumed that the exercise of exclusive intellectual property rights is not restrictive on competition, because of the general benefits of a system granting such rights. Only if the exclusive rights are abused by being relied on in excess of the purpose of IP law, a restriction of competition is considered capable of arising.[102] For instance, in *Generics*, the CJ found that a settlement agreement in patent infringement proceedings would not restrict competition under Article 101 TFEU unless exceeding the legitimate objective of protecting the patent.[103] Further, the CJ has found that the (legitimate) exercise of an exclusive intellectual property right "cannot in itself constitute abuse of a dominant position";[104] only exceptionally can the exercise be abusive, such as if an undertaking counteracts consumer welfare by refusing to license intellectual property, thereby preventing innovations.[105] Consequently, the conflict between IP law and competition law appears to be

[99] See joined cases C-274/11 and C-295/11 *Spain and Italy v Council*, ECLI:EU:C:2013:240, para 22, developed in the opinion by AG Bot, ECLI:EU:C:2012:782, para 60.
[100] See Retro M. Hilty, 'Individual, Multiple, and Collective Ownership: what impact on Competition?' in Jan Rosén (ed), *European Intellectual property law* (Elgar 2016), 55; Enforcement Directive, recital 1; Jones, Sufrin, and Dunne (n 1) 813ff.; Jones and Nazzini (n 88), 204; Irena Tusek, 'EU Competition Law Policy versus Intellectual Property Rights: A Study of the Microsoft Case' (2010) 6 Croatian Yearbook of European Law & Policy 103, 105f.; OECD (2019), *Licensing of IP Rights and Competition Law* (DAF/COMP(2019)3), 8 – "It is now widely understood that this conflict is more apparent than real, however, as both policies seek to promote consumer welfare, economic growth and innovation".
[101] See Technology Transfer Guidelines, para 7; Maggiolino (n 71), 12, 14, and 30f. – on page 12 describing dynamic efficiency as a measurement of "the rate of innovation", and on page 14 captivatingly expressing that "no firm would fight in order to smite its rivals via innovation if markets could not move from perfect competition to monopoly regimes."; comp Jones, Sufrin, and Dunne (n 1), 8.
[102] See C-307/18 *Generics* (n 39), opinion of AG Kokott, ECLI:EU:C:2020:28, paras 111–114; comp Enforcement Directive, recital 12.
[103] See C-307/18 *Generics* (n 39), paras 84–89.
[104] See C-418/01 *IMS* (n 3), para 34.
[105] See for that effect C-418/01 *IMS* (n 3); T-201/04 *Microsoft* (n 3), para 646.

confined to the textual and not teleological dimension of the legal areas – competition law should 'defer' to IP law, the latter being considered efficiency-enhancing unless IP law is utilised in excess of its purpose to the detriment of competition and efficiency.[106]

Considering the outlined relation between IP law and competition law, the legitimate exercise of IPRs could be viewed as an exception from EU competition law. The logical approach to applying EU competition law would be to ask a two-fold question: is the purpose of IP law exceeded and is competition restricted? Although not explicated, this approach can be discerned in case law. For instance, in Lundbeck,[107] the court set out to examine whether a settlement agreement in patent infringement proceedings exceeded the subject matter of the disputed patent and, in doing so, incentivised competitors to not enter the market for competing on the merits.[108]

How to determine whether the purpose of IP law is exceeded, however, is not obvious.[109] A narrow approach would be to require that the purpose of IP law

[106] See Jones and Nazzini (n 88), 204; Peter Chrocziel, Moritz Lorenz, and Wolrad Prinz zu Waldeck und Pyrmont, 'European Union Law', in Prinz zu Waldeck und Pyrmont W., Lorenz M., and Chrocziel P., *Intellectual property and Competition Law* (Kluwer Law International, 2016), 99 – "using IPR beyond the boundaries of those systems for goals that are not envisaged by the IP system may result in specific cases in violations of competition law"; comp Whish and Bailey (n 1), 788; T-201/04 *Microsoft* (n 3), paras 705–709 – seemingly accepting possible objective justification if the decreased incentive to innovate outweighs the prevented technical development caused by a refusal to license (i.e. if dynamic efficiency is maximised); see on innovation in general (not only in the form of IPRs) being considered to enhance efficiency and thus competition C-152/19 P *Deutsche Telekom* (n 71), para 47; case T-705/14 *Unichem Laboratories v Commission*, ECLI:EU:T:2018:915, para 309 – "the misuse of intellectual property rights must be penalised, but not the lawful exercise of those rights"; Ezrachi and Maggiolino (n 71), 598 – "intervention is restricted to those instances where it is the exclusive right upon intellectual resources that chills innovation."

[107] See case C-591/16 P *Lundbeck v Commission*, ECLI:EU:C:2021:243.

[108] See C-591/16 P *Lundbeck* (n 107), paras 113-114 and 122; see also C-307/18 *Generics* (n 39), paras 84–95; see about refusal to license in the following chapter 3.

[109] Comp Jones and Nazzini (n 88), 204ff. – the authors recognise that even if the relationship is theoretically smooth, there may exist numerous obstacles to a smooth application in practice; Ioannis Lianos, 'Competition Law and Intellectual Property (IP) Rights: Analysis, Cases and Materials' (2016), in Lianos I., Korah V., and Siciliani P., *Competition Law* (Hart Publishing 2017, Forthcoming), available at SSRN: https://ssrn.com/abstract=2863814, accessed September 8, 2021, 27ff. – discussing alternative approaches.

is counteracted, such as by preventing the dissemination of new products, thus hampering innovation and dynamic efficiency.[110] However, case law supports a wider approach, considering the condition to be met already where the purpose of IP law is pursued disproportionately (i.e. inappropriately or unnecessarily) restrictive on competition;[111] no balancing appears to be conducted, though, since the legitimate (purposive) exercise of IP law cannot be prohibited by competition law.[112] This wide approach, besides being supported by case law, appears necessary for retaining theoretical harmony between IP law and competition law. Namely, in addition to pursuing dynamic efficiency, like IP law, competition law pursues static (i.e. allocative and productive) efficiency; however, taking the narrow approach would ignore restrictions on static efficiency as long as dynamic efficiency is pursued, irrespective of how proportionately.[113]

The wide approach may be exemplified by the CJ's preliminary ruling in *Huawei*. In this case, the CJ indicated that Huawei, a patent holder, had violated Article 102 TFEU by initiating infringement proceedings against ZTE without first offering to license the patent to ZTE on FRAND[114] terms. Importantly, the patent at dispute had obtained the status of a standard-essential patent (SEP) in return for Huawei's promise to grant licenses to third parties on FRAND terms.[115] In its ruling, the court clarified that while the

[110] See eg T-201/04 *Microsoft* (n 3), paras 646–648.
[111] See to that effect, concerning Article 101 TFEU, C-307/18 *Generics* (n 39), paras 84–87; Case 258/78 *L.C. Nungesser KG and Kurt Eisele v Commission*, ECLI:EU:C:1982:211, paras 55–61; Case 27/87 *Erauw-Jacquery v La Hesbignonne*, ECLI:EU:C:1988:183, paras 10–11; see to that effect, concerning article 102, C-307/18 *Generics* (n 39), para 149–151; C-170/13 *Huawei* (n 89), paras 44–71.
[112] See for the same conclusion joined cases C-241/91 P and C-242/91 P *Magill* (n 3), opinion of AG Gulmann (n 70), para 79–84; see also on legitimate exercise not possible to prohibit eg C-307/18 *Generics* (n 39), paras 84–89; C-418/01 *IMS* (n 3), para 34; C-170/13 *Huawei* (n 89), para 59.
[113] See Lianos, 'Competition Law and Intellectual Property (IP) Rights: Analysis, Cases and Materials' (n 109), 25 – Lianos describes that such an order "would sacrifice 'static efficiency' for 'dynamic efficiency'"; see also about static and dynamic efficiency Jones, Sufrin, and Dunne (n 1), 8; Technology Transfer Guidelines, para 7.
[114] See about fair, reasonable, and non-discriminatory (FRAND) terms eg Lidgard (n 38), 711.
[115] See C-170/13 *Huawei* (n 89), para 22.

exercise of IPRs cannot itself constitute an abuse of a dominant position,[116] it is necessary to strike a fair balance between IP-law and competition law.[117] This balance was struck by the court already in determining the existence of abuse (i.e. the applicability of Article 102 TFEU) and not in determining whether an already established abuse would prevail over the IPR.[118] The result of the balance was that while infringement proceedings for protecting a SEP are legitimate, the procedure of bringing such proceedings by an undertaking having promised to grant licenses on FRAND terms must "comply with specific requirements".[119] In other words, where a patent-holder have promised to generally grant licenses for a fair royalty fee, the holder's interest (and thus the incentive to innovate) would not be proportionately pursued by bringing infringement proceedings without first trying to honour that promise.[120]

The wide approach was more clearly expressed in *Generics*, which established a connection between the wide approach and the concepts of protection of commercial interests (under Article 102 TFEU) and ancillary restraints (under Article 101 TFEU), respectively. Concerning Article 102 TFEU, and with reference to *United Brands*,[121] the CJ held that that article does not foretake "the right to take such reasonable steps as [an undertaking] deems appropriate to protect its commercial interests".[122] From *United Brands*, and subsequent case law alike, the protection of own commercial interests is legitimate only while it is proportionate.[123] As an example of such protection,[124] and with reference to the judgment in *Huawei*, the court held that the exercise of an IPR "cannot in itself constitute an abuse of [a] dominant

[116] See C-170/13 *Huawei* (n 89), para 47; C-170/13 *Huawei*, opinion of AG Wathelet, ECLI:EU:C:2014:2391, para 61.
[117] See C-170/13 *Huawei* (n 89), para 42; C-170/13 *Huawei*, opinion of AG Wathelet (n 116), para 59.
[118] See C-170/13 *Huawei* (n 89), para 55–60.
[119] See C-170/13 *Huawei* (n 89), para 59.
[120] Comp C-170/13 *Huawei*, opinion of AG Wathelet (n 116), para 74
[121] See Case 27/76 *United Brands* (n 37).
[122] See C-307/18 *Generics* (n 39), para 149.
[123] See Case 27/76 *United Brands* (n 37), para 190; joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37), para 71; Jones, Sufrin, and Dunne (n 1), 388f.
[124] See C-307/18 *Generics* (n 39), para 150 – "More particularly".

position".[125] Concerning Article 101 TFEU, the concept of protection of own commercial interests under Article 102 TFEU shares similarities with the concept of ancillary restraints, which likewise is capable of justifying restrictions following from the proportionate pursuit of economic interests.[126] Consonantly, albeit without express reference to the concept of ancillary restraints, the CJ held in *Generics* that a settlement agreement in a patent dispute would not be prohibited under Article 101(1) TFEU if its content is "appropriate and strictly necessary having regard to the legitimate objectives of the parties to the agreement";[127] naturally, the legitimate objective of an IPR holder is to protect the purpose of the IPR under IP-law.[128]

To tie up the presented considerations, both IP law and competition law ultimately pursue consumer welfare.[129] However, competition law pursues consumer welfare in a broader sense by recognising not only dynamic efficiency but also static efficiency.[130] Thus, in remedying potential textual over-broadness of IP law in the pursuit of welfare, a fair balance is required between competition law and IP law.[131] The balance is struck already in determining whether a restriction of competition exists.[132] The concrete expression of this balance appears to be that the exercise of IPRs cannot constitute a restriction under Article 101(1) TFEU or abuse under Article 102 TFEU, in so far as it is necessary and appropriate (proportionate) for pursuing the purpose of IP-law.[133]

---

[125] See C-307/18 *Generics* (n 39), para 150.
[126] See on ancillary restraints Jones, Sufrin, and Dunne (n 1), 247ff.; C-382/12 P *MasterCard* (n 39), para 89; T-208/13 *Portugal Telecom* (n 39), paras 103–105.
[127] See C-307/18 *Generics* (n 39), para 85.
[128] Comp C-307/18 *Generics* (n 39), para 88; case T-472/13 *Lundbeck v Commission*, ECLI:EU:T:2016:449, para 495, confirmed on appeal in C-591/16 P *Lundbeck* (n 107), para 125; Case 238/87 *Volvo v Veng*, ECLI:EU:C:1988:477, para 8.
[129] See n 100 and 101 and text thereto.
[130] See n 113 and text thereto.
[131] See for that effect C-170/13 *Huawei* (n 89); comp Lianos, 'Competition Law and Intellectual Property (IP) Rights: Analysis, Cases and Materials' (n 109), 25.
[132] See for that effect eg C-170/13 *Huawei* (n 89); C-418/01 *IMS* (n 3), paras 48 and 49.
[133] See for that effect eg C-307/18 *Generics* (n 39), para 85 and 150; C-170/13 *Huawei* (n 89), para 46; C-418/01 *IMS* (n 3), para 34; Case 258/78 *Nungesser* (n 111), paras 55–61; Case 27/87 *Erauw-Jacquery* (n 111), paras 10–11; comp Marina Lao, 'Networks, Access, and Essential Facilities: From Terminal Railroad to Microsoft' (2009) 62(2) Southern Methodist University Law Review 557, 590 – "the intellectual property system should offer innovators no more incentives than are necessary to stimulate innovation".

3 Refusal to License

3.1 Refusal to License in Case Law About Competitors

3.1.1 Introduction

Refusal to license constitutes in principle a legitimate exercise of an IPR and can thus not in itself constitute an abuse of a dominant position.[134] Only in exceptional circumstances may a refusal to license involve abuse of dominance.[135] In case law about refusal to license competitors, the CJEU has explained that circumstances are exceptional at least if the refusal to license an IPR, which is an indispensable input on a downstream market (section 3.1.3), both excludes all competition on the downstream market (section 3.1.4), and prevents the development of that market to the prejudice of consumers (section 3.1.5). A refusal that meets these circumstances is abusive unless it is objectively justified.[136]

3.1.2 Necessity of Discerning Two Separate Markets

Before considering the conditions, it follows from the preceding description that for establishing abusive refusal to license "it is determinative"[137] that two separate and discernible markets are concerned. The IPR concerned should constitute a product on an upstream market and an input on a downstream market.[138] The same condition applies mutatis mutandis for refusal to

[134] See C-418/01 *IMS* (n 3), para 34; joined cases C-241/91 P and C-242/91 P *Magill* (n 3), para 49; Case 238/87 *Volvo* (n 128), para 8.
[135] See C-418/01 *IMS* (n 3), para 35; joined cases C-241/91 P and C-242/91 P *Magill* (n 3), para 50; comp Case 238/87 *Volvo* (n 128), para 9.
[136] See for varying expressions eg joined cases C-241/91 P and C-242/91 P *Magill* (n 3), para 52–56; C-418/01 *IMS* (n 3), para 38 and 48; T-201/04 *Microsoft* (n 3), para 332-333, 647 and 648; C-418/01 *IMS* (n 3), opinion of AG Tizzano, ECLI:EU:C:2003:537, para 66; Lidgard (n 38), 707; Waelde and others (n 60), 916ff.; Jones, Sufrin, and Dunne (n 1), 504ff.; Whish and Bailey (n 1), 817ff.; Bailey and John, 'Intellectual Property Righst' (n 12), 798ff.; Chrocziel and Prinz zu Waldeck und Pyrmont, 'European Union Law' (n 106), 72ff.; Catherine Seville, *EU Intellectual Property Law and Policy* (Edward Elgar Publishing, 2016), 484ff.
[137] See C-418/01 *IMS* (n 3), para 45.
[138] See C-418/01 *IMS* (n 3), para 45; T-201/04 *Microsoft* (n 3), para 335.

supply.[139] Notably, for the upstream market, it is sufficient that "a potential market or even hypothetical market can be identified".[140] The effect is that a refusal to license may be abusive even if the relevant IPR has never previously been available for license.[141]

Defining the relevant markets does not itself constitute an end but merely a tool that facilitates the competition assessment by identifying the relevant competitive constraints and thus the market power of the undertakings concerned. Consequently, the market definition may be described as providing a systemized framework for further assessment.[142] In this regard, concerning refusal to license, a tenable understanding is that one should discern two separate markets to assess abuse of dominance through refusal to supply on the upstream market, causing exclusion of competition and prevention of development on the downstream market.[143] Therefore, since all judgments of the CJEU about refusal to license have concerned vertically integrated dominant undertakings, the abuse addressed could be described as leveraging of dominance to increase the market power downstream.[144]

[139] See for that effect C-7/97 *Bronner* (n 37); Jones, Sufrin, and Dunne (n 1), 493.
[140] See C-418/01 *IMS* (n 3), para 44.
[141] see C-418/01 *IMS* (n 3), opinion of AG Tizzano (n 136), para 56 and 57; C-418/01 *IMS* (n 3), para 43; T-201/04 *Microsoft* (n 3), para 335; comp on refusal to supply C-7/97 *Bronner* (n 37).
[142] see David Bailey and Laura Elizabeth John, 'Market Definition', in Bailey D and John LE (eds), *Bellamy & Child: European Union Law of Competition* (8th edn, Oxford University Press 2018), 257f.; Jones, Sufrin, and Dunne (n 1), 100f.; Market Definition Notice, paragraph 2 – "The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face."; case T-399/16 *CK Telecoms UK Investments v Commission*, ECLI:EU:T:2020:217, paras 144 and 145; comp Article 101(3) Guidelines, para 27; Horizontal Cooperation Guidelines, para 10.
[143] see C-418/01 *IMS* (n 3), opinion of AG Tizzano (n 136), para 55; C-418/01 *IMS* (n 3), paras 40–47 – the court explained the separation of two separate markets as guidance in determining whether competition was excluded downstream.
[144] see T-201/04 *Microsoft* (n 3), para 559; C-418/01 *IMS* (n 3), opinion of AG Tizzano (n 136), para 55; Peter Chrocziel and Prinz zu Waldeck und Pyrmont, 'European Union Law' (n 106), 98; see also on leveraging of dominance Jones, Sufrin, and Dunne (n 1), 390ff.; C-333/94 P *Tetra Pak v Commission*, ECLI:EU:C:1996:436, para 27; Case 311/84 *CBEM* (n 43), para 27; C-52/09 *TeliaSonera* (n 42), paras 84–87.

3.1.3 Requirement of Indispensability

3.1.3.1 Indispensable for Viably Remaining on the Market

Beyond the necessity of identifying two separate markets, a set of exceptional circumstances (conditions) must be met by a refusal to license for rendering it abusive.[145] As already indicated, the relevant IPR must constitute an indispensable input on the downstream market.[146] The condition of indispensability applies equally to refusal to supply in general.[147] In the following, I will explain that indispensability is determined objectively[148] and mandates that no substitute enabling viable competition either exist or can be created.[149]

For indispensability, it is sufficient that there are no substitutes that enable competitors to viably conduct their business on the downstream market. In *Microsoft*, the GC upheld the Commission's interpretation that it is sufficient with indispensability for competitors to remain viably on the market.[150] The GC reasoned that "[t]he correctness of that approach is not open to dispute";[151] if competitors' viable presence on the market is prevented "it follows that the maintenance of effective competition on that market is being hindered".[152] Seemingly incorrectly, it has been contended that the GC thereby lowered the threshold for indispensability by not requiring total exclusion from the market.[153] Namely, the sufficiency of an absence of viable substitutes for establishing indispensability appears also in earlier case law.[154]

[145] See, for instance, C-418/01 *IMS* (n 3), para 35; joined cases C-241/91 P and C-242/91 P *Magill* (n 3), para 50; comp Case 238/87 *Volvo* (n 128), para 9.
[146] See eg C-418/01 *IMS* (n 3), para 38; T-201/04 *Microsoft* (n 3), para 333.
[147] See eg C-7/97 *Bronner* (n 37), paras 41–45; C-418/01 *IMS* (n 3), paras 28 and 29 – adopting the same approach to indispensability as in C-7/97 *Bronner* for refusal to supply in general.
[148] See Jones, Sufrin, and Dunne (n 1), 497.
[149] See T-201/04 *Microsoft* (n 3), para 229, 369, and 421.
[150] See T-201/04 *Microsoft* (n 3), paras 229, 369, and 421.
[151] See T-201/04 *Microsoft* (n 3), para 229.
[152] See T-201/04 *Microsoft* (n 3), para 229.
[153] see Jones, Sufrin, and Dunne (n 1), 516; Bo Vesterdorf, 'Article 82 EC: Where do we stand after the Microsoft judgement?' (2008), Global Antitrust Review (GAR) 1, 7.
[154] Joined cases T-374/94, 375/94, 384/94 and 388/94 *European Night Services and Others v Commission*, ECLI:EU:T:1998:198; C-418/01 *IMS* (n 3) – referring to the sufficiency of it being "unreasonably difficult" and "not economically viable" to create a substitute.

EU competition law is concerned with effective competition,[155] for which not any and all but only sufficiently constraining competitive forces are of relevance.[156] However, requiring a substitute to be viable is not the same as requiring it to be equally efficient as the IPR refused; viable substitutes are sufficient "even if they are less advantageous".[157] Consequently, viability relates merely to whether the business may be economically justified (profitable), if not immediately at least within the (reasonably) longer term.[158]

3.1.3.2 No Actual or Potential Substitute

Indispensability requires the absence of any viable *actual or potential* substitute.[159] Therefore, indispensability consists of a two-steps test. The first step is "whether there are products or services which constitute alternative solutions".[160] A second step is "whether there are technical, legal or economic obstacles capable of making it impossible or at least unreasonably difficult for any undertaking seeking to operate in the market to create, possibly in cooperation with other operators, the alternative products or services."[161] While the assessment of existing substitutes may go without further remarks, excluding indispensability based on potential (possible to create) substitutes

[155] See Case 6/72 *Continental Can* (n 72), para 25; Jones, Sufrin, and Dunne (n 1), 25.
[156] See about sufficient degree of competition Case 322/81 *Michelin v Commission*, ECLI:EU:C:1983:313, paras 48–50; Jones, Sufrin, and Dunne (n 1), 100; Niels, Jenkins, and Kavanagh (n 81), 31f.; see about the definition of actual and potential competitor being confined to sufficient constraining force Article 1(1)(c) Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L 102/1; Vertical Agreement Guidelines, para 27; Horizontal Cooperation Guidelines, para 10; Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) [2014] OJ C 291/1, footnote to para 8(a); C-307/18 *Generics* (n 39), para 58.
[157] C-418/01 *IMS* (n 3), para 28; C-7/97 *Bronner* (n 37), para 43.
[158] Comp C-165/19 P *Slovak Telekom* (n 4), para 50; C-7/97 *Bronner* (n 37), opinion of AG Jacobs (n 71), para 68; C-418/01 *IMS* (n 3), para 29, in relation to the opinion of AG Tizzano (n 136), para 84 – the AG considered that the creation of a substitute was not economically viable because of sufficient costs to create a "risk that the investments made would not be amortised."
[159] See C-165/19 P *Slovak Telekom* (n 4), para 49; case T-301/04 *Clearstream v Commission*, ECLI:EU:T:2009:317, para 147; C-7/97 *Bronner* (n 37), para 41.
[160] See C-418/01 *IMS* (n 3), para 28.
[161] See C-418/01 *IMS* (n 3), para 28.

– in particular the aspect of economic obstacles – demands further clarification.

Economic obstacles are sufficient if they entail that the creation of a substitute "is not economically viable for production on a scale comparable to that of the undertaking which controls the existing product or service."[162] On this backdrop, the assessment of whether a substitute could be created is easily confused with the so-called as efficient competitor test (AEC test), while it could rather be named a prospective economic viability test. Namely, the assessment is not based on the AEC test. The AEC test is a hypothetical test for examining the effects of specific conduct on a competitor as efficient (i.e., with the same costs) as the dominant undertaking.[163] That test is only "one tool amongst others for the purposes of assessing whether there is an abuse of a dominant position".[164] The CJ in *IMS*, rather than referring to a hypothetical situation of similar costs (i.e. the AEC test), placed weight only at the similarity in the scale of the activity. Thus, the test adopted for assessing economic obstacles appears to be an objective and prospective test of economic viability; the question is whether the investments required for achieving a business of a scale equal to the dominant undertaking's activity could expectedly yield sufficient return within a reasonable timeframe as to be considered economically viable.[165]

Two examples can be given of situations in which the creation of a substitute is not economically viable. Firstly, it would not be economically viable if the costs are simply excessive, excluding any reasonable expectations in recovery

[162] See C-418/01 *IMS* (n 3), para 28; comp C-7/97 *Bronner* (n 37), para 46.
[163] See Jones, Sufrin, and Dunne (n 1), 373f.; Maggiolino (n 71), 61; C-52/09 *TeliaSonera* (n 42), paras 39–41; case C-62/86 *AKZO v Commission*, ECLI:EU:C:1991:286, para 74; case C-202/07 P *France Télécom v Commission*, ECLI:EU:C:2009:214, para 108.
[164] See C-23/14 *Post Danmark* (henceforth referred to as *Post Danmark II*), ECLI:EU:C:2015:651, para 61.
[165] Comp C-7/97 *Bronner* (n 37), paras 45 and 46, in relation to the opinion of AG Jacobs (n 71), para 68; C-418/01 *IMS* (n 3), paras 28 and 19; C-418/01 *IMS* (n 3), opinion of AG Tizzano (n 136), para 84 – not economically viable because of sufficient costs to create a "risk that the investments made would not be amortised."

of investments.[166] Secondly, it would not be viable if the relevant upstream market has no room for another competitor.[167] All markets cannot host an unlimited number of competitors – natural limits may arise for markets of scale on which the consumer demand is limited. Markets of scale typically arise where the fixed costs, and often sunk costs, are high, entailing that the average total production costs per unit decrease as output increases, in other words, that it is more cost-efficient to produce more. Naturally, no undertaking can produce an infinite number of units, and even if that would be possible a 'minimum efficient scale' may exist, being the number of outputs after which the average costs start to increase again. If the demand does not exceed the minimum efficient scale, there is room only for one supplier. If the demand is higher but does not exceed two times that scale, there is room only for two suppliers, and so on. This economic logic may create natural monopolies or oligopolies by rendering it non-economically viable to enter the market.[168] Consequently, markets may be encumbered by barriers to entry consisting of economic obstacles arising from economies of scale.[169]

3.1.3.3 Indispensability as Objectively Defined

It appears from the considerations to indispensability that the concept is objectively and not, as has been proposed, subjectively defined.[170] Namely, the resource should be indispensable, or in other words objectively necessary

[166] See C-418/01 *IMS* (n 3), para 29, and opinion of AG Tizzano (n 136), para 84 – observe that the case mainly concerned palpable costs for the buyer. Irrespective of whether the main costs fall on the buyer or the seller, however, the effect is the same; the buyer will be unwilling to pay the price that the seller needs to be profitable.
[167] See C-7/97 *Bronner* (n 37), opinion of AG Jacobs (n 71), para 68.
[168] See Niels, Jenkins, and Kavanagh (n 81), 10ff.; Jones, Sufrin, and Dunne (n 1), 6ff.; European Commission (2007) (n 47), 207 – here it is expressed that duplication of the indispensable resource would not be economically viable if "the total income generated in the market in question would not generate profits from two facilities"; see also, for reasoning as to that effect, C-7/97 *Bronner* (n 37), opinion of AG Jacobs (n 71), para 68.
[169] See about entry barriers Jones, Sufrin, and Dunne (n 1), 344; Case 27/76 *United Brands* (n 37), para 122; *Intel* (case COMP/37.990) Commission decision D (2009) 3726 final [2009], para 866.
[170] See about objective definition Jones, Sufrin, and Dunne (n 1), 497; Article 102 guidelines, para 81–84 – describing indispensability in terms of an input being objectively necessary; see about subjective definition Waelde and others (n 60), 919 – the authors consider that economic viability may differ between different undertakings.

or essential, for any viable competition to remain on the market.[171] If there are no existing substitutes, it is not of relevance whether the individual undertaking refused is in a position to create a substitute, but whether the creation of a substitute by one or more undertakings jointly would objectively and prospectively be profitable.[172] The purpose of the requirement of indispensability is "to determine whether [the dominant] undertaking has a genuinely tight grip on the market"[173] or, in other words, whether that undertaking has "a genuine stranglehold on the related market".[174] From indispensability, the capability of the undertaking to eliminate (strangle) any effective competition on the downstream market should follow.[175] However, whether the input is indispensable and whether all effective competition is eliminated are two separate questions.[176]

3.1.4 Requirement of Elimination of All Effective Competition

Having established an understanding of the role of relevant markets and indispensability, it is appropriate to probe into the condition of eliminating all effective competition on the downstream market.[177] It could appear as if this condition is more favourable for the dominant undertaking in the case of refusal to license as compared to the corresponding requirement for refusal to supply.[178] Namely, as concerns refusal to supply the EU courts have in some cases implied that it would be sufficient to exclude any effective competition on the part of the undertaking refused.[179] Yet, the condition appears to be the

[171] see T-201/04 Microsoft (n 3), paras 229, 369, and 421; see about indispensable, objectively necessary, and essential being synonymous Whish and Bailey (n 1), 718 – "all three expressions can be used interchangeably."
[172] See section 3.1.3.2.
[173] See C-165/19 P *Slovak Telekom* (n 4), para 49.
[174] See C-7/97 *Bronner* (n 37), opinion of AG Jacobs (n 71), para 65.
[175] See, for that effect, joined cases C-241/91 P and C-242/91 P *Magill* (n 3), para 56; C-401/18 *IMS* (n 3), opinion of AG Tizzano (n 136), para 66.
[176] See for that effect T-712/14 *CEAHR* (n 86), paras 105-118.
[177] See joined cases C-241/91 P and C-242/91 P *Magill* (n 3), para 52–56; C-418/01 IMS (n 3), para 38; T-201/04 Microsoft (n 3), para 332.
[178] See Jones, Sufrin, and Dunne (n 1), 509.
[179] See joined cases 6 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents v Commission*, ECLI:EU:C:1974:18, para 25; C-7/97 *Bronner* (n 37), para 41; T-301/04

same for both refusal to license and supply – all effective competition, and not only competition from the undertaking refused, should be eliminated as to reserve the downstream market for the dominant undertaking.[180]

The identical approaches to the condition of elimination of competition follow from the distinction between indispensability and elimination of competition as separate conditions.[181] A refusal of access to an indispensable input would necessarily exclude the refused undertaking as an effective competitor, because of the absence of substitutes that enable a viable presence on the downstream market.[182] Thus, the condition of elimination of competition must require something more – that is, the elimination of effective competition in general. An example of this is the GC's judgment in *CEAHR*.[183] Several watch manufacturers refused to supply spare parts to independent watch repairers. Although individual repairers could be excluded from the market, the refusal was not abusive as effective competition remained through well-functioning selective distribution systems.[184] Though, albeit separate, the requirements of indispensability and elimination of competition will coincide in cases where the dominant undertaking refuses to supply all (potential) competitors.[185]

Clearstream (n 159), para 147 and 148; T-712/14 *CEAHR* (n 86), paras 88–90; Jones, Sufrin, and Dunne (n 1), 499f.

[180] See T-201/04 *Microsoft* (n 3), para 560–564; T-712/14 *CEAHR* (n 86), paras 105–118; C-418/01 *IMS* (n 3), paras 37, 38, and 52; C-7/97 *Bronner* (n 37), opinion of AG Jacobs (n 71), para 58 – "Such conduct will not have an adverse impact on consumers unless the dominant undertaking's final product is sufficiently insulated from competition to give it market power."; Lidgard (n 38), 703 – describe as a requirement in general, for refusal to deal, that "the refusal will *'eliminate effective competition'* on the downstream market, immediately or over time"; European Commission (2007) (n 47), 204 – explicating that abusive refusal to supply requires that "effective competition is significantly diminished or eliminated"; Article 102 Guidelines, para 85 – expressing a condition that the refusal is "generally liable to eliminate, immediately or over time, effective competition in the downstream market."; Maggiolino (n 71), 150f. jointly with 160ff.

[181] See about that separation C-7/97 *Bronner* (n 37), para 41; T-201/04 *Microsoft* (n 3), para 332; C-418/01 *IMS* (n 3), para 38.

[182] See section 3.1.3.1.

[183] See T-712/14 *CEAHR* (n 86).

[184] See T-712/14 *CEAHR* (n 86), paras 104–118.

[185] See for that effect joined cases C-241/91 P and C-242/91 P *Magill* (n 3), para 56; *ARA Foreclosure* (Case AT.39759) Commission decision C (2016) 5586 [2016], paras 112 and 113.

Having rationalised the equal approach, the meaning of eliminating all effective competition remains partially ambiguous. On the one hand, two aspects of the condition are clear. Firstly, it is sufficient with the elimination of all effective competition, rather than all competition – "the fact that the competitors of the dominant undertaking retain a marginal presence in certain niches on the market cannot suffice to substantiate the existence of such competition".[186] Secondly, the elimination can be either actual or potential, meaning that it must not yet have occurred – "what matters is that the refusal at issue is liable to, or is likely to, eliminate all effective competition on the market."[187] Both these points correlate with EU competition law in general, which concerns actual or potential restrictions of effective competition.[188] On the other hand, it is hard to imagine any clear-cut end of effective competition; the distinction between effective and ineffective competition appears to be one of degree and not kind.[189] The most precise definition would probably be that the refusal should either prevent the rising[190] or exclude the existence of[191] any significant, but not necessarily any and all,[192] competitively constraining force.[193] Possibly, the requirement could be described as fulfilled

[186] See T-201/04 *Microsoft* (n 3), para 563; see also T-301/04 *Clearstream* (n 159), para 148; T-712/14 *CEAHR* (n 86), paras 91 and 106; Bailey and John, 'Intellectual Property Rights' (n 12), 801; Whish and Bailey (n 1), 723; Jones, Sufrin, and Dunne (n 1), 499f. and 517; Tusek (n 100), 111f.; Vesterdorf (n 153), 8.
[187] See T-301/04 *Clearstream* (n 159), para 148; T-201/04 *Microsoft* (n 3), paras 560 and 561; T-712/14 *CEAHR* (n 86), para 106.
[188] See about article 102 TFEU C-23/14 *Post Danmark II* (n 164), para 66–69; C-52/09 *TeliaSonera* (n 42), para 64; Article 102 Guidelines, paras 21 and 37; see about article 101 TFEU Case 5/69 *Voelk v Vervaecke*, ECLI:EU:C:1969:35, para 7; Case C-7/95 P *Deere v Commission*, ECLI:EU:C:1998:256, para 77; Case C-238/05 *ASNEF-EQUIFAX*, ECLI:EU:C:2006:734, para 50; Horizontal Cooperation Guidelines, para 20; Vertical Agreement Guidelines, para. 97.
[189] Comp definition of abuse dominance in Case 85/76 *Hoffmann-La Roche* (n 52), para 91 – abusive conduct is such conduct which, on a market where "the degree of competition is weakened […], has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."
[190] See, for that effect, joined cases C-241/91 P and C-242/91 P *Magill* (n 3), particularly para 56; C-418/01 *IMS* (n 3).
[191] See, for that effect, T-201/04 *Microsoft* (n 3), paras 560–620.
[192] See T-201/04 *Microsoft* (n 3), para 563; see also T-301/04 *Clearstream* (n 159), para 148; T-712/14 *CEAHR* (n 86), paras 91 and 106.
[193] see for similar definitions Tusek (n 100), 111f.; Vesterdorf (n 153), 8.

already when the refusal may give rise to (or ensure the retainment of) a dominant position on the downstream market.[194]

To rationalise the condition, one could draw a parallel to article 101(3)(b) TFEU. To be justified, a disputed agreement must not award the parties "the possibility of eliminating competition in respect of a substantial part of the products in question."[195] The rationale is that competition drives efficiency, including dynamic efficiency, which establishes an interest in ensuring that short term efficiency gains are not counteracted by long term efficiency losses.[196] The Commission expressly favours the same considerations to apply under article 102 TFEU.[197] Simultaneously, it is established that "in the long term, it is generally favourable to the development of competition and in the interest of consumers to allow a company to reserve for its own use the facilities that it has developed for the needs of its business."[198] The condition of elimination of all effective competition thus appears to aim at striking a balance between static and dynamic efficiency in pursuing long term efficiency, for the benefit of consumers.[199]

3.1.5 Requirement of Preventing Development of the Downstream Market

The last condition for declaring a refusal to license abusive is that it should prevent the development of the downstream market.[200] The requirement is at least met if the refusal prevents the emergence of a new product.[201] However, the line between a modification of the same product and the emergence of a

[194] Comp *FAG - Flughafen Frankfurt/Main AG* (Case IV/34.801) Commission decision OJ L 72/30 [1998], para 72 – the commission considered the disputed refusal to constitute an abuse because the dominant undertaking "extended its dominant position on the market for the provision of airport landing and take-off facilities to the neighbouring but separate market for ramp-handling services."
[195] See article 101(3)(b) TFEU.
[196] See Jones, Sufrin, and Dunne (n 1), 271; Article 101(3) Guidelines, para 105.
[197] See Article 102 Guidelines, para 30.
[198] See C-165/19 P *Slovak Telekom* (n 4), para 47.
[199] Comp about the interplay of benefits Lao (n 133), 592ff.
[200] See C-418/01 *IMS* (n 3), para 37 and 48.
[201] See joined cases C-241/91 P and C-242/91 P *Magill* (n 3), para 54; C-418/01 *IMS* (n 3), para 37, 48, and 49.

new product is not evident.[202] In *Microsoft*, the GC explained that preventing the emergence of a new product is not necessary; it suffices that the refusal prevents technical development to the prejudice of consumers.[203] Thus, it suffices that a modification of the same product, in a developed form, is prevented. Yet, it is not evident when a modification amounts to a development.[204] With certainty, however, an undertaking seeking a license must 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".[205]

Tenably, the requirement could be related to dynamic efficiency and rationalised as destined to determine whether IP law is disproportionally pursued and, thus, whether competition law may prevail. Dynamic efficiency is concerned with "how well a market delivers innovation and technological progress."[206] Thus, the requirement of prevention of development of the downstream market appears to relate to whether a disputed refusal to license limits dynamic efficiency, by preventing new products and technological development. Simultaneously, IP law pursues the objective of increasing consumer welfare, by increasing dynamic efficiency.[207] Thus, if the requirement is fulfilled, the purpose of IP law would be counteracted. If the purpose of IP law is disproportionally pursued, competition law may prevail.[208] As for refusal to license, competition law "can prevail only where refusal to grant a licence prevents the development of the secondary market to the detriment of consumers."[209] On this backdrop, it seems that if a refusal to license counteracts the purpose of IP law by limiting dynamic efficiency, and only then, it may be held to disproportionally pursue the purpose of IP

[202] See Tusek (n 100), 112f.; Whish and Bailey (n 1), 819 – "future cases will have to examine further the scope of the new product rule [..] as to the 'newness' of the product".
[203] See T-201/04 *Microsoft* (n 3), para 647; comp article 102(b) TFEU; C-418/01 *IMS* (n 3), para 48.
[204] See Tusek (n 100), 112f.
[205] See C-418/01 *IMS* (n 3), para 49.
[206] See Jones, Sufrin, and Dunne (n 1), 8; see also Maggiolino (n 71), 12 – describing dynamic efficiency as measuring "the rate of innovation".
[207] See section 2.2.2.
[208] See section 2.4.
[209] See C-418/01 *IMS* (n 3), para 48.

law. Accordingly, it is insufficient that all effective competition would be eliminated for considering a refusal to license to disproportionally pursue the purpose of IP law.[210] However, prima facie two objections arise. Firstly, would not the purpose of IP law be pursued as efficiently, but less restrictively for competition, by licensing on FRAND terms? Secondly, since effective competition may entail dynamic efficiencies, would not already its elimination counteract the purpose of IP law?

The first objection appears defaulted. Reasonably, the alternative of licensing cannot, in itself, render the alternative of reserving the utilisation of an IPR to its holder unnecessarily restrictive. One course of conduct is more restrictive than necessary for the aim pursued only where a less restrictive but equally efficient alternative exists.[211] However, IP law does not take a stand on whether licensing or reserving the IPR for own use is more effective in pursuing the purpose of IP law; instead, IP law grants the holder of an IPR freedom of choice,[212] in harmony with the freedom of contract.[213] In practice, though, there would exist little freedom of choice and thus of contract if licensing was generally considered to be as efficient (i.e. having an equal effect on dynamic efficiency) as a refusal to license; the reservation of an IPR through a refusal to license would expectedly always be more restrictive on competition having regard to static efficiency.[214] Instead, the approach by the court appears to be that licensing is less restrictive and at least as efficient (in the pursuit of dynamic efficiency) only where the refusal to license is counteracting dynamic efficiency.[215]

---

[210] see C-418/01 *IMS* (n 3), opinion of AG Tizzano (n 136), para 61 and 62.
[211] See Justyna Maliszewska-Nienartowicz, 'The Principle of Proportionality in the European Community Law- General Characteristic and Practical Application' (2008) 24(1) Pravni Vjesnik 89, 91f. – "the action is necessary if it cannot be replaced by an alternative measure which would have the same result and at the same time would not threaten legally protected interests or objectives so much."; Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16(2) European Law Journal 158, 165.
[212] See Case 238/87 *Volvo* (n 128), para 8; comp C-165/19 P *Slovak Telekom* (n 4), para 46.
[213] See Article 16 the Charter; see by analogy C-165/19 P *Slovak Telekom* (n 4), para 46.
[214] Comp Jones, Sufrin, and Dunne (n 1), 8ff. – describing static efficiency and that monopoly typically counteract such efficiency.
[215] See, for that effect, C-418/01 *IMS* (n 3), para 48; T-201/04 *Microsoft* (n 3), para 647; see also Maggiolino (n 71), 168 – "EU institutions use antitrust law to confront IPRs that, in their opinion, fall short of boosting innovation […] regardless of the (likely) harm to allocative efficiency […]".

The second objection appears partially legitimate. If effective competition increases dynamic efficiency,[216] its elimination will counteract dynamic efficiency and thus disproportionally pursue IP law.[217] However, simply because effective competition may increase dynamic efficiency it cannot be concluded that it is always likely to do so.[218] Thus, a contextually palatable understanding is that the requirement of preventing development constitutes a qualification, or extension, of the requirement of elimination of effective competition; it must be ascertained whether and concretised in what way dynamic efficiency is likely to be counteracted.[219]

3.1.6 Exhaustive Nature of the Requirements

One may wonder whether the requirements outlined above are exhaustive (necessary) for finding a refusal to license abusive. Expressions hereabout figured in the Commission's decision in *Microsoft*, where the Commission indicated that the requirements are not exhaustive.[220] It held that there may in an individual case also exist "other circumstances of exceptional character that may deserve to be taken into account".[221]

After some elaborative remarks, the thought presented by the Commission appears amenable. Namely, establishing an abuse requires consideration to all specific circumstances of the individual case at dispute.[222] It logically follows that differing circumstances requires differing considerations. Consequently, it may be possible to discern different types of abuses,

[216] See above about effective competition and dynamic efficiency, section 2.3.
[217] See section 3.1.4.
[218] Comp Jones, Sufrin, and Dunne (n 1), 8 and 13f. – on page 8 expressing that "it can be argued that innovation may be better delivered by monopolistic rather than competitive markets".
[219] See about competition law prevailing only at the disproportionate pursuit of the purpose of competition law section 2.4; comp Evrard (n 9), 503 – considering that exceptional circumstances can exist only "where a grant of intellectual property rights is questionable, either because of overbreadth or due to other reasons."
[220] See *Microsoft* (Case COMP/C-3/37.792) Commission decision C(2004)900 final [2004], paras 555–558; Jones, Sufrin, and Dunne (n 1), 512.
[221] See Case COMP/C-3/37.792 *Microsoft* (n 220), para 555.
[222] See C-165/19 P *Slovak Telekom* (n 4), para 42.

combined with different requirements. Concerning refusal to supply, this effect is exemplified by Case C-165/19 P *Slovak Telekom*. In this case, the defendant, a telecom operator, was legally obliged to grant supply to its so-called 'local loops'. The defendant did grant supply but on allegedly abusive terms. The question arose whether, in that scenario, the local loops needed to be indispensable downstream for the conduct to be abusive. The court answered in the negative, distinguishing case C-7/97 *Bronner* that established the requirements of indispensability and elimination of all competition for refusal to supply. The court reasoned that the requirements in *Bronner* were "justified by the specific circumstances of that case which consisted in a refusal by a dominant undertaking to give a competitor access to infrastructure that it had developed for the needs of its own business, to the exclusion of any other conduct."[223] The only remedy in *Bronner* would be "to force the dominant undertaking to give access to its infrastructure".[224] The imposition of that remedy was conditioned upon strict requirements, for two reasons. First, it would severely restrict the interrelated rights of freedom of contract and right to property – rights which jointly award the property owner freedom of choice of whether to grant others access or reserve the property for own needs.[225] Secondly, protecting the incentive to develop more efficient facilities may be more beneficial to competition and consumers in the long term (dynamic efficiency) than the short term benefits from forced access

[223] See C-165/19 P *Slovak Telekom* (n 4), para 45.
[224] See C-165/19 P *Slovak Telekom* (n 4), para 51; See also, about limiting the requirements outlined above to cases requiring the remedy of compulsory contracting, *Google Search (Shopping)* (Case AT.39740) Commission decision C(2017) 4444 final [2017], para 651 – "the Bronner criteria are irrelevant in a situation, such as that of the present case, where bringing to an end the infringement does not involve imposing a duty on the dominant undertaking to 'transfer an asset or enter into agreements with persons with whom it has not chosen to contract'."; see also, for the effect of requiring compulsory contracting, joined cases C-241/91 P and C-242/91 P *Magill* (n 3); C-7/97 *Bronner* (n 37); C-418/01 *IMS* (n 3); T-201/04 *Microsoft* (n 3).
[225] See C-165/19 P *Slovak Telekom* (n 4), para 46; C-165/19 P *Slovak Telekom* (n 4), opinion of AG Saugmandsgaard Øe, ECLI:EU:C:2020:678, paras 70–74; Articles 15 and 16 the Charter; see also, about refusal to supply interfering with the freedom of contract, Albertina Albors-Llorens, 'Refusal to Deal and Objective Justification in EC Competition Law', (2006) 65(1) Cambridge Law Journal, 24–27, 24; C-7/97 *Bronner* (n 37), opinion of AG Jacobs (n 71), para 56 – "the right to choose one's trading partners and freely to dispose of one's property are generally recognised principles in the laws of the Member States".

(static efficiency).[226] However, since the issue in Slovak Telekom was not the absence of access, but the access on unfair terms – for which the remedy would be less restrictive on the conflicting interests by not necessitating a forced-on granting of access – the requirements in *Bronner* did not apply.[227] The requirements in Bronner apply only where the abuse lies in the refusal as such.[228] In other words, *Slovak Telekom* showcases that different circumstances may require different considerations, and thus different requirements, to strike a fair balance between the interests concerned.[229]

There is no reason why the considerations in *Slovak Telekom* should not apply equally to refusal to license. The factual circumstances in the cases establishing the approach to refusal to supply and license competitors, respectively, have been similar, with the mere difference that the latter concern IPRs. All cases have concerned the refusal to grant access to a competitor on a downstream market, possible to remedy only by compulsory granting of access.[230] Furthermore, refusal to license and supply are mainly based on the same requirements: indispensability and elimination of competition.[231] Also, refusal to license naturally calls for a corresponding balancing of interests; a balance is needed both between competition law and

[226] See C-165/19 P *Slovak Telekom* (n 4), para 47; C-165/19 P *Slovak Telekom* (n 4), opinion of AG Saugmandsgaard Øe (n 225), paras 75–79; see also about interplay between static and dynamic efficiency in general David J. Teece, 'Favoring Dynamic over Static Competition Implications for Antitrust Analysis and Policy' in Manne G.A., Wright J.D. (eds), *Competition Policy and Patent Law under Uncertainty: Regulating Innovation* (Cambridge University Press, 2012); Kingston (n 38), 699f.; Article 102 Guidelines, paras 86–90; Niamh Dunne, 'Dispensing with Indispensability' (2020) 16(1) Journal of Competition Law and Economics 74, 76; Rita Coco, 'Antitrust Liability for Refusal to License Intellectual Property: A Comparative Analysis and the International Setting', (2008) 12(1) Marquette Intellectual Property Law Review 1, 3 and 19; see also for more economic considerations on the balancing of efficiencies Richard J. Gilbert and Carl Shapiro, 'An Economic Analysis of Unilateral Refusals to License Intellectual Property', (1996) 93(23) Proceedings of the National Academy of Sciences of the United States of America 12749.

[227] See C-165/19 P *Slovak Telekom* (n 4), paras 50 and 51; see for similar conclusions case C-295/12 P *Telefónica and Telefónica de España v Commission*, ECLI:EU:C:2014:2062, paras 75 and 96; Case C-52/09 *TeliaSonera* (n 42), paras 55–58.

[228] See T-612/17 *Google Shopping* (n 52), para 232.

[229] Comp C-165/19 P *Slovak Telekom* (n 4), opinion of AG Saugmandsgaard Øe (n 225), para 66–79.

[230] See joined cases C-241/91 P and C-242/91 P *Magill* (n 3); C-7/97 *Bronner* (n 37); C-418/01 *IMS* (n 3); T-201/04 *Microsoft* (n 3).

[231] See sections 3.1.3 and 3.1.4 above; see T-201/04 *Microsoft* (n 3), paras 332-334.

the rights of freedom of contract and (intellectual) property[232] and between static and dynamic efficiencies.[233] However, the balancing of static and dynamic efficiencies must be nuanced as apparently being inherent in IP law, since the exercise of an IPR cannot in itself constitute an abuse.[234] This anomaly necessitates the additional requirement of the disproportionate pursuit of the purpose of IP law.[235] If a fair balance of efficiencies is disturbed by the disproportionate pursuit of the purpose of IP law, competition law may prevail to re-establishing a fair balance.[236]

Concludingly, and naturally, the requirements for finding an abuse relate to the interests at stake.[237] There are limits where the circumstances of cases are sufficiently different to justify different requirements for the finding of abuse, meaning that there are different types of abuses.[238] It appears, as regards the requirements for refusal to supply and license, that the limit is drawn where

[232] See Articles 16 and 17 the Charter.
[233] See n 113 and text thereto.
[234] See C-7/97 *Bronner* (n 37), opinion of AG Jacobs (n 71), para 62 – here stating that the granting of an IPR "in itself involves a balancing of the interest in free competition with that of providing an incentive for research and development and for creativity."; Inge Govaere, 'Abuses of dominant position, intellectual property rights and monopolization in EU competition law: some thoughts on a possible course of action', in Mateus A.M., Moreira T. (eds), *Competition law and economics: advances in competition policy enforcement in the EU and North America* (Edward Elgar 2010), 179 – "it is first and foremost the IP system itself that seeks to establish the proper balance between allowing for temporary short-term restrictions on competition in order to provide incentives to invest in R&D, in the one hand, and furtherance of long-term competition and innovation, on the other hand."; European Commission, in OECD (1997), *Competition Policy and Intellectual Property Rights* (DAFFE/CLP(98)18) 271, 274 – here it is described that IP-law remedies the market failure that too much (static) competition reduce the incentive to innovate, whereby IP-law "is a means of *internalising* the positive externalities so that an efficient allocation of resources could be achieved in the form of a sufficient level of investment in R&D." (emphasis added)
[235] Comp C-165/19 P *Slovak Telekom* (n 4), opinion of AG Saugmandsgaard Øe (n 225), para 77; C-7/97 *Bronner* (n 37), opinion of AG Jacobs (n 71), para 62; n 106 and text thereto.
[236] See n 131 and text thereto.
[237] See for that effect C-165/19 P *Slovak Telekom* (n 4), paras 38–61, and opinion of AG Saugmandsgaard Øe (n 225), paras 66-79.
[238] See for that effect C-165/19 P *Slovak Telekom* (n 4), paras 38–61; C-52/09 *TeliaSonera* (n 42), paras 55–58; C-295/12 P *Telefónica* (n 227), para 75; see for different abuses and different requirements, based on different circumstances, eg about predatory pricing C-62/86 *AKZO* (n. 163); C-209/10 *Post Danmark I* (n 42); Jones, Sufrin, and Dunne (n 1), 399f.; see about exclusive dealing and loyalty rebates C-413/14 P *Intel* (n 74); see about discriminatory abuse case C-525/16 *Meo - Serviços de Comunicações e Multimédia*, ECLI:EU:C:2018:270; Jones, Sufrin, and Dunne (n 1), 551ff.; see about excessive pricing case C-177/16 *Biedrība "Autortiesību un komunicēšanās konsultāciju aģentūra - Latvijas Autoru apvienība" Konkurences padome*, ECLI:EU:C:2017:689.

the abuse consists only in the refusal as such, rendering compulsory granting of access the sole remedy.[239] In other cases, the issue concerns something else than a sole refusal of access, such as margin squeeze or discrimination.[240] Possibly, an additional limit is that the undertaking refused should be a competitor on the downstream market, which is further developed in the following sections.[241] Consequently, to ensure a fair balance between interests concerned, and as explicated by the Commission in *Microsoft*, different requirements may apply for different circumstances.[242] Conversely, when the circumstances justify certain requirements – such as those for refusal to license described above and outlined in *Magill*, *IMS*, and *Microsoft* – deviating from those requirements would risk jeopardizing the fair balance sought. Thus, expectedly, the requirements for refusal to license are exhaustive, but only in absence of factual deviations requiring different considerations for striking a fair balance of the interests concerned.[243]

In the following sections, I will examine whether the same requirements as outlined above may apply also in case of refusal to license a non-competitor. In other words, I will examine whether the refusal to license in absence of a dominant undertaking's vertical integration may be abusive and whether it forms a different type of abuse than refusal in the case of vertical integration.

---

[239] See T-612/17 *Google Shopping* (n 52), paras 232–233.
[240] See about refusal to supply C-165/19 P *Slovak Telekom* (n 4), para 50 and 51; C-52/09 *TeliaSonera* (n 42), paras 55–58; C-295/12 P *Telefónica* (n 227), para 75; see about discrimination and refusal to license Case 238/87 *Volvo* (n 128), para 9; Hou (n 6), 30.
[241] See C-165/19 P *Slovak Telekom* (n 4), para 45, see for refusal to license only considered in relation to refusal to license competitor joined cases C-241/91 P and C-242/91 P *Magill* (n 3), in particular paras 52 and 56 – it appears from the paragraphs that the case concerned an asymmetric market, while no substitutes existed for the prevented product, the prevention reserved the market for the holder of the IPR; C-418/01 *IMS* (n 3), eg para 22 and 52; T-201/04 *Microsoft* (n 3), eg paras 36, 152, 317 and 563.
[242] See Case COMP/C-3/37.792 *Microsoft* (n 220), paras 555–558; Maggiolino (n 71), 142 – "practices […] which appear different from a behavioural standpoint may, however, produce the same effects on market power and consumer welfare and, therefore, may deserve to be treated in the same manner. In contrast, practices having the same form merit to be judged in a dissimilar way when the applied economic theory states that they produce different effects in different scenarios."
[243] Comp by analogy C-165/19 P *Slovak Telekom* (n 4), paras 48 and 49 – explaining that compulsory granting of access may not be justified "unless the dominant undertaking has a genuinely tight grip on the market concerned. […] The application, to a particular case, of the conditions laid down by the Court of Justice in the judgment in Bronner, […] allows the competent authority or national court to determine whether that undertaking has a genuinely tight grip on the market".

3.2 Distinction Between Refusal to Lincence Competitors and Non-competitors

3.2.1 Introduction

In the previous chapter, I examined the requirements for declaring a refusal to license competitors abusive. It became clear that those requirements correspond to the requirements for refusal to supply competitors, with the additional requirement of prevention of development of the downstream market. It was uncovered that the requirements represent the interests at stake in a certain set of circumstances; different circumstances demand different requirements for striking a fair balance. This is what gives rise to different types of abuses. On this backdrop, it has been proposed that there should be a division between refusal to deal with existing and new customers, respectively, as two types of abuses.[244] That understanding builds on an interpretation of case law a contrario. For instance, in *United Brands*, the court held that a dominant undertaking "cannot stop supplying a *long standing customer* who abides by regular commercial practice, if the orders placed by that customer are in no way out of the ordinary".[245] However, in the following, I present that the interests at stake appear not to support such a division for the purpose of refusal to supply or license, but rather support a division between refusal in relation to competitors and non-competitors, respectively, as two types of abuses (section 3.2.2–3.2.4). Subsequently, in section 3.3, I explore refusal to supply non-competitors (section 3.3.2) and whether refusal to license non-competitors may be abusive and, if so, by what requirements (section 3.3.3).

[244] See case C-53/03 *Syfait and Others*, ECLI:EU:C:2005:333, opinion of AG Jacobs, ECLI:EU:C:2004:673, paras 54–65; Brian Sher, 'The last of the steam-powered trains: modernising Article 82' (2004) 25(5) European Competition Law Review 243, 243; Nguyen, Minssen, and Groussot (n 38), 300.
[245] See Case 27/76 *United Brands* (n 37), para 182 (emphasis added); see also a similar expression in joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37), para 34.

3.2.2 The Interest of a Balance Between Static and Dynamic Efficiencies

The relevant interests at stake in case of a refusal to supply or license speak against a division between existing and new customers. As disclosed in the previous chapter, the relevant interests are fundamental rights (freedom of contract and right to property) and the weighing of dynamic and static efficiencies, mainly including consideration to the incentive to innovate.[246] In this section, I investigate whether new and existing customers can be distinguished based on the balance of static and dynamic efficiencies. In the following section, I probe into the interests of fundamental rights.

It is not apparent that consideration of the balance between static and dynamic efficiency justifies a general distinction between existing and new customers. As discerned in the following, the effects on the market and on the incentive to innovate seem similar for both cases. Instead, what appears is a stark difference in effect on the incentive to innovate between having to deal with a competitor or non-competitor.

As regards effects on the market, refusal to deal with an existing customer as well as a new customer could remove or prevent an actor that would otherwise exist on the downstream market, and thus reduce competition. In extension, both cases can eliminate all effective competition on the downstream market.[247] The effects in a specific case are, irrespective of whether an existing or new customer is refused, naturally dependent on the context, such as whether other actors exist on the same market, or to what extent the

[246] See section 3.1.6.

[247] See for removal of existing customer joined cases 6 and 7/73 *Commercial Solvents* (n 179); Case 311/84 *CBEM* (n 43); T-201/04 Microsoft (n 3); joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37); see for prevention of new customer *Commission decision concerning a refusal to grant access to the facilities of the port of Rødby [Denmark]* (94/119/EC) Commission decision OJ L 55/52 [1993]; *Sea Containers v. Stena Sealink - Interim measures* (Case IV/34.689) Commission decision OJ L 15/8 [1993]; joined cases C-241/91 P and C-242/91 P *Magill* (n 3); C-7/97 *Bronner* (n 37); C-418/01 *IMS* (n 3).

undertaking refused exerted (or would have exerted) competitive pressure on that market.[248] Thus, no general difference is apparent in this regard.

Likewise, as regards the incentive to innovate, no general difference is apparent. A requirement to supply or license may reduce the economic profitability of innovating activity and, thereby, the incentive thereto.[249] The other way around, the logic is that the incentive to innovate increases as the possible profits from innovation increase.[250] Both refusals to deal with existing and new customers may be economically rational (profitable) or irrational. On the one hand, supplying or licensing existing and new customers may enable the commercialization of an innovation, particularly if the supplier or licensor lacks the necessary resources for entering the downstream market on its own.[251] On the other hand, a requirement to deal with new customers, or existing customers alike, may – to detriment of profitability – increase internal competition,[252] or increase competitive

[248] See about dependency on context David Bailey and Laura Elizabeth John, 'Article 101(1)', in Bailey D and John LE (eds), *Bellamy & Child: European Union Law of Competition* (8th edn, Oxford University Press 2018), 153; Robert H. Frank, *The Darwinian Economy: Liberty, Competition, and the Common Good* (Princeton University Press, 2011), 26ff.; see analogously cases concerning article 101 TFEU case C-345/14 *Maxima Latvija*, ECLI:EU:C:2015:784, para 26; case C-234/89 *Delimitis v Henninger Bräu*, ECLI:EU:C:1991:91, para 14; Case 23/67 *Brasserie De Haecht v Wilkin Janssen*, ECLI:EU:C:1967:54, 415.

[249] See C-165/19 P *Slovak Telekom* (n 4), para 47; comp Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10, recital 9–11.

[250] See Bishop and Walter (n 84), 46 – "The lower the expected profits from bringing a new product to market, the less a firm is likely to choose to invest in research and development in the first place."; See about profit as the driving force in market economies Jones, Sufrin, and Dunne (n 1), 2 and 9; Niels, Jenkins, and Kavanagh (n 81), 2, 8, 12f, and 14 – on page 14 writing that "The lure of monopoly profit is what drives suppliers to be innovative"; Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (Generic NL Freebook Publisher) <https://eds-b-ebscohost-com.ludwig.lub.lu.se/eds/ebookviewer/ebook/bmxlYmtfXzEwODYwNDZfX0FO0?sid=545f6598-a5da-4205-9d6a-34813ffb7a3f@pdc-v-sessmgr01&vid=0&format=EB&lpid=lp_324&rid=0> accessed September 23, 2021, 343; Jan Boone, 'Intensity of competition and the incentive to innovate' (2001) 19(5) International Journal of Industrial Organization 705, 706; Gilbert and Shapiro (n 226), 12749f. – the authors explain that permitting certain conducts "would increase the profits from invention and, therefore, enhance incentives for innovation."

[251] See regarding IPRs Robert P. Merges, 'Economics of Intellectual Property Law', in Parisi F. (ed), *The Oxford handbook of law and economics: Volume 2: Private and commercial law* (Oxford University Press, 2017), 208f.

[252] See, for that effect, joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37).

pressure on the supplier if the supplier is (becoming) vertically integrated on the downstream market.[253] Furthermore, an undertaking may have a limited capacity to supply or license, with the consequence that, in particular, a requirement of continuing supply or licensing to an existing customer might prevent that undertaking from dealing with a new customer willing to pay more.[254] Importantly, the dynamic and evolving nature of markets must be kept in mind; in principle, profits from commercial activity arise over time, meaning that the assessment of profitability (and thus the incentive to innovate) cannot be confined to the situation when an innovation is first placed on the market[255] – market actors must continuously "adapt to the changing environment by changing strategies and structures".[256]

Without any clear and general difference between refusal to deal with existing and new customers, as regards the balancing of static and dynamic efficiencies, no difference in treatment under competition law appears legitimate.[257] A difference in treatment without any evident difference in the situation seems unfounded and arbitrary in relation to the combat of anti-competitiveness and the strive to avoid so-called false positives and negatives (over- and under-enforcement).[258] Instead, the economic theory of a free market economy favours equal treatment in the form of non-intervention; in principle, the spontaneous order arising from market actors acting in the self-interest (profit maximation) best pursue the general interests of society.[259]

---

[253] See, for that effect about existing customers, joined cases 6 and 7/73 *Commercial Solvents* (n 179); Case 311/84 *CBEM* (n 43); T-201/04 *Microsoft* (n 3); about new customers Case 94/119/EC *Port of Rødby* (n 247); Case IV/34.689 *Sea Containers* (n 247); joined cases C-241/91 P and C-242/91 P *Magill* (n 3); C-7/97 *Bronner* (n 37); C-418/01 *IMS* (n 3).

[254] See about limited capacity Niels, Jenkins, and Kavanagh (n 81), 10ff.; Jones, Sufrin, and Dunne (n 1), 6ff.; n 168 and text thereto.

[255] Comp Teece (n 226), 210ff.; Schumpeter (n 81), 82 – "Capitalism, then, is by nature a form or method of economic change and not only never is but never can be stationary".

[256] See Teece (n 226), 212f.

[257] See European Commission (2007) (n 47), 203 – "in conceptual terms, treatment of these two types of situations under Article 82 should be the same".

[258] See about false positives and negatives Jones, Sufrin, and Dunne (n 1) p. 55f.

[259] Jones, Sufrin, and Dunne (n 1), 2f.; Yong Tao, 'Spontaneous economic order' (2016) 26(3) Journal of Evolutionary Economics 467, in particular 457f. and 497; Brian C. Albrecht, 'The Breakdown of Spontaneous Order: Smith and Hayek Diverge' (2017) 11(1) New York University Journal of Law and Liberty 346, 354ff.; Daniel J. Herron, Sean

Consequently, instead of distinguishing between new and existing customers, more tenable (and assumptively more incentivising for innovation) would be to leave a margin of discretion – freedom of choice – for the (potential) supplier to decide the most profitable course of conduct, without any prejudice in favour of either existing or new customers.[260] This indeed appears to be the approach under IP law.[261] Consistently, this appears also to be the approach adopted for refusal to supply and license under competition law;[262] for instance, in *Microsoft*,[263] the GC applied the same requirements concerning new and previous customers as the CJ did in *IMS*[264] concerning a new customer, and in *Sea Containers*[265] the commission applied the same requirements concerning a new customer as the CJ did concerning an existing customer in *CBEM*[266] and *Commercial solvents*,[267] respectively.

3.2.3 The Interest of Fundamental Rights

Alike the balance between static and dynamic efficiencies,[268] the relevant fundamental rights seem not to support the proposed division between new and existing customers. As far as refusal to supply or license is concerned, the right to property and freedom of contract are interrelated. The right to property is concerned with the right for an undertaking "to own, use, dispose of and bequeath his or her lawfully acquired possessions".[269] The freedom of

Sovacool, and Matthew T. Phillips, 'Hayek's Theory of Spontaneous Order and the Normative Development of the Free Market and Common Law' (2019) 39 The Journal Jurisprudence 239; Friedrich Hayek, *Det stora misstaget: socialismens felslut* (Timbro AB, 1990) 102ff.; Smith (n 250), 343 – here, Smith is writing about the so-called invisible hand, describing the spontaneous order that arise in free markets.

[260] Comp, for a similar thought, Sher (n 244), 245 – "market structures are constantly adapting – layers disappear, new avenues or products open up – and nowhere do we have a real consideration of why or whether the law should favour any structure, existing or otherwise."

[261] See n 212 and text thereto.

[262] Comp Niels, Jenkins, and Kavanagh (n 81), 220 – "it does not necessarily matter whether access is withdrawn or never granted. What matters most is the effect of the refusal on competition and efficiency in the round, that is, in both the IP and the downstream markets, and in both the short and long run."

[263] See T-201/04 *Microsoft* (n 3).

[264] See C-418/01 *IMS* (n 3).

[265] See Case IV/34.689 *Sea Containers* (n 247).

[266] See Case 311/84 *CBEM* (n 43).

[267] See joined cases 6 and 7/73 *Commercial Solvents* (n 179).

[268] See section 3.2.2,

[269] See Article 17 the Charter.

contract includes principally the freedom to choose with whom to conduct business (conclude contracts) *and* to terminate contracts.[270] Consequently, a requirement to supply or license a new customer or continue to supply or license an existing customer would interfere with both rights simultaneously. Interference may be lawful if provided for by law and if proportionate in pursuit of the general interest protected by that law.[271]

EU competition law appears not to justify different degrees of interference depending on refusal in relation to a new or existing customer. EU competition law is concerned with ensuring the retainment *and* growth of competition.[272] Thus, the objective of competition law may be counteracted irrespective of whether the undertaking refused is an existing or new customer.[273] Simultaneously, EU competition law is not concerned with protecting competitors, such as protecting a contracting party against breaches or termination of contracts.[274] Whether a contract must be honoured or may be terminated are issues of contract law – a legal area separate from competition law.[275] Truly, though, this is not the same as saying that

[270] See Article 16 the Charter; Tobias Lock, 'Article 16 CFR' in Kellerbauer M., Klamert M., and Tomkin J., *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press, 2019), 2148; see also about termination C-201/15 *AGET Iraklis*, ECLI:EU:C:2016:972, paras 67–69.
[271] See article 52(1) the Charter; Lock (n 270), 2148 and 2151; case C-416/10 *Križan and Others*, ECLI:EU:C:2013:8, para 113; case C-292/97 *Karlsson and Others*, ECLI:EU:C:2000:202, para 45; Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17, article 52; see, about the corresponding protocol 1 article 1 European Convention on Human Rights, Rome 4 November 1950, elaboration in Iain Cameron, *An Introduction to the European Convention on Human Rights* (8th edn, Iustus Förlag AB, 2018), 151f.
[272] See Case 85/76 *Hoffmann-La Roche* (n 52), para 91 -- describing abuse as conduct which "has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."; Case IV/34.689 *Sea Containers* (n 247), para 67.
[273] See above section 3.2.2.
[274] See joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others*, ECLI:EU:C:2009:610, para 63; C-209/10 *Post Danmark I* (n 42), para 22; Jones, Sufrin, and Dunne (n 1), p. 50.
[275] See Armin Lambertz, 'The Role of Competition Law in Regulatory European Private Law', (2013) 4 MaRBLe Research Papers 295, 300 – "Contract law seeks to minimize transaction costs by providing parties with the necessary tools to establish their respective rights and obligations vis-à-vis each other. […] Competition law, on the other hand, is first and foremost aimed at generating and preserving a level playing field for market participants. The efficiency of transactions is not assessed from the perspective of the parties in question but from the market as a whole."; Katlin Cseres, 'Competition and

competition law does not interfere with contract law; competition law may interfere with contract law, inter alia by requiring the granting of access to certain property or by declaring a contract void, but only in the form of proportionate remedies for ensuring the objectives of competition law in so far as a restriction of competition is first established, not as an end itself.[276] In sum, since not legitimised by its objectives, EU competition law cannot restrict the freedom of contract as concerns the freedom to end commercial relations more than as concerns the freedom not to enter such relations.

This conclusion is not contradicted by the CJ judgment in the case *BP*.[277] In that case, an oil crisis caused a scarcity in oil, forcing the dominant undertaking (BP) to reduce its supplies (i.e., a partial refusal to supply). BP reduced its supplies to a disproportionally greater extent in relation to ABG, an occasional customer, than in relation to its traditional customers. The court did not consider the conduct to be abusive.[278] On this backdrop, it has been suggested that EU competition law allows for preferential treatment of long-standing customers, and thus a lower level of protection for newer customers.[279] That suggestion appears unfounded. Besides the fact that competition law is not protecting competitors but the retainment and growth of competition, the suggestion is not supported by *BP* itself. It is evident from the judgment that the scarcity of oil constituted a legitimate cause for BP to partially refuse supply in protecting its commercial interests;[280] the question, instead, concerned whether the (allowed) refusal was enforced discriminatorily.[281] The CJ found that there was no abusive discrimination

Contract law', in Arthur Hartkap and others (eds), *Towards a European Civil Code*, (4th edn rev. exp., Kluwer Law International 2011) 205, 206ff.

[276] Comp article 7 and recital 9 and 12 Reg. 1/2003; Lambertz (n 171), 301ff.; Hein Kötz, *European Contract Law* (2nd edn, Oxford University press, 2017), 119; Hugh Beale and others, *Cases, Materials and Text on: Contract Law* (2nd edn, Hart Publishing, 2010), 4 and 619ff.; Cseres (n 171), 206ff.

[277] See Case 77/77 *Benzine en Petroleum Handelsmaatschappij BV and others v Commission of the European Communities*, ECLI:EU:C:1978:141.

[278] See Case 77/77 *BP* (n 277), para 43.

[279] See Hou (n 6), 6.

[280] See on protection of commercial interests Case 27/76 *United Brands* (n 37), para 189; joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37), para 69.

[281] See Case 77/77 *BP* (n 277), particularly from para 18.

since ABG, for various reasons,[282] was an occasional customer not in a comparable situation to the traditional customers of BP.[283] Consequently, article 102 TFEU could not constitute a legal basis for requiring an equal reduction in supply.[284] Hence, it would constitute an unjustified interference with the right to property and freedom of contract to require a certain portioning of distribution.[285] Discrimination is not concerned with different treatment of non-comparable situations;[286] thus, the outcome in *BP* should not have differed if, instead, the reduction of supply to traditional customers would have been the greater – the case does not entail that older customers are more worthy of protection than newer.

3.2.4 Distinction Between Competitors and Non-competitors

While a distinction between refusal in relation to existing and new customers does not appear justified, a distinction between refusal in relation to competitors and non-competitors does. Truly, a requirement to deal with either competitors or non-competitors would equally interfere with fundamental rights; in either case, the supplying or licensing undertaking would be compelled to initiate or continue a commercial relationship – consisting in the granting of access to its property – with another undertaking.[287] However, due to differences in the balance of efficiency gains and losses between dealing with competitors and non-competitors, respectively, the interference may be justified to differing degrees.[288]

[282] See Case 77/77 *BP* (n 277), paras 24–31.
[283] See Case 77/77 *BP* (n 277), paras 32 and 33.
[284] See Case 77/77 *BP* (n 277), paras 34–35.
[285] See on requirement of restriction being provided for by law article 52(1) the Charter.
[286] See about discrimination as an abuse article 102(d) TFEU; C-95/04 *British Airways* (n 42), para 139; Case 85/76 *Hoffmann-La Roche* (n 52), para 90; C-209/10 *Post Danmark I* (n 42), para 30; see about the principle of discrimination under EU law in general Craig and De Burca (n 17), 567f.; Christopher McCrudden and Sacha Prechal, 'The Concepts of Equality and Non-Discrimination in Europe: A practical approach' (2009) European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities Unit G.2., 12 – "unlike cases may be treated differently"; article 21 the Charter.
[287] See article 16 and 17 the Charter.
[288] See, about balancing of efficiency gains and losses in the relation between competition law and fundamental rights, Cseres (n 171), 210.

When balancing efficiency gains and losses, consideration must be had to the incentive to innovate and the effects of a refusal on the market – a refusal may reduce competition and thus both static and dynamic efficiencies but may simultaneously favour dynamic efficiency.[289] Naturally, a refusal in relation to competitors and non-competitors, respectively, may equally reduce competition – static and dynamic – that would otherwise exist on the downstream market; effective competition from one market actor is removed.[290] In this regard the situations are similar. The only difference is whether the competition removed would restrain the market power of the supplier or not.

However, supplying or licensing a competitor or non-competitor, respectively, differ in relation to the incentive to innovate. In principle, it is economically rational to supply or license non-competitors.[291] Contrastingly, it is in principle not economically rational to supply or license own competitors. Namely, while competition is good for society at large,[292] it is in principle negative for the individual market incumbent. The economically rational goal for market actors is to become monopolists and reap monopoly profits.[293] Vertically integrated undertakings can pursue that goal by leveraging market power upstream to reserve the market downstream for

[289] See n 195–198 and text thereto; section 3.2.2.
[290] See, for removal of competition not being own competition, for instance joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37); see, for removal of competitor being own competitor, for instance C-418/01 *IMS* (n 3).
[291] See Hou (n 6), 3 – "Since there is in general no conflict of interest with a simple client/seller model, a dominant supplier usually has no incentive to decline the request of some clients in this case."
[292] See Whish and Bailey (n 1), 18; Jones, Sufrin, and Dunne (n 1) p. 69; Article 102 Guidelines, para 5 – "Consumers benefit from competition through lower prices, better quality and a wider choice of new or improved goods and services."; Article 101(3) Guidelines, para 33.
[293] see Niels, Jenkins, and Kavanagh (n 81), 14f.; Jones, Sufrin, and Dunne (n 1) p. 9f.; see, in american law, *US v Aluminum Co of America (ALCOA)* [1945] 148 F 2d 416 (2nd Circuit) – in this case, Judge Learned Hand made the renowned statement that "The successful competitor, having been urged to compete, must not be turned upon when he wins."

itself.[294] Thus, requiring an undertaking to supply or license competitors, thereby enabling the competitors to exert an effective competitive force, is in principle or invariably detrimental for that undertaking's own profitability and, thus, its incentive to innovate.[295]

Consequently, while the restriction on the fundamental rights is equal in both cases, there is a difference in balance between static and dynamic efficiencies. As discerned above, the efficiency losses caused by compulsory granting of access to non-competitors ought in general to be lower than in relation to competitors, while the efficiency gains are comparable.[296] Differences in the balance of efficiencies may justify differently extensive interference with the right to property and freedom of contract.[297] The logical effect is that a restriction of competition might be found, and interference with fundamental rights might be justified, more easily for refusals in relation to non-competitors.[298] Thus, one can discern two branches of case law as concerns refusal to supply and license. Firstly, there is the line of case law which has over time developed the requirements outlined above for refusal in relation to competitors of supply or license, respectively.[299] Secondly, there is the line

[294] See for that effect eg joined cases 6 and 7/73 *Commercial Solvents* (n 179), para 25; Case 311/84 *CBEM* (n 43), para 25; joined cases C-241/91 P and C-242/91 P *Magill* (n 3), para 56; C-418/01 *IMS* (n 3), para 52; T-201/04 *Microsoft* (n 3), para 563.
[295] See C-165/19 P *Slovak Telekom* (n 4), para 47 – "it is generally favourable to the development of competition and in the interest of consumers to allow a company to reserve for its own use the facilities that it has developed for the needs of its business. If access to a production, purchasing or distribution facility were allowed too easily, there would be no incentive for competitors to develop competing facilities."
[296] See n 289 – 295 and text thereto.
[297] See Cseres (n 171), 210; comp C-7/97 *Bronner* (n 37), opinion of AG Jacobs (n 71), paras 55-70; comp Article 52(1) the Charter – the provision requires a proportionality assessment.
[298] Compare joined cases C-241/91 P and C-242/91 P *Magill* (n 3), opinion of AG Gulmann (n 70), paras 96 and 97.
[299] See joined cases 6 and 7/73 *Commercial Solvents* (n 179); Case 311/84 *CBEM* (n 43); *Sealink/B&I - Holyhead : interim measures* (Case IV/34.174) Commission decision [1992] 5 CMLR 255; Case 94/119/EC *Port of Rødby* (n 247); Case IV/34.689 *Sea Containers* (n 247); joined cases C-241/91 P and C-242/91 P *Magill* (n 3); Case IV/34.801 *FAG - Flughafen Frankfurt/Main AG* (n 194); C-7/97 *Bronner* (n 37); C-418/01 *IMS* (n 3); T-201/04 *Microsoft* (n 3); T-712/14 *CEAHR* (n 86); see also for expression of the division T-504/93 *Tiercé Ladbroke* (n 5), para 133 – the GC held that the claimants could not rely on joined cases 6 and 7/73 *Commercial Solvents* and case 311/84 *CBEM* because in those cases "the company in a dominant position, like its customers, was present on the downstream market, namely the market in derivatives. In contrast, in this case the [dominant undertakings] are not present on the Belgian market in French sound and pictures."

of case law which has developed other requirements for refusal to supply in relation to non-competitors;[300] in the following (section 3.3), I explore which those requirements are and whether they may be extended to refusal to license.

3.3 Refusal to License Non-competitors

3.3.1 Introduction

While refusals in relation to new and existing customers seemingly should not be distinguished into separate types of abuses, refusals in relation to competitors and non-competitors seemingly should.[301] Problematically, the approach to refusal to license non-competitors has not to date been satisfactorily clarified.[302] However, as discovered from studying refusals in relation to competitors, the approach to refusal to supply and to license, respectively, are predominantly corresponding. Thus, for exploring refusal to license non-competitors, which is carried out in section 3.3.3, I will first seek guidance from examining the approach to refusal to supply non-competitors.

The assessment of refusals to supply non-competitors, however, is not palpably more clarified than the assessment of refusals to license. The prior has been considered by the EU institutions only in a few cases[303] and by legal literature merely limitedly and inconsistently.[304] Additionally, the situation is barely touched upon by the Article 102 Guidelines.[305] To date, the most

[300] See Case 27/76 *United Brands* (n 37); Case 77/77 *BP* (n 277), *BBI/Boosey & Hawkes: Interim measures* (Case IV/32.279) Commission decision OJ L 286/36 [1987]; joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37); comp about refusal to license T-504/93 *Tiercé Ladbroke* (n 5).
[301] See section 3.2.
[302] See, for judgments touching upon refusal to license non-competitors, T-504/93 *Tiercé Ladbroke* (n 5); Case 53/87 *Consorzio italiano della componentistica di ricambio per autoveicoli and Maxicar v Régie nationale des usines Renault*, ECLI:EU:C:1988:472; Case 238/87 *Volvo* (n 128).
[303] See Case 27/76 *United Brands* (n 37); Case 77/77 *BP* (n 277); Case IV/32.279 *BBI/Boosey & Hawkes* (n 300); joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37); T-504/93 *Tiercé Ladbroke* (n 5).
[304] Comp eg Jones, Sufrin, and Dunne (n 1) p. 520f.; Mano, Nazzini, and Zenger (n 1), 464; Bailey and John, 'Article 102' (n 1), 959ff.; Whish and Bailey (n 1), 725ff.; Hou (n 6), 3ff.
[305] see Article 102 Guidelines, para 77.

guiding expression was given by the CJ in *Sot. Lelos Kai*, holding that the refusal by a dominant undertaking "to meet the orders of an existing customer constitutes abuse of that dominant position […] where, without any objective justification, that conduct is liable to eliminate a trading party as a competitor".[306] As previously discerned, there is no reason not to apply the same approach to new customers. The mentioning of existing customers in *Sot. Lelos Kai* should be understood as a factual circumstance, not as a legal requirement. Still, it is not evident whether refusal to supply non-competitors constitutes an independent type of abuse or is sorted under other types of abuses, such as discriminatory abuse.[307] Whether, and provided what requirements, refusal to supply non-competitors may be an independent type of abuse is explored in section 3.3.2.

3.3.2 Refusal to Supply Non-competitors

3.3.2.1 United Brands – the Expansive Approach

The foundational case on refusal to supply non-competitors is *United Brands*.[308] UBC, a supplier of bananas of the brand Chiquita, held a dominant position on the market for bananas in a substantial part of the internal market.[309] UBC supplied bananas to various ripeners (distributors), among others the Danish ripener Olesen. After Olesen became the exclusive distributor in Denmark of Dole bananas (a banana brand in competition with Chiquita) and participated in a marketing campaign for Dole bananas, UBC ceased all its supplies to Olesen.[310] The CJ concluded that the cessation was abusive – a dominant undertaking "cannot stop supplying a long standing customer who abides by regular commercial practice, if the orders placed by that customer are in no way out of the ordinary."[311] It considered that such

[306] See joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37), para 34.
[307] see Hou (n 6), 3ff. – considering that the matter concerns discriminatory abuse; Mano, Nazzini, and Zenger (n 1), 464 – considering that the matter concerns exclusive dealing or tying.
[308] See Case 27/76 *United Brands* (n 37).
[309] See Case 27/76 *United Brands* (n 37), paras 35, 36, 57, and 129
[310] See Case 27/76 *United Brands* (n 37), page 216f.
[311] See Case 27/76 *United Brands* (n 37), para 182.

refusals would, in particular, limit markets to the prejudice of consumers[312] and be discriminatory,[313] with the possible effect of ultimately eliminating a trading party from the relevant market.[314] The court admitted, as a justification, that a dominant undertaking may act to protect its own commercial interest if the protective measure is proportionate and its actual purpose is not "to strengthen this dominant position and abuse it".[315] In casu, the refusal was not justified as being in excess of those requirements; the court considered that UBC must have understood that the effect of the refusal would be to strengthen its own position as a supplier by deterring ripeners from giving preference to competing banana brands.[316]

Whether the case supports refusal to supply as an independent type of abuse is not evident. Firstly, it has been suggested that the case rather concerned exclusive dealing.[317] Indeed, the court in *United Brands* considered that the refusal would limit markets and that it would deter customers from preferring competitors' products.[318] Secondly, it has been proposed that the case rather concerned discrimination.[319] Indeed, as seen, that proposal also gains support in the judgment.[320] However, a third interpretation is not excluded – namely, that the court established refusal to supply non-competitors as an independent type of abuse.

Different types of abuses may be interrelated and complementary. As evident from BP, discussed above, abuse by discrimination may complement refusal to supply, where the refusal as such is legitimate.[321] Another example is margin squeeze which may be interrelated with but independent from predatory pricing. Conduct that constitutes margin squeeze may

[312] See Article 102(b) TFEU.
[313] See Article 102(c) TFEU.
[314] See Case 27/76 *United Brands* (n 37), para 183.
[315] See Case 27/76 *United Brands* (n 37), para 189.
[316] See Case 27/76 *United Brands* (n 37), paras 191–194.
[317] See Mano, Nazzini, and Zenger (n 1), 464 and 475; comp Article 102 Guidelines, para 77.
[318] See Case 27/76 *United Brands* (n 37), paras 182 and 192.
[319] see Hou (n 6), 3ff.
[320] See Case 27/76 *United Brands* (n 37), paras 183.
[321] See section 3.2.3.

simultaneously but separately constitute predatory pricing.[322] Thus, in the same fashion, it is consequential that the fact that a conduct is discriminatory should not necessarily exclude that that conduct can constitute an abuse separate from discriminatory abuse if the circumstances so justify.[323] Indeed, in *United Brands*, the court did not limit its considerations to discrimination but additionally considered limitation of markets and, seemingly, other non-specified effects.[324] It thus appears as if the court went beyond mere discriminatory abuse, to something else.

That something else was not necessarily abusive conduct through de facto exclusive dealing.[325] Truly, the court expressed that a refusal, such as that at dispute, "would limit markets".[326] However, that expression is only with an inconsistency-creating interpretation connected to customers being deterred from preferring competitors to UBC. Namely, the court expressly considered such deterrence only in relation to justification; for justification, the purpose of the conduct must not be to strengthen one's dominant position.[327] If equal deterrence would simultaneously be a requirement for abusive refusal, to begin with, the possibility of justification based on commercial interest appears chimerical. Instead, the court seemingly considered that a refusal to supply may limit the downstream market by foreclosing the customer being refused; the court was evidently of the opinion that the refusal "might in the end eliminate a *trading party* from the relevant market."[328]

---

[322] See C-52/09 *TeliaSonera* (n 42), para 102; see about margin squeeze Jones, Sufrin, and Dunne (n 1), 416ff.; C-52/09 *TeliaSonera* (n 42); C-280/08 P *Deutsche Telekom v Commission*, ECLI:EU:C:2010:603; C-295/12 P *Telefónica* (n 227); see about predatory pricing Jones, Sufrin, and Dunne (n 1), 399ff.; Mano, Nazzini, and Zenger (n 1), 397ff.; Whish and Bailey (n 1), 756ff.; C-62/86 *AKZO* (n. 163); C-202/07 P *France Télécom* (n 163); C-209/10 *Post Danmark I* (n 42); Article 102 Guidelines, paras 62–74.
[323] Comp, about requirements for abuse being mandated by the circumstances, section 3.1.6.
[324] See Case 27/76 *United Brands* (n 37), para 183 – "especially".
[325] See, about de facto exclusive dealing, Article 102 Guidelines, para 33; Vertical Agreement Guidelines, para 129; Jones, Sufrin, and Dunne (n 1), 446; Case 85/76 *Hoffmann-La Roche* (n 52), paras 89 and 90; C-413/14 P *Intel* (n 74), paras, 137 and 138.
[326] See Case 27/76 *United Brands* (n 37), para 183.
[327] See Case 27/76 *United Brands* (n 37), para 189 and 192.
[328] See Case 27/76 *United Brands* (n 37), para 183 (emphasis added); comp Anne C. Witt, *The More Economic Approach to EU Antitrust Law* (Hart Publishing 2016), 146 – describing as harmful conduct under article 102 TFEU including inter alia conduct that

The risk of such elimination in *United Brands* could be rationalised by framing UBC as an unavoidable trading partner, because of providing Chiquita bananas as a so-called must-stock product.[329] An unavoidable trading partner is an undertaking on which customers are economically dependent – without partnering with that undertaking, profits would be reduced.[330] Such dependency may arise if customers are not able to fully cover their quantitative demands by substitutes.[331] It may also arise if customers cannot, without having that undertaking as a trading partner, wholly satisfy their own customers' needs or preferences.[332] In the latter scenario, the unavoidable undertaking is said to supply a must-stock product.[333] It naturally follows that if an unavoidable trading party refuses to supply, the undertaking refused may become less competitive and potentially (but not necessarily) ultimately eliminated from the market.[334] In accordance herewith, in *United Brands*, the court considered that Chiquita bananas "cashes in on the reputation of a brand name known to and valued by the consumers"[335] and, undisputedly, the refusal – in relation to consumer preferences – deprived Olesen of over half of its sales.[336] If Olesen would be ultimately eliminated, that would limit the market by limiting the number of

cause "restrictions of the freedom of action or commercial opportunity of competitors and trading partners" and that cause "limitations of consumers' choices on where to source their supplies".

[329] See, about unavoidable trading partner and must-stock items, Jones, Sufrin, and Dunne (n 1), 353f.; COMP/37.990 *Intel* (n 169), paras 885-905.

[330] Comp case T-219/99 *British Airways v Commission*, ECLI:EU:T:2003:343, paras 213 -- 217; T-229/94 *Deutsche Bahn v Commission*, ECLI:EU:T:1997:155, para 57; Jones, Sufrin, and Dunne (n 1), 353.

[331] See, for that effect, *Upstream gas supplies in Central and Eastern Europé* (Case AT.39816) Commission decision C(2018) 3106 final [2018], para 34.

[332] See, for that effect, COMP/37.990 *Intel* (n 169), para 891; case T-65/98 *Van den Bergh Foods v Commission*, ECLI:EU:T:2003:281, para 156; T-219/99 *British Airways* (n 330), paras 213–217.

[333] See Jones, Sufrin, and Dunne (n 1), 353f.; Philippe Choné and Laurent Linnemer, 'Non Linear Pricing and exclusion: II. Must-Stock products', (2016) 47(3) RAND Journal of Economics 631, 631; Article 102 Guidelines, para 36.

[334] Comp Case 27/76 *United Brands* (n 37), paras 166 and 182.

[335] See Case 27/76 *United Brands* (n 37), para 182.

[336] See Case 27/76 *United Brands* (n 37), para 166.

ripeners and thus the possible choice of contracting party for customers further downstream.[337]

Importantly, an undertaking being dominant ought to simultaneously be, in general, an unavoidable trading party. Dominance does not require monopoly, meaning that an undertaking does not have to be totally unavoidable to be dominant.[338] Simultaneously, an undertaking being only insignificantly unavoidable cannot be dominant. If a large proportion of an undertaking's customers could profitably switch to substitutes, the pivotal scope of tied-in customers would not reasonably allow that undertaking to act appreciably independently without it being self-detrimental; an increase of profit per sale would be outweighed by the loss of sales.[339] Unless an undertaking can, over a significant period of time, act appreciably independently without it being self-detrimental, that undertaking does not hold the necessary substantial market power for being dominant.[340] Instead, it follows that it is sufficient, but also necessary, that a substantial part of the market is incontestable by actual or potential competitors – the undertaking should be *in general* unavoidable. Consequentially, the court has concluded that it is inherent in

[337] Comp Case 6/72 *Continental Can* (n 72), para 29 – describing it as abusive with "an alteration to the supply structure which seriously endangers the consumer's freedom of action in the market, such a case necessarily exists, if practically all competition is eliminated. Such a narrow precondition as the elimination of all competition need not exist in all cases"; Jones, Sufrin, and Dunne (n 1), 365 – describing Article 102(b) TFEU as covering exclusionary abuse; Case 27/76 *United Brands* (n 37), para 182.

[338] See Jones, Sufrin, and Dunne (n 1), 331; Damien Geradin and others 'The Concept of Dominance' in Geradin D. (ed), *GCLC Research Papers on Article 82 EC* (Global Competition Law Centre, 2005), 10f.; Case 85/76 *Hoffmann-La Roche* (n 52), para 39 – "Such a position does not preclude some competition"; see also, for that effect, T-219/99 *British Airways* (n 330) – dominance found at a market share of 39,7%.; case T-191/98 *Atlantic Container Line and Others v Commission*, ECLI:EU:T:2003:245, para 932.

[339] See about critical loss Niels, Jenkins, and Kavanagh (n 81), 48f.; Kai Küschelrath, 'Critical Loss Analysis in Market Definition and Merger Control', (2009) 5(3) European Competition Journal 757, 758.

[340] See Case 85/76 *Hoffmann-La Roche* (n 52), para 38 and 39 – at paragraph 39 clarifying that an undertakings independent conduct only indicate dominance "so long as such conduct does not operate to its detriment"; Jones, Sufrin, and Dunne (n 1), 98f. and 331; Article 102 Guidelines, paras 10 and 11; see, about profitability, also Case 322/81 *Michelin* (n 156) – the court clarified, quite reasonably, that *temporary* unprofitability or losses by the conduct does not prevent it from being abusive.

the concept of a dominant position that the dominant undertaking is *in general* an unavoidable trading partner on the relevant market.[341]

Thus, what the court in *United Brands* appears to suggest is that a refusal by a dominant undertaking to supply non-competitors is, unless justified, abusive as such – negative effects on competition (inter alia discrimination and limitation of markets) are assumed to follow.[342] Two points are noticeable about this approach. Firstly, it would mean that anti-competitive foreclosure extends beyond foreclosing of own competitors. Competition law is concerned with protecting effective competition and thus economic efficiency and, ultimately, consumer welfare.[343] Harmoniously, it should not matter whether one's own or another's competitor is foreclosed.[344] Consistently, this aligns article 102 TFEU with article 101 TFEU, which both holds the same objective;[345] under article 101 an agreement may be prohibited "irrespective of the market on which the parties operate".[346] Secondly, the approach in *United Brands* is expansive, and risks intercepting refusals not in fact having

[341] See C-23/14 *Post Danmark II* (n 164), para 40; C-95/04 P *British Airways* (n 42), paragraph 75; T-155/06 *Tomra Systems and Others v Commission*, ECLI:EU:T:2010:370, para 269; Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports and Others v Commission*, ECLI:EU:C:2000:132, para 132; case T-286/09 *Intel v Commission*, ECLI:EU:T:2014:547, para 91 and 92 – observe that this case was set aside on appeal by the CJ in C-413/14 P *Intel* (n 74), but the findings about dominance and unavoidable trading party was disputed as such, which is evident also from C-413/14 P *Intel* (n 74), opinion of AG Wahl (n 74), para 144; comp for similar thoughts Peter Alexiadis and Alexandre de Streel, 'Designing an EU Intervention Standard for Digital Platforms' (2020) EUI Working Papers, RSCAS 2020/14, 6; Geradin and others (n 338), 16 and 19.

[342] Case 27/76 *United Brands* (n 37), para 182–184.

[343] See about objectives of EU competition law section 2.3; see particularly C-413/14 P *Intel* (n 74), opinion of AG Wahl (n 74), paras 41 and 42; C-52/09 *TeliaSonera* (n 42), paras 22–24; Case 6/72 *Continental Can* (n 72), paras 12 and 26.

[344] See, in relation to refusal to supply, the UK Supreme Court, case *Arriva The Shires Ltd v London Luton Airport Operations Ltd* [2014] EWHC 64 (Ch), para 99 – "I do not accept, however, that as a matter of law, a foreclosure of the downstream market distorting competition among competitors on that market should be an abuse only if it generates an economic gain on the part of the dominant undertaking. That is inconsistent with the case law which emphasises the objective nature of abuses and which establishes that motivation and intention are generally not relevant to the question of infringement"; Bailey and John, 'Article 102' (n 1), 960; see in relation to discrimination T-128/98 *Aéroports de Paris v Commission*, ECLI:EU:T:2000:290, para 173 – "the concept of abuse is an objective concept and implies no intention to cause harm. Accordingly, the fact that ADP has no interest in distorting competition on a market on which it is not present, and indeed that it endeavoured to maintain competition, even if proved, is in any event irrelevant."

[345] See about the same objective Case 6/72 *Continental Can* (n 72), para 25.

[346] See C-194/14 P *AC-Treuhand* (n 76), para 35.

negative effects on competition – so-called false positives.[347] Unsurprisingly, the judgment has been criticised as giving too little consideration to economic efficiencies, and has instead been considered to have as its main purpose "to protect small undertakings from the large."[348]

3.3.2.2 The More Restrictive Approach

While the first point noted about the approach in *United Brands* has been affirmed, the second has been remedied. As case law currently stands, the refusal to supply a non-competitor constitutes an abuse "where, without any objective justification, that conduct is liable to eliminate a trading party as a competitor".[349]

Before the CJ had the opportunity to revisit the conclusions in *United Brands,* the Commission had its go. In its decision in *Boosey & Hawkeys,*[350] the Commission found that B&H, a manufacturer of brass instruments being dominant on the market for brass instruments for British-style brass bands,[351] had abused its dominance by ceasing to supply RCN, a brass band instruments repairer, and GHH, a brass band instruments retailer.[352] The cessation succeeded a decision by RCN and GHH to jointly create the company BII for the manufacturing of brass instruments in competition with B&H.[353] However, instead of declaring the refusal abusive as such, unless justified,[354] the commission held that a non-justified refusal to supply "may constitute an abuse".[355] The refusal in casu was abusive because "the dependence of GHH and RCN on B&H products is such that there was a substantial likelihood of

[347] Comp Nguyen, Minssen, and Groussot (n 38), 305; see also about false positives in general Jones, Sufrin, and Dunne (n 1), 56.
[348] See Per Jebsen and Robert Stevens, 'Assumptions, Goals, and Dominant Undertakings: The Regulation of Competition Under Art. 86 of the European Union' (1996) 64(3) Antitrust Law Journal 443, 511; see also Liza Lovdahl Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (Cambridge University Press, 2010), 68.
[349] See joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37), para 34.
[350] See Case IV/32.279 *BBI/Boosey & Hawkes* (n 300).
[351] see Case IV/32.279 *BBI/Boosey & Hawkes* (n 300), paras 2 and 17.
[352] see Case IV/32.279 *BBI/Boosey & Hawkes* (n 300), paras 3 and 19.
[353] See Case IV/32.279 *BBI/Boosey & Hawkes* (n 300), paras 7 and 8.
[354] see for that conclusion Case 27/76 *United Brands* (n 37), para 182.
[355] See Case IV/32.279 *BBI/Boosey & Hawkes* (n 300), para 19.

their going out of business as a result of the withholding of supplies."[356] In other words, B&H an unavoidable trading partner for RCN and GHH, specifically, to a sufficient extent as to render the refusal of supplies capable of eliminating the latter from their respective markets.[357] The fact that the refusal would indirectly risk eliminating BBI – a (potential) competitor – was considered an aggravating, but thus apparently not a necessary, factor.[358]

Later, in *Sot. Lelos Kai*,[359] the CJ had the opportunity to revisit the conclusions in *United Brands*. In its judgment, the CJ essentially followed the reasoning of the Commission in *Boosey & Hawkeys*. As for the facts in *Sot. Lelos Kai*, GlaxoSmithKline (GSK) manufactured the pharmaceutical Lamictal, an epilepsy medicine, for which no substitutes were considered to exist. Thus, GSK was assumed, by the CJ, to hold a dominant position in respect of Lamictal.[360] GSK AEVE, a subsidiary to GSK, (jointly referred to as GSK) imported Lamictal to Greece and sold it to wholesalers that distributed it to hospitals and pharmacies on the Greek market.[361] The question referred to the CJ concerned GSK's refusal to supply the Greek wholesalers with more than a limited quantity of Lamictal.[362] The rationale for the refusal was evidently to limit parallel imports from Greece to Member States with higher selling prices.[363] The differing selling prices arose from the fact that several Member States had, under influence of an EU directive,[364] regulated the selling price of inter alia Lamictal, either in the form of fixed prices or more discretionary alternatives.[365] On this backdrop, the rationale for GSK's refusal may be further explained. The low selling price in Greece,

[356] See Case IV/32.279 *BBI/Boosey & Hawkes* (n 300), para 19.
[357] comp Case IV/32.279 *BBI/Boosey & Hawkes* (n 300), para 3, 5, 6 and 13 – here, it appears that RCN and GHH was essentially fully dependent on B&H; see above about unavoidable trading partner-
[358] See Case IV/32.279 *BBI/Boosey & Hawkes* (n 300), para 19.
[359] See joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37).
[360] See joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37), paras 9 and 24.
[361] See joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37), paras 9–11.
[362] See joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37), paras 13 and 14
[363] See joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37), para 36.
[364] See Council Directive 89/105/EEC of 21 December 1988 relating to the transparency of measures regulating the pricing of medicinal products for human use and their inclusion in the scope of national health insurance systems [1989] OJ L40/8.
[365] See joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37), paras 59–63.

because of Greek price regulation, would require GSK to sell Lamictal to wholesalers at a lower price than possible in Member States with higher regulated, or unregulated, selling prices. This would grant the Greek wholesaler a cost advantage, which in the length could force GSK to either lower prices charged to other wholesalers or accept the Greek wholesalers' successive absorption of other wholesalers' market shares.[366] As the CJ observed, states' differing intervention in selling prices "is one of the factors liable to create opportunities for parallel trade."[367]

In its assessment, the CJ adopted a two-step approach.[368] First, it considered concisely whether the conduct was prima facie abusive[369] and, secondly and more elaboratively, whether the conduct was conclusively abusive or justified as proportionally protecting GSK's commercial interests.[370] The first question is of interest here, while the second falls outside the scope of this thesis.[371] As to the first question, the court concluded that a refusal to supply constitutes an abuse "where, without any objective justification, that conduct is liable to eliminate a trading party as a competitor".[372] The court made two specifying remarks: it is sufficient with the elimination of effective competition, and it is sufficient with such elimination from only one relevant market and not

[366] Comp joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37), para 36, 44 and 70; joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37), opinion of AG Ruiz-Jarabo Colomer, ECLI:EU:C:2008:180, paras 106-119; C-53/03 *Syfait*, opinion of AG Jacobs (n 244), para 84 – the facts in this case were in principle identical to those in Sot. Lelos Kai; see about similar arguments in an equal situation which also concerned GlaxoSmithKline, albeit under article 101 TFEU, case T-168/01 *GlaxoSmithKline Services v Commission*, ECLI:EU:T:2006:265, paras 258 and 259; joined cases *Glaxo Wellcome (notification)* (Case IV/36.957/F3), *Aseprofar and Fedifar (complaint)* (case IV/36.997/F3), *Spain Pharma (complaint)* (case IV/37.121/F3), *BAI (complaint)* (case IV/37.138/F3), and *EAEPC (complaint)* (case IV/37.380/F3) Commission decision C(2001)1202 [2001], paras 80, 90, and 171 – in the latter paragraph it appears that Lamictal, among other of GlaxoSmithKline's products, "are distributed by independent wholesalers."
[367] See joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37), para 67; joined cases IV/36.957/F3 *Glaxo Wellcome*, IV/36.997/F3 *Aseprofar*,; IV/37.121/F3 Spain Pharma, IV/37.138/F3 BAI, and IV/37.380/F3 EAEPC (n 366), para 29.
[368] See Kingston (n 38), 688.
[369] See joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37), paras 33–39.
[370] See joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37), paras 40--77; see C-53/03 *Syfait*, opinion of AG Jacobs (n 244), para 72; see about the rule of reason approach adopted by the court Nguyen, Minssen, and Groussot (n 38), 296; Kingston (n 38), 697.
[371] See delimitations in section 1.4.
[372] See joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37), para 34.

necessarily of the trading party in general.[373] Thus, a partial refusal to supply which would prevent parallel export on part of the customer refused, thereby foreclosing that customer from the market of import, would restrict competition and constitute an abuse, unless justified.[374] Similarly to *United Brands*,[375] the court in Sot. Lelos Kai considered that a refusal that forecloses a customer particularly has the effect of limiting production, markets, or technical development in breach of Article 102(b) TFEU.[376] However, different to *United Brands* no discrimination was alleged to have occurred – the practice of quantitatively limited supplies was general, adopted in relation to all Greek wholesalers.[377]

Concludingly, it is possible to discern only one express requirement; the refusal to supply must be liable to eliminate effective competition on part of the undertaking refused (henceforth called the requirement of individual elimination).[378] This is less demanding than the requirement for refusal to deal with competitors of eliminating all effective competition on one market.[379] However, an additional requirement of indispensability, albeit not expressly acknowledged, might be inherent in the requirement of individual elimination. Namely, indispensability does not require the absence of any and all substitutes, but merely the absence of substitutes ensuring a viable presence on the relevant market.[380] If viable substitutes do not exist, an undertaking refused cannot remain an effective competitive force.[381] A contrario, an undertaking refused a dispensable resource seems able to

[373] See joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37), para 35.
[374] See joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37), paras 36, 37, 56, 57 and 64–71; Kingston (n 38), 688.
[375] See Case 27/76 *United Brands* (n 37), para 183.
[376] See joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37), paras 33 and 39.
[377] See joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37), paras 13 and 14; joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37), opinion of AG Ruiz-Jarabo Colomer (n 366), para 37.
[378] See joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37), paras 34 and 35.
[379] See section 3.1.4.
[380] See section 3.1.3.1.; Ezrachi and Maggiolino (n 71), 602f.; see also, at national level, the UK competition appeal tribunal, case *ME Burgess JJBurgess and SJ Burgess (trading as JJ Burgess & Sons) v Office of Fair Trading* [2004] Competition Appeal Tribunal, 1044/2/1/04, para 312 – the tribunal considered that "if a competitor is substantially weakened but not eliminated, it is not necessarily the case that no abuse has occurred".
[381] See T-201/04 *Microsoft* (n 3), para 229.

continue to exert an effective competitive pressure, even if possibly not *as efficient* as if not refused.[382]

On this backdrop, there are two reasons for considering indispensability to be inherent in the requirement of individual elimination. Firstly, an undertaking providing an indispensable product could be described as a trading party being unavoidable to a qualified degree.[383] Accordingly, in *Boosey & Hawkeys*, the Commission appears to have described indispensability albeit in other terms – the undertakings refused were sufficiently dependent on the refusing undertaking as to render the refusal liable to eliminate them from the market.[384] Secondly, not requiring indispensability would extend abusive refusals to supply to refusals that eliminate effective competition on part of the undertaking refused only in combination with that undertaking's contributory negligence of not resorting to a substitute. That approach appears untenably wide. It would deprive the requirement of individual elimination of any content since all refusals would be liable to eliminate the undertaking refused – an undertaking refused can always omit to resort to a substitute.[385] After all, owing to the interference with fundamental rights and the incentive to innovate, an obligation to supply should be imposed only exceptionally.[386]

Although a requirement of indispensability tenably is inherent in the requirement of individual elimination, indispensability does not necessarily bear the same meaning as for refusal to deal with competitors. For refusal to

[382] Comp Dunne (n 226), 81 – "if all available substitutes are so unreasonable as to render effective competition unviable, even though some competition can strictly survive at the margins, then the threshold for indispensability has been reached."; n 157 and text thereto.
[383] Comp Lars Kjolbe, 'Rebates under article 82 EC: navigating uncertain waters', (2010) 31(2) European Competition Law Review 66, 72 – here holding that the "requirement of 'indispensability' is similar to the 'must-stock' condition"; comp also n 329–341 and text thereto – inter alia entailing that unavoidability is inherent in a position of dominance; Dunne (n 226), 79 – "Indispensability, self-evidently, requires more than dominance, although it typically coincides with a position of significant power in the relevant market. The concept, broadly speaking, is akin to that of an 'essential facility,' namely, an obligatory input, access to which can be considered 'critical to ... competitive vitality' in an adjacent market, and which cannot be secured from suppliers other than the defendant."
[384] See Case IV/32.279 *BBI/Boosey & Hawkes* (n 300), para 19.
[385] See, about sufficiency of liability, joined cases C-468/06 to C-478/06 *Sot. Lelos Kai* (n 37), para 34.
[386] See Jones, Sufrin, and Dunne (n 1), 484; Dunne (n 226), 77; joined cases C-241/91 P and C-242/91 P *Magill* (n 3), para 50; C-7/97 *Bronner* (n 37), para 41.

deal with competitors, indispensability is not prevalent if it would be economically viable to create a substitute "for production on a scale comparable to that of the undertaking which controls the existing product or service."[387] That requirement appears premised on the upstream undertaking producing for its own needs on the relevant downstream market;[388] undertakings should not free ride on their competitors' investments if they may viably make equal investments themselves.[389] However, for refusal to supply non-competitors, more reasonable would possibly be to consider the economic viability of vertical integration upstream for a scale of production corresponding to own needs downstream. This, however, remains speculation in anticipation of further clarifying case law.

3.3.3 Approach to Refusal to License Non-competitors

3.3.3.1 Introduction

Following the same logic as for refusal to deal with competitors, refusals to license non-competitors should be assessed by the same requirements as refusals to supply non-competitors, but with an additional requirement about market development.[390] However, to date there are no unambiguous judgments clarifying the matter.[391] It is not even settled whether a refusal to license a non-competitor can be abusive at all.[392] Namely, in *Tiercé Ladbroke*, the GC held that "in the absence of direct or indirect exploitation by the [IPR

[387] See C-418/01 *IMS* (n 3), para 28; comp C-7/97 *Bronner* (n 37), para 46.
[388] See C-165/19 P *Slovak Telekom* (n 4), para 45–47 – at paragraph 45 explaining that the requirements for refusal to deal with competitors "was justified by the specific circumstances of that case which consisted in a refusal by a dominant undertaking to give a competitor access to infrastructure that it had developed for the needs of its own business" (emphasis added); see for that effect C-418/01 *IMS* (n 3) – the disputed IPR was developed for own use downstream; C-7/97 *Bronner* (n 37) – the disputed service was developed for own distribution downstream.
[389] Comp Article 102 Guidelines, para 75; C-165/19 P *Slovak Telekom* (n 4), para 47; C-418/01 *IMS* (n 3), para 28.
[390] See above, about refusal to license competitors corresponding to refusal to supply competitors with the difference of the requirement of development of the downstream market, sections 3.1.3–3.1.6.
[391] See, for judgments touching upon refusal to license non-competitors, T-504/93 *Tiercé Ladbroke* (n 5); Case 53/87 *Renault* (n 302); Case 238/87 *Volvo* (n 128).
[392] See Coco (n 226), 41.

holder] of their intellectual property rights on the [relevant] market, their refusal to supply cannot be regarded as involving any restriction of competition on the [relevant] market."[393] In the following, I will first examine whether a refusal to license non-competitors can at all be abusive (section 3.3.3.2). Subsequently, I will explore what requirements would expectedly have to be fulfilled for such refusals to be classified as abuse of dominance (section 3.3.3.3).

3.3.3.2 Whether Refusals to License Non-Competitors May be Abusive at all

The expressions by the GC in *Tiercé Ladbroke* appears to question whether refusals to license non-competitors may be abusive at all.[394] As for the background to the dispute in *Tiercé Ladbroke*, Ladbroke was a Belgian company active in Belgium for betting on horse races. For that activity, Ladbroke requested a license for real-time broadcasting of sound and picture of French horse races. The rights holder, sociétés de courses (SDC), refused to grant the requested license. At the time, both SDC itself (through subsidiaries) and other undertakings by license, broadcasted the relevant races in France, Germany, and Austria, but not in Belgium.[395] Belgium was considered a separate, national geographic market, meaning that Ladbroke was not a competitor.[396] On this backdrop, the GC held that it was not possible to rely on *Magill*[397] (i.e., the case law on refusal to license competitors), because SDC was not vertically integrated on the Belgian market.[398] Questionably, the GC added that, thus, the refusal "cannot be regarded as involving any restriction of competition on the Belgian market."[399]

At least three reasons render untenable the understanding that a refusal to license non-competitors could not be abusive. Firstly, the GC itself appears

[393] See T-504/93 *Tiercé Ladbroke* (n 5), para 130.
[394] See n 393 and text thereto.
[395] See T-504/93 *Tiercé Ladbroke* (n 5), paras 1–9.
[396] See T-504/93 *Tiercé Ladbroke* (n 5), para 123.
[397] See joined cases C-241/91 P and C-242/91 P *Magill* (n 3).
[398] See T-504/93 *Tiercé Ladbroke* (n 5), para 130.
[399] See T-504/93 *Tiercé Ladbroke* (n 5), para 130.

not to have been certain about the conclusion, adding that the requirements for finding an abuse would not be met even if vertical integration would not be one of those requirements.[400] Secondly, the CJ has indicated that refusal to license non-competitors may be abusive. In *Volvo* and *Renault*, respectively, the CJ held, as obiter dictum, that a refusal to license may be abusive if it involves "a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation".[401] Truly, an aftermarket (a secondary market, such as for spare parts) and a primary market may jointly form one relevant market if the cross-substitutability is sufficiently strong,[402] but in principle, they ought to be separate.[403] Thirdly, allowing refusals to license non-competitors to be abusive would further legal consistency. In general, "any licensing is preferrable to no licensing";[404] licensing contributes to the dissemination of new technologies (follow on innovation) and, thereby, the enhancement of dynamic efficiency.[405] Thus, a refusal to license may be detrimental for consumers, irrespective of in relation to competitors or not.[406] Simultaneously, in general, compulsory licensing to

[400] See T-504/93 *Tiercé Ladbroke* (n 5), para 131.
[401] See Case 238/87 *Volvo* (n 128), para 9; Case 53/87 *Renault* (n 302), para 16.
[402] See eg Market Definition Notice, para 56; Vertical Agreement Guidelines, para 91; Jones, Sufrin, and Dunne (n 1), 118f. and 321; Niels, Jenkins, and Kavanagh (n 81), 73ff.; *EFIM* (case COMP/39.391) Commission decision C(2009)4125 [2009], para 16, upheld in case C-59/12 P *Zentrale zur Bekämpfung unlauteren Wettbewerbs*, ECLI:EU:C:2013:634; case T-427/08 *CEAHR v Commission*, ECLI:EU:T:2010:517, para 102.
[403] See e.g. Jones, Sufrin, and Dunne (n 1), 118 – "the normal approach to market definition may result in an aftermarket existing of one brand of spare parts"; see also, for that effect, Case 22/78 *Hugin Kassaregister AB and Hugin Cash Registers Ltd v the Commission*, ECLI:EU:C:1979:138, paras 5–7 – about market for spare parts for watches being separate from the market for watches, as the structure of supply and demand differed; Case 322/81 *Michelin* (n 156), paras 46–52 – about rethreaded tyres being separate from new tyres; case T-30/89 *Hilti v Commission*, ECLI:EU:T:1991:70, paras 66–68 – about nails for nail guns being separate from nail guns, because of being possibly separately demanded and thus not forming an indivisible whole.
[404] See European Commission (1997) (n 234), 276.
[405] See European Commission (1997) (n 234), 276; OECD (2019) (n 103), 14 – "Licensing allows the integration of the licensed property with complementary factors of production, leading to more efficient exploitation of IP, and benefiting consumers through the reduction of costs and the introduction of new products."
[406] Comp Bailey and John, 'Article 102' (n 1), 960 – "if the dominant undertaking is not itself operating in the downstream market but its refusal to supply prevents the emergence of a new product downstream, that may still constitute an abuse, at least in the context of licensing of intellectual property rights".

own competitors expectedly is more adverse for the incentive to innovate.[407] Thus, considering economic efficiencies, it appears more justified to prohibit a refusal vis-a-vis non-competitors.[408] Additionally, a stricter approach to refusal to license non-competitors than competitors would be consistent with the approach to refusal to supply.[409]

Consequently, one should not expect that a refusal to license in the future will be allowed simply because the undertaking refused is not a competitor of the dominant undertaking. Instead, *Tiercé Ladbroke* could be taken to mean only that the case law on refusal to license competitors, cannot be fully relied on if the undertaking refused is not a competitor.[410] In the following section, I explore under what conditions abuse could arise in the latter scenario.

3.3.3.3 Requirements for a Refusal to License Non-competitors to be Abusive

The requirements for considering a refusal to license non-competitors to be abusive are not evident. In section 3.1, the requirements for refusal to license (and supply) competitors were explored. In section 3.2.4, I discovered that there ought to be a distinction between refusal to deal with competitors and non-competitors. In section 3.3.2 I explored the results of that distinction in relation to refusal to supply, divulging that a refusal to supply non-competitors may be found abusive more easily than vis-a-vis competitors. Consonantly, the GC in *Tiercé Ladbroke* distinguished the case law on refusal to license competitors. It reasoned that absent vertical integration a refusal to license could not be abusive "unless it concerned a product or service which

[407] Comp case IV/32.279 *BBI/Boosey & Hawkes* (n 300), para 19 – albeit encumbered with exceptions, as evident from above, the Commission held that "There is no obligation placed on a dominant producer to subsidize competition to itself."; see section 3.2.4.
[408] Comp joined cases C-241/91 P and C-242/91 P *Magill* (n 3), opinion of AG Gulmann (n 70), paras 96–97 – here contending a more lenient approach to refusal to license non-competitors than competitors; comp also section 3.2.4.
[409] Comp section 3.3.2.2 – making clear that the approach to refusal to supply non-competitors places lower requirements for finding an abuse than in relation to competitors.
[410] Comp T-504/93 *Tiercé Ladbroke* (n 5), para 130 – "The applicant cannot rely on the Magill judgment to demonstrate the existence of the alleged abuse, since that decision is not in point."

was either essential for the exercise of the activity in question, in that there was no real or potential substitute, or was a new product whose introduction might be prevented, despite specific, constant and regular potential demand on the part of consumers".[411] This expression suggests a lower threshold than for refusal to license competitors – there is no condition of elimination of all competition leaving it sufficient with the elimination of the undertaking refused.[412] Simultaneously, it suggests that there are two alternative requirements: either the IPR should be indispensable or the refusal should prevent a new product.[413] In the following, I explore whether the requirements reasonably are alternative or cumulative.

The requirements of indispensability and emergence of a new product could in theory be alternative. Even if an IPR is necessary for a specific new product, it is not necessarily indispensable for an economically viable presence on the relevant market.[414] Naturally, a product market does not have to be confined to identical products.[415] However, the requirements not being cumulative is untenable.

Firstly, it would cause contextual disharmony since a refusal to license non-competitors could be found more easily than a refusal to supply non-competitors; for the latter, indispensability is a necessary condition.[416] Competition law can only trump IP law provided that the disputed conduct restricts competition and exceeds a proportionate pursuit of the purpose of IP

[411] See T-504/93 *Tiercé Ladbroke* (n 5), para 131.
[412] Comp T-504/93 *Tiercé Ladbroke* (n 5), para 132; n 113 and text thereto – about indispensability entailing elimination of the undertaking refused.
[413] See Jones, Sufrin, and Dunne (n 1), 506; Ezrachi and Maggiolino (n 71), 601; Kerber and Schmidt (n 41), 5.
[414] See, about the definition of indispensability, sections 3.1.3 and 3.3.2.2.
[415] See, for this effect, Case 322/81 *Michelin* (n 156), para 44 – about different and not directly substitutable products (tyres) belonging to the same market; see also, about product differentiation, Niels, Jenkins, and Kavanagh (n 81), 26 – "Differentiation typically means that there is a spectrum of products that are close but imperfect substitutes. For example, there is a whole range of cars from superminis and small family cars to executive and luxury cars."; David S. Evans and Richard Schmalensee, 'The Antitrust Analysis of Multi-Sided Platform Businesses' (January 30, 2013) University of Chicago Institute for Law and Economics, Working Paper No. 623, Available at SSRN: https://ssrn.com/abstract=2185373, accessed September 24, 2021.
[416] See section 3.3.2.2 about refusal to supply non-competitors.

law.[417] Thus, the competition law approach towards IPRs should correspond to comparable situations not concerning an IPR, with a possible additional requirement for establishing that the purpose of IP law is disproportionally pursued.[418] This effect became evident from examining refusal to license competitors, which corresponds to refusal to supply competitors, but with the additional requirement that development of the downstream market should be prevented.[419] Thus, in relation to refusal to license non-competitors, consistent would be that, if both requirements exist, they are cumulative.

Secondly, indispensability being sufficient per se for establishing an abuse would not adhere to the relation between IP law and competition law. IPRs constitute exclusionary rights that protect the expression of an idea against duplications.[420] In *IMS* the CJ described that the market development requirement serves to ensure that the licensee "does not intend to limit itself essentially to duplicating the goods or services already offered".[421] On this backdrop, it has been proposed that the market development requirement follows from IPRs protection against duplications.[422] If true, the market development requirement should apply also to refusal to license non-competitors. However, the argument is flawed. Refusal to license concerns situations where the IPR constitutes an input in the creation of a product or service; the IPR does not necessarily protect the latter against duplication.[423]

Instead, the rationale for a requirement of market development ought to be found in the balance between static and dynamic efficiencies. The exercise of

[417] See section 2.4 about the clash between IP law and competition law.
[418] See, for that effect, section 3.1.5 about the market development requirement.
[419] See sections 3.1.5 and 3.1.6.
[420] See Waelde and others (n 60), 805; Chrocziel and Prinz zu Waldeck und Pyrmont, 'Introduction' (n 64), 2; Jones, Sufrin, and Dunne (n 1), 809 f.; Case 238/87 *Volvo* (n 128), para 8; Case 53/87 *Renault* (n 302), para 15.
[421] see C-418/01 *IMS* (n 3), para 49; comp C-418/01 *IMS* (n 3), opinion of AG Tizzano (n 136), para 62.
[422] See Mano, Nazzini, and Zenger (n 1), 474; Inge Govaere and Hanns Ullrich (eds), *Intellectual Property, Market Power and the Public Interest* (Peter Lang, 2008), 79.
[423] Comp Govaere and Ullrich (n 422), 79 – here, the authors describes the same argument with the wording that an IPR "grants protection for innovations, not for business decisions to make use of them in a certain way."; see for an example of where the product was covered by the IPR Case 238/87 *Volvo* (n 128); see for examples where it expectedly was not Joined cases C-241/91 P and C-242/91 P *Magill* (n 3); T-201/04 *Microsoft* (n 3).

an exclusive intellectual property right, even by a dominant undertaking, cannot as such constitute a breach of EU competition law.[424] A balance between free competition and incentive to innovate may be described as inherent in IP law or, synonymously phrased, internalised under IP law.[425] IP law grants exclusive rights, in other words, limited monopolies, which are possible to utilise "either directly or by the grant of licences to third parties".[426] It follows that IP law does not distinguish between whether the IPR holder exercises the exclusive right itself or licenses it – "the licensor should generally be free to refuse to license other firms, and to limit exploitation of the innovation either to itself or to its selected licensee(s)".[427] Applied to refusal to license, these considerations render untenable that indispensability would be a sufficient requirement for finding an abuse. An IPR is indispensable if, without access to it, an undertaking cannot compete effectively on the relevant market, meaning that that undertaking would be eliminated from that market.[428] Therefore, a requirement of compulsory licensing – to competitors or non-competitors alike – which is based solely on an IPR's indispensability appears to conflict with the subject matter of IPRs; the exercise of the exclusive right would be abusive already if it could cause exclusion from the relevant market.[429] Competition law should penalise

[424] See eg C-170/13 *Huawei* (n 89), para 46; C-307/18 *Generics* (n 39), para 150; Case 238/87 *Volvo* (n 128), para 8; European Commission (1997) (n 234), 278.
[425] See C-7/97 *Bronner* (n 37), opinion of AG Jacobs (n 71), para 62; Govaere (n 234), 179; European Commission (1997) (n 234), 274.; n 234; see, about internalisation, Madeleine Claesson, 'An IPR Perspective', in Lidgard H.H. and Atik J. (eds), *The intersection between IPR and competition law: A study of recent developments in U.S. and European law*, (Intellecta docysus, 2008), 40, 43f, and 48.
[426] See Case 15/74 *Centrafarm BV and Others v Sterling Drug*, ECLI:EU:C:1974:114, para 9; see also Rickard Vernet, 'The Existence/Exercise Distinction: Helpful, Confusing, or Merely Obsolete?', in Lidgard H.H. and Atik J. (eds), *The intersection between IPR and competition law: A study of recent developments in U.S. and European law*, (Intellecta docysus, 2008), 156f.; Xin Song, 'In & Out Licensing And The Doctrine of Special Responsibility: A European Perspective', in Lidgard H.H. and Atik J. (eds), *The intersection between IPR and competition law: A study of recent developments in U.S. and European law*, (Intellecta docysus, 2008), 164; Lidgard (n 38), 706.
[427] See OECD (2019) (n 103), 31; see also, for EU law in specific, Case 15/74 *Centrafarm BV* (n 426), para 9.
[428] See section 3.1.3.1; n 182 and text thereto; n 384 and text thereto;
[429] See Marije Borghart (n 70), 35f. – "the essential facilities doctrine is a direct challenge to the concept underlying IPRs. […] [I]t is difficult to see how a denial of the monopoly does not equally deny the exclusivity lying at the very essence of the right."; OECD (1997), *Competition Policy and Intellectual Property Rights* (DAFFE/CLP(98)18), 9 – "it is difficult to see how competition agencies can take action in such cases without directly

only abuse of IPRs, not their lawful exercise.[430] Consequentially, the CJ has held that "the mere fact of securing the benefit of an exclusive right granted by law, the effect of which is to enable the manufacture and sale of protected products by unauthorized third parties to be prevented, cannot be regarded as an abusive method of eliminating competition".[431] Something additional is required for a refusal as such to be abusive. That something appears to be the prevention of development of the downstream market; if the IPR is used to restrict dynamic efficiency it is no longer legitimately exercised since it counteracts the purpose of IP law.[432]

Thirdly, it appears teleologically unsatisfactory to consider the market development requirement sufficient for finding an abuse. A requirement of indispensability limits prohibitions of refusals to license to situations in which the dominant undertaking has a stranglehold on the downstream market.[433] That stranglehold allows the dominant undertaking to eliminate downstream actors and, thus, their participation in effective competition – static and dynamic.[434] On this backdrop, because of two reasons, prevention of market

attacking the exclusivity lying at the very heart of IPR."; Claesson (n 425), 48 – "It could be argued that compulsory licensing destroys the balance that exists within the IP itself. The core right of preventing others from using the invention is restricted and it could be said that the company is being punished for its own success".

[430] See C-307/18 *Generics* (n 39), opinion of AG Kokott (n 102), para 111.

[431] See Case 53/87 *Renault* (n 302), para 15.

[432] See in general European Commission (1997) (n 234), 278 – "Additional elements are required, such as the fact that the holder is neither working the patent itself, nor allowing others to do so (under licence), thus withholding important technical progress from the public against the public interest"; Maggiolino (n 71), 168 – "EU institutions use antitrust law to confront IPRs that, in their opinion, fall short of boosting innovation […] regardless of the (likely) harm to allocative efficiency […]"; See about refusal to license non-competitors in specific joined cases C-241/91 P and C-242/91 P *Magill* (n 3), opinion of AG Gulmann (n 70), para 76; T-504/93 *Tiercé Ladbroke* (n 5), para 132; Case 238/87 *Volvo* (n 128), para 9; see about refusal to license competitors in specific e.g. C-418/01 *IMS* (n 3), para 48 – in the relation between IP law and competition law "the latter can prevail only where refusal to grant a licence prevents the development of the secondary market to the detriment of consumers."; see, about counteracting the purpose of IP law, n 215 and 217 and text thereto.

[433] See C-7/97 *Bronner* (n 37), opinion of AG Jacobs (n 71), para 65; C-165/19 P *Slovak Telekom* (n 4), paras 48 and 49.

[434] See, about indispensability and effective competition, T-201/04 *Microsoft* (n 3), para 229 and 377 – here connecting indispensability to viable presence on the market and, thus, effective competition; see also n 85 and 106 and text thereto; see, about effective competition including static and dynamic competition, C-165/19 P *Slovak Telekom* (n 4), para 47; C-7/97 *Bronner* (n 37), opinion of AG Jacobs (n 71), para 57; Jones, Sufrin, and

development as sufficient for imposing compulsory licensing appears not to strike a fair balance between the interests concerned – that is, the interests of fundamental rights and efficiencies. Firstly, to the extent that the product is dispensable, compulsory licensing appears to surpass necessity in remedying or preventing harm to consumer welfare.[435] Even if a refusal of access to a dispensable input might prevent one specific market development, other substitutable and effectively competitive albeit not identical developments are possible;[436] the negative effects of a refusal may thus be remedied by the market itself.[437] Secondly, interference absent indispensability could stifle dynamic efficiency upstream. Namely, besides reducing the incentive to innovate in general, it would diminish the need to invest in innovative activity (and thus dynamic competition) on the upstream market – free-riding upstream would be possible already by innovating downstream.[438] Consequently, in the long term at least, a lone market development requirement would arguably – in so far as concerns dispensable IPRs – be likely predominantly detrimental to dynamic efficiency; seemingly, it does not strike a fair balance.

Dunne (n 1), 271; Article 101(3) Guidelines, para 105; Article 102 Guidelines, para 30; Niels, Jenkins, and Kavanagh (n 81), 147ff.; Schumpeter (n 81), 85.

[435] See, about the principle of proportionality and the requirement of necessity, Maliszewska-Nienartowicz (n 211), 91f.; Harbo (n 211), 161 and 165.

[436] See, about the definition of indispensability, section 3.1.3.

[437] See, about competition law contrastingly dealing with market failures, Jones, Sufrin, and Dunne (n 1), 3 – "Competition rules deal with market imperfections and failures."; Kerber and Schmidt (n 41), 29 and 33 – on page 29 writing that "using a compulsory license to limit in special cases the extent of IPRs may not stifle innovation, but may help to solve problems which emerge within the IPR system."

[438] Comp Whish and Bailey (n 1), 713f. – explaining that compulsory access that allows for free riding, albeit positive in the short-term, "might ultimately be anti-competitive, if the consequence would be to discourage the necessary investment for the creation of the facility in the first place"; Article 102 Guidelines, para 75 – "competitors may be tempted to free ride on investments made by the dominant undertaking instead of investing themselves."; see also, about investment in innovation being connected to costs and profits, Doris Hildebrand, 'European School in EC Competition Law', (2002) 25(1) World Competition 3, 8f.; see about the threat of others innovative activity (dynamic competition) driving innovation Niels, Jenkins, and Kavanagh (n 81), 147ff.; Schumpeter (n 81), 81ff. – here writing about the concept of creative destruction; comp case COMP/C-3/37.792 *Microsoft* (n 220), para 783 – here, the commission concluded that the evidence put forward by Microsoft to prove a reduced incentive to innovate rather indicated that a compulsory license would increase that incentive by increasing dynamic competition; Kerber and Schmidt (n 41), 7ff. – here about the Commission's decision case COMP/C-3/37.792 *Microsoft* (n 220).

In summary, both contextual and teleological reasons seemingly favour indispensability and market development as cumulative rather than alternative requirements, for classifying a refusal to license non-competitors abusive.

4 Competitor or not – it matters

4.1 Introduction

It is settled case law that a refusal to license an IPR, at least to a competitor, may constitute abuse of dominance prohibited under article 102 TFEU. According to this case law, a refusal to license is abusive if three cumulative requirements are met. Firstly, the IPR must constitute an indispensable input on a downstream market. Secondly, the refusal must (likely) eliminate all effective competition on that market. Thirdly, the refusal must prevent market development. Apart from the market development requirement, the approach is the same for refusals to supply (i.e., a refusal to grant access to non-IPRs). If the requirements are met, the refusal is prima facie abusive, meaning that it is abusive unless objectively justified. However, two major uncertainties remain: firstly, does the same approach apply to refusal to license in relation to new and existing customers and to own competitors and non-competitors; secondly, if competitors and non-competitors should be treated differently, can a refusal to license a non-competitor be abusive and, if so, what are the requirements for declaring it prima facie abusive?

4.2 The Relevant Distinctions

The first uncertainty concerns the scope of the settled case law in relation to refusal to license. Should there be a distinction between new and existing customers, a distinction between competitors and non-competitors, or should there be no such distinction at all? The CJEU has not clearly explicated any distinction and thoughts has figured in the legal doctrine of a distinction between new and existing customers. Yet, a sole distinction between competitors and non-competitors appears to be the most reasonable alternative.

A distinction between new and existing customers as concerns refusal to deal under competition law appears unjustified. Firstly, in either case, the right to property and freedom of contract are equally restricted by a compulsory license; these fundamental rights ensure undertakings a freedom to conclude and to terminate contracts granting access to their property. Secondly, differing degrees of interference under article 102 TFEU for refusals in relation to new and existing customers, respectively, ought to require the situations not to be comparable for the purpose of that article. In general, competition law aims to directly or indirectly protect and further consumer welfare. Effective competition is assumed to create economic efficiencies for the benefit of consumers. Consistently, competition law is concerned not only with the retainment but also the growth of competition. Contrastingly, competition law is not concerned with the protection of competitors (or contracting parties) as such, as assumptively lacking general causality to consumer welfare. Thus, relevant for competition law is the effects, which may be discerned by consolidating economic theory. Economic theory gives no clear support for a distinction between new and existing customers, but rather the opposite. An undertaking's incentive to innovate is driven by the prospect of profitability; future profitability can in principle not be assessed in a static moment since markets are evolving and require undertakings to be flexible and adaptive. A general distinction between new and existing customers, therefore, appears inappropriate. Accordingly, it is understandable that the EU courts and the Commission have applied the same requirements in both scenarios and – expectedly – will continue to do so in the future.

Instead, what appears legitimate is a distinction between refusal to deal with own competitors and non-competitors. The reason is an apparent difference in the effect on the incentive to innovate. By analogy, in principle, it would expectedly be self-detrimental to supply own enemies with weapons to enable them to wage war against oneself. However, supplying weapons to actors in war only with others is not necessarily and only indirectly self-detrimental. Thus, it is understandable, and indeed consequential, that the commission and

the EU courts appear to favour lower requirements for declaring a refusal in relation to non-competitors abusive.

4.3 Abusive Refusal to License Non-competitors

Provided that a distinction between competitors and non-competitors is correct, it remains unsettled in case law both whether a refusal to license a non-competitor may be abusive at all and, if so, under what requirements it may be abusive unless objectively justified.

Most likely, refusals to license non-competitors constitute an independent type of abuse. Two jointly considered contextual reasons render it necessary that refusals to license non-competitors could be abusive, for assuring legal systemic consistency. Firstly, refusals to supply non-competitors may be abusive. Simultaneously, the approach to refusals to license and supply, respectively, appears to correspond aside from the deviations necessary for determining whether IP law is disproportionally pursued allowing competition law to prevail. This correspondence appears reasonable; I see no cause to expect that the restrictive effects of a refusal of access to an indispensable input – IPR or not – would generally differ. In either case, a refusal could expectedly harm consumers by limiting markets, both as regards the degree of competition and the degree of market development. Instead, the difference between refusal to license and supply, respectively, is merely that a weighing of interests in favour of the incentive to innovate is internalised under IP law. Secondly, and in complement to the first, refusals to license competitors can be abusive simultaneously as the approach to finding an abuse in relation to non-competitors should theoretically not be less intrusive. Thus, the interest of protecting the incentive to innovate should not exclude the possibility of establishing an abuse. In sum, refusals to license non-competitors should, like refusals to supply non-competitors, be capable of having restrictive effects, which should not be invariably outweighed by the interest of protecting the incentive to innovate.

It follows from the previous considerations in section 4.2 and 4.3 that refusals to license non-competitors should, like refusals to supply non-competitors, be capable of being abusive, albeit under other (lower) requirements than for refusal to license competitors.

For a refusal to license competitors to be abusive, the refused IPR must be indispensable on a downstream market and the refusal must risk both eliminating all effective competition and prevent market development on that market. Apart from the market development requirement, the requirements correspond to those for abusive refusal to supply competitors.

For a refusal to supply non-competitors to be abusive, it suffices that the refusal meets a requirement of individual elimination (i.e. that the refusal is capable of eliminating the undertaking refused as an effective competitor on one market). The requirement of individual elimination corresponds to a requirement of indispensability since no individual elimination would objectively occur if viable substitutes existed. Thus, in comparing refusal to supply competitors and non-competitors, the difference appears to be whether the refusal must eliminate *all* effective competition or only effective competition on part of the undertaking refused.

The approach to refusal to license and supply seemingly fundamentally correspond. Therefore, adopting an equivalent distinction between individual elimination and elimination of all effective competition for refusal to license non-competitors and competitors, respectively, would enhance consistency. The requirement of individual elimination implies that a requirement of indispensability should be applied to refusals to license non-competitors. However, a sole requirement of individual elimination cannot reasonably be sufficient. Exclusionary effects are natural consequences of IPRs and appear to constitute a trade-off internalised under IP law. Consequently, something additional is required for the purpose of IP law to be exceeded and competition law to prevail. Since IP law pursues dynamic efficiency, a logical

view would be that a refusal to license exceeds that purpose if it counteracts dynamic efficiency. That purposive approach seems to underly the approach to refusal to license competitors, and I find no reason to deviate from a consistent approach to refusal to license non-competitors. The general difference in incentive to innovate between refusal in relation to competitors and non-competitors does not affect IP law. Instead, it assumptively affects to what degree competition downstream generally must be restricted to ultimately disadvantage consumers; this difference appears reflected in the requirement of elimination of all effective competition (for competitors) vis-à-vis the requirement of individual elimination (for non-competitors).

In summary, a refusal to license non-competitors may expectedly be abusive if it meets a requirement of individual elimination and a market development requirement. This would complete the circle in an endorsement of contextual harmony; the assessment of refusals to license competitors and non-competitors would each correspond to that of refusal to supply competitors and non-competitors, respectively, but with an additional market development requirement.

4.4 Conclusions

Under present case law, a refusal to license may be abusive if meeting three requirements. Firstly, the relevant IPR must be indispensable on the downstream market. Secondly, the refusal should eliminate all effective competition on that downstream market. Thirdly, the refusal should prevent market development. These requirements likely apply only for dominant undertakings' refusals to license their own competitors.

Despite being distinguishable, also a refusal to license non-competitors can reasonably be abusive. The contrary would cause legal inconsistencies in relation to the approach to refusal to license competitors and refusal to supply, respectively.

Tenably, a refusal to license non-competitors is abusive if it meets two requirements: firstly, a requirement of individual elimination (including a requirement of indispensability) and, secondly, a requirement of prevention of market development (market development requirement).

Bibliography

BOOKS

Bailey D. and John L.E., 'Article 101(1)', in Bailey D. and John L.E. (eds), *Bellamy & Child: European Union Law of Competition* (8th edn, Oxford University Press, 2018).

Bailey D. and John L.E., 'Article 102' in Bailey D. and John L.E. (eds), *Bellamy & Child: European Union Law of Competition* (8th edn, Oxford University Press, 2018).

Bailey D. and John L.E., 'Competition Law and Policy in the EU' in Bailey D. and John L.E. (eds), *Bellamy & Child: European Union Law of Competition* (8th edn, Oxford University Press, 2018).

Bailey D. and John L.E., 'Intellectual Property Right', in Bailey D. and John L.E. (eds), *Bellamy & Child: European Union Law of Competition* (8th edn, Oxford University Press 2018).

Bailey D. and John L.E., 'Market Definition', in Bailey D. and John L.E. (eds), *Bellamy & Child: European Union Law of Competition* (8th edn, Oxford University Press, 2018).

Beale H. and others, *Cases, Materials and Text on: Contract Law* (2nd edn, Hart Publishing, 2010).

Bently L. and others, *Intellectual property law* (5th edn, Oxford University Press, 2018).

Bishop S. and Walter M., *The Economics of EC Competition Law: concepts, application and measurement* (Simon & Maxwell, 2010).

Borghart M., 'An Antitrust Perspective', in Lidgard H.H. and Atik J. (eds), *The intersection between IPR and competition law: A study of recent developments in U.S. and European law* (Intellecta docysus, 2008).

Cameron I., *An Introduction to the European Convention on Human Rights* (8th edn, Iustus Förlag AB, 2018).

Chrocziel P. and Prinz zu Waldeck und Pyrmont W., 'Introduction', in Prinz zu Waldeck und Pyrmont W., Lorenz M., and Chrocziel P., *Intellectual property and Competition Law* (Kluwer Law International, 2016).

Chrocziel P, Lorenz M., and Prinz zu Waldeck und Pyrmont W., 'European Union Law', in Prinz zu Waldeck und Pyrmont W., Lorenz M., and Chrocziel P., *Intellectual property and Competition Law* (Kluwer Law International, 2016).

Claesson M. 'An IPR Perspective', in Lidgard H.H. and Atik J. (eds), *The intersection between IPR and competition law: A study of recent developments in U.S. and European law* (Intellecta docysus, 2008).

Craig P. and De Burca G., *EU law: Text, Cases and Materials* (7th edn, Oxford University Press, 2020)

Cseres K., 'Competition and Contract law', in Hartkap A. and others (eds), *Towards a European Civil Code* (4th edn rev. exp., Kluwer Law International, 2011).

de la Mano M., Nazzini R., and Zenger H., 'Article 102' in Faull J. and Nikpay A. (eds), *Faull & Nikpay: the EU law of competition* (3rd edn, Oxford University Press 2014).

Frank R.H., *The Darwinian Economy: Liberty, Competition, and the Common Good* (Princeton University Press, 2011).

Geradin D. and others, 'The Concept of Dominance' in Geradin D. (ed), *GCLC Research Papers on Article 82 EC* (Global Competition Law Centre, 2005).

Govaere I., 'Abuses of dominant position, intellectual property rights and monopolization in EU competition law: some thoughts on a possible course of action', in Mateus A.M., Moreira T. (eds), *Competition law and economics: advances in competition policy enforcement in the EU and North America* (Edward Elgar Publishing, 2010)

Govaere I. and Ullrich H. (eds), *Intellectual Property, Market Power and the Public Interest* (Peter Lang, 2008).

Hayek F., *Det stora misstaget: socialismens felslut* (Timbro AB, 1990).

Hettne J. and Eriksson I.O. (ed), *EU-rättslig Metod: Teori och Genomslag i Svensk Rättstillämpning* (2nd edn, Norstedts juridik, 2011).

Hilty R.M., 'Individual, Multiple, and Collective Ownership: what impact on Competition?' in Rosén J. (ed), *European Intellectual property law* (Edward Elgar Publishing, 2016).

Jansen N., 'Making Doctrine for European Law', in van Gestel R., Micklitz H., and Rubin E.L., *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press, 2017).

Jones A. and Nazzini R., 'The Effect of Competition Law on Patent Remedies' in Bradford Biddle C. and others, *Patent Remedies and Complex Products: Toward a Global Consensus* (Cambridge University Press 2019).

Jones A., Sufrin B., and Dunne N., *Jones & Sufrin's EU Competition Law: Text, Cases, and Materials* (7th edn, Oxford University Press, 2019).

Kleinman J., 'Rättsdogmatisk metod' in Nääv M., and Zamboni M. (eds), *Juridisk Metodlära* (2nd edn, Studentlitreratur AB, 2018)

Kötz H., *European Contract Law* (2nd edn, Oxford University Press, 2017).

Lock T., 'Article 16 CFR' in Kellerbauer M., Klamert M., and Tomkin J., *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press, 2019).

Lovdahl Gormsen L., *A Principled Approach to Abuse of Dominance in European Competition Law* (Cambridge University Press, 2010).

Maggiolino M., *Intellectual Property and Antitrust: A Comparative Economic Analysis of US and EU Law* (Edward Elgar Publishing, 2011).

Merges R.P., 'Economics of Intellectual Property Law', in Parisi F. (ed), *The Oxford handbook of law and economics: Volume 2: Private and commercial law* (Oxford University Press, 2017)

Nguyen T., Minssen T., and Groussot X., 'The Rule of Reason under Article 82 EC after Sot Lelos Kai Sia' in Lidgard H.H. (ed), *National Developments in the Intersection of IPR and Competition Law: From Maglite to Pirate Bay* (Hart Publishing, 2011).

Niels G., Jenkins H., and Kavanagh J., *Economics for competition lawyers* (2nd edn, Oxford University Press, 2016).

Peeperkorn L. and Verouden V., 'The Economics of Competition' in Faull J. and Nikpay A. (eds), *Faull & Nikpay: the EU law of competition* (3rd edn, Oxford University Press, 2014).

Pila J. and Torremans P., *European Intellectual Property Law* (2nd edn, Oxford University Press, 2019).

Sauter W., *Coherence in EU Competition Law* (Oxford University Press 2016).

Schumpeter J.A., *Capitalism, Socialism and Democracy* (Routledge, 1994).

Seville C., *EU Intellectual Property Law and Policy* (Edward Elgar Publishing, 2016).

Smith A., *An Inquiry Into the Nature and Causes of the Wealth of Nations* (Generic NL Freebook Publisher) https://eds-b-ebscohost-com.ludwig.lub.lu.se/eds/ebookviewer/ebook/bmxlYmtfXzEwODYwNDZfX0FO0?sid=545f6598-a5da-4205-9d6a-34813ffb7a3f@pdc-v-sessmgr01&vid=0&format=EB&lpid=lp_324&rid=0, accessed September 23, 2021.

Smits J.M., 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' in van Gestel R., Micklitz H., and Rubin E.L., *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press, 2017).

Song X., 'In & Out Licensing And The Doctrine of Special Responsibility: A European Perspective', in Lidgard H.H. and Atik J. (eds), The intersection between IPR and competition law: A study of recent developments in U.S. and European law, (Intellecta docysus, 2008).

Teece D.J., 'Favoring Dynamic over Static Competition Implications for Antitrust Analysis and Policy' in Manne G.A., Wright J.D. (eds), *Competition Policy and Patent Law under Uncertainty: Regulating Innovation* (Cambridge University Press, 2012).

Van Bael & Bellis, *Competition Law of the European Union* (6th edn, Kluwer Law International 2021).

Vernet R., 'The Existence/Exercise Distinction: Helpful, Confusing, or Merely Obsolete?', in Lidgard H.H. and Atik J. (eds), *The intersection between IPR and competition law: A study of recent developments in U.S. and European law*, (Intellecta docysus, 2008).

Waelde C. and others, *Contemporary Intellectual Property: Law and Policy* (4th edn, Oxford University Press, 2016).

Whish R. and Bailey D., *Competition Law* (8th edn, Oxford University Press, 2018).

Wildgen P., 'A Law And Economics Perspective', in Lidgard H.H. and Atik J. (eds), *The intersection between IPR and competition law: A study of recent developments in U.S. and European law* (Intellecta docysus 2008).

Witt A.C., *The More Economic Approach to EU Antitrust Law* (Hart Publishing, 2016).

ARTICLES

Albors-Llorens A., 'Refusal to Deal and Objective Justification in EC Competition Law', (2006) 65(1) Cambridge Law Journal, 24.

Albrecht B.C., 'The Breakdown of Spontaneous Order: Smith and Hayek Diverge' (2017) 11(1) New York University Journal of Law and Liberty 346.

Alexiadis P. and de Streel A., 'Designing an EU Intervention Standard for Digital Platforms' (2020) EUI Working Papers, RSCAS 2020/14.

Boone J., 'Intensity of competition and the incentive to innovate' (2001) 19(5) International Journal of Industrial Organization 705.

Choné P. and Linnemer L., 'Non Linear Pricing and exclusion: II. Must-Stock products', (2016) 47(3) RAND Journal of Economics 631.

Coco R., 'Antitrust Liability for Refusal to License Intellectual Property: A Comparative Analysis and the International Setting', (2008) 12(1) Marquette Intellectual Property Law Review 1.

Dunne N., 'Dispensing with Indispensability' (2020) 16(1) Journal of Competition Law and Economics 74.

Evans D.S. and Schmalensee R., 'The Antitrust Analysis of Multi-Sided Platform Businesses' (January 30, 2013) University of Chicago Institute for Law and Economics, Working Paper No. 623, Available at SSRN: https://ssrn.com/abstract=2185373, accessed September 24, 2021.

Evrard S.J., 'Essential Facilities in the European Union: Bronner and Beyond', (2004) 10(3) Columbia Journal of European Law 491.

Ezrachi A. and Maggiolino M., 'European Competition Law, Compulsory Licensing, and Innovation', (2012) 8(3) Journal of Competition Law and Economics 595.

Gilbert R.J. and Shapiro C., ‘An Economic Analysis of Unilateral Refusals to License Intellectual Property’ (1996) 93(23) Proceedings of the National Academy of Sciences of the United States of America 12749.

Grassie G., 'Trade Secrets: the new EU Enforcement regime', (2014) 9(8) Journal of Intellectual Property Law & Practice 677.

Harbo T., 'The Function of the Proportionality Principle in EU Law' (2010) 16(2) European Law Journal 158.

Herron D.J., Sovacool S., and Phillips M.T., 'Hayek's Theory of Spontaneous Order and the Normative Development of the Free Market and Common Law' (2019) 39 The Journal Jurisprudence 239.

Hildebrand D., 'European School in EC Competition Law', (2002) 25(1) World Competition 3.

Hou L., 'Refusal to Deal within EU Competition Law' (June 11, 2010), Available at SSRN <https://ssrn.com/abstract=1623784>, accessed September 3, 2021.

Husovec M., ''The Essence of Intellectual Property Rights Under Article 17(2) of the EU Charter' (2019) 20(6) German Law Journal, 840.

Jebsen P. and Stevens R., 'Assumptions, Goals, and Dominant Undertakings: The Regulation of Competition Under Art. 86 of the European Union' (1996) 64(3) Antitrust Law Journal 443.

Kerber W. and Schmidt C., 'Microsoft, Refusal to License Intellectual Property Rights, and the Incentives Balance Test of the EU Commission' (November 8, 2008), available at SSRN: <https://ssrn.com/abstract=1297939>, accessed September 7, 2021.

Kingston S., 'Joined Cases C–468/06 to C–478/06, Sot. Lelos kai Sia EE, Farmakemporiki AE Emporias kai Dianomis Farmakeftikon Proionton and Others v. GlaxoSmithKline AEVE Farmakeftiko', (2009) 46(2) Common Market Law Review 683.

Kjolbe L., ‘Rebates under article 82 EC: navigating uncertain waters’, (2010) 31(2) European Competition Law Review 66.

Korah V., 'Patents and Antitrust', in OECD (1997), Competition Policy and Intellectual Property Rights (DAFFE/CLP(98)18) 375.

Küschelrath K., ‘Critical Loss Analysis in Market Definition and Merger Control’, (2009) 5(3) European Competition Journal 757.

Lamadrid de Pablo A., 'Competition Law as Fairness', (2017) 8/3) Journal of European Competition Law & Practice 147.

Lambertz A., 'The Role of Competition Law in Regulatory European Private Law', (2013) 4 MaRBLe Research Papers 295.

Lao M., ‘Networks, Access, and Essential Facilities: From Terminal Railroad to Microsoft’ (2009) 62(2) Southern Methodist University Law Review 557.

Lenaerts K., and Gutierrez-Fons J.A., ‘To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice’ (2014) 20(2) Columbia Journal of European Law 3.

Lianos I., 'Competition Law and Intellectual Property (IP) Rights: Analysis, Cases and Materials' (2016), in Lianos I., Korah V., and Siciliani P., *Competition Law* (Hart Publishing 2017, Forthcoming), available at SSRN: https://ssrn.com/abstract=2863814, accessed September 8, 2021.

Lianos I., ‘Some Reflections on the Question of the Goals of EU Competition Law’ (January 1, 2013), CLES Working Paper Series 3/2013, available at SSRN: https://ssrn.com/abstract=2235875, accessed August 30, 2021.

Lidgard H.H, 'Application of Article 82 EC to abusive exclusionary conduct – Refusal to supply or to license' (2009) 4 Europarättslig tidskrift 694.

Loza E. and others, 'Financial Considerations in International Intellectual Property Licensing Transaction', (2006) 40(1) International Lawyer (ABA) 67.

Maliszewska-Nienartowicz J., 'The Principle of Proportionality in the European Community Law- General Characteristic and Practical Application' (2008) 24(1) Pravni Vjesnik 89.

McCrudden C. and Prechal S., 'The Concepts of Equality and Non-Discrimination in Europe: A practical approach' (2009) European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities Unit G.2.

Niebel R., de Martinis L., and Clark B., 'The EU Trade Secrets Directive: all change for trade secret protection in Europe?' (2018) 13(6) Journal of Intellectual Property Law & Practice 445.

Peczenik A., 'A Theory of Legal Doctrine' (2001) 14(1) Ratio Juris 75.

Sher B., 'The last of the steam-powered trains: modernising Article 82' (2004) 25(5) European Competition Law Review 243.

Stylianou K. and Iacovides M., 'The Goals of EU Competition Law - A Comprehensive Empirical Investigation' (December 4, 2020), available at <SSRN:https://ssrn.com/abstract=3735795>, accessed August 30, 2021.

Tao Y., 'Spontaneous economic order' (2016) 26(3) Journal of Evolutionary Economics 467.

Tsotsorin M.V., ‘Practical Considerations in Trade Secret Licensing’ (October 1, 2012), available at SSRN: https://ssrn.com/abstract=2334060> accessed September 3, 2021.

Tusek I., 'EU Competition Law Policy versus Intellectual Property Rights: A Study of the Microsoft Case' (2010) 6 Croatian Yearbook of European Law & Policy 103.

Vesterdorf B., ‘*Article 82 EC: Where do we stand after the Microsoft judgement?*’ (2008), Global Antitrust Review (GAR) 1.

Vezzoso S., ‘The Incentives Balance Test in the EU Microsoft Case: A More 'Economics-Based' Approach?’ (March 13, 2009), available at SSRN: <https://ssrn.com/abstract=1358924>, accessed September 7, 2021.

Westerman P.C., ‘Open or Autonomous: The Debate on Legal Methodology as a Reflection of the Debate on Law’ (October 30, 2009), available at SSRN: <https://ssrn.com/abstract=1609575>, accessed August 30, 2021.

OTHER SOURCES

Eurlex, ‘Sources of European Union Law’, available at: < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l14534>, accessed August 31, 2021.

Eurlex, ‘Glossary of summaries: European Union (EU) Hierarchy of norms’, available at: < https://eur-lex.europa.eu/summary/glossary/norms_hierarchy.html>, accessed August 31, 2021.

European Commission, in OECD (1997), Competition Policy and Intellectual Property Rights (DAFFE/CLP(98)18) 271.

European Commission, in OECD (2007) Refusal to deal (DAF/COMP(2007)46) 201.

Lindén J., ‘Restriction By Object: A Restriction Based Purely on Experience or Also on Effects?’ (LUB Student Papers, 2021).

Merriam-Webster, ‘Refuse’, available at: <https://www.merriam-webster.com/dictionary/refuse>, accessed September 12, 2021.

OECD (1997), Competition Policy and Intellectual Property Rights (DAFFE/CLP(98)18)

OECD (2019), Licensing of IP Rights and Competition Law (DAF/COMP(2019)3).

Table of Cases

EUROPEAN UNION

COMMISSION DECISIONS

BBI/Boosey & Hawkes: Interim measures (Case IV/32.279) Commission decision OJ L 286/36 [1987].

Sealink/B&I - Holyhead : interim measures (Case IV/34.174) Commission decision, [1992] 5 CMLR 255.

Sea Containers v. Stena Sealink - Interim measures (Case IV/34.689) Commission decision OJ L 15/8 [1993].

Commission decision concerning a refusal to grant access to the facilities of the port of Rødby [Denmark] (94/119/EC) Commission decision OJ L 55/52 [1993].

FAG - Flughafen Frankfurt/Main AG (Case IV/34.801) Commission decision OJ L 72/30 [1998].

Joined cases *Glaxo Wellcome (notification)* (Case IV/36.957/F3), *Aseprofar and Fedifar (complaint)* (case IV/36.997/F3), *Spain Pharma (complaint)* (case IV/37.121/F3), *BAI (complaint)* (case IV/37.138/F3), and *EAEPC (complaint)* (case IV/37.380/F3) Commission decision C (2001)1202 [2001].

Microsoft (Case COMP/C-3/37.792) Commission decision C (2004) 900 final [2004].

Intel (case COMP/37.990) Commission decision D (2009) 3726 final [2009].

EFIM (case COMP/39.391) Commission decision C (2009) 4125 [2009].

Telekomunikacja Polska (Case COMP/39.525) Commission decision C (2011) 4378 final [2011].

ARA Foreclosure (Case AT.39759) Commission decision C (2016) 5586 [2016].

Google Search (Shopping) (Case AT.39740) Commission decision C (2017) 4444 final [2017].

Upstream gas supplies in Central and Eastern Europé (Case AT.39816) Commission decision C (2018) 3106 final [2018].

GENERAL COURT

Case T-30/89 Hilti v Commission, ECLI:EU:T:1991:70.

Case T-504/93 *Tiercé Ladbroke v Commission*, ECLI:EU:T:1997:84.

Case T-229/94 *Deutsche Bahn v Commission*, ECLI:EU:T:1997:155.

Joined cases T-374/94, 375/94, 384/94 and 388/94 *European Night Services and Others v Commission*, ECLI:EU:T:1998:198.

Case T-128/98 *Aéroports de Paris v Commission*, ECLI:EU:T:2000:290.

Case T-191/98 *Atlantic Container Line and Others v Commission*, ECLI:EU:T:2003:245.

Case T-65/98 *Van den Bergh Foods v Commission*, ECLI:EU:T:2003:281.

Case T-219/99 *British Airways v Commission*, ECLI:EU:T:2003:343.

Joined cases T-213/01 to 214/01 *Österreichische Postsparkasse v Commission*, ECLI:EU:T:2006:151.

Case T-168/01 *GlaxoSmithKline Services v Commission*, ECLI:EU:T:2006:265.

Case T-201/04 *Microsoft v Commission*, ECLI:EU:T:2007:289.

Case T-301/04 *Clearstream v Commission*, ECLI:EU:T:2009:317.

Case T-155/06 *Tomra Systems and Others v Commission*, ECLI:EU:T:2010:370.

Case T-427/08 *CEAHR v Commission*, ECLI:EU:T:2010:517.

Case T-286/09 *Intel v Commission*, ECLI:EU:T:2014:547.

Case T-486/11 *Orange Polska v Commission*, ECLI:EU:T:2015:1002.

Case T-208/13 *Portugal Telecom v Commission*, ECLI:EU:T:2016:368.

Case T-472/13 *Lundbeck v Commission*, ECLI:EU:T:2016:449.

Case T-712/14 *CEAHR v Commission*, ECLI:EU:T:2017:748.

Case T-705/14 *Unichem Laboratories v Commission*, ECLI:EU:T:2018:915.

Case T-399/16 *CK Telecoms UK Investments v Commission*, ECLI:EU:T:2020:217.

Case T-612/17 Google and Alphabet v Commission (Google Shopping), ECLI:EU:T:2021:763.

COURT OF JUSTICE

JUDGMENTS

Joined cases 28 to 30/62 *Da Costa en Schaake NV and Others v Administratie der Belastingen*, ECLI:EU:C:1963:6.

Case C-6/64 *Costa v E.N.E.L.*, ECLI:EU:C:1964:66.

Case 23/67 *Brasserie De Haecht v Wilkin Janssen*, ECLI:EU:C:1967:54.

Case 5/69 *Voelk v Vervaecke*, ECLI:EU:C:1969:35.

Case 6/72 *Europemballage Corporation and Continental Can Company v Commission*, ECLI:EU:C:1973:22.

Joined cases 6 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents v Commission*, ECLI:EU:C:1974:18.

Case 15/74 *Centrafarm BV and Others v Sterling Drug*, ECLI:EU:C:1974:114.

Case 27/76 *United Brands v Commission*, ECLI:EU:C:1978:22.

Case 77/77 *Benzine en Petroleum Handelsmaatschappij BV and others v Commission*, ECLI:EU:C:1978:141.

Case 85/76 *Hoffmann-La Roche v Commission*, ECLI:EU:C:1979:36.

Case 22/78 *Hugin Kassaregister AB and Hugin Cash Registers Ltd v the Commission*, ECLI:EU:C:1979:138.

Case 258/78 *L.C. Nungesser KG and Kurt Eisele v Commission*, ECLI:EU:C:1982:211.

Case 262/81 *Coditel v Ciné-Vog Films*, ECLI:EU:C:1982:334.

Case 283/81 *CILFIT v Ministero della Sanità*, ECLI:EU:C:1982:335.

Case 322/81 *Michelin v Commission*, ECLI:EU:C:1983:313.

Case 337/82 *St. Nikolaus Brennerei und Likörfabrik v Hauptzollamt Krefeld*, ECLI:EU:C:1984:69.

Case 311/84 *CBEM v CLT and IPB*, ECLI:EU:C:1985:394.

Case 27/87 *Erauw-Jacquery v La Hesbignonne*, ECLI:EU:C:1988:183.

Case 53/87 *Consorzio italiano della componentistica di ricambio per autoveicoli and Maxicar v Régie nationale des usines Renault*, ECLI:EU:C:1988:472.

Case 238/87 *Volvo v Veng*, ECLI:EU:C:1988:477.

Case C-234/89 *Delimitis v Henninger Bräu*, ECLI:EU:C:1991:91.

Case C-62/86 *AKZO v Commission*, ECLI:EU:C:1991:286.

Case C-92/92 *Collins and Patricia Im- und Export v Imtrat and EMI Electrola*, ECLI:EU:C:1993:847.

Joined cases C-241/91 P and C-242/91 P *RTE and ITP v Commission*, ECLI:EU:C:1995:98.

Joined cases C-46/93 and C-48/93 *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others*, ECLI:EU:C:1996:79.

Case C-333/94 P *Tetra Pak v Commission*, ECLI:EU:C:1996:436.

Case C-200/96 *Metronome Musik v Music Point Hokamp*, ECLI:EU:C:1998:172.

Case C-7/95 P *Deere v Commission*, ECLI:EU:C:1998:256.

Case C-7/97 *Bronner*, ECLI:EU:C:1998:569.

Case C-434/97 *Commission v France*, ECLI:EU:C:2000:98.

Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports and Others v Commission*, ECLI:EU:C:2000:132.

Case C-292/97 *Karlsson and Others*, ECLI:EU:C:2000:202.

Case C-453/99 *Courage and Crehan*, ECLI:EU:C:2001:465.

Case C-309/99 *Wouters and Others*, ECLI:EU:C:2002:98.

Case C-292/00 *Davidoff*, ECLI:EU:C:2003:9.

Case C-112/00 *Schmidberger*, ECLI:EU:C:2003:333.

Case C-418/01 *IMS Health*, ECLI:EU:C:2004:257.

Joined cases C-189/02, 202/02, 208/02, and 213/02 P *Dansk Rørindustri and Others v Commission*, ECLI:EU:C:2005:408.

Case C-205/03 P *FENIN v Commission*, ECLI:EU:C:2006:453.

Case C-238/05 *ASNEF-EQUIFAX*, ECLI:EU:C:2006:734.

Case C-95/04 P *British Airways v Commission*, ECLI:EU:C:2007:166.

Case C-412/05 P *Alcon v OHIM*, ECLI:EU:C:2007:252.

Case C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union*, ECLI:EU:C:2007:772.

Case C-341/05 *Laval un Partneri*, ECLI:EU:C:2007:809.

Case C-450/06 *Varec*, ECLI:EU:C:2008:91.

Joined cases C-468/06 to C-478/06 *Sot. Lélos kai Sia*, ECLI:EU:C:2008:504.

Case C-202/07 P *France Télécom v Commission*, ECLI:EU:C:2009:214.

Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others*, ECLI:EU:C:2009:610.

Case C-48/09 P *Lego Juris v OHIM*, ECLI:EU:C:2010:516.

Case C-280/08 P *Deutsche Telekom v Commission*, ECLI:EU:C:2010:603.

Case C-52/09 *TeliaSonera Sverige*, ECLI:EU:C:2011:83.

Joined cases C-403/08 and C-429/08 *Football Association Premier League and Others*, ECLI:EU:C:2011:631

Case C-277/10 *Luksan*, ECLI:EU:C:2012:65.

Cas C-209/10 *Post Danmark*, ECLI:EU:C:2012:172.

Case C-1/11 *Interseroh Scrap and Metals Trading*, ECLI:EU:C:2012:194.

Case C-549/10 P *Tomra and Others v Commission*, ECLI:EU:C:2012:221.

Case C-457/10 P *AstraZeneca v Commisson*, ECLI:EU:C:2012:770.

Case C-226/11 *Expedia*, ECLI:EU:C:2012:795.

Case C-416/10 *Križan and Others*, ECLI:EU:C:2013:8.

Joined cases C-274/11 and C-295/11 *Spain and Italy v Council*, ECLI:EU:C:2013:240.

Case C-59/12 P *Zentrale zur Bekämpfung unlauteren Wettbewerbs*, ECLI:EU:C:2013:634.

Case C-295/12 P *Telefónica and Telefónica de España v Commission*, ECLI:EU:C:2014:2062.

Case C-382/12 P *MasterCard and Others v Commission*, ECLI:EU:C:2014:2201.

Case C-170/13 *Huawei Technologies*, ECLI:EU:C:2015:477.

Case C-23/14 *Post Danmark*, ECLI:EU:C:2015:651.

Case C-194/14 *AC-Treuhand v Commission*, ECLI:EU:C:2015:717.

Case C-345/14 *Maxima Latvija*, ECLI:EU:C:2015:784.

Case C-201/15 *AGET Iraklis*, ECLI:EU:C:2016:972.

Case C-413/14 P *Intel v Commission*, ECLI:EU:C:2017:632.

Case C-177/16 *Biedrība "Autortiesību un komunicēšanās konsultāciju aģentūra - Latvijas Autoru apvienība" Konkurences padome*, ECLI:EU:C:2017:689.

Case C-547/16 *Gasorba and Others*, ECLI:EU:C:2017:891.

Case C-525/16 *Meo - Serviços de Comunicações e Multimédia*, ECLI:EU:C:2018:270.

Case C-123/16 P *Orange Polska v Commission*, ECLI:EU:C:2018:590.

Case C-476/17 *Pelham and Others*, ECLI:EU:C:2019:624.

Case C-307/18 *Generics (UK) and Others*, ECLI:EU:C:2020:52.

Case C-637/19 *BY (Preuve photographique)*, ECLI:EU:C:2020:863.

Case C-152/19 P *Deutsche Telekom v Commission*, ECLI:EU:C:2021:238.

Case C-165/19 P *Slovak Telekom v Commission*, ECLI:EU:C:2021:239.

Case C-591/16 P *Lundbeck v Commission*, ECLI:EU:C:2021:243.

OPINIONS

Case Opinion 2/13 *Accession of the European Union to the ECHR*, ECLI:EU:C:2014:2454.

AG OPINIONS

Joined cases C-241/91 P and C-242/91 P *RTE and ITP v Commission*, ECLI:EU:C:1995:98, opinion of AG Gulman. ECLI:EU:C:1994:210.

Case C-7/97 *Bronner*, ECLI:EU:C:1998:569, opinion of AG Jacobs, ECLI:EU:C:1998:264.

Case C-418/01 *IMS Health*, ECLI:EU:C:2004:257, opinion of AG Tizzano, ECLI:EU:C:2003:537.

Case C-53/03 *Syfait and Others*, ECLI:EU:C:2005:333, opinion of AG Jacobs, ECLI:EU:C:2004:673.

Joined cases C-468/06 to C-478/06 *Sot. Lélos kai Sia*, ECLI:EU:C:2008:504, opinion of AG Ruiz-Jarabo Colomer, ECLI:EU:C:2008:180.

Joined cases C-274/11 and C-295/11 *Spain and Italy v Council*, ECLI:EU:C:2013:240, opinion of AG Bot, ECLI:EU:C:2012:782.

Case C-170/13 *Huawei Technologies*, ECLI:EU:C:2015:477, opinion of AG Wathelet, ECLI:EU:C:2014:2391.

Case C-413/14 P *Intel v Commission*, ECLI:EU:C:2017:632, opinion of AG Wahl, ECLI:EU:C:2016:788.

Case C-469/17 *Funke Medien NRW*, ECLI:EU:C:2019:623, opinion of AG Szpunar, ECLI:EU:C:2018:870.

Case C-152/19 P *Deutsche Telekom v Commission*, ECLI:EU:C:2021:238, opinion of AG Saugmandsgaard ØE, ECLI:EU:C:2020:678.

Case C-165/19 P *Slovak Telekom v Commission*, ECLI:EU:C:2021:239, opinion of AG Saugmandsgaard ØE, ECLI:EU:C:2020:678.

Case C-307/18 *Generics (UK) and Others*, ECLI:EU:C:2020:52, opinion of AG Kokott. ECLI:EU:C:2020:28.

THE UNITED STATES OF AMERICA

COURT OF APPEALS FOR THE SECOND CIRCUIT

US v Aluminum Co of America (ALCOA) [1945] 148 F 2d 416 (2nd Circuit).

THE UNITED KINGDOM

COMPETITION APPEAL TRIBUNAL

ME Burgess JJBurgess and SJ Burgess (trading as JJ Burgess & Sons) v Office of Fair Trading [2004] Competition Appeal Tribunal, 1044/2/1/04.

SUPREME COURT

Arriva The Shires Ltd v London Luton Airport Operations Ltd [2014] EWHC 64 (Ch).

Table of Legislation

EUROPEAN UNION

DIRECTIVES

Council Directive 89/105/EEC of 21 December 1988 relating to the transparency of measures regulating the pricing of medicinal products for human use and their inclusion in the scope of national health insurance systems [1989] OJ L40/8.

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10.

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L 157/45.

Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1.

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L 77/20

Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks [2015] OJ L 336/1.

Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L 157/1.

Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L 11/3.

REGULATIONS

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

Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L 102/1.

DECISIONS

Council Decision 94/800/EC of 22 December 2014 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) [1994] OJ L 336/1.

NOTICES AND OTHER SOFT LAW

Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Making the most of the EU's innovative potential An intellectual property action plan to support the EU's recovery and resilience' [2020] COM/2020/760 final.

Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.

Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7.

Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11/1.

Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements [2014] OJ C 89/3.

Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/97.

Guidelines on Vertical Restraints [2010] OJ C 130/1.

Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) [2014] OJ C 291/1.

WORLD TRADE ORGANISATION

Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex IC of the Agreement Establishing the World Trade Organization, Marrakesh 15 April 1994.

COUNCIL OF EUROPE

European Convention on Human Rights, Rome 4 November 1950.