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Protection Of Investments In European Abuse Of Dominance Cases

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1. Introduction

A reverse tendency can be observed in the European abuse of dominance practice: while in the case of tangible assets there is an attempt to establish a transitory exemption from competition law – a sort of temporary exclusivity -, with respect to intangible assets there is a move away from this periodic exclusivity as the IPR that provides such exemption is gradually eroded through competition law enforcement. Therefore, unsurprisingly, the protection of investment in the European abuse of dominant cases has become a hot issue by the *Microsoft*[1] case, where the interest in maintaining development of a whole economic sector has come into conflict with the protection of individual innovations.

However, the goal is clearly recognized: *"a duty under Article 82 EC for a dominant undertaking […] 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." Therefore, "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."*[2] Only striking the proper balance seems to be difficult. This article intends to give an overview of how European competition law tries to address this problem in the so-called 'refusal to deal' cases.

2. What kind of investments are protected under the European competition law?

Investments leading to 'first-mover-advantages' should be protected. This policy is supported by the European competition rules on control of concentrations and on restrictive agreements, in which the Commission has expressly recognized the need to protect investments that create new markets. Under these rules, a strong market position that stems from 'first-mover-advantages' is normally not interpreted as an elimination of competition.[3] Vertical restraints resulting in the opening up of new product or geographic markets do not restrict competition in general either.[4] Furthermore, new product introductions are recognised as efficiency gains when generated by a concentration, as these are likely to enhance the ability and incentive of the new entity to act pro-competitively for the benefit of consumers.[5]

Contrary to this, the exercise of intellectual property rights ("IPR") might constitute an abuse of dominant position if it involved certain abusive conducts.[6] It seems awkward in the light of the fact that intellectual property is generally characterised by high creation and low reproduction costs.[7] Consequently, the creator of a new product would have little chance to recoup its investment, and a market failure could arise unless remedied by granting an exclusive right (legal monopoly) to the creator.[8]

The concept of rewarding investments is missing in the case of tangible property which is objectionable even from constitutional point of view, a basic principle of which is that the different types of properties must be treated equally. Interestingly, DG Competition apparently intends to develop on competition law grounds an identical safeguard mechanism[9] to tangible properties, while on the other hand on similar grounds it may intervene during the exclusivity period devoted to IPRs. DG Competition's Discussion Paper emphasizes that "*in order to maintain incentives to invest and innovate, the dominant firm must not be unduly restricted in the exploitation of valuable results of the investment. For these reasons the dominant firm should normally be free to seek compensation for successful projects that is sufficient to maintain investment incentives, taking the risk of failed projects into account. To achieve such compensation, it may be necessary for the dominant firm to exclude others from access to the input for a certain period of time.*"[10]

The DG Competition favours giving protection to those investments in networks that are deployed in a competitive environment. The Discussion Paper emphasizes that networks are regarded as non-competitive where it is likely that the investments in the indispensable input would have been made even if the investor had known that it would have a duty to supply.[11] This could be the case if the input is indispensable only because the owner enjoys, or has enjoyed until recently, special or exclusive rights.[12] These arguments are mirrored in *Telefónica,*[13] where the Commission stated that the *"original investments*[14] *were undertaken in a context where Telefónica was benefiting from special or exclusive rights that shielded it from competition. […] The investment criteria used by the former monopoly at that time would have led to the investment being made even if there would have been a duty to supply."*[15] According to *Motta,* it is not irrelevant whether a company obtains the facility by virtue of own investment, or without taking any risks, since in the latter case for example it gains exclusive rights on a publicly developed and financed facility.[16]

It is also not irrelevant if the tangible upstream resource, that is mainly infrastructure, is just partially upgraded. In the electronic communications area, the Commission takes the position that such partial network improvements (e.g. VDSL[17]) shall not constitute an emerging network, and consequently shall not fall under regulatory forbearance.[18] The Commission confirmed this in *Telefónica,*[19] where it stressed that the deployment of ADSL services is not regarded as equivalent with the rolling out of new infrastructure. At the same time, the Commission has taken a different approach with respect to energy infrastructure. The Gas Directive,[20] for example, allows exemptions from access obligations not only for totally new infrastructure, but also for the partially new infrastructure, as well as for an existing infrastructure with significantly increased capacity. However, unlike gas products, the services provided on the electronic communication networks are not homogeneous due to dynamic technical development. Therefore, if a dominant position was reached on partially new or upgraded communication infrastructure, it could be leveraged into the traditional market (e.g. from VDSL to ADSL). As a peculiarity of electronic communications, it cannot, however, generally be upheld that only brand new infrastructure is subject to competition law's 'regulatory holiday'.

3. How the competition law respects IPRs?

Article 295 of the EC Treaty provides for the respect of national ownership rules which recognise the investments leading to IPRs. As the ECJ has noted *"in the absence of Community standardization or harmonization of laws, determination of the conditions and procedures for granting protection of an intellectual property right is a matter for national rules."*[21] Therefore, only the exercise of IPR but not the granting of the IPR itself can be subject to the Treaty.[22] The Court of First Instance (CFI) held that *"if the right is exercised in such ways and circumstances as in fact to pursue an aim manifestly contrary to the objectives of Article 86. In that event, the copyright is no longer exercised in a manner which corresponds to its essential function, within the meaning of Article 36 of the Treaty."*[23]

The ECJ developed a well-known test during the past few decades to determine whether the exercise of an IPR constitutes an abuse of dominant position, which is often referred to as the "exceptional circumstances test." Accordingly, competition law eliminates the exclusivity enjoyed by the IP owner under certain exceptional circumstances: if the refusal to license cumulatively:[24] (i) prevents the appearance of a new product which the IPR holder did not offer and for which there is a potential consumer demand, (ii) is not justified, and (iii) the IP owner reserves to himself a secondary market[25] by excluding all competition on that market.[26] This test is also applicable for trade secrets.[27]

The CFI in *Ladbroke*[28], and *ECJ in IMS Health*[29], re-confirmed that the applicant cannot rely on the *Magill* judgment to demonstrate the existence of the alleged abuse since in that case the parties were not competing in the same primary market.[30] However, in *IMS Health,* the ECJ added that the fact that the upstream services not marketed separately was not regarded as precluding, from the outset, the possibility of identifying a separate market.[31] It is sufficient that a potential market or even hypothetical market can be identified.[32]

In the *Microsoft* case the CFI ruled that Article 82 EC does not apply only from the time when there is no more competition on market.[33] It is sufficient to demonstrate for the purpose of establishing an infringement of Article 82 EC that the refusal to supply the intellectual property at issue is liable to, or is likely to, eliminate all effective competition on the market. In contrast with this, in *Magill* and *IMS Health* the elimination of the competition was imminent. The CFI considered that the IPR in itself cannot constitute an objective justification to refuse within the meaning of *Magill* and *IMS Health.*[34] The CFI supported the Commission's position that under objective justification it shall be investigated - after refuting the fear that the IP owner's products might be cloned - if the IP owner's incentives to innovate might be balanced by the positive impact of that obligation on innovation in the industry as a whole.[35]

Based on this exceptional circumstances test, the competition law may respect but cannot expressly protect the investments in the case of intangible products since the competition law may intervene during the IPR's exclusivity period. The recognition concerned manifests in the 'appearance of a new product and limitation of technical development' criteria, which is the balancing factor between the interest in free competition and the incentive to innovate. It is because the CFI expressed that the appearance of a new product cannot be the only parameter which determines whether a refusal to license an IPR is capable of causing prejudice to consumers within the meaning of Article 82(b).[36] As that provision states, such prejudice may arise where there is a limitation not only of production or markets, but also of technical development.[37]

However, the Court left open the exact meaning of the technical development.[38] The CFI stated that "*the same specification can be implemented in numerous different and innovative ways by software designers […] the implementation of specifications is a difficult task which requires significant investment in money and time."*[40] The Commission held in its decision that Microsoft with its refusal to supply locked the clients into a homogeneous Windows solution at the level of work group server operating systems and discouraged[39] its competitors from developing new products.[41] The CFI confirmed that *"Microsoft retained by its refusal discouraged its competitors from developing and marketing work group server operating systems with innovative features, to the prejudice, notably, of consumers."*[42] Accordingly, the creation of an unfavorable environment for competitors' innovation may be regarded as prejudice to the consumers in the meaning of the Article 82(b).

The point is in 'the appearance of a new product and the limitation of technical development' that *"the requested party does not intend to limit itself* *essentially to duplicating the goods or services already offered by the owner of the intellectual property right."*[43] Therefore, the competitor's product has to be characterized by a different nature.[44] For example in *Magill* the ECJ simply accepted as "new" a product with a different layout. Whereas, in *Microsoft* CFI noted that *"Microsoft's competitors would not be able to clone or reproduce its products solely by having access to the interoperability information covered by the contested decision."*[45] *Moreover, "nor would Microsoft's competitors have any interest in merely reproducing Windows work group server operating systems. […] they will have no other choice, if they wish to take advantage of a competitive advantage over Microsoft and maintain a profitable presence on the market, than to differentiate their products from Microsoft's products with respect to certain parameters and certain features."*[46]

The problem is that this system of compulsory licensing under the competition law is time consuming, totally vague and uncertain; accordingly the companies are not able to foresee and judge when they are obliged to licence.[47] For the sake of legal certainty, a proper solution to protect incentives to invest could be the *ex-ante* regulation and dispute resolution before a competent authority at national level and not the long and uncertain *ex-pos*t competition law enforcement with high penalties.[48]

4. Monopoly pricing of the IPRs

A firm that achieved a *de facto* monopoly by virtue of its investments is therefore normally entitled to compete by exercising its exclusionary rights.[49] Indeed, the UK High Court stated in a leading information society sector case that: *"Intellectual property rights enable their owner to charge higher prices. That is not an abuse. It is an inherent feature of such rights."*[50] Absent exclusionary conduct on the part of IPR owner, US antitrust law also does not regard the charging of monopoly prices unlawful since it is an important element of the free market system.[51] The situation is different in Europe where, even in the absence of exclusionary conduct, the mere charging of exploitative prices may amount to an abuse of a dominant position.[52] However, the Commission did not concern the patented protocols in its recent decision[53] when declaring that remuneration rates that Microsoft charged for the non-patented interoperability information were not objectively justified.[54] Consequently, the Commission may respect the monopoly price of the IPRs but not of the trade secret. It seems strange in view of the fact that the CFI concluded that the trade secrets must be treated as equivalent to intellectual property rights.[55]

The Commission assessed whether Microsoft's fees comply with the reasonability requirement of the 2004 Commission decision finding that Microsoft abused a dominant position by failing to supply its competitors with information required to interoperate with its server operating systems. According to the 2004 decision, the remuneration Microsoft receives for this "interoperability information" can be regarded as reasonable if it allows competitors to viably compete with Microsoft and if it represents a fair compensation for the value of the technology transferred to the competitors, i.e., excluding the strategic value stemming from Microsoft's market power.[56] The value of the protocol technology must go beyond the mere value of enabling interoperability.[57] The Commission's view is that Microsoft is not entitled to charge a fee for technology which is available in the public domain, but only for innovative technology, which would normally mean technology covered by patent.[58] Innovation can be shown by demonstrating that the protocol technology does not already form part of the state of the art (novelty), nor it is obvious to persons skilled in the art.[59] This novelty and non-obviousness concept was regarded as a proxy for assessing the innovation in technology in order to determine whether the value of the protocol technology goes beyond the mere value of enabling interoperability.[60] According to the Commission the remuneration rates that Microsoft charged for the non-patented Interoperability Information is not objectively justified is provided by a market valuation of comparable technologies.[61]

Microsoft claimed that the non-patented protocols are valuable trade secrets[62] and they also represent innovation, but this argument was rejected by the monitoring trustee.[63] The Commission held that the protection that such trade secrets enjoy under national law is usually more limited than that given to copyrights or patents.[64] *"While there may be a presumption of legitimacy of a refusal to license an intellectual property right created by law, the legitimacy under competition law of a refusal to disclose a secret which exists solely as a result of a unilateral business decision."*[65] Although the companies choose the trade secret to protect their investment for an unlimited period, it appears that the Commission is free to revise this decision, contrary to patented properties. This may fade away the attractiveness of trade secrets.

5. The protection of investments in tangible property

As it was already stated, the DG Competition intends to develop an exclusivity period awarding the investments in tangible products. However, it is unclear what kind of test should be applied to tangible property deployed among competitive circumstances during its hypothetical exclusivity period. The Discussion Paper does not address this issue, but it should be kept in mind that the competition law provides for intervention during the exclusivity period in case of IPRs. The CFI *Microsoft* decision confirmed that the 'appearance of a new product' criteria can only be found in the case-law on IPR.[66] The reason may be that it is not possible to create a product with different nature - as it required[67] - by using the same tangible upstream resources (typically network elements). The Commission stated in *Telefónica*[68] that the particular circumstances of that case fundamentally differ from those in *Bronner* because the network investments were undertaken in a context where Telefónica was benefiting from special or exclusive rights.[69] Moreover, the Commission said that *Bronner* was not applicable,[70] however, it left open what exactly was not applicable.

The ECJ in the *Bronner* case - where access to a tangible asset (home-delivery service) had to be evaluated - stated that a refusal to access constitutes an abuse of dominant position if (i) the service in itself is indispensable to carrying on a person's business, inasmuch as there is no actual or potential substitute in existence for that scheme; (ii) the refusal likely to eliminate all competition and (iii) refusal be incapable of being objectively justified.[71] The ECJ held that to accept the existence of economic obstacles to create an alternative solution, it must be established, at the very least, that the creation of those products or services is not economically viable for production on a scale comparable to that of the undertaking which controls the existing product or service.[72] Namely, in *Bronner*, the ECJ stipulated a high threshold for essentiality, holding that mere inconvenience in duplicating the essential facility in question would not suffice[73] Therefore, in case of an infrastructure deployed among competitive circumstances, the substitutability should be assessed from an objectively comparable competitor's point of view. However, it cannot be said – in the absence of case law – that this test can also be applied during the exemption period proposed by DG Competition. It is more likely, that this test would be applied after the expiry of this hypothetical exclusivity period.

Interestingly, the threshold of competition intervention can be lower, especially with respect to the liberalisation process.[74] The Hungarian Competition Authority's ("GVH") view is that, whenever there is doubt as to whether a particular practice or market process unreasonably restricts competition or is just a manifestation of fierce competition, the GVH tends to consider it a competitive practice. This is because *"in the competitive process, the same instruments of competition can be used to both restrict and enhance it."*[75] *This is an application of the principle of minimum necessary intervention.*[76] *However, this approach does not hold in the context of market liberalization process."*[77] This may be because the liberalised networks are usually fruits of the previous exclusivity period.

6. Conclusion

European competition law does not expressly protect investments in intellectual properties but certainly recognizes them by applying the 'appearance of a new product and the limitation of technical development' test in the abuse of dominance cases. Eventually, European competition law also accepts the monopoly pricing of patented IPRs but not of trade secrets.

It does so notwithstanding that trade secrets and patented IPRs were confirmed by CFI to be equal concerning a refusal to deal, and that companies often choose to invoke trade secrets in order to protect their investments. These improvements, however, may decrease the attractiveness of the concept of trade secret. Moreover, the compulsory licensing system under competition law is so vague, long and uncertain that it cannot be excluded that a market leader is restrained from innovation.[78] For the sake of legal certainty, a proper solution to protect incentives to invest could be the *ex-ante* regulation.

While the Commission tends to intervene during the exclusivity period granted for the patented IPRs under national law to award the investor's performance, at the same time it misses an identical safeguard mechanism in case of tangible properties and therefore intends to develop one under European competition law. This approach can be supported but it remains to be seen what kind of test would be applied to the refusal to (tangible) essential facilities deployed under competitive circumstances.

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The views expressed in this commentary do not necessarily reflect that of White & Case or its clients. Replies to this commentary are gratefully received.

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2. Advocate General Poiares Maduro's Opinion at para. 39, C-109/03 *KPN Telecom BV V. OPTA*
3. Therefore, the block exemption covers R & D agreements for an additional period of seven years (i.e. beyond the R & D phase) irrespective of whether or not the parties obtain with their new products/technology a high share within this period. Commission Notice - Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, Official Journal C 003 , 06/01/200, at para. 73.
4. Commission notice - Guidelines on Vertical Restraints, Official Journal C 291, 13/10/2000, at para. 119., 10
5. Commission Regulation No 802/2004 of 7 April 2004 implementing Council Regulation No 139/2004 on the control of concentrations between undertakings, OJ L 133, at para. 9.3. ii)
6. C-53/87, *Consorzio italiano della componentistica di ricambio per autoveicoli & Maxicar V. Regie nationale des usines Renault,* [1988] ECR 6039, para 16.
7. Estelle Derclaye: An economic approach to what the conditions of abuse of a dominant position of copyright should be, http://www.serci.org/2003/derclaye.pdf, 2003, p. 3.
8. Estelle Derclaye: Abuses of Dominant Position and Intellectual Property Rights: A Suggestion to Reconcil the Community Courts Case Law, In: World Competition 26(4), 2003., p. 699 [2003b]
9. DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses Public consultation Brussels, December 2005, at para. 236.
10. DG Competition discussion paper, at para. 235., The U.S. Supreme Court also recognised the importance of not undermining incentives for investments and innovation in *Trinko* case: *"Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law."Verizon Communications Inc. v. Law Offices of Curtis Trinko, LLP* 540 US 682 (2004) at para. 407.
11. *Ibid.*
12. *Ibid.*
13. Commission Decision of 04.07.2007, COMP/387.784 - *Wanadoo España vs. Terlefónica,* at para. 304.
14. Public Switched Telephone Network (PSTN) – added
15. *Ibid.*. at para. 304.
16. Massimo, Motta: Versenypolitika, Elmélet és gyakorlat, Gazdasági Versenyhivatal, Versenykultúra Központ, Budpest, 2007., p. 71.
17. Very High Speed Digital Subscriber Line
18. SG-Greffe(2006)D/204686, Commission Recommendation, 2007/879/EC, at para. 7.
19. COMP/387.784., at para. 305., 633.
20. Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ L176/57, 15.07.2003, Article 22.
21. C-241/91 and C-242/91, *Radio Telefis Eireann e Independent Televisón Publications Ltd. v. Commission,* [1995] ECR I-743, at para. 49.
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23. T-70/89 *BBC v. Commission* [1991] II-535, at para 58.
24. *IMS Health GmbH&Co. OHG v. NDC Health GMbH&Co. KG,* C-418/01, [2004] ECR-I 5039., at para. 38
25. Neighbouring market in *Microsoft v. Commission,* T-201/04, ECR [2005] II-1491, at para. 332.
26. C-241/91 and C-242/91, *Radio Telefis Eireann e Independent Televisón Publications Ltd. v. Commission,* [1995] ECR I-743 (*Magill*)
27. T-201/04, at para. 289. A trade secret is proprietary information that confers a competitive advantage on its owner. But unlike a patent, a trade secret is protected not by a statutory grant of exclusive ownership conditioned on public disclosure, but rather by non-disclosure and continued secrecy. J. Gregory Sidak: Trade Secrets and the Option Value of Involuntary Exchange , Working Paper, August 2004, p. 2.
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29. C-418/01, at para. 45.
30. T-504/93, at para 130-132.
31. C-418/01, at para 43.
32. C-418/01, at para 44.
33. T-201/04, at para. 561.
34. *Ibid.* at para. 690.
35. *Ibid.* at para. 710.
36. *Ibid.* at para. 647.
37. *Ibid.*
38. James Killick: The Microsoft judgment and its implications for (dominant) IP holders, Fordham IP Conference, March 27, 2008
39. T-201/04, at para. 655.
40. *Ibid.* at para. 658.
41. COMP/37.792, at para. 694.
42. T-201/04, at para. 653.
43. C-418/01, at para. 49.
44. C-418/01, Opinion of the Advocate General Tizzano, 2 October 2003, 62.
45. T-201/04, at para. 657.
46. *Ibid.,* at para. 658.
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51. *Verizon Communications Inc. v. Law Offices of Curtis Trinko,* LLP540 US 682 (2004)
52. Damien Geradin: Pricing abuses by essential patent holders in a standard-setting context: A view from Europe, Paper prepared for t the "The Remedies for Dominant Firm Misconduct" Conference, June 4-5, 2008 – University of Virgina, p. 14. It is argued that the 'reasonable relation to the economic value of the product' test (Elaborated by ECJ in *United Brands,* 27/76 [1978] ECR-207) is not applicable to the IPRs because the royalties do not mirror the marginal cost of the IPR, which is zero but the highly risky investment and finding a proper benchmark for royalty rates is difficult since IPR is by definition unique. p. 16-17.
53. Commission Decision of 27/02/2008, fixing the definitive amount of the periodic penalty payment imposed on Microsoft, Corp. by decision C(2005)4420 final, COMP/C-3/34.792, at para. 138.
54. *Ibid.,* at para. 221.
55. T-201/04, at para. 289.
56. COMP/37.792, at para, 1008. ii) and COMP/C-3/34.792., at para. 138
57. *Ibid.,* at para. 134.
58. *Ibid.,* at para. 130. and 132.
59. Commission Decision of 27/02/2008, fixing the definitive amount of the periodic penalty payment imposed on Microsoft, Corp. by decision C(2005)4420 final, COMP/C-3/34.792, at para. 138.
60. *Ibid.,* at para. 134.
61. *Ibid.,* at para.221.
62. See also: T-201/04, at para. 273.
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64. T-201/04, at para. 280.
65. T-201/04, at para. 280.
66. Ibid. at para. 334.
67. C-418/01, at para. 49.
68. COMP/387.784., at para. 302.
69. *Ibid.,* at para. 304.
70. *Ibid.,*at para. 302.
71. C-7/97, at para. 40-41.
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