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**THE ESSENTIAL FACILITIES DOCTRINE BEFORE THE  
EUROPEAN COMMUNITY COURTS: OSTRACISED OR  
EXPANDED?**

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## A. INTRODUCTION

Free trade constitutes a fundamental component of the European Union's ("EU") Single Market. Nevertheless, developments resulting from the implementation of competition rules within the Union's legal order, illustrate that there might be cases in which the established right to choose one's trading partners as well as other concepts encapsulated therein could be legally overridden. The European Community Courts have in numerous instances applied Article 82 EC<sup>1</sup> so as to hold unilateral refusals by dominant undertakings to supply goods or services, to allow access to facilities or to license intellectual property rights towards third parties as being abuses of those undertakings' dominant position. Taking into consideration that compulsory dealing does not form part of the law of contract, it soon became evident that such rulings on behalf of the Courts were bound to be the subject of great debate and controversy.

Abuses of a dominant position emanating from a dominant undertaking's refusal to deal by supplying or licensing, have come to fall within what is now known as the doctrine of 'essential facilities'. The 'essential facilities' doctrine explicitly exists only in judgments of US courts and the European Commission's ("the Commission") Decisions in competition cases. The said doctrine can be considered as being the contemporary metamorphosis of the *ratio decidendi* in the *Commercial Solvents* ruling<sup>2</sup> of the European Court of Justice.

Inevitably, as a result of its radical implications, the doctrine has found itself at the heart of literature debate. The Opinion delivered by Advocate-General Jacobs of the European Court of Justice in the case of *Bronner*<sup>3</sup> provides a clear encapsulation of the issues entailed in cases involving a refusal to supply and the balancing which should be sought by the Community Courts in adjudicating such cases brought before them.<sup>4</sup> This article revisits the suggestions made by Advocate-General Jacobs in his aforementioned Opinion as well as peripheral concepts and developments pertaining to the 'essential facilities' doctrine. It embarks on an intrinsic review of the Community Courts' approach in their consideration of such cases so as to extract the degree of consistency, if any, both within the case-law itself and as to the doctrine's principles. Inevitably, such an examination endeavours to ascertain whether the approach followed by the Courts in their rulings over the years has in any way adopted, expanded or dismissed the doctrine, with an emphasis to the sensitive nature of cases involving a refusal to license intellectual property rights, such as *Microsoft*<sup>5</sup>, and whether the latter ruling in particular provides any new indications over the said doctrine's evolution.

## B. FROM COMMERCIAL SOLVENTS TO 'ESSENTIAL FACILITIES'

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<sup>1</sup> Treaty Establishing the European Community

<sup>2</sup> Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corp v Commission* [1974] ECR 223 (hereinafter: "Commercial Solvents")

<sup>3</sup> Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and others* [1998] ECR I-7817 (hereinafter: "Bronner")

<sup>4</sup> Opinion of A-G Jacobs delivered on 28 May 1998, Case C-7/97 *Oscar Bronner v. Mediaprint*, para.56.

<sup>5</sup> Case T-201/04, *Microsoft Corp. v. Commission* [2007] 5 C.M.L.R. 11 (hereinafter: "Microsoft")

The starting point for ‘refusal to supply’ cases in the European Community can be traced back to 1974, when the European Court of Justice upheld the Commission’s Decision<sup>6</sup> in the *Commercial Solvents* case, in that the refusal to supply on behalf of a dominant undertaking to a downstream market competitor of the former’s own subsidiary would eliminate that competitor and was therefore an infringement of Article 82 EC. Doherty has noted that since that judgment “it has been clear in EC law that a dominant undertaking has a duty to deal in at least some circumstances”.<sup>7</sup> The ‘essential facilities’ doctrine has been defined by Advocate-General Jacobs as being the case where a company in “a dominant position in the provision of facilities which are essential for the supply of goods or services on another market abuses its dominant position where, without objective justification, it refuses access to those facilities”.<sup>8</sup> Whish calls the doctrine a natural consequence of the judgment in *Commercial Solvents*.<sup>9</sup> Ritter convincingly argues that there is a direct continuity between the *Commercial Solvents* judgment and the ‘essential facilities’ case-law.<sup>10</sup> Moreover, Jacobs makes explicit reference to the ‘essential facilities’ doctrine in his Opinion in *Bronner* and details the case-law precedent from *Commercial Solvents* to *Ladbroke*<sup>11</sup> under that umbrella.<sup>12</sup> As shall be seen, this paper subscribes to the view that the principle established in *Commercial Solvents* has evolved into the ‘essential facilities’ doctrine.

It can be seen quite clearly that the Commission is a proponent of the ‘essential facilities’ doctrine and has indeed expressly referred to it as of its 1994 Decision in *Sealink*.<sup>13</sup> For the Commission, as Advocate-General Jacobs noted in his 1998 Opinion, the ‘essential facilities’ notion plays an important role in cases concerning a refusal to supply.<sup>14</sup> He further notes that it is “clear that the Commission considers that refusal of access to an essential facility...can by itself be an abuse even in the absence of other factors”<sup>15</sup>.

Although all EU Member-States have national legal orders which are harmonized with the principles of the Single Market, there are some States that have nonetheless proceeded to create competition rules under which “an unjustified refusal to enter a binding contract may constitute an abuse of dominant position”.<sup>16</sup> Jacobs refers to Spain, France, Greece, Finland and Portugal, as having enacted such rules.<sup>17</sup> The influence of the Commission in that regard is evident, as can be seen from the information provided in a 1996 OECD discussion paper.<sup>18</sup>

On the other hand, the Community Courts, with which this paper is mainly concerned, have never made explicit reference to the ‘essential facilities’ doctrine.<sup>19</sup> Some commentators have

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<sup>6</sup> Commission Decision 72/457/EEC, 14.12.1972

<sup>7</sup> Doherty, B., ‘Just What Are Essential Facilities’ (2001) 28 *Common Market Law Review* 397, at 404.

<sup>8</sup> A-G Jacobs, *op.cit.*, para.34

<sup>9</sup> Whish, R., *op.cit.*, p.667

<sup>10</sup> Ritter, C., ‘Refusal to Deal and “Essential Facilities”’: Does Intellectual Property Require Special Deference Compared to Tangible Property?’ (2005) 28(3) *World Competition*, at 285

<sup>11</sup> Case T-504/93, *Tiercé Ladbroke v Commission* [1997] ECR II-923 (hereinafter: “Ladbroke”)

<sup>12</sup> A-G Jacobs, *op.cit.*, paras.33-43

<sup>13</sup> Commission Decision 94/19/EC of 21 December 1993, *Sea Containers v Stena Sealink - interim measures*, OJ 1994 L 15, p. 8

<sup>14</sup> *Ibid.*, para. 52

<sup>15</sup> *Ibid.*, para. 50

<sup>16</sup> *Ibid.*, para.53

<sup>17</sup> *Ibid.*

<sup>18</sup> OECD, ‘*The Essential Facilities Concept*’, GD (96) 114, 16 July 1996

<sup>19</sup> A-G Jacobs, *op.cit.*, para.54.

been avid to see judgments such as *Magill*<sup>20</sup> - and to an extent *Télémarketing*<sup>21</sup> - as being endorsements of the doctrine on behalf of the Courts, while *Bronner* has been characterized as being the case in which the European Court of Justice “came closest to pronouncing on the existence of an essential facilities doctrine in EC law”.<sup>22</sup>

### C. WHY COURTS SHOULD BE CAREFUL IN IMPOSING A DUTY TO DEAL

Advocate-General Jacobs’ Opinion in *Bronner* might be explicitly referring to the ‘essential facilities’ doctrine, but it nonetheless extends notes of caution addressed to the Community Courts. Jacobs states that justifying interference with dominant undertakings’ freedom to contract requires careful balancing of conflicting considerations<sup>23</sup>. He calls upon the Courts not to lose sight of the “fact that the primary purpose of Article [82] is to prevent distortion of competition – and in particular to safeguard the interests of consumers – rather than to protect the position of particular competitors”.<sup>24</sup>

Within the context of why the Courts should be careful in imposing a duty to deal, Jacobs emphatically states that “the mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it”<sup>25</sup>. Jacobs warns the Court that allowing competitors to require access to facilities of dominant undertakings, which is something that might prove pro-competitive and to the interest of consumers as it would allow claimants to enter the market in the short term, might be harmful in the long term. Making it easy for competitors to access facilities of dominant firms would result in an absence of incentives for such competitors to develop their own facilities, while it would also remove incentives for dominant firms to invest in their own facilities.<sup>26</sup>

From an economic perspective, Jacobs’ observations are clearly referring to the promotion of allocative efficiency, in that imposing the sharing of facilities of a dominant firm would be “stimulating competition in downstream markets”,<sup>27</sup> versus dynamic efficiency, in that incentives to innovate would diminish. There has been relevant literature<sup>28</sup> which advocates for the need to balance between allocative and dynamic efficiency gains within the context under discussion.

As Geradin illustrates, this assertion of Jacobs’ is the “only serious reference to the ex ante vs. ex post trade-off” and is “clearly in line with...the Supreme Court in *Trinko*”,<sup>29</sup> a landmark US

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<sup>20</sup> Joined Cases C-241/91 P and C-242/91 P, *RTE and ITP v. Commission* [1995] ECR-I 743 (hereinafter: “*Magill*”)

<sup>21</sup> Case 311/84, *Centre Belge d’Etudes du Marché Télémarketing SA (CBEM) v Compagnie Luxembourgeoise de Télédiffusion* [1985] ECR 3261 (hereinafter: “*Telemarketing*”)

<sup>22</sup> Doherty, B., *op.cit.*, at 416.

<sup>23</sup> *Ibid.*, para.57

<sup>24</sup> *Ibid.*, para.58

<sup>25</sup> *Ibid.*, para.57.

<sup>26</sup> *Ibid.*, para.57.

<sup>27</sup> Geradin, D., ‘Limiting the Scope of Article 82 EC: What can the EU learn from the US Supreme Court’s judgment in *Trinko* in the wake of *Microsoft*, *IMS* and *Deutsche Telecom*?’ (2004) 41 *Common Market Law Review* , at 1539.

<sup>28</sup> Elhauge, E., ‘Defining Better Monopolization Standards’ (2003) 56 *Stanford Law Review* 253, at 300-305.

<sup>29</sup> Geradin, D., *op.cit.*, at 1540

case. In *Trinko*, the US Supreme Court had denied the extension and development of the ‘essential facilities’ doctrine and its applicability. Specifically, it refused to rule in favour of an exception to the rule that businesses need not aid competitors.

Therefore, special reference is due to the particular care that is required in assessing cases featuring inputs or facilities that are the “fruit of substantial investment”.<sup>30</sup> Such care is indeed pivotal in cases in which this ‘fruit’ consists of intellectual property rights. Jacobs finds that granting intellectual property rights, which are exclusive in nature, at least for a limited period, involves a “balancing of the interest in free competition with that of providing an incentive for research and development”.<sup>31</sup> Anyone commenting on the *Magill* case, examined below, has not avoided stressing the exceptionality of the circumstances in that case and it is commonly acceptable that the Community Courts have adopted a higher legal standard for cases involving refusal to license intellectual property rights than for refusal to supply, or provide access to, ‘tangible’ or ‘physical’ property.

Overall, revisiting the submissions in the Opinion in question offer a portrayal of the reasons for which the Courts are obliged to engage in extensive balancing when ruling upon cases entailing refusals to deal. Markedly, in the US front, Areeda has underlined in an article highly critical of the ‘essential facilities’ doctrine that compulsory access, if it exists at all, is and should be very exceptional.<sup>32</sup> He goes on to say that “no one should be forced to deal unless doing so is likely substantially to improve competition in the marketplace by reducing price or by increasing output or innovation”.<sup>33</sup>

#### **D. THE APPROACH FOLLOWED BY THE COMMUNITY COURTS**

Placed in the above context, the propositions in Jacob’s Opinion give rise to a prism through which the approach followed by the Community Courts as regards the fate of the ‘essential facilities’ doctrine can be reviewed. A methodological examination of the relevant landmark cases becomes tantamount so as to determine how far, if at all, such rulings have been influenced by the observations in that Opinion. This methodological approach shall deploy the criteria established in the *Bronner* ruling of the European Court of Justice in 1998 and for which case the Opinion of Advocate-General Jacobs was written, as the comparative basis for evaluating case law preceding and succeeding *Bronner*, therefore allowing for a crystallization of the Courts’ approach throughout the years.

*Bronner* has been fundamental in the Courts’ examination of refusals by dominant undertakings by being the eminent judicial formulation of the contemporary conceptualization of the particular circumstances under which the ‘essential facilities’ doctrine emerges.

*Bronner* came before the Court by way of referral to it by an Austrian court pursuant to the provisions of Article 234 EC. The claimant in the case was Oscar Bronner, the publisher of the daily *Der Standard* newspaper with a small market share in the Austrian daily newspaper

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<sup>30</sup> A-G Jacobs, *op.cit.*, para.62

<sup>31</sup> *Ibid.*, para.62

<sup>32</sup> Areeda, P., ‘Essential Facilities: An Epithet in Need of Limiting Principles’ (1990) 58 *Antitrust Law Journal* 841, at 852.

<sup>33</sup> *Ibid.*, at 852.

market. The defendant, Mediaprint, also a newspaper publisher, had developed a national delivery system, to which the claimant requested access for the purpose of distributing *Der Standard* through those means. Mediaprint refused to allow access to its system, a refusal forming the basis of to the claimant's action before the Austrian court, which led to the latter seeking the Court's opinion as to whether such a refusal would amount to an abuse of a dominant position under Article 82 EC. On the matter of abuse, the European Court of Justice stated that for an abuse it would have to be shown that Mediaprint's refusal to allow access to the delivery system would be likely to eliminate all competition in the daily newspaper market, which was the downstream market, and that the system was indispensable for carrying on business in the newspaper market.<sup>34</sup> Following this proposition, the Court held that Mediaprint's system was not indispensable as there were other means of distributing daily newspapers<sup>35</sup> while there were no technical, legal or economic obstacles that made it impossible for others in the market to establish a system of their own.<sup>36</sup>

On the matter of indispensability, the Court established that in order to prove that the system was indispensable by showing that the creation of such a system is "not a realistic potential alternative"<sup>37</sup>; it would not have sufficed to argue that it was not economically viable to create such a system. It would be necessary to establish, at the very least, that it would "not be economically viable to create a second system for the distribution of newspapers with a circulation comparable to that of the daily newspapers distributed by the existing scheme".<sup>38</sup> On this matter the European Court of Justice agreed with Jacobs, who had asked whether another large newspaper would be deterred from creating a similar network.<sup>39</sup>

The Court's judgment was much briefer than the Advocate General's Opinion, while it did not itself refer to the 'essential facilities' doctrine as the latter explicitly did. The Court's *ratio decidendi* established the following three criteria for assessing an alleged abuse: first, the refusal must be likely to eliminate all competition in the downstream market; second, the refusal cannot be objectively justified; third, there must be indispensability in that there is no actual or potential substitute in existence. An evident scepticism towards imposing a duty to deal can be seen throughout the Judgment. This is particularly clear in that the Court "stopped at the threshold issue of whether there was a substitute and did not look any further".<sup>40</sup> Thus, in *Bronner*, the landmark case for 'refusal to deal' situations, the European Court of Justice was indeed very cautious, while the criteria it set and the difficulty their satisfaction entails were clear indications that it was not willing to light-heartedly impose a duty to deal.

### **1. Bronner applied retrospectively**

In order to accurately evaluate the Community Courts' approach as to whether the discussed doctrine has received any formulation within their jurisprudential context, the *Bronner* criteria must be employed in the course of examining important case-law precedents in this field. Only by tracing the degree of consistency between the criteria laid down in *Bronner* and the Courts' approach in previous judgments can the present analysis progress.

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<sup>34</sup> *Bronner*, para. 41

<sup>35</sup> *Ibid.*, para. 42

<sup>36</sup> *Ibid.*, para. 44

<sup>37</sup> *Ibid.*, para. 45

<sup>38</sup> *Ibid.*, para. 46

<sup>39</sup> A-G Jacobs, *op.cit.*, para. 68.

<sup>40</sup> Doherty, B., *op.cit.*, at 419

As previously mentioned, *Commercial Solvents* has been the starting point for ‘refusal to supply’ cases in the European competition law context. In that case, the dominant supplier of amino-buthanol, a raw material used by Zoja, a drug producer in the downstream market, suddenly refused to supply the latter party. Simultaneously, the dominant undertaking’s subsidiary was an emerging competitor in the downstream market in which Zoja operated. The Commission found that the dominant undertaking’s conduct amounted to an abuse of its dominant position, something that the European Court of Justice upheld on appeal. It was thus established that it is an infringement of Article 82 EC for an undertaking in a dominant position to refuse supplying a downstream market competitor where the effect of doing so would eliminate all competition in that market.

The *Bronner* judgment refers to the rule of *Commercial Solvents* early on in its examination of the matter of abuse. In retrospectively deploying the criteria identified in *Bronner*, it can firstly be confirmed that *Commercial Solvents* was the landmark case where the aim of elimination of competition was attributed to the intentions and the rationale behind the dominant undertaking’s refusal. As far as objective justification is concerned, it did not suffice that the sole reason for the refusal to supply was the dominant undertaking’s entry into the downstream market. Moreover, the ‘actual or potential substitute’ criterion of *Bronner* seems to have had a harsher manifestation in *Commercial Solvents*, where the European Court of Justice “explicitly declined”<sup>41</sup> to examine substitutability by way of developing alternative raw materials on behalf of the client and constrained itself in examining the raw materials already present in the market and their substitute capacity.<sup>42</sup> It can safely be extracted that the Court in *Commercial Solvents* was indeed much more cautious and unwilling to deepen into the substitutability matter, as it subsequently did in *Bronner*.

At this stage, it is of the utmost importance for the purposes of the present article to direct the *Bronner* criteria to the *Magill* case, also revisited in the *Bronner* Judgment by the Court. In *Magill*, it was upheld that three television broadcasters in the UK and Ireland had abused their individual dominant positions by refusing to make their schedules available to a competitor in the downstream market of listings magazines, where all three broadcasters published their separate listings magazines. Although *Magill* might appear as an application of the *Commercial Solvents* precedent, it is in fact a most controversial case. That the ruling essentially meant that intellectual property rights could be subject to imposed licensing was quite shocking for intellectual property and antitrust lawyers alike,<sup>43</sup> since such overriding of otherwise inviolable rights could have the potential of disrupting a number of markets founded upon the protection of intellectual property.

To the present analysis’ relevance, the European Court of Justice in *Bronner* depicted *Magill* as being an exceptional case and gave its reasons for considering so: firstly, without the listings information sought by the downstream competitor, the latter would not be able to compete; secondly, there was a demonstrable potential demand for the product; third, there were no objective justifications for the refusal and, lastly, the refusal would eliminate all competition in the downstream market.<sup>44</sup> Reading the *Renault*<sup>45</sup> and *Volvo*<sup>46</sup> Judgments,

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<sup>41</sup> Doherty, B., *op.cit.*, at 420.

<sup>42</sup> *Commercial Solvents*, para. 15

<sup>43</sup> Ritter, C., *op.cit.*, at 285

<sup>44</sup> *Magill*, paras.39-40

<sup>45</sup> Case 53/87 *CICRA v. Renault* [1988] ECR 6039

which preceded *Magill*, the Court's stance can be said to be succinct, as it is clearly portrayed in those cases that, as a general principle, refusing to supply intellectual property rights will not be held to be abusive.

By applying the *Bronner* criteria over *Magill*, as these were summarised *supra*, it can firstly be seen that as regards the potential to eliminate competition, the refusal to make television schedules available was indeed likely to cause such an effect. Furthermore, the broadcasters' argument of being entitled to protect their intellectual property rights as being an objective justification for their conduct, did not suffice for the Court, which did not bother itself with copyright protection issues. Lastly, there was no actual or potential substitute to the broadcasters' listings. Crucially, when reading *Magill* through the prism of the *Bronner* criteria, it can be articulated that while the Court gave weight to the need for a new entrant offering a new product in *Magill*, it placed its emphasis on 'indispensability' and the effect of eliminating all competition in *Bronner*.

It has been crystallised through the Community Courts' case-law that the differentiating factor between the variety of cases falling within the 'essential facilities' doctrine is whether intellectual property rights are the subject-matter of the refusal on behalf of the dominant undertaking. The 'additional' condition in the case of a refusal causing the prevention of a new product from appearing in the market for which there is potential consumer demand, has been established as being confined to cases involving a refusal to license information protected by intellectual property rights. This notion was also upheld by the Court of First Instance in *Microsoft*,<sup>47</sup> examined below.

In light of this observation, a further matter should be parenthetically noted, namely the varying situations of refusing to supply existing customers on the one hand, as was the case in *Commercial Solvents* and refusing to supply new entrants into the market, offering a new product, as seen in *Magill* on the other. The elements that the *Bronner* Judgment established as requirements towards finding a refusal to supply as being abusive are present in both *Commercial Solvents* and *Telemarketing*, both involving 'terminations' of supply to existing customers. As Whish explains, the essence of the cases in question is not the protection of a competitor that depends on the supplies of the dominant undertaking, "but the maintenance of competition in the downstream market: for this reason, no distinction needs to be drawn between supply to existing customers and supply to new ones".<sup>48</sup> It can further be said that there is no significant difference between the two sets of cases described. Characteristically, it has been commented that if a *Commercial Solvents* type of situation were to arise today, it would probably be assessed under the *Bronner* or *IMS*<sup>49</sup> tests, depending on whether it concerns intellectual property or not.<sup>50</sup> Continuing on the retrospective application of the *Bronner* criteria over other 'refusal to supply' cases preceding that Judgment, such as *Ladbroke* and *European Night Services*,<sup>51</sup> it can be confirmed that such cases have been judged under some consistency by the Community Courts. In *Ladbroke*, the Court of First

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<sup>46</sup> Case 238/87 *Volvo AB v Erik Veng (UK) Ltd* [1988] ECR 6211

<sup>47</sup> *Microsoft*, para. 334.

<sup>48</sup> Whish, R., *op.cit.*, p. 667

<sup>49</sup> Case C-418/01 *IMS Health GmbH & Co KG v NDC Health* [2004] ECR I-5039 (hereinafter: "IMS").

<sup>50</sup> Ritter, C., *op.cit.*, at 283

<sup>51</sup> Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94, *European Night Services and others v. Commission* [1998] ECR II-1341 (hereinafter: "European Night Services")

Instance upheld the Commission's view which rejected the claim that a refusal by the French horse-race operators to provide image and sound from their races to a Belgian bets operator constituted an abuse of a dominant position. The Court rightly refused to apply *Magill*, as *Ladbroke* was already dominant in the betting market and the refusal to supply would not result in the elimination of competition in that market. In *European Night Services*, the same Court applied *Ladbroke* and ruled, against the Commission's Decision, that a "product or service cannot be considered necessary or essential unless there is no real or potential substitute".<sup>52</sup>

As a result of the above retrospective application of the *Bronner* criteria on some of the most important case-law, it can be said that the Courts' approach in *Bronner* is consistent with preceding rulings. Nonetheless, it is true that in earlier cases the Community Courts had not laid weight to discovering whether indispensability is present. Specifically, in *Bronner* the Court said that it did not suffice for the claimant to show that it was economically impossible to establish a national delivery system, it would be necessary at the very least to show that an undertaking with a circulation in the range of Mediaprint would not have been able to do so.<sup>53</sup> As Whish notes, a narrow view of what amounts to an indispensable input or facility should be taken, in accordance to the judgments under examination.<sup>54</sup> Therefore, it can be seen that beyond maintaining consistency and coherence up the *Bronner* Judgment, the Community Courts have indeed been pragmatically careful, as they have not been very prompt to impose a duty to deal and have only done so after receiving satisfaction in respect of their stringent tests. *However, a chronologically advancing loosening of the stringency in the Courts' tests can be traced as regards refusals not entailing intellectual property, which does not however deter the consistency as to their approach.* Rephrase.

## 2. Post-Bronner: the IMS Judgment

Proceeding to examine the post-*Bronner* era, it is inevitable that one turns to the Court's Judgment in *IMS*. The significance of this case is illustrated in that while *Bronner* is the controlling authority for cases involving refusals to supply tangible or physical property, *IMS* can be considered as being the respective authority for refusal to licence.<sup>55</sup> This arises, inter alia, from the fact that *Bronner* did not answer whether the *Magill* case-law could apply to any property right. The *IMS* Judgment confirmed that there is a higher standard for compulsory licensing of intellectual property rights, a persuasion present in Jacob's Opinion in *Bronner*, as seen *supra*.<sup>56</sup>

In that case, IMS, the world leader in data collection on deliveries by wholesalers of pharmaceuticals, had developed, along with its customers, a geographic format for presenting this data on the German market. This format, which divided Germany into 1860 zones, had become the de facto industry standard. IMS prevented competitors such as NDC, a new entrant in the German market, from using the industry standard it controlled by relying on copyright. NDC, following a Frankfurt court ruling against using a format that was derived from the IMS standard, initiated further legal proceedings against IMS in Germany. The

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<sup>52</sup> *European Night Services*, para.208.

<sup>53</sup> *Bronner*, para. 41

<sup>54</sup> Whish, R., *op.cit.*, p. 674

<sup>55</sup> Ritter, C., *op.cit.*, at. 287

<sup>56</sup> See *supra*, n. 32.

Frankfurt Landgericht referred the matter of whether IMS' conduct had been abusive of its dominant position to the European Court of Justice, pursuant to Article 234 EC.

The European Court of Justice, following an examination of relevant case-law, defined a four-part test for establishing the circumstances under which a refusal to license would constitute an abuse. Firstly, the Court confirmed the *Bronner* test that the input protected by copyright must be indispensable for carrying out a particular business.<sup>57</sup> Moreover, the Court clarified that upon assessing indispensability, "it must be established, at the very least that the creation of those products...is not economically viable for production on a scale comparable to that of the undertaking which controls the existing product".<sup>58</sup> Secondly, the refusal must prevent the emergence of a new product for which there is potential consumer demand.<sup>59</sup> Thus, in the 'new product' requirement, not only do we witness a return to an element identified in *Magill* but missing from *Bronner*, but also the elevated stringency that cases involving intellectual property rights necessitate. As Killick notes, the Court is clear that "duplication (i.e. offering the same product or 'cloning')...is not enough".<sup>60</sup> Thirdly, the refusal must not be objectively justified, something that the Court left to the *Landgericht* to decide. Lastly, the refusal must exclude all competition from a secondary market. For the European Court of Justice, it was sufficient that "a potential market or even a hypothetical market can be identified".<sup>61</sup>

It can be argued that in *IMS* the Court did not merely return to the route it followed in *Magill*, but it also expanded the circumstances under which dominant firms could be forced to give access to essential facilities.<sup>62</sup> Nonetheless, it should be held into account that both *Magill* and *IMS* had been characterised as "oddities"<sup>63</sup> and "unlikely to emerge in the future".<sup>64</sup> Furthermore, there is also the view that they can both "be seen as remedies to aberrations in the application of national laws".<sup>65</sup>

In general, it remains true that cases involving a refusal to license intellectual property rights require the particular care Jacobs laid out in his Opinion for *Bronner*. The same stands true - and it should come as no surprise - as regards the *Microsoft* Judgment, in which the Court of First Instance employed the *Magill* and *IMS* tests. This article concurs that both *Magill* and *IMS* are highly unusual cases, in that they involved refusals to license legally protected intellectual property rights owned by undertakings which held a special position in the market. However, in no case should this lead us to perceive such cases as depriving incidents of refusals to license intellectual property rights from being dealt with within the 'essential facilities' doctrine. On the contrary, as shall also be seen below in *Microsoft*, such cases have led to the expansion of the doctrine for the benefit of jurisprudence.

### 3. The CFI's judgment in Microsoft

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<sup>57</sup> *IMS*, para. 28.

<sup>58</sup> *IMS*, para. 28

<sup>59</sup> *IMS*, para. 38

<sup>60</sup> Killick, J., 'IMS and *Microsoft* Judged in the Cold Light of IMS' (2004) 1(2) *Competition Law Review* 23, at 26.

<sup>61</sup> *IMS*, para. 44

<sup>62</sup> Also see Geradin, D., *op.cit.*, at 1552.

<sup>63</sup> Ritter, C., *op.cit.*, at 283

<sup>64</sup> *Ibid.*

<sup>65</sup> Ritter, C., *op.cit.*, at 286.

The facts of this infamous case involving one of the largest corporations globally are not to be referred to extensively as they are generally widely known. The Court of First Instance's ruling in *Microsoft* upheld a Commission Decision of 2004<sup>66</sup> by which Microsoft was found to have abused its dominant position. Microsoft was guilty of such abuse, according to the Decision, due to its refusal to provide interoperability information necessary for competitors to be able to effectively compete in the relevant market and also tying its Media Player with its Windows Operating System. The Commission had at the time imposed a large fine and ordered Microsoft to provide the interoperability information to interested undertakings and offer Windows without the bundled Media Player.<sup>67</sup> Although both types of abusive conduct on behalf of Microsoft are of immense significance, it is only the first type that shall be commented upon as being relevant for the purposes of the present analysis, namely that Microsoft had refused to supply its competitors with and authorise use of 'interoperability information' for the development and distribution of products which would compete with Microsoft's respective products in the relevant market.<sup>68</sup> This was held by the Commission as amounting to an abuse under Article 82 EC.

It should come as no surprise that on appeal before the Court of First Instance, the Commission relied on the jurisprudence of *Magill* and *IMS* to advance its case.<sup>69</sup> The Commission argued that those rulings should not receive automatic application merely due to the similarity in nature between them and *Microsoft*, while it also stressed that the *IMS* list of exceptional circumstances was not exhaustive and that such list included criteria the satisfaction of which was "sufficient".<sup>70</sup> These precedents, the Commission argued, did not concern the specific problems of the present case, as the economic sector concerned received legislative recognition that compatibility was favourable to society in general.<sup>71</sup> In the alternative case, the Commission argued that the criteria set in *Magill* and *IMS* are anyway satisfied as such in the case before the Court.<sup>72</sup>

On the other hand, Microsoft argued that the exceptional circumstances as prescribed by the aforesaid case-law were not satisfied and that *Bronner* should be the appropriate precedent to be taken into consideration.<sup>73</sup> There was basically concurrence between the parties as to the fact that the refusal in question could be assessed under Article 82 EC, but not as to the criteria which should be applied in the context of such an assessment. This dispute in *Microsoft* is intrinsic to the present analysis, since its resolution by the Court has provided a crystallisation of the 'essential facilities' doctrine and internal distinctions therein.

The Court, after evaluating the technical and factual matters involved, approached the issues raised through the prism of the substantially developed case-law discussed earlier. It undertook to examine whether the exceptional circumstances established in *Magill* and *IMS* were present in the case before it.<sup>74</sup> As seen *supra* and as summarised by the Court,<sup>75</sup> these

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<sup>66</sup> Commission Decision 2007/53/EC, 24.3.2004 (hereinafter: "the Decision")

<sup>67</sup> *Ibid.*

<sup>68</sup> Art. 2(a) of the Decision.

<sup>69</sup> *Microsoft*, para. 107.

<sup>70</sup> *Microsoft*, para. 303

<sup>71</sup> Contested Decision, recitals 745 to 763.

<sup>72</sup> *Microsoft*, para. 311.

<sup>73</sup> *Microsoft*, paras. 112 and 297.

<sup>74</sup> *Microsoft*, paras. 332-702.

<sup>75</sup> *Microsoft*, para. 332.

exceptional circumstances were identified as emerging when the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market, when it excludes any effective competition on that neighbouring market and when it prevents the appearance of a new product for which there is potential consumer demand. On the latter criterion, the Court affirmed that this is “found only in the case-law on the exercise of an intellectual property right”.<sup>76</sup>

With regard to indispensability, the Court concluded, in upholding the Commission’s methodology in the context of the contested Decision, that the only way other work-group server operating systems were to compete with Microsoft, was for them to be capable of interoperability with Microsoft’s Windows on an equal footing.<sup>77</sup> It found that Microsoft was able to impose Windows architecture as the de facto standard for work-group computing,<sup>78</sup> that interoperability with Windows is a factor that plays “a key role in the uptake of Windows work group server operating systems”<sup>79</sup>. Moreover, the Court found that the degree of interoperability of a non-Windows server added to a Windows work-group network will have an effect on “the efficiency with which that [server] delivers its services to the users of the network”.<sup>80</sup> The only solution to allowing such interoperability would be disclosures on behalf of Microsoft.<sup>81</sup>

As far as the elimination of competition is concerned, the Court found the secondary market definition as well as the calculation of the market shares as carried out by the Commission in the contested Decision to be correct<sup>82</sup> and affirmed that Microsoft’s refusal confined competitors’ products to marginal shares of the market, thus risking elimination of all effective competition on that market.<sup>83</sup> Within the same context, Microsoft argued that the Commission erred in law by using the term ‘risk’ of elimination of competition, whereas in cases involving intellectual property rights the Court demands the elimination to be ‘likely’ and ‘close to certainty’.<sup>84</sup> The Court disagreed with Microsoft and held that the aforesaid terms were used by the Community judicature without distinction. It stated that these indistinguishable terms had the common purpose of reflecting that Article 82 EC does not apply only from the time when there is no more competition in the relevant market and competition that still exists on that market should be safeguarded.<sup>85</sup>

In relation to the exceptional circumstances pertaining to a ‘new product’, the Court did not find a manifest incorrectness in the Commission’s approach<sup>86</sup> of considering Microsoft’s refusal as limiting technical development to the prejudice of consumers within the meaning of Article 82(b) EC.<sup>87</sup> The Court held that should the insufficient degree of interoperability be removed as an obstacle, technical development would not be limited and consumers would be

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<sup>76</sup> *Microsoft*, para. 334.

<sup>77</sup> *Microsoft*, para. 422.

<sup>78</sup> *Microsoft*, para. 392.

<sup>79</sup> *Microsoft*, para. 393.

<sup>80</sup> *Microsoft*, para. 413.

<sup>81</sup> *Microsoft*, para. 435.

<sup>82</sup> *Microsoft*, paras. 480-559.

<sup>83</sup> *Microsoft*, para. 336.

<sup>84</sup> *Microsoft*, para. 439.

<sup>85</sup> *Microsoft*, para. 561.

<sup>86</sup> See Decision, recitals 693-701.

<sup>87</sup> *Microsoft*, para. 649.

benefited by new products.<sup>88</sup> Microsoft's competitors would then be able to offer work group server operating systems which would be distinguished from Microsoft's "with respect to parameters which consumers consider important"<sup>89</sup>. Moreover, it held that Microsoft's competitors would not be able to clone its products solely by having access to the interoperability information in question.<sup>90</sup>

In considering whether any objective justification could be found over Microsoft's abusive behaviour, the Court held that it could not be sufficiently established that should the interoperability information be disclosed Microsoft would undergo significant impact over its incentives to innovate.<sup>91</sup> Therefore, in the absence of objective justification, the Court found the exceptional circumstances as identified in *Magill* and *IMS* to be present and the Commission's approach to be correct

*Microsoft* emerges as another case 'highly unlikely' to arise in the future, but which most certainly can be dealt with under the approach followed in all three of these extraordinary cases. When the examined exceptional circumstances exist, a duty to disclose can be imposed, overriding the legal protection afforded to intellectual property. This situation is not and cannot be construed as being a deprivation of the 'essential facilities' doctrine's penetration into cases involving refusals to disclose intellectual property rights. Quite the opposite, it is a reaffirmation that the Community Courts have indeed subscribed to the particular care needed in cases where the relevant criteria are fulfilled towards imposing upon dominant undertakings a respective duty to supply, allow access to facilities or disclose information indispensable to competitors in a neighbouring market so as to effectively compete and that such a venture on behalf of the judicature could mean the overriding of intellectual property rights.

It is evident that the varying situations of refusal cases would not be able to receive a proper handling by employing the *Bronner* precedent alone. The exceptional circumstances identified in *Magill* and *IMS* and followed in *Microsoft*, formulate the judicial approach for dealing with cases involving intellectual property rights and the sensitivities such rights entail as to their disclosure to competing entities in a market. The higher protection levels tantamount to intellectual property rights and the effect an unjustified refusal to license such rights could have against potential or actual competitors in a neighbouring market, is the element which gives rise to an expanded stringency during the examination of such cases by Community Courts, forming a hierarchy among the two pillars that compose the 'essential facilities' doctrine.

While the test applied in *IMS* and *Microsoft* is a manifestation of the respective one established in *Bronner*, the former has been adjusted to address the 'exceptional circumstances' created by the intellectual property factor. Depending on the particulars of each case brought before the Community Courts, the *Bronner* or *IMS* tests are deployed. This approach has been crystallised by the Court of First Instance's Judgment in *Microsoft*. The latter ruling has also provided the ability to satisfy the exceptional circumstance of the

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<sup>88</sup> *Microsoft*, paras. 643-665.

<sup>89</sup> *Microsoft*, para. 656

<sup>90</sup> *Microsoft*, para. 657

<sup>91</sup> *Microsoft*, para. 697

prevention of a new product appearing through the provisions of Article 82(b) EC, i.e. the prevention of technical development.

Hence, the ‘essential facilities’ doctrine has not merely survived in the case-law of the Community Courts, but it has most vehemently received, through *Microsoft*, a crystallization of its expansion into two distinct pillars. Specifically, it is now evident that cases where the dominant undertaking refuses to supply or allow access to ‘essential facilities’ and cases where such a refusal entails intellectual property rights both fall within the same doctrinal umbrella and give rise to potential infringement of Article 82 EC, yet respectively require a different approach with distinct varying tests established in *Bronner* on the one hand and *Magill* and *IMS* rulings on the other.

## E. CONCLUSION

The freedom to contract, a pivotal and fundamental element of free trade, has transcended ancient Greece<sup>92</sup> into our own globalised times. Advocate-General Jacobs states in his Opinion for the case of *Bronner* before the European Court of Justice, that the “right to choose one’s trading partners and freely to dispose of one’s property are generally recognised principles [...] incursions on those rights require careful justification”.<sup>93</sup> Whish concurs with this view in that it is a general proposition that “firms should be allowed to contract with whomsoever they wish”.<sup>94</sup> Nonetheless, it is now clear in Community law, as Advocate-General Jacobs has admitted,<sup>95</sup> that a refusal by a dominant undertaking to supply essential inputs or allow access to essential facilities, can in some cases infringe competition in the Community by being an abuse under Article 82 EC.

Commentators still remain divided over the Courts’ approach in these cases.<sup>96</sup> Areeda states that “no court should impose a duty to deal that it cannot explain”.<sup>97</sup> The *Trinko*<sup>98</sup> Judgment in the US has given rise to further debatable issues, such as an alleged traditional focus of the European Court of Justice to lay increased emphasis to ‘allocative efficiency’, namely the benefit from the distribution of resources in cases such as the ones examined above.<sup>99</sup> What is more, there are commentators that see other unanswered questions in *Bronner* as well.<sup>100</sup>

As examined above, the *Bronner* judgment cannot be considered as being a completely novel attitude towards ‘refusal to supply’ cases. It certainly echoes previous case-law, as demonstrated from the retrospective application of its *ratio*. The Courts have nonetheless used that Judgment to lay down some accurate criteria towards establishing whether a refusal can constitute an abuse of a dominant position. Within this context, *Bronner* arises as the landmark ruling for cases in which dominant undertakings refuse to supply competitors in a secondary market and such deprivation of indispensable facilities could eliminate all

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<sup>92</sup> Aristotle (350 B.C.) *Rhetoric*, I, Ch.15

<sup>93</sup> A-G Jacobs, *op.cit.*, para.56

<sup>94</sup> Whish, R., *op.cit.*, p.663

<sup>95</sup> A-G Jacobs, *op.cit.*, para.61

<sup>96</sup> See generally Ritter, C., *op.cit.*

<sup>97</sup> Areeda, P., *op.cit.*, at 853

<sup>98</sup> *Verizon v. Law Offices of Curtis V Trinko* [2004] 124 S Ct. 872

<sup>99</sup> Geradin, D., *op.cit.*, at 1540.

<sup>100</sup> See, generally, Doherty, B., *op.cit.*

competition in the secondary market concerned. Simultaneously, exceptional cases, such as *Microsoft*, are dealt with through a crystallised amalgamation of criteria, clearly emanating from the rulings in *Magill* and *IMS*, which themselves have emerged through a more rigorous and appropriately adjusted manifestation of the approach adopted in *Bronner*. Jacobs' Opinion has been transposed into the relevant Community case-law throughout the years and a duty to deal can now be imposed under certain very specific and stringently established criteria. Explain.

The principles of recognising an undertaking's right to trade freely and with whomsoever it wants and that this right should not be easily overridden are inherent in the approach followed by the Community Courts. It can be said, following the preceding examination, that the Community Courts have essentially followed the advice of Advocate-General Jacobs, as they have provided for accurate, cautious and multi-level tests for assessing when, and if, a refusal to supply essential inputs or allow access to essential facilities could amount to an abuse of dominance.

In applying the test in *Bronner* retrospectively, the Community Courts have maintained a consistent stance in cases where a dominant undertaking refuses to supply to a downstream competitor. On the other hand, the exceptional circumstances prevailing in intellectual property-related cases such as *Magill*, *IMS* and *Microsoft*, have similarly led to an the imposition of a duty to deal in these cases. As discussed above, it has definitively emerged from *Microsoft* that intellectual property rights can be overridden, as was the case in *Magill* and *IMS*, despite there being a higher standard as to the burden of proof on behalf of the party seeking relief as to an alleged abuse by a dominant undertaking refusing to license such rights.

The exceptionality of 'refusal' entailing intellectual property rights cannot give rise to their separation from the essential facilities' doctrine. On the contrary, as has been argued earlier, the Courts' ruling in *Microsoft* can only lead to one conclusion as to the judicature's approach. This conclusion is that the 'essential facilities' doctrine, although never articulated as such by Community Courts, has received judicial development as a notion and entails a stringent bi-pillared testing approach, for which the determinative factor is whether intellectual property rights are the subject-matter of the dominant undertaking's refusal. This duality of the doctrine accommodates all known types of abusive refusals and employs either the *Bronner* criteria or the 'exceptional circumstances' found in *Magill*, *IMS* and *Microsoft*. There is now not merely a 'continuity' from earlier case-law, but an expansion and clarification of the 'essential facilities' doctrine. Evidently, the determining factor of the nature of the 'facility' is what raises the stringency bar and imposes one approach over the other.