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Refusal to Deal

Answers to the Questionnaire of the ICN Unilateral Conduct Working Group

As a non-governmental agent (NGA) and a member of the ICN Unilateral Conduct Working Group, I hereby provide my answers to the questionnaire on "refusal to deal."

I. Concept of Refusal to Deal

The answers are based on the term of "refusal do deal" as defined by the questionnaire, *i.e.* as "the unconditional refusal by a dominant firm (or a firm with substantial market power) to deal with a rival." The questionnaire further explains that "this typically occurs when a firm refuses to sell an input to a company with which it competes (or potentially competes) in a downstream market." In this sense, a refusal to deal also includes the case of a "refusal to license intellectual property (IP) rights" or "to grant access to an essential facility."

A refusal to deal may also take the form of a "constructive" refusal to deal which is characterized "by the dominant firm's offering to supply its rival on unreasonable terms (e.g., extremely high prices, degraded service, or reduced technical interoperability)." A constructive refusal to deal may be accomplished through a so-called "margin-squeeze," "which occurs when a dominant firm charges a price for an input in an upstream market, which, compared to the price it charges for the final good using the input in the downstream market, does not allow a rival on the downstream market to compete."

Neither the questionnaire nor the following answers to it cover "conditional refusals to deal." In such a case, "the supply of the relevant product is conditioned on the rival's accepting limitations on its conduct, such as certain tying, bundling, or exclusivity arrangements." The ICN Unilateral Conduct Working Group has dealt with such practices in the *Report on Tying and Bundled Discounting* (June 2009) and the *Report on Exclusive Dealing* (April 2008).[1]

II. Purpose of These Answers

The questionnaire is principally addressed to the different agencies as ICN Members and seeks to produce information on varies jurisdictions. Yet it was also made clear that the NGAs should not double the work of their national agencies but should feel free to present their own view on the issues at stake. Accordingly, the answers take a much broader policy approach to the questions. References to individual jurisdictions are made mostly with the aim of illustrating the substantive arguments. Most examples are taken from European and German law on the one hand and U.S. American law on the other hand.

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[1] See http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Unilateral_WG_4.pdf.

III. General Legal Framework

1. *Does your jurisdiction recognize a refusal to deal as a possible violation of your antitrust law? If so, is the term refusal to deal used in a manner different from the definition in the introductory paragraphs above? Please explain.*

Refusals to deal are recognized by some jurisdictions as a potential violation of competition laws. In the framework of rules on unilateral conduct, a refusal to deal can be considered as one of the cases of non price-related conduct for which illegality is most difficult to be assessed. In the market economy, also dominant firms should in principle be free to choose with whom they prefer to deal and at what terms. As in all cases of unilateral conduct, the challenge consists in distinguishing anticompetitive conduct from competition on the merits. Hence, the question is not whether a refusal to deal is considered illegal but which conditions need to be met to make an individual refusal to deal unlawful.

A first step to limiting the rules and principles on refusal to deal may consist in defining the very concept of a "refusal to deal" more narrowly than just as a "refusal to deal with a (potential) customer." The questionnaire seems to take such an approach by limiting "refusals to deal" to "refusals to deal with a rival." Yet such a narrow definition would exclude many cases of potentially illegal refusals to deal in which the dominant firm and the costumer are not active in the same market. Under European law, *United Brands*, one of the first and most prominent refusal-to-deal cases was of such a nature.[2] In this case, United Brands tried to punish and discipline Olson, a Danish ripener, for having cooperated with Dole in an advertising campaign by terminating supplies of bananas. In this case, Olson was not a "rival" of United Brands. Rather, the economic "target" of the refusal to supply was Dole, United Brands' competitor, who was in need of access to the ripening facilities controlled by United Brands. This example demonstrates that the cases to be covered in the following should not be limited to refusal to deal "with a rival." It is therefore suggested to define a "refusal to deal" more openly in the sense of a "refusal to deal with a (potential) customer." As pointed out before, this would not mean that every refusal to deal with a customer will have to be considered as illegal. This is rather a matter of the additional requirements of illegality, which still need to be defined.

In line with this broad definition, it is recommended to leave the "theory of harm," which is required in order to distinguish legal from illegal conduct," to the conditions for illegality. This seems important in order to avoid "false negatives." Whereas it is true that "refusal-to-deal" cases are nowadays mainly discussed when vertically integrated firms use their market power in the upstream market as a leverage to exclude competitors from a downstream market, *United Brands* demonstrates that these are not the only relevant cases. The scenario, in which a dominant firm tries to extend market power to a downstream market by refusing to deal with a rival, is not just a description of a potential illegal refusal to deal; it already alludes to a very specific theory of harm. This is especially true for the so-called "essential facilities doctrine." Equating an "essential facilities" scenario with an illegal refusal to deal may easily produce two sorts of fallacies. On the one hand, there is a risk of "false negatives" if enforcers argue that a refusal to license can only be considered as illegal if the dominant firm refuses to provide an essential input or to grant access to an essential facility to a competitor in the downstream market. On the other hand, there is also the risk of "false positives:" the refusal to provide an essential input or to grant access to an essential facility may not be a sufficient test for identifying illegal conduct.

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[2] Case 27/76 *United Brands v Commission* [1976] ECR 207. Cf. van Bael & Bellis, *Competition Law in the European Union*, 4th ed. 2005, p. 947 (distinguishing *United Brands* as a sub-category of refusal-to-deal case from cases in which the dominant firm refuses to deal with a competitor in a downstream market).

2. *Please state the statutory provisions or legal basis (including any relevant guidelines or formal guidance) for your agency to address a refusal to deal. Are there separate provisions for specific forms of refusal (e.g., IP licensing, essential facilities, margin squeeze)?*

Refusal-to-deal cases are dealt with under unilateral conduct rules. In many jurisdictions, it will be for the agencies and the courts to decide whether and – if so – under which conditions the general rules on unilateral conduct apply to a refusal to deal. U.S. law provides an example of such a law. Section 2 of the Sherman Act leaves it to practice to decide whether and under which conditions a refusal to deal has to be considered an act of monopolization or an attempt of monopolization.[3]

Under EU law, a refusal to deal has to be dealt with under the general prohibition on abuse of market dominance. However, Article 82 of the EC Treaty[4] provides more guidance than U.S. law by containing a non-exhaustive list of examples of such an abuse. Yet, this list does not contain an explicit rule on refusal to deal. In individual cases of a refusal to deal, practices may refer to different examples contained in Art. 82. Most importantly, the European Court of Justice (ECJ) based its decision in *Magill* on Art. 82(b) EC, by arguing that the refusal to license the copyright in the listings of TV programs to an independent publisher "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." [5] This "new product requirement" was explicitly derived from the formula of Art. 82(b) EC according to which an abuse may consist "in limiting production, markets or technical development to the prejudice of consumers." Later on, the discussion arose whether the new product rule would have to be understood as a "cumulative," i.e. indispensable requirement for a duty to license. In *IMS Health*,[6] The ECJ answered this question in the affirmative, however, without even mentioning Art. 82(b) EC. This judgment encouraged Microsoft to challenge the decision, in which the Commission had held that Micorsoft had violated Art. 82(b) EC by refusing to provide competitors in the market for work group server operating systems the interoperability information contained in the Windows program. Before the European Court of First Instance (CFI), Microsoft indeed argued that its competitors did not intend to provide a new product in the sense of the *IMS Health* holding.[7] However, the CFI recalled that the new product rule had been based by the ECJ on the example contained Art. 82(b) EC.[8] Thereby, the CFI was able to confirm the position of the Commission according to which the issue was not only whether competitors intended to offer a new product but that it was sufficient that Microsoft had "limited technical development to the prejudice of consumers" in the sense of Art. 82(b) by a "refusal to allow follow-on innovation."[9]

Still, Art. 82(b) EC should not be considered as the only legal basis for a prohibition of a refusal to deal under European law. It is to be recalled that in *United Brands* the ECJ did not even refer to the cases listed in Art. 82 EC, but immediately held that a dominant firm "cannot stop supplying a long standing customer who abides by regular commercial practice, if the

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[3] See, in particular, *Aspen Skiing v. Aspen Highlands Skiing*, 472 U.S. 585 (1985); *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, LLP, 540 U.S. 398 (2004).
[4] These comments refer to the provisions of the EC Treaty still applicable at the time of the writing of these comments, although the Treaty on the Functioning of the European Union is expected come into force on 1 December 2009.
[5] Joined Cases C-241/91 P and C-242/91 P *RTE and ITE v Commission* (*Magill*) [1995] ECR I-743, para. 54.
[6] Case C-418/01 *IMS Health* [2004] ECR I-5039, para. 38.
[7] Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, paras 621-28.
[8] *Ibid*., para. 643.
[9] *Ibid*., para. 632.

orders placed by that customer are in no way out of the ordinary."[10] Recognition of additional cases of a refusal to deal beyond the cases listed by Art. 82 EC is consistent with the wording of this provision since the list is not exhaustive. It has to be added that European practice could also rely on other examples of Art. 82 EC, especially on the prohibition on discrimination as contained in Art. 82(c) EC, in order to capture refusal-to-deal cases.

Still in other jurisdiction, practice may even rely on rules that have specifically been adopted in view of refusal-to-deal cases. An example is provided by the Sec. 19(4) No. 4 German Act against Restraints of Competition,[11] which contains a specific rule on essential facilities. It is important to note that this rule is limited to networks and other infrastructure facilities. At the time of its adoption, in the late 1990s, the legislature carefully considered the scope of this rule and rejected its application to IP rights in particular. However, this has not prevented the German Federal Supreme Court (*Bundesgerichtshof*) from maintaining a duty to license of the holder of a patent that controlled access to a technological standard by relying on the German prohibition of discrimination as contained in Sec. 20(1) of the Act.[12] Hence, also German experience demonstrates that specific rules on refusal to deal should not be considered to be of an exclusionary character. Those very specific rules, just like the examples contained in Art. 82 EC, may be helpful in order to deal with some cases of a refusal to deal, whilst the general prohibition on anti-competitive unilateral conduct still provides a fall-back position for other cases.

Rules implementing an essential facilities doctrine are also known in other jurisdictions. According to the Slovak Competition Act, also a "right" can be considered as an essential facility in the sense of its essential facilities provision.[13] Therefore, it seems that, in contrast to the German essential-facilities provision, the Slovak one would also apply to a refusal to license an essential intellectual property right.

3. Do the relevant provisions apply only to dominant firms or also to other firms?

Some jurisdictions also prohibit unilateral conduct below the threshold of market dominance. In Germany, for instance, the prohibition on discrimination as contained in Sec. 20(1) Act against Restraints of Competition[14] also applies to firms that hold so-called "relative" market power. According to the second paragraph of Sec. 20, the first paragraph also applies to undertakings "insofar as small or medium-sized enterprises as suppliers or purchasers of certain kinds of goods or commercial services depend on them in such a way that sufficient and reasonable possibilities of resorting to other undertakings do not exist." This rule has considerable practical importance in the retail business where small retailers may depend on access to certain brands for doing their business, although the brand as such does not provide market power, or inversely the producers of certain brands depend on access to large retail chains in order to have sufficient access to consumers.

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[10] Supra note 1, para. 182. This holding was recently confirmed in Joined Cases C-468/06 to C-478/06 *Sot. Lélos kai Sia* [2008] ECR I-7139; on this case see Josef Drexl, 'Healing with bananas – How should Community competition law deal with restraints on parallel trade in pharmaceuticals?' in TECHNOLOGY AND COMPETITION: CONTRIBUTIONS IN HONOUR OF HANNS ULLRICH 571 (Josef Drexl et al. eds 2009).

[11] Gesetz gegen Wettbewerbsbeschränkungen (GWB). English translation available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0911_GWB_7_Novelle_E.pdf.

[12] Case KZR 40/02, (2004) *Gewerblicher Rechtsschutz und Urheberrecht* 966 – *Standard-Spundfass*. An English translation of this decision is available in: 36 *Journal of Intellectual Property and Competition Law (IIC)* 742 (2005).

[13] Art. 8(3) and (4) of the Act 136/2001 on the Protection of Competition. English translation available at: http://www.antimon.gov.sk/files/30/2009/Act%20136-2001-novela-aj.rtf.

[14] *Supra* note 11.

4. *Is a refusal to deal a civil/administrative and/or a criminal violation? If it is a criminal violation, does this apply to all forms of refusal to deal?*

In principle, the ban on refusal-to-deal cases are enforced in accordance with the general rules applicable to unilateral conduct. In contrast to the enforcement of the cartel prohibition, experience shows that private enforcement may play a major role in the field. Wherever the law makes a refusal to deal illegal, the law may recognize a corresponding private right of the potential customer (so-called "petitioner") to claim a "duty to deal," which will be enforced by the private law courts. This is why, for instance, the abovementioned German rules on control of "relative market power" are mostly enforced by private parties themselves who seize private law courts with the goal of forcing the other party with relative market power to enter into a contractual relationship. Competition agencies may therefore largely abstain from enforcing such rules by imposing administrative fines.

In general, private enforcement may even be more crucial in refusal-to-license cases. Here, the petitioner of an IP right may be tempted to simply use the right and may then be sued by the right-holder for infringement. The defendant may then rely on the violation of competition law as a defence to the infringement claim. Under EU competition law, such reliance on Art. 82 EC is known as the "Euro defence." In a most recent case, the German Federal Supreme Court has brought precision to the requirements under which a firm can use another person's IP right and rely on German competition law as a defence to the IP infringement claim.[15]

Another question is whether refusal-to-license cases are good cases for criminal sanctions. Since the assessment of the illegality of refusal-to-deal cases is most complex, for many jurisdictions the major problem in this regard will be that the legal provisions that apply are not sufficiently precise in the light of constitutional requirements for supporting criminal sanctions.

IV. Experience

5. *How many in-depth investigations (i.e., beyond a preliminary review) of a refusal to deal has your agency conducted during the past ten years (or use a different time frame if your records do not go back ten years)?*

See the answers provided by the competition agencies.

6. *In how many refusal to deal cases did your agency find unlawful conduct during the past ten years? Please provide the number of cases concerning IP-licensing, essential facilities, margin squeeze, and all other types separately. For any case, in which your agency found unlawful behavior, please describe the anticompetitive effect and the circumstances that led to the finding.*

   For administrative systems -- i.e., the agency issues its own decision (subject to judicial review) on the legality of the conduct -- please state the number of agency decisions

[15] Bundesgerichtshof of 4 July 2009, Case KZR 29/06 – *Orange-Book-Standard*. According to this judgment, the defendant is required to request a license before using the IP right. If the right-holder refuses to license, the defendant must still act according to a reasonable licensing contract and even pay reasonable licensing fees.

finding a violation, or settlements that were challenged in court and, of those, the number upheld and overturned. For judicial systems -- i.e., the agency challenges the conduct in court -- state the number of cases your agency has brought that resulted in a final court decision that the conduct violates the competition law or a settlement that includes relief.

Please state whether any of these cases were brought using criminal antitrust authority.

Please provide a short English summary of the leading refusal to deal cases (including IP licensing, essential facility, and margin squeeze) in your jurisdiction, and, if available, a link to the English translation, an executive summary, or press release.

This question refers to the frequency of refusal-to-deal cases. Allthough these comments are not intended to report on the experience of any given jurisdiction, it still makes sense to consider the likelihood that refusal-to-deal cases will arise in the future in more general terms.

Especially practice in experienced jurisdictions has proven to be very hesitant to intervene too easily and too frequently in refusal-to-deal cases. The reasons for such hesitation are very obvious. A ban on a refusal to deal does not prohibit a specific form of business action. It rather imposes a "duty to act" in a particular way. One may even argue that, when challenging a refusal to deal, the agencies and courts have to act very much like regulatory agencies, which sometimes will even have to fix the price for the good or service provided by the dominant firm. The agencies and courts may even be more hesitant to order a duty to license for not interfering with the exclusivity of IPRs as the very essence of such rights. Accordingly, in *Magill*, the ECJ held that a duty to license can only be affirmed in "in exceptional circumstances."[16]

But how do we have to understand the term of "exceptional circumstances" in this context? Is this meant to be a statement on the frequency of intervention or one on how to define the substantive threshold of intervention?

In this regard, it is important to note that in the future we may well experience more cases involving a refusal to license. Already during the last few years, practice in the EU demonstrated that most important cases on refusal to deal were IP-related. Such cases may become even more frequent, when many markets, most importantly in the information technology (IT) sector, are increasingly based on standardized technologies. Access to such technology – and, hence, to the IP rights that control the standard – will be indispensable for competitors for entering the relevant market. Therefore, the question of whether unilateral conduct rules may be used as a legal basis for a duty to license may well become an almost daily issue for competition agencies in many jurisdictions rather than remaining just an "exceptional" phenomenon.

7. *Does your jurisdiction allow private parties to challenge a refusal to deal in court? If yes, please provide a short description of representative examples of these cases. If known, indicate the number (or an estimate) of private cases.*

As already highlighted in the answer to Question 4, private cases may especially arise under Art. 82 EC. Within the EU, cases on a refusal to deal often reach the ECJ under the referral procedure of Art. 234 EC from private law courts who have before them cases of a Euro defence, like in refusal-to-license cases,[17] or cases in which a dominant firm is sued for

[16] *Supra* note 5, para. 50.
[17] This was the case in the *IMS Health* case, supra note 6.

damages or even for a claim to start or to continue supplies.[18]

In jurisdictions which allow such private enforcement, private parties have a choice between private enforcement and complaining before competition agencies with the objective of triggering administrative intervention.[19] Experience in the EU shows that competition agencies are not necessarily better placed than private law courts to provide quick relief to the victims of a refusal to deal. In *IMS Health*, for instance, the President of the CFI suspended the interim decision of the Commission, holding that the case-law of the courts was not sufficiently clear to provide a prima facie case against *IMS Health* who had refused to license to the complainant.[20] Private law courts may therefore be better placed than administrative agencies to provide interim relief to the victims of a refusal to deal, for being able to device a "preliminary" legal opinion in even more complex cases that have not been before the courts so far.

VI. Evaluation of an actual refusal to deal

8. *What are your jurisdiction's criteria for evaluating the legality of refusals to deal? You may wish to address the following points in your response.*

    a. *What are the competitive concerns regarding a refusal to deal? Must the practice exclude or threaten to exclude a rival (or rivals) from the market, or all rivals? If only threatened exclusion is required, how is it determined? If neither actual nor threatened exclusion is required, what other harms are considered?*

In very general terms, the primary "competitive concern" consists in that a refusal to deal has an exclusionary effect on rivals, whether they are potential customers or not, and thereby produces a restrictive impact on competition and/or reduces consumer welfare. Because of this "exclusionary effect," refusal to deal is usually considered to belong to the so-called "exclusionary practices," as opposed to purely "exploitative practices."

This raises the question whether actual exclusion should be required. From a policy perspective, the answer should be "no." Unilateral conduct rules have a preventive function. They are designed to inform dominant firms on how they have to behave in the relevant market. Accordingly, firms have to assess whether they are allowed to act or not when they design their "future" business methods. Therefore, the only question can be whether the refusal to license has the potential effect of foreclosing markets and not whether a specific refusal to deal "later on" actually leads to the exclusion of one or several rivals from the market.

Such predictions, of course, require an economic "theory of harm." This is where the economics on market foreclosure has to come into play. One of these theories of harm is the essential facilities doctrine, which is based on the idea that a dominant firm that controls an essential facility (such as an infrastructure – ferry harbours, airports, railway tracks) should

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[18] See more recently Joined Cases C-268/06 to C-278/06 *Sot. Lélos kai Sia* [2008] ECR I-7139 (private law claims of Greek pharmaceutical wholesalers against GlaxoSmithKline who tried to undermine parallel exports to other Member States by restricting supplies).

[19] Both roads were taken in *IMS Health*; see Commission Interim Decision, Case COMP D3/38.044 – NDC Health/IMS Health, http://ec.europa.eu/competition/antitrust/cases/decisions/38044/en.pdf.

[20] Order of the President of the CFI of 26 October 2001, Case T-184/01 R *IMS Health v Commission*, http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=T-184/01&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100.

not be allowed to exclude competition from the downstream market by refusing to grant access to the essential facility. However, refusal-to-deal cases should not always be equated with a leveraging theory, in which a dominant firm tries to extend market power from an upstream to a downstream market. Especially the ECJ has to be criticized for applying such an approach to some refusal-to-license cases. It may have been correct to apply a leveraging theory in the *Magill* case,[21] where it was possible to distinguish between the upstream market for the information on the TV programs (or maybe even the broadcasting operation itself) and the downstream market for TV guides. However, the situation in *IMS Health* was very different.[22] There, the petitioner was in need of using the copyrighted brick-structure of the dominant firm for entering the market for the service of providing data on the retail sales of drugs to the pharmaceutical companies after the 1860-brick structure, basically a map of Germany subdivided in 1860 sectors, had emerged as the standard used in the whole industry. In this case the cause of market dominance is to be found in the market for the service of data collection where the brick structure was used as a standardized tool. To distinguish here between an upstream market for the IP right and a downstream service market does not only appear highly artificial. More importantly, the leveraging theory, according to which the copyright holder harmed competition by "leveraging market power from one market to another," does not really capture the core of the theory of harm needed for the assessment of the case. Rather, it would be more appropriate to state that there was only one relevant market, namely the service market, on which the copyright holder has been dominant all along and from which he was able to exclude any competitor by relying on the copyright controlling a standard that was essential for doing business in the market.

Another issue is whether the potential of excluding some competitors would be sufficient or whether there must be complete elimination of competition by exclusion of all rivals. In the light of the general goal of consumer welfare, the latter might seem to provide the appropriate answer, since, as some would argue, competition law should not protect competitors but competition. As long as there is a sufficient number of competitors that keep prices low, consumers will not suffer. Yet this view needs to be rejected. Even discrimination against some competitors may be considered a specific aspect which may tip the balance to illegality. Whereas discrimination as such should not be considered as anti-competitive under unilateral conduct rules, even in the very cautious *Trinko* decision of 2004,[23] the U.S. Supreme Court held that a refusal to deal may only be considered illegal where a dominant firm stops supplying an existing customer or when it discriminates between different customers. In the above-cited German *Standard-Spundfass* case,[24] the German Federal Supreme Court affirmed a violation of German competition law in a situation where the holder of a patent on the technical specifications of a drum used in the chemical industry had agreed to grant licenses for free to all other German drum manufacturers who had participated in the standard-setting procedure of the German chemical industries for such drums but refused to license to an Italian manufacturer who had not participated in this procedure. For affirming a violation of competition law, the Court did not even consider whether the Italian competitor would have intended to provide higher quality drums, which was unlikely, given the fact that the Italian competitor was in need of using the same technology. Nor did the court argue that the exclusion of the Italian competitor had lowered price competition, which was equally unlikely, given the considerable number of other producers active in the market. This case may be taken as evidence that, under German law, competitors enjoy equal protection even if consumers do not suffer any specific harm.

[21] Supra note 5.
[22] See supra note 6.
[23] Supra note 3.
[24] Supra note 12.

Such a policy may be considered by many as economically unsound. However, the question of how many competitors are needed in order to drive prices down, in the sense of static efficiency, is already difficult to answer. Moreover, the question of whether specific conduct harms competition should not only be assessed through the lenses of neo-classical price theory but should also take into account institutional perspectives. Granting equal access to all competitors to a market does not only correspond to the normative criterion of equal treatment. It may also create the better institutional arrangement for promoting entrepreneurship and enhancing the willingness of individuals to take economic risk by starting their own business operations. The concept of competition in such a system is very much based on the notion of openness of the market guaranteed to all market participants and not just on consumer welfare defined through the criterion of static efficiency and pre-defined consumer interests. This concept of openness of markets may well be the better and more sustainable basis for an efficient, i.e. welfare enhancing competition law. Such an approach may also be preferable in view of enhancing dynamic competition. In a scenario of standardized technology, for instance, it may be better to have multiple players who compete with each other for follow-on innovation than just a limited number of players that are needed to keep prices low for consumers. Innovation processes are often much more driven by diversity of ideas, which requires that the most innovative minds have access to the market.

b. *Must consumer harm be demonstrated? Must the harm be actual or may it be just likely, potential, or some other degree of proof?*

Especially economists often argue that in order to distinguish properly between anti-competitive conduct and competition on the merits, there should be a requirement of a showing of consumer harm.[25] This also seems a widely spread view in the U.S. In the recent decision in *Rambus v. FTC*, a so-called patent hold-up case, in which the FTC had ordered Rambus to license its DRAM technology to chip manufacturers, the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) held that a violation of Section 2 Sherman Act would require a showing of consumer harm. The Court thereby also clarified that only the final consumer could be considered as a consumer in the sense of the consumer harm criterion. Hence, a mere showing that chip producers would have to pay excessive prices was not held to be sufficient proof of harm to competition.[26]

Under European law, the ECJ has never accepted such a consumer harm approach. Even according to most recent decisions of the ECJ[27] and of the CFI,[28] it was held that Art. 82 EC also protects consumers “indirectly” by protecting the “competitive structure” and that therefore a showing of actual harm to consumer would not be required.[29] In its *GlaxoSmithKline* decision, however, the CFI suddenly seemed to prefer a different approach to applying Art. 81 EC on restrictive agreements in requiring that in order to affirm a restraint of competition in the sense of Art. 81(1) EC actual harm to consumers needs to be demonstrated. The Court justified this view in the light of the overall goal of competition law to promote consumer welfare. On appeal, however, the ECJ corrected this holding by clarifying that EU competition law does also protect the structure of the market and that

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[25] See also the Economic Advisory Group on Competition Policy (EAGCP), An Economic Approach to Article 82, July 2005, http://ec.europa.eu/comm/competition/publications/studies/eagcp_july_21_05.pdf.

[26] Rambus Inc. v. FTC (D.C. Cir. 2008), http://pacer.cadc.uscourts.gov/docs/common/opinions/200804/07-1086-1112217.pdf. See also the critical comments by Josef Drexl, ‘Deceptive Conduct in the Patent World – A Case for US Antitrust and EU Competition Law’, in: PATENTS AND TECHNOLOGICAL PROGRESS IN A GLOBALIZED WORLD, LIBER AMICORUM JOSEPH STRAUS 137, 143 *et seq*. (Wolrad Prinz zu Waldeck et al. eds 2009).

[27] Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331, para. 106.

[28] Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, para. 664.

[29] Case T-168/01 *GlaxoSmithKline v Commission* [2006] ECR II-2969, para. 172.

therefore "it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price."[30]

The European rejection of the consumer-harm approach is reminiscent of the structure-conduct-performance paradigm which is nowadays quite rightly rejected by modern economics. However, the European approach to the criteria for a restraint of competition should not be accused of being based on a "structural" approach. The wording used by the Courts is explained by the specific set of facts underlying the early *Continental Can* judgment of the ECJ, in which it was held that ex-Art. 86 EEC Treaty (Art. 82 EC) would also protect consumers in an indirect way by prohibiting a merger of an already dominant firm with a competing firm for harming the structure of competition.[31] Whereas in this decision, the Court had to deal with a merger case affecting the "structure" of competition, and thereby laid the foundation for the recognition the category of structural abuses as part of the Art. 82 EC, the wording ("structure") later made it over to other abuses, including exclusionary practices and refusal-to-deal cases. It is worthwhile to note that in the Italian versions of the *Continental Can* decision and the successor decisions of the recent past, the "structure" wording has never been used. Instead, the Court in the Italian versions preferred to use the word of "effective competition" (*concorrenza effettiva*), which highlights the central argument of this case-law. Already in *Continental Can*, the Court relied on ex-Art. 3(f) EEC Treaty (Art. 3(1)(g) EC) which proclaims the guarantee of "undistorted competition" in the internal market as one of the goals of EC law. From this, it is clear that the immediate goal of EC competition law is the protection of competition – or the competitive process – as such, whereas the protection of consumer interests is only an intermediary goal.

The question remains, however, whether the European approach can be considered good economic policy. Indeed, European law may protect consumers even much better by protecting competition as such and without additionally requiring a showing of harm to consumers. Indeed, the consumer-harm approach suffers from a number of flaws. Two arguments seem most important: first, the consumer-harm approach increases the risk of false negatives by making it more difficult to prove a violation of competition law.[32] Secondly, there is also the need to predict whether a specific conduct is illegal when a dominant firm, for instance, refuses to deal with a rival. Economists would mostly assess consumer harm in terms of price and output. However, in many markets, technological progress has become increasingly important also for consumers. Whether a rival who is excluded from the market by a refusal to deal and who therefore will not be able to compete with the dominant firm for better products or follow-on innovation will come up with innovation that will be preferred by consumers, however, is simply a development that cannot be predicted easily or at all. Whether product innovations can convince consumers to move from the incumbent to the rival is a matter for the competitive market to decide. This is what Friedrich August von Hayek meant by "competition as a discovery procedure."[33] According to this approach, it is better to protect the "process of competition" instead of assessing the effects of a conduct on competition by an attempt to predict future effects on the interest of consumers which can, after all, only be identified by effective competition.

There is also an option to the consumer-harm approach. A restraint of competition especially in applying unilateral conduct rules should be assessed in the light of foreclosure effects.

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[30] Joined Cases C-501/06, C-513/06, C-515/06 and C-519/06 *GlaxoSmithKline v Commission* [2009] ECR I-0000, para. 63; also citing Case C-8/08 *T-Mobile Netherlands* [2009] ECR I-0000, paras. 38 *et seq*.
[31] Case C-6/72 *Euroemballage and Continental Can v Commission* [1973] ECR 215, para. 25.
[32] This is highlighted by the fact that in recent years it was for alleged infringers of competition law to argue before the European Courts that proof of actual harm to consumers should be required.
[33] Friedrich-August von Hayek, *Competition as a Discovery Procedure*, in NEW STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS AND THE HISTORY OF IDEAS (Friedrich August von Hayek ed. 1978), p. 179.

However, in its Guidance Paper on Art. 82 EC, the Commission seems to go in the direction of the consumer-harm approach by arguing that it will focus its enforcement priorities on those types of conduct that are most harmful to consumers.[34] Yet this does not have to prove that the Commission will now completely switch to a consumer harm approach. In principle, it maintains the previous position in line with the case-law of the courts that a violation has to be proven by "anticompetitive foreclosure"[35] and provides a serious of considerations for assessing such foreclosure effects.[36] Still, the Commission seems to require "likely consumer harm" in addition to foreclosure effects and, in this regard, deserves to be criticized against the backdrop of the analysis presented above. At least the Commission clarifies that also direct purchasers, even when they are not final consumers, are to be considered consumers in this sense. In comparison to the situation in the U.S., this certainly mitigates the European approach.

c. *Does intent play a role, and if so what role and how is it demonstrated?*

In general, competition law should not penalize intent but only real harm or threat to competition. However, in practice, agencies and courts should and usually do take into account the strategies of dominant firms, including their intentions, when assessing the legality of their business conduct. In this regard, where investigation by the competition agencies produces evidence that a dominant firm has developed a strategy which it itself considers as one of exclusionary conduct, such evidence can support an economic-based theory of harm in the sense that the conduct indeed had the potential of foreclosing markets to actual or potential competitors.

d. *Are refusals to deal evaluated differently if there is a history of dealing between the parties? Is a prior course of dealing between the parties a requirement for finding liability?*

In the U.S., after the *Trinko* holding,[37] it looks very unlikely that the Supreme Court would ever apply Section 2 Sherman Act to an "initial" refusal to deal, whereas termination cases may still fall under Section 2 Sherman Act.

In Europe, Article 82 EC has also been applied to cases of "initial" refusal to deal.[38] This is sound policy. To limit a violation of competition law to termination cases could even turn out to be counterproductive. Under such a rule, dominant firms would be better advised to never enter into a contractual relationship with rivals.

Yet distinguishing between termination cases and initial refusals may make sense in the framework of assessing whether the refusal is efficient. Prior dealing indicates that the dominant firm itself was at least at one point in time of the opinion that this made economic sense. It is therefore good policy, like according to the Guidance Paper of the European Commission, to require the dominant firm to demonstrate why the dealing should no longer be considered efficient.[39]

e. *Are refusals to deal evaluated differently if the dominant firm has had a course of dealing with firms that are not rivals or potential rivals? Thus, if a firm sells its*

[34] Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct to dominant firms, 9 February 2009, para. 5, available at: http://ec.europa.eu/competition/antitrust/art82/guidance_en.pdf.
[35] *Ibid*., para. 19.
[36] *Ibid*., para. 20.
[37] Supra note 3.
[38] See, in particular, the ECJ decision in *Magill*, supra note 5, and *IMS Health*, supra note 6.
[39] Guidance Paper, supra note 34, para. 84.

product to everyone except its main rival, is that relevant to whether the refusal is unlawful?

Such discrimination may be another indication that the refusal to deal aims to exclude the rival from the market. Yet, also in this regard, there must be a convincing theory of harm which makes the refusal to deal likely to harm competition. Discrimination practiced by a dominant firm as such is no proof that there is no pro-competitive explanation of such conduct. Therefore, also in such cases, a more thorough economic analysis of the facts and the potential effects on competition needs to be undertaken.

9. *Does your jurisdiction recognize a distinct offense of refusing to provide access to "essential facilities"? Your response need not include any offenses that arise from sector-specific regulatory provisions rather than the competition laws.*

   If so, how does your jurisdiction define "essential facilities"? Under what conditions has a refusal to deal involving an "essential facility" been found unlawful? Please provide examples and the factors that led to the finding.

As mentioned above,[40] some national laws have specific provisions on essential facilities with different scope of application. Other jurisdictions may recognize a specific essential facilities doctrine in applying the general unilateral conduct provisions. In the abovementioned *Trinko* judgment, the U.S. Supreme Court has explicitly refrained from either accepting or rejecting the essential facilities doctrine. Nevertheless, it is equally clear that this court would be very reluctant to accept such a doctrine in the future. In the EU, the ECJ is generally held to have developed a European essential facilities doctrine in a series of cases. These cases mostly relate to the refusal to license IP rights.[41] In the *Bronner* case, the ECJ relied on the *Magill* case-law on refusal to license without having to clarify whether the threshold for non-IP cases could possibly be lower. Since the Court held that access to the newspaper distribution system in Austria was not indispensable for the competitor to enter the market for daily newspapers, it was possible to reject a duty to deal for lack of an essential facility.[42] The indispensability criterion, which is essential for the application of Art. 82 EC to refusal-to-deal cases was developed in the very first essential facilities case in the Community, namely the *Commercial Solvents* case, in which an integrated firm terminated supply of essential raw materials in order to exclude competitors from a downstream market.[43] In this case, the ECJ highlighted in particular that ex-Art. 86 EEC Treaty (Art. 82 EC) would have to apply if the refusal "risks elimination all competition" on the downstream market.[44] This requirement later made it to the case-law on refusal to license.[45]

Whatever criteria are chosen for an essential facilities doctrine, an important caveat needs to be made. The mere existence of an essential facility does not provide a conclusive theory of harm. This plays in two directions. First, to the extent that the essential facilities doctrine relies on a leveraging theory, one has to keep in mind that there may also be refusal-to-deal cases which present an abuse but cannot be explained by a leveraging theory.[46] Second, the mere fact that a competitor is in need of access to an essential input controlled by a dominant

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[40] On Question 2, above.
[41] *Magill* (supra note 5); *IMS Health* (supra note 6); see also the CFI decision in *Microsoft* (supra note 7).
[42] Case C-7/97 *Bronner* [1998] ECR I-7791, paras 41 et seq.
[43] Case 6/73 *Istituto Chemioterapico Italiano and Commercial Solvents v Commission* [1974] ECR 223.
[44] Ibid., para. 25.
[45] Joined Cases C-241/91 P and C-242/91 P *RTE and ITE v Commission* (*Magill*) [1995] ECR I-743, para. 56.
[46] See also the answer on Question ##, above.

firm and that the refusal to deal (or to allow access to this input) does not by itself justify intervention.[47] A full assessment of the effects of the refusal to deal on the relevant market is certainly required. This assessment would have to take into account the negative impact of a duty to deal of the dominant firm's initial and subsequent incentives to invest in the provision of the essential facilities and in maintaining and improving it under such duty to deal. Equally, other justifications should be accepted such as limited capacity or technical compatibility and quality concerns.

9. Does the analysis differ if the refusal involves intellectual property? If so, please explain.

In the U.S., there is no case-law on the level of the Supreme Court that would deal with a duty to license. However, in the light of the *Trinko* case, which uses clear language as to the importance of a monopoly for creating incentives for innovation, it may well be even likely than for regular refusal-to-deal cases that the Court would accept a duty to license IPRs.

In the EU, the standard for refusal to license is defined by the ECJ judgment in *IMS Health*. This decision defined a "cumulative three-factor test", which is actually a "four-factor test" if one takes into account that the bottom line of the test is that use of the relevant IP right has to be indispensable for being able to enter the relevant market. In *IMS Health*, the ECJ held:

> "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 consumer demand, that it is unjustified and such as to exclude any competition on a secondary market."[48]

This decision was meant to clarify an earlier dispute as to whether the first requirement of the prevention of the emergence of a new product (so-called "new product rule") has to be considered a "cumulative" requirement, meaning that a refusal to license can only be accepted if the refusal leads to the prevention of a new product on the downstream market. The decision seems to affirm this question, which would amount to a narrow reading of the earlier *Magill* decision in this regard. Yet, on the new product rule, IMS Health does not solve all problems:

First, it is hard to understand why the court, on the one hand, affirms the cumulative approach whereas, on the other hand, it also holds that the fulfillment of said cumulative requirements is "sufficient" (not "necessary") to show an abuse. This still brings up the question whether the decision leaves some room for accepting alternative tests under which a refusal to license can be considered an abuse. Such flexibility may also be derived from the fact that the new product rule was developed by the ECJ in *Magill* with reference to the wording of ex-Art. 86(b) EC Treaty (Art. 82(b) EC), which only provides one possible example of an abuse. This is why the Commission, in its arguments before the CFI in the Microsoft case, referred to the wording of "sufficient" in *IMS Health* for supporting its view that *IMS Health* did not provide an "exhaustive list" of criteria under which a refusal to license can be considered abusive.[49] In *Microsoft*, the CFI later on seemed to make use of such flexibility by holding that according

[47] There are a few cases on the Court of Appeals level that demonstrate a general reluctance to decide in favour of a duty to license; see, for instance, *Data General Corp. v. Grumman System Support Corp.*, 36 F.3d 1 147 (1st Cir. 1994).
[48] Case C-418/01 *IMS Health* [2004] ECR I-5039, para. 38.
[49] Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, para. 307.

to Art. 82(b) EC also the limitation of technical development to the prejudice of consumers could be considered an abuse and confirmed the abuse as argued by the Commission.[50]

Secondly, the new product rule does not give very much guidance as to how the concept of a "new product" has to be understood. Whereas in *Magill* it was held that a comprehensive TV guide would constitute a "new product" as compared to TV guides that only cover the programs of single TV stations, it is less clear whether mere product improvements or higher levels of quality already justify that a competitor intends to offer a "new product".

It is more important, however, to identify the rational behind the new product rule. A duty to license allows the copying of protected subject-matter. Copying by a competitor may be expected to enhance price competition (competition by imitation), whereas it may lower incentives of the right-holder to invest in the production of the protected subject-matter in the first place. Hence, there is a risk that the duty to license would merely increase static efficiency at the price of a much greater decrease of dynamic efficiency. From this, one may be tempted to conclude that the new product rule may be justified only if the petitioner of the license will also contribute to innovation by offering a "new product." Although such a theory may well have guided the ECJ, there are also counterarguments. The ECJ requires the emergence of a new product on the downstream market. Such innovation, however, does not need to be related in any way with the incentives the legislature expects from the relevant IP right. *IMS Health* just provides a very good example of this. What is a new product concerning the collection of marketing data for the sale of pharmaceuticals on the downstream market? Do we have to require more efficient means of data collection, which, after all, would only make it cheaper – in the sense of price competition – for pharmaceutical companies to get the pertinent data collected? How does such innovation relate to the copyright protection of a "creative" brick-structure? This analysis and these critical questions demonstrate that the ECJ has brought up a too formal approach to refusal to license. Competition policy should go to the heart of the economic problems involved in the individual case. In this regard, the relevant European cases (*Magill*, *IMS Health*, *Microsoft*) present largely different scenarios which also require different analytical treatment. *Magill* was a case in which copyright protection enabled the right-holder to control access to information, namely the listings of TV programs, which was essential for competitors to enter the market, although copyright protection is not meant to control information but to enhance its distribution by only protecting the form of presenting information. The control over the essential input (information and not the copyright itself) makes *Magill* a typical essential facilities case. In contrast, *IMS Health* is better characterized as a standardization case. The use of the copyrighted brick-structure had developed as a standard in the industry. Pharmaceutical companies had made a considerable investment in developing the specific method of data collection in cooperation with IMS Health and in training its own employees for being able to work with this method. Such sunk costs made it very unlikely that customers (pharmaceutical companies) would easily switch to a competitor which would use a different structure. In standardization cases, it is less likely that competitors would come up with a "new product". When high entry barriers prevent competitors from overturning the standard, dynamic competition can only take place within the standard. Finally, *Microsoft* can be described as an interoperability and standardization case, in which the need for technological interoperability requires competitors to have access to the interoperability information contained in the Windows operating systems program for entering the adjacent market of work group operating system programs. The competition concern here is to maintain incentives for follow-on innovation in this adjacent market.

[50] Ibid., para. 643; see also the answer to Question 2, above.

This analysis demonstrates that more sophisticated and more economics-based analyses need to be undertaken for assessing refusal-to-license cases more appropriately.

From the other extreme, theories which are purely based on a very rough error analysis, which would lead to an almost complete exclusion of a duty to license have to be rejected. It is true that refusal-to-license cases would in principle require a full assessment of the pro and anti-competitive effects by taking into account static and dynamic efficiencies. The problem here is that economic modeling is relatively experienced in assessing effects on static (price) competition, whereas it is not possible to predict which kinds of innovation will not be made if the right-holder abstains from investment in innovation as a consequence of a possible duty to license. This is why some economists and lawyers propose an error analysis according to which the likely cost of false non-intervention (false negatives), resulting in a loss of static efficiency, and the cost of false intervention (false positives), resulting in a reduction of innovation (dynamic efficiency) need to be compared.[51] Since, moreover, dynamic efficiencies (innovation) are held to be more conducive to welfare maximization than static efficiencies (price competition), these authors generally recommend not to intervene in IP rights. Such a way of thinking seems to have influenced very much the way of thinking of the Antitrust Division of the DoJ under the former Bush administration and many U.S. courts. This theory needs to be rejected for mainly two reasons: firstly, this theory is based on the assumption that IPRs always promote dynamic efficiency and innovation. However, this is not necessarily so. Especially when the scope of protection is drawn to widely, IPRs may be used as part of a strategy to exclude competitors who may even be more likely to innovate. *Magill* is just an example of such a scenario. Secondly, it is not so that competition law enforcers only intervene with the goal of promoting static (price) competition. Competition laws can also be used for keeping markets open for competitors who will increase the likelihood of innovation in an otherwise foreclosed market.

These ideas on refusal to license could be summed up in the following principles:

(i) Refusals to license do not require a test which is substantially different from other cases of refusal to deal. Intellectual property does not deserve higher immunity from competition law than real property. However, in IP-related cases, competition law enforcers need to take into account the effects of the refusal to deal on dynamic competition and innovation in particular. Refusal-to-license cases are therefore more difficult to assess than other duty-to-deal cases.

(ii) The mere fact that a competitor has to use an IP right in order to be able to enter a market – as an expression of an essential facilities doctrine – does not provide a sufficient justification for competition law intervention. Such intervention may be detrimental to the incentives to innovate and decrease dynamic efficiency.

(iii) IPRs in principle exclude “competition by innovation” and therefore incite competitors to compete for better products (“competition by substitution”). Therefore, a refusal to license should generelly be held to be pro-competitive,

[51] See, in particular, David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices, A Neo-Chicago Approach*, 72 U. CHI. L. REV. 72; Damien Geradin, Christian Ahlborn, Vincenzo Denicolò & A. Jorge Padilla, *DG Comp’s Discussion Paper on Article 82: Implications of the Proposed Framework and Antitrust Rules for Dynamic Competition Industries*, 2006, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=894466.

base on the gains in dynamic efficiency which outbalance the loss in static efficiency.

(iv) However, a duty to license has to be imposed in "exceptional circumstances". Such exceptional circumstances have to be considered whenever it is impossible or close to impossible to enter the market without using the IPRs of the dominant firm. Such rights, that exclude market access as such, may be called "indispensable" IPRs.[52] Indispensable IPRs should not be equated with IPRs that lead to a market dominant position. A pharmaceutical company that markets a patented, most effective drug may well win the whole market. But, in principle, competitors have the possibility to invest in R&D and to come up with an even better drug. The situation is different in a case of standardization or, more generally, of markets that are characterized by network effects. In such situations, the incumbent right holder may not easily be replaced by substitution, since customers are highly unlikely to switch even if the product of the competitor is much better. Yet, the mere existence of network effects does not justify intervention. Competition agencies need to take into account how stable the standard is and how strong network effects actually are and to which extent a duty to license would reduce incentives to innovate of the incumbent. On the other hand, a duty to license can increase the likelihood of follow-on innovation within the standard, and competitors who can claim a license may be more likely to challenge the previous standard. Hence, a duty to license does not necessarily reduce incentives to innovate in competition "for the market". Likewise, in the *Microsoft* case, the producers of work group operating system programs (so-called "middle ware") were most likely to challenge Microsoft's market dominant position in the market for the operating system. Therefore, the best theory of harm in Mircosoft was maybe not one of leveraging market power to a downstream or neigbouring market but one of fencing off potential competitors from the market in which Microsoft is dominant with its Windows operating system.

It may be added that the case-law of the ECJ does not prevent the EU Member States and their competition law enforcers to recognize more interventionist regimes on refusal to license under domestic unilateral conduct rules. Although the agencies and courts of the Member States have to apply European law, Regulation 1/2003 allows Member State to prohibit unilateral conduct that would be considered legal under European competition rules. In the light of the abovementioned *Standard-Spundfass* case decided by the German Federal Supreme Court,[53] Germany may be the most important country which provides for such stricter rules. Since the case was decided shortly after *IMS Health*, the German court new about the new product requirement of the ECJ. Yet it did not even consider to apply this rule and confirmed a violation of German competition law in this standardization case. More in line with the principles sketched above, the court rather argued that allocating the whole market to the right holder by excluding not only competition by imitation but also competition by substitution would not be in line with the program of IP legislation. Most importantly, the court explained that in a standardization case the patent owner does not win the whole market by competition in the market but only because the standard-setting organization decides

[52] For this concept see Josef Drexl, Beatriz Conde Gallego, Stefan Enchelmaier, Matthias Leistner & Mark-Oliver Mackenrodt, *Comments of the Max Planck Institute for Intellectual Property, Competition and Tax Law on the Directorate-General Competition Discussion Paper of December 2005 on the Application of Art. 82 of the EC Treaty to Exclusionary Practices*, 37 IIC 558 (2006). See also Beatriz Conde Gallego, *Unilateral refusal to license indispensable intellectual property rights – US and EU approaches*, in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND COMPETITION LAW 215 (Josef Drexl ed. 2008).

[53] Supra note 12.

accordingly. Hence, in standardization cases, the right-holder gets more out of the patent that he deserves purely based on patent policy.

a. *Does the type of intellectual property change the analysis (e.g., patents versus trade secrets)?*

b. *Can a refusal to provide interface information to make a product interoperable constitute a refusal to deal?*

Both questions can be answered together since interface information (or interoperability information) may be considered as a trade secret as long as it is not publicly available.

IPRs are very diverse and protect very different kinds of subject-matter. Patents are meant to enhance innovation; copyright law, at least in the traditional cultural sector, is expected to promote creativity.[54] Hence, there can be no doubt as to whether the particular kind of IP right needs to be taken into account.

The issue was especially brought up in the context of the European *Microsoft* case. The European Commission handed down its decision shortly before the ECJ decided on *IMS Health*. Against the backdrop of the recognition of the cumulative theory by the ECJ, Microsoft then tried to challenge the Commission decision by maintaining that the interoperability information contained in its Windows operating system, which Microsoft was ordered to provide to competitors in the market for work group operating system programs, was protected by IPRs (patents, copyright, trade secrets). Since it was quite doubtful whether Microsoft could rely on patent or copyright protection, the question arose whether the protection of trade secrets should be put on the same level with IPRs for the purpose of applying Art. 82 EC.

The CFI left this question unanswered since it held that even if one applied the test for a refusal to license IPRs, the Commission did not err in concluding that Microsoft committed an abuse in the sense of Art. 82 EC when it refused to provide the interoperability information to competitors.

As, in general, no argument can be made in the direction that a refusal to license requires any other fundamentally different test than other refusals to deal, the same is true for a refusal to grant access to trade secrets. However, in making the analysis of the individual case, competition law enforcers should take into account the innovation dimension of the specific trade secret. In this regard, it is crucial to note that, in contrast to patent law, trade secrets are "untested." Whereas patents are only granted for inventions that fulfill the general requirements of patentability (novelty, non-obviousness and utility in U.S.; novelty, inventive step, industrial applicability in Europe and many other countries), a trade secret can be any information that is kept secret. Control over the trade secret including an "indispensable" (essential) information may easily block market entry, even if from a technological perspective the information is in no way innovative or even new and does not qualify for patent protection. Such a situation arises in particular when interoperability information contained in a computer program is kept secret. The interoperability information is a necessary result of the programming activity and in no way more innovative than other parts of the program. Hence, its high economic value does not stem from technological superiority

[54] As to the concept of "creative competition" see Josef Drexl, *Competition in the field of collective management: Preferring "creative competition" to economic efficiency in European copyright law*, in: COPYRIGHT LAW: A HANDBOOK ON CONTEMPORARY RESEARCH 255 (Paul Torremans ed. 2007).

but only from the market foreclosing effect of keeping it secret. A duty to provide such information will therefore not have any significant adverse effect on the level of innovation in the software industry. Of course, under a duty to deal the dominant firm will make lower profits that may be re-invested in R&D, and lower profit margins may make it less likely that already the initial investment will be made. This, however, are considerations that are valid for any monopoly. The more important point here is that the exclusionary effect and the loss in efficiency is produced by a form of protection that does not comparatively high gains in dynamic efficiency.[55]

10. Does the analysis change if the refusal occurs in a regulated industry? If so, please explain.

Regulation often provides for specific obligations to grant access especially to networks (as essential facilities). Regulation may be better placed for solving the problem of finding the appropriate price to be paid for the use of such facility. Essential facility rules as part of a regulatory framework, however, should also rely on a competition-oriented analysis. In principle, the owners of networks should only be forced to grant access when competition would otherwise significantly restricted and where networks cannot be duplicated easily.

Another issue is whether regulation should exclude the applicability of the rules on refusal to deal under general competition law. The answer should be "no." There is no reason why regulated industries should benefit from a privilege in this regard.

11. Does the analysis change if the refusal is made by a former state-created monopoly? If so, please explain.

Sometimes it is argued that intervention in a refusal-to-deal case can be more easily justified if the refusal is practiced by a former state-owned monopoly. The argument in favour of this is that the initial investment in the network or infrastructure was not triggered by market incentives but by a political decision of society and was financed by the citizens as tax payers and users of the network or infrastructure.

Whereas these arguments should not completely be rejected, things are a bit more complex. The former monopolist is also expected to be able to invest in the maintenance of the network or the infrastructure. Incentives to invest in future innovation may significantly be reduced if a duty to share is imposed too easily or at inadequately low prices. Hence, competition law should not only look backwards into the history of the incumbent but should also care about future innovation. In addition, the longer the former monopolist has had to gain its money in a competitive market, the less persuasive the argument of the past status as a state-owned monopolist is.

VII. Evaluation of constructive refusals to deal

12. Does your jurisdiction recognize the concept of a "constructive" refusal to deal? If so, does it differ from the definition in the introductory paragraphs above? When determining

[55] For more details on this analysis of the *Microsoft* case and trade-secrets protection see, in particular, Josef Drexl, *Die Verweigerung der Offenlegung von Unternehmensgeheimnissen als Missbrauch marktbeherrschender Stellung*, in SCHUTZ VON KREATIVITÄT UND WETTBEWERB – FESTSCHRIFT FÜR ULRICH LOEWENHEIM ZUM 75. GEBURTSTAG 437 (Reto M. Hilty et al. eds 2009).

whether the terms of dealing constitute a constructive refusal to deal, how does your jurisdiction evaluate such questions as whether the price is sufficiently high or whether the quality has been sufficiently degraded so as to constitute a constructive refusal?

National laws will usually not have any specific provisions on constructive refusals to deal. The European Commission recently made clear in its Guidance Paper on Art. 82 EC that a "constructive refusal" to deal, "which may take the form of unduly delaying or otherwise degrading the supply of the product or involve the imposition of unreasonable conditions in return of supply," would just be regarded as a form of refusal to deal.[56] Hence, an outright refusal to deal is not required.

Practices of a constructive refusal to deal are a strategy dominant firms may apply to undermine their general duty to deal. Such practices are especially known from regulated industries. An incumbent telecommunication company may reduce the quality of its services when, for instance, customers of its competitors experience a disruption of the phone lines.[57] Such examples demonstrate that these cases should not escape control. However, these cases, as the question indicates, are also most difficult as regards drawing the line between legal and illegal conduct.

VIII. Evaluation of "margin squeeze"

13. Does your jurisdiction recognize a concept of (or like) margin squeeze? If so, under what circumstances and what criteria are applied to determine whether the margin squeeze violates your law?

You may wish to address the following sorts of issues: the effect the margin squeeze must have on the downstream market to be a violation; must the firm be dominant in both the upstream and downstream markets, or only the upstream market; how, if at all, the criteria are different from determining whether a firm is engaging in predatory pricing; any cost benchmarks used to determine if a margin squeeze exists; how your jurisdiction would treat a temporary margin squeeze; how, if at all, your jurisdiction's analysis of margin squeeze differs from its analysis of a traditional refusal to deal; do the criteria change depending on whether the margin squeeze occurs in a regulated industry or in an industry in which there is a duty to deal imposed by a law other than the jurisdiction's competition laws?

In contrast to general refusal-to-deal cases, margin squeeze cases have to be considered as price-related restraints; still they also belong to refusal-to-deal cases. In such a case, the dominant firm agrees to deal but only at excessive prices and thereby intents to exclude the rival from a downstream market by reducing its profit margins.

Those cases may also be looked assessed as potential predatory pricing cases. From that other perspective, the emphasis is put on the question of whether low prices charged by the dominant firm on the downstream market to final customers are meant to drive rivals out of the market.

In the U.S., the Supreme Court recently dealt with a margin squeeze case in *Linkeline*.[58] The

[56] Guidance Paper, supra note 34, para. 79.
[57] Cf. the *Trinko* case of the U.S. Supreme Court, supra note 3.
[58] *Pacific Bell Phone Co. v. Linkline Communications Inc*. (2009), http://www.supremecourtus.gov/opinions/08pdf/07-512.pdf.

Court looked at both allegations of prize squeeze and predatory pricing. It finally held that there cannot be any duty to leave to rivals any profit margins where there is no duty to deal on the wholesale level and no predatory pricing on the retail level.

Price squeeze cases can be considered as a sub-category of "constructive" refusal to deal (supra VII.). In its Guidance Paper, also the European Commission discusses margin squeeze under the heading of refusal to deal. The question of whether prices imposed on the rival are abusive is assessed by the Commission by applying the "as efficient competitor test." Hence, the mere fact that a rival has to leave the market will not prove margin squeeze, if the rival is comparably less efficient. More concretely, the Commission announces to rely on the LRAIC (long-run average incremental costs) criterion, which is also used in the field of telecommunication regulation for calculating the retail prices for the provision of phone lines to rival telecommunication companies.

IX. Presumptions and Safe Harbours

14. Are there circumstances under which the refusal to deal (or any specific type) is presumed illegal? If yes, please explain, including whether the presumption is rebuttable and, if so, what must be shown to rebut the presumption.

(Rebuttable) presumptions are meant to facilitate decision making in prima facie case of illegality. In this sense, mere examples of abusive conduct as contained, for instance, in Art. 82 EC, should not be considered a presumption of illegal contact. In these cases, the competition law enforcer still has to engage in a careful assessment of the case. In the situation of discrimination, for instance, the enforcer will have to test whether the refusal to deal with some rivals can be explained as an efficient business conduct (competition on the merits).

A kind of presumption can be found in some provisions on essential facilities. According to Sec. 19(4) No. 4 German Act against Restraints of Competition, a refusal to grant access to a network or an infrastructure by a dominant undertakings against adequate remuneration is automatically considered as illegal provided that the petitioner is unable for legal or factual reasons to operate as a competitor of the dominant undertakings on the upstream or downstream market. The dominant firm, however, can reject this presumption of illegality by demonstrating that for operational or other reasons such concurrent use is impossibly or cannot reasonably be expected. This latter demonstration is to be categorized as a justification which has to be proven by the dominant firm.

14. Are there any circumstances under which there is a safe harbour for a refusal to deal (or any specific type)? Are there any circumstances under which there is a presumption of legality? Please explain the terms of any presumptions or safe harbors.

The bottom line of the law on refusal to deal is and should be that also a dominant firm is free to choose with whom it wants to contract and at what terms. This, however, is not an absolute safe harbour. In general, it is for the competition law enforcer to justify why there is an "exceptional" case in which intervention is mandated.

X. Justifications and Defenses

16. What justifications or defenses are permitted for a refusal to deal? Are there any particular justifications or defenses for specific types of refusal? Please specify the types of justifications and defenses that your agency considers in the evaluation of a refusal to deal, the role they play in the competitive analysis, and who bears the burden of proof.

Usually, specific rules on essential facilities and case-law on refusal to deal will ban "unjustified" refusal or, conversely, allow a justification for which the dominant firms carries the burden of proof.

In the field of network and infrastructures, capacity and technical issues will generally constitute a basis for justification. For instance, the operator of a ferry harbour is allowed to exhaust the capacity of the harbour by operating all of its own ferries. Similarly, the operator of a network or an infrastructure may request respect of certain technical standards in order to make sure that the infrastructure will not be damaged.

As can be seen from the discussion of the *IMS Health* case above, the ECJ also requires that the refusal to license be not justifiable. So far, IP-related cases have not brought up cases in which the justification was an issue. In its Guidance Paper, the European Commission announced that it will consider efficiency claims by dominant undertakings according to which the refusal to deal was necessary to realize an adequate return on the investments required to develop its input, thus generating incentives to continue to invest.

This general approach corresponds to the case-law of the ECJ which has recognized an "efficiency defence" also in the framework of Art. 82 EC.[59] Thereby, the Court transfers the system of exemptions of Art. 81(3) EC to the application of Art. 82 EC. This approach has already had its practical impact on the application of Art. 82 EC to IP-related cases. In *Microsoft*, especially economists recommended an "incentive balancing approach" according to which the Commission would be required to identify the effects of the refusal on the incentives to innovate on both Microsoft and its competitors and to balance the two for the purpose of answering the question whether there is an abuse. The CFI, however, applied Art. 82 EC quite differently. First, the Court investigated whether there was an abuse by lowering the incentives to innovate of competitors. Only as part of a second step, the Court granted Microsoft an efficiency defence, according to which Microsoft carried the burden of proof to show that the duty to provide the interoperability information would significantly reduce its incentives to innovate.[60] In its Guidance Paper, the Commission takes up this idea by stating that it is for the dominant firm to demonstrate any negative impact of the duty to deal on its ability to innovate.[61]

This approach is not unproblematic. Art. 82 EC simply does not contain any exemption rule in addition to the abuse concept, and abuse has to be demonstrated by the competition agency. Moreover, it seems more convincing to oblige the agency to take all effects on innovation into account in assessing whether a refusal is anticompetitive.

On the other hand, the statement of the Guidance Paper that an efficiency defence can also be derived from the need to recoup investment in innovation may well give too much room for a justification. IPRs do not imply the right to recoup investment in the creation of the subject-matter of protection. Recoupment depends on the success of the innovation in the market. Markets, however, are supposed to work according to the rules of competition. Hence, to recognize the interest in recouping investment in innovation as a "defence" to an abuse, *i.e.* to

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[59] Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331, para. 86.
[60] Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, paras 688 and 697.
[61] Guidance Paper, supra note 34, para. 90.

a restraint of competition, seems to contradict the very idea of competition. Also investment in innovation, as any other form of investment, does and should involve risk-taking.

IX. Remedies

17. What remedies for refusals to deal were applied in the cases discussed in questions 6 and 7? If one available remedy is providing mandated access/rights to purchase, how is the price established for the sale/license of the good or service? How are other terms of the transaction determined?

The primary remedy to an illegal refusal to deal is the imposition of a "duty to deal". In civil law cases, this amounts to a claim to conclude a contract with specific terms. This highlights the need of agencies and courts to define all terms of the contract. Moreover, refusal-to-deal cases require continuous regulation as long as the dominant position persists. In *Microsoft*, the Commission tried to avoid this need by imposing a duty on Microsoft to submit a proposal for establishing a mechanism that includes a monitoring trustee. This was the only point where the CFI disagreed with the Commission: the Commission cannot delegate its power of control to a third person and thereby avoid to problem of continuous regulation.[62]

Regulating a duty to deal also requires a decision on the appropriate price. The difficulties involved in "simulating" market prices may be one reason why especially practice in the U.S. is very reluctant to intervene in refusal-to-deal cases. There are, however, two counterarguments:

First, recognition of a duty to deal redefines the negotiating power of the parties. Since also the dominant undertaking knows that there may be an intervention and price-regulation, this undertaking is likely to avoid intervention by granting access or supply at lower prices. Hence, in practice, enforcers will not always have to intervene in refusal-to-deal cases and to fix prices.

Second, even in the U.S. there are IP-related cases in which courts do not hesitate to decide on prices. In recent years, considerable case-law has developed on the so-called patent troll phenomenon. Patent trolls acquire unused patents with the objective to extract from users highest royalty rates without practicing these patents themselves. In the *eBay* case, which presented a patent troll scenario, the U.S. Supreme Court confirmed in general terms that an injunction as an equitable remedy under U.S. patent law will not automatically be granted but depends on the fulfillment of specific requirements.[63] If these conditions are not fulfilled, the patent owner only has a remaining claim for damages. The exclusive patent right is then reduced to a mere liability system. In this context, U.S. Courts do not seem to have any problems to fix damages even for future use which, from an economic perspective, is nothing else than the fee to be paid for a statutory licence. But also in the abovementioned Supreme Court case, we can see that the parties finally preferred to settle the case with an agreement on licensing fees much below the initially claimed level and thereby avoided a court decision on the price issue.

Of course, in refusal to deal cases, competition agencies may also impose fines. The European *Microsoft* case triggered the highest fine ever imposed under European law by the time of the decision.

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[62] Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, paras 1251-79.
[63] *eBay Inc v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

18. *If the unlawful refusal to deal arose in a regulated industry, was the remedy available because of the regulatory provisions applicable to the defendant or is the remedy one that could be used for any (non-regulated industry) unlawful refusal to deal?*

(No answer.)

19. *Has your agency considered using any other remedies in refusal to deal cases that are available under your jurisdiction's competition laws and that were not described in your response to Question 18? Did the availability or administrability of a remedy influence the decision whether or how to bring a refusal to deal case? If so, please expain your response.*

As explained in the answer to Question 17, the prospect of continuous supervision of dominant undertakings similar to regulated industries, including price control, may be a reason why some agencies are reluctant to intervene in refusal-to-deal cases.

X. Policy

20. *What policy considerations does your jurisdiction take into account with respect to a refusal to deal? Do they apply to all forms of refusal? Are there any particular considerations for specific types of a refusal to deal? What importance does your jurisdiction's policy place on incentives for innovation and investment in evaluating the legality of refusals to deal?*

See answer to Questions 8 and 9, above.

21. *Please provide any additional comments that you would like to make on your experience with refusals to deal in your jurisdiction. This may include, but is not limited to, whether there have been – or whether you expect there to be – major developments or significant changes in the criteria by which you assess refusal to deal cases.*

To some extent, the concept that refusal to deal has to be conceptualized as an example of exclusionary conduct, may be questioned. The exclusionary character of a refusal to deal is evident in a scenario in which the refusal is addressed to a customer who is a rival on a downstream market. Yet, refusal-to-deal cases also have an element of exploitation. This becomes most obvious on the level of remedies when enforcers are challenged by the difficult task to set prices and thereby to avoid excessive pricing in the sense of Art. 82(a) EC. The fact that U.S. law does not recognize excessive pricing as a case of monopolization under Section 2 Sherman Act may explain why this jurisdiction in particular is very hesitant in exercising control on refusals to deal. However, as can be seen against the backdrop of recent developments in U.S. patent law, according to which an injunction as an equitable relief is not at all automatic (see Question 17), U.S. law provides for adequate responses to the problem of excessive pricing, although it has to resort to solutions outside the scope of antitrust law.

It can also be expected that especially refusal-to-license cases will become more frequent in the future. This is mostly due to the increasing need for technological standards especially in the IT sector and the need to pool high numbers of essential patents that control such standards. In such cases, the exclusivity of IPRs reduces welfare by restricting access to the use of the right to much ("tragedy of the anti-commons") and increases the risk that the

owners of individual essential rights try to extract excessive income from their rights by not cooperating in the patent pooling.[64] As long as IP law itself does not restrict the exclusivity of the right when standards are involved, it will be for competition law to solve the problem. When each of several hundreds of patents controls the whole standard, it makes no sense to leave it to the market to identify the price for licensing of some or all of these patents. In such cases, competition law enforcers have to live up to the challenge of controlling prices. Where the price mechanism simply does not work, also mere exploitation, in form of a refusal to license below the monopoly level, should be part of law on unilateral conduct.

[64] See Michael A. Helfer, *Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARVARD L. REV. 621 (1998).