

EXPERT REPORT OXPIL(A)

E.C. CASE REVIEW ESSENTIAL FACILITIES/REFUSAL TO LICENSE Oxford Public Interest Lawyers¹

28 August 2003

I. Introduction

1. Art. 82 EC-Treaty

The concept of essential facilities (EF) becomes relevant within Art. 82 of the EC-Treaty and/or Chapter II of the Competition Act 1998 (UK), (which is in *pari materia* with Article 82). With the backdrop of the facts as given, the discussion is limited to an examination of whether the refusal to license or a refusal to supply amounts to an abuse of a dominant position under Art. 82 EC/Chapter II (s. 18) UK Competition Act 1998.

Article 82 of the EC Treaty (ex Article 86 identical) reads:

“Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

In order to establish the abuse of a dominant position under Art. 82 EC-Treaty, the following conditions must be met:

¹ Dr Katja Ziegler, Lecturer in law and German Deputy Director at the Institute of European and Comparative Law at the University of Oxford.

Estelle Dehon BA(Hons) LLB (Wits) BCL (Oxon).

Tina Piper, BA University of Toronto, LLB Dalhousie University Law School, Rhodes Scholar, Oxford University (BCL with Distinction in European and Comparative Law, Olswang Prize for achievement in Intellectual Property Law).

Sudhir Krishnaswamy, DPhil candidate at the Faculty of Law, University of Oxford.

Shamnad Basheer, BCL, Oxford University, MPhil/DPhil candidate, Oxford University.

1. One or more *undertakings*
2. must be in a *dominant position* on the relevant product market
3. within the *Common Market or as substantial part* thereof
4. and must engage in practices that amount to an *abuse*
5. which has an *effect on trade* between Member States

The first threshold criterion for a prohibited conduct under Art. 82 is to establish dominance in a given market, the ‘product’ market being determined by demand and supply substitutability. Apart from the ‘product’ market, the ‘relevant market’ (see Notice on Market definition), on which dominance is assessed comprises of the ‘geographical’ market and in some cases, the ‘temporal’ market. Market definition, therefore, is essential and crucial.

The definition of dominance stated by the ECJ in *United Brands* focussed on the power to act independently from competitors:

“The dominant position ... relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.”²

Dominance hence does not solely depend on market shares nor is it automatically excluded where some competition does exist.³ Rather, other criteria including price control, barriers to entry, the structure of the market and the type of competitors, will also be taken into account while assessing dominance.

It is important to remember that ‘dominance’ per se is not prohibited under Article 82- rather it is only when such dominance is abused that Article 82 springs into operation.

The ECJ’s definition of abuse in *Hoffmann-La Roche v. Commission*⁴ is as below:

“... behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing on the market or the growth of that competition.”

On a procedural aside: the EC (or European) Commission is the regulatory authority enforcing the EC competition rules. Its decisions can be challenged by means of certain actions, most notably, actions for annulment in the European Courts. Since 1989 the Court of First Instance (CFI) rules on actions of private (or corporate) individuals with the possibility to appeal to the European Court of Justice (ECJ). Apart from this, since Article 82 is directly applicable in Member States, individual

² ECJ, case 27/76, 1978 ECR 207, para. 65 – *United Brands*.

³ ECJ, case 85/76, 1979 ECR 461, para. 39 – *Hoffmann-La Roche*.

⁴ [1979] ECR 461, 18 at para 91.

citizens can invoke these articles before national courts and claim damages that result from anticompetitive abuses.

2. Essential Facilities in EC Law

In the following paragraphs, it shall be examined whether and under what conditions a dominant undertaking may be abusing its position when it refuses access to an “essential facility”, be it in the form of a refusal to supply or in the form of a refusal to licence.

The essential facilities doctrine has its origins in the US⁵ and has been most widely applied in regulating the access to physical infrastructure such as transport facilities (notably, ports) or utility networks (e.g. pipelines, energy networks). Often this has to be seen in the context of deregulation and the breaking up of what was perceived as natural monopolies, often under state control or ownership.⁶ This background might have led to a broader application of the essential facilities doctrine.

In *B& I/ Sealink* [1992] 5 CMLR 255 para. 41 the Commission made an explicit reference to the ‘essential facilities’ doctrine for the first time:

“A dominant undertaking which both owns or controls and itself uses an **essential facility**, i.e. a facility or infrastructure, without access to which competitors cannot provide services to their customers, and which refuses to grant its competitors access to that facility or grants access only on terms less favourable than those which it gives its own services, thereby placing the competitors at a competitive disadvantage, infringes Article 82 if the other conditions of that article are met. A company in a dominant position may not discriminate in favour of its own activities in a related market.”

This passage appears to envisage the operation of the doctrine where the denial of access results in a mere competitive disadvantage, which has since been narrowed – a mere showing of a disadvantage is not sufficient. Having said this, it is also clear that the denial of access does not have to actually eliminate competition, but must make competitors’ activities “seriously and unavoidably uneconomic.” (*Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector* [1998] 5 CMLR 821). In this *Notice* the Commission defined an essential facility as:

“[A] facility or infrastructure which is essential for reaching customers and/or enabling competitors to carry on their business, and which cannot be replicated by any reasonable means” and, refusal of access must lead to “the proposed activities being made either impossible or seriously and unavoidably uneconomic” (845).

However, the concept of EF, sometimes in the shape of the more general concept of refusal to supply, has been expanded to apply to

- the refusal to supply raw materials used for a more complex product (*Commercial Solvents*);

⁵ United States v. Terminal Railroad Association, 224 U.S. 383 (1912).

⁶ Whish, *Competition Law*, 4th edition, p. 615.

- spare parts (*Hugin* cash registers);
- Proprietary Information (*IBM*)⁷;
- intellectual property rights P (Magill ,Volvo⁸, IMS, Intel);
- other facilities (Bronner-which involved a newspaper's nation-wide home-delivery network)

⁷ XIVth Report on Competition Policy 1984, para. 94-95 (the dispute between IBM and the Commission was settled by IBM agreeing to provide interface information to enable competitors to provide software compatible with the IBM computer system).

⁸ Case 238/87, 1988 ECR 6211.

II. Relevant Case-law

Case 6&7/73, 1974 ECR 223 - Commercial Solvents

The first case of the ECJ on refusal to supply involved the refusal by a dominant chemical company, Commercial Solvents (CS)⁹ to supply Zoja with an ingredient needed for the production of a tuberculosis treatment drug on a downstream market. Whereas Zoja had been a longterm customer of CS, the refusal to supply coincided with CS's activity on the same downstream market (via a joint venture). The refusal to supply would have eliminated Zoja as the only competitor. The ECJ upheld the Commission's decision, saying:

“25. . . .an undertaking being in a dominant position as regards the production of raw material and therefore able to control the supply to manufacturers of derivatives cannot, just because it decides to start manufacture of these derivatives in competition with its former customers act in such a way as to eliminate their competition which, in the case in question, would have amounted to eliminating one of the principal manufacturers of ethambutol in the Common market.”¹⁰

Although the ECJ did not use the term 'essential facilities', it is clear that it was referring to this concept.

However, it is not clear from the judgement whether the aim of the ECJ was to protect competitors (small firms) or consumers (those paying for tuberculosis treatments).

Case 238/87, [1988] ECR 6211 - AB Volvo v. Eric Veng (UK) Ltd¹¹

This is the first case in which the Court considered whether a refusal to license an IP right could be abusive. The case concerned the front wings of Volvo 200 cars (on which Volvo held a registered design). Veng imported these products, manufactured reproductions of them, and marketed them in the United Kingdom without authority from Volvo who instituted proceedings for a violation of its registered design. The ECJ held in two famous paragraphs that:

“8. It must also be emphasized that the right of the proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without its consent, products incorporating the design constitutes **the very subject-matter of his exclusive right**. It follows that an obligation imposed upon the proprietor of a protected design to grant to third parties, even in return for a reasonable royalty, a licence for the supply of products incorporating the design would lead to the proprietor thereof being **deprived of the substance of his exclusive right**, and that a refusal to grant such a licence cannot in itself constitute an abuse of a dominant position.”

However:

⁹ Case 6/73 & 7/73, 1974 ECR 223.

¹⁰ Para. 25 of the Judgment.

¹¹ See *Ian S. Forrester*, “Compulsory licensing in Europe: a rare cure to aberrant national intellectual property rights?”, <http://www.ftc.gov/opp/intellect/020522forrester.pdf>.

“9. It must however be noted that the exercise of an exclusive right by the proprietor of a registered design in respect of car body panels may be prohibited by Article 86 [now 82¹²] if it involves, on the part of an undertaking holding a dominant position, **certain abusive conduct such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation**, provided that such conduct is liable to affect trade between Member States.”

The Court found that no such conduct was present in the instant case, and therefore answered the case in the following terms:

“The refusal by the proprietor of a registered design in respect of body panels to grant to third parties, even in return for reasonable royalties, a licence for the supply of parts incorporating the design cannot in itself be regarded as an abuse of a dominant position within the meaning of Article 86 [now 82]”.

The position after *Volvo v Veng* is that a mere refusal to grant a licence to a third party will not in itself constitute an abuse of a dominant position. Rather, Article 82 requires factors over and above a mere refusal to licence. The crucial point in this case was that Veng merely wanted to copy Volvo’s design to make cheaper spare parts for Volvo cars – he had no intention to innovate, but was merely trying to “free ride” on Volvo’s efforts to develop an original design for its cars. The underlying national IP right was not an aberration even if utilitarian decision rights are inherently less valuable and less honoured than patents. However, as paragraph 9 of the judgment shows, the Court did not rule out the possibility categorically that a refusal to license might amount to an abuse. The ECJ endorsed three examples that had been suggested by counsel when a refusal to licence might be abusive: a refusal to license might be abusive if coupled with (1) an arbitrary refusal to supply spare parts to independent repairers, (2) overcharging for spare parts, or 3) ceasing to produce spare parts for a particular model when there were many vehicles of that model still on the road, i.e. despite an objective demand.

¹² Art. 86 became now Art. 82 EC-Treaty due to the Treaty of Amsterdam renumbering. There was no change in substance.

C-241 & 242/91 P, [1995] ECR I-743 - RTE v. Magill¹³

Magill is the first EC case in which the refusal to license an intellectual property right was held to constitute an abuse under Article 82 EC. Consequently, the IP right holder was ordered to compulsorily license the right invoked. Magill published a weekly TV Guide containing programme schedules for all the television channels available in Ireland. At that time, the broadcasting and TV stations RTE, BBC and ITV each published separate weekly guides to their own programmes. All of them supplied programme information free to daily newspapers, which were allowed to publish one day's listings (or two days' at weekends or where the following day was a public holiday). Weekly and Sunday newspapers could publish the weekend listings and highlights of the week ahead. However, publication of the weekly listings was not authorised – the broadcasters had reserved this for themselves relying on Irish copyright rules. The broadcasters successfully sought an injunction to prevent the continued publication of the Magill comprehensive weekly guide on the basis that, as literary works and compilations, the schedules were entitled to copyright protection.

Magill lodged a complaint with the Commission alleging that the broadcaster's refusal to licence the weekly listings amounted to an abuse within the meaning of Article 82. The Commission found that the broadcasters had abused their respective dominant positions on the market for their weekly listings: their refusal had prevented the introduction onto the market of a new product for which there was "substantial potential demand". It ordered that the broadcasters licence each other and third parties on a non-discriminatory basis, a decision confirmed by the CFI.

In determining that the broadcasters were dominant in the market, the Commission considered as salient both that the information held by the broadcasters was "the essential raw material" for a comprehensive TV guide, and that "[e]qually for the consumer wishing to obtain advance weekly information, these listings are essential" (para 20). The Commission also went on to point out that each of the broadcasters held both a factual and a legal monopoly - the factual monopoly stemmed from it not being possible for third parties reliably to produce listings themselves, and this was exacerbated by the legal monopoly stemming from the intellectual property rights in the listings so produced (para 22).

In determining that this dominance was abused "to the prejudice of consumers", the Commission considered both the impossibility for publishers to produce weekly listings without the information held by the broadcasters, and the clear demand for the new product (para 23). This demand, it reasoned, resulted from the advantages to consumers of a comprehensive guide being available, as opposed to three separate guides. It was also significant that the justification advanced by the broadcasters for refusing to allow use of the information was weak, and that the broadcasters could easily still compete in the TV guide market even if their information was available to third parties.

¹³ For discussion of the judgment cf. *John Temple Lang*, "Defining Legitimate Competition, Companies Duties to Supply Competitors, and Access to Essential Facilities," in *International Antitrust Law and Policy*, 1994: Annual Proceedings of the Fordham Corporate Law Institute, edited by Barry E. Hawk (Irvington-on-Hudson, N.Y.: Transnational Juris Publications; The Hague, The Netherlands: Kluwer Law and International, 1995), p. 245; *Ian S. Forrester*, "Compulsory licensing in Europe: a rare cure to aberrant national intellectual property rights?", <http://www.ftc.gov/opp/intellect/020522forrester.pdf>.

In response to argument that the existence of an intellectual property right meant that there could be no abuse, the Commission stated:

“The argument put forward by the parties in relation to copyright do not affect this conclusion. On the contrary the Commission considers that the practices and policies of ITP, BBC and RTE in the present case in fact use copyright as an instrument of abuse” (para 23).

The Court endorsed this by explicitly rejecting the “immunity” argument advanced by the copyright holders in *Magill* (paras 48-50):

“With regard to the issue of abuse, the arguments of the appellants and IPO wrongly presuppose that where the conduct of an undertaking in a dominant position consists of the exercise of a right classified by national law as “copyright”, such conduct can never be reviewed in relation to Article 86 [now Art. 82] of the Treaty. Admittedly, 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. Further, the exclusive right of reproduction forms part of the author’s rights, so that refusal to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of a dominant position (judgment in Case 238/87 Volvo, cited above). However, it is also clear from that judgment (paragraph 9) that the exercise of an exclusive right by the proprietor may, in **exceptional circumstances**, involve abusive conduct.”

The ECJ upheld the Commission decision. It appeared to approach the case as an instance of a refusal to supply. In coming to the conclusion that there was abuse of a dominant position, the Court similarly noted that the broadcasters were

“the only sources of the basic information on programme scheduling which [was] the **indispensable raw material** for compiling a weekly television guide” (para 53).

The Court then took three elements into consideration:

- 1) The broadcasters’ refusal to provide “basic information” prevented the emergence of a **new product**, “which the broadcasters did not offer and for which there was a **potential consumer demand**.” (para 54)
- 2) There was “no justification for such refusal either in the activity of the television broadcasting or in that of publishing television magazines” (para 55) and
- 3) The broadcasters, by denying access to “the raw material indispensable for the compilation” of a TV guide, “reserved to themselves the secondary market of weekly television guides by excluding all competition on that market” (para 56)

Therefore, the refusal was an abuse under Article 82 (b).

The Court’s approach verges on an essential facilities analysis, but there is no discussion of an essential facilities doctrine, despite the Commission’s increased reliance on it in the years preceding the ECJ judgement.

Whereas the Commission argued that the broadcasters' claim to copyright strengthened their factual monopoly over the listings into a legal monopoly, with the result that "no competition from third parties [was] permitted to exist," the ECJ did not follow that reasoning. It noted that as the broadcasters were the only source of programme information, they each enjoyed

"by force of circumstance... a *de facto* monopoly over the information used to compile [programme] listings." (para 47)

It may be suggested that implicitly, the ECJ considered that a copyright in a list is not justifiable.¹⁴ By labelling *Magill* as a refusal to supply case, the ECJ managed to sidestep the argument on the relationship between nationally granted intellectual property rights and the Treaty rules on competition that had generated so much controversy in the earlier stages of the case.

It must also be remembered that in *Magill*, the weekly listings were not reasonably and practically replicable – no amount of innovation could produce an alternative. This separates them from the vast majority of intellectual property rights cases and clearly informed the courts decision to order a license.

¹⁴ Cf. para. 55 of the Judgment. See also Ian S. Forrester, "Compulsory licensing in Europe: a rare cure to aberrant national intellectual property rights?", <http://www.ftc.gov/opp/intellect/020522forrester.pdf>: "The low intrinsic value of the right was not expressly mentioned in the *Magill* case by the Courts (their role is not to comment on the appropriateness of national copyright rules). It was commented on by the Commission and defended by the broadcasters. It was, however, clearly part of the equation, part of the "exceptional circumstances"."

C-7/97, [1998] ECR I-7817 or 1999] 4 C. M. L. R. 112 - Oscar Bronner v. Mediaprint

In *Oscar Bronner*, the ECJ confirmed the authority in *Magill* that the exercise of an intellectual property right may, in exceptional circumstances, constitute an abuse. It should be noted, however, that Advocate General Jacobs said of the *Magill* case in his Opinion in the case at 63:

“the provision of copyright protection for programme listings was difficult to justify in terms of rewarding or providing an incentive for creative effort.”

In *Bronner* the issue before the ECJ was whether the defendant newspaper’s nation-wide home-delivery network constituted an essential facility. Bronner sought an order that Mediaprint cease abusing its dominant position by including his publication in its distribution network in return for fair remuneration. Mediaprint, through its daily newspapers, had 47% of the Austrian daily newspaper market in terms of circulation, and 42% in terms of advertising revenue. It also operated the only nation-wide home-delivery service for subscribers. Oscar Bronner published and distributed a newspaper which had a 3.6% share of the circulation, and a 6% share of the advertising revenues of the Austrian daily newspaper market. Bronner sought an order from the Higher Regional Court of Vienna, based on the Austrian federal law on cartels and other restrictive practices which mirrors Article 86 of the EC Treaty, requiring Mediaprint to include his newspaper in its home-delivery service against payment of reasonable remuneration. Mediaprint was willing to allow Bronner access to its home-delivery system only if Bronner also entrusted Mediaprint with the tasks of printing the paper and all distribution of the paper, not just distribution by home-delivery.

In an Opinion which clearly supports a European essential facilities doctrine, Advocate General Jacobs stated that it would not be sufficient that a dominant undertaking’s control of a facility gave it a competitive advantage. Duplication of the facility should be impossible or extremely difficult or highly undesirable and there must be a genuine stranglehold on the related market:

“duplication of the facility is impossible or extremely difficult owing to physical, geographical or legal constraints or is highly undesirable for reasons of public policy.”¹⁵

“not merely for the undertaking demanding access but for any other undertaking wishing to compete” (para 65-66).

He held that there was no obligation on Mediaprint to allow Bronner access to its network:

“Although Bronner itself may be unable to duplicate Mediaprint’s network, it has numerous alternative – albeit less convenient – means of distribution open to it” (para. 67)

The ECJ emphasised that the essential facilities doctrine applies only in exceptional circumstances. The Court stated that it would only be an abuse of Article 86 [now 82]

¹⁵ The test seems to take into account the degree of amortisation on investment.

of the EC Treaty for Mediaprint to refuse Bronner access to its home-delivery system if three conditions were satisfied:

- 1) the refusal to give Bronner access to Mediaprint's home-delivery system would be likely to eliminate all competition in the daily newspaper market on the part of Bronner;
- 2) such refusal cannot be objectively justified; and
- 3) the home-delivery service, in itself, is indispensable to carrying on Bronner's business inasmuch as there is no actual or potential substitute in existence for that home-delivery service. (para 41)

The ECJ did not regard these conditions as being satisfied in this case. Other methods of distribution, such as by post and by sale in shops or kiosks, were available, even if they constituted less advantageous means of distribution. The ECJ also stated that there were no technical, legal or economic obstacles making it impossible, or even unreasonably difficult, for a publisher of papers to establish, possibly in co-operation with other newspaper publishers, its own nation-wide home-delivery service. The ECJ specifically rejected Bronner's argument that the small circulation of his newspaper made it economically unviable for him to develop his own nation-wide home-delivery scheme. The ECJ held that such an argument is not enough to demonstrate the lack of a realistic potential alternative to access to the home-delivery scheme. It would be necessary to show objectively that the establishment of an alternative home-delivery system was not economically viable - that is, not just that Bronner could not develop an alternative home-delivery system, but that an alternative home-delivery system was not a realistic option for any of Mediaprint's actual or potential competitors in the daily newspaper market.

The ECJ in *Oscar Bronner* did not articulate the underlying economic considerations: it did not expressly state that competition should help consumers rather than competitors, nor did it identify the objections to a wide doctrine of essential facilities. It did, however, read the case law very carefully, and showed how limited it is. The ECJ expressly stated that *Magill* was an exceptional case. Its conclusions followed those of the Advocate General, and must lend weight to his analysis of the underlying economic considerations. The ECJ strongly affirmed that the starting point in all such cases is that firms are free to decide who is to have access to their facilities and assets, and that it is only as a last resort that EC competition law will intervene, with the burden of proof being on the alleged victim of the refusal of access in the first instance.

The broad ruling in *Magill* has been narrowly construed in further rulings of the CFI with respect to the 'essentiality' of a facility:

T-504/93, [1997] ECR II-923 - Tiercé Ladbroke SA v Commission

In the *Ladbroke* case, an attempt was made to extend this line of authority to IP rights. Ladbroke, which operates betting shops in which punters bet on horse races, requested Pari Mutuel International (PMI) to licence its copyright on televised pictures and sound commentaries of French horse races. It relied on *Magill* to argue that without access to the televised pictures and sound commentaries it was unable to compete on the horse-race betting market. The Commission refused to pursue the complaint for various reasons. It would have been useful to have access to the pictures, but it was not ‘essential’. The Court of First Instance rejected Ladbroke’s appeal against the Commission’s decision, while describing *Magill* as follows at para 131:

“The refusal to supply the applicant could not fall within the prohibition laid down by Article 86 unless it concerned a product or service which 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 (see in that connection Joined Cases C-241/91 P and C-242/91 P RTE and ITP v Commission [1995] ECR I-743, paragraphs 52, 53 and 54).”

The *Ladbroke* judgment can be read as suggesting that there may be a duty to license *either* where access is essential *or* where the refusal will block the emergence of a new product. In that respect it might have broadened *Magill* where the Court used a cumulative “and” between these requirements.¹⁶

¹⁶ See para. 54.

T-374, 375, 384, 388/94, [1998] ECR II-3141 - European Night Services

ENS was a transport operator (not: a railway company) set up as a joint venture of several major European railway operators providing overnight passenger services between points on the Continent and the United Kingdom through the Channel Tunnel. The agreement was exempted from Art. 81 EC (prohibiting agreements and concerted practices between undertakings) on the condition that the mother companies of the joint venture provide other transport operators wishing to operate night passenger trains through the Channel Tunnel the same necessary rail services on the same conditions as they have agreed to supply to ENS. The right to offer passenger rail services was not to be reserved to ENS. In effect that meant that the Commission was treating the rail services (i.e. provision of locomotives, train crews, and paths on the national networks and through the Tunnel) on the upstream market (provision of rail services) as essential facilities to ENS' activities on the downstream market (provision of passenger services). The decision was challenged on several grounds, amongst others, because of an alleged misapplication of the EF doctrine.

The CFI annulled the Commission decision for error of assessment, but added – quoting *Magill* and *Ladbroke* – even if the Commission's assessment were correct,

“that a product or service cannot be considered necessary or essential unless there is no real or potential substitute” (para. 208).

By way of examples, it further concretised what a real or potential substitute meant, namely that the

“infrastructure, products or services which are ‘necessary’ or ‘essential’ for entry to the relevant market ... [are] not ‘interchangeable’ and ... [that] by reason of their **special characteristics - in particular the prohibitive cost of and/or time reasonably required for reproducing them** - there are no viable alternatives available to potential competitors ... which are thereby excluded from the market.” (para. 209)

The CFI annulled the Commission's decision on the grounds that the Commission had not sufficiently shown that competitors could not buy the relevant train services otherwise (e.g. by buying or renting locomotives – they used their own train), even if they would be the first company to do so.

By stressing that a facility is only essential if there is no substitute, the CFI was attempting to strike the right balance between the mere advantage of free riding on a competitor's innovation and the potential for distorting competition by a refusal to licenses.¹⁷

¹⁷ Critical of this perception of intellectual property rights from a human rights perspective *Chapman*, 2002 JIEL 861, 867, 870 et seqq.

T-52/00, judgment of 17 June 2003, n.y.r. – Coe Clerici Logistics

In this recent case, the claimant challenged the Commission's decision not to take action against the Italian state following a complaint of a logistics undertaking transporting coal for the Italian energy producer ENEL against the Italian regulations of access to infrastructure in the Port of Ancona. The claimants argued – quoting *Bronner* – that access of their ships to a certain quay (with fixed system of conveyors and hopper and a certain depth of water) was an essential facility. The Commission did not consider this sufficient to justify the classification of the quay as an essential facility. It held that there were alternative solutions for unloading available for the claimant who had continued to supply ENEL for two years without having been granted access to the quay. (The CFI dismissed this case on procedural grounds and for the claimant's misrepresentation or lack of proof of the facts.)

IMS Health

In the recent IMS Health case, an interim order was issued by the European Commission¹⁸ requiring IMS to grant a licence to a competitor. The case is currently pending in the CFI which issued suspended the Commission's decision in interim proceedings. The hearing in main proceedings in the CFI took place on 6 April 2003 and judgment is awaited.

IMS Health is a world leader in data collection on pharmaceutical sales and prescriptions. It has copyright over its 1860 brick structure which segments Germany into sales zones or bricks. The concept behind the brick structure is to partition Germany into the maximum number of geographical units that permits data collection without the ability to match the data to a specific pharmacy, which would contravene German data protection rules. The 1860 brick structure soon developed into a de facto industry standard for sales data collection and analysis. It came to be widely used by German pharmaceutical companies to analyse sales trends, measure market shares, and gauge the performance of sales representatives. The company successfully brought actions for breach of copyright against competitors using the copyrighted brick structure and refused to grant them licenses. One competitor, NDC complained to the European Commission.

The Commission argued that prevention, by means of refusal to license an intellectual property right, of the emergence of a new competitor willing to offer new variations of the same services on the same market as the dominant undertaking might amount to an abuse where those competitors cannot otherwise access the market in question because the protected work constitutes a de facto industry standard. This ignores the first of the Magill criteria, so the Commission seems to be treating the criteria as non-cumulative.¹⁹

On an initial investigation, the Commission found that there were a number of factors which compelled the conclusion that the 1860 structure constituted an 'essential facility' -consequently, a denial of access to this facility constituted an abuse:

¹⁸ Commission Decision of 3 July 2001, not yet formally published but available on the internet at: <http://europa.eu.int/comm/competition/antitrust/cases/decisions/38044/en.pdf>.

¹⁹ See Appendix for an extract of an academic comment on this case.

- i) The copyrighted system of IMS was ‘indispensable’ in that operated as “a de facto industry standard”.²⁰ The creation of an alternative structure would be unreasonably difficult, given the constraints of data protection law, IMS's copyright and most importantly, the fact that pharmaceutical companies were in a way ‘locked in’ to this copyrighted structure and refused to buy data in any other format.²¹ It was therefore an unviable economic proposition for competitors to sell sales data in any other format. Consequently, there were no actual or potential substitutes that could be availed of by competitors.
- ii) There was no objective justification for the refusal. The competitor’s infringement, and legal challenge to the validity, of IMS’s copyright were not sufficient justification because the 1860 brick structure was indispensable to compete on the relevant market and granting the competitor a licence “would not . . . impact on the question under German law of whether a copyright exists or not, and if so, who owns it”.²² The competitor’s offer of a nominal sum for a licence was again no justification for a refusal as IMS had made no counter offer. Similarly, criminal allegations pertaining to theft of information from IMS did not justify a refusal since IMS was “to address any perceived harm [from] alleged criminal behaviour through appropriate lawful means, and not by attempting to eliminate competition in the relevant market”.²³
- iii) The refusal of access to the brick structure was likely to eliminate all competition in the relevant market²⁴

The Commission found that ‘these exceptional circumstances meet the test set out in *Bronner* for a refusal to supply to be considered an abuse of a dominant position’.²⁵ The Commission there fore concluded that the complainants had made out a *prima facie* case, relief was urgently required and that the refusal to licence would cause serious and irreparable damage to the complainants and intolerable damage to the public interest.²⁶ It therefore ordered interim measures forcing IMS to grant a licence on non-discriminatory and commercially reasonable terms- if the terms could not be agreed upon by the parties, they would be determined by independent experts on the basis of transparent and objective criteria.

Upon IMS’s application for interim measures to the Court of First Instance, the interim order of the Commission was provisionally suspended by an Order of the President of the CFI (on 10 August 2001). A full hearing of the application for interim suspension was held on 14 September 2001 and the President made a further order on 26 October 2001 confirming the suspension of the Commission decision for interim measures until the action in the main proceedings would be heard. The President considered that there was “a serious dispute, at the very least” as to whether

²⁰ Paras 37-42. According to the Commission, ‘the 1860 brick structure is a ‘common’ language for communicating information between all players in the pharmaceutical industry ...’.

²¹ Paras 92-123.

²² Para 169.

²³ Para 170.

²⁴ Para 70.

²⁵ Para 181.

²⁶ Paras 188-194.

"exceptional circumstances" existed in the case capable of justifying the imposition of a compulsory licence.²⁷

As Ian S Forrester²⁸ notes:

“In granting the suspension of the effectiveness of the operative part of the Decision, the President of the Court of First Instance voiced doubts about the Commission’s non-cumulative interpretation of the conditions regarded as constituting ‘exceptional circumstances’ in Magill. In particular, he was concerned that the Commission did not regard it as necessary that the refusal to license should prevent the emergence of a new product or service for which there is potential consumer demand on a market separate from that where the licensor is dominant. He also expressed concern that a compulsory licence might create doubts among rightholders. The merits of the controversy are likely to be resolved by the Court of First Instance when it gives judgment in the main action, or by the Court of Justice, should it give judgment first in parallel proceedings involving a reference from the Frankfurt Oberlandesgericht about whether copyright rights should indeed exist in the circumstances.”

Concurrently to the litigation relating to competition law aspect of the case on the European level, German courts have to decide on the claim of a copyright infringement. So far, only interim proceedings have resulted in decisions. The Oberlandesgericht Frankfurt/Main annulled by an order of 19 February 2002²⁹ the interim injunction prohibiting NDC from using IMS’s copyrighted 1860 brick structure. If national courts arrived at a finding that there is no copyright in the brick structure, the discussion on EF at the EC level would become redundant.

²⁷ Para 106.

²⁸ Ian S. Forrester, ‘Compulsory licensing in Europe: a rare cure to aberrant national intellectual property rights?’, <http://www.ftc.gov/opp/intellect/020522forrester.pdf>.

²⁹ Not yet reported.

Intel

Since Chapter II (s. 18) of the Competition Act 1998 is in pari materia with Art. 82 of the EC-Treaty, UK case law has by and large mirrored the EC position. Therefore, the discussion on UK law will not be an elaborate one. The UK position is best reflected by the recent ruling of the Court of Appeal in the ³⁰case.

Intel Corp v. Via Technologies Inc. and others, [2002] EWCA Civ 1905

A patent infringement action was brought by Intel, the (by a wide margin) leading manufacturer of PC microprocessors and chipsets, against VIA Technologies, a manufacturer of PC chipsets. VIA argued that Intel's refusal to grant it a patent licence to enable it to produce chipsets compatible with the Pentium 4 microprocessor was an abuse of Intel's dominant position. In particular, VIA argued that Intel's refusal to grant a license was abusive because it led to Via to withdraw a new product from the market for which there was continuing demand, and would force consumers to adopt a more expensive technology. Intel's claims were heard in three parts, the Chipset patent issues, the CPU patent issues and the competition issues. In June 2002, Intel applied for summary judgment on the competition issues, Lawrence Collins J. granted the application, holding that VIA had not demonstrated that it came within the *Magill*³¹ category of exceptional circumstances. He stated that *Magill* has yet to be successfully pleaded in the English courts, citing *Philips Electronics NV v Ingman Ltd*³², *Sandvik AB v KR Pfiffner (UK) Ltd*³³ and *HMSO v Automobile Association*.³⁴ Stressing that VIA was not prevented from introducing new products, competing with those produced by Intel and its licensees, Lawrence Collins J held that it was not seriously arguable that:

“.....a patent holder may not refuse a licence, simply on the ground that competition will otherwise be eliminated because its competitors would need to make use of the invention. That would wholly undermine the purpose of patent protection, and could not in itself amount to an exceptional circumstance.”³⁵

The Court of Appeal overruled the first instance decision. Sir Andrew Morritt V-C states that courts should be cautious where it can be seen that the jurisprudence of the ECJ is in the course of development. He holds, however, referring to both the *Magill* and *Bronner* tests³⁶, that although *Magill* and *IMS Health* indicated the circumstances which the ECJ and the President of the Court of First Instance regarded as

³⁰ Court of Appeal (Civil Division), [2002] EWCA Civ 1905, [2002] All ER (D) 346 Dec), available via lexis-nexis.

³¹ Case C-241 & 242/91 P *RTE V Commission* [1995] ECR I-743, [1995 4 CMLR 418.

³² [1998] 2 CMLR 839, Laddie J.

³³ [1999] EuLR 755, Neuberger J.

³⁴ [2001] EuLR 80, Laddie J. In *ICI v Kalon*, an application to strike out was successfully resisted on 24th February 1999 before HHJ Boggis QC, sitting as a deputy judge of the Chancery Division, on the basis of Article 82 EC and *Magill* in a copyright and database right case. The *ex tempore* judgment is not reported. See Aidan Robertson, *Litigating under the Competition Act 1998: The Early Case Law*, Lecture to the Law Society's European Group on 18th September 2002.

³⁵ Para. 173 of the Judgment.

³⁶ Para. 46.

exceptional, it did not follow that other circumstances in other cases should not be regarded as exceptional. It was at least arguable that the ECJ would develop its jurisprudence under Article 82, such that there could be a breach of Article 82 without the exclusion of a wholly new product or all competition. In the words of the Vice-Chancellor,

" With regard to the premise Magill and IMS indicate the circumstances which the Court of Justice and the President of the Court of First Instance respectively regarded as exceptional in the cases before them. It does not follow that other circumstances in other cases will not be regarded as exceptional. In particular it is at least arguable, as the President recognised in IMS, that the Court of Justice will assimilate its jurisprudence under Article 82 more closely with that of the essential facilities doctrine applied in the United States. In that event there could be a breach of Article 82 without the exclusion of a wholly new product or all competition. This approach seems to me to be warranted by the width of the descriptions of abuse contained in Article 82 itself."³⁷

Concurring with the above view and holding that it was open to Via to establish at trial that the facts pleaded could amount to 'exceptional circumstances', Mummery L.J. said :

"This is not a straightforward case of an alleged infringer simply being refused a license by the patent holder. The more complex question is, given Intel's assumed dominance in the markets for microprocessors and chipsets, is it abusing that dominance by adopting a policy for the exploitation and enforcement of its large portfolio of patent rights, which has the effect of distorting competition in the EC? ... This ... necessarily involves a factual investigation into Intel's licensing policy (whom it licenses or refuses to license, in what circumstances, on what terms and restrictions) and an examination of the effects of the implementation of the policy on competition from other products in the relevant market, which has special features of "industry standard" requirements and need for compatibility with hardware and software technology. A trial is needed to establish the facts and to resolve the question."³⁸

³⁷ Para 48. See also Duncan Curley. Eurodefences and Chips: "a somewhat indigestible dish": the UK Court of Appeal's Decision in Intel Corp v Via Technologies, EIPR 2003.

³⁸ Para. 96 of the Judgment.