European Competition Law, Compulsory Licensing and Innovation

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I. Introduction

This paper explores the interface between competition law and intellectual property rights in the context of compulsory licensing. It considers the way in which European competition law has been applied to limit the protection awarded to IPR holders. It argues that the use of competition law as an external balancing tool, on a case by case basis, has gradually eroded the protection conferred by IPR. Publication of the Guidance Paper on Article 102 TFEU by the European Commission has further contributed to this trend and has blurred the limiting principles which governed the application of competition law to IPR.

The paper reflects on the consequences of these changes, and their effect on innovation and welfare.

II. The European Formula for Intervention

Under European competition law, it may be possible, at times, to limit the protection awarded by intellectual property rights, and order a dominant company to license its intellectual property. The following section reviews the main building blocks which have shaped the evolution of European jurisprudence on compulsory licensing. As will be highlighted below, this evolution encompasses a gradual erosion of the protection awarded by IPR and a widening of the scope of Article 102 TFEU.

The European Court of Justice’s judgment in Commercial Solvents Corporation v Commission, firmly embedded into European judicature, the possibility of condemning a dominant company for refusing to supply an undertaking at the downstream level, and subsequently eliminating competition in that market. The doctrine of refusal to supply was subsequently used in a number of cases, concerning tangible as well as intellectual property, where the dominant company abused its upstream market power by leveraging it to improve its position at the downstream level. The doctrine has also been used in cases where the refusal to supply, was intended to protect the upstream market in which the company enjoyed a dominant position.

1 Guidance on the Commission's Enforcement Priorities in Applying [Article 102 TFEU] to Abusive Exclusionary Conduct by Dominant Undertakings, OJ 2009/C 45/02
The application of the doctrine to IPRs in the Magill case constitutes a significant landmark in the debate on the interface between the two legal regimes. While the Court held that the mere ownership of an intellectual property right does not necessarily establish the existence of a dominant position, it outlined the instances in which a refusal to licence would amount to an abuse. It held that the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct.

The special circumstances in Magill, which swung the balance in favour of an obligation to license were later highlighted, and limited, in Oscar Bronner. Accordingly, to amount to an abuse of dominance: 1) a refusal to licence/supply would concern a product the supply of which was indispensable for carrying on the business in question; 2) such refusal prevents the appearance of a new product for which there was a potential consumer demand; 3) the refusal is likely to exclude all competition in the secondary market; and 4) it is not justified by objective considerations.

In clarifying the notion of exceptional circumstances, the Oscar Bronner judgment seemed to have limited the enforcement boundaries of Article 102 TFEU. It emphasised the need for careful balancing of conflicting considerations prior to interfering with a dominant undertaking's freedom to contract. As highlighted by Advocate General Jacobs in his opinion, ‘… in assessing such conflicting interests, particular care is required where the goods or services or facilities to which access is demanded, represent the fruit of substantial investment. That may be true in particular in relation to refusal to license intellectual property rights’.

However, the Oscar Bronner balancing formula was short lived, and has been eroded in subsequent cases.

In Tierce Ladbroke the Court of First Instance (CFI, now General Court) distinguished the circumstances of that case from those of Magill. The Court noted that the refusal to license could not fall within the Article 102 TFEU prohibition unless it concerned a product or service which was either essential for the exercise of the activity in question, or was a new product whose introduction might be prevented, despite specific, constant and regular potential demand from consumers. In doing so, the Court treated conditions [1] and [2] in Magill as alternatives rather than cumulative, thus widening the instances in which the test could be applied.

Further erosion was introduced in the IMS Health judgment. There, the CFI reiterated the formula and conditions stated in Oscar Bronner, but in relation to condition [3], namely that the refusal must be likely to exclude all competition in the secondary market, the Court held that the finding of a 'potential or even hypothetical market' would suffice. The finding of a 'fictional' downstream market is significant, as it may result in compulsory licensing from a dominant undertaking to its competitor.

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7 AG Opinion, para 62.


The Microsoft judgment\textsuperscript{10} is particularly interesting, as it provides the latest signal from the European Court on the interface between competition law and IPRs. The case concerned an appeal to the CFI on a Commission decision which found Microsoft to have abused its dominant position, among other things, by refusing to grant licences for interoperability information. While the Commission accepted that some level of interoperability was present on the market, it argued nonetheless that this was not sufficient to provide for viable competition.\textsuperscript{11} On appeal, the CFI upheld the Commission finding that Microsoft abused its dominant position by refusing to provide interoperability information. The judgment contributed to the further widening of Article 102 TFEU at three distinct levels.

First, with respect to the requirement of the appearance of a new product, the Court held that the circumstances 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)] TFEU'. As that provision states, such prejudice may arise where there is a limitation not only of production or markets, but also of technical development.\textsuperscript{12} The CFI used Article 102(b) TFEU to ‘import’ innovation into the Magill equation. This ‘internal’ expansion tipped the balance of the carefully crafted list of exceptional circumstances in the Magill and IMS Health judgments, and lowered the threshold for finding an abusive refusal to licence. The Court’s interpretation of innovation not only lowered the threshold for intervention, but arguably also introduced uncertainty to the test, making it difficult to determine the level of innovation which may trigger intervention.

Second, the Court widened the notion of indispensability. Earlier cases such as Commercial Solvents, Magill and IMS Health were based on the absence of a potential or actual substitute which was objectively indispensible. Yet, in Microsoft, the CFI broadened the concept to cover ‘economic indispensability’.\textsuperscript{13} In this respect, the Court held that although access to the market might have been technically possible, Microsoft’s refusal to licence the interoperability information eliminated the economic viability of such entry.\textsuperscript{14} The Court added in this context that the test for indispensability is also satisfied when competition is eliminated gradually rather than immediately.\textsuperscript{15}

Third, the Court further lowered the threshold for intervention by eroding the requirement for elimination of all competition in the secondary market, which formed part of the conditions in earlier cases. It held that it is not ‘necessary to demonstrate that all competition on the market would be eliminated. What matters, for the purpose of establishing an infringement of [Article 102 TFEU], is that the refusal at issue is liable to, or is likely to, eliminate all effective competition on the market.’\textsuperscript{16} The Court noted that: ‘If the Commission were required to wait until all competitors were eliminated from the market, or until their elimination was sufficiently imminent, before being able to take action under [Article 102 TFEU], that would clearly run counter to the objectives of that provision, which is to

\textsuperscript{10} Case T-201/04 Microsoft Corp, v Commission, CFI, [2007] ECR II-3601, [2007] 5 CMLR 11
\textsuperscript{12} ibid.
\textsuperscript{14} ibid.
\textsuperscript{15} Case T-201/04 Microsoft (n 10 above) para 428
\textsuperscript{16} ibid. para 563
maintain undistorted competition in the common market and, in particular, to safeguard the competition that still exists on the relevant market. 17

III. Implications for Innovation

Reflecting on the developments of the European Court’s judicature from *Magill* to *Microsoft*, the widening trend of Article 102 TFEU is evident. Case by case application and balancing has resulted in (at times inconsistent) modification of the test on account of IPRs. But, to what extent does this trend affect the incentives of both the IP holder and its competitors to innovate and invest? Is it likely to lead to the dominant company refraining from future investments fearing the risk of compulsory licensing? Would competitors avoid investing, in the hope that compulsory licensing will allow them to free ride on others’ innovation?

*The nature of the right*

In some of the cases, unique circumstances may serve to explain, in hindsight, why compulsory licensing provided an adequate remedy. Beyond the formal intervention formula, a significant characteristic of several of the cases was the secondary role played by the intellectual property at stake.

For example, in *Magill*, the information was secondary to the main broadcasting business of the dominant companies. The finding of abuse would have had limited, if any, effect of innovation, not least as the protection at national level was not in line with other European Member States.

In *Microsoft*, the case evolved around interoperability information. While valuable, this information was secondary to the main assets of Microsoft. Taking into account the competitive pressure to which Microsoft was subjected, the effect on innovation was deemed limited.

Arguably, the relative weight of the IPR in each case, and it being secondary to the main activity, provides a natural safeguard which would limit the effect on future innovation and investment.

*Single market*

In sharp contrast, the *IMS* case reveals different potential effects on innovation. This is primarily due to the way in which the Court satisfied itself with the presence of a single market and departed from the upstream/downstream model. 18 Such an approach risks undermining incentives to innovate, since the dominant company is ordered to licence its IPR to a competitor. Moreover, the presence of a single market meant that the rights in question concerned the core business of the dominant company. In other words, not only was the

17 ibid. para 561
18 Contrast this approach with the US approach as evident in *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP* (02-682) 540 U.S. 398 (2004) 305 F.3d 89. There, the US Supreme Court considered the absence of two distinct markets as a relevant factor in its decision not to condemn a refusal to supply (para 5); on this point see further: J Drexl ‘Intellectual Property and Antitrust law—IMS Health and Trinko—Antitrust Placebo for Consumers instead of Sound Economics in Refusal-to-Deal cases’ (2004) 35 Intl Rev Industrial Property and Copyright L 788. The US Supreme Court distinguished between the case at hand and the *Aspen Skiing* decision, noting that the latter involved a refusal to sell an existing product which was previously marketed separately.
dominant company asked to licence a competitor, it was also asked to provide it with its prime asset.

The possible adverse effect on innovation, have played a role in the United States’ approach to compulsory licensing. In *Trinko*, the US Supreme Court noted that compelling monopolies to share the source of their advantage:

‘is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to in-vest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing a role for which they are ill-suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion. Thus, as a general matter, the Sherman Act “does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.” United States v. Colgate & Co., 250 U. S. 300, 307 (1919).’

One possible way to justify the outcome in *IMS* is to question the justification of the copyright protection. Since IMS developed the brick structure in collaboration with other pharmaceutical companies, and it became the de facto industry standard, one might argue that competition law was used here to remedy unjustified overprotection by intellectual property law.

While the presence of industry standards may have reduced the likelihood for a chilling effect in that particular case, the legacy of this case is problematic. By stripping a dominant company of its main asset, the Court challenged not only the alleged abuse, but also the position of dominance itself. The absence of two markets blurred the separation between dominance and abuse and resulted in a de-facto condemnation of market power. The dominant company was asked to licence its main asset to its competitor, and, moreover, had to do so on terms which would enhance consumer welfare, thus reducing the price for that asset.

*Terms of the licence*

Following a finding of abuse, a question arises as to the terms of the compulsory licence. This may be particularly challenging when the IPR has not previously been licensed. In such cases, the court or competition agency would have the task of determining the conditions for the first licence. Rhetoric aside, the practical task of evaluating under which terms the license should be granted, is challenging and would require those bodies to adopt an ill-fitting regulatory function.

*Open-end benchmark*

In *Microsoft*, the Court observed the open-ended nature of the benchmark for intervention, stating that the circumstances 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) TFEU].’

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19 Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP, n 18 above.
This approach was echoed at national level. In *Intel Corporation v Via Technologies Inc*, the Court held (in a summary judgment and on appeal) that a patent holder may be restricted from exercising its IP rights in circumstances which differ from those identified in *Magill* and *IMS*.20 Similarly in *Burgess v Office of Fair Trading*21 the Competition Appeal Tribunal considered a refusal by funeral directors operating a local crematorium to allow access to that crematorium. The CAT noted that ‘if a competitor is substantially weakened but not eliminated, it is not necessarily the case that no abuse has occurred, in our view.’22 A similar comment may also be found in *Purple Parking Ltd & Meteor Parking Ltd and Heathrow Airport Ltd*.23

While justifiable, these comments have considerable inherent potential for causing a widening of Article 102 TFEU. This is particularly the case in the national context, since a multitude of enforcers may use competition law as an ex-post tool to challenge IPRs.

The impact of this widening trend is not limited to the conditions for finding abuse. It may also extend the nature of IP rights which are challenged.24 Looking at the European Union case law, it is evident that the IP rights subjected to limitations in the competition arena have been ‘weaker rights’; the limitations tend not to encroach upon the core protection awarded, for example, by patent law. Challenges to patents (and Europe has seen many of them) have been conducted within the IP framework, rather than using competition law as an external tool.

In this respect the *Intel* judgment stands at odds with the general trend, since it concerns a challenge to a patent. While the claim arose as part of a “Euro Defence” in a patent infringement action, the possibility, in principle, of applying the intervention formula to

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22 ibid. para 312
23 [2011] EWHC 987 (Ch), paras 91–97,
24 In the context of the European Database Directive, the role played by ex-post analysis was considered. The drafting and deliberation of the Directive reveal that there was a lobbying that favoured an external approach. The *Magill* case was used to argue that there is no need for a ‘compulsory licensing provision’ for single source providers. See J.H. Reichman and Pamela Samuelson ‘Intellectual Property Rights in Data?’ [1997] 50 Vand. L. Rev. 51: ‘A two-pronged strategy by lobbyists opposed to the compulsory license provisions of the first two drafts of the Directive may have succeeded in wooing the Commission away from the automatic license provision. One prong relied on the European Court of Justice’s recent decision in *Radio Telefis Eireann v. Commission of the European Communities*, 1 C.E.C. 400 (1995) (widely known as the *Magill* decision), which illustrated the use of competition law to deal with the abuse of a dominant position when a sole source provider of information refused to license a competitor. In *Magill*, the Court affirmed the Commission’s finding of abuse because the owner of a U.K. copyright in television program listings refused to license the listings to a firm that wished to publish a weekly guide for television viewers. See, for example, Tritton, Intellectual Property in Europe at 638–48 (cited in note 50) stressing that refusal to permit independent compilations by willing third parties transformed qualified monopoly of copyright law to abusive, absolute monopoly). See also Sasha Haines, Copyright Takes a Dominant Position, 16 Eur. Intell. Prop. Rev. 401, 401 (1994) (noting that publishers who claimed that the refusal to license in Magill was not abusive ironically used Magill to argue no compulsory license was needed even in the case of sole-source providers). The other prong was to argue for a several-year test period during which compulsory licenses would not be available so that the Commission could gather evidence about licensing practices to determine if there were sufficient abuses to warrant reintroducing compulsory license provisions. See E.C. Directive on Databases, art. 16 (3), 1996 O.J. (L 77) at 27 (cited in note 7).’
patents was seriously considered. This may represent a significant future widening of the potential scope of Article 102 TFEU.

*Intervention formula*

While each case may have been justified on its narrow facts, the intervention formula exists outside of these unique circumstances. It remains as a benchmark for intervention independently of the value of the IP right at stake, and other case specific considerations.

For instance, in the *Microsoft* judgment, the CFI noted that ‘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.’

Given that each case represents an inconsistent application, and possibly also ‘reverse reasoning’, any attempt to extract an overriding intervention formula is problematic. Despite this, in an attempt to foster certainty as to the benchmark for intervention, such a formula has nevertheless emerged.

In this respect, the Commission’s guidance as to its enforcement priorities in relation to Article 102 TFEU provides an illustrative example of the widening consequences which result from the extraction of principle from a series of unique cases.

*The Commission Guidance on Article 102 TFEU*

The Commission’s approach is anchored in the principles developed by case law. Accordingly, the Commission states that intervention in such cases is the exception, and will only take place following careful consideration of the effects it may have on innovation and investment.

While it largely reflects the formula for intervention as manifested in case law, the Guidance does embody several changes:

    i.  Consumer Harm

There appears to be a change to the benchmark for intervention. The Commission has modified the overall test, as established in the case law, by shifting the emphasis to consumer harm. The Guidance stipulates that the Commission will consider a refusal to supply as an enforcement priority, and intervene, when three cumulative conditions are met: [1] the product is objectively necessary; [2] the refusal would lead to elimination of effective competition in the downstream market; and [3] the refusal would lead to consumer harm.

This change in rhetoric signals an emphasis on effect. In an attempt to advance an effect oriented approach, the Commission has introduced *consumer welfare* as a key variant in the analysis. Accordingly, the Commission will balance the likely negative consequences of the refusal to supply on consumer welfare, against the negative consequences of imposing an

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25 Case T-201/04 *Microsoft* (n 10 above) para 335.
26 Commission Guidance (n 1 above)
27 ibid, para 75
28 ibid, para 81
obligation to supply. The prevention of innovation is considered to be an example of such harm, but the Guidance leaves the condition open-ended. One would expect the Commission to pour additional content into this benchmark, as its own cases develop. Until then, it is unclear what the new condition might encompass.

While providing limited certainty, the focus on consumer harm shifts attention firmly onto consumers, rather than competitors. Once developed, this could provide a useful limiting principle, since it ensures that intervention is triggered only where consumer harm is proven, rather than by showing exclusion of competitors.

ii. Exceptional Circumstances

The role played by ‘exceptional circumstances’ in limiting the application of Article 102 TFEU has also been affected by the Guidance. As illustrated above, the Court has held that a duty to contract arises only in ‘exceptional circumstances.’ This acts as an important safety valve, stressing the need for proportionality, and restraining the application of competition law. It has served as a balancing instrument, even in those cases (such as Microsoft) where the Court actually widened the realm of competition law. Commenting on that case, Bo Vestedorf, former President of the CFI, noted its significance in ensuring a restrictive application and interpretation of Article 102 TFEU.

Surprisingly, despite the central role of this instrument in the Union’s case law, and earlier references to it in the Commission’s 2005 Staff Discussion Paper, the Commission omitted it from its 2008 Guidance. While the Commission does say that intervention requires careful consideration, it does not state clearly that a duty to contract would arise only in ‘exceptional circumstances.’ Consequently, it appears to have removed from its tool box, or at least pushed aside, a significant limiting principle.

iii. Follow-on Innovation

A further example illustrating a departure from case law concerns follow-on innovation. On this point, the Guidance stipulates that:

‘The Commission considers that consumer harm may, for instance, arise where the competitors that the dominant undertaking forecloses are, as a result of the refusal, prevented from bringing innovative goods or services to market and/or where follow-on innovation is likely to be stifled [Case T-201/04 Microsoft v Commission]. This may be particularly the case if the undertaking which requests supply does not intend to limit itself essentially to duplicating the goods or services already offered by the dominant undertaking on the downstream market, but intends to produce new or improved goods or services for which

29 ibid. para 86
31 B Vestedorf ‘[Article 102 TFEU]: Where do we Stand after the Microsoft Judgement?’ (n 13 above), page 9.
32 DG Competition Discussion Paper on the Application of [Article 102 TFEU] to Exclusionary Abuses, available at: http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf, para 239, where the Commission noted that ‘Only under exceptional circumstances can the refusal to license an IPR be considered an abuse’ citing Case 238/87 Volvo (n 3 above), Joined Cases C-241/91 P and C-242/P Magill (n 5 above), and Case C-418/01 IMS Health (n 9 above).
33 See Lang. (n 30 above).
34 ibid.
there is a potential consumer demand or is likely to contribute to technical development [Case C-418/01 IMS Health v NDC Health].

This statement illustrates the imperfect overlap between the broad concepts described in the Guidance, and those of the European Court. With respect to follow-on innovation, the Guidance includes a reference to the Microsoft and IMS Health cases and suggests that such innovation is likely to be stifled in particular when the undertaking which requests the supply does not intend to duplicate the goods. Yet, in its IMS Health judgment the ECJ held that a refusal by a dominant undertaking to licence an indispensable product “… 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.” The Commission has favoured a less restrictive approach, putting forward a broad statement which is not accompanied by the factual matrix surrounding the cases from which the benchmark was imported. The result is a likely widening of the instances in which abuse may be found.

Evidently, the Commission is trying to extract a rule from the case law. However, the Microsoft decision was justified by its particular facts, namely the incidental role played by the information and the unique market characteristics at play. In this context, the merit of establishing a general principle, based on the characteristics of a unique case, is questionable.

iv. Efficiency Defence

The introduction of an efficiency defence in the Guidance is to be welcomed, since it may help inject economic appraisal into the analysis of abuse. It introduces a degree of fine tuning, moving away from a formalistic approach, and explores the real welfare consequences of particular conduct by dominant companies. As such, it could potentially counterbalance the widening trends illustrated above. The defence could, in principle, allow a dominant company to justify its actions when it can show that efficiencies brought about by its refusal to licence outweigh the likely negative effects stemming from the alleged anticompetitive conduct.

In its Guidance, the Commission outlines two situations which may give rise to a successful defence by an IPR holder, both of which focus on the motivation to invest and innovate. The first is justified by the need to allow the dominant undertaking to realise an adequate return on investment required to develop its input business. The second concerns the effect on the dominant undertaking’s innovation and the need to generate incentives for it to continue to take risks and invest in innovation. With respect to the latter, the Commission will consider the effects that an obligation to supply, and follow-on innovation by competitors, will have on the dominant undertaking. This is in line with the 2005 Discussion Paper where, in the context of licensing, the Commission observed the need to consider whether the intellectual

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35 Commission Guidance (n 1 above) para 87 (emphasis added).
36 C-418/01 IMS Health (n 9 above) para 49.
37 The Commission’s statement in the Guidance may also be contrasted with its own statement in the 2005 Discussion Paper where it noted that a refusal by a dominant company to license access to the IPR could be considered abusive when ‘the refusal to grant a licence prevents the development of the market for which the licence is an indispensable input, to the detriment of consumers.’ This, the Commission added, ‘may only be the case if the undertaking which requests the licence does not intend to limit itself essentially to duplicating the goods or services already offered on this market’. (Discussion Paper, n 32 above, para 239).
38 Guidance Paper (n 1 above) para 89. Note Case T-201/04 Microsoft (n 10 above) in which a similar claim made by Microsoft was rejected, paras 688–711.
property rights may be the result of substantial investment entailing significant risks.\(^{39}\) This need particularly arises where the investment would not have been made if the investor had known that it would have a duty to supply.\(^{40}\)

However, such considerations have traditionally formed part of the initial assessment of abuse by the Commission and European Courts. As indicated by the Commission in its Guidance, intervention in cases of refusal to supply is the exception, and will only take place following careful consideration of the effects it may have on innovation and investments.\(^{41}\) The extent to which the novel efficiency defence adds and refines the analysis in the context of IPRs is therefore questionable. Worth noting though, is the fact that the defence does alter the burden of proof. Whereas before, this would have been part of establishing abuse by the Commission, under the Guidance it would be a defence that the defendant company would need to establish itself.

In its 2005 Discussion Paper, the Commission stated that if the conduct of a dominant undertaking generates efficiencies and satisfies the other conditions of Article 101(3) TFEU, such conduct should not be classified as an abuse under Article 102 TFEU.\(^{42}\) Accordingly, the proposed efficiency defence under Article 102 TFEU was based on four conditions:

(i) that efficiencies are realised or likely to be realised as a result of the conduct concerned;
(ii) that the conduct concerned is indispensable to realise these efficiencies;
(iii) that the efficiencies benefit consumers;
(iv) that competition in respect of a substantial part of the products concerned is not eliminated.\(^{43}\)

The Guidance largely retains this approach to efficiencies.\(^{44}\) With respect to the fourth condition, it stipulates that ‘… where there is no residual competition and no foreseeable threat to entry, the protection of rivalry and the competitive process outweigh possible efficiency gains.’\(^{45}\) The Commission then adds that, in its view:

‘Exclusionary conduct which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains.’\(^{46}\)

To satisfy the fourth condition, the dominant undertaking should show that ‘… competition in respect of a substantial part of the products concerned is not eliminated’. However, this condition is (an imperfect) mirror image of the refusal to licence test in its narrow interpretation. Recall that, when applied narrowly, the finding of abuse will be substantiated due to the refusal being found ‘… likely to exclude all competition in the secondary market’.\(^{47}\) In such a case, the elimination of all competition would exclude the use of the efficiency defence. This is not surprising considering the general view, as expressed by the

\(^{39}\) Discussion Paper (n 32 above) para 235.
\(^{40}\) Discussion Paper (n 32 above) para 236.
\(^{41}\) Commission Guidance (n 1 above) para 75.
\(^{43}\) Discussion Paper (n 32 above) para 84.
\(^{44}\) Commission Guidance (n 1 above) paras 30–1.
\(^{45}\) ibid, para 30.
\(^{46}\) ibid, para 30.
\(^{47}\) See the Magill and Oscar Bronner judgments (n 5 and n 6 above).
Commission, according to which ‘… the protection of rivalry and the competitive process is given priority over possible pro-competitive efficiency gains.’

The defence may however have a role to play when the refusal to supply or licence is established on a more liberal interpretation than established in the Magill judgment, as seems to be favoured by the Commission. In cases where the Commission has established abuse on the basis of negative effects on competition in the downstream market or partial elimination of competition, the defence could provide a (limited) balancing tool. However, it would be for the undertaking to bear the burden of proof, and establish the requisite conditions of this as yet unexplored vehicle.

On this point, in the TeliaSonera judgement, the Court noted that exclusionary effects ‘could be counterbalanced … by advantages in terms of efficiency which also benefit the consumer.’ Similarly, in Deutsche Telekom, consumer considerations formed part of the analysis of abuse. While both these cases concerned margin squeeze, they provide a good indication as to the role played by efficiency and consumer welfare in the analysis.

**IV. Practical Implications**

The discussion here highlights the evolving formula for intervention and for a finding of abusive refusal to licence. The main risk posed by these developments is that the increased erosion in the protection awarded by IPR may result in a chilling effect on competition and innovation. This is of particular concern since the intervention formula lacks clear intellectual foundations, and has developed on a somewhat ad hoc basis. As illustrated, the Commission’s attempted extraction from the case by case approach has resulted in a widening trend.

In many respects, this represents sub-optimal enforcement, comprising of instances in which the competition tool has been applied – albeit with restraint – with limited refinement.

On one hand, one may argue that the practical impact of this application is arguably restricted. The widening trend has not opened the flood gates, nor are IP holders subjected to a barrage of competition challenges. Cases which have succeeded consist of truly unique circumstances, which are not easily duplicated. More specifically to innovation driven sectors, it can be argued that ongoing competitive pressure cannot easily be chilled by the handful of cases on compulsory licensing. Dominant undertakings, which are not shielded by network effects, are subjected to ongoing risks of new entry and are likely to continually innovate in order to maintain their market position.

On the other hand, it is possible to question whether the small number of cases indicates a lack of chilling effect on innovation. Arguably, it is the perception of over enforcement which chills innovation, and that chilling effect exists irrespective of the number of challenges and cases. While the publication of the Guidance Paper does not alter the Commission’s appetite, or lack of appetite, to intervene in such cases, it does change the signal as to the level of intervention, and may also have an impact on enforcement at national level. Increased use of the open-ended formula at national level, and the ex-post application of competition law to

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48 Discussion Paper (n 32 above) para 91.
49 Discussion paper (n 32 above) para 231.
50 Case C-52/09 Konkurrensverket v. TeliaSonera AB, ECJ, para 75-77.
51 Case C-280/08 P, Deutsche Telekom v. Commission, ECJ, para 253. Interestingly, in TeliaSonera, efficiencies were treated as part of the objective justification argument, thus shifting the burden of proof.
‘strong rights’, may ultimately have a chilling effect on innovation. According to this view, while ex-post competition intervention may be a necessary evil, it can be limited and clarified to minimise effects on innovation. Unsurprisingly, the extent to which one is persuaded by either of the arguments above depends primarily on one’s market power and IP portfolio. The optimal trade-off between innovation and compulsory licensing is rather elusive.

Still, one could aim to clarify it by providing a more consistent analytical framework which takes note of the unique circumstances underpinning intervention in specific cases. In this respect, the extraction of a general intervention formula, detached from the factual matrix, is problematic. In addition, greater attention to the scope of the compulsory remedy and its limitations, may assist in minimising undesirable effects. Its effects are not only confined to the EU and may be felt elsewhere.\footnote{When a competition remedy cannot be isolated to a given territory - the most restrictive competition regime determines the level of IP protection worldwide.}

\footnote{In addition, greater attention to the scope of the compulsory remedy and its limitations, may assist in minimising undesirable effects.}