

# Dilemma between the Identification of Two Markets and the Interpretation of the New Product Condition: Some Thoughts on a Possible Two-Fold Approach

Tiancheng Jiang  
PhD Candidate, Ghent University



## INTRODUCTION<sup>1</sup>

EU competition law has established a ‘modified *per se* legality standard’, under which a dominant firm’s refusal to license IPR to other rivals is considered to be abusive only in exceptional circumstances.<sup>2</sup> One principle in EU competition law is that intervention by competition authorities should result in an increase in social welfare.<sup>3</sup> Indeed, it is believed that the introduction of new products would enhance social welfare.<sup>4</sup> However, such a test has created substantial practical difficulties. In particular, the requirement that two markets shall be involved and that a new product with unmet consumer demand has been prevented by the refusal, raises complex practical issues.<sup>5</sup> Though the new product condition is perceived as an essential ingredient in the exceptional circumstances test,<sup>6</sup> the new product is such a ‘soft concept’ that it is ‘not subject to any well received legal or economic definition’,<sup>7</sup> which leaves its definition less clear. It remains uncertain under which circumstances a product would be considered as *new* (i.e. at what stage of production must that new product be,<sup>8</sup> to what extent and in which way must the new product be different from the existing ones<sup>9</sup>). Would the new product condition be met only if the product offered by the rival is capable of creating a new market by itself and non-substitutable to the existing products (high standard), or it is sufficient that some novel features has been presented in that product while it remains competing with the existing products (low standard)?<sup>10</sup>

‘It is necessary to emphasize, as the Court has already done on several occasions, that [EU] legislation must be unequivocal and its application must be predictable for those

---

1. I am grateful for the comments and suggestions from my promoter Prof. Inge Govaere and my colleagues Merijn Chamon, Hans Merket and Valerie Demedts. I am alone responsible for the views expressed and the shortcomings in this paper.

2. Exceptional circumstances include 4 conditions: (1) indispensability of the IP claimed for the downstream market; (2) elimination of the competition on the downstream market; (3) the refusal prevents the emergence of a new product for which there is a potential consumer demand; (4) the IP owner has no justification.

3. Ahlborn, Evans and Padilla (n1) 1110.

4. *ibid* 1132.

5. Similar concern also has been expressed in e.g. Damien Geradin, ‘Limiting the Scope of Article 82 EC: What Can the EU Learn from the U.S. Supreme Court’s Judgment in *Trinko* in the Wake of *Microsoft*, *IMS*, and *Deutsche Telekom*?’ (2004) 41 *Common Market Law Review* 1519, 1539.

6. Ahlborn, Evans and Padilla (n1) 1112.

7. Geradin (n5) 1531.

8. Christophe Humpe and Cyril Ritter, ‘Refusal to Deal’, (2005) *GCLC Research Papers on Article 82 EC 07/2005*, 158 <<http://www.coleurop.be/content/gclc/documents/GCLC%20Research%20Papers%20on%20Article%2082%20EC.pdf>> accessed 15 March 2012.

9. Steven Anderman and Hedvig Schmidt, *EU competition law and intellectual property rights: the regulation of innovation* (2nd edn, Oxford University Press 2011) 118. See also Derek Ridyard, ‘Compulsory Access Under EC Competition Law – A New Doctrine of “Convenient Facilities” and the Case for Price Regulation’ (2004) 11 *European Competition Law Review* 669, 670. Marcus Glader, *Innovation Markets and Competition Analysis: EU Competition Law and US Antitrust Law* (Edward Elgar 2006) 293.

10. Geradin (n5) 1531-32.

who are subject to it.<sup>11</sup> This paper attempts to propose a two-fold approach – interpreting new product conditions by reference to the distinct situations of two markets – to answer the following questions: (1) in which market should the new product arise? (2) When may a product be qualified as new? The remaining of this paper is divided into five parts. The second section reviews the evolution of the new product condition under Art 102(b) TFEU. The third section questions whether refusal to license IPR deserves a different treatment against refusal to supply other properties. The fourth section distinguishes three situations of two markets. The fifth section introduces a two-fold approach to interpret new product according to the distinct situations of two markets. The sixth section contains a brief conclusion.

### THE EXTENSIVELY INTERPRETED NEW PRODUCT CONDITION

The new product condition, which was identified in *Magill*<sup>12</sup> and subsequently confirmed in *IMS Health*<sup>13</sup>, requires that the alleged refusal has the effect of preventing the emergence of a new product for which the consumers have unmet demand. It might be the most controversial criterion in the assessment of a refusal to license. Though the Court of Justice clearly pointed out in *IMS Health* that a ‘me-too’ version<sup>14</sup> of the dominant firm’s product is not enough<sup>15</sup>, it is not clear how *new* the product should be and to what extent consumers should desire the product. These concerns have become even more complicated since the General Court in *Microsoft*<sup>16</sup>, as well as the Commission in its Discussion Paper<sup>17</sup> and Commission Guidance<sup>18</sup>, added follow-on innovation to the exceptional circumstances test and replaced the new product condition with a broader notion of consumer harm.<sup>19</sup> The emergence of the concept of follow-on innovation is possibly due to the practical difficulty in applying the new product condition, and the *Microsoft* case has triggered the modification of this condition. It was unclear whether a product competing directly with the product offered by the dominant firm on the same market could be regarded as a new product; but the *Microsoft* case demonstrates that Article 102 TFEU could be applied in a refusal to license case where there is a follow-on innovation brought by the rivals’ product which directly competes with the dominant firm’s product.<sup>20</sup>

The General Court considered that the conditions in the exceptional circumstances test are not exhaustive, by pointing out that the prevention of the appearance of a new product in refusal to license cases is only one *example* of possible criteria to determine whether the refusal may cause disadvantages for the customer. Such a prejudice can also be caused by the impediment of technical development.<sup>21</sup> The General Court maintained that Article 102 TFEU would be infringed not only by practices which prejudice

11. Case 70/83 *Gerda Kloppenburg v Finanzamt Leer* [1984] ECR 1075, para 11.

12. Joined cases C-241/91 P and C-242/91 *Radio Telefis Eireann (RTE) and Independent Television Publications (ITP) v Commission* [1995] ECR I-743.

13. Case C-418/01 *IMS Health v NDC Health* [2004] ECR I-5039.

14. *Ridyard* (n9) 669.

15. *ibid*, para 49.

16. Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601.

17. DG Competition, ‘Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses (Discussion Paper)’. <<http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>> accessed 20 March 2012.

18. Communication from the Commission – Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7 (Commission Guidance).

19. Discussion Paper, para 237-240; Commission Guidance, para 86-88.

20. *Microsoft* (Case Comp/C-3/37.792) Commission Decision 2007/53/EC [2007] OJ L32/23, para 1003.

21. Case T-201/04 *Microsoft*, para 647.

consumers directly, but also by those which indirectly harm their interests.<sup>22</sup> On the one hand, a large group of consumers of Microsoft are locked into Microsoft products owing to the lack of interoperability;<sup>23</sup> but on the other hand, the advantage that Microsoft retained discouraged its rivals from developing and marketing workgroup server systems, which would force the rest of the consumers to switch to Microsoft.<sup>24</sup> Therefore, such a limitation on technical development of the entire industry deriving from the dominant firm's refusal is also within the meaning of Article 102(b) TFEU.

Following the Court's decision, the Commission in its Guidance introduced a much broader concept 'consumer harm' to replace the new product condition. The Commission Guidance seemingly includes two different interpretations of the new product condition - the original new product condition and the follow - on innovation condition - by stating:

The Commission considers that consumer harm may, for instance, arise where the competitors that the dominant undertaking forecloses are, as a result of the refusal, prevented from bringing innovative goods or services to market and/or where follow-on innovation is likely to be stifled. This may be particularly the case if the undertaking which requests supply does not intend to limit itself essentially to duplicating the goods or services already offered by the dominant undertaking on the downstream market, but intends to produce new or improved goods or services for which there is a potential consumer demand or is likely to contribute to technical development.<sup>25</sup>

The original interpretation of the new product condition, which imposes a higher standard of proof on the competition authorities, aims to protect the legitimate exercise of IPR by a dominant firm so as to reward its previous innovatory efforts. It requires proof of novelty of the new product and evidence of consumer demand, making the refusal abusive only in exceptional situations. Nevertheless, the practical difficulty of such an interpretation gives way to the extensive interpretation of the new product condition. The extensive interpretation is based on the belief that consumer welfare is the ultimate objective and it would be better served by protecting competition for innovations, especially in the information technology sector. From this point of view, this broader interpretation is assessed positively.<sup>26</sup> However, the standard of proof in the extensive condition is lower. According to the follow-on innovation approach, if the technology development is very likely once the essential IPR were accessible for the requesting rivals, the dominant firm may not unilaterally turn down the request. Then this test would be satisfied in almost every IPR case when valuable intellectual property was disclosed to competitors –it goes without saying that the essential technology information from a dominant firm on the market would be valuable for its rivals to directly or indirectly improve their competing products.<sup>27</sup> The aim of the extensive interpretation is to protect the competitive process and consumer welfare, but not to protect the rivals' benefit. If the condition could be satisfied too easily, a dominant firm would be reluctant to invest in R&D so as to avoid the potential free riding by the rivals. According to the judgment

---

22. *ibid.*, para 664.

23. *ibid.*, para 65051.

24. *ibid.*, para 653.

25. Commission Guidance, para 87.

26. Claudia Schmidt and Wolfgang Kerber, 'Microsoft, refusal to license intellectual property rights, and the incentives balance test of the EU Commission' 14 (12<sup>th</sup> Annual Conference at the University of Toronto held by the International Society for New Institutional Economics, Toronto, June 2008).

27. James Killick, 'IMS and Microsoft Judged in the Cold Light of IMS' (2004) 1(2) *The Competition Law Review*, 23, 43.

of the *Microsoft* case, a dominant firm would be able to legitimately refuse to license only when the possibility of developing the technology by the competitors has little reality. However, this line is hard to draw. Consequently, in the long run both the entire industry and the consumer welfare would be impaired. Moreover, this extensive interpretation makes the right to refuse an exception rather than a rule.<sup>28</sup>

#### DO REFUSALS TO LICENSE IPR CASES DESERVE A DISTINCT TREATMENT?

The relatively looser requirement deriving from the extensive interpretation of the new product condition brings us back to the old debate: whether refusals to license IPR should be treated in a different way compared to refusals to supply other properties. Prior to *Microsoft*, a key factor in distinguishing refusals to license IPR cases from other refusal cases was whether the refusal prevented the emergence of a new product. However, since the General Court in the *Microsoft* judgment, as well as the Commission in its Guidance, has taken technical development in the downstream market into consideration, it seems this has become the approach applied in refusal to license IPR cases. Yet, this approach and that applied in refusal to supply other properties are not quite distinct from each other.

The supporters of a distinct approach,<sup>29</sup> which requires that stricter conditions should be met in order to invoke competition liability, start from the multi-premises, namely: a) IP is susceptible to free riding against other properties;<sup>30</sup> b) IP owners undertake substantial sunk costs and the failure to recover these costs is often higher;<sup>31</sup> and c) compulsory license would impede innovation<sup>32</sup>. However, another group of commentators<sup>33</sup> oppose such an approach and maintain that the rationales behind protecting the investment in non-IP properties and protecting the investment in IPR are essentially the same.<sup>34</sup> For this group, the reasons to support a higher protection standard for IPR are not convincing. Firstly, regarding the free riding concern, they believe it is true that 'physical facilities are generally more difficult and expensive to copy and are usually subject to capacity constraints', but that this is the reason why IP holders are granted exclusive rights.<sup>35</sup> It is not convincing that refusal to license should be treated in a 'more leniently' way under Art 102 TFEU to insure the exclusivity granted by the IP law.<sup>36</sup> In the second place, *ex ante* investments in IP are not always more costly than in physical property such

28. On this point see also Ian S. Forrester, 'Magill Revisited', in Inge Govaere, Reinhard Quick and Marco Bronckers (eds), *Trade and Competition law in the EU and Beyond* (Edward Elgar 2011) 376, 388: 'In less than 20 years, we have moved from anything being surprising (*Magill*) to everything being possible (*Microsoft*)'.

29. See e.g. John Temple Lang, 'Anti-Competitive Abuses Under Article 82 Involving Intellectual Property Rights', in Claus Dieter Ehlermann and Isabela Atanasiu (eds) *European Competition Law Annual 2003: What is an Abuse of a Dominant?* (Hart Publishing 2005); James Langenfeld, 'Intellectual Property and Antitrust: Steps Towards Striking a Balance' (2001) 52 *Case Western Reserve Law Review* 91.

30. *ibid.* See also e.g. the 1995 DOJ/FTC Antitrust Guidelines for the Licensing of Intellectual Property, section 2.1: 'Intellectual property has important characteristics, such as ease of misappropriation, that distinguish it from many other forms of property'.

31. See e.g. Langenfeld (n29) 94.

32. See e.g. Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*. [1998] ECR I-7791, Opinion of AG Jacobs, para 62. See also Case T-184/01R *IMS Health*, the Order of the President of the General Court, para 125.

33. See also Einer Elhauge, 'Defining Better Monopolization Standards' (2003) 56 *Stanford Law Review* 253, 276; Donald F. Turner, 'Basic Principles in Formulating Antitrust and Misuse Constraints on the Exploitation of Intellectual Property Rights' (1985) 53 *Antitrust Law Journal* 485, 489; Thomas Eilmansberger, 'How to Distinguish Good From Bad Competition Abuses' (2005) 42 *Common Market Law Review*, 129, 158.

34. Robert O'Donoghue and A Jorge Padilla, *The Law and Economics of Article 82 EC* (Hart Publishing 2006) 421. See also Humpe and Ritter (n8) 143-44.

35. O'Donoghue and Padilla (n35) 422.

36. *ibid* 422-23.

as investments in infrastructure required for broadband internet access.<sup>37</sup> In the third place, on the relation between IP protection and incentive to invest, a higher standard of IP protection may not inevitably translate into more effort invested in innovation<sup>38</sup> because ‘the IP-related financial incentive curve and the innovation curve are not indefinitely parallel.’<sup>39</sup> From the perspective of the firms, it is suggested that whether the IPR would be subject to compulsory license is a ‘negligible’ factor assuming the firms are ‘rational.’<sup>40</sup> ‘Second-generation innovation’ that benefits from the duty to share IPR should be taken into consideration as well when dealing with incentives to invest in innovation activities.<sup>41</sup> Moreover, conferring higher protection on IPR might distort the allocation of business resources through attracting the dominant firms to ‘incorporate’ their IPRs into other valuable properties in order to benefit from a higher protection.<sup>42</sup>

The arguments above are both reasonable; however, neither is particularly compelling nor prevails upon the other. It seems that it would not be optimal to treat IP and other properties in such an absolute equal way – by interpreting the new product condition in an extremely extensive way – where the characteristics of IP are ignored. On the other hand, setting up a totally distinct system for IP – by interpreting the new product condition in an extremely strict way – seems inconsistent with the current trend of the EU Commission and EU Courts’ practice. Therefore, this paper suggests not to put aside either of the two, but to fit the low standard of interpretation and high standard of interpretation of the new product condition in a two-fold system.

## IDENTIFICATION OF TWO MARKETS

### 1. *Two markets requirement*

Normally there is no obligation on the dominant firm to help his rivals in the same relevant market by granting access to his essential IPR, which is the essence of IPR protection.<sup>43</sup> It is pro-competitive to encourage the participants to compete on the merits, in other words, to allow firms to develop and keep their own advantages.<sup>44</sup> The dominant firm would not be expected to take responsibility for his rivals’ less attractiveness to buyers unless his conduct, refusal to license for instance, has made his rivals’ products ‘positively less attractive or less readily available than they would otherwise be.’<sup>45</sup> Such an obligation could only be imposed when there are two neighbouring markets involved.<sup>46</sup>

---

37. *ibid* 423.

38. Humpe and Ritter (n8) 145.

39. *ibid* 145-46.

40. *ibid* 146.

41. Steven C. Salop and R. Craig Romaine, ‘Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft’ (1999) 7 *George Mason Law Review* 617, 664.

42. Humpe and Ritter (n8) 144.

43. See eg: as the ECJ put it in Case 238/87 *Volvo v Veng*, para 8: ‘The right of a proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without his 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.’ See also O’Donoghue and Padilla (n35) 436.

44. O’Donoghue and Padilla (n35) 436.

45. John Temple Lang, ‘Anticompetitive Non-Pricing Abuses under European and National Antitrust Law’, in Barry Hawk (ed) *2003 Fordham Corporate Law Institute* (New York 2004) 235, 243.

46. See John Temple Lang, ‘Anticompetitive Abuses under Article 82 involving Intellectual Property Rights’, in Claus Dieter Ehlermann and Isabela Atanasiu (eds) *European Competition Law Annual 2003: What is an Abuse of a Dominant Position?* (Hart Publishing 2006) 589, 610: ‘in two-market situations because a competitor in the downstream market that gains control of a necessary input is not offering a better or a cheaper product in the downstream market, but only getting power to harm consumers in that market by shutting out its competitors’, ‘in a single market situation, something that is ‘necessary’ to compete can only be a competitive advantage.’

In *Magill*, the Commission found two separate markets, namely the market for TV listings information and the market for weekly TV guides. The *IMS Health* judgment confirmed the necessity of establishing two markets as the basis of the application of the exceptional circumstances test.<sup>47</sup> The Court took into consideration the question of whether it is necessary that products in both the upstream and downstream markets are marketed. By referring to the *Bronner* case<sup>48</sup>, the Court concluded that the fact that the product was ‘not marketed separately would not preclude the possibility of identifying a separate market.’<sup>49</sup> In other words, it is sufficient that ‘a potential market or hypothetical market can be identified.’<sup>50</sup> Furthermore, the existence of two separate production stages is necessary in the sense that the product or service on the primary stage is indispensable for the production on the secondary stage.<sup>51</sup> These were confirmed in the *Microsoft* case.<sup>52</sup> Based upon the fact that the products on the two markets have been separately marketed, the situations may be divided into two categories: the first involves two existing markets and the second involves one existing market and one potential market. This subsection only deals with the latter. According to the market where the potential product is situated, the two markets in the latter category could be composed of: (1) one potential upstream market and one existing downstream market, or (2) one existing upstream market and one potential downstream market.

## 2. Potential upstream market

In *IMS Health* the Court of Justice explicitly pointed out something which it already had hinted to in *Magill* and *Bronner*, where in both cases the essential inputs were not separately marketed. This lower standard for the two-market requirement has attracted quite a bit of criticism.

Firstly, due to the specific characteristic of IPR, if such a low standard is adopted, it would become ‘meaningless’<sup>53</sup> since any IPR could “‘hypothetically” be marketed as a stand-alone item’<sup>54</sup>. Secondly, it should always be kept in mind that a clear vertical separation between the upstream market and the downstream market should be present.<sup>55</sup> However, whether the essential input in the upstream production stage could constitute a separate market or merely a competitive advantage is not clear. One commentator critically interpreted the judgment as saying that it was enough ‘even if the input is a competitive advantage of a kind which has never previously been marketed or licensed by any company, and which it would not be economically rational to license to a direct competitor.’<sup>56</sup> In this way, a dominant firm would be asked to share its competitive advantage and be responsible for creating competition in its own market rather than in a downstream market.<sup>57</sup> Thirdly, identifying an upstream market merely because of the

47. Case C-418/01 *IMS Health*, para 44.

48. Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*. [1998] ECR I-7791.

49. Case C-418/01 *IMS Health*, para 40-43.

50. *ibid.*, para 44.

51. *ibid.*, para 45.

52. Case T-201/04 *Microsoft*, para 335: ‘it is necessary to distinguish two markets, namely, a market constituted by that product or service and on which the undertaking refusing to supply holds a dominant position and a neighbouring market on which the product or service is used in the manufacture of another product or for the supply of another service. The fact that the indispensable product or service is not marketed separately does not exclude from the outset the possibility of identifying a separate market.’

53. Killick (n27) 27-28.

54. Geradin (n5) 1530. See also Humpe and Ritter (n8) 151; Temple Lang (n47) fn 41.

55. O’Donoghue and Padilla (n35) 437.

56. Temple Lang (n47) 307.

57. Humpe and Ritter (n8) 152.

different stages of production would make the test unpredictable. Furthermore, defining the product market narrowly by reference to separate consumer demands (especially in the case of products such as consumables and spare parts<sup>58</sup>) is one thing, but identifying the two different stages of production as two separate markets is another.

Therefore, in order to identify a potential upstream market the answers to the following three questions might play a vital role: (1) Intent: whether the dominant firm is willing to license his IPR to the rivals, or if there is any licensing or sharing history for the IPR?<sup>59</sup> (2) Likelihood to distinguish the production of the IP from the production of the final product: whether the IP could be identified distinctly (i.e. a separate intermediate product)? (3) Separate consumer demand: whether there is separate consumer demand rather than the requests from the rivals for the IP concerned? However, as in fact the dominant firm already turned down the access request, the intent to potentially license such input seldom exists. Therefore in most situations the requested essential IP inputs might merely be a competitive advantage of the right owners, and if the dominant firm is forced to share its competitive advantage to his rivals, a huge disincentive to invest in R&D that pursues for a competitive advantage *vis-a-vis* rivals would be created.<sup>60</sup> Therefore, the potential upstream market situation can hardly exist and there is no need to advance to the interpretation of the new product condition.

### 3. Potential downstream market

Another possibility of two markets - an existing upstream market and a potential downstream market - has rarely been discussed thus far. The Exceptional circumstances test does not cover a situation in which the refusal has such an effect as to prevent a new product that by itself creates a totally *new* market that did not previously exist.<sup>61</sup> Put another way, is it a necessary condition that the new product competes with the dominant firm's own product? The clear line drawn by EU Courts is that where a dominant firm refuses to supply another undertaking on a market where the former one is not present, as in *Ladbroke*<sup>62</sup>, its conduct would not be considered abusive. However, a downstream market where the dominant firm is not present and a potential downstream market that has not yet been established are two concepts. It is reasonable not to require the dominant firms to predict potential compulsory licensing in a market where they are not present.<sup>63</sup> But it would not be logical that the most innovative products, which are highly likely to create new product markets, would hardly justify a compulsory license.<sup>64</sup> It is argued that the condition that the new product should compete with the dominant firm's own product is too 'prescriptive'.<sup>65</sup> On the one hand, other situations that

---

58. i.e. Case 22/78 *Hugin v Commission* [1979] ECR 1869; Case C-53/92P *Hilti AG v Commission* [1994] ECR I-667; Case T-83/91 *Tetrapak v Commission* [1994] ECR II-755; Case 53/87 *CICRA et Maxicar v Renault* [1988] ECR 6039; Case 238/87 *Volvo v Veng* [1988] ECR 6211. See Steven Anderman and Hedvig Schmidt (n9) 40-46.

59. Steven Anderman and Hedvig Schmidt (n9) 113-14: 'article 102 can be infringed when a company such as Microsoft with an industrial standard, limits technical development by refusing to continue to share interface information and thereby prevents competitors on related markets from developing their interoperable systems. If Microsoft had opted for a closed system in the way say of Apple Mac initially, the circumstances might have been different and it would normally have been entitled to continue to compete on that basis.'

60. Geradin (n5) 1530. See similar criticism in John Temple Lang, 'Mandating access: the principles and the problems in Intellectual Property and competition policy', (2004) 15(5) *European Business Law Review* 1087, fn24: 'Market... does not include the mere possibility of granting licences of the intellectual property rights. If there is such a right, it is always possible to license it. But that does not create a market for the purpose of the essential facility principle, and it could not do so, without making every intellectual property potentially right subject to compulsory licensing.'

61. See also Ekaterina Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart Publishing 2010) 124-25.

62. Case T-504/93 *Ladbroke v Commission* [1997] ECR II 923.

63. Humpe and Ritter (n8) 153. See also in Temple Lang (n47) 271.

64. *ibid.* See also Humpe and Ritter (n8) 153.

65. O'Donoghue and Padilla (n35) 449.

are capable of causing prejudice to consumers may also be sufficient to invoke Article 102(b);<sup>66</sup> on the other hand, if the concept of new product should be confined to the same market as the dominant firm's product and the new product is required to meet previously unsatisfied demand by its product differentiation, it would result in market expansion and in turn give rise to the need of re-defining the scope of the relevant market.<sup>67</sup>

Nevertheless, the practical difficulty lies in how to predict which market the potential new product will belong, as well as the actual scope of that rising market.<sup>68</sup> Potential downstream markets may, according to the predictability of the potential new product, fall into two types: 'distant future market'<sup>69</sup> and 'imminent future market'<sup>70</sup>. Distant future market describes the situation where R&D process of the new product is at a relatively early stage, and the scope of the potential downstream market is uncertain.<sup>71</sup> On the other hand, the term imminent future markets stands for a 'reasonably predictable' R&D process with a high chance of success, clearer market boundaries and attractiveness to consumers.<sup>72</sup> For the rivals, it would be easier to justify their access request if they could demonstrate that the establishment of a new market is imminent by the launch of a new product.

#### INTERPRETATIONS OF NEW PRODUCT: A POSSIBLE APPROACH

##### 1. *Weakness of current interpretation*

Prior to *Microsoft* case, EU competition authorities said nothing concrete on the definition of a new product except for roughly defining a new product as something not being offered by the dominant firm for which the consumers have unmet demands. The fact that Advocate General Tizzano in *IMS Health* suggested a new product to be a product with 'different nature' while competing with existing products<sup>73</sup> does not resolve this matter substantially. The new product condition is therefore considered 'a bad proxy' from an economic perspective: newness is a variable that is difficult to define in the framework of competition law.<sup>74</sup> A product is 'a specific bundle of characteristics' and consumer preferences are actually 'attached to characteristics and not to the product itself'.<sup>75</sup> Therefore there are two possibilities of a new product: a product 'integrating a new characteristic', or a product with 'a better performance on one characteristic'.<sup>76</sup> Another reason is that the condition only requires 'the intent to propose a new product' and covers 'the very preliminary stages of innovation', which makes the reaction from the consumers and the improvement of the market very uncertain.<sup>77</sup>

---

66. *ibid.*

67. *ibid.*

68. Humpe and Ritter (n8) 153.

69. Marcus Glader, *Innovation Markets and Competition Analysis: EU Competition Law and US Antitrust Law* (Edward Elgar 2006) 237, 303.

70. *ibid.* 248, 306.

71. *ibid.* 237, 303.

72. *ibid.* 248, 306.

73. Case C-418/01 *IMS Health*, Opinion of AG Tizzano, para 90(1).

74. Francois Leveque, 'Innovation, Leveraging and Essential Facilities: Interoperability Licensing in the EU Microsoft Case' (2005) 28(1) *World Competition* 71, 76.

75. *ibid.* 75-76.

76. *ibid.* 76.

77. *ibid.*



Lack of discussion on the new product condition by the EU Commission in *Microsoft* and subsequently the broader interpretation by the General Court, may be due to the fact that: (1) defining new product is problematic in practice; (2) Microsoft disrupted prior levels of supply rather than refused to start to supply, which gives rise to (3) the rivals not being capable of demonstrating their ability to create new products; (4) the characteristic of interoperability information determines that the products offered by the rivals directly compete with the product offered by Microsoft. Given that the EU Courts have chosen the lower threshold in *IMS Health* and *Microsoft*, it seems that Article 102 has been interpreted by EU Courts as safeguarding the right of the rivals to compete on a level playing field rather than preventing harm to competition.<sup>78</sup> It would be hard for the IP owners to decide whether they are still entitled to refuse since it is sufficient for the rivals to demonstrate their ‘intellectual and financial resources to develop the market in some way’<sup>79</sup> and some ‘degree of novelty of a product which the competitor was not yet in a position to produce,’<sup>80</sup> without defining a concrete product in detail which the development would bring about.<sup>81</sup> The right to refuse would thus become an exception that could be claimed only when the requesting rivals’ intention to develop the market would highly unlikely be achieved.<sup>82</sup>

The following two sub-sections are meant to advise as to how the new product condition shall be applied respectively in two existing and one existing market situations. However, it would be overly ambitious in this contribution to attempt to devise a wholly new approach that could fit in every refusal to license case to determine whether the proposed product is new or not, but the purpose is to suggest some principles and the difference in interpreting new product in different situations of two markets.

## 2. *The first fold: two existing markets situation*

In this situation where most refusal conducts take place, the new product or the product claiming to bring about technical development on the downstream market directly compete with the existing product offered by the IP owner. A new product should create ‘a new type of market option’ and substantially ‘increase product quality and/or levels of innovation.’<sup>83</sup> Two points seem essential in interpreting the new product condition: the newness of the proposed new product and its capacity to satisfy unmet consumer demand.

Would it be sufficient to meet the condition if the rivals contributed own efforts to their products and not simply cloned the product of the dominant firm? Or, should it be concluded that the firms cannot justify their access request because they do not seek to develop a new product, but simply want to continue producing the product they had developed?<sup>84</sup> The *first* principle is that ‘some incremental or minor improvement on existing products’ contained in the proposed new product cannot satisfy the

---

78. Geradin (n5) 1532.

79. Rousseva (n66) 123.

80. Temple Lang (n65) 1111.

81. Rousseva (n66) 123.

82. *ibid.*

83. O’Donoghue and Padilla (n35) 447.

84. Geradin (n5) 1538. The same concern expressed in Roberto Pardolesi and Andrea Renda, ‘The European Commission’s Case against Microsoft: Kill Bill?’ (2004) 27(4) *World Competition* 513, 550: ‘competitors were not trying to market a newly developed software product; Microsoft rivals merely wanted to ensure costless and perfect interoperability of their (already existing) products with Windows client OS.’

requirement of newness.<sup>85</sup> It has been generally acknowledged that the condition would be meaningless if trivial changes could create new products, such as a weekly TV guide providing BBC listings in a different format in *Magill* case, as it would 'never be constraining'.<sup>86</sup> The direct rivals' intention to offer a product with some new characteristics alone could hardly justify the intervention of the competition authorities.<sup>87</sup> Therefore, it is suggested that the dynamic efficiency of both the IP holder and the requesting party should be taken into consideration and that the competition authorities should strike a balance between these two dynamic efficiencies.<sup>88</sup> Otherwise, if enormous investment has been made into the input and the proposed new product only represents little investment, it would go too far and 'send the wrong message to the industry'.<sup>89</sup>

The *second* practical concern in this situation is how to prove whether demand for such a new product exists. The 'demand expansion test' proposed by Ahlborn et al. suggests that a new product should attract new consumers who previously were not in the market and which subsequently expands the market.<sup>90</sup> According to this test, firstly, the expansion of the market should be real or predictable and the degree of such expansion should be significant.<sup>91</sup> The second practical issue relates to the burden of proof, the requesting party should demonstrate his business plan to introduce a new product and the prospective, potential consumer demand for such product<sup>92</sup>. It is maintained that the proof of consumer demand is highly speculative 'unless the product in question exists in other geographic markets and proves to be well received by consumers'.<sup>93</sup> Moreover, a mere demand shift from the product of the dominant firm to the new product, which indicates that the old product and the new one compete for the same group of consumers, is not sufficient to meet the requirement. The fact that in the two existing markets situation the new product and other existing products are within the same relevant market however determines that the new product would be a 'diversification' of other existing products.<sup>94</sup> Therefore it is quite difficult to distinguish 'what part of the demand is shifted demand and what part of it is newly attracted demand'.<sup>95</sup> The result would be different if this test had been adopted in the *Magill* case, in which case there merely was a consumer demand shift from existing TV guides to Magill's comprehensive TV guide rather than market demand expansion.<sup>96</sup> It seems that this test underlines the relationship between the novelty of the new product and its attractiveness to the potential consumers (quantitative), but that it ignores the possible enhancement of consumer welfare brought by the better good or service for those consumers already in the market (qualitative).

### 3. *The second fold: one existing market situation*

As analysed in the previous section, in the situation of potential upstream market, the

---

85. O'Donoghue and Padilla (n35) 447.

86. Ahlborn, Evans and Padilla (n1) 1125.

87. Temple Lang (n65) 1110-11.

88. See Humpe and Ritter (n8) 158-59.

89. *ibid.*

90. Ahlborn, Evans and Padilla (n1) 1147. See also O'Donoghue and Padilla (n35) 447-48.

91. Ahlborn, Evans and Padilla (n1) 1148.

92. *ibid* 1148-49.

93. Rousseva (n66) 123.

94. *ibid* 127.

95. *ibid* 126.

96. *ibid.* However, Robert O'Donoghue and A Padilla consider that Magill's TV guide 'was likely to have attracted new consumers into the market' and it was not merely 'shift demand from existing guide' in *The Law and Economics of Article 82 EC* (Hart Publishing 2006) 448.

essential IP developed by the dominant firm is merely a competitive advantage, if: (1) the IP owner has not given access to the IP, and no other firm had done that in a similar situation; (2) it would be irrational considering that the potential access would affect the dominant firm's 'revenues or incentives to innovate'.<sup>97</sup> Therefore, there is no need to consider the new product condition since the two markets requirement has not been met.

On the other hand, considering the real possibility of meeting the two markets requirement in the situation of a potential downstream market, how to interpret the new product deserves to be discussed. It is maintained that the refusal might be difficult to justify if the new product is 'unrelated to existing product' and 'will not render obsolete or affect the demand for existing products'.<sup>98</sup> Advocate General Gulmann in *Magill* also supported that a new product should not already exist on the relevant market and not compete with the product already offered by the IPR holder.<sup>99</sup> According to Gulmann's 'conservative' approach,<sup>100</sup> the protection of the IPR holder's creative effort would be impaired if the product to be offered by its rival is only a better version.<sup>101</sup> The fundamental elements in determining the new product also depend on the degree of novelty of the product to be offered and the existence of unmet consumer demand. Compared to the approach applied in the two existing markets situation, (1) the requirement on the degree of newness must be stricter in that a clear line could be drawn between the existing products and the new product, in other words the essential functions of the new product should not be the same as the existing ones thus a new market is very likely to be created. (2) The measurement of consumer demand in practice would be even more difficult based on the uncertainty of the new market.

Smart phones, as 'an increasingly important segment of the mobile phone landscape',<sup>102</sup> could be an example. Smart phones not only provide basic functions (such as making phone calls, sending out and receiving text messages),<sup>103</sup> but are also equipped with a CPU<sup>104</sup> and an operating system for the users to realise the functions of personal computers such as access to social networking sites, downloading and installing applications, playing media documents and finding the optimum route through a GPS system. Therefore, the main functions of a smart phone are not the same as the traditional mobile phones, and they could be considered a combination of a mobile

---

97. Temple Lang (n47) 266-67.

98. Glader (n74) 294.

99. Case C-241/91 P and C-242/91 *Magill*, Opinion of AG Gulmann in *Magill*, para 93, 96.

100. Forrester (n28) 382.

101. Case C-241/91 P and C-242/91 *Magill*, Opinion of AG Gulmann in *Magill*, para 97: 'if copyright is used in order to prevent the emergence of a product which is produced by means of the work protected by the copyright and which competes with the products produced by the copyright owner himself. Even if that product is new and better, the interests of consumers should not in such circumstances justify interference in the specific subject-matter of the copyright. Where the product is one that largely meets the same needs of consumers as the protected product, the interests of the copyright owner carry great weight. Even if the market is limited to the prejudice of consumers, the right to refuse licenses in that situation must be regarded as necessary in order to guarantee the copyright owner the reward for his creative effort.'

102. According to *The 2010 European Digital Year in Review* by the global leader in measuring the digital world comScore, smart phone penetration in the EU5 (United Kingdom, France, Germany, Spain and Italy) increased by 9.5% to 31.1% in Dec 2010 (3 month average). <[http://www.comscore.com/Press\\_Events/Presentations\\_Whitepapers/2011/2010\\_Europe\\_Digital\\_Year\\_in\\_Review](http://www.comscore.com/Press_Events/Presentations_Whitepapers/2011/2010_Europe_Digital_Year_in_Review)>

According to comScore's press releases, in the U.S. during the 3 months ending in Sep 2011, 87.4 million people owned smart phones out of 234 million used mobile devices <[http://www.comscore.com/Press\\_Events/Press\\_Releases/2011/11/comScore\\_Reports\\_September\\_2011\\_U.S.\\_Mobile\\_Subscriber\\_Market\\_Share](http://www.comscore.com/Press_Events/Press_Releases/2011/11/comScore_Reports_September_2011_U.S._Mobile_Subscriber_Market_Share)>;

In Canada, during Sep 2011 smart phone adoption reaches 40 percent out of 20.1 million mobile device users <[http://www.comscore.com/Press\\_Events/Press\\_Releases/2011/11/Smartphone\\_Adoption\\_Reaches\\_40\\_Percent\\_in\\_Canada](http://www.comscore.com/Press_Events/Press_Releases/2011/11/Smartphone_Adoption_Reaches_40_Percent_in_Canada)>; And in Japan during Dec 2010 7 million mobile users are smart phone owners < [http://www.comscore.com/Press\\_Events/Press\\_Releases/2011/2/Smartphone\\_Adoption\\_Continues\\_to\\_Grow\\_in\\_Japan](http://www.comscore.com/Press_Events/Press_Releases/2011/2/Smartphone_Adoption_Continues_to_Grow_in_Japan)> accessed 12 December 2011.

103. Compared to smart phone, feature phone is used to describe low-end mobile phones which are for consumers who want relatively lower price mobile phone without all the functions of a smart phone.

104. Central Processing Unit.

phone and a computer. It might be maintained that smart phones are capable to satisfy some *new* consumer demand not covered by the *old* products. Furthermore, the advanced technology incorporated brought by R&D investment could be one reason to make the pricing policies of smart phones different from other mobile phones. From the perspective of the consumers, it could be imagined that smart phones and feature phones are not interchangeable and do not compete on the same market. It may, however, be difficult to reach this conclusion when the smart phones began to emerge in the market, since in the early stage the main functions of smart phones were not as mature as today. Secondly, the market share and sales volume of smart phones for each brand were not separately calculated and analysed. Thirdly, consumer demand for the smart phones might be stronger and be quantified easily nowadays along with their increasing knowledge for the smart phones. The analysis above suggests that it is not easy to consider a newly introduced product as a new product in the competition context at the very beginning or even in R&D process.

Looking back at *Magill*, one might wonder whether the comprehensive weekly TV guide was a new product in this context.<sup>105</sup> Irish TV viewers had a demand for such a comprehensive product, which could be inferred partly by the existence of dozens of comprehensive TV guides in continental Europe and partly by the broadcasters' fear for the emergence of the *Magill* guide.<sup>106</sup> However, the key question is whether such consumer demand was for a *better* product or for a *new* product. *Magill* TV guide that included the information of BBC, RTE and ITV's forthcoming programmes was clearly to the benefit of the consumers by offering them another option, though the information contained was not as much as the existing TV guides offered by three broadcasters. However, the essential function of a weekly TV guide has not been changed by the *Magill* guide. The viewer could also obtain the programme information of next week from three existing TV guides although it would cost more and cause inconvenience for the consumers.<sup>107</sup> The fact that the programme listings were delivered, free of charge, to all magazines and newspapers and published on a daily basis but the request from *Magill* was refused<sup>108</sup> could also demonstrate that, from the perspective of the broadcasters, the multi-channel TV guide competed directly with the existing TV guides. Therefore the *Magill* guide was still in the same weekly TV guide market with other existing magazines and a new market had not been thus created. *Magill*'s comprehensive weekly TV guide could provide additional convenience for the consumers; however, it was merely a better product rather than a new product. Prevention of the emergence of a better product should be an acceptable result as long as the firms compete on the merits and consumer welfare is not deprived.

---

105. The discussion below only attempts to find whether *Magill* TV guide competed directly with the existing products and whether it was capable to create a new market itself in the context, but not implies that the *Magill* case is belong to one existing market and one potential market situation. Also, it is clear that NDC's product in *IMS Health* and the workgroup server operating systems offered by Microsoft's rivals compete directly with the existing products of the IP owners, so it is not necessary to discuss the *IMS Health* case and the *Microsoft* case in this interpretation of the new product.

106. Forrester (n28) 381.

107. The price of *Magill* TV guide was 82 cents and buying three weekly magazines would cost the viewers a total of 124 cents in Ireland. *ibid* 377.

108. *ibid* 380.

---

## CONCLUSION

The new product condition established in EU refusal to license cases has become a looser criterion after the *Microsoft* case, and blurs the line between refusal to license cases and refusal to supply other facilities. However, the debate on whether IPR cases should be treated differently has not reached a consensus. The author proposed in this paper to apply different standards to interpret the new product condition by reference to different situations of two markets. In the two existing markets situation, incremental or minor improvements on the existing products are not sufficient to meet the newness requirement. In addition the proposed new product should be capable to expand the market rather than to merely shift consumer demand from existing products. If only one existing market is involved, in the potential upstream market situation, generally the essential IP would only be considered as a competitive advantage but not as a separate market and the two markets requirement cannot be satisfied; in the potential downstream market situation, the degree of novelty of the proposed new product should be higher in order to demonstrate that the potential downstream market is imminent, only in this way could the line with the existing products be drawn. However, it is admitted that the practical difficulty here lies in the measurement of potential consumer demand for the new product.

---