

THE THEORY OF ESSENTIAL FACILITIES. THE PRINCIPLE OF ACCESS TO INVENTION IN CASE OF ABUSIVE REFUSAL TO LICENSE

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Abstract

Essential facilities designate specific inputs which are essential for the production of other downstream goods.

Inputs are situated upstream and so are eligible for intellectual property protection. In order to foster competition in the downstream, holders of these inputs should be forced to give access to potential users, by offering them operating licenses. In other words, one must respect the exclusive right of intellectual property holder to freely exploit his invention or must he be sacrificed in favor of downstream competition ?

In the present analysis we intend to analyze some of either controverted or less known judicial aspects related to the theory of essential facilities.

Keywords: *compulsory licenses, essential feature, dominance, abuse, input, effective competition.*

1. Generalities

It has been widely assumed that the compulsory licenses for the intellectual property rights, based on art. 102 of the Treaty establishing the European Union, stand as an example for the cases of essential facilities. According to the logic on which the theory of "essential facilities" is based, the owner of a facility which cannot be reproduced by way of the ordinary process of innovation and investment and in the absence of which the competition on a market is impossible or restricted, must share it with a rival.

Hence, the term essential facility means the entirety of material and non-material installations owned by a dominant and non-reproducible enterprise; as a result the third parties' access to these installations is indispensable for them to carry out their activity on the market, and it concerns the situation when one may obtain a forced access to an intangible asset owned by a dominant enterprise.

The theory has its origin in the American competition case law from the beginning of the last century when a conflict of access to railroad infrastructure had to be resolved¹. In this case, St. Louis was the only area with railroad infrastructure which granted access to the railroad infrastructure of other areas and the association with *Terminal Railroad Association of St. Louis* owned a fraction of the operation of the railroad in St. Louis, as a result, it actually controlled the entire access to such infrastructure, which caused it to be called to trial in order to be obligated to grant access to other operators in exchange for reasonable and non-discriminatory tariffs. The USA Supreme Court compelled *Terminal Railroad Association of St. Louis* to grant access in

exchange for reasonable tariffs on the grounds that the railroad is a public utility and the association *Terminal Railroad Association of St. Louis* acted as a cartel, with the risk of excluding other users of the railroad. At that moment, The Court referred to the competition aspect of the business and did not introduced the term essential facility, it being applied subsequently, the theory assigning it three cumulative conditions in order to be applied: the use thereof is indispensable for an operator which provides a specific service, it is impossible or at least difficult to multiply the infrastructure in this case and, finally, the functional control exercised by way of monopole or a group of associates acting unitary. The subject matter was not fighting the monopolies, but merely the abuse of a dominant position for vertical integration, which imposed the intervention of the competition authorities.

In Europe, the theory of essential facilities was applied for the first time in 1992², following a complaint of B&I (an Irish ferry operator), when the Commission established that Sealink (a British ferry operator, which was also the harbour authority in Holyhead, Wales) abused its dominant position when it modified its schedule in such way that this modification affected the loading and un-loading operations of B&I, following the reduction of the available time. In other words, the Commission held that the deed of the owner of an essential facility to use its power on a market in order to consolidate its position on a related market is an abuse according to art. 82 of the EEC Treaty [art. 102 of TEEU]. This happens when such owner grants his competitors access on the related market under conditions that are

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¹ Case *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912);

² Case *Be-I Line v. Stena-Sealink*, CJEC, 11 iun. 1992 (IP/92/478).

less advantageous than his own services, without any objective justification. The Commission ruled by way of decision that Sealink to adopt a different schedule or return to the initial one. The Commission assessed that there is a risk of an “irreparable prejudice” to be produced due to increasing the interruptions in the loading and un-loading procedures as well as the effects of such on the services offered.

The term essential facility is not directly connected with the actual completion and efficient competition. The actual competition is defined as the competition exercised on the market, whereas the efficient competition means the best potential competition on the market. It is possible that a non-competition situation, meaning the absence of actual competition, to meet the criteria of an efficient competition. The theory showed³ that several markets reserve for themselves an efficient competition and the CJEC⁴ explicitly says that the purpose of the competition policies is to preserve on the market the possibilities of an efficient or potential competition. This means the possibility of third enterprises to compete with the enterprise in the dominant position, the latter not having the right to compromise the actual competition and thus having particular obligations including to allow the competitors to create an actual competition. This is why one observed that an enterprise in a dominant position might attempt an assault upon the competition even in the absence of an abusive practice considering the obligation pointed above, to ensure an actual competition on the market. In this context, if the enterprise owns an essential facility, it also has the correlative obligation to maintain the market competition.

One observed that such logic resembles the one in the domain of asymmetric regulations, used in case of networks industries⁵, where the dominant position of the enterprise is not a consequence of its merits, but one of public power, situation in which, even in the absence of an abuse, such company must license third parties.

The background of the theory of essential facilities is the notion of abuse and monopole. If we were to refer it by comparison to the property law in the Civil Code, transposing this definition to the intellectual property law, we might say that the intellectual property is a material good that belongs to a person and the competition law is an easement of such good. The owner of the good may use it in an absolute manner but the limits of exercising the ownership right have been introduced under art. 556.

The theory of the abuse is comparable to the abuse of dominant position.

The essential facilities assign the specific inputs, indispensable to producing other downstream goods.

The inputs are thus situated upstream and may benefit from the protection of the intellectual property, and in order to favour the downstream competition, the owners of such inputs should be compelled to allow the access of the potential users, by way of offering them operating licenses.

In other words, must one respect the exclusive right of the owner of the intellectual property to exploit freely its invention or should one sacrifice it in favour of the downstream competition?

This problem occurred in numerous contemporary businesses regarding the competition law and there have been considerable discussions on this topic. In order to address the question, we remind that a patent gives the owner an exclusive right to prevent the use by third parties, more specifically to produce or to sell without the owner's authorisation during the legal protection period of 20 years as of constituting the regulated deposit.

The European competition law acknowledges the intellectual property, but if such concerns an input which is indispensable to the downstream production, a license refuse in this sense is deemed as abusive behaviour, considering the dominant position on this market. Such classification of an abuse based on art. 102 of the TEEU lead to the theory of the so-called essential facilities.

In a dynamic vision, the innovative enterprise owns an essential facility generated by an invention and finds itself in a forceful position for its direct competitors and enterprises situated downstream which need access to such essential resource. The problem is extremely delicate and it is up to the competition authorities to analyse the enterprise's action which owns the facility whether it is guilty of abuse of dominant position meaning if an increase of the prices requested by such suppresses the technological competition and thus the efficiency.

The use of essential facilities theory in European case law accredited the thesis of the expropriation of the owner of intellectual property rights in the superior interest of the competition, but the articulation between the two domains is much more complex.

In USA, where the intellectual property law is deemed intangible under the competition requirements, the problem was brought into question in the 70s in the famous case *FTC v. Xerox*, when FTC⁶ imputed to the photocopy machines manufacturer that it created a portfolio of thousands of patents, which increased on annual basis, that lead to a sort of monopole over the photocopy machines markets, thus blocking the entry of other competitors on this market. *Xerox* was accused of restrictive and market monopole practices⁷ and FTC's objective was to allow competition. By way of decision ruled on February 17,

³ Marie – Anne Frison Roche, *Régulation versus concurrence, in Au-delà des codes*, Dalloz, Paris, 2011, p. 171-185.

⁴ CJEC 21 feb. 1973, case *Euroemballage-Continental Can c/Comision Europenne*, no. 6/72.

⁵ Marie – Anne Frison Roche, *op. cit.*, Dalloz, Paris, 2011, p. 171-185.

⁶ Federal Trade Commission of USA.

⁷ Antitrust Litigation, 203 F. 3d 1322.

2003⁸ the American justice condemned *Rank Xerox* forcing it to ensure access to competitors to the parts and computer programs thus to form an efficient market competition.

The guidelines of JD⁹ and FTC in this domain are based on three principles:

- the intellectual property is treated in the antitrust domain as any other form of property;
- there is no assumption that an intellectual property right automatically creates a market power;
- protection by license of an intellectual property right is *a priori* pro-competition but there is no obligation for the owner of the intellectual property right to license third parties in order to ensure competition on the same market.

The Supreme Court mentioned in the case of *Verizon Communications v. Law Offices of Curtis V. Trinko* that the enterprise has no obligation to license competitors save for particular situations, when its refusal may have anti-competition consequences.

In European case law, as of the case of *Volvo*¹⁰, but even more significant the case of *Magill*¹¹, the principle of access to work subject to an abusive refusal of license grounded by the theory of essential infrastructure has been materialised.

This principle works for the particular situation of an enterprise in a dominant position owning a material or non-material infrastructure, non-reproducible and to which the access of competitors is indispensable for carrying out their activity.

The fundamental feature of an “essential facility” case is that once the abuse was identified, there is an obligation to offer access to the facility.

In general, it is pro-competition to allow the companies to keep for their exclusive personal use the goods they acquired or built, and to expect from the other companies to acquire and to build their own products corresponding to their use, in case they need such goods to be competitive. The possibility to be compelled to share a facility, whose cost is substantial, must always have a certain effect of discouragement of the investments. Nevertheless, in case there is an abuse of exclusion according to art. 102, paragraph b of TEEU, more specifically if a dominant company owns or controls the access to something that is essential to allow its competitors to compete, it may be pro-competition for the company to be compelled to allow access to a competitor, (only) in case its refusal to proceed so has serious enough effects on the actual or potential competition. This obligation occurs, even when the refusal is proven, only when the competitor cannot obtain the products or the services from another source and it cannot build or invent by itself, and only in case the owner has no legitimate justification for the refusal. In other words, the exception applies only when the “dominant” competition is possible, and

when such is possible, only in case it allows access to this facility. Anyway, these conditions are necessary, but not enough, for a duty to contract.

We mention that based on art. 102 paragraph b of TEEU, there is an obligation to allow the first license in non-discriminatory terms under the aforementioned requirements. It is not an abuse to deny the access solely because the claimant would be in a better position, should it allow access to it, or because another competitor might occur. The refusal to distribute a facility, irrespective of its importance, is not normally an abuse, which we shall explain when we address the “additional abusive behaviour”.

We remind that the enterprise is dominant on the market by supplying a product or a service that is essential to the competitors which operate on a secondary (marginal) market and there is no real or possible source for such product or service, or if there is no satisfactory substitute for such, and the competitors could not produce it by themselves. Objectively, the competitors cannot offer their services on the secondary market without access to that product or service. If they can offer their services, even if with serious disadvantage, the advantageous facility cannot be elementary.

The refusal to supply the product of the service would cause damage to the consumers (this requirement is expressly provided by art. 102, paragraph b, which is, at least usually, and probably, always, the relevant provision in art. 102).

The damage caused to the consumers may occur because the refusal creates, confirms or strengthens the dominant position of the company on the secondary market (as seller on that market, and not only because of its control over an essential factor of production). This usually represents the “limitation” or reduction of the existing competition in a way it would not have been thus restricted. Nevertheless, if the competition on the main market has already been restricted by the intellectual property rights of the dominant company, isn't there an abuse from the company to exercise such? The prejudice caused to the consumers can be also produced by preventing the apparition of a new type of product or service that offers clear advantages for the consumers, which would compete with the product of the dominant company.

However, there is no objective justification for the refusal to contract.

There are no set criteria to determine the appropriate price in case of obligatory forced access to the elementary facility by compulsory license.

The phrase “essential facility” does not create another different type of breach of the right or the legal norm. In addition, it does not create an abuse where, otherwise there would not be an abuse. A dominant company is never obligated to compensate its

⁸ Case *Verizon Co. v. Law Office of Curtis V. Trinko*, US Supreme Court, LLP 358, US 905.

⁹ Department of Justice of USA.

¹⁰ CJEC, 5 October 1988, *AB Volvo c/ Erik Veng (UK) Ltd.*, Nr. 238/87, Rec. p. 6211.

¹¹ CJEC, 6 April 1995, *RTE et ITP Ltd c. Commission*, 241 et 242/91, Rec., p.743.

competitors for the disadvantages they have (of course, save for those the company itself created).

If there is an obligation to allow access, then there is also an obligation to allow access in non-discriminatory terms, and these terms may correspond to the terms imposed by the dominant company for its operations (because terms less favourable would cause a certain degree of blocking, against the provisions under art. 102, letter b). If this kind of operations does not exist, but art. 102 letter c applies, it suffices that these terms to meet the requirements under art. 102 letter c.

In case *Oscar Bronner*¹² one argued that it is necessary to demonstrate that the owner of the intellectual property rights prevents the apparition of a new product for which there is a potential demand, situation in which the theory of essential facilities is applied.

We remind that in the case of *Magill*¹³ the Court of Justice deemed as abusive the refusal expressed by the Irish television channels to broadcast the programs of *Magill* in view of it editing a weekly guide to regroup the TV programs of six national channels. The denial to make available to *Magill* the TV programs was deemed discriminatory and not allowing a license to reproduce was deemed as not reasonable, which constitutes itself an abuse of dominant position of the Irish television channels on upstream market and obstructing the apparition of a new offer for the one which is not a direct competitor in a downstream market.

Also, in the case of *IMS*¹⁴ the Court found that this enterprise comprised a data base regarding the sales in German pharmacies under the form of a 1860 modules structure and a derived 2847 modules structure, which became a standard due to its practical aspect based on the German postal codes and the free distribution thereof to pharmacists; in the same time NDC decided to opt for the use of this structure but IMS refused to sell its data base and the Court applied the theory of essential facilities deeming that the owner of the infrastructure must ensure the access to competitors in order to make the competition possible.

The difference between this and the previous case, in grounding the defence, is that the essential facility was granted to a company that operated on the same market, and not as in the previous decisions, on a downstream market.

In cases of *Microsoft*, the courts have changed the grounds for the sentencing thereof, insisting on the idea of the prejudice caused to the consumers by affecting the technical progress.

If, in the case of *Volvo*, the actual behaviours which can be deemed abusive are indicated (the arbitrary refusal to deliver spare parts to the independent repairers, fixing the prices of the spare parts at a inequitable level, the decision of not producing spare parts for a certain model, although many cars of the same model were in circulation), in the case of *Magill* there is a general rule connected to the exceptional circumstances which can be qualified as abuse of dominant position generated by a refusal of license of intellectual property rights.

Thus, the Court showed that there is no real or potential substitute to the weekly television guides which *Magill* wants to publish and that the television channels were the only brute source of information regarding the programs, as raw material indispensable to make a weekly television guide, and the refusal to license constitutes an obstruction to the apparition of a new product (...)“for which there is a potential demand from the consumers¹⁵” and finally, that “this refusal was unjustified”. By “raw material” it was considered the information owned by the television channels as a simple raw material, regardless of its nature and without out any interest in the intellectual property rights.

There are thus three conditions to classify a refusal to license as abusive:

- an obstruction to the apparition of a new product for which there is a potential demand from the consumers, which means the indispensable character of the product protected by intellectual property rights;
- the absence of an objective justification of the refusal to license to be examined whether it is objective and proportional, always grounded on “exterior factors of the dominant enterprise¹⁶”;
- the total exclusion of the competition on the derived market, more specifically, following the refusal to license by the owner of the intellectual property right, it reserves for itself a monopole on a derived market, except for the market of the product covered by the intellectual property right. This way, it is forbidden to extend a monopole to a derived market, such being deemed as abusive.

The appreciation of the connection between the main market and the derived market assumes a sufficient connection that is appreciated on a practical basis so that the responsibility of the owner of the dominant position on the main market to be disjointed towards the adjacent one; in this sense, the dimension of the derived market is of significant importance.

In case of *Tiercé Ladbroke*¹⁷, TPI CE stated that “the refusal to license cannot be revealed as a breach of art. 86 of the EEC Treaty [art. 102 of the TEEU]

¹² CJEC, November 26, 1998, case *Bronner c. Media Print C7/97*.

¹³ CJEC, April 6, 1995, case *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities*, C-241/91 P și C-242/91 P.

¹⁴ CJEC, case 418/01 *IMS Health GmbH & Co. c. NDC Health GmbH & Co. KG* (2004) ECR I-5039.

¹⁵ CJEC, April 6, 1995, *RTE et ITP c/ Commission*, cited case.

¹⁶ JOCE, Nr.C 45 of February 24, 2009, p. 7, point 28.

¹⁷ TPI, June 12, 1997, *Tiercé Ladbroke s.a. c/ Commission*, 504/93, p. 923.

unless it concerns a product or a service which is either essential for exercising the activity in question, in the sense that there is no real or potential substitute, either it is a new product whose apparition is obstructed and which has a potential and constant demand from the consumers”.

According to above, it appears that a judicial obligatory license mechanism was instituted at European level, the Commission deeming that it has the right to set forth the conditions of license and to impose thereof, which under the aspect of contractual freedom is a measure which must be appreciated as exceptional, accepted as a necessity in regulating the markets¹⁸.

This aspect was theoretically analysed¹⁹, having been deemed that such an intervention to create obligatory licence without legal support cannot be but exceptional, interpreted *strict sensu* and should be expressly provided in the legal norms.

However, this matter is not easy to accomplish because the intellectual property is subjected to norms at national level, thus the mechanism on non-voluntary license should be provided by the national legal texts, which may lead to legislative fragmentation and different interpretation, but more specifically it is contrary to the competition law norms which are of European essence, including the praetorian way in which the European judge acts, who took the liberty to interfere in the existence and exercise notions of the intellectual property rights.

In our opinion, we deem that we are in the presence of a rule of competence and based on grounds, in order to achieve a unique internal market and the observance of the competition principle, the competence falls under the Commission and the CJEU regarding the exercising of the intellectual property rights. The refusal to license must be deemed as a reference to exercising the intellectual property rights, and not the existing thereof.

In this context, we ask ourselves whether the system of obligatory license, which is not grounded on a text of law, can fall discretionary in the hands of the European authorities, in the absence of *non*-subjective principles to guide their means of action?

The question remains opened and obviously pertains by the competition and promotion policies of the technical progress.

We join the theoretically opinion which states the absence of an indispensable precision to remove the arbitrary aspect in the aforementioned assessment.

2. The conditions of the essential facilities theory

In order to accede to a principle of access to the infrastructure protected by intellectual property rights, save for Magill case, in which we find it in an incipient form, clarifications have been subsequently brought in a continuous evolution of the case law.

Thus, the conditions which must be observed in order to apply this principle have been delimited, in the case of IMS the conditions of application from the case-law regarding the abusive refusal to licence as well as in the case of *Oscar Bronner*²⁰ are indicated, although it does not concerns intellectual property rights. In the case of *IMS*²¹ it was mentioned that the conditions must be met cumulatively, more specifically: the existence of an obstruction to the apparition of a new product for which there is a potential demand from the consumers, the exclusion of the competition on the derived market and the absence of an objective justifications to deny the license. Without direct indication, there is also a forth condition, more specifically the one regarding the indispensable feature of the product or service for which the access is requested, but such is self-understood from the previous three conditions.

We shall further examine these conditions:

a. The indispensable feature of the product or service

This must be deemed as a prior condition, in the absence thereof the enunciated principle cannot be applied to an actual situation. In the case of *Oscar Bronner*, CJEC stated that “in order to invoke the case of Magill in sense of the existence of an abuse according art. 86 of the EEC Treaty [art. 102 of the TEEU], not only the refusal of the service must be in such way that it removes any competition whatsoever on the market from the service petitioner, but it must also not be objectively justified, unless, but in equal measure, the service itself is indispensable for carrying out its activity, in the sense that there is no real or potential substitute to this service.” One finds that by the way of stating the grounds, the theory of essential infrastructure in the intellectual property law was complied with. One must also note that in the case of *Oscar Bronner* the court used the phrase of absence of a real or potential substitute with reference to a service indispensable for carrying out an activity, by referring to a service or a product constituting the upstream market owned by an enterprise in a dominant position following the monopole conferred by an intellectual property right. Regarding the assessment of the indispensable feature, one must understand it depending on the proven facts, depending on the inexistence of an alternative solution to that service or

¹⁸ M. A. Frison Roche, *Contrat, concurrence, régulation*, RTD civ. 2004, p. 451.

¹⁹ P.Y. Gautier, *Le cédant malgré lui" : étude du contrat forcé dans les propriétés intellectuelles*, D.Aff., 1995, p. 123.

²⁰ Cases *Oscar Bronner GmbH & Co. KG contre Mediaprint Zeitungsund Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG et Mediaprint Anzeigengesellschaft mbH & Co. KG.*, Nr. C-7/97, Rec. p. I-7791, point 41.

²¹ CE, July 3, 2001, No. 2002/165/CE, No. COMP D3/38.044, *NDC Health c/ IMS HEALTH*, JOCE Nr. L 59 du February 28, 2002 p. 18, point 45 si 56.

product. The alternative solutions, regarding the case law, must concern a “real or potential” substitute, which makes the term substitute to be very broad so that the products and the services can be even less advantageous.

The absence of alternative solutions does not suffice in order to establish the indispensable feature of the product or the service, it is necessary to ascertain “the existence of regulatory or economical technical obstructions which would make impossible or at least very difficult for an enterprise to try to operate on the said alternative products or services market, to cooperate, in the end, with other operators²². Depending on these, one may establish whether the obstruction is nullifying for the derived market in the development of a new alternate product or service.

We deem that an enterprise is in absolute impossibility in case of economical non-viability of development of an substitute for the product bearing intellectual property rights in order to have access on the derived market. We deem that the term regulatory obstruction has a legal source, i.e. legislative, by which the enterprises receive a monopole in carrying out their economical activities, such as: power grids, methane gas, railroads and others. Besides these legislative sources there may exist regulatory ones, norms or certificates particular to the activity or product in the respective case.

As regards the intellectual property, the source is legislative by way of allowing the owner of the intellectual property rights by the lawmaker a monopole of exclusive exploitation of its creation. The term technical obstruction is more complicated because it refers to a third party’s impossibility to enter on a derived market, in other words, to accede to technical means to allow it to create and develop an infrastructure which challenges the one from which it requests access. This wide meaning competes with the regulatory obstruction in case there are technical norms for a product, regarding putting in on the market, with certain particular characteristics.

We reiterate that in the case of *Microsoft*²³, it had a dominant position on the operating systems market and denied the supply of operative data Sun Microsystems which would allow it to operate on the derived market of server operating systems. Actually, the data concerned “the protocol specifications of server to server communications”. The Court defined the inoperability as “the capacity for two computer programs to change information and to mutually use this information so that each computer program to be allowed under the means provided”. These data were extremely specialized and hermetic, thus Sun Microsystems, in order to activate in a viable manner on the server operation market, had to come up with operation systems capable to communicate with the

Windows operating systems found in every informatics environment, considering the extremely powerful position Microsoft had in this domain, which determined the Commission to deem these data as “extraordinary characteristics”²⁴, protected by the intellectual property, and Microsoft owned more than 90% of the market and *Windows* is the “fact norm” for these operation systems, thus any competitor cannot trade in a viable manner its products if it is unable to achieve a high degree of operability with such. This means there is no other way but to know what *Windows* created, whereas its information is irreplaceable. As regards the term economical obstructions, this means that creating an alternate product or service is not economically profitable when comparing it to the economic efficiency of the original product or service.

Thus, the European Commission sentenced Microsoft on March 24, 2004 for abuse of dominant position following the limitations of the inoperability regarding the operation systems for servers and sales connected to *Media Player*. From this case, it appears that voluntary limitation of inoperability was the result of a strategy for committing an abuse of dominant position targeting the transmission by way of crossbar effect of the market power in the domain of operation systems for PC to operation systems for servers. The Commission retained that it had a dominant position following the entry barriers set up by own networks in the domain and the enterprise’s practices which indicate the said strategy. The Commission deemed that the interface protocols are necessary for the viability of every alternate offer to the extend *Windows* was not yet the market standard but was becoming *cvasi-inexorable* and that meant that although the Microsoft strategy did not have as immediate effect the elimination of competition, this still induced a significant risk in this sense. This is why the Commission deemed that such practices obstruct the innovation and are in the detriment of the competitors, which are to pay extremely high prices, and in the same time lead to decreasing the consumers’ freedom of choice. Microsoft’s refusal to allow licenses to the competitors meant that those competitors are prevented from developing advanced versions of their products. The penalty consisted of a 500,000 EUR fine together with the obligation to supply to the competitors information regarding the interoperability in order to transmit information protocols of client to server and server to server communication and to authorize the use thereof for the development and distribution of competitive products on the operation systems market²⁵. In motivating the decision, the court showed that a dominant operator has specific obligations in preserving a structure of the actual competition, *a fortiori* which means the European

²² CJEC, April 29, 2004, *IMS Health*, *caz precitat*.

²³ Case *Sun Microsystems, Inc. v. Microsoft Corporation*, U.S. District Court, Northern District of California, San Jose, nr. 97-CV-20884.

²⁴ European Commission, March 24, 2004, Nr. COMP/C-3/37.792, *Microsoft*, point 429.

²⁵ TPICE, Decision of September 17, 2007 in the case of *Microsoft Corporation c. Commission* (case T-2001/04).

vision in applying the theory of essential facilities and granting obligatory licenses: “although the enterprises are mainly free to choose their commercial partners, a dominant enterprise’s refusal to deliver may, in certain circumstances, act as an abuse of dominant position.”

In the case of *Oscar Bronner*, the Court stated that the economic obstruction cannot be deduced from the fact that reproducing the infrastructure was not profitable and consequently, the economical activity of the license petitioner must be reported in quantitative terms to the one of the infrastructure owners.

Following the analyze of the aforementioned cases it appears that an abuse of dominant position by not allowing a license to competitors may exist only if the existence of the competitive enterprises is compromised and it limits the technical development on the consumers’ detriment in a direct and/or indirect manner thus by affecting the actual competition’s structure. At the same time, one must notice that the enterprise in the dominant position cannot use any price to allow the third parties access to the essential facility found on its property, because it would commit another abuse of dominant position. But this price aspect is hard to quantify and regulate by the competition authorities, because there are no criteria regarding the amount of the technological advance comprised in the essential facility, which creates a legal uncertainty²⁶ with effects on the innovation determination on behalf of the essential facilities owners, these not being certain that they can benefit from the innovation effort.

Thus, to invest in an alternative product or service that is not profitable may be considered an economical obstruction, if the profitability is appreciated in the conditions thereof. In this sense, one may proceed arithmetically by establishing the development and functioning costs of an alternative product or service by an enterprise which cannot obtain profit from its economical activity. However, the problem of the economical obstruction is more subtle, because the economical obstruction makes that any investment in an alternative product or service to be an economical nonsense.

We deem that the difference depending on the nature of the obstructions must not be made absolute in the performed analysis, which is how the judges have proceeded in the aforementioned cases, where they gathered information and finally ruled only upon the economical obstruction, the other two not being defined. At the same time, we notice that the obstruction in the creation of an alternate product or service actually means barriers in entering on a market limited by the product or service protected by the intellectual property, owned by the enterprise in the monopole position. OCDE performed a synthesis on

this problem²⁷ which defined the term of entry barrier pointing out that “the important thing in the actual cases is not to know whether an obstruction responds to the definition of the entry barrier like in other case, but to question oneself with regards to a pragmatic manner over the possibility, opportunity and measure in which an entry can intervene taking into account the actual situation of every business”.

b. The risk of excluding the competition on the derived market

The main problem consists of distinctly identifying the two markets, the main one and the derived one, which, in the case of *IMS Health*²⁸, the court stated that “it is determinative to be able to identify two stages of different production, connected by the fact that the upstream product is an indispensable element for providing the downstream product”, in other terms, one may identify an upstream input market. Such market can be but potential, “in the sense that the enterprise in the monopole position which operates in this market to not trade in an autonomous manner the inputs in this case, but to exploit them in an exclusive manner on a derived market, restraining or completely removing the competition on this secondary market”.

Following these arguments, it appears that the enterprise in the dominant position operates on the main market, but not on the derived market. What happens when it operates on the derived market as well? Does the principle of essential infrastructure still apply?

In our opinion, the condition of the distinct markets is no longer complied with and thus, the principle cannot be invoked. Under this aspect, we deem the European case law confusing in the case of *IMS* where the supply is made on the same market of the product, but it is used as argument the obstruction of the new product protected by intellectual property rights.

c. The condition of the existence of the obstructions at the apparition of a new product

The condition was mentioned in the case of *IMS*, according to which “the enterprise requesting a license must not limit oneself to reproduce products or services which are already offered on the derived market by the owner of the intellectual property rights, but to intend to offer new products or services which the owner cannot offer and for which there a potential demand from the consumers”. According to the formulation, the condition of the new product sets a double protection: of the interests of the owner of the intellectual property rights and of the interests of the consumers.

The novelty, by reference to the product already offered by the owner, implies the delimitation of the

²⁶ The legal uncertainty is a general principle of the European law established by the CJEC in the case of *SNUFAP v. The High Authority CECA* on March 22, 1961 and implies the expectancy of the rule and its stability. In this case, the uncertainty concerns the expectancy of the resources flow resulting from innovation.

²⁷ OCDE, *The competition and the entry barriers*, Synthesis, February 2007, available on <http://www.oecd.org/>.

²⁸ CJCE, April 29, 2004, C – 418/01.

notion. We deem that it means the existence of certain sufficient elements of particularity of the product already offered by the owner on the derived market. To impose the novelty seems to be a condition much too severe for the petitioner by reference to the novelty of the product covered by the intellectual property law. In reality, we deem that there is novelty when a consumer can find differences between this product and other competitors' products; to this it must also be added the potential character of the consumers' request which at the moment of requesting the access to the essential facility, they are not satisfied with the equivalent products already existing on the market.

The condition of the new product allows the attenuation of the problem of the particular merit acknowledged to the owner of the intellectual property rights to deny the access of third parties which only aim at proposing a product already offered by the owner. In case law and doctrine, the condition of the new product was deemed to materialize the idea of the competition on merits.

In the communication of the Commission regarding the application of art. 102 of TEEU²⁹ it has been set forth that: "according to the caselaw it is not illegal for an enterprise to occupy a dominant position and this enterprise may participate at the competition game through its merits". This is why it looks unjust that the creation effort supplied by an enterprise to obtain a place on the derived market to be reduced up to zero by obligations set in order to cede a license over its right, whereas the third party did not place any effort to obtain a place on the derived market. This is also the subject matter of art. 102 of TEEU which does not protect the less successful enterprises than the dominant enterprise.

As regards the novelty by reference to the consumer's request, we deem that it has been pursued that this condition to remedy the appreciation difficulties regarding the novelty criterion, in the sense of appealing to a less subjective criterion and not connected to the owner and the competitors on the derived market, but which would allow the consumers to distinguish between the offered products and the ones already existing and to request them which leads to amelioration of the allocation of the possible resources.

The novelty criterion in the analysed context is different from the novelty which characterises the patented inventions, having distinctiveness in the competition law. Because the abusive refusal to license can only be applied in the derived products of the essential infrastructure, in this sense, in the case of IMS, it was estimated that "the refusal to license cannot be deemed abusive save for the case the enterprise which requested the license does not expect to limit only to substantially reproducing the goods and the services which are already offered on the derived market by the owner of the intellectual property rights,

but also has the intention to produce goods or services with different characteristics which may compete with the goods or the services of the owner of the intellectual property rights and thus, to meet the specific needs of the consumers which are not satisfied with the existing goods and services". Therefore, the novelty cannot be assimilated to the absence of the ability to be replaceable in the sense of the competition law. If the new product cannot non-replaceable to the already offered product, there is no risk of competition between the rightful owner and the license petitioner. In the case of *Microsoft*³⁰, the Court insisted on the fact that the damage brought to the consumers is primary in order to characterise the obstruction of the apparition of a new product and consequently, it deemed the novelty condition needs to be appreciated, according to art. 82 paragraph 2, letter b of the EEU Treaty, according to which the practices consisting in the limitation of the markets production or the technical development causing damage to the consumers are abusive.

In other words, the condition of the new product is nothing but an element amongst all the others which should be viewed per ensemble.

3. The additional abusive behaviour as a condition of the remedy principle by compulsory licenses

According to the case law, the refusal to license is illegal only to the extent that it has an "additional abusive behaviour". In addition, the Court retained that allowing the compulsory license assumes in all cases the existence of *exceptional circumstances*.

The additional condition is justified because, on one hand, the dominant position is never illegal. Thus, even if the dominant position is based on intellectual property rights, the competition law cannot end this position by way of allowing compulsory licenses. On the other hand, a dominant enterprise's denial to license an intellectual property right could not normally be an abuse because it would mean that the dominant enterprises be actually prevented from acquiring and exercising the intellectual property rights for their own use. However, it cannot be deemed as illegal the deed of a dominant enterprise that uses the owned intellectual property rights according to the purpose for which such were conceived.

Thus, a compulsory license can be requested only in certain circumstances, and a simple refusal to allow a license over an intellectual property right is not illegal based on art. 102. To support the contrary, it means to consolidate a rule which would contradict the concept of intellectual property, as well as the principle provided under art. 102 which states in all cases the existence of an abuse.

²⁹ JOCE No. C 45 du February 24, 2009, p. 7, point 1.

³⁰ TPICE, September 17, 2007, case *Microsoft Corp. c/ Commission*, Nr. T-201/04, *Rec.* p. II-3601, point 332.

Obtaining and exercising the intellectual property rights are deemed as pro-competition, even when the owners are dominant enterprises, because they will not be encouraged to obtain new patents, unless they are free to exercise the rights they own.

However, the case law does not explain “additional abusive” as well as the way it is accompanied by the refusal to contract. Save for the fact that a refusal to license cannot be itself an abuse, the case law does not offer a clear approach for any future cases. The Court simply resumes at offering a few examples of situations whose subject matter is “additional abusive behaviour”. There are the typical situations of essential facilities found on two markets in which the dominant enterprise monopolises a clearly identifiable main market. There is also the example which was presented in the case of *Magill*, regarding the granting of television licenses, where the refusal to license prevents the consumers from a new type of product, which was not produced by the dominant company and for which there is a clear unsatisfied demand. In the decision in the case of *Microsoft*, the Court ruled that there might be a compulsory license in case the refusal would limit the technical development of the competitors, thus causing damages to the consumers. As a result of a lack of adequate explanations, it was deemed necessary to conceive an enumeration of all the circumstances which in courts’ view have set exceptional circumstances. It appears that there is no clear rule.

It is obvious that the refusal to allow a license can be deemed illegal only to the extent that it is directly connected by an “additional abusive behaviour”. An abuse that lacks any connection would affect the legality of the refusal to license. Based on art. 102 letter b, the additional abusive behaviour must imply a serious damage caused to the consumers and can also manifest outside the market to which the intellectual property right refers to.

As already explained, the characteristic of the essential facility is that when an abuse is identified, the remedy implies not only the cease of the abuse but also the compulsory access to that license. Therefore, automatically it must be a relation between the abuse and the compulsory access.

The relation between the refusal to license and the additional abusive behaviour, which makes the refusal to license illegal, must argue why a compulsory license is an adequate remedy for the additional behaviour.

Therefore, the connection is explained by the fact that the refusal makes the other behaviour possible, strengthens or aggravates its anti-competition and exploitation effects. Probably the connection is the fact that to simply end the other abuse does not suffice and would not be an efficient remedy. The compulsory license must be the adequate remedy for the additional abuse.

So, we are in the presence of an “additional abusive behaviour” if the dominant enterprise would

refuse to license in other way than in anti-competition conditions (for example, save for the condition that the owner of the license not to challenge its intellectual property rights) or in exploitation conditions (for example, in case it would insist on royalty payment of the license owner’s rights or on excessive prices) or in the case it would refuse to license for an intellectual property right even if it would have committed to allow the license in view of a standard to which it agreed. A remedy at the market level by allowing a compulsory license seems more efficient and less bureaucratic than continuing the surveillance by a competition authority in order to ensure that the initial abuse would not repeat itself. Continuing the surveillance may though be necessary in cases of setting excessive and discriminating prices.

The behaviour or the additional element must be a behaviour forbidden by art. 102 of TEEU. Practically, the dominant enterprise must commit deeds or cause effects among the ones punishable by art. 102. Otherwise it would be in the presence of a normal result of the exercise of the intellectual property right on the market. The additional element cannot simply be an economical monopole, because such is, at least temporary, many times, the result of the application of an intellectual property right. The behaviour must bring an anti-competition effect which would cause damages to the consumers.

All the elements that prove the simple dominant position cannot constitute the condition of “additional abusive behaviour”. However, the behaviour, and not the market situation, constitutes an abuse. The characteristics of the market determined by the legal monopole conferred by the intellectual property right, may lead, temporary or permanently, to an economical monopole, may explain the dominant position, but they cannot constitute an abuse. Thus, the fact that simple intellectual property right represents a unique source difficult to duplicate or “reinvent”, very valuable, does not equalates to an “abusive behaviour”, characteristics which generate a considerable competition advantage.

The case of *Bronner* is an important case for the “essential facilities”, especially due to the general attorney’s opinion, although the intellectual property is not the subject matter. A newspaper editor who had the only home delivery service in Austria refused to offer home delivery services of a competitor newspaper. The Court said that the refusal would be illegal only if it would eliminate the entire competition by the petitioner, without objective justification, and if the service would be indispensable because there would not be a real or potential replacement. But there were alternatives to home delivery and it was possible to develop a competitor system of home delivery. There was no prove that it would be non-economical for the competitors, acting together if it would be necessary, to create the second home delivery system with a coverage similar to the existing one.

For example, in the case of *Volvo vs. Veng* and *CfCRA vs. Renault* the Court stated that the freedom of an intellectual property right to refuse to license is the core of its right and that the refusal to license cannot be contrary to art. 102. The Court retained that “one must note the fact that exercising an exclusive right by the owner of a registered draw or a model as regards the car body board can be forbidden by art. 82 [art. 102 of TEEU] if such implies, from a dominant position enterprise, certain abusive behaviours, such as the abusive refusal to supply with spare parts to the independent repairers, establishing inequitable prices for the spare parts or the decision to cease the production of spare parts for a certain model, even if many cars of such model are still in circulation, provided that such behaviour would affect the trade changes between the member states”.

In this case, the general attorney argued that the refusal to license might be illegal should the excessive prices be combined, which is contrary to art. 102 paragraph a of TEEU. In the conventional theory regarding the compulsory granting of licenses, as an aspect of the right to essential facilities, this commentary would be hard to digest, because the excessive prices have nothing to do with the essential facilities. Also, the excessive prices for the products intended for the dominant market would constitute an abuse for the same market for which the compulsory license was granted. It had always retained that in the cases of essential facilities there must always be two markets. If there would not be two markets, the dominant company would be compelled to share the competitive advantage with a direct competitor.

Thus, the case *Volvo vs. Veng* suggest a principle that applies to the exploitation abuses, more specifically if an identifiable abuse was committed, the compulsory access by way of license would be an efficient and adequate remedy.

In the case of Microsoft, the Court retained that the additional abuse must not necessarily prevent the development of a new product for which there is a clear and unsatisfied demand. The abuse might “limit the technical development” of a competitor according to art. 102 paragraph b of TEEU, if the damage caused to the consumers is obvious enough. This finding is important because it complements one of the omissions of the conventional law over the “additional abusive behaviour”. This consolidates the theory pursuant to which the additional abusive behaviour can be any kind of abuse forbidden by art. 102 of TEEU. In addition, it becomes clear that at. 102, paragraph b of the TEEU offers a comprising and clear definition of the exclusion abuse, which is necessary for the judicial security.

In the case of *IGR Stereo Television*³¹, IGR, a group owned by all German manufacturers of television equipments, was also the owner of certain patents for stereo receivers necessary to equipping the

German televisions with stereo reception systems. They unified their patents for a stereo television system and the German authorities approved their system. IGR licensed only its own members, establishing that licensing other traders would occur subsequently and only in limited quantities. The patent was used to stop the distribution by Salora, a Finnish company of stereo television in Germany. The Commission appreciated that the intellectual property right does not justify the refusal to license. The case is not well known, but it is important because it shows that in case of agreements to share technologies, each party can have a legal obligation to grant licenses to third parties.

FGR Stereo v. Salora is, consequently, an important precedent in cases in which companies agreed to set a standard, based on the fact that the licenses for certain patents can be essential to allow the use of the standards as well as in cases of patents clusters and participative associations.

Thus, the condition of the existence of the “additional abusive behaviour” must refer to an abuse according to the provisions of art.102 of TEEU instead of the simple exercise of the intellectual property rights, even if there are prejudices caused to consumers, makes a clear interpretation.

If there would be a duty to contract, even if there were no abuses committed, simply to create a bigger competition, this would represent a regulation rule, which does not comply with the principles of the competition law. All cases of essential facilities implied identifiable abuses. In case the abuse is discriminatory, the obligation to contract in non-discriminatory conditions is clearly the adequate remedy. In case there is a refusal to contract for the first time, the abuse must consolidate the dominant position or to disadvantage the competitors in a new way. In these situations, a prejudice caused to the consumers would result from the refusal to contract, and the refusal would limit the production, commercialization or technical development of the competitor or the newcomers. In each of these cases, the obligation to contract may clearly be the adequate remedy.

In conclusion, the principle of essential facility is in fact a remedy principle. We have not identified clues out of which to result that the case-law of the Union`s courts suggests that the Union`s law would impose, in accordance to art. 102 of TEEU, an obligation to allow access to a facility, simply because it is essential. This fact is contrary to the principles according to which a dominant position is not illegal and that it will not apply a remedy if an abuse was not committed.

³¹ The Commission, Report XI on the Competition Policy, 1982, p. 63.

4. Arguments pro and con to the theory of essential facilities

The demarcation line between the inherent and extrinsic limits of protection, between keeping the functionality of the industrial property system and the salvation of the free competition, between the protected technology and the replacement technology becomes more fine because it is the intellectual property right itself which provides rules by opening the protection system through exclusive rights to a real competition between the dependent complementary technologies towards the intra-technological competition. Such device of inherent limits favouring the intra-technological competition should be efficient if the exclusive right does not degenerate in a very broad monopole right in order to be individually exploited by a single enterprise.

Normally it is about saving the possibility of the development of secondary markets, the diversification of protected products based on products that are dependent partially, technically and economically on the firsts. In the end, the problem that the law seeks a solution to is similar to the one subsidiary to the rules defining the patented invention in front of the exclusion of very wide real knowledge in order to be *internalized* in an useful way through an exclusive right granted to a single owner such as findings, scientific theories or mathematics methods, etc. The provisions of art. 52 para. 2 letter a and c of the CBE does not aim only to maintain the public domain of knowledge but also to avoid the appropriation of knowledge whose application is very wide and unpredictable to be usefully entrusted to an individual and exclusive exploitation. The theory emphasized the very broad blocking effect that a patent produces on discoveries, scientific theories, mathematical methods or plans and principles of intellectual activities and on the other hand the transaction costs required for operating a very wide exclusivity.

The case law in the matter of competition law sentences an enterprise which owns an exclusive right and dominates a market to license the third parties who want to create new products, dependent on a protected product on a derived market where the dominant enterprise has no firm objectives but where there is a certain or probable demand³². These solutions are much commentated and do not need further explanations³³.

One recalls that competition law cannot intervene if its particular application criteria are met, namely the existence of a dominant position in the market and the fact of abuse characterized by the use of an invention for which there is an actual or real potential demand on a neighboring market and the

dominant enterprise refrains itself to satisfy without valid justification. The crucial problem of this case-law is not that it does not allow third parties to penetrate the exclusive right by a license application which the owner will not refuse without abuse. Consequently these licenses will not allow them to make direct intra-technological competition to the dominant enterprise, but only to serve or develop secondary markets for complementary or substitution derivatives thus to enter into a barriers and technological diversification competition.

Often the problem is better to grasp and define the nature and importance of the knowledge to which access must be granted in order to maintain effective competition through merit, in every market. Consequently, the only fact, although the owner of the information did not disclose it, concerning its person, its enterprise and its business has by definition a factual or legal monopole on such information without this meaning that there is a dominant position on the market information. Such an approach would deny *a priori* any possibility of competition for obtaining the concerned information. Therefore, the information must have particular qualities and in any case we must preserve the assimilation in Magill case law to an essential facilities theory. The dangers related to the investments uncertainty or sub-remunerations, innovative inputs also reduce the risks of innovation require an approach and focuses on specific restrictions on competition rather than a statutory approach as found in the essential facilities theory.

In the field of intellectual property, the theory of essential facilities should be used with reluctance, as did the US competition authorities, considering that as a brake on development.

However, a compulsory license is not in complete contradiction with the intellectual property protection because it also causes an innovation effort to overcome competitors amid the dissemination of knowledge in the technical field.

Therefore, a policy of compulsory license is a compromise between the interests of innovators and society as a whole.

Such compulsory licensing implied the issue of the prevalence of competition law on intellectual property law, with major consequence of legal uncertainty given the unfounded access requests of the opportunistic enterprises and damage innovation. More surprising is that such a theory was taken over in European law after the American Supreme Court has abandoned it.

According to the American case law³⁴, the concept of essential facility designates an indispensable resource owned by an innovating

³² CJEC of October 5, 1988, Case no. 238/87, *Volvo/Veng*, Rec. 1988, 6211, p. 9; *idem* October 5, 1988, Case no 53/87, *CICRA/Renault*, Rec. 1988, 6039, p. 16; CJEC of April 6 1995, Case no C-241/91 P si C-242/91 P, RTE and ITV *Publications/Commission*, Rec. 1995 I 1743, p. 48 and the subs.; TPI of September 17, 2007, Case no. T-201/04, *Microsoft/Commission*, Rec. 2007 II p. 621

³³ Microsoft Decision: abuse of dominant position, refusal to license TPI of September 17, 2007, Case no. T-201/04, *Microsoft/Commission*, Rec. 2007 II, p. 621, 637.

³⁴ Case *United States v. Terminal Railroad Assn. of St. Louis*, 224 U.S. 383.

company that would allow competitors to carry out their activity on the relevant market, but it is impossible to be acquired by reasonable means (financial, technical and temporal). If the court reaches such a conclusion, it can force the holder of the facility to open their access under reasonable conditions, so to ensure the competition.

In Europe, the competition policies applied the theory of essential facility to the intellectual property rights in a much broader way, on the idea that the inventor has a competitive advantage vis-a-vis the subsequent enterprises, requiring arbitration. Yet, a compulsory license in profit competitors may compromise innovation.

The European case law has applied the theory of essential facilities by dragging from physical infrastructure to intangible assets, when the US Supreme Court reiterated its rejection of the theory. The two opposing views exist because there are different views on competition, as one gives importance to the market structure or the analysis of innovation concerns. The European vision admitted the obtaining of a forced access to an intangible asset, owned by a dominant enterprise in the form of compulsory licenses, which caused the competition law to prevail on intellectual property rights. It was considered that ³⁵ the application of the theory of essential facility to intangible assets creates a climate of legal uncertainty regarding the possibility of opportunistic enterprises to have unfounded access to such structures which affects the companies' innovation concerns.

The theory of essential facilities, by its logic, is not irreconcilable with the essence of intellectual property, since it aims to impose mandatory sharing and forced contract, while the main objectives of intellectual property rights aim to provide exclusivity to its owner. The theory of essential facility, allowing limitation up to suppression of the intellectual property right owner to prohibit the exploitation of its right by third parties, allows this way for the idea that the refusal itself to license constitutes an abuse of a dominant position to be validated. Moreover, the exclusive right of exploitation is reduced to a mere right to be paid.

Another negative effect of the application of the theory of essential facilities to intellectual property rights is represented by the diminishing of the concerns to create, to innovate. To this it is added the uncertainty of the conditions for the application of essential theories for a very wide interpretation made by the European Commission and Court of First Instance of the European Union, as was done in the Microsoft case where the CFI considered that the risk is simple enough to be considered competition is exclusive. Finally, this theory has as negative effect the practical difficulties of setting the price of access to resource.

This theory comes to accentuate the current phenomenon of regulation of the intellectual property law by competition law, which has not happened in the past, with the consequence of increased legal uncertainty for the creator, creation of killer patent portfolios, scientific incompetence of competition authorities, etc.

Opposite to the analyzed case-law trends, we notice that the intellectual property and the competition are not absolutely incompatible as long as the intellectual property does not degenerate into abuse or abusive monopole.

We consider that both the legislator as well as the courts must turn their attention to the notions of *abuse* and *unfair monopole* and ensure regulations or interpretations that are consistent with the theory of abuse of rights, but also excluding the possibility that the enterprises less inventive to call upon vexatious measures.

All that implies a right implies the possibility of misuse and the abuse must be excluded in order to allow the coexistence of rights.

We believe that intellectual property is a two-edged weapon: it stimulates the innovation by protecting a monopole, but also blocks access to goods under monopole, goods which may be necessary to produce other goods needed in the market.

In other words, the monopole may have the effect of preventing third parties to innovate. It is a movement that creates a vicious cycle which imposes a regulation of intellectual property in a new way to overcome these drawbacks.

This way we wish to say that it would wrongly blame the competition law which sought a solution to prevent abuse of rights in case of monopole caused by intellectual property and which is only a palliative in waiting for a regulation of the intellectual property law and that's why competition law intervention should be limited to exceptional circumstances.

We believe that competition law is best to a quality innovation stimulation that will positively be passed on to the consumer.

The technical compulsory license can bring a balance within the intellectual property law by reference to competition law, although it constitutes a limitation of the intellectual property law, the introduction of compulsory license has the effect of producing an incentive to innovation that would allow innovators to remunerate their investments and ultimately, to encourage the dissemination of knowledge within the company. The legal license is considered as having a high degree of difficulty in terms of setting the tariff access to essential facility. Therefore, a rigorous theoretical framework in which the legal uncertainty generated by limiting intellectual property rights to be reviewed is necessary for an optimum dosage of legal and judicial measures.

³⁵ Frédéric Marty, Julien Pillot, *Politiques de concurrence et droits de propriété intellectuelle: La théorie des facilités essentielles en débat*, disponible en : http://www.gredeg.cnrs.fr/working-papers/WP-anciens/Old/Intangibles_facilites_essentielles_contentieux_concurrentiels.pdf

In conclusion, three fundamental principles must prevail in the case of essential facilities theory³⁶:

- the obligation of the owners of an essential resource to share its use with third parties should only be exceptional especially when the monopole comes as an innovation effort of its owner;
- the irresistible need of third parties to use that resource and the fact that they do not seek merely to share the monopole rent to be proved;
- the refusal to license a third party shall not itself be deemed illegal and should not be condemned save for proving the abuse of dominant position of the monopole holder to remove the competitors from the market.

5. Granting licenses in other cases of abuse

The principle of remedy is not limited to any particular type of abuse. Apart from cases of suppression of a new and desirable type of product, a compulsory license could be an adequate remedy for establishing excessive prices, contrary to art. 102 lit. a, as suggested by the Court, and of course in cases of discrimination. As already mentioned, compulsory licenses would be appropriate where the company has committed itself to grant licenses to a standard. Where a dominant enterprise makes two products that must work together, it may be required to be licensed all intellectual property rights involved in the interface that make them work together, so as to allow competitors to make each product compatible with the other (but not to copy any of the products). This would be a natural part of a judicial remedy in a case of "binding", under art. 102 lit. d or in a case of "grouping". In a case of fraud or "patent thicket" (the deliberate multiplication of questionable patents in order to obstruct competitors), a compulsory licensing for all patents may be the only effective remedy. Where a dominant enterprise acquires unduly intellectual property rights, it may be requested to license third parties. In addition, if an intellectual property right has been used to complement or enhance an exclusionary abuse committed in another way, the right cannot be used to obtain unlawful indirect result.

It is well established in European competition law that a behavior which in isolation could be legal, it can be illegal if combined with illegal behavior in one strategy of exclusion. However, in cases where the abuse is the monopolization of a second market, the essence of the abuse is blocking the current competition and where there is competition to be blocked, there is normally no abuse. Intellectual property rights provide even to a dominant enterprise the right to refuse to open a market for its competitors.

The theory of remedy also clarifies in a useful way, the issue of imposing compulsory license indecisions on interim measures. In accordance with the established practices, the provisional measures should be taken to maintain or restore a situation as it was before the alleged abuse to occur. According to the theory of remedy, the abuse should not be a refusal to grant licenses, but another type of behavior. The provisional measures, if they were justified, would be necessary to restore the situation as it was before starting that other behavior. If no license was given or promised, then no license should be decided by way of interim measures. This means that interim measures should not be imposed in cases where abuse prevents the development of a new type of product for which there is a clear and unsatisfied demand because, by definition, a license in this case would change the previous situation. But provisional measures would constitute as appropriate action if a dominant company would obstruct or reduce existing competition, where the other conditions for interim measures were complied with. Therefore, the theory of remedy explains and confirms the view of the President of the Court of First Instance, that 'the Commission would not normally have to decide to grant a compulsory license in an interim measures decision. However, if it would be appropriate that by interim measures to end obstruction or handicap competition created by the alleged abuse, the fact that they could be removed only if permitted licensing of intellectual property rights, it should be allowed this to make the provisional measures ineffective.

It should be recognized that it would be difficult to use a compulsory license as a remedy in cases of excessive pricing under art. 102 lit. a. The essential difficulty is to establish appropriate royalty rate. It must be small enough to allow licensees to sell the product or service at a lower price than the dominant enterprise, and not just to be on the "price umbrella" safe of the dominant company in order to share his excessive prices.

Art. 40 para. 1 of the TRIPS Agreement recognizes that the practice or concession conditions in licensing of intellectual property law that restricts competition may have adverse effects on trade and hinder the transfer and dissemination of technology can be regarded as illegal. The agreement recognizes the compulsory licensing scheme granted by public authorities concerning a patent in exchange of an adequate remuneration of internal law and provides a procedure preceding the grant of a compulsory license agreements, measures which aim to prevent such licenses relating to the hindered competition.

³⁶ Areeda Ph. (1988), *Essential facilities: an epithet in need of limiting principles*, *Antitrust Law Eview*, vol. 58.

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