Evolution and Development of the Essential Facilities Doctrine in a European Competition Law Context

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Introduction
The essential facilities doctrine, the notion that an undertaking would in certain circumstances be compelled to share a facility or infrastructure with competitors on reasonable terms, has since inception been subject to rigorous scrutiny and intense debate amongst legal and economic minds. This paper seeks to explore and evaluate the evolution and development of the doctrine, principally as it has been applied, critiqued and propounded by EU Commission, Court of Justice of the European Union [CJEU] and commentators. The legal framework upon which it hinges in a U.S. and EU context will be reviewed before the notable judgments of Magill,1 Oscar Bronner,2 IMS Health3 and Microsoft4 are analysed in turn. Ultimately, this paper posits the essential facilities doctrine is tacitly entrenched within European competition law and a useful instrument to enhance consumer welfare within the toolbox of the EU Commission and Courts. Stringent conditions have emerged through precedent, which must be satisfied prior to forced disclosure being mandated upon facility owners. The circumstances upon which the doctrine may be deployed within dynamic markets remains open to interpretation and delineating an appropriate line over which an exclusive intellectual property right (IPR) may be encroached upon fuels the complexity permeating this area of jurisprudence. Ultimately, the lack of legal certainty faced by organisations contemplating large scale R&D investment compels this author to beg and plead the EU Commission and Courts to clarify the doctrines scope and correct legal application at its earliest convenience.

Foundations of the Essential Facilities Doctrine
The Essential Facilities Doctrine has been at the heart of American antitrust since United States v Terminal Railroad Association,5 in which the Supreme Court held a ‘bottleneck’ facility that could not feasibly be duplicated must be shared among rivals

on non-discriminatory terms. It serves as a long-standing limitation on the general U.S. rule that a firm has no obligation to deal with competitors and renders a unilateral refusal to deal subject to potential liability as a monopolisation of Section 2 of the U.S. Sherman Act.\(^6\) Similarly, in *Otter Tail Power Co v United States*,\(^7\) the Supreme Court held an electric utility with a monopoly in the generation of electricity and high-voltage transmission violated Section 2 when it refused to sell at wholesale to a municipality seeking to compete with the utility in the retail market. The corresponding framework upon which the doctrine hinges within the European Community is Article 102 Treaty on the Functioning of the European Union (TFEU), which prohibits abuse of a dominant position within the common market or a substantial part of it in so far as it may affect trade between Member States. AG Jacobs articulated the significance of the doctrine in *Oscar Bronner* submitting ‘a dominant undertaking must not merely refrain from anti-competitive action but must actively promote competition by allowing potential competitors access to the facilities, which it has developed’.\(^8\)

‘Essential Facilities’ are generally accepted as assets ‘without access to which competitors cannot provide services to their customers’\(^9\). This broad definition appears capable of bringing almost any asset within its ambit, yet suggests the wider competitive market structure will play a determinative role. The doctrine emerged from cases concerning abusive refusals to deal with existing customers and where a vertically integrated owner, holding exclusive control over a facility, leveraged that control to gain an advantage over competitors in a downstream market. For example, in *B&I Sealink*,\(^10\) the Commission obliged a port owner to reverse competitive constraints placed on downstream competitors, which resulted from altering the schedule of its own ferries in the latter market. Similarly, the CJEU first applied Article 102 TFEU in a manner resembling the essential facilities doctrine in *Commercial Solvents*.\(^11\) In that instance the Court, upholding the Commission’s

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\(^8\) *Bronner* (n 2).


\(^10\) Ibid.

decision, held a refusal by the world’s only producer of tuberculosis drug raw materials to continue to supply an existing customer, who was also a downstream competitor constituted an abuse within Article 102 TFEU, even if the dominant firm planned to use the raw materials itself, where such denial threatened to eliminate all competition from the market.

However, the CJEU were evidently mindful of the circumstances that imposing forced disclosure or compulsory access on a dominant undertaking not only struck at the heart of one of the central tenants of the market economy, freedom of contract, but could also jeopardise incentives to future investment. Thus, the Courts declined to apply its previously enunciated duty to supply to cases involving a refusal to licence, demonstrating a concern to safeguard IPR’s from unnecessary intrusion by competition law, particularly where there was no risk of market foreclosure in a ‘market’ that may exist outside the subject matter of an IPR. Thus in AB Volvo v Veng, the Court held the mere failure to licence one’s IPR’s would not, by itself, constitute abuse of a dominant position. Indeed, to hold otherwise would impose an absolute duty to deal with everyone requesting access to the facility by an undertaking with a dominant position. However, the Court cautioned ‘the exercise of an exclusive right by the proprietor of a registered design… may be prohibited by Art 102 TFEU if it involved, on the part of an undertaking holding a dominant position, certain abusive conduct’.

The ‘Exceptional Circumstances’ Test

Magill

The Magill judgment represents the closest the CJEU has come to endorsing, albeit tacitly, the essential facilities doctrine. Magill, a publisher who decided to produce a comprehensive weekly television guide, challenged an injunction imposed by certain broadcasting organisations that refused to distribute reliable advance listings

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14 [1988] ECR 1-123.
15 Ibid, at 6211.
16 Magill (n 1).
17 Ibid.
information and protected their listings by enforcing their copyright. This challenge was upheld by the Commission, General Court and on appeal, the CJEU as an abuse of a dominant position within Article 102 TFEU.

Through a highly individualised and fact-based inquiry, the CJEU first focused on whether the broadcasters occupied a dominant position by virtue of their copyright in the television programme listings. It held their exclusive possession of basic information (channel, day, time and title of programmes) enabled each to secure a *de facto* monopoly over the publication of such listings. Thus, third parties such as Magill were in a situation of economic dependence, which hindered the emergence of any effective competition on the downstream market for comprehensive television guides. ¹⁹

Subsequently, the CJEU analysed whether the broadcasters had abused their dominant position. The Court upholding the principle enunciated previously in *AB Volvo v Veng*, ²⁰ concluded ‘exceptional circumstances’ led the refusal in *Magill* to constitute abusive conduct: no substitutes for the information existed, resulting in Magill’s dependence on the broadcasting organisations as the sole source of an ‘indispensable raw material’ for producing the comprehensive television guide, which in turn prevented the appearance of a new product for which there was potential consumer demand; there was no objective justification for the refusal to licence and the companies concerned, by their conduct, reserved to themselves the secondary (or downstream) market of weekly television guides by excluding all competition. ²¹ Goyder interestingly suggests two additional arguments enunciated by the Commission may have tacitly influenced the CJEU’s opinion, namely the availability of weekly television guides in other Member States and the fact the copyright in programme material arose solely from the existence of a statutory privilege conferred upon the broadcast organisations. ²²

The Court refrained from explicitly deploying essential facilities terminology and through accentuating the material sought as information, as opposed to intellectual

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¹⁹ *Magill* (n 1).
²⁰ *AB Volvo* (n 14).
²¹ *Magill* (n 1).
property, appeared to articulate the listings as some lower form of life not worthy of protection. Compelling compulsory licencing under the essential facilities doctrine to remedy unmeritorious copyright may well enable Courts and CEO’s to weaken the copyright owner’s grip over material that should not be his exclusive right to exploit. However, by taking merit into account, competition intervention would invariably translate into uncertainty in copyright exploitation. Additionally, distinguishing unmeritorious copyright is a challenging task and cuts through the integrity of competition law analysis. Nevertheless, access to the protected copyright can be understood by considering the raw material was critical to the creation of the television guides. Magill\textsuperscript{24} can be distinguished from \textit{Commercial Solvents}\textsuperscript{25} in that the defendant broadcasters were not seeking to leverage their control over the essential facility into the downstream market for weekly comprehensive television guides but rather were attempting to leave the market unsupplied. Little guidance was provided as to the categorical limitations of the doctrine or circumstances in which a refusal to licence an IPR would be considered abusive. In its aftermath, it remained uncertain whether the ‘exceptional circumstances’ were context specific or whether they should be applied as cumulative conditions for abuse. Overall, it appeared where an undertaking had acquired a dominant position, even without being a monopolist, competitors would essentially be able to free ride on its investments. Hence, there was a scorching need for the CJEU to intervene and clearly define the conditions under which the doctrine should apply.

The position became even more uncertain following \textit{Tierce Ladbroke SA v Commission},\textsuperscript{26} which appeared to simultaneously restrict and expand the scope of \textit{Magill}.	extsuperscript{27} The case concerned the refusal of a racecourse operators’ association to permit radio and television commentaries on French race meetings in its betting offices. The General Court distinguished \textit{Magill},\textsuperscript{28} holding there was no duty to grant a licence to a firm that was not only present in the market already, but a market

\begin{itemize}
  \item \textsuperscript{23}Lim, ‘Copyright Under Siege: An Economic Analysis of the Essential Facilities Doctrine and the Compulsory Licensing of Copyrighted Works’ (2007) 17 \textit{Albany Law Journal of Science and Technology}.
  \item \textsuperscript{24}Magill (n 1).
  \item \textsuperscript{25}Commercial Solvents (n 11).
  \item \textsuperscript{26}[1997] ECR II-923.
  \item \textsuperscript{27}Magill (n 1).
  \item \textsuperscript{28}Ibid.
\end{itemize}
leader. Additionally, an alternative condition was asserted whereby a duty to supply might exist where the absence of substitutes rendered access essential or where refusal to licence prevented the introduction of a new product for which there was regular customer demand. The General Court confirmed the applicability of the doctrine to IPR’s but rightly found that broadcasts of French horse races simply did not constitute a facility to which access was essential in order to compete in the Belgium betting market.29

**Oscar Bronner**30

To prevent an overzealous application of the essential facilities doctrine, which risked alienating owners to take their business to alternative jurisdictions, its prerequisite conditions were strengthened in *Oscar Bronner GmbH v Mediaprint*.31 Through a preliminary reference, the CJEU was asked whether it was an abuse of a dominant position within Art 102 TFEU for a press undertaking (Bronner) holding a very large share of the daily newspaper market in Austria and which operated the only nationwide newspaper home delivery scheme to refuse paid access to that scheme by the publisher of a rival newspaper (Mediaprint).

The CJEU closely followed the compelling opinion of AG Jacobs who overtly reasoned on the basis of the essential facilities doctrine and stressed the necessity of confining the concept within strict limits. It set out a tripartite test, combining the conditions of *Magill*32 with the new requirement of indispensability (i.e. no actual or potential substitutes) enunciated in *Ladbroke*.33 The Court held only when a facility owned by a dominant company was indispensable to or impossible to replicate by a competitor would an unjustified refusal to grant access to it be rendered abusive. This would only be the case if no plausible substitutes, even if less advantageous, existed (such as selling through the post, kiosks or shops) and the impossibility of duplicating the facility was objective, due to ‘technical, legal or economic obstacles’ and not to the limited capacities such as inadequate output of the specific competitor requiring access. Through this requirement, the threshold required to avail of the doctrine

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29 *Ladbroke* (n26).
30 *Bronner* (n 2).
31 Ibid.
32 *Magill* (n 1).
33 *Ladbroke* (n 26).
appeared to be raised to situations in which the owner of a facility held more than a dominant position.\textsuperscript{34} Even though sharing the essential facility may have been efficient, it was not critical for competition on the market. The Court appeared particularly severe and restrictive surrounding the capacity of economic reasons to justify a duty to supply, requiring ‘at the very least, that the creation of those products or services (be)... not economically viable for production on a scale comparable to that of the undertaking, which controls the existing product or service.’\textsuperscript{35} This appeared to indicate the doctrine would be applicable if a duopoly was not economically viable in the market where the facility was provided.\textsuperscript{36} The central economic consideration was whether the investments required for duplicating the facility to which access was requested would deter entry by a reasonably efficient competitor. Focus centred on whether it was possible for a substitute facility to be created and not on whether competitors would in fact make the investment.\textsuperscript{37} Furthermore, the Court stated in order to assess whether the refusal to grant access to an indispensable product or service was abusive, it was relevant to distinguish an upstream market, constituted by the product or service, and a secondary downstream market, on which the product or service in question was used for the production of another product or the supply of another service. As emphasised by AG Jacobs, the CJEU’s real concern was whether Bronner, by refusing access to its home delivery system, obtained a ‘genuine stranglehold’ on the Austrian newspaper market.\textsuperscript{38}

Reflecting on Commercial Solvents\textsuperscript{39} subsequent to the judgment indicates the Court in that instance should have considered whether potential substitutes existed and whether it was technically feasible and economically viable for them to be developed. In light of that, the Court may have found the raw materials supplied by Commercial Solvents were not indispensable for allowing Zoja to compete on the ethambutol market. Similarly, Evrard argued the program listings Magill\textsuperscript{40} was authorised to use, i.e. listings covering two days and the highlights of the week ahead, were sufficient to

\textsuperscript{35} Bronner (n 2), at 1-7807.
\textsuperscript{38} Bronner (n 2).
\textsuperscript{39} Commercial Solvents (n 11).
\textsuperscript{40} Magill (n 1).
produce a guide capable of competition on the downstream market. Indeed, albeit a weekly television guide would serve as a more valuable asset to many consumers at that point in time, a two-day supplement appeared economically feasible notwithstanding the limited useful life, time frame and costs of production associated with such a guide.\textsuperscript{41}

Overall, the judgment limited the application of the essential facilities doctrine to instances where it was physically impossible for any competitor to duplicate the facility and to exclude its applicability where it was simply economically unattractive to replicate.\textsuperscript{42} A careful balance was struck between the need to protect incentives to investment, property rights of large firms and the demands of a competitive economy. As Dr Capobianco noted, the judgment prevented the doctrine being used as ‘a low cost alternative to the more arduous and time consuming process of competing to make better products than ones rivals’.\textsuperscript{43}

**IMS Health GmbH v NDC Health**

Another attempt was made to expand the scope of the essential facilities doctrine in *IMS Health GmbH v NDC Health*.\textsuperscript{44} The CJEU was requested through a preliminary reference to determine whether Article 102 TFEU applied where a company with a dominant position refused to grant for valuable consideration a licence agreement – an 1860’s brick structure protected by copyright – to a competitor in circumstances where potential clients rejected any product which did not make use of this brick structure as their set up relied on products manufactured on the basis of it.

From the outset, AG Tizzano\textsuperscript{45} distinguished the case, stressing IMS’s allegedly abusive refusal to grant a licence was aimed at ‘competitors operating on the market concerned by the copyright itself.’ By contrast, earlier cases concerned ‘vertically integrated undertakings which by refusing to grant a licence abused their dominant position on an upstream market in order to restrict or eliminate competition on a

\textsuperscript{41} Evrard (n 34).
\textsuperscript{43} Albors-Llorens (n 18).
\textsuperscript{44} IMS Health (n 3).
\textsuperscript{45} Case C-418/01, IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG [2004] ECR 1-5039, Opinion of AG Tizzano, p 5042.
downstream market.’ The Court submitted for the doctrine to apply, two markets must be identified. However, there need not be a sharp distinction between a primary and secondary market, but a new product should emerge on the downstream market as a consequence of the application of the doctrine. The Court clarified it is not an essential element of Magill that the ‘input’ deemed essential to competing in the downstream market be sold separately. It is sufficient if the input is part of a ‘potential or even hypothetical market.’ By separating the various stages of production in this way, the IPR or the innovation on which the IPR rests forms the primary market and the application of the IPR in the product or service forms the derivative market.

The critical question was therefore whether IMS’s 1860’s brick structure was upstream an indispensable factor in the downstream supply of German regional sales data. The Court held this question should be answered in the affirmative where three cumulative conditions were satisfied:

(i) Non-disclosure would frustrate the development of a new product for which there was a potential consumer demand
(ii) The refusal was not justified by objective considerations
(iii) Non-disclosure would result in the elimination of all competition in the downstream market

Given the case came before the Court via a preliminary ruling, the CJEU had no jurisdiction to deal with the application of these criteria to the actual facts of the case, a task that was referred back to the national courts.

Regarding the prevention of a new product, the Court held a refusal to grant a licence would only be abusive in cases where the IPR holder was using his right with the sole purpose of preventing the development of a new market for which the licence was an

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47 Magill (n 1).
49 J Goyder and A Albors-Llorens (n 22).
indisputable input and in doing so, acted to the detriment of consumer interests.\textsuperscript{50} Similar to \textit{Magill},\textsuperscript{51} the concept of a ‘new’ product was unfortunately not elaborated upon and a grey area surrounds the distinction between those products that are ‘essentially a duplication’ of existing ones and those that are truly ‘new’. However, this test would never be constraining were trivial changes permitted to constitute a ‘new product’.\textsuperscript{52} Dr. Temple Lang suggests the refusal must prevent the emergence of ‘a new kind of product’.\textsuperscript{53} The product should be a derivation not previously offered, rather than a mere clone as such a threshold would enable every product to potentially attract compulsory licencing. The value lost by consumers for the improved product not being on the market is the key variable.\textsuperscript{54} Additionally, the doctrine should be confined to ‘new products’ in the secondary market. From an economic perspective, the critical issue was not whether some consumers would like the improvement being made but what their willingness to pay for it was and whether it outweighed the costs of the improvement.\textsuperscript{55} One commentator suggested the opinion of consumers could play an important role and a product could be considered ‘new’ where it expands the market at current prices by incorporating customers whose demands were not previously satisfied.\textsuperscript{56} Overall, for the term not to lose all distinguishing power, it should be construed narrowly.

The judgment illustrated the protection of free competition could only prevail where refusal to grant a licence prevented the development of the secondary market to detriment of consumers. It remained unresolved whether a dominant undertaking could argue the refusal to licence, especially aimed to a competitor, was necessary to allow it to recoup the value of its investment and thus, could be ‘objectively justified’. However, the Commission in its 2005 Discussion Paper on the application of Article 102 TFEU to exclusionary abuses suggested any objective justification arguments based on the need to protect the dominant undertaking’s incentives to innovate would

\textsuperscript{50} \textit{Ibid.}
\textsuperscript{51} \textit{Magill} (n 1).
\textsuperscript{54} Leveque (n 42).
\textsuperscript{55} Lim (n 23).
\textsuperscript{56} Ahlborn (n 53).
probably be unsuccessful, especially when the refusal to grant a licence was likely to result in stifling further technical development, whether ‘radical’ or ‘follow on’.  

The Doctrines Application within Dynamic Industries

Much of the ambiguity and lack of clarity appears to derive from the doctrines application within highly dynamic industries and those concerning IPR’s. Uncertainty exists as to the optimum manner in which the principles developed within aforementioned ‘traditional’ industries should be applied. The Courts and Commission have failed to explicitly indicate whether such conditions are suitable in markets where it is essential to consider not only the short term impact of compelling a firm to disclose its proprietary information but also the strategic effects of allegedly exclusionary practice on the incentives to invest in R&D.

European Commission v Microsoft

The landmark Microsoft judgment concerned whether Microsoft’s refusal to disclose to Sun Microsystems sufficient interoperability information to enable them to create ‘Workgroup Server Operating Systems’ (WGSOS) that would be compatible with Microsoft Windows desktop and server operating systems constituted an abuse under Article 102 TFEU. Through a two-step approach, the Commission found the interface information to be indispensable. The Commission considered the degree of compatibility with Windows, which non-Microsoft WGSOS would require in order for competitors to remain viably on the market. Secondly, the Commission appraised whether the information Microsoft refused to disclose was indispensable to that degree of interoperability. It concluded competitors’ systems had to be interoperable with Windows on an equal footing with Microsoft’s own systems if they were to compete viably with them and this would be not possible in the absence of the information Microsoft refused to disclose.

Albeit the General Court did not adopt the Commission’s preferred legal standard, which assessed all relevant circumstances of the case, it reached the same conclusion.

58 Microsoft (n 4).
59 Ibid.
The General Court considered it first appropriate to decide whether the *IMS Health* criteria were present and only if one or more were absent to assess the particular circumstances invoked by the Commission. Thus, the *IMS Health* criteria appeared to have been stretched as the Court held the exceptional circumstances checklist non-exhaustive and merely an ‘open ended set of conditions’ to be assessed against the background of each case. In concluding the interoperability protocols to be indispensable, the Court rightfully dismissed Microsoft claim that reverse engineering could suffice as a sufficient alternative to the protected information. Such an approach would constitute ‘an unstable basis for a business model’, being not only demanding in terms of both time and cost, but leaving competitors playing continuous catch up in a rapidly evolving industry with strong network effects.

The Court concluded the Commission’s finding to the effect that Microsoft’s refusal limited technical development to the prejudice of consumers within the meaning of Article 102 TFEU was not manifestly incorrect. It acknowledged Article 102 TFEU recognised a refusal to licence an IPR as capable of causing prejudice to consumers where there was a limitation ‘not only of production or markets, but of technical development’. The General Court reasoned the refusal effectively ‘locked in’ and channeled existing and future users to Microsoft’s entrenched format, hindering consumer welfare and perpetuating an inefficient standard. Once the interconnection protocols were provided, competitors would be able to offer WGSOS which, far from merely reproducing Windows systems already on the market, would be distinguished with respect to parameters which consumers considered important. Given the nature of the software industry, product differentiation would be essential for competitors seeking to remain profitably on the market. Molden criticised the Courts reasoning and suggested it more appropriate to explicitly admit the reversal of previous case law, or at the very least, substantial modification of the new product condition. He noted the judgment essentially replaced the new product condition from the *IMS Health* case law with a ‘new or improved’ product test. This new product

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60 *IMS Health* (n 3).
61 Ibid.
62 *Microsoft* (n 4).
63 Ibid, p 3832.
requirement appeared to have been diluted from its inception in *Magill*,\(^{65}\) where the Court referred to a new product for which there was established consumer demand, to *Microsoft*,\(^{66}\) where it was sufficient that consumer demand and the need to design around Microsoft’s IPR’s would ensure that rivals’ implementations constituted new products. Simultaneously, this ‘technical development’ criterion markets a return to a more textual interpretation of the Treaty provisions on competition and suggests a potential shift in focus from effects on the market to intention to innovate.

The Court found the ‘elimination of competition’ limb of the *IMS Health*\(^ {67}\) test was met based on two considerations. Firstly, the General Court upholding the Commission’s approach held it is sufficient that there is potential elimination of competition, which contrasts with the CJEU’s previous requirement that all competition on a neighbouring market be excluded. The Court reasoned if the Commission were required to wait until competitors were eliminated from the market, or until elimination was sufficiently imminent, that would run counter to the objective of Article 102 TFEU, which was to ‘maintain undistorted competition on the common market… and safeguard the competition that still exists on the relevant market.’ The impact would likely be irreversible due to the markets network effects and likelihood of auxiliary software and content being developed which would be compatible with this leading format. Thus, the refusal would effectively enable Microsoft to extend its market power in the client PC operating systems market, which encompassed the interoperability information, to the related market for the provision of WGSOS. The Court explicitly dismissed Microsoft’s reasoning regarding a distinction between ‘likely to eliminate all competition’ and ‘high probability’ that the conduct would have such a result, holding ‘Microsoft’s complaint is purely one of terminology and is wholly irrelevant.’ Secondly, the Commission needed to establish the elimination of ‘effective competition.’ The General Court reviewed the Commission’s analysis of market share trends held by Microsoft and competitors concluding the refusal to supply had *de facto* marginalised a number of competing suppliers from the market, rendering them no longer a ‘credible threat’ to the dominant firm. However, the fact competitors of the dominant undertaking retained a marginal presence in certain

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\(^{65}\) *Magill* (n 1).

\(^{66}\) *Microsoft* (n 4).

\(^{67}\) *IMS Health* (n 3).
niches on the market would not suffice to substantiate the existence of such competition.

The Commission, after establishing the exceptional circumstances identified by the CJEU in Magill\(^{68}\) and IMS Health\(^{69}\) were present proceeded to consider whether the justification put forward by Microsoft, on the basis of the alleged impact on its incentives to innovate, might prevail over those exceptional circumstances. The sole fact the protocols were covered by copyright could not prevent them being relied upon to avoid a finding of an infringement under Article 102 TFEU. There was ‘no reason why secret technology should enjoy a higher level or protection than, for example, technology which had necessarily been disclosed to the public by its inventor in a patent application procedure.’ Although the burden of proof of the existence of circumstances that may constitute an infringement of Article 102 TFEU was bourne by the Commission, the General Court held it was for Microsoft to raise any plea of objective justification. The Court concluded Microsoft merely put forward ‘vague, general and theoretical’ arguments and failed to prove the disclosure of the interconnection protocols would have hampered its incentives to innovate. Indeed, Microsoft’s circular reasoning and non-disclosure was inconsistent not only with normal market behaviour, but also Microsoft’s previous sharing of interoperability information when it retained a small share of the WGSOS market.

Overall, the decision sets an important precedent for dominant firms yet is arguably exceptional in many ways as it is directed to an instance of super dominance rarely observed and to markets with strong network effects. Whether the interoperability information was covered by IPR’s at all remains contestable, given there was investment only in the software products, the critical information being merely a derivative of an invention. However, the Commission and Court proceeded on the assumption that the interoperability information was protected by IPRs. The importance of compatibility and interoperability as a decisive factor influencing consumer choice may distinguish Microsoft\(^{70}\) from precedent going forward. The Court adopted a formalistic approach, which largely followed the ‘ordoliberal’

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\(^{68}\) Magill (n 1).
\(^{69}\) IMS Health (n 3).
\(^{70}\) Microsoft (n 4).
tradition in European Competition policy in preference to a specific effects-based analysis. First, the Court admitted the possibility that a refusal should be evaluated based on an elastic set of ‘exceptional circumstances’ and not solely those identified by the CJEU in *IMS Health*.\(^{71}\) Second, the Court effectively replaced the new product limb of the exceptional circumstances test with one based on the general concept of limiting technical development. Third, the Court nullified the indispensability prong of the test by adopting an elimination of competition test based on the prediction of future market behaviour and which adopted an ‘effective competition’ concept.\(^{72}\) Such an approach contrasts greatly with the weak per se lawful rule for refusal to supply by dominant firms enunciated in *Magill*,\(^{73}\) *Bronner*\(^{74}\) and *IMS Health*,\(^{75}\) whereby a refusal would be considered lawful but for exceptional circumstances.

In technologically driven and innovative markets, maintaining incentives to investment is critical to economic development and subsequent enhancement of consumer welfare. The pivotal question appears to be how to reward the efforts of technological development of the ‘winning’ supplier while avoiding the possibility of a ‘winning product’ becoming so entrenched as to prevent the emergence of a more efficient and thus preferable, alternative output.\(^{76}\) Perhaps an extension in the length of time afforded to all IPR’s should be granted to prevent a chilling effect on investment from the outset and to compensate against the risk that in certain circumstances an organisation’s exclusive right may be encroached upon for the benefit of consumers. Alternatively, intellectual property law itself holds many potentially useful doctrines at its disposal, including the fair value doctrine and ideal expression dichotomy that constrain the exercise of IPR’s in situations in which the risk of anticompetitive harm while perhaps remote may outweigh the perceived incremental risk to dynamic efficiency without potentially distorting competition law in ways which may have unexpected consequences in alternative contexts. Thus,

\(^{71}\) *IMS Health* (n 3).
\(^{73}\) *Magill* (n 1).
\(^{74}\) *Bronner* (n 2).
\(^{75}\) *IMS Health* (n 3).
\(^{76}\) Andreangeli (n 12).
working to achieve reforms within the realm of intellectual property law may offer benefits comparable to those promised under the essential facilities doctrine.\textsuperscript{77}

\textbf{Conclusion - A Doctrine Still Awaiting “Limiting Principles”}\textsuperscript{78}

Albeit the Community Courts have avoided explicit reference to the ‘essential facilities’ doctrine, it has effectively become the modern metamorphosis of the \textit{ratio decidendi} enunciated in the CJEU \textit{Commercial Solvents}\textsuperscript{79} ruling. In contrast to the U.S. Supreme Court in \textit{Trinko},\textsuperscript{80} which explicitly declined to recognise the doctrine, it appears a clever instrument at the disposal of the EU Commission and Courts, facilitating intervention to prevent abusive conduct under Article 102 TFEU. While grounded against the bedrock principle of competition that posits consumer welfare is enhanced by vigorous competition, as Areeda submitted, ‘no one should be forced to deal unless doing so is likely substantially to improve competition in the marketplace by reducing price or by increasing output or innovation’.\textsuperscript{81} Justifying interference with a dominant undertaking’s freedom to contract demands careful balancing of conflicting considerations: it may appear logical to suggest social benefits, which may arise from compelling a dominant firm to share the fruits of its labour with competitors, justify its application. However, such benefits may be illusory where the long run costs to dynamic efficiency are accounted for or where courts are unable to administer the precise terms and price of forced sharing. Many aspects of the doctrine remain difficult to determine, including the circumstances in which a facility will be deemed so indispensable and impossible to replicate as to constitute an essential facility. Moreover, its application within highly dynamic industries remains open to interpretation with \textit{IMS Health}\textsuperscript{82} and \textit{Microsoft}\textsuperscript{83} suggesting a higher standard, incorporating the additional criterion of preventing a new product for which there is potential consumer demand or limiting technical development, may apply to cases involving the exercise of IPR’s. The resulting legal uncertainty is likely to adversely affect incentives to invest by both dominant undertakings and competitors, rendering

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\item\textsuperscript{77} Molden (n 64).
\item\textsuperscript{78} Areeda, ‘Essential Facilities: An Epithet in Need of Limiting Principles’ (1990) 58 \textit{Antitrust Law Journal}, 841.
\item\textsuperscript{79} \textit{Commercial Solvents} (n 11).
\item\textsuperscript{80} \textit{Verizon v Trinko} [2004] 540 US 398.
\item\textsuperscript{81} Areeda (n 78).
\item\textsuperscript{82} \textit{IMS Health} (n 3).
\item\textsuperscript{83} \textit{Microsoft} (n 4).
\end{itemize}
this author compelled to urge the EC Commission and Courts to clarify the scope of the doctrine and the appropriate balance in maximising short and long run consumer welfare at its earliest convenience. Finally, while it remains uncertain how the CJEU will consolidate *Microsoft* with precedent, should EU Judges be faced with confusion surrounding the correct approach to follow in determining the optimum circumstances in which to encroach upon owners’ exclusive rights and assets with the goal of enhancing consumer welfare, this author would hope they would continue to proceed cautiously, adopt a stringent legal standard and refrain from light heartedly mandating a duty to deal.
Bibliography

Cases

- *AB Volvo v Feng* [1988] ECR 1-123.

Books and Articles