



# 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 (physical property)

- 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.”



# 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)



# Glaxo/Sot. Lelos kai Sia (C-468/06)

- Refusal to supply wholesalers with pharmaceuticals in order to diminish parallel trade.
- "Cannot stop supplying a long-standing customer who abides by regular commercial practice, if the orders placed ... are in no way out of the ordinary." (para. 49)
- Impact of price regulation
- Objective justification: R&D (para 70)