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# EUROPARÄTTSLIG TIDSKRIFT

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**HANS HENRIK LIDGARD**

**Application of Article 82 EC to Abusive  
Exclusionary Conduct – Refusal to Supply or to  
License**



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# APPLICATION OF ARTICLE 82 EC TO ABUSIVE EXCLUSIONARY CONDUCT

## – Refusal to Supply or to License

Hans Henrik Lidgard\*

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One of the more troubling concepts in EU competition law is to what extent companies are allowed to refuse to supply and, as a sub-category thereof, to refuse to license. As a qualified guess, this concept has lately intrigued Swedish master student's papers more than any other single subject. The Commission has through its 2009 Guidelines on Article 82<sup>1</sup> tried to condense the answer with respect to exclusionary practices<sup>2</sup> into understandable instructions. The critique have been multi-faceted: The Commission is overreaching and creating new law or the Guidelines do not provide sufficient guidance. Section D of the Guidelines deals with exclusionary conduct in the form of refusal to supply and margin squeeze, which is the focus of this comment.

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\* Hans Henrik Lidgard is Professor of Law at the Lund University, Sweden. This article is the basis of a comment made to a presentation by John Temple-Lang, Cleary, Gottlieb, Steen and Hamilton, Brussels at a seminar organized by the Swedish Network for European Studies on the Commission's Guidance Paper on Article 82 EC in Stockholm on September 29, 2009. In the forthcoming issue, No 1 2010 of *Europarättslig Tidskrift*, articles by John Temple Lang and Lars Henriksson stemming from the Seminar will be published.

<sup>1</sup> Communication on February 9, 2009 from the EC Commission; Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, (the 2009 Guidelines") C(2009) 864 final, OJ 2009 C 45/7 available at [http://ec.europa.eu/competition/antitrust/art82/guidance\\_en.pdf](http://ec.europa.eu/competition/antitrust/art82/guidance_en.pdf).

<sup>2</sup> Even if the examples in Article 82 refer to exploitative conduct, there are few cases which actually deal with abusive exploitation. Most of them are reference cases, but in *British Leyland Public Limited Company v EC Commission*, 11 November 1986. ECR [1986] 3263. Exploitation often relates to a discussion on excessive prices but "the Court does not always separate between excessively high exclusionary and excessively high exploitative prices." Nils Wahl, judge at the Court of First Instance, *Exploitative high prices and European competition law – a personal reflection in The Pros and Cons of High Prices* (2007), available at [http://www.kkv.se/upload/Filer/Ovrigt/Konferenser/Pros\\_Cons/Pros%20and%20Cons%20of%20High%20Prices.pdf](http://www.kkv.se/upload/Filer/Ovrigt/Konferenser/Pros_Cons/Pros%20and%20Cons%20of%20High%20Prices.pdf).

Departing from fundamental concepts, this paper briefly recaps the case-law development with respect to refusal to deal on both sides of the Atlantic; revisits the EU Guidelines and recent U.S. development, and finally considers refusal to license. All with the purpose to understand whether the 2009 Guidelines actually restate the law as it stands today.

## 1. FUNDAMENTAL CONCEPTS

An overriding fundamental principle of law is the right to deal or refuse to deal with whomever you want. The concept is a contractual principle and as such has no foundation in EU law itself. It is, however, so well established in the national law of the Member States that there should be little doubt that it is a principle also embraced by Community law<sup>3</sup> and affects any decision to be made – even in competition law. Still there may be exceptions to the basic rule, but they must be interpreted restrictively.

Is this principle equally strong in civil and common law?

Ownership is next to sacred in US law. No trespassing and few limitations on its use. The starting premise is that there is no obligation to deal, supply, licence or share.<sup>4</sup> This attitude also seems to prevail in an antitrust context.<sup>5</sup>

The European perspective is slightly different. The overriding principle applies, but ownership carries certain social duties and owners have to endure limitations in their rights – whether in real or intellectual property. For example, in Sweden the notion of “*allmansrätt*” basically means that the public cannot be fenced off private property. Everyone has a right to pass as long as it does not cause real inconvenience to the property owner. In Germany the balance is expressed in the Constitution as “ownership obligates”; the exercise of ownership shall also be to the benefit of society.<sup>6</sup> In the field of intellectual property

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<sup>3</sup> Groussot, X., and Lidgard, H.H., *Are there General Principles of Community Law affecting Private Law?* In *General Principles of EC Law in a Process of Development* (ed. Bernitz U. et al.) at p. 155, Kluwer Law International (2008).

<sup>4</sup> U.S. Constitution, amendment V: “No person shall be... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation”.

<sup>5</sup> “Thus, as a general matter, the Sherman Act “does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.” *VERIZON COMMUNICATIONS INC., v. LAW OFFICES OF CURTIS V. TRINKO, LLP* (“*TRINKO*”), 540 U.S. 398, 408 (2004) (quoting *UNITED STATES v. COLGATE & CO.*, 250 U.S. 300, 307 (1919)).

<sup>6</sup> Grundgesetz, <http://dejure.org/gesetze/GG/13.html><http://dejure.org/gesetze/GG/15.html>  
Artikel 14: (1) Das Eigentum und das Erbrecht werden gewährleistet. Inhalt und Schranken werden durch die Gesetze bestimmt. (2) Eigentum verpflichtet. Sein Gebrauch soll zugleich dem

this position is exemplified by an openness (at least in principle) to compulsory licensing, a principle which has no direct equivalence in US law. Thus the Civil Law attitude generally seems less hesitant to limit the rights of an owner, but the question is how it applies in competition law context focusing on refusals to deal.

The legislative history of European competition rules offers little support to answer the question.<sup>7</sup> The EC Treaty is subject to a dynamic, functional interpretation which disregards the original intent. The language in Article 82 EC therefore provides the starting point on how to deal with single-firm conduct. The stipulation is, however, framed in broad language prohibiting abuse of dominance affecting trade. The examples in Article 82 are geared towards exploitative practices and do not mention exclusionary practices such as refusal to deal. Practice however, illuminates the reach of the provision.

## 2. EU DEVELOPMENT

When a *non-dominant* company refuses to deal with a customer there are few European concerns. In the 2009 Guidelines the EC Commission refers to its rule of thumb defining non-dominance as a market share below 40%.<sup>8</sup> Alternatives and substitutes are available, and reasons to deviate from the fundamental contractual principle are few. EU-law under Article 81 EC has primarily been preoccupied with contractual situations where non-dominant companies refuse to deal because they have chosen to divide the market between different middlemen<sup>9</sup> or to simply stop or hinder parallel trade.<sup>10</sup> Creating a single European market has an overriding fundamental value and the Commission's group exemptions and the case law make it clear that such efforts may well fall under the "no-no category" – often referred to as "hard-core" prohibitions in EU-law.

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Wohle der Allgemeinheit dienen. (3) Eine Enteignung ist nur zum Wohle der Allgemeinheit zulässig. Sie darf nur durch Gesetz oder auf Grund eines Gesetzes erfolgen, das Art und Ausmaß der Entschädigung regelt. Die Entschädigung ist unter gerechter Abwägung der Interessen der Allgemeinheit und der Beteiligten zu bestimmen. Wegen der Höhe der Entschädigung steht im Streitfalle der Rechtsweg vor den ordentlichen Gerichten offen.

<sup>7</sup> See Schweitzer, H., *Parallels and Differences in the Attitude towards Single-Firm Conduct: What are the Reasons? The History, Interpretation and Underlying Principles of Sec. 2 Sherman Act and Art. 82*, EUI Law Working Paper No 2007/32, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1093248](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1093248).

<sup>8</sup> 2009 Guidelines, fn. 1, point 14.

<sup>9</sup> ECJ, Joined Cases 56 & 58–64, *Etablissements Consten S.A.R.L. and Grundig-Verkauf-GmbH v EC Commission*, 13 July 1966, [1966] ECR 299.

<sup>10</sup> ECJ, Case 16/74, *Centrafarm v. Wintrop*, 31 October 1974, [1974] ECR 1183, and Case 15/74, *Centrafarm BV et Adriaan de Peijper v Sterling Drug Inc.*, 31 October 1974. [1974] ECR 1147.

The freedom to contract principle is not otherwise subject to exception where real market power is lacking.

The situation becomes trickier if the supplier of the good or the service has a *dominant position* on the market. Here EU law has introduced the notion of “special responsibility” for dominant companies to act in line with competition requirements.<sup>11</sup> A line of cases have established that in “special circumstances” – such as (i) if the supplier holds a monopoly in the raw material;<sup>12</sup> (ii) there has been a lasting relation which is interrupted;<sup>13</sup> or (iii) the buyer is seeking to introduce a new product on a secondary market for which there is consumer demand and no objective reasons for a refusal,<sup>14</sup> – a dominant company may be required to supply on reasonable terms.<sup>15</sup>

In the early 70s Commercial Solvents Corporation<sup>16</sup> held a world monopoly in the raw material required for the downstream product. It changed its commercial policy, produced the downstream product itself and stopped supplying former customers. These elements were held relevant for prohibiting a refusal to supply an “essential facility” required to maintain a competitor on the market and to secure competition in the future. The negative attitude towards refusal to supply has been substantially expanded over the last 30 years and is now applied to e.g. computerized airline ticket reservations,<sup>17</sup> airline interline

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<sup>11</sup> ECJ, Case 322/81, *Michelin v EC Commission*, 9 November 1983, [1983] ECR 3461.

<sup>12</sup> ECJ, Case 6 & 7/73, *Istituto Chemioterapico Italiano & Commercial Solvents Corp. v EC Commission* (“Commercial Solvents”), 6 March 1974, [1974] ECR 223.

<sup>13</sup> *Id.*, cf. ECJ, Case 27/76, *United Brands Co v EC Commission*, 14 February 1978, [1978] ECR 207.

<sup>14</sup> See ECJ, Joined Cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann & Independent Television Publication Limited v EC Commission* (“Magill”), 6 April 1995, [1995] ECR I-743 (Irish copyright protection of TV-listings); Case C-481/01, *IMS Health v EC Commission*, 11 April 2002, [2001] ECR I-5039, (copyright protection for data on sales of pharmaceuticals); CFI, Case T-201/04, *Microsoft Corp. v EC Commission*, 17 September 2007, [2007] ECR II-3601 (copyright protection for interoperability information).

<sup>15</sup> In his Opinion in Case C-7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG* (“Bronner”), [1998] ECR I-7791, Advocate General Jacobs takes a balanced approach at point 53: “Yet, a duty under Article 82 EC for a dominant undertaking to aid its competitors should not be assumed too lightly and refusal to supply a competitor is not automatically considered abusive just because the inputs in question are necessary to compete on a secondary market. A balance should be kept between the interest in preserving or creating free competition in a particular market and the interest in not deterring investment and innovation by demanding that the fruits of commercial success be shared with competitors.”

<sup>16</sup> ECJ, Case 6/73 and 7/73, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v EC Commission*, 6 mars 1974, [1974] ECR 223.

<sup>17</sup> EC Commission, Case COMP IV 32.318, *London European – Sabena*, 4 November 1988, OJ 1988 L 317/47.

services,<sup>18</sup> ground handling services,<sup>19</sup> telephone directories,<sup>20</sup> bank clearing services,<sup>21</sup> telecommunications,<sup>22</sup> and software interoperability information.<sup>23</sup>

In September 2009 the CFI addressed refusal to deal with respect to financial services. The Clearstream Group (“CBL”) provides clearing, settlement and custody services in relation to securities. CBL and Euroclear Bank SA (“EB”) are the only international central securities depositories currently operating in the EU. CBF, an affiliate in the CBL group, is the central securities depository in Germany and currently the only bank having the status of a securities depository bank and allegedly a necessary partner in Germany. CBF had, according to the EC Commission, infringed Article 82 EC, by refusing to supply primary clearing and settlement services to EB and discriminated against it by applying discriminatory prices.<sup>24</sup> The refusal harmed innovation and competition in the provision of cross-border secondary clearing and settlement services and, ultimately, consumers within the single market.

On appeal, the CFI in 2009<sup>25</sup> agreed with the Commission and recalled that whilst the finding that a dominant position exists does not in itself imply any reproach, the undertaking concerned has a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition on the common market. A dominant company may protect its own commercial interests when they are attacked, and whilst such an undertaking must be allowed the right to take such reasonable steps as it deems appropriate to protect those interests, such behavior cannot be allowed if its purpose is to strengthen that dominant position and thereby abuse it.<sup>26</sup>

(133) It therefore follows from the nature of the obligations imposed by Article 82 EC that, in specific circumstances, undertakings in a dominant position may be deprived of the right to adopt a course of conduct or take measures which are not in

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<sup>18</sup> EC Commission, Case COMP IV 33.544, *British Midland v. Aer Lingus*, 26 February 1992, OJ 1992 L 96/34.

<sup>19</sup> CFI, Case T-128/98, *Aéroports de Paris v EC Commission*, 12 December 2000, ECR [2000] II-3929.

<sup>20</sup> ECJ, Case C-109/03, *KPN Telecom BV v Onafhankelijke Post en Telecommunicatie Autoriteit (OPTA)*, 25 November, 2004, [2004] ECR I-11273.

<sup>21</sup> EC Commission, Case COMP 38.096, *Clearstream*, 2 June 2004, available at <http://ec.europa.eu/competition/antitrust/cases/decisions/38096/en.pdf>.

<sup>22</sup> EC Commission, Case COMP IV 38.784, *Wanadoo España v Telefonica*, 4 July 2007, OJ 2008 C 83/6. The case deals with margin squeeze constituting a constructive refusal to supply and is under appeal in CFI, Case T-398/07, *Kingdom of Spain v EC Commission*, OJ 2008 C 8/17.

<sup>23</sup> CFI, Case T-201/04, *Microsoft Corp. v EC Commission*, 17 September 2007, ECR [2007] II-3601.

<sup>24</sup> *Clearstream*, fn. 21.

<sup>25</sup> CFI, Case T-301/04, *Clearstream Banking AG, Clearstream International SA, v EC Commission*, 9 September 2009, n.y.r. at paragraph 132.

<sup>26</sup> Id., ref to Case T-203/01, *Michelin v Commission*, [2003] ECR II-4071, paragraph 55.



themselves abuses and which would even be unobjectionable if adopted or taken by non-dominant undertakings.<sup>27</sup>

This is indeed a difficult holding for industry. Even without acting in an abusive way companies could be forced to undertake undesired actions. The formulation, with its requirement to assist a competitor, has a ring of old Harvard school economics as best represented by the far-reaching U.S. *Alcoa*-judgment by Judge Learned Hand.<sup>28</sup>

The CFI even went further and explained although the burden of proof of the existence of circumstances that constitute an infringement of Article 82 EC is on the Commission, it is the burden of the dominant undertaking concerned to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission to show that the arguments and evidence relied on by the undertaking cannot prevail.<sup>29</sup> The commercial behavior of a dominant company may not distort competition on an upstream or a downstream market. “There must be a finding that the behaviour hinders the competitive position of some of the business partners of that undertaking in relation to the others”.<sup>30</sup>

(193) In that regard, there is nothing to prevent discrimination between business partners who are in a relationship of competition from being regarded as abusive as soon as the behaviour of the undertaking in a dominant position tends, having regard to the whole of the circumstances of the case, to lead to a distortion of competition between those business partners. In such a situation, it cannot be required in addition that proof be adduced of an actual quantifiable deterioration in the competitive position of the business partners taken individually.<sup>31</sup>

Based on these recent expressions, it can be questioned whether the purpose behind the Commission’s and the Court’s intervention really is the protection of the public from market failure rather than the protection of businesses from the workings of the market.<sup>32</sup> Is European competition law for the benefit of

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<sup>27</sup> Id., ref. to Case T-111/96, *ITT Promedia v Commission*, [1998] ECR II-2937, paragraph 139.

<sup>28</sup> *UNITED STATES v. ALUMINUM CO. OF AMERICA*, 148 F.2d 416, (2d Cir. 1945) (“*ALCOA*”).

<sup>29</sup> CFI, Case T-301/04, *Clearstream*, fn. 25, paragraph 185.

<sup>30</sup> Id., at paragraph 192 with reference to ECJ, Case C-95/04 P, *British Airways v Commission*, [2007] ECR I-2331, paragraphs 143 and 144.

<sup>31</sup> Id., at paragraph 193 with ref. to *British Airways* above, paragraph 145.

<sup>32</sup> In *Bronner*, fn. 15, Advocate General Jacobs in point 58 advised that “it is important not to lose sight of the fact that the primary purpose of Article 86 is to prevent distortion of competition – and in particular to safeguard the interests of consumers – rather than to protect the position of particular competitors. It may therefore, for example, be unsatisfactory, in a case in which a competitor demands access to a raw material in order to be able to compete with the dominant undertaking on a downstream market in a final product, to focus solely on the latter’s market power on the upstream market and conclude that its conduct in reserving to itself

competition or competitors?<sup>33</sup> Should the European view rather be explained by the fact that protecting competitors in certain instances is a way of maintaining competition in the market i.e. preventing market distortion?

### 3. THE US PERSPECTIVE

American authorities are less interventionist. A firm violates section 2 of Sherman Act only when it acquires or maintains, or attempts to acquire or maintain, a monopoly by engaging in exclusionary conduct “as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”<sup>34</sup> Subjecting a single firm’s actions to judicial scrutiny for reasonableness “would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote.”<sup>35</sup> The successful competitor, “having been urged to compete, must not be turned upon when he wins.”<sup>36</sup>

U.S. case-law repeatedly underlines that in competition policy it “is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects.”<sup>37</sup> The mechanism through which competition may be excluded “is the same mechanism by which a firm stimulates competition.”<sup>38</sup> Courts of general jurisdiction are ill suited “to act as central planners, identifying the proper price, quantity, and other terms of dealing” and they should not assume the day-to-day controls characteristic of a regulatory agency.<sup>39</sup>

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the downstream market is automatically an abuse. Such conduct will not have an adverse impact on consumers unless the dominant undertaking’s final product is sufficiently insulated from competition to give it market power.”

<sup>33</sup> U.S. commentators tend to suggest that EU law primarily seeks to protect competitors. As a controversial example *see* Thomas Barnett, Assistant Attorney General for the Department of Justice Antitrust Division. He issued the following statement after the CFI in 2007 affirmed the substance of the EC Commission 2004 decision against Microsoft: “We are, however, concerned that the standard applied to unilateral conduct by the CFI, rather than helping consumers, may have the unfortunate consequence of harming consumers by chilling innovation and discouraging competition. In the United States, the antitrust laws are enforced to protect consumers by protecting competition, not competitors. In the absence of demonstrable consumer harm, all companies, including dominant firms, are encouraged to compete vigorously. U.S. courts recognize the potential benefits to consumers when a company, including a dominant company, makes unilateral business decisions, for example to add features to its popular products or license its intellectual property to rivals, or to refuse to do so”. Available at [www.usdoj.gov](http://www.usdoj.gov).

<sup>34</sup> *U.S. v. GRINNELL CORPORATION*, 384 U.S. 563, 571 (1966).

<sup>35</sup> *COPPERWELD CORP. v. INDEPENDENCE TUBE CORP.*, 467 U.S. 752, 775 (1984).

<sup>36</sup> *ALCOA*, fn. 28, at 430.

<sup>37</sup> *SPECTRUM SPORTS, INC. v. MCQUILLAN*, 506 U.S. 447, 458–59 (1993).

<sup>38</sup> *BROOKE GROUP LTD. v. BROWN & WILLIAMSON TOBACCO CORP.*, 509 U.S. 209, 226 (1993).

<sup>39</sup> *See TRINKO*, fn. 5, at 408, 415: “We have repeatedly emphasized the importance of clear rules in antitrust law. Courts are ill suited “to act as central planners, identifying the proper

U.S. development has perhaps been more straightforward based on the premise that “[a] monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits.”<sup>40</sup> Aggressive competition, even though it may harm less-efficient firms, “is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster.”<sup>41</sup>

*In conclusion* it appears from this general discussion that there are differences between the European and the American attitudes with respect to intervention against single firm conduct.

The U.S. focus is on efficiencies measured as consumer welfare. The European attitude is more complex with a more permissive attitude towards limiting ownership rights, a need to protect the development of a single market and a medium to long term approach to secure the competitive process. The destiny of the market actors shall be determined by “competition on the merits” rather than exclusionary practices by a dominant firm.<sup>42</sup> One position is not necessarily more economically sound and efficient than the other. In a short term perspective the elimination of a competitor may not have a demonstrable impact on consumer welfare because of e.g. economies of scale, whereas in a longer perspective the reduction may diminish the dynamics of an industry and thereby reduce consumer welfare over time.<sup>43</sup> Americans prefer under-deterrence and expect that the market will correct itself in a Chicago school manner, whereas Europeans are not so certain and underline the need for short-term competition as well, which may result in a certain over-deterrence.

#### 4. THE 2009 GUIDELINES

In its 2009 Guidelines, the Commission expresses enforcement priorities in applying Article 82 EC to abusive exclusionary conduct by dominant undertakings. The single dominant incumbent has, as always, “a special responsibility” not to impair competition. The 2009 Guidelines aim at exclusionary conduct,

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price, quantity, and other terms of dealing. ... “No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.”

<sup>40</sup> *OLYMPIA EQUIP. LEASING CO. V. WESTERN UNION TEL. CO.*, 797 F.2d 370, 375 (7<sup>th</sup> Cir. 1986) (Posner, J.).

<sup>41</sup> *COPPERWELD*, fn. 35, at 767.

<sup>42</sup> Cf. Schweitzer, H., *Parallels and Differences in the Attitude towards Single-Firm Conduct*, fn. 7, at p. 33.

<sup>43</sup> Cf. Comanor, W.S., *Is there a consensus on the Antitrust Treatment of Single-Firm Conduct?*, 2008 *Wisconsin Law Review* 387, 395.

which is harmful to consumers and the Guidelines are basically not applicable to exploitative conduct. To meet the U.S. criticism that EU mainly protects competitors, the Commission anxiously emphasizes that it is the competitive process that is the aim and not simply protecting competitors.<sup>44</sup>

In its assessment of dominance the Commission will follow traditional standards for assessment of dominance based on the market position of the dominant company and its competitors, constraints to entry and expansion and countervailing buying power.<sup>45</sup> The aim is to only intervene when the conduct of the dominant company is likely to lead to anticompetitive foreclosure. The Commission will make a detailed assessment of the allegedly abusive conduct to determine if it causes consumer harm except for certain situations of a *per se* character, such as when the dominant prevents its customers from testing competitor's products or pays partners to delay the introduction of a rival product.<sup>46</sup> The Commission will take into account whether or not the activity is objectively necessary, or produces substantial efficiencies, guaranteeing no harm to consumers and outweighing any anticompetitive effect.<sup>47</sup> The attitude may be characterized as a balancing rule of reason approach.

The starting point is, as it should be, that any company – including a dominant one – should have the right to choose its trading partners and dispose freely of its property.<sup>48</sup> Undue intervention may risk the incentive to invest and innovate and thereby possibly harm consumers and tempt competitors to free ride on others' investments.<sup>49</sup>

It is often the point where the upstream dominant company competes on downstream markets that problems occur and it is this vertical foreclosure that is the type of refusal addressed by the 2009 Guidelines. The Guidelines cover a broad range of practices such as (i) the refusal to supply existing or new customers; (ii) the refusal to license intellectual property and interface information; or (iii) the refusal to grant access to an essential facility. All of the examples have been dealt with by the Community Courts in frequently discussed case law. According to the Commission it is not necessary that the refused product is actually traded, nor is there a need for an actual refusal. Identification of a market, a realistic demand and a "constructive refusal" is enough to

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<sup>44</sup> The 2009 Guidelines, fn. 1, point 6.

<sup>45</sup> *Id.*, point 12.

<sup>46</sup> *Id.*, point 21.

<sup>47</sup> *Id.*, point 85.

<sup>48</sup> *Id.*, point 75.

<sup>49</sup> Making it mandatory to supply former customers may lead to a perverse incentive for a dominant company to refrain from ever dealing with a rival. See Elhauge, E., *Defining Better Monopolization Standards*, (2003) 56 *Stanford Law Review*, 256 also available at [http://www.law.harvard.edu/faculty/elhauge/pdf/monopolization\\_standards.pdf](http://www.law.harvard.edu/faculty/elhauge/pdf/monopolization_standards.pdf).

trigger an investigation.<sup>50</sup> Likewise “margin squeeze” may be a reason for intervention.<sup>51</sup>

The requirements for intervention are based on a determination of whether or not the product or the service is

- (i) an “objective necessity” because there is no actual or potential substitute, which potential downstream competitors could rely on. (If there has been prior supply the reasons for the refusal will be subject to even closer scrutiny); and
- (ii) the refusal will “eliminate effective competition” on the downstream market, immediately or over time; the risk of which increases with the magnitude of the market share of the dominant company; and
- (iii) “consumer harm” is likely, including a case where an innovative competitor is prevented from taking its *new* products, for which there is consumer demand, to the market, and follow-on innovations are stifled.<sup>52</sup>

The Commission is more likely to order supply if the dominant company is active in a regulated market and has an obligation to supply under such legislation, or if the dominance is the result of prior state intervention.<sup>53</sup>

The Commission will balance negative effects against claims of objective necessity and efficiency advanced by the dominant company, such as the need for incentives to invest in the future, balancing risks of failed projects and the effects on follow on inventions.

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<sup>50</sup> The 2009 Guidelines, fn. 1, point 78.

<sup>51</sup> *Id.*, point 79 where the Commission refers to “the efficient competitor test” as a benchmark. If the upstream price is so high that it does not allow the efficient competitor to trade in the downstream market. It is interesting to note that the U.S. is taking a different position to margin squeezing. See the recent judgment of the US Supreme Court in *PACIFIC BELL TELEPHONE CO., DBA AT&T CALIFORNIA. v. LINKLINE COMMUNICATIONS, INC.*, 129 S.Ct. 1109 (2009) also available on <http://www.supremecourtus.gov/opinions/08pdf/07-512.pdf>.

<sup>52</sup> *Cf.* Case T-301/04, *Clearstream Banking AG*, fn. 25, at paragraph 147: In that regard, it follows from the case-law of the Court of Justice that, in order to find the existence of an abuse within the meaning of Article 82 EC, the refusal of the service in question must be likely to eliminate all competition in the market on the part of the person requesting the service, such refusal must not be capable of being objectively justified, and the service must in itself be indispensable to carrying on that person’s business (Case C-7/97 Bronner [1998] ECR I-7791, paragraph 41). According to settled case-law, a product or service is considered necessary or essential if there is no real or potential substitute (see Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others v Commission* [1998] ECR II-3141, paragraph 208, and the case-law cited therein).

<sup>53</sup> The 2009 Guidelines, fn. 1, point 81.

## 5. RECENT U.S. DEVELOPMENT

The reluctance to intervene against single-firm activities such as refusal to supply was fuelled by the 2004 *Trinko* judgment.<sup>54</sup> There, the US Supreme Court concluded that the dominant company's alleged insufficient assistance in the provision of local telephone network service to rivals was not a recognized antitrust claim under the Court's existing refusal-to-deal precedents.

This conclusion would be unchanged even if we considered to be established law the "essential facilities" doctrine crafted by some lower courts, under which the Court of Appeals concluded respondent's allegations might state a claim.<sup>55</sup> We have never recognized such a doctrine,<sup>56</sup> and we find no need either to recognize it or to repudiate it here. It suffices for present purposes to note that the indispensable requirement for invoking the doctrine is the unavailability of access to the "essential facilities"; where access exists, the doctrine serves no purpose. Thus, it is said that "essential facility claims should ... be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms."<sup>57</sup> Respondent believes that the existence of sharing duties under the 1996 Act supports its case. We think the opposite: The 1996 Act's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access. To the extent respondent's "essential facilities" argument is distinct from its general § 2 argument, we reject it.<sup>58</sup>

A factor of particular importance in *Trinko* was the existence of a separate regulatory structure<sup>59</sup> designed to deter and remedy anticompetitive harm. The additional benefit to competition provided by antitrust was regarded as small, and it was less plausible that the antitrust laws contemplated such additional scrutiny.<sup>60</sup>

The Court underlined the need to be cautious in limiting the right to refuse to deal with other firms because enforced sharing may lessen incentives for all to invest in new development and obligates the courts to make business judgments that they are ill equipped to make:

Against the slight benefits of antitrust intervention here must be weighed a realistic assessment of its costs. Allegations of violations of § 251(c)(3) duties are both technical and extremely numerous, and hence difficult for antitrust courts to evaluate.

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<sup>54</sup> *VERIZON COMMUNICATIONS INC. v. LAW OFFICES OF CURTIS V. TRINKO LLP*, 540 U.S. 398, (2004) ("TRINKO").

<sup>55</sup> The Supreme Court cites the critical article by Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841 (1989).

<sup>56</sup> Reference to *ASPEN SKIING CO. v. ASPEN HIGHLANDS SKIING CORP.*, 472 U.S. 585, at 611 (1985).

<sup>57</sup> Reference to P. Areeda & H. Hovenkamp, *Antitrust Law*, p. 150, 773e (2003 Supp.).

<sup>58</sup> *TRINKO*, fn 54, at 411.

<sup>59</sup> This regulatory structure was contained in separate legislation in the form of the Telecommunications Act of 1996.

<sup>60</sup> *Id.*, at 412.

Applying § 2's requirements to this regime can readily result in "false positive" mistaken inferences that chill the very conduct the antitrust laws are designed to protect.<sup>61</sup>

However, the Court did not embrace a particular standard to address the refusal to deal situation, which reflects the fact that antitrust policy in the U.S. has long been in search of an appropriate standard to address exclusionary conduct and still is not ready to adopt a single one. Different theories have been advanced,<sup>62</sup> such as the "profit-sacrifice or no economic sense" standard, a "disproportionality/proportional balancing" test,<sup>63</sup> a "recoupment test", an "impairing-rivals efficiencies/raising rivals cost" test or an "equally efficient competitor" test.<sup>64</sup> The "recoupment test" seems to be firmly endorsed by the Supreme Court in predatory pricing situations, but it has limited application in a refusal to deal situation.<sup>65</sup> The "no economic sense" standard has strong implications in a refusal to deal context by asking if the challenged conduct makes economic sense for the monopolist, but for its potentially exclusionary effect. Critics underline, however, that the test is difficult to implement and that it cannot be applied in cases of misleading or deceptive conduct.

Even if a single standard would increase predictability for all actors, it appears that each and every test evaluated has considerable draw-backs. In the

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<sup>61</sup> *Id.*, at 414 where the Court refers to *MATSUSHITA ELEC. INDUSTRIAL CO. v. ZENITH RADIO CORP.*, 475 U.S. 574, 594.

<sup>62</sup> See Grimm, K.L., *General Standards for Exclusionary Conduct*, <http://www.ftc.gov/os/sectiontwohearings/docs/section2generalstandards.pdf>. Grimm summarizes interventions in the context of the FTC/Department of Justice Joint Hearing on Section 2 of the Sherman Act: Single-Firm Conduct as related to Competition.

<sup>63</sup> Hovenkamp, H., *The Harvard and Chicago Schools and the Dominant Firm*, University of Iowa Legal Studies Research Papers, 07/19, September 2007, <http://ssrn.com/abstract=1014153> underlines that the problem in the U.S. is to agree on a single standard and he advocates the disproportionality test, which has a balancing basis, but where the burden of proof is on the plaintiff advancing a Sherman Act, § 2 argument.

<sup>64</sup> Among the multitude of tests available, the EC Commission in the 2009 Guidelines, besides the traditional balancing test, emphasizes the "equally efficient competitor test". The test has been proposed by Judge Posner and departs from the premise that a practice is deemed exclusionary only if it may exclude a rival at least as efficient as the defendant. The test is, however, primarily helpful to consider in pricing matters and cannot serve as a single standard for abuse of dominance.

<sup>65</sup> The recoupment test appears tailor made for predatory pricing. The plaintiff must show that the price is below an appropriate measure of cost and a reasonable probability of recouping what has been sacrificed. *Brooke Group*, fn. 38, 226, confirmed by *WEYERHAEUSER COMPANY, v. ROSS-SIMMONS HARDWOOD LUMBER CO., INC.* 549 U.S. 312 (2007) with respect to a predatory bidding case. It is interesting to note that this test, so firmly anchored in U.S. antitrust law for predatory situations, has still not been accepted in Europe. See Schweitzer, H., *Parallels and Differences in the Attitude towards Single-Firm Conduct*, fn. 7, at pp. 27–33 elaborating on differences in attitude between EU and U.S.

*Microsoft*<sup>66</sup> judgment, the Federal Circuit took a different route and applied a rule-of-reason “*balancing test*” similar to the European approach.<sup>67</sup> The drawback is, of course, the lack of predictability for the actors involved and it remains to be seen if the Supreme Court will follow that route.

## 6. REFUSAL TO LICENSE IN EUROPE

It is noteworthy that the 2009 Guidelines do not deal extensively with refusal to license in spite of the fact that much of the case law actually deals with this situation. The 2005 Discussion paper<sup>68</sup> had a full section on this issue. It appears that the Commission now regards refusal to license as subsumed into the general discussion on refusal to deal. This may be true. But if nothing else, it could for pedagogic reasons be helpful to address the issue separately as there are a number of specific features:

- There is no obvious economic response to how to deal with refusal to license intellectual property rights from a competition law perspective. Granting access to essential facilities stimulates competition in a secondary market (thereby contributing to allocative efficiency). On the other hand, it risks reducing the incentive for the essential facility holder to invest.
- There is generally no obligation to grant licenses to IPR. The very idea of an IPR is to provide a limited monopoly and antitrust law should not intervene under ordinary circumstances to upset this fundamental idea;<sup>69</sup>
- Only under “exceptional circumstances could a refusal to license become abusive.

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<sup>66</sup> *UNITED STATES v. MICROSOFT CORPORATION*, 253 F.3d 34, (Fed. Cir. 2001).

<sup>67</sup> *Id.*, at 58. To establish exclusionary conduct the balancing test contains five steps: (1) An anticompetitive effect by harming the competitive process and thereby harming consumers. Harm to competitors will not suffice. (2) Plaintiff carries the burden of proof. (3) Defendant must proffer a procompetitive (greater efficiency or enhanced consumer appeal) justification for its conduct – the burden then shifts back to the plaintiff to rebut that claim. (4) If the defendant’s procompetitive justification stands un rebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit. (5) Focus is upon the effect of the conduct, not upon the intent behind it.

<sup>68</sup> DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, Brussels December 2005 (“the 2005 Discussion Paper”).

<sup>69</sup> See ECJ, Case 237/87, *Volvo AB v. Erik Veng (U.K.) Ltd.*, 5 October 1988, [1988] ECR 6211. In Case C-385/07, *Der Grune Punkt*, 16 July 2009, n.y.r. DSD (the rightsholder) advances the argument that licensing conditions enforced upon it by law failed to take case law into account. In paragraph 146 the ECJ dismissed the argument by holding that DSD was free to decide with whom to enter trademark contracts. “The decision at issue merely obliges DSD not to claim payment from its contractual partners for take-back and recovery services which it has not provided.”



It may, of course, be asked if it really is for authorities to make the balance and impose obligations in complex licensing situations where it ultimately is a question of establishing an exact price for the mandatory license.<sup>70</sup> The U.S. *Trinko* court was reluctant.

The leading European cases – *Magill*,<sup>71</sup> *IMS*<sup>72</sup> and *Microsoft*<sup>73</sup> – are all essentially about the specific responsibility a dominant entity has in exceptional circumstances to provide access to intellectual property rights to be used in downstream markets. The obligation in these cases primarily relates to copyright, but there is no reason to believe that it does not apply to any other IPR.

The formal requirements for an “exceptional circumstance” in a refusal to license case are that the refusal relates to (i) an input, which is objectively needed to be able to compete on a downstream market, (ii) that the competitor wishes to introduce a new product for which there is consumer demand, and that (iii) that there is no objective justification for the refusal to license. In ordinary language such an input is an “essential facility” – even if the Community Courts, and now the Commission, are less anxious to use this notion. As discussed, the *Trinko* Court, if not entirely rejecting the notion, at least took a very cautious approach to the concept, whereas it, disregarding the semantics, appears to be well and alive on the European side after *IMS* and *Microsoft*.

In *Microsoft* the company suggested that IPR in itself was an objective reason not to supply interoperability information, but the argument was brushed away by the Court of First Instance.<sup>74</sup> In its 2005 Discussion Paper the Commission

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<sup>70</sup> See Geradin, D., Limiting the scope of Article 82 of the EC Treaty: What can the EU learn from the U.S. Supreme Court’s judgment in *Trinko* in the wake of *Microsoft*, *IMS* and *Deutsche Telekom?*, Common Market Law Review, December 2005, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=617263](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=617263).

<sup>71</sup> ECJ, Joined Cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann & Independent Television Publication Limited v EC Commission* (“*Magill*”), 6 April 1995, [1995] ECR I-743 (Irish copyright protection of TV-listings).

<sup>72</sup> ECJ, Case C-481/01, *IMS Health v EC Commission*, 11 April 2002, [2001] ECR I-5039, (copyright protection for data on sales of pharmaceuticals).

<sup>73</sup> CFI, Case T-201/04, *Microsoft Corp. v EC Commission*, 17 September 2007, ECR [2007] II-3601, (copyright protection for interoperability information).

<sup>74</sup> CFI, Case T-201/04, *Microsoft*, fn. 73, at paragraph 690: “The Court considers that... the fact that the communication protocols covered by the contested decision, or the specifications for those protocols, are covered by intellectual property rights cannot constitute objective justification within the meaning of *Magill* and *IMS Health*... *Microsoft*’s argument is inconsistent with the *raison d’être* of the exception which that case-law thus recognises in favour of free competition, since if the mere fact of holding intellectual property rights could in itself constitute objective justification for the refusal to grant a licence, the exception established by the case-law could never apply. In the U.S. in *United States, v. Microsoft Corporation*, 253 F.3d 34, 63 (Fed. Cir. 2001), the United States Court of Appeals for the District of Columbia Circuit took a more blunt position: “*Microsoft*’s primary copyright argument borders upon the frivolous. The company claims an absolute and unfettered right to use its intellectual property as it wishes ... That is no more correct than the proposition that use of one’s personal property, such as a baseball bat, cannot give rise to tort liability.”

went even further by stating that use of secrecy regarding interoperability information may be to leverage market power from one market to another, which could well be an abuse. The Commission added that it was reasonable to apply a lower standard to such refusal. There is hardly any support for the latter clarification and it does not reappear in the 2009 Guidelines.

Another element of interest in the *Microsoft* case is that Microsoft tried to show that its incentive to invest would be upset by an obligation to share its interface information with others. The Commission in its decision remarked that it was not only Microsoft's incentive to invent that was at stake, but that of an entire industry.<sup>75</sup> This novel approach was not discussed at any length by the CFI.<sup>76</sup> It did not have to advance new theories in order to find that Microsoft had abused its dominant position. The question is if the Commission may reuse this argument in future cases? On this point the 2009 Guidelines are silent and anything else would have been a surprise. The Commission has no power to create the law and the Guidelines would have been the wrong place for any new theories.

## 7. REFUSAL TO LICENSE IN THE U.S.

There is no duty to license in the U.S., nor can there be compulsory licensing.<sup>77</sup> Bruce McDonald from the U.S. Department of Justice Antitrust Division explained that the U.S. disagrees with imposing liability for a unilateral refusal to supply intellectual property going beyond requiring firms merely to refrain

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<sup>75</sup> Commission, Decision COMP/C-3/37.792, *Microsoft*, 24 March 2004, OJ 2007 L 32/23 at point 783: "The major objective justification put forward by Microsoft relates to Microsoft's intellectual property over Windows. However, a detailed examination of the scope of the disclosure at stake leads to the conclusion that, on balance, the possible negative impact of an order to supply on Microsoft's incentives to innovate is outweighed by its positive impact on the level of innovation of the whole industry (including Microsoft). As such, the need to protect Microsoft's incentives to innovate cannot constitute an objective justification that would offset the exceptional circumstances identified."

<sup>76</sup> CFI, Case T-201/04, *Microsoft*, fn. 73, at paragraph the CFI concludes that "The Commission came to a negative conclusion but not by balancing the negative impact which the imposition of a requirement to supply the information at issue might have on Microsoft's incentives to innovate against the positive impact of that obligation on innovation in the industry as a whole, but after refuting Microsoft's arguments relating to the fear that its products might be cloned..., establishing that the disclosure of interoperability was widespread in the industry concerned... and showing that IBM's commitment to the Commission in 1984 was not substantially different from what Microsoft was ordered to do in the contested decision... and that its approach was consistent with Directive 91/250..."

<sup>77</sup> There is no reported case in which a court has imposed antitrust liability for a unilateral refusal to sell or license a patent or copyright other than Kodak, discussed below. Courts do not generally view a monopolist's unilateral refusal to license a patent as exclusionary conduct.

from anticompetitive conduct that harms rivals and to compel firms to affirmatively to assist their rivals.<sup>78</sup> The qualifications expressed relax the underlying statement considerably and it appears that the U.S. position is not as clear as is sometimes suggested.

In the 1992 *Kodak*<sup>79</sup> judgment independent service organizations (ISO's) began servicing copying and micrographic equipment manufactured by Kodak. Kodak limited the availability to ISO's of replacement parts for its equipment to make it more difficult for ISO's to compete with it in servicing such equipment. The ISO's alleged that Kodak had unlawfully monopolized and attempted to monopolize the sale of service and parts for such machines, in violation of § 2 of that Sherman Act. The Supreme Court held in the first round that the ISO's had presented genuine issues for trial and remanded the case.

On remand the 9<sup>th</sup> Circuit<sup>80</sup> defined the requirements for § 2 Sherman Act to apply: A § 2 *attempt to monopolize claim* requires: (1) a specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving "monopoly power," and (4) causal antitrust injury. A § 2 *monopolization claim* differs primarily in the requisite intent and the necessary level of monopoly power. A § 2 *monopoly claim* requires proof that the incumbent (1) possessed monopoly power in the relevant market and (2) willfully acquired or maintained that power.<sup>81</sup>

Kodak had substantial patent and copyright protection and controlled its designs, brand name and know-how. Together with various contractual arrangements and the benefits of economies of scale, these supported a finding of high barriers to entry by new manufacturers. The Ninth Circuit held that the pro-competitive effects and statutory rights extended by the intellectual property laws must be guaranteed. A rebuttable presumption required that "while exclusionary conduct can include a monopolist's unilateral refusal to license a [patent or] copyright a monopolist's desire to exclude others from its protected work is a presumptively valid business justification for any immediate harm to consumers."<sup>82</sup> However, the court found from the evidence presented, that

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<sup>78</sup> See remarks by McDonald, J.B., Deputy Assistant Attorney General Antitrust Division U.S. Department of Justice, *Section 2 and Article 82: Cowboys and Gentlemen*, presented to the College of Europe Global Competition Law Centre: The Modernisation of Article 82, Second Annual Conference, Brussels June 16–17, 2005, found at [http://www.usdoj.gov/atr/public/speeches/speech\\_mcdonald.htm](http://www.usdoj.gov/atr/public/speeches/speech_mcdonald.htm).

<sup>79</sup> *EASTMAN KODAK CO., v. IMAGE TECHNICAL SERVICES INC.*, 504 U.S. 451 (1992).

<sup>80</sup> *EASTMAN KODAK CO., v. IMAGE TECHNICAL SERVICES INC.*, 125 F.3d 1195 (9<sup>th</sup> Cir. 1997), cert. denied, 523 U.S. 1094 (1998).

<sup>81</sup> *Id.*, at 1202.

<sup>82</sup> *Id.*, at 1218 quoting *DATA GENERAL CORPORATION, v. GRUMMAN SYSTEMS SUPPORT CORPORATION*, 36 F.3d 1147, 1187 (1<sup>st</sup> Cir. 1994).

Kodak's presumptively valid business justification was rebutted on the grounds of pretext only.<sup>83</sup>

Shortly after in a similar situation, but now with respect to Xerox machines, the Federal Circuit in *ISO*<sup>84</sup> took the opposite view. The logic of the Kodak judgment required an evaluation of the patentee's subjective motivation for refusing to sell or license its patented products, but the Federal Circuit declined to follow that logic.<sup>85</sup> If a patent infringement suit is not objectively baseless, an antitrust defendant's subjective motivation is immaterial.

In the absence of any indication of illegal tying, fraud in the Patent and Trademark Office, or sham litigation, the patent holder may enforce the statutory right to exclude others from making, using, or selling the claimed invention free from liability under the antitrust laws. We therefore will not inquire into his subjective motivation for exerting his statutory rights, even though his refusal to sell or license his patented invention may have an anticompetitive effect, so long as that anticompetitive effect is not illegally extended beyond the statutory patent grant."<sup>86</sup>

According to the Federal Circuit it is the infringement defendant, not the patentee, that bears the burden to showing that an exceptional situation exists. In the absence of such proof, a court will not inquire into the patentee's motivations for asserting his statutory right to exclude. Even where the burden of proof has been met, the elements of a Sherman Act violation must be established. Xerox's refusal to sell its patented parts did not exceed the scope of the patent grant. This ended the enquiry. Xerox was under no obligation to sell or license its patented parts and did not violate the antitrust laws by refusing to do so.

The Supreme Court did not grant certiorari in either case and the requirement of underlying intent remains undetermined today.

Focus in the U.S. has, as stated by the *Xerox* Court, rather been on the filing of fraudulent or otherwise improper patent infringement claims by the dominant firm, which is a form of misuse of government process. Referring to the fraudulently achieved patent in a subsequent infringement process will have an exclusionary effect.<sup>87</sup>

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<sup>83</sup> Id., at 1219–1220.

<sup>84</sup> *IN RE INDEPENDENT SERVICE ORGANIZATIONS ANTITRUST LITIGATION*, 203 F.3d 1322 (Fed. Cir. 2000), cert. denied, 531 U.S. 1143 (2001).

<sup>85</sup> Id., at 1327.

<sup>86</sup> Id., at 1327–1328, citing *GLASS EQUIPMENT DEVELOPMENT, INCORPORATED, v. BESTEN, INC.*, 174 F.3d 1337, 1343 (Fed. Cir. 1999).

<sup>87</sup> *WALKER PROCESS EQUIPMENT v. FOOD MACHINERY & CHEMICALS CORP.*, 382 U.S. 172 (1965). Cf. *NOBELPHARMA AB v. IMPLANT INNOVATIONS INC.*, 141 F.3d 1059 (Fed. Cir. 1998). See Hovenkamp, fn. 63, at p. 20 ff.

## 8. OBLIGATION TO DEAL – UNDER WHAT CONDITIONS?

In Europe, a compulsory license is a likely competition law remedy in refusal to license situations. The limited guidance as to the terms and conditions for a forced license creates substantial problems.

Lately the focus has been on (F)RAND conditions – i.e. Fair, Reasonable and Non-Discriminatory terms. The question is whether this notion really offers more precision.<sup>88</sup> If the parties are requested to negotiate these terms, the contacts may result in unlawful collusion. If the authorities are to make a determination they may enter a field where they are less well equipped. It is interesting to note the agreement between the Commission and Microsoft on what Microsoft could charge for use of its interoperability information. In this matter the Commission was acting as a business planner. The result seems to be far from the ordinary business terms resulting from arm-length open negotiations.<sup>89</sup>

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<sup>88</sup> In Case C-109/03, *KPN Telecom BV*, fn. 20, the ECJ held in paragraph 42 with respect to telephone directories that “The reply to the second question must therefore be that Article 6(3) of the Directive, in so far as it provides that the relevant information must be provided to third parties on terms which are fair, cost oriented and non-discriminatory, must be interpreted as meaning that: – with regard to data such as the name and address of the persons and the telephone number allocated to them, only the costs of actually making those data available to third parties may be invoiced by the supplier of the universal service; –with regard to additional data which such a supplier is not bound to make available to third parties, the supplier is entitled to invoice, apart from the costs of making that provision, the additional costs which he has had to bear himself in obtaining the data, provided that those third parties are treated in a non-discriminatory manner.

<sup>89</sup> See SPEECH/07/647 by Neelie Kroes, European Commissioner for Competition Policy, *Introductory remarks on Microsoft’s compliance with March 2004 antitrust decision*, Press conference, Brussels, 22nd October 2007, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/647>. Neelie Kroes states that Microsoft has finally agreed to comply with its obligations under the 2004 Commission decision, which was upheld last month by the Court of First Instance. “I told Microsoft that its royalty rates were too high for the patents they claim are applicable to the interoperability information. In response, Microsoft has slashed its requested royalties for a worldwide licence, including patents from 5.95% to 0.4% – less than 7% of the royalty originally claimed. I told Microsoft that the royalties for access to its secret interoperability information were unreasonable and had to be reduced. Microsoft has now abandoned its demand for a royalty of 2.98 % of revenues from software developed using licensed information. That percentage royalty has become a nominal, one-off payment of 10 000 EUR. This is all that has to be paid by companies that dispute the validity or relevance of Microsoft’s patents.” Pursuant to the agreement and with the active participation of the Commission, on December 19, 2007 Microsoft entered into a protocol license with the Protocol Freedom Foundation (the PFIF”.) Under the license, in return for a onetime 10,000 Euro payment to Microsoft the PFIF made the interface protocols available to Samba.org. Samba is a server suite available for free download. Apparently only SAMBA has used the license for Microsoft’s operating protocols with other competitors like Sun utilizing the free SAMBA downloads and adding their software devices to the freeware ver-

## 9. SIDING WITH THE COMMISSION OR THE CRITIQUES

Everyone seems to agree that refusal to deal cases must be evaluated on their respective merits. The 2009 Guidelines are precisely what the heading says – guidelines that should act as support for industry and other interested parties. They only bind the Commission even if they, of course, will have influential value. With respect to refusal to deal, the Guidelines basically restate positions that emanate from case law. The expert will not find much of novelty, whereas those less accustomed to competition law may find support in them.

An obligation to deal is not to be found in every situation. On the contrary, the basic rule remains, as the Commission puts it, that any company, whether dominant or not, should have the right to choose its trading partners and dispose freely of its property. The focus in the European Guidelines is on a situation where the dominant company competes on downstream markets. Any intervention requires careful consideration.<sup>90</sup> In the individual case there must be a showing of disproportionate harm to consumers and that the competitive process is upset by the activity of the dominant undertaking. In American terms this is a solid “rule-of-reason balancing approach”. For a European this seems the most appropriate way to address a single firm abuse even if it lacks predictability in all situations. If the activity makes no other economic sense for the dominant firm than excluding competitors, there are good reasons to remedy the situation by imposing an obligation to deal.

My understanding is that basically the 2009 Guidelines correctly, but incompletely, states the law as it relates to refusal to deal. The starting point is that a company may refuse to deal in an ordinary situation and defend its privileged position. What could be added is solid, practical advice regarding the more precise boundaries required to avoid a legitimate business strategy from becoming a prohibited exclusionary practice. Further case law development may clarify the situation, and the Commission will have an opportunity to revisit the 2009 Guidelines when it, in due time, is ready to publish guidelines on exploitative behaviour as an abuse of a dominant position.

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sion of SAMBA. See, Page, W.H. and Childers S.J., *Bargaining in the Shadow of the European Microsoft Decision: The Microsoft-Samba Protocol License*, V. 102 *Northwestern University Law Review Colloquy* p.332, 336 (2008). These competitors include IBM, Apple, Sun and Novell, all of which, are major Microsoft competitors and some of whom hire SAMBA Team members to work exclusively on the SAMBA project. *Id.* Accordingly, with the Commission’s intervention Microsoft has received a total of 10,000 EUR for IPR Microsoft originally valued at 5.94% of an undertaking’s revenues. Indeed, SAMBA by providing free downloads of IPR is “selling” it to Microsoft’s competitors for less than average variable cost.

<sup>90</sup> 2009 Guidelines, fn. 1, point 74.