



# Competition law and compulsory licensing

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# The competition rules in brief

- Regulation of market conduct
  - EU EEA law: Prohibition of
    - restrictive agreements/concerted practises and
    - Abuse of dominant position
  - Norwegian law: Harmonised
  
- Regulation of transactions (M&A)



# Enforcement pluralism

- EU Commission
- EFTA Surveillance Authority
- National Competition Authorities
  - Network
- Private action before ordinary courts



# The issue

- A long history of interface between IP and Competition Law with regard to refusals to license
- No final settlement of the issue
- A line of cases carving out a “doctrine” of refusals to licence and deal



# Article 82

- Test of dominance (United Brands para 65):  
”position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors , customers and ultimately of its consumers”
- Test of abuse (Michelin I para 70):  
“article 82 covers practices which are likely to affect the structure of a market where , as a direct result of the presence of the undertaking in question , competition has already been weakened and which , through *recourse to methods different from those governing normal competition* in products or services based on traders' performance , have the effect of hindering the maintenance or development of the level of competition still existing on the market”



# Point of departure: Refusals to deal

- Established early that refusals to deal may constitute abuse of dominant position
- Commercial Solvents (Case 6/73 para 25):  
”an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position”
- Unjustified refusal – elimination of competition



# Line of cases – refusals to deal

- United Brands
  - Cut-off of supplies to existing customer
  - Mixed abuse
- British Petroleum
  - Gave priority to long-standing customers during petrol crisis
- Telemarketing
  - Tying



# Essential facilities

- The "harbour cases"
    - Commission decisions
    - Stena Sealink
  - The Bronner case (C-7/97)
    - Refused access to newspaper distribution system in Austria
- "Although in *Commercial Solvents* ... the Court of Justice held the refusal by an undertaking holding a dominant position in a given market to supply an undertaking with which it was in competition in a neighbouring market with raw materials ... and services ... respectively, which were *indispensable* to carrying on the rival's business, to constitute an abuse, it should be noted, first, that the Court did so to the extent that the conduct in question was likely to *eliminate all competition* on the part of that undertaking."





# Intellectual property

- Volvo v Veng (238/87, para 8)
- The right to refuse access constitutes the very subject matter of the right:

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



# Magill TV Guide 1

- 241/91
- Refusal to share copyrighted TV-listings
- Indispensable (para 53):
  - ”...the only sources of the basic information on programme scheduling which is the indispensable raw material for compiling a weekly television guide”
- New product requirement
  - ”The appellants' refusal to provide basic information by relying on national copyright provisions thus prevented the appearance of a new product, a comprehensive weekly guide to television programmes”



# Magill TV Guide 2

- No justification (para 55)  
”there was no justification for such refusal either in the activity of television broadcasting or in that of publishing television magazines”
- Elimination of competition (para 56)  
”the appellants, by their conduct, reserved to themselves the secondary market of weekly television guides by excluding all competition on that market ... since they denied access to the basic information which is the raw material indispensable for the compilation of such a guide.”



# IMS Health (C-418/01) 1

- Para 34: Subject matter:  
"the exclusive right of reproduction forms part of the rights of the owner of an intellectual property right, so that refusal to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of a dominant position"
- Para 35: Abuse in "exceptional circumstances"



# IMS Health 2

- Restatement of Magill

”the exceptional circumstances were constituted by the fact that the refusal in question concerned a product (information on the weekly schedules of certain television channels), the supply of which was *indispensable* for carrying on the business in question (the publishing of a general television guide), in that, without that information, the person wishing to produce such a guide would find it impossible to publish it and offer it for sale, the fact that such refusal *prevented the emergence of a new product* for which there was a potential consumer demand, the fact that it was *not justified by objective considerations*, and was likely to *exclude all competition in the secondary market.*”



# IMS Health 3

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



# Syfait C-53/03

- Advocate General Jacobs 28 October 2004
  - Inspired by Trinko
  - More flexible approach?
  - Trade-off between
    - Restriction of competition
    - Incentives
  - Particular features of pharmaceutical industry



# Microsoft T-201/04

- Decided 17 September 2007
- Abuses:
  - Refusal to supply interoperability information, e.g.:
    - "Microsoft's refusal to supply as at issue in this Decision is a refusal to disclose specifications and allow their use for the development of compatible products."
  - Tying
    - Tying Windows Media Player to Windows Operating System





# Microsoft 2

- Refusal to deal & new product requirement
  - ” The circumstance relating to the appearance of a new product, as envisaged in *Magill* and *IMS Health*, paragraph 107 above, 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 82(b) EC. As that provision states, such prejudice may arise where there is a limitation not only of production or markets, but also of technical development.” (Para 647)
- Objective justification
  - ” The Court finds that, as the Commission correctly submits, Microsoft, which bore the initial burden of proof (see paragraph 688 above), did not sufficiently establish that if it were required to disclose the interoperability information that would have a significant negative impact on its incentives to innovate. ” (Para 694)



# Microsoft 3

- Bundling

- ” In the case of complementary products, such as client PC operating systems and application software, it is quite possible that customers will wish to obtain the products together, but from different sources. For example, the fact that most client PC users want their client PC operating system to come with word-processing software does not transform those separate products into a single product for the purposes of Article 82 EC.” (Para 922)
- ” The Court observes that it cannot be disputed that, in consequence of the impugned conduct, consumers are unable to acquire the Windows client PC operating system without simultaneously acquiring Windows Media Player, which means (see paragraph 864 above) that the condition that the conclusion of contracts is made subject to acceptance of supplementary obligations must be considered to be satisfied.” (Para 961)



# Microsoft 4

- Bundling – impact on competition
  - “As already observed at paragraph 868 above, the fact that the Commission examined the actual effects which the bundling had already had on the market and the way in which that market was likely to evolve, rather than merely considering – as it normally does in cases of abusive tying – that the tying has by its nature a foreclosure effect, does not mean that it adopted a new legal theory.” (Para 1035)
  - “OEMs are reluctant to add a second media player to the package which they offer consumers, as a second media player uses hard-disk capacity on the client PC while offering functionality similar, in essence, to that of Windows Media Player and when it is unlikely that consumers will be prepared to pay a higher price for such a bundle.” (Para 1044)



# US law Aspen Skiing (472 US 585)

- Inter-change of ski-tickets:  
”The refusal to accept the Adventure Pack coupons in exchange for daily tickets was apparently motivated entirely by a decision to avoid providing any benefit to Highlands even though accepting the coupons would have entailed no cost to Ski Co. itself, would have provided it with immediate benefits, and would have satisfied its potential customers. Thus the evidence supports an inference that Ski Co. was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival.”



# US Law Trinko (540 US 398)

- Telecommunications Act 1996: TPA
- Also a claim under Section 2?

"The complaint alleges that Verizon denied interconnection services to rivals in order to limit entry. If that allegation states an antitrust claim at all, it does so under §2 of the Sherman Act, which declares that a firm shall not "monopolize" or "attempt to monopolize." It is settled law that this offense requires, in addition to the possession of monopoly power in the relevant market, "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."



## US Law Trinko 2

Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms 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 invest 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."



# US Law Trinko 3

- Essential facility doctrine not recognized
- Aspen Skiing "at or near the outer boundary of §2 liability"
- Alternative route: Sector specific legislation better suited, citing Phillip Areeda:  
"No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency."
- Conclusion: No intervention



# US Law: Conclusion

- No general acceptance of essential facility doctrine
- Sector specific rules limit the application of antitrust
- Why?
  - Private enforcement. As opposed to EU
- Section 2 apparently construed more narrowly than Article 82





# Enforcement

- Public vs private enforcement
- US solution: Private treble damages remedy
- Compulsory licensing under IP law?
- What are the remedies?



# Remedies under EC Competition Law

## *Public remedies*

- Interim injunctions
- Cease-and-desist orders
- Fines

## *Private remedies*

- Competition law as a "sword":
  - Interim injunctions
  - Final injunctions
  - Damages
- Competition law as a "shield" i.e. as defence in infringement proceedings under national IP legislation:
  - Disapplication of conflicting national law
  - Abus de droit/vexatious litigation



# EC Law requirements for private remedies

- "Self-executing" provisions
- Principle of effectiveness
- Principle of equivalence
  - A right to damages
  - A right to interim injunctions before national courts



# The IMS Health litigation

- IMS Health: Developed sales tracking system for pharmaceuticals
- Former employees founded competing companies applying copyright protected 1860 Brick system
- Copyright infringement actions 2000
- NDC Health requested a licence. Rejected by IMS Health

<b>18 Dec. 2000:</b>	<b>NDC lodged a complaint before the EC Commission</b>
<b>3 July 2001:</b>	<b>Interim measures adopted (OJ 2002 L p. 59)</b>
<b>26 Oct. 2001:</b>	<b>Decision suspended by President of CFI (T-184/01)</b>
<b>11 April 2002:</b>	<b>Confirmed by President of ECJ (C-481/01 P)</b>
<b>13 August 2003:</b>	<b>Withdrawal of decision. Right to use a system derived from 1860 recognized by OLG Frankfurt</b>
<b>29 April 2004</b>	<b>ECJ delivers judgement in copyright infringement action</b>



# IP Law remedies – compulsory licensing

- Self-executing?
- A right to license as a subjective right?
- No overriding principle of effective and equivalent protection (unless the right is granted by EC law)
- Interim injunctions
- A right to damages?
- Significance of harmonisation
- *Are IP law remedies suitable for competitors' suits?*
- *Would IP law compulsory licensing satisfy the requirement of an effective remedy?*



# Conclusions

- EU: Indispensable, new product, elimination of competition, unjustified
- US: Limited exception to the freedom of contract
- Impact of sector specific rules different
- Competition and antitrust remedies more powerful?