> innovation and competition in the provision of cross-border secondary clearing and settlement services and ultimately the consumers within the single market.[744]

It has been suggested that this standard can be explained by the fact that the case concerned the emergence of a pan-European settlement and clearing market and that it is therefore of limited precedential value.[745]

C. REFUSAL TO SUPPLY AND INTELLECTUAL PROPERTY RIGHTS

(i) General

Refusal to supply in respect of intellectual property rights (IPRs) is one aspect of the problematic interface between competition law and intellectual property law.[746] Neither the EU Courts nor the Commission has applied the phrase 'essential facilities' to IPRs but the leading case on IPRs, *Magill*,[747] featured significantly in *Bronner*[748] and, in turn, *Bronner* was relied upon in the intellectual property case *IMS*.[749] The arguments on this matter centre around the fact that the law has already put in place a regime to deal with intellectual property; that compulsory licensing of IPRs is a dangerous disincentive to innovation; and that the law to date has not properly explained why some situations are so 'exceptional' that the normal rights of an IPR owner to exclude others should be eroded.

Obviously, the existence of IPRs will prevent undertakings competing on certain markets. Although the EU Courts have held that the ownership of IPRs does not necessarily mean that an undertaking holds a dominant position,[750] some rights can nonetheless constitute a barrier to entry under any conception of that term.[751] An undertaking cannot usually produce or use something protected by IPRs without the consent of the rights holder. IPRs owners frequently license their rights to others and Chapter 12 deals with the application of Article 101 to such agreements. Article 102 may be relevant, however, when the rights holder is in a dominant position and refuses to give licences to those wanting them.

(ii) The *Car Parts* Cases

The matter first came before the CJ in two Article 267 references, *Volvo* and *Renault*.[752] In essence the CJ was asked whether it is an abuse for a car manufacturer to refuse to license the design rights on its car parts to third parties wishing to manufacture and sell such parts[753] The CJ held that a refusal to license was not normally an abuse, but might become so in certain circumstances.

744 Case T-301/04, *Clearstream* [2009] ECR II-3155, para. 149.

745 Nazzini, n. 116, 268–269.

746 See also the issue of standard-essential patents, discussed in Section 14.C.ii of this chapter, and Chap. 12 on the licensing of IPRs.

747 Cases C-241–242/91 P, *Magill* [1995] ECR I-743.

748 Case C-7/97, *Bronner* [1998] ECR I-7791.

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

750 See Chap. 6, Section 6.C.v.d, p. 338.

751 See Chap. 1, Section 15.C.

752 Case 238/87, *AB Volvo v Erik Veng* [1988] ECR 6211 and Case 53/87, *CICCRA and Maxicar v Renault* [1988] ECR 6039, decided on the same day.

753 The cases arose after the CJ had confirmed in Case 22/78, *Hugin* [1979] ECR 1869 that an undertaking may be dominant on the market for its own spare parts even if the primary product market is competitive.

Case 238/87, *AB Volvo v Erik Veng* [1988] ECR 6211

Court of Justice

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.

9.[[754]] 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 [102] 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 references in the judgments to the 'very subject-matter of the exclusive right' and the 'exercise of an exclusive right' are to concepts which the Court had already developed to deal with the tension between IPRs and Community law, mainly in the area of the free movement of goods and services. The outcome of their application in *Volvo* and *Renault* was that the CJ held that a refusal to grant licences would be an abuse only if it involved or gave rise to 'certain abusive conduct'. In effect the car makers were given a choice: either they could license third parties, or they could retain their monopoly and ensure, inter alia, that they did not arbitrarily refuse to supply independent repairers, did not charge unfairly, and continued to supply parts for old models. One way of looking at this is to see an order to license as a *remedy* for other abuses.[755] The examples of abusive conduct given are not unproblematic, however, including the issue of what is an 'unfair' price.[756] The refusal to supply spare parts to independent repairers was classed as an abuse even though it involved the supply of products to new, rather than existing, customers, albeit within a very particular context.[757]

(iii) The *Magill* Case

Magill[758] concerned copyright in 'television listings' (television programme schedules). Under UK and Irish law copyright protected not only literary works which resulted from creative or intellectual endeavour but also compilations of information resulting from 'skill, judgment and labour' or the 'sweat of the brow', including listings of programmes to be broadcast.[759] Such compilations were

[754] Para. 9, with only insignificant changes in wording, was repeated in Case 53/87, *Renault* [1988] ECR 6039, para. 16.

[755] See the discussion in J. Temple Lang, 'Anti-competitive Non-Pricing Abuses under European and National Antitrust Law' [2003] *Fordham Corp L Inst* 235, 292–301.

[756] See Section 16.A, p. 566. And see generally V. Korah, 'No Duty to License Independent Repairers to Made Spare Parts: The *Renault*, *Volvo* and *Bayer* and *Hennecke* Cases' [1988] *EIPR* 381. The extent to which a car manufacturer has power to charge excessively in the aftermarket for spare parts without affecting sales in the competitive foremarket is questionable, see Chap. 6, Section 5.B.i.h, p. 302 ff.

[757] EU competition law has special provisions covering motor vehicle distribution, see Chap. 11.

[758] Cases C-241–242/91 P, *Magill* [1995] ECR I-743, on appeal from Cases T-69–70/89, 76/89, *RTE, ITP, BBC (Magill) v Commission* [1991] ECR II-485, on appeal from *Magill TV Guide* [1989] OJ L78/43.

[759] At the time of the *Magill* decision the relevant UK law was the Copyright Act 1956 which, according to *Independent Television Publications v Time Out* [1984] FSR 64, protected programme listings. The Broadcasting Act 1990, s. 176 specifically provides that persons broadcasting television and radio programmes in the UK have to

not protected by intellectual property laws in the other Member States of the EU, where copyright covered only the fruits of creative or intellectual effort. The EU Courts have said on several occasions that where intellectual property laws are not harmonised EU law recognises the *existence* of rights granted by the Member States.

In 1985 RTE had a statutory monopoly over television broadcasting in Ireland and the BBC and IBA had a statutory duopoly in the UK (including Northern Ireland). Most viewers in Ireland and Northern Ireland could receive the channels of all three broadcasters. RTE and the BBC owned the copyright in the programme listings for their respective channels and ITP owned the copyright in the listings of the IBA franchised channels. RTE, the BBC, and ITP each published a weekly TV guide containing only their own individual weekly programme listings. They also gave listings information to the press to be published according to strictly enforced licensing conditions. An Irish publisher, Magill, started to publish a comprehensive weekly TV guide giving details of all programmes available to viewers in the Irish Republic and Northern Ireland, but the television companies obtained injunctions against it in national legal proceedings. Magill complained to the Commission that the television companies, by refusing to give out reliable advance listings information and protecting their listings by enforcing their copyright, were infringing Article 102.

The EU Courts and the Commission appear to have been influenced by the fact that the UK and Ireland were alone among the Member States in affording copyright protection to TV listings, and that composite TV guides could therefore be published in the other Member States, where they were popular and common.[760] The case became perceived as a battle between the protection of national IPRs and competition law, for if the TV companies' refusal to deal with Magill *was* an abuse the only remedy was, in effect, to order them to give the publisher a licence of their copyrights.

The Commission found that the television companies had infringed Article 102.[761] It held that each was dominant in the market for its weekly listings and that their policies in restricting the availability of the information were driven by a desire to protect their own individual weekly guides in the downstream market. The GC upheld the Commission. The GC related the position under Article 102 to the case law on IPRs in the context of the free movement of goods and services.[762] RTE and ITP appealed. The CJ confirmed the finding of abuse but its judgment was strikingly different to that of the GC. It concentrated on the specific scenario in issue and eschewed extended discussion about the nature of IPRs and their relationship to the competition rules.[763] Rather, it treated the matter as a straightforward refusal to supply and applied the principles laid down in previous Article 102 case law.

Cases C-241–242/91 P, *RTE & ITP v Commission* [1995] ECR I-743 (*Magill*)

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(a) Existence of a dominant position

46. So far as dominant position is concerned, it is to be remembered at the outset that mere ownership of an intellectual property right cannot confer such a position.

make information about the programme schedules available to any person in the UK who wants to publish it: the actual dispute in *Magill* therefore became a dead issue as regards the UK during the course of the case, which explains why the BBC was not party to the appeal to the CJ.

760 See particularly the Commission's submissions to the GC, [1991] ECR II-485, summarised in paras. 43–59 of the judgment, culminating in the Commission's statement in para. 59 that 'copyright should not subsist in compilations of banal information'.

761 *Magill TV Guide* [1989] OJ L78/43.

762 There were three separate judgments, but the crucial paras. are the same in all three.

763 See particularly para. 58 of the judgment. The CJ did not follow Gulmann AG, who recommended in his Opinion setting aside the GC judgment, primarily to uphold the inviolability of IPRs.

47. However, the basic information as to the channel, day, time and title of programmes is the necessary result of programming by television stations, which are thus the only source of such information for an undertaking, like Magill, which wishes to publish it together with commentaries or pictures. By force of circumstance, RTE and ITP, as the agent of ITV, enjoy, along with the BBC, a *de facto* monopoly over the information used to compile listings for the television programmes received in most households in Ireland and 30–40 per cent. of households in Northern Ireland. The appellants are thus in a position to prevent effective competition on the market in weekly television magazines. The [General Court] was therefore right in confirming the Commission's assessment that the appellants occupied a dominant position (*Michelin, paragraph 30*)

(b) Existence of an abuse

48. 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 [102].

49. 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 (*Volvo* v. *Veng*, paragraphs 7 and 8).

50. 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.

51. In the present case, the conduct objected to is the appellants' reliance on copyright conferred by national legislation so as to prevent Magill—or any other undertaking having the same intention—from publishing on a weekly basis information (channel, day, time and title of programmes) together with commentaries and pictures obtained independently of the appellants.

52. Among the circumstances taken into account by the [General Court] in concluding that such conduct was abusive was, first, the fact that there was, according to the findings of the [General Court], no actual or potential substitute for a weekly television guide offering information on the programmes for the week ahead. On this point, the [General Court] confirmed the Commission's finding that the complete lists of programmes for a 24-hour period—and for a 48-hour period at weekends and before public holidays—published in certain daily and Sunday newspapers, and the television sections of certain magazines covering, in addition, 'highlights' of the week's programmes, were only to a limited extent substitutable for advance information to viewers on all the week's programmes. Only weekly television guides containing comprehensive listings for the week ahead would enable users to decide in advance which programmes they wished to follow and arrange their leisure activities for the week accordingly. The [General Court] also established that there was a specific, constant and regular potential demand on the part of consumers (see the *RTE* judgment, paragraph 62, and the *ITP* judgment, paragraph 48).

53. Thus the appellants—who were, by force of circumstance, the only sources of the basic information on programme scheduling which is the indispensable raw material for compiling a weekly television guide—gave viewers wishing to obtain information on the choice of programmes for the week ahead no choice but to buy the weekly guides for each station and draw from each of them the information they needed to make comparisons.

54. The appellants' refusal to provide basic information by relying on national copyright provisions thus prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the appellants did not offer and for which there was a potential consumer demand. Such refusal constitutes an abuse under heading (b) of the second paragraph of Article [102].

55. Second, there was no justification for such refusal either in the activity of television broadcasting or in that of publishing television magazines (*RTE* judgment, paragraph 73, and *ITP* judgment, paragraph 58).

56. Third, and finally, as the [General Court] also held, the appellants, by their conduct, reserved to themselves the secondary market of weekly television guides by excluding competition on that market

(*Commercial Solvents*, paragraph 25) since they denied access to the basic information which is the raw material indispensable for the compilation of such a guide.

57. In the light of all those circumstances, the [General Court] did not err in law in holding that the appellants' conduct was an abuse of a dominant position within the meaning of Article [102].

58. It follows that the plea in law alleging misapplication by the [General Court] of the concept of abuse of a dominant position must be dismissed as unfounded. It is therefore unnecessary to examine the reasoning of the contested judgments in so far as it is based on Article [36 TFEU].

It can be seen that in this judgment the CJ said (paragraph 48) that while it is not true that the exercise of IPRs can *never* be reviewed under Article 102, a refusal to grant a licence to reproduce cannot *in itself* constitute an abuse of a dominant position (paragraph 49). It cited *Volvo* as establishing that a refusal might constitute an abuse *in exceptional circumstances*. In this case the exceptional circumstances were:

- there was no substitute for a composite weekly television guide, for which there was a specific, constant, and regular potential demand on the part of consumers;
- the appellants' refusal to supply prevented the appearance of a new product for which there was a potential consumer demand[764] (an abuse under Article 102(b), in 'limiting production, markets or technical development to the prejudice of consumers');
- there was no justification for such refusal;
- the appellants were reserving to themselves the secondary market of weekly television guides by excluding all competition on the market.

The following points should also be noted:

- The CJ based its finding of dominance on the fact that the TV companies had a *de facto* monopoly over the listings, i.e. they were responsible for producing the TV schedules and were the only source of advance information about them (paragraph 47). The Commission (paragraph 22) based the finding of dominance on both the *de facto* monopoly and the legal monopoly stemming from the copyright. The GC based it on the legal monopoly (paragraph 63 of the *RTE* judgment). The CJ did not even mention the existence of the IPRs in its discussion of dominance in paragraph 47.
- The CJ (paragraphs 53 and 56) described the undertakings' conduct in terms of refusal to supply a raw material. It did not use essential facilities terminology. It referred back to *Commercial Solvents* (paragraph 56), seeing the present case as an example of the established abuse of a dominant undertaking trying to exclude competition on a downstream market.
- Unlike the car makers in *Volvo* and *Renault* the television companies were not given a choice of how they could avoid committing an abuse. Although the judgment did not mention compulsory licensing there was only one way in which the abuse could be remedied.[765]
- The judgment established the norm that refusal to license is *not* generally an abuse. The judgment was less of an assault on IPRs than it was on the exploitation of compilations of information gained as a by-product of an undertaking's main business. It is possible to see *Magill* as a limitation of the power wielded by statutory monopolists. The power of the television companies in respect of the TV guides arose as a result of their privileged position on a broadcasting market with few channels.

[764] The AG on the other hand (paras. 93–102 of the Opinion) thought that the fact that the product Magill wanted to produce was new and would compete with the right holders' own products was a reason to find that the refusal to supply was *not* abusive.

[765] The existence of the Copyright Tribunal in the UK meant that the Commission itself did not have to become involved in price-setting.

It was unclear whether the 'list' of exceptional circumstances in *Magill* was cumulative or not. In particular it was unclear whether the hindrance of a new product was a necessary, or a separate and sufficient, ground for holding the refusal to supply the IPR to be abusive. If the television companies had already produced their own composite guides by cross-licensing each other, the composite guide of a third party would not have been a new product, but the undertakings would still have reserved for themselves a special position on the secondary market. In *Tiercé Ladbroke*,[766] which concerned Ladbroke's complaint that the French *sociétés de courses* and their associated companies refused to supply broadcasts of French horse races to Ladbroke's betting shops in Belgium, the GC said that the refusal to supply could constitute an abuse only if *either* the product or service was essential to the activity in question *or* the introduction of a new product demanded by consumers was being prevented.[767] The GC thus suggested that a refusal to supply which precluded the introduction of a new product might constitute an abuse for that reason alone, even if the access demanded was not 'essential'. In other words, the GC read the 'exceptional circumstances' in *Magill* as severable, not cumulative.[768] In the *IMS* case, however, the CJ considered the circumstances as cumulative.

(iv) The *IMS* Case

a. The Facts of *IMS*

The *IMS* case concerned the '1860 brick structure', a system for representing regional pharmaceutical sales data in Germany. It consisted of a grid superimposed on the map of Germany, breaking down the country into small geographical 'bricks' based on factors including postcodes, administrative and political boundaries, and the location of doctors and pharmacies.[769] IMS collected pharmaceutical sales information from wholesalers, formatted it in accordance with the brick structure so enabling it to be analysed in various ways, and provided sales reports to its customers, the pharmaceutical companies. The brick structure had been developed over many years, in collaboration by IMS with the pharmaceutical industry[770] and the Commission found that it had become the *de facto* industry standard. IMS's competitors[771] attempted to develop similar brick structures but IMS claimed that these infringed its copyright and obtained interim injunctions in the German courts to restrain their use. The competitors complained to the Commission that IMS's refusal to license the brick structure meant that it was impossible for them to provide pharmaceutical data services to customers as they could not present data in a way acceptable to the customers without infringing IMS's copyright and there was no prospect of the customers changing to a radically different structure. The Commission found that the brick structure was indispensable to carrying on business in the relevant market; there was no actual or potential substitute for it; there was no objective justification for IMS's refusal to license; and that there were 'exceptional circumstances' in the *Magill* sense. It ordered interim measures[772] which were suspended pending the appeal.[773]

[766] Case T-504/93, *Tiercé Ladbroke SA v Commission* [1997] ECR-II 923. Ladbrokes was appealing to the GC against the Commission's rejection of its complaint.

[767] Ibid., para. 131.

[768] The GC dismissed Ladbroke's appeal. The *sociétés de courses* did not operate betting shops in Belgium, so the downstream market issue did not arise. Showing films of the races was not essential to providing services in betting shops, and the *sociétés de courses* were not discriminating (contrary to Art. 102(c)) as they did not license anybody in the relevant market (Belgium).

[769] There were around 21,500 pharmacies and 287,000 doctors in Germany (*IMS/NDC* [2002] OJ L59/18, para. 14). German privacy laws prevent the production of data which can identify sales in individual pharmacies.

[770] There was considerable dispute about the extent of this collaboration.

[771] One of the competitors, PII, was founded by a former director of IMS, and later taken over by NDC.

[772] COMP/38.044, *NDC Health/IMS: Interim Measures* [2002] OJ L59/18. *IMS* was to give a licence on request and on a non-discriminatory basis to all undertakings currently on the German regional sales data services market.

[773] Case T-184/01 R, *IMS Health v Commission* [2001] ECR II-3193, para. 125, *aff'd* Case C-481/01 P(R), *IMS Health v Commission* [2002] ECR I-3401.

In the meantime, litigation between IMS and NDC was ongoing in Germany and a preliminary reference was made to the CJ asking about the interpretation of Article 102 in the context of IMS's refusal to license. Before the ruling was given, however, a German court gave judgment on the issue of IMS's claim to copyright in the brick structure, holding that the brick structure was protected by copyright but that this did not prevent other parties from developing a similar structure. Moreover, NDC began to compete more successfully with IMS. The Commission therefore withdrew the interim measures.[774] The CJ however proceeded to give its ruling on the preliminary reference.

b. The CJ Ruling

The ruling of the CJ, which largely followed the Opinion of Advocate General Tizzano, set out the conditions in which a refusal to supply a copyright is an abuse, and left the German court to decide whether the conditions were satisfied in the situation before it.

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

The Landgericht Frankfurt am Main asked three questions:

- first, whether it was an abuse not to grant a licence in a situation where the competitor was seeking access to the same geographical and product market and the customers would only accept a product based on material protected by the copyright;
- secondly, was the participation of the customers in developing the copyright material relevant;
- thirdly, were the costs which the customers would occur in switching to a product protected by a different data bank relevant.

The Court held that the second and third questions both concerned factors which had to be taken into consideration in determining whether the protected structure was indispensable for the relevant marketing studies. The following extract is the part of the judgment dealing with the first question.

Court of Justice

34. According to settled case-law, the exclusive right of reproduction forms part of the owner'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* . . . paragraph 8, and *Magill*, paragraph 49).

35. Nevertheless, as is clear from that case-law, exercise of an exclusive right by the owner may, in exceptional circumstances, involve abusive conduct (*Volvo*, paragraph 9, and *Magill*, paragraph 50).

36. The Court held that such exceptional circumstances were present in the case giving rise to the judgment in *Magill*, in which the conduct complained of by the television channels in a dominant position involved invoking the copyright conferred by national legislation on the weekly listings of their programmes in order to prevent another undertaking from publishing information on those programmes together with commentaries, on a weekly basis.

37. According to the summary of the *Magill* judgment made by the Court at paragraph 40 of the judgment in *Bronner*, the exceptional circumstances were constituted by the fact that the refusal in question concerned a product (information on the weekly schedules of certain television channels), the supply of which was indispensable for carrying on the business in question, (the publishing of a general television guide), in that, without that information, the person wishing to produce such a guide would find it impossible to publish it and offer it for sale (paragraph 53), the fact that such refusal prevented the emergence of a new product for which there was a potential consumer demand (paragraph 54), the fact that it was

[774] Commission Decision 2003/741/EC, [2003] OJ L268/69; IP/03/1159.

not justified by objective considerations (paragraph 55), and was likely to exclude all competition in the secondary market (paragraph 56).

38. It is clear from that case-law that, in order for the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it is sufficient that three cumulative conditions be satisfied, namely, that that refusal is preventing the emergence of a new product for which there is a potential consumers demand, that it is unjustified and such as to exclude any competition on a secondary market.

39. In light of the order for reference and the observations submitted to the Court, which reveal a major dispute as regards the interpretation of the third condition, it is appropriate to consider that question first.

The third condition, relating to the likelihood of excluding all competition on a secondary market

40. In that regard, it is appropriate to recall the approach followed by the Court in the *Bronner* judgment, in which it was asked whether the fact that a press undertaking with a very large share of the daily newspaper market in a Member State which operates the only nationwide newspaper home-delivery scheme in that Member State refuses paid access to that scheme by the publisher of a rival newspaper, which by reason of its small circulation is unable either alone or in cooperation with other publishers to set up and operate its own home-delivery scheme under economically reasonable conditions, constitutes the abuse of a dominant position.

41. The Court, first of all, invited the national court to determine whether the home delivery schemes constituted a separate market (*Bronner*, paragraph 34), on which, in light of the circumstances of the case, the press undertaking held a de facto monopoly position and, thus, a dominant position (paragraph 35). It then invited the national court to determine whether the refusal by the owner of the only nationwide home-delivery scheme in a Member State, which used that scheme to distribute its own daily newspapers, to allow the publisher of a rival daily newspaper access to it deprived that competitor of a means of distribution judged essential for the sale of its newspaper (paragraph 37).

42. Therefore, the Court held that it was relevant, in order to assess whether the refusal to grant access to a product or a service indispensable for carrying on a particular business activity was an abuse, to distinguish an upstream market, constituted by the product or service, in that case the market for home delivery of daily newspapers, and a (secondary) downstream market, on which the product or service in question is used for the production of another product or the supply of another service, in that case the market for daily newspapers themselves.

43. The fact that the delivery service was not marketed separately was not regarded as precluding, from the outset, the possibility of identifying a separate market.

44. It appears, therefore, as the Advocate General set out in points 56 to 59 of his Opinion, that, for the purposes of the application of the earlier case-law, it is sufficient that a potential market or even hypothetical market can be identified. Such is the case where the products or services are indispensable in order to carry on a particular business and where there is an actual demand for them on the part of undertakings which seek to carry on the business for which they are indispensable.

45. Accordingly, it is determinative that two different stages of production may be identified and that they are interconnected, the upstream product is indispensable in as much as for supply of the downstream product.

46. Transposed to the facts of the case in the main proceedings, that approach prompts consideration as to whether the 1860 brick structure constitutes, upstream, an indispensable factor in the downstream supply of German regional sales data for pharmaceutical products.

47. It is for the national court to establish whether that is in fact the position, and, if so be the case, to examine whether the refusal by IMS to grant a licence to use the structure at issue is capable of excluding all competition on the market for the supply of German regional sales data on pharmaceutical products.

The first condition, relating to the emergence of a new product

48. As the Advocate General stated in point 62 of his Opinion, that condition relates to the consideration that, in the balancing of the interest in protection of copyright and the economic freedom of its owner, against the interest in protection of free competition the latter can prevail only where refusal to grant a licence prevents the development of the secondary market to the detriment of consumers.

49. Therefore, the refusal by an undertaking in a dominant position to allow access to a product protected by copyright, where that product is indispensable for operating on a secondary market, may be regarded as abusive only where the undertaking which requested the licence does not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the copyright, but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand.

50. It is for the national court to determine whether such is the case in the dispute in the main proceedings.

The second condition, relating to whether the refusal was unjustified

51. As to that condition, on whose interpretation no specific observations have been made, it is for the national court to examine, if appropriate, in light of the facts before it, whether the refusal of the request for a licence is justified by objective considerations.

52. Accordingly, the answer to the first question must be that the refusal by an undertaking which holds a dominant position and is the owner of an intellectual property right over a brick structure which is indispensable for the presentation of data on regional sales of pharmaceutical products in a Member State, to grant a licence to use that structure to another undertaking which also wishes to supply such data in the same Member State, constitutes an abuse of a dominant position within the meaning of Article [102] where the following conditions are fulfilled:

- the undertaking which requested the licence intends to offer, on the market for the supply of the data in question, new products or services not offered by the copyright owner and for which there is a potential consumer demand;
- the refusal is not justified by objective considerations;
- the refusal is such as to reserve to the copyright owner the market for the supply of data on sales of pharmaceutical products in the Member State concerned by eliminating all competition on that market.

In this ruling the CJ laid down (paragraphs 38 and 52) that three *cumulative* conditions made the refusal to license a copyright an abuse:

- first, a 'new product' was involved;
- secondly, access to the protected material was 'indispensable' so that the refusal would exclude *any/all* (paragraphs 38 and 52) competition on a secondary market (not, as in *Bronner*, all competition from the person requesting access);
- thirdly, the refusal was unjustified.

One view of the judgment is that the CJ came down firmly on the 'side' of the IPR holder, in that there is a presumption against the licence (see paragraph 48). The CJ repeated that a refusal to grant a licence cannot in itself constitute an abuse (paragraph 34). It allowed for the possibility of compulsory licences but only in 'exceptional circumstances' (paragraph 35). It incorporated into the exceptional circumstances the requirement of 'indispensability' in the *Bronner* sense, which sets the bar at a high level, and it demanded that the party requiring the licence intends to offer new goods and services for which there is a potential consumer demand. On the other hand, the 'indispensable' and 'new product' requirements are such that everything will turn on the application of these conditions to the facts of the case. In *IMS* the CJ referred everything back to the national court without giving any indication as to whether the requirements were in fact satisfied in the case. In *IMS* there was room for argument about whether NDC was providing a 'new product'.[775] The Commission stated in its Decision that the sales reports of the firms 'differ markedly'.[776] It came down to a matter of whether this would fulfil the condition of not 'essentially duplicating' the right holder's product. The key to this is the interests of consumers. In paragraph 48 the Court said that the only situation in which free competition can override the rights of the copyright holder is where the refusal prevents the development of the secondary market to the detriment of consumers (in other words limiting production to the detriment of consumers as provided for in Article 102(b)). The licence is not ordered to protect the competitor but to protect consumers.

The CJ did require that the development of a secondary market be affected. As the Commission had done it spelt two markets out of the situation in *IMS*. The Court said (paragraph 44) that it is enough if a 'potential or even hypothetical' market can be identified upstream. It only required that 'two different stages of production' can be identified.[777] The question here is how hypothetical can the market for the input be. The upstream market in *IMS* was a very artificial one: IMS only developed the brick structure in order to produce its own sales reports. It was different in *Magill* where the television listings existed as a by-product of the broadcasting activities and would have existed whether or not the broadcasters had published their own magazines. As one commentator said (critically) of the Commission decision in *IMS*, it was enough 'even if the input is a competitive advantage of a kind which has never previously been marketed or licensed by any company, and which it would not be economically rational to license to a direct competitor'.[778] There are few production processes that cannot be divided as in *IMS* if one thinks hard enough and anything protected by an IPR can on this basis form an upstream market. One can compare *IMS* on this point with the judgment of the US Supreme Court in *Verizon v Trinko*,[779] set out in Section 13.G, where the fact that 'the services allegedly withheld are not otherwise marketed or available to the public' and existed 'only deep in the bowels of Verizon' was a factor in holding the refusal to deal lawful.[780]

The *IMS* ruling gave little flavour of the underlying factual situation. It is necessary to read the Commission decision to fully appreciate that *IMS*, like *Magill*, involved a 'weak' copyright. Indeed, the Commission seemed to consider that IMS had more or less hijacked the industry standard.[781] If *IMS* could be taken as turning on the particular facts of how the brick structure had been developed and the copyright acquired, it could be viewed as a response to a quirk of national law. Some commentators considered that the cases should be viewed in this light—as exceptional responses to unsatisfactory copyright laws—and argued that there was no reason to suppose that the same approach would be taken to strong patent rights, for example.[782] However, *Magill and IMS* were relied upon by the GC in the *Microsoft* case, where any IPRs concerned were certainly not the product of quirks of copyright laws. As far as the indispensability requirement is concerned it should be

[775] Unlike *Bronner*, where the CJ made it clear that that the conditions laid down there were not satisfied.

[776] According to the customers the coverage of parts of Germany was more complete and they provided more detail on types of information, [2002] OJ L59/18, para. 15.

[777] It can be argued that by saying that it was a matter of whether two *stages of production* can be identified the Court was abandoning the requirement of two *markets*: it is enough that there are two *products*. See J. Venit, 'The IP/Antitrust Interface After *IMS Health*' in Ehlermann and Atanasiu, n. 31, 609, 625.

[778] J. Temple Lang, 'Anti-competitive Non-Pricing Abuses under European and National Antitrust Law' [2003] *Fordham Corp L Inst* 235, 307.

[779] 540 US 398, 124 S.Ct 872 (2004).

[780] Moreover *IMS* did not involve leveraging. IMS was not leveraging its dominance from the upstream to the downstream market: see Venit, n. 777.

[781] And see F. Fine, '*NDC/IMS*: A Logical Application of the Essential Facilities Doctrine' [2002] *ECLR* 457; F. Fine, '*NDC/IMS*: In Response to Professor Korah' (2002) 70 *Antitrust LJ* 247.

[782] See, e.g., M. Delrahim, 'Forcing Firms to Share the Sandbox: Compulsory Licensing of Intellectual Property Rights and Antitrust', BIICL Conference, 10 May 2004, available at <http://www.usdoj.gov/atr/public/speeches/203627.htm> (Delrahim was at the time US Deputy Assistant Attorney General, DOJ Antitrust Division).

noted that the Commission withdrew its interim decision in August 2003 because the situation had changed, in that NDC had succeeded in concluding contracts with some larger pharmaceutical companies and there was no longer a threat that it might be eliminated from the market. The Commission stated that its decision was without prejudice to whether the improvement in NDC's position had been caused by the German judgment on the copyright. If it was not caused by this it throws doubt on how indispensable the 1860 brick structure was in the first place.

D. REFUSAL TO SUPPLY AND INTEROPERABILITY—THE *MICROSOFT* CASE

A particular kind of refusal to supply arises in the IT sector in respect of 'interface information'. Providers of software need to be able to make products which operate with other systems and programs. This is known as 'interoperability'. For this they require interface information, i.e. information about the systems and programs of other producers with which their products need to be compatible and usable. This information may be protected by IPRs (copyright). It may be obtainable by decompilation (reverse engineering) but this can be impossible or not practically or economically feasible.[783] Where there is a dominant undertaking on a software market it may be essential to the competitive viability of other providers that their products are compatible with those of that undertaking.

The Commission first addressed this issue in 1984 when it dealt with a number of IBM's practices.[784] It alleged that IBM had abused its dominant position by failing to supply other manufacturers with interface information needed to make competitive products work with IBM's System/370. A settlement was reached by which IBM, while not admitting the existence of a dominant position or any abuse thereof, undertook to disclose sufficient interface information to enable competitors in the EEC to attach hardware and software products of their own design to System/370.[785]

The *Microsoft* investigation began in 1998 after Sun Microsystems lodged a complaint. Microsoft had over 90 per cent of the PC operating systems market. The Commission described this as approaching a near monopoly and Microsoft as being in an 'overwhelmingly dominant position'.[786] Sun complained of Microsoft's refusal to disclose to those who provided server operating systems sufficient interface information to enable them to create 'workgroup server operating systems' (WGOS) that would operate satisfactorily with Microsoft's Windows desktop and server operating systems. Microsoft had previously supplied full interoperability information to server producers but cut it back after entering that market itself. Five years and three statements of objections after the investigation began the Commission held that Microsoft held a dominant position on both the client PC operating systems market and the WGOS market and that it had committed an abuse by refusing to supply the interface information. Microsoft was fined €497,196,304[787] and ordered to make the relevant information available to undertakings on the WGOS market within 120 days and ensure that the information was kept updated on an ongoing basis and in a timely manner.[788]

In the decision the Commission examined whether the *Bronner* and *Magill*[789] criteria were fulfilled, although it noted that it was 'of interest' that this was a case (unlike *Bronner* and *Magill*) of

783 For the arguments about the possibilities of reverse engineering in *Microsoft*, see text at n. 791.

784 For the tying aspects, see Section 12.E.iii, p. 480.

785 See Commission, *XIVth Report on Competition Policy* (1984) parts 94–95.

786 COMP/37.792, *Microsoft* 24 March 2004, para. 435.

787 The fine was also in respect of the tying abuse, see Section 12.E.iii, p. 480.

788 To be enforced by the appointment of a 'monitoring trustee' to ensure that the disclosures are complete and accurate. For this issue see Chap. 13, Section 7.E.ii.b, p. 944. The dispute between the Commission and Microsoft as to whether Microsoft was complying with the obligation to supply the information on fair and reasonable terms led to the imposition of a periodic penalty payment, Case T-167/08, *Microsoft v Commission* EU:T:2012:323.

789 The decision was adopted a month before the CJ's *IMS* ruling.

the disruption of previous levels of supply.[790] It held that the criteria were fulfilled. In doing so the Commission followed the 'effects-based' approach to the application of Article 102 which it set out the following year in the Discussion Paper. It examined the facts closely, identified effects on consumers, and considered the issues of incentives to innovation.

The Commission found that the information was indispensable by adopting a two-stage approach. First, it considered what degree of interoperability with Windows non-Microsoft WGOS required in order for the competitors to be able to remain viably on the market and, secondly, it appraised whether the information that Microsoft refused to disclose was indispensable to attaining that. On the basis of customer surveys the Commission found that although the competitors' systems had features and functionalities which customers preferred to those of Microsoft's this was trumped by the attraction of full interoperability with Windows. It concluded that the competitors' systems had to be able to interoperate with Windows on an equal footing with Microsoft's own systems if they were to compete viably with them and that this was not possible without the information Microsoft refused to disclose. There were no substitutes for disclosure by Microsoft. Microsoft argued, inter alia, that reverse engineering was a means of its competitors accessing the information but the Commission held that reverse engineering required 'considerable efforts with uncertain chances of success'[791] and that the viability of products produced by reverse engineering depended on Microsoft not breaking the compatibility (for instance by upgrading the operating system): '[r]everse engineering is therefore an unstable basis for a business model'.[792] The Commission held, with regard to the criteria of the elimination of competition, that the refusal to supply put Microsoft's competitors 'at a strong competitive disadvantage . . . to an extent where there is a risk of elimination of competition'.[793] This would impact on technical development to the prejudice of consumers contrary to Article 102(b)[794] because the competitors would, at best, be confined to niche existences and there would be little scope for innovation,[795] while Microsoft's incentives to innovate would be diminished by the disappearance of its competitors.[796] The Commission rejected Microsoft's plea that the refusal to supply was justified by the fact that the information was protected by IPRs and that forced disclosure would lessen its incentives to innovate. Even if there was such a disincentive the Commission held that 'the possible negative impact of an order to supply on Microsoft's incentives to innovate is outweighed by its positive impact on the level on innovation of the whole industry (including Microsoft)'.[797]

The *Microsoft* decision stretched the *Magill* criteria. For example, the Commission held not that the refusal prevented the appearance of a specific new product but rather that 'technical development' would be limited. The Commission therefore hedged its bets. In case the Microsoft situation did not satisfy the principles laid down in the previous cases it argued that there was no 'exhaustive checklist' of exceptional circumstances and that it could have regard to other circumstances, i.e. that a refusal to supply should be examined on a case-by-case basis so that refusal that did not fit exactly within the *Bronner* or *Magill* criteria could still be an abuse.[798]

790 I.e. like *Commercial Solvents* and *Centre Belge*: COMP/37.792, *Microsoft* 24 March 2004, para. 556.

791 COMP/37.792, *Microsoft* 24 March 2004, para. 685.

792 Ibid., para. 686.

793 Ibid., para. 589.

794 Ibid., paras. 693–701.

795 Ibid., para. 700.

796 Ibid., para. 725.

797 Ibid., para. 783.

798 Ibid., para. 555. In the Discussion Paper of 2005 the Commission reinforced this argument by placing interoperability in a separate category of refusal to supply. It said that 'it may not be appropriate to apply to such refusals to supply information the same high standards for intervention as those described in the previous subsections' (which set out the principles derived from the previous cases, by that time including *IMS*): Discussion Paper, paras. 271–272.

Before the GC the Commission argued that it was entitled to take account of all the particular circumstances surrounding the refusal and identified three particular characteristics in this case: (a) the information related to interoperability, 'a matter to which the Community legislature attaches particular importance'; (b) Microsoft was using its 'extraordinary power' on one market to eliminate competition on an adjacent market; and (c) the case involved the disruption of previous levels of supply.[799] The GC examined first whether the Commission was justified in finding that the highest standard—the *Magill/IMS* exceptional circumstances test—was satisfied and, having decided that it was, upheld the Commission decision without expressly considering the position had it not been.[800] However, the GC had to give an expansive interpretation of the criteria in the case law in order to do this and it might have been preferable had it seized the opportunity to consider the other relevant special circumstances put forward by the Commission.[801]

The GC applied the 'manifest error of assessment' standard of review. The GC said that the 'review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers . . .'.[802] The 'manifest error' standard is particularly significant in *Microsoft* where the Commission was making predictions about the elimination of competition and the effects on innovation rather than judging past events.[803]

In respect of the *Magill/IMS* criteria the GC reiterated what was said in *IMS*, i.e. that in order for a refusal to supply to be abusive on the grounds that it denies access to an indispensable product or service two markets must be involved but the upstream market may merely be 'hypothetical'.[804] It examined the Commission decision in the light of the four conditions established in the case law–indispensability; elimination of competition; new product; no objective justification—and upheld it.

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332. It also follows from that case-law that the following circumstances, in particular, must be considered to be exceptional:

- in the first place, the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market;
- in the second place, the refusal is of such a kind as to exclude any effective competition on that neighbouring market;
- in the third place, the refusal prevents the appearance of a new product for which there is potential consumer demand.

333. Once it is established that such circumstances are present, the refusal by the holder of a dominant position to grant a licence may infringe Article [102] unless the refusal is objectively justified.

334. The Court notes that the circumstance that the refusal prevents the appearance of a new product for which there is potential consumer demand is found only in the case-law on the exercise of an intellectual property right.

799 COMP/37.792, *Microsoft* 24 March 2004, paras. 316–317.

800 Ibid., para. 712.

801 See P. Larouche, 'The European *Microsoft* Case at the Crossroads of Competition Policy and Innovation: Comment on Ahlborn and Evans' (2008–2009) 75 *Antitrust LJ* 933, 959.

802 Case T-210/04, *Microsoft* [2007] ECR II-3601, para. 87.

803 For the recent cases on the standard of review, see Chap. 13, Section 8.A.vii, p. 1000.

804 Case C-418/01, *IMS* [2004] ECR I-5039, paras. 43–44.

335. Finally, it is appropriate to add that, in order that a refusal to give access to a product or service indispensable to the exercise of a particular activity may be considered abusive, it is necessary to distinguish two markets, namely, a market constituted by that product or service and on which the undertaking refusing to supply holds a dominant position and a neighbouring market on which the product or service is used in the manufacture of another product or for the supply of another service. The fact that the indispensable product or service is not marketed separately does not exclude from the outset the possibility of identifying a separate market (see, to that effect, *IMS Health* . . . paragraph 43). Thus, the Court of Justice held, at paragraph 44 of *IMS Health* . . . that it was sufficient that a potential market or even a hypothetical market could be identified and that such was the case where the products or services were indispensable to the conduct of a particular business activity and where there was an actual demand for them on the part of undertakings which sought to carry on that business. The Court of Justice concluded at the following paragraph of the judgment that it was decisive that two different stages of production were identified and that they were interconnected in that the upstream product was indispensable for supply of the downstream product.

336. In the light of the foregoing factors, the Court considers that it is appropriate, first of all, to decide whether the circumstances identified in *Magill* and *IMS Health* . . . as described at paragraphs 332 and 333 above, are also present in this case. Only if it finds that one or more of those circumstances are absent will the Court proceed to assess the particular circumstances invoked by the Commission . . .

On the indispensability condition the GC confirmed the Commission's approach to finding indispensability through the twofold test described, and its conclusion was that the test was satisfied.[805] On the other conditions it concluded as follows.

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Elimination of competition

– The applicable criterion

560. In the contested decision, the Commission considered whether the refusal at issue gave rise to a 'risk' of the elimination of competition on the work group server operating systems market (recitals 585, 589, 610, 622, 626, 631, 636, 653, 691, 692, 712, 725, 781, 992 and 1070 to the contested decision). Microsoft contends that that criterion is not sufficiently strict, since according to the case-law on the exercise of an intellectual property right the Commission must demonstrate that the refusal to license an intellectual property right to a third party is 'likely to eliminate all competition', or, in other words, that there is a 'high probability' that the conduct in question will have such a result.

561. The Court finds that Microsoft's complaint is purely one of terminology and is wholly irrelevant. The expressions 'risk of elimination of competition' and 'likely to eliminate competition' are used without distinction by the Community judicature to reflect the same idea, namely that Article [102] does not apply only from the time when there is no more, or practically no more, competition on the market. If the Commission were required to wait until competitors were eliminated from the market, or until their elimination was sufficiently imminent, before being able to take action under Article [102], that would clearly run counter to the objective of that provision, which is to maintain undistorted competition in the common market and, in particular, to safeguard the competition that still exists on the relevant market.

562. In this case, the Commission had all the more reason to apply Article [102] before the elimination of competition on the work group server operating systems market had become a reality because that

[805] Case T-210/04, *Microsoft* [2007] ECR II-3601, paras. 369–436.

market is characterised by significant network effects and because the elimination of competition would therefore be difficult to reverse (see recitals 515 to 522 and 533 to the contested decision).

563. Nor is it necessary to demonstrate that all competition on the market would be eliminated. What matters, for the purpose of establishing an infringement of Article [102], is that the refusal at issue is liable to, or is likely to, eliminate all effective competition on the market. It must be made clear that the fact that the competitors of the dominant undertaking retain a marginal presence in certain niches on the market cannot suffice to substantiate the existence of such competition.

564. Last, it must be borne in mind that it is for the Commission to establish that the refusal to supply gives rise to a risk of the elimination of all effective competition. As already stated at paragraph 482 above, the Commission must base its assessment on accurate, reliable and coherent evidence which comprises all the relevant data that must be taken into consideration in order to assess a complex situation and which are capable of substantiating the conclusions drawn from them.

. . . **The new product**

643. It must be emphasised that the fact that the applicant's conduct prevents the appearance of a new product on the market falls to be considered under Article [102(b)] . . . which prohibits abusive practices which consist in 'limiting production, markets or technical developments to the . . . prejudice of consumers'.

644. Thus, at paragraph 54 of *Magill* . . . the Court of Justice held that the refusal by the broadcasting companies concerned had to be characterised as abusive within the meaning of that provision because it prevented the appearance of a new product which the broadcasting companies did not offer and for which there was a potential consumer demand.

645. It is apparent from the decision at issue in that case that the Commission had, more specifically, considered that by their refusal, the broadcasting companies limited production or markets to the prejudice of consumers (see the first paragraph of recital 23 to Commission Decision 89/205/EEC . . . *Magill TV Guide/ITP, BBC and RTE* . . .). The Commission had found that that refusal prevented publishers from producing and publishing a weekly television guide for consumers in Ireland and Northern Ireland, a type of guide not then available on that geographic market. Although each of the broadcasting companies concerned published a weekly television guide, each guide was devoted to that particular broadcaster's own programmes. In finding an abuse of a dominant position by those broadcasting companies, the Commission had emphasised the harm which the absence of a general weekly television guide on the market in Ireland and in Northern Ireland caused to consumers, who, if they wished to know what programmes were being offered in the coming week, had no alternative to buying the weekly guides of each channel and themselves extracting the relevant information in order to make comparisons.

646. In *IMS Health* . . . the Court of Justice, when assessing the circumstance relating to the appearance of a new product, also placed that circumstance in the context of the damage to the interests of consumers. Thus, at paragraph 48 of that judgment, the Court emphasised, with reference to the Opinion of Advocate General Tizzano in that case . . . that that circumstance related to the consideration that, in the balancing of the interest in protection of the intellectual property right and the economic freedom of its owner against the interest in protection of free competition, the latter can prevail only where refusal to grant a licence prevents the development of the secondary market, to the detriment of consumers.

647. The circumstance relating to the appearance of a new product, as envisaged in *Magill* and *IMS Health* . . . cannot be the only parameter which determines whether a refusal to license an intellectual property right is capable of causing prejudice to consumers within the meaning of Article [102(b)] . . . As that provision states, such prejudice may arise where there is a limitation not only of production or markets, but also of technical development.

648. It was on that last hypothesis that the Commission based its finding in the contested decision. Thus, the Commission considered that Microsoft's refusal to supply the relevant information limited technical development to the prejudice of consumers within the meaning of Article [102(b)] . . . (recitals 693 to 701 and 782 to the contested decision) and it rejected Microsoft's assertion that it had not been demonstrated that its refusal caused prejudice to consumers (recitals 702 to 708 to the contested decision).

649. The Court finds that the Commission's findings at the recitals referred to in the preceding paragraph are not manifestly incorrect.

650. Thus, in the first place, the Commission was correct to observe, at recital 694 to the contested decision, that '[owing] to the lack of interoperability that competing work group server operating system products can achieve with the Windows domain architecture, an increasing number of consumers are locked into a homogeneous Windows solution at the level of work group server operating systems'.

651. It must be borne in mind that it has already been stated at paragraphs 371 to 422 above that Microsoft's refusal prevented its competitors from developing work group server operating systems capable of attaining a sufficient degree of interoperability with the Windows domain architecture, with the consequence that consumers' purchasing decisions in respect of work group server operating systems were channelled towards Microsoft's products . . .

652. The limitation thus placed on consumer choice is all the more damaging to consumers because, as already observed at paragraphs 407 to 412 above, they consider that non-Microsoft work group server operating systems are better than Windows work group server operating systems with respect to a series of features to which they attach great importance, such as 'reliability/availability of the . . . system' and 'security included with the server operating system'.

653. In the second place, the Commission was correct to consider that the artificial advantage in terms of interoperability 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 (see, to that effect, recital 694 to the contested decision). That refusal has the consequence that those competitors are placed at a disadvantage by comparison with Microsoft so far as the merits of their products are concerned, particularly with regard to parameters such as security, reliability, ease of use or operating performance speed (recital 699 to the contested decision).

654. The Commission's finding that '[i]f Microsoft's competitors had access to the interoperability information that Microsoft refuses to supply, they could use the disclosures to make the advanced features of their own products available in the framework of the web of interoperability relationships that underpin the Windows domain architecture' (recital 695 to the contested decision) is corroborated by the conduct which those competitors had adopted in the past, when they had access to certain information concerning Microsoft's products . . .

655. The Commission was careful to emphasise, in that context, that there was 'ample scope for differentiation and innovation beyond the design of interface specifications' (recital 698 to the contested decision). In other words, the same specification can be implemented in numerous different and innovative ways by software designers.

656. Thus, the contested decision rests on the concept that, once the obstacle represented for Microsoft's competitors by the insufficient degree of interoperability with the Windows domain architecture has been removed, those competitors will be able to offer work group server operating systems which, far from merely reproducing the Windows systems already on the market, will be distinguished from those systems with respect to parameters which consumers consider important (see, to that effect, recital 699 to the contested decision).

. . .

658. Nor would Microsoft's competitors have any interest in merely reproducing Windows work group server operating systems. Once they are able to use the information communicated to them to develop systems that are sufficiently interoperable with the Windows domain architecture, 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. It must be borne in mind that, as the Commission explains at recitals 719 to 721 to the contested decision, the implementation of specifications is a difficult task which requires significant investment in money and time

659. Last, Microsoft's argument that it will have less incentive to develop a given technology if it is required to make that technology available to its competitors (see paragraph 627 above) is of no relevance

to the examination of the circumstance relating to the new product, where the issue to be decided is the impact of the refusal to supply on the incentive for Microsoft's competitors to innovate and not on Microsoft's incentives to innovate. That is an issue which will be decided when the Court examines the circumstance relating to the absence of objective justification.

660. In the third place, the Commission is also correct to reject as unfounded Microsoft's assertion during the administrative procedure that it was not demonstrated that its refusal caused prejudice to consumers (recitals 702 to 708 to the contested decision).

661. First of all, as has already been observed at paragraphs 407 to 412 above . . . contrary to Microsoft's contention, consumers consider non-Microsoft work group server operating systems to be better than Windows work group server operating systems on a number of features to which they attach great importance.

662. Next, Microsoft cannot rely on the fact that consumers never claimed at any time during the administrative procedure that they had been forced to adopt a Windows work group server operating system as a consequence of its refusal to disclose interoperability information to its competitors. In that connection, it is sufficient to point out that Microsoft does not dispute the Commission's findings at recitals 705 and 706 to the contested decision. Thus, at recital 705 to the contested decision, the Commission observes that it is developers of complementary software required to interoperate with Microsoft's systems who 'depend on the interface information' and that '[c]ustomers will not always exactly know what is disclosed by Microsoft to other work group operating system vendors and what is not'. At recital 706 to the contested decision, the Commission states '[w]hen confronted with a "choice" between putting up with interoperability problems that render their business processes cumbersome, inefficient and costly, and embracing a homogeneous Windows solution for their work group network, customers will tend to opt for the latter proposition' and that '[o]nce they have standardised on Windows, they are unlikely to report interoperability problems between their client PCs and the work group servers'.

663. Furthermore, Microsoft's own statements concerning the disclosures made under the United States settlement show that those disclosures had the consequence of offering greater choice to consumers (see recital 703 to the contested decision).

664. Last, it must be borne in mind that it is settled case-law that Article [102] . . . covers not only practices which may prejudice consumers directly but also those which indirectly prejudice them by impairing an effective competitive structure (Case 85/76 *Hoffmann-La Roche v Commission* . . . paragraph 125, and *Irish Sugar v Commission* . . . paragraph 232). In this case, Microsoft impaired the effective competitive structure on the work group server operating systems market by acquiring a significant market share on that market.

665. The Court concludes from all of the foregoing considerations that the Commission's finding to the effect that Microsoft's refusal limits technical development to the prejudice of consumers within the meaning of Article [102(b)] . . . is not manifestly incorrect. The Court therefore finds that the circumstance relating to the appearance of a new product is present in this case.

. . . The absence of objective justification

688. The Court notes, as a preliminary point, that although the burden of proof of the existence of the circumstances that constitute an infringement of Article [102] . . . is borne by the Commission, it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted.

689. In the present case, as the Commission found at recital 709 to the contested decision and as Microsoft expressly confirmed in the application, Microsoft relied as justification for its conduct solely on the fact that the technology concerned was covered by intellectual property rights. It made clear that if it were required to grant third parties access to that technology, that 'would . . . eliminate future incentives to invest in the creation of more intellectual property' (recital 709 to the contested decision). In the reply,

the applicant also relied on that fact that the technology was secret and valuable and that it contained important innovations.

690. The Court considers that, even on the assumption that it is correct, 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 other words, a refusal to license an intellectual property right could never be considered to constitute an infringement of Article [102] even though in *Magill* and *IMS Health* . . . above, the Court of Justice specifically stated the contrary.

691. It must be borne in mind that, as stated at paragraphs 321, 323, 327 and 330 above, the Community judicature considers that the fact that the holder of an intellectual property right can exploit that right solely for his own benefit constitutes the very substance of his exclusive right. Accordingly, a simple refusal, even on the part of an undertaking in a dominant position, to grant a licence to a third party cannot in itself constitute an abuse of a dominant position within the meaning of Article [102] . . . It is only when it is accompanied by exceptional circumstances such as those hitherto envisaged in the case-law that such a refusal can be characterised as abusive and that, accordingly, it is permissible, in the public interest in maintaining effective competition on the market, to encroach upon the exclusive right of the holder of the intellectual property right by requiring him to grant licences to third parties seeking to enter or remain on that market. It must be borne in mind that it has been established above that such exceptional circumstances were present in this case.

692. The argument which Microsoft puts forward in the reply, namely that the technology concerned is secret and of great value to the licensees and contains important innovations, cannot succeed either.

693. First, the fact that the technology concerned is secret is the consequence of a unilateral business decision on Microsoft's part. Furthermore, Microsoft cannot rely on the argument that the interoperability information is secret as a ground for not being required to disclose it unless the exceptional circumstances identified by the Court of Justice in *Magill* and *IMS Health*, above, are present, and at the same time justify its refusal by what it alleges to be the secret nature of the information. Last, there is no reason why secret technology should enjoy a higher level of protection than, for example, technology which has necessarily been disclosed to the public by its inventor in a patent-application procedure.

694. Second, from the moment at which it is established that—as in this case—the interoperability information is indispensable, that information is necessarily of great value to the competitors who wish to have access to it.

695. Third, it is inherent in the fact that the undertaking concerned holds an intellectual property right that the subject-matter of that right is innovative or original. There can be no patent without an invention and no copyright without an original work.

696. The Court further observes that in the contested decision the Commission did not simply reject Microsoft's assertion that the fact that the technology concerned was covered by intellectual property rights justified its refusal to disclose the relevant information. The Commission also examined the applicant's argument that if it were required to give third parties access to that technology there would be a negative impact on its incentives to innovate (recitals 709 and 712 to the contested decision).

697. The Court finds that, as the Commission correctly submits, Microsoft, which bore the initial burden of proof (see paragraph 688 above), did not sufficiently establish that if it were required to disclose the interoperability information that would have a significant negative impact on its incentives to innovate.

698. Microsoft merely put forward vague, general and theoretical arguments on that point. Thus, as the Commission observes at recital 709 to the contested decision, in its response of 17 October 2003 to the third statement of objections Microsoft merely stated that '[d]isclosure would . . . eliminate future incentives to invest in the creation of more intellectual property', without specifying the technologies or products to which it thus referred.

699. In certain passages in the response referred to in the preceding paragraph, Microsoft envisages a negative impact on its incentives to innovate by reference to its operating systems in general, namely both those for client PCs and those for servers.

700. In that regard, it is sufficient to note that, at recitals 713 to 729 to the contested decision, the Commission quite correctly refuted Microsoft's arguments relating to the fear that its products would be cloned. It must be borne in mind, in particular, that the remedy prescribed in Article 5 of the contested decision does not, and is not designed to, allow Microsoft's competitors to copy its products (see paragraphs 198 to 206, 240 to 242 and 656 to 658 above).

701. It follows that it has not been demonstrated that the disclosure of the information to which that remedy relates will significantly reduce—still less eliminate—Microsoft's incentives to innovate.

702. In that context, the Court observes that, as the Commission correctly finds at recitals 730 to 734 to the contested decision, it is normal practice for operators in the industry to disclose to third parties the information which will facilitate interoperability with their products and Microsoft itself had followed that practice until it was sufficiently established on the work group server operating systems market. Such disclosure allows the operators concerned to make their own products more attractive and therefore more valuable. In fact, none of the parties has claimed in the present case that such disclosure had had any negative impact on those operators' incentives to innovate.

. . .

704. Last, the Court finds that Microsoft's assertion that in the contested decision the Commission applied a new evaluation test when rejecting the objective justification which Microsoft had submitted is based on a misreading of that decision.

705. That assertion is based on a single sentence in recital 783 to the contested decision, which is in a part of that decision containing the findings of the Commission's analysis, at recitals 560 to 778, of the refusal at issue.

706. That sentence reads as follows:

> '[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)'.

707. However, that sentence must be read in conjunction with the one coming immediately afterwards in the same recital, which states that '. . . the need to protect Microsoft's incentives to innovate cannot constitute an objective justification that would offset the exceptional circumstances identified'.

708. It must also be compared with recital 712 to the contested decision, where the Commission sets out the following considerations:

> 'It has been established above . . . that Microsoft's refusal to supply [creates a risk of elimination of] competition in the relevant market for work group server operating systems, that this is due to the fact that the refused input is indispensable to carry on business in that market and that Microsoft's refusal has a negative impact on technical development to the prejudice of consumers. In view of these exceptional circumstances, Microsoft's refusal cannot be objectively justified merely by the fact that it constitutes a refusal to license intellectual property. It is therefore necessary to assess whether Microsoft's arguments regarding its incentives to innovate outweigh these exceptional circumstances.'

709. In other words, in accordance with the principles laid down in the case-law . . . the Commission, after establishing that the exceptional circumstances identified by the Court of Justice in *Magill* and *IMS Health* . . . were present in this case, then proceeded to consider whether the justification put forward by Microsoft, on the basis of the alleged impact on its incentives to innovate, might prevail over those exceptional circumstances, including the circumstance that the refusal at issue limited technical development to the prejudice of consumers within the meaning of Article [102(b)] . . .

710. 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 (recitals 713 to 729 to the contested decision), establishing that the disclosure of interoperability was widespread in the industry concerned (recitals 730 to 735 to the contested decision) 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 (recitals 736 to 742 to the contested decision) and that its approach was consistent with Directive 91/250 (recitals 743 to 763 to the contested decision).

711. It follows from all of the foregoing considerations that Microsoft has not demonstrated the existence of any objective justification for its refusal to disclose the interoperability at issue.

712. As the exceptional circumstances identified by the Court of Justice in *Magill* and *IMS Health* . . . were also present in this case, the first part of the plea must be rejected as wholly unfounded.

As seen from the preceding extracts of the judgment, the GC upheld the Commission decision on the basis that the *Magill/IMS* exceptional circumstances were present. In doing so the GC gave an elastic interpretation to those exceptional circumstances. It should also be noted that the GC did not confine its statements to copyrights.

- *Indispensability*. The GC upheld the Commission's finding that it was indispensable for the competitors' systems to work as seamlessly with Windows as Microsoft's own products[806] even though a fringe of competitors unable to do so were operating on the market. The interface information might have been greatly more convenient for the competitors, but they *were* functioning without it. Indispensability in *Microsoft* did not mean exclusion from the market.[807]
- *Elimination of competition*. First, the GC interpreted this requirement as meaning the elimination of *effective* competition on the downstream market (paragraph 563). The continued existence of fringe competitors in niche markets was irrelevant. Secondly, the GC was content that the Commission should demonstrate merely a 'risk' of the elimination of effective competition and accepted that the Commission did not have to wait for the elimination of competition before it could act. It dismissed as semantics all Microsoft's arguments about a difference between 'risk', 'likely to', and 'high probability' (paragraphs 560–561) despite the oft-quoted plea of a Microsoft lawyer at the hearing that there is a world of difference between a risk of getting bird flu and the likelihood of getting it.[808] Unlike *Magill*, where the refusal to supply entirely excluded the potential entrant from the market, the competitors in *Microsoft* were on the market but might leave it, or become marginalised, at some future time. This all involved speculation as to how the (constantly evolving, high technology) market would develop in the future. As has been pointed out, this is akin to the kind of prediction that is undertaken in merger cases, where the EU Courts have held the Commission to a rigorous standard of proof.[809] In *Microsoft*, however, the GC was happy that the Commission had established a 'risk' based on accurate, reliable, and coherent evidence.[810] Furthermore, it has been pointed out that in Article 102 cases which may take years to reach the GC (over three in *Microsoft*) any 'risk' foreseen by the Commission at the time of the decision may or may not have materialised to a greater or lesser

[806] The Commission explained further at the hearing that this included a non-Windows WGOS being able to 'talk' to a Microsoft WGOS just as if it were itself a Microsoft WGOS: Case T-210/04, *Microsoft* [2007] ECR II-3601, para. 237.

[807] See D. Ridyard, 'Compulsory Access under EC Competition Law—A New Doctrine of "Convenient Facilities" and the Case for Price Regulation' [2004] *ECLR* 670.

[808] Said on Day Three of the *Microsoft* hearing, 26 April 2009, Ahlborn and Evans, n. 636, 927; D. Beard, '*Microsoft*: What Sort of Landmark?' (2008) 4 *Competition Policy International* 39.

[809] See Beard, ibid., 42–43; for mergers, see Chap. 15.

[810] Case T-210/04, *Microsoft* [2007] ECR II-3601, paras. 564, 620.

extent. The problem is then how far the Court could employ the benefit of hindsight, given the limitations of judicial review.[811]

- *A 'new product'*. The GC said that the Commission had not made a manifest error in failing to identify a specific new product for which there was actual or potential consumer demand whose emergence was prevented by the refusal to supply. It was enough that the refusal limited 'technical developments to the prejudice of consumers' within Article 102(b). Having noted that in *IMS* itself the CJ was concerned about refusals which prevented the development of the secondary market to the detriment of consumers,[812] the GC said that the appearance of a 'new product' was not the only relevant parameter (paragraphs 646–647). It noted that Article 102(b) applies to the limitation of technical development as well as production and markets. Accordingly the Commission was correct in considering that the test included (as yet unspecified and unknown) products emerging from innovation by the competitors which would not occur if the competitors left the market and/or were unable to develop products fully compatible with Windows. The lack of interoperability meant that consumers were increasingly locked in to Windows WGOS (paragraph 650). The GC also agreed with the Commission's view that the competitors would not have any interest in just 'cloning' Microsoft's products but had every reason to develop differentiated products (paragraph 658). However, it has been argued that mere cloning could be profitable for competitors if they could compete with Microsoft on price.[813] Notably (paragraph 659), Microsoft's argument that it would have less incentive to develop new technology if it were required to divulge it to competitors was held by the GC to be irrelevant to the 'new product' condition which was concerned only with the *competitors'* incentives to innovate (Microsoft's incentives were considered an objective justification issue). The GC thus endorsed the Commission's view that a refusal to supply may be abusive not because it excludes competitors but because it is likely to hinder future innovation.

In dealing with Microsoft's plea of objective justification the GC provided clarification of how the defence actually works (paragraph 688). The case itself, however, demonstrates how difficult it is to separate out objective justification from the initial finding of abuse (see paragraph 659). The GC rejected Microsoft's plea that the fact that the information was covered by IPRs justified its refusal to disclose, on the grounds that it would lead to the conclusion that a refusal to license could never be an abuse. It also rejected Microsoft's pleas that disclosure would have a negative impact on its incentives to innovate, dismissing them as 'vague and theoretical arguments' which did not specify the technologies or products concerned (paragraph 698). The judgment suggests, therefore, that the defence might succeed if a greater level of detail were given. However, in paragraph 696 the GC puts the burden of proof on the dominant undertaking to demonstrate that its incentives would be harmed by compulsory licensing and, especially where (as here) the evolution of high technology markets is involved, it is questionable whether it would ever be possible to discharge that burden. The GC's judgment on this point should also be contrasted to its willingness to accept, without similar specificity, the claims about 'technical development' being limited and assuming that the refusal to deal will lead to consumer harm. One curious point on objective justification is the GC's treatment of the Commission's statement that the positive impact on the industry as a whole outweighed the negative impact on Microsoft's incentives.[814] Microsoft argued before the GC that this introduced a whole new test into the application of Article 102,[815] and the GC's attempt to try to

[811] See further on this, Beard, n. 808, 47.

[812] Case C-418/01, *IMS* [2004] ECR I-5039, para. 48.

[813] D. Howarth and K. McMahon, '"Windows has performed an Illegal Operation": The Court of First Instance's Judgment in *Microsoft v Commission*' [2008] ECLR 117, 124.

[814] COMP/37.792, *Microsoft* 24 March 2004, para. 783.

[815] Case T-210/04, *Microsoft* [2007] ECR II-3601, paras. 669–670.

explain away what the Commission was saying is unconvincing (paragraphs 705–710).[816] From the efficiencies point of view it can be argued that the Commission was correct[817] although it is also said that balancing tests are 'an inherently unreliable and unpredictable method to address mandatory access cases'.[818]

As with the tying part of the judgment,[819] *Microsoft* is significant not only in respect of the substantive law on refusal to supply and IPRs but also in the context of the 'modernisation' of Article 102 and the Commission's review. First, the GC concentrated on looking at the position of the competitors and stressed the fall in their market share and the rise in Microsoft's (for example, paragraph 428). Secondly, it emphasised the disadvantage to the competitors and deduced consumer prejudice from that. Thirdly, as already noted, the GC in paragraph 664 repeated that Article 102 is concerned with the impairment of the competitive structure, but said that Microsoft had done that by acquiring a significant market share and did not explain how it led to consumer detriment in this case.

The GC has also been criticised for failing to engage sufficiently with the implications of networks effects. One American commentator has suggested that the GC, instead of straining to apply the existing rules, could instead have asked the 'important questions', i.e. (a) are consumers and the market seriously disadvantaged by denial of full access to interoperability information and if 'yes', (b) would the respondent and the market be seriously disadvantaged by a duty to grant access?[820]

E. REFUSAL TO SUPPLY IN SITUATIONS NOT INVOLVING UPSTREAM/DOWNSTREAM MARKETS

Refusals to supply where the issue is not one of vertical foreclosure of competitors in downstream markets are not covered in the refusal to supply section of the Guidance Paper and have mainly concerned the supply of products for distribution or resale and a dominant firm protecting its commercial interests.

In *United Brands* the Commission held that UBC had abused its dominant position on the banana market by refusing to continue supplying its Chiquita bananas to its Danish ripener/distributor, Oelsen, in response to Oelsen taking part in an advertising and promotion campaign for Standard Fruit's 'Dole' bananas. Oelsen was not under an exclusive purchasing obligation but UBC argued that Oelsen had sold fewer and fewer Chiquitas in comparison to Doles, and had taken less trouble in ripening them. Without gainsaying UBC's allegations, the CJ upheld the Commission's finding that the refusal to supply infringed Article 102.

816 I.e. that if the sentence was read in conjunction with other passages of the decision it was clear that the Commission was considering whether the alleged impact on Microsoft's innovation incentives might prevail over the presence of the exceptional circumstances laid down in *Magill* and *IMS*.

817 C. Ritter, 'Refusal to Deal and Essential Facilities: Does Intellectual Property Require Special Deference Compared to Tangible Property?' (2005) 3 *World Competition* 281, 298.

818 D. Geradin, 'Limiting the Scope of Article 82 EC: What Can the EU Learn from the Supreme Court's Judgment in *Trinko*, in the Wake of *Microsoft*, *IMS* and *Deutsche Telekom*?' (2004) 41 *CMLRev* 1526, 1542.

819 See Section 12.E.iii, p. 480 ff.

820 E. Fox, '*Microsoft* (EC) and Duty to Deal: Exceptionality and the Transatlantic Divide' (2008) 4 *Competition Policy International* 25, 29. The Commission initiated a further investigation in January 2008 for refusing 'to disclose interoperability information across a broad range of products, including information related to its Office suite, a number of its server products, and also in relation to the so called.NET Framework': MEMO/08/19. In July 2009, the Commission announced that Microsoft had 'made proposals in relation to disclosures of interoperability information that would improve interoperability' between third party products and several Microsoft products: MEMO/09/352.