

**THE INTERFACE BETWEEN INTELLECTUAL PROPERTY RIGHTS  
AND ARTICLE 102 OF THE TREATY ON THE FUNCTIONING OF  
THE EUROPEAN UNION**

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**Abstract**

*This article aims to provide an overview of the case law of the Court of Justice of the European Union in relation to the intersection of intellectual property rights and the abuse of dominant position under Article 102 of Treaty on the Functioning of the European Union. First, the relationship between intellectual property law and competition law is evaluated whether there is tension or complementarity. Second, the case law is argued to show two segments: The first segment consists of the classic intellectual property-competition law intersection cases where the majority of the cases deal with refusal to license and the principle is that the exercise of intellectual property rights does not constitute abuse of dominance in itself; however, under exceptional circumstances, abuse may be found. On the other hand, the second segment of the case law shows that; in parallel to the intellectual property right holders' new methods to exploit their intellectual property rights, new types of abusive conduct have arisen. In the relevant section, these abuses are listed and landmark cases and their future implications are provided. Finally, regarding the remedies, for the first segment, they are recommended to be decided cautiously so as not to undermine IPRs. For the second segment, it has been remarked that since these abuse types are mutant due to new commercial strategies, the authorities should not be hasty and inconsistent.*

**Keywords**

*Abuse of Dominant Position, Compulsory Licensing, Refusal to License, Misuse of IPRs, AstraZeneca*

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**Öz**

*Bu makale, Avrupa Birliği'nin İşleyişine Dair Antlaşma'nın 102. maddesinde düzenlenen hâkim durumun kötüye kullanılması halleri ile fikri mülkiyet haklarının kesiştiği durumlar için Avrupa Birliği Adalet Divanının geliştirmiş olduğu içtihadı ilişkin açıklamalarda bulunmaktadır. Bu bağlamda öncelikle, fikri mülkiyet hukuku ile rekabet hukuku arasındaki ilişkinin çatışma mı yoksa bütünsellik mi teşkil ettiği incelenmiştir. Ardından içtihadın iki ana bölümden oluştuğu tespiti yapılmıştır. Buna göre ilk bölüm, çoğu sözleşme yapmayı reddetme biçiminde tezahür eden ve kural olarak fikri mülkiyet haklarına başvurma hâkim durumun kötüye kullanılması anlamına gelmeyeceği, ancak istisnai şartlar altında kötüye kullanmanın gerçekleşebileceği klasik fikri mülkiyet-rekabet hukuku çakışmasının yaşandığı davalardan oluşmaktadır. Öte yandan, fikri mülkiyet hak sahiplerinin haklarını kullanmada yeni metotlar geliştirmelerine paralel olarak, Avrupa Birliği Adalet Divanı içtihatlarının diğer bölümünü yeni kötüye kullanma türleri teşkil etmektedir. İlgili başlık altında, bu kötüye kullanma türleri belirtilmiş ve önemli davalar ile bu davaların geleceğe yönelik olası sonuçları açıklanmıştır. Son olarak, hukuki çarelere ilişkin olarak, ilk bölümdeki davalar için, fikri mülkiyet haklarını göz ardı etmemeye özen göstererek karar verilmesi tavsiye edilmektedir. İkinci bölümde öngörülen hukuki çarelere ilişkin olarak ise, bu kötüye kullanma türleri yeni ticari stratejiler nedeniyle biçim değiştirir nitelikte olduğundan yetkililer aceleci ve tutarsız davranmamaya dikkat etmelidir.*

**Anahtar Kelimeler**

*Hâkim Durumun Kötüye Kullanılması, Zorunlu Lisanslama, Sözleşme Yapmayı Reddetme, Fikri Mülkiyet Haklarının Kötüye Kullanımı, AstraZeneca*

**INTRODUCTION**

Upon the awakening that the free markets do not always run in the best interest of consumers, European competition law; the legal basis of which is provided under Article 101 and Article 102 of the Treaty on the Functioning of the European Union (TFEU), has been equipped with sanctions such as fines and remedies in order to redress the markets.<sup>1</sup> Article 102 TFEU concerning abuse of dominant position provides a number of examples of conduct that may constitute abuse.

<sup>1</sup> MARSDEN, P. and P. WHELAN (2007), "When Markets are Failing (Part 1)", *Competition Law Insight*, p. 7.

Meanwhile, as competition law has developed at its own pace, there has been an overlap between competition law and intellectual property law. Intellectual property law (IP law) is the branch of law granting certain exclusive rights to its holders allowing them to manufacture, sell and license. In contrast to the exclusivity of the IP law, competition law and particularly Article 102 TFEU require the right holders to cease their conduct based on IP law and this has stimulated the discussion whether competition law interferes with or even undermines IP law or whether the two branches of law are complementary. This article aims to examine the jurisprudence of the Court of Justice of the European Union (the Court) with regard to the interface between the intellectual property rights (IPRs) and competition law regarding Article 102 TFEU; the role of IPRs in the interpretation of dominance and the assessment of abuse types and remedies.

In this article, the case law is argued to have shown two segments: The first segment is argued to comprise classic IP-competition law intersection cases where the majority of the cases deal with refusal to license and tying on the line of *Volvo*<sup>2</sup>, *Renault*<sup>3</sup>, *Magill*<sup>4</sup> and *Microsoft*<sup>5</sup> judgments. According to the jurisprudence under the first segment, the principle is that the exercise of IPRs does not constitute abuse of dominant position per se; however, under exceptional circumstances, abuse may be found. On the other hand, the second segment of the case law shows an atypical pattern of facts which does not fall under the category of first segment. In parallel to the IPR holders' discovery of new methods to exploit their IPRs, new types of abusive conduct have arisen. These miscellaneous types of abuses are listed and new landmark cases and their future implications are provided. Finally, in relation to the remedies, for the first segment, the remedies of both the European Commission (the Commission) and the Court are recommended to be taken into account with an alert not to undermine IPRs and to guarantee an appropriate return to the IPR holder. For the second segment, since these abuse types are "mutant" due to new commercial exploitation strategies of the undertakings, the authorities should not be hasty and inconsistent when finding abuse.

## 1. THE INTERFACE BETWEEN IP LAW AND COMPETITION LAW

In relation to this discussion, the Court has repeatedly reassured that the TFEU provisions shall not interfere with the exercise of IPRs and has acknowledged

<sup>2</sup> Case 238/87 *Volvo v Veng (UK) Ltd* [1988] ECR 6211.

<sup>3</sup> Case 53/87 *CICRA et Maxicar v Renault* [1988] ECR 6039.

<sup>4</sup> C-241-242/91P *Radio Telefis Eireann v Commission (Magill)* [1995] ECR I-743.

<sup>5</sup> Case T-201/04 *Microsoft Corp v Commission* [2007] ECR II-3601, [2007] 5 CMLR 11 para 335.

that neither the mere existence nor the exercise of IPRs corresponds to abuse of dominant position<sup>6</sup>. However, as IPRs grant exclusivity and the competition law remedies challenge this exclusivity, tension between two branches of law arises. Several suggestions have been proposed to describe the origin of the tension: (i) The different philosophies underlying these laws, in other words, the exclusivity by IP law and prevention of elimination of competition by competition law; (ii) the contrast between the static competition and the protection of dynamics which is portrayed as “a trade-off between the dynamic benefits that society realizes from allowing firms to secure significant rewards, including monopoly prices, from making risky investments and engaging in innovation; and the static cost that society incurs when firms with significant market power raise prices and curtail output”<sup>7</sup> and (iii) the assessment triggered by the comparison between allocated and dynamic objectives<sup>8</sup>.

Similarly, there is no agreement among economists on the definition of the relationship between IP law and competition law; however, there are two main views on how dynamic efficiency can be promoted by IP rules and competition law<sup>9</sup>. The first view asserts that interference with the exclusivity should be avoided including the situations where the IPR creates market dominance; since such interference would normally have a negative impact on incentives to innovate whereas the second view promotes the theory of complementarity and states that both competition law and IP law aim dynamic efficiency and it shall only be achieved through competition law maintaining competitive pressure on the IPR holder to compete with other products<sup>10</sup>.

<sup>6</sup> ANDERMAN, S. and H. SCHMIDT (2011), *EU Competition Law and Intellectual Property Rights: Regulation of Innovation*, Second Edition, Oxford University Press, Oxford, UK, p.18. Case 24/67 *Parke Davis v Probel* [1968] ECR-55, Case 78/70 *Deutsche Grammophon v Metro* [1971] ECR I-487, Case 53/87 *CICRA et Maxicar v Renault* [1988] ECR 6039, Case 238/87 *Volvo v Veng (UK) Ltd* [1988] ECR 6211, C-241-242/91P *Radio Telefis Eireann v Commission (Magill)* [1995] ECR I-743.

<sup>7</sup> EVANS, D. S. and K. N. HYLTON (2008), “The Lawful Acquisition and Exercise of Monopoly Power and Its Implications for the Objectives of Antitrust”, *Competition Policy International*, No:4(2), p. 203-227.

<sup>8</sup> DENOZZA, F. (2012), “Intellectual Property and Refusal to Deal: “Ad Hoc” versus “Categorical Balancing””, G. Caggiano, G. Muscolo and M. Tavassi (eds.), in *Competition Law and Intellectual Property: A European Perspective*, Walters Kluwer, Croydon, p. 259.

<sup>9</sup> DREXL, J. (2008), “Is there a “more economic approach” to intellectual property and competition law?”, J. Drexl (ed.), in *Research Handbook on Intellectual Property and Competition Law*, Edward Elgar, Cheltenham, p. 36.

<sup>10</sup> Ibid.

Rather than characterizing it with the terms tension or complementarity, another explanation depicts the relationship between competition law and IP law as multidimensional as these two branches of law are not only complementary as they both promote progress in the form of economic growth<sup>11</sup> but are also interdependent on each other as both are necessary and neither is sufficient by itself.<sup>12</sup>

Since the purpose of IPRs is to provide legal protection which can create market power, the legal rules at the intersection is expected to focus on issues related to power; however, they fail to resolve practical power issues that lie at the intersection; therefore, when courts rule on an issue at such intersection they should focus on whether the exercise of IPRs enhances the goals of intellectual property or not.<sup>13</sup> Accordingly, if the source of the power exercised is innovative contribution, the exercise should be allowed; if not, the exercise should be limited either by IP law itself or by competition law.<sup>14</sup> Therefore, a more careful and consistent focus on the relationship between economic markets and innovative contributions has been proposed to solve the tension.<sup>15</sup>

On the other hand, both claims which describe the relationship as clash or substantial convergence of goals *i.e.* complementarity are criticized for being over-simplistic and it has been suggested that rather than attributing a direct role to any one of the branches over the other, the recognition of frequent dialect between the two would be useful for elimination of obstruction of innovation and competitive dynamics.<sup>16</sup>

In addition to the suggestions above, it has been argued that the Court has foreseen a hierarchical relationship between these two branches of law by allowing competition law to restrict exercise of IPRs under exceptional circumstances and

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<sup>11</sup> PERITZ, J. R. R. (2011), "Competition within Intellectual Property Regimes: The Instance of Patent Rights", S. Anderman and A. Ezrachi (eds.), in *Intellectual Property and Competition Law: New Frontiers*, Oxford University Press, Oxford, p. 28.

<sup>12</sup> LESLIE, C.R. (2009), "Antitrust and Patent Law as Component Parts of Innovation Policy", [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2062428](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2062428), Date Accessed: 10.3.2015, p.1260.

<sup>13</sup> PATTERSON, M. R. (2008), "Intellectual Property and sources of Market Power", I. Govaere and J. Ullrich (eds.), in *Intellectual Property, Market Power and the Public Interest*, College of Europe Studies, Brussels, No: 8, p. 36.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, p.57.

<sup>16</sup> GHIDI, G. (2012), "The Bride and the Groom. On the Intersection between Intellectual Property and Antitrust Law", G. Caggiano, G. Muscolo and M. Tavassi (eds.), in *Competition Law and Intellectual Property: A European Perspective*, Walters Kluwer, Croydon, p. 29.

two main reasons are pointed out for such hierarchy:<sup>17</sup> First, competition law has been given a higher role in the TFEU whereas IP law has been left to national legislation. Secondly, competition law is generally viewed as a matter of public law whereas IP law is treated as an exercise of private property right.

Consequently, the relationship should be characterized to be both conflicting and congruent<sup>18</sup> because the aims of both laws overlap and the competition law is entitled to apply when there is a restriction of competition.<sup>19</sup> Furthermore, the confrontation between competition law and IP law shall continue without reduction even though one may reflect that since the Court provides guidance on what may comprise an abuse of dominant position in relation to IPRs by the case law it settles, the factual situation shows that such thinking is misleading since IP owners have developed more aggressive commercial strategies in their exercise of IPRs and in response to these developments, the regulatory authorities have adapted themselves in measuring market power and assessing the abusive conduct.<sup>20</sup>

Finally, as established by the Court's case law, a right to access to innovative creations covered by IPRs may be given to third parties if there is a foreclosure of the market; however, the practical and vital question is to what extent access to developments which are covered by IPRs shall be given to third parties since a wrongful intervention by competition law would result in not only undermining the lawful rights but also in deterring innovative practices since the owner of these practices should normally be entitled to benefit through the exclusivity granted by the IP law.

## **2. THE EFFECT OF IPRs ON THE ASSESSMENT OF ABUSE OF DOMINANT POSITION**

### **2.1. The Role of IPRs in the Assessment of the Relevant Market: Narrow Product Markets**

The application of Article 102 TFEU first requires the finding of a dominant position of an undertaking in the relevant product and geographic markets. The

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<sup>17</sup> ANDERMAN, S. and H. SCHMIDT (2007), "EC Competition Policy and IPRs", S. Anderman (ed.), in *The Interface Between Intellectual Property Rights and Competition Policy*, Cambridge University Press, Cambridge, p. 37-124.

<sup>18</sup> Peritz 2011, p. 18.

<sup>19</sup> Anderman and Schmidt 2011, p. 4-5.

<sup>20</sup> Ibid.

relevant product market definition is crucial when there are cases involving IPRs since narrow market definitions may coincide with the assessment of dominance before the assessment of abuse.<sup>21</sup> Relevant product markets have generally been defined along the scope of the IPR and therefore it has been assumed that IPRs eventually generate market power in *Hilti*<sup>22</sup> and *Tetra Pak II*<sup>23</sup>.

The narrow definition of markets by competition authorities leads to single product markets, which is not particularly desired by IPR holders; yet has a direct impact on them.<sup>24</sup> For example, due to the nature of technology fixing process, the owner of a technology may find itself in a single product market as in *Rambus*<sup>25</sup> where patented technologies were assessed as a single product market.<sup>26</sup> Therefore, IPRs may lead to narrow market definition which causes higher possibility of finding dominance and therefore the IP right holder may find himself to enjoy extreme form of dominance *i.e. de facto* monopoly.<sup>27</sup>

## 2.2. The Role of IPRs in the Assessment of Dominance

As the Court has upheld several times, the existence of IPRs does not automatically signify that the undertaking in the possession of IPRs is in a dominant position. On the other hand, patent rights particularly contribute to dominance when the undertaking has a strong position in the market and the competitors do not have patents with which they could negotiate cross-licensing.<sup>28</sup> Moreover, the special category of monopoly or essential input rather than the mere threshold definition of dominance is essential<sup>29</sup> for IPR holders as it can be seen from *Magill* where the Court assessed *de facto* monopoly for TV listings held by TV companies.

In dominance assessment, the market power is measured and one of the leading indicators of market power is high market shares as the Commission has

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<sup>21</sup> Anderman and Schmidt 2011, p. 36.

<sup>22</sup> Case T-30/89 *Hilti AG v. Commission*, [1991] ECR II-1439.

<sup>23</sup> Case C-333/94P *Tetra Pak International SA v Commission (Tetra Pak II)* [1996] ECR I-5951. Anderman and Schmidt 2011, p.142.

<sup>24</sup> Anderman and Schmidt 2011, p. 10.

<sup>25</sup> Commission Decision of 9 December 2009, COMP/38.636-*Rambus*

<sup>26</sup> ANDERMAN, S. (2011), "The IP and Competition Interface: New Developments", S. Anderman and A. Ezrachi (eds.), in *Intellectual Property and Competition Law: New Frontiers*, Oxford University Press, Oxford, p. 12.

<sup>27</sup> Anderman and Schmidt 2011, p. 36.

<sup>28</sup> TURNER, J. D. C. (2010), *Intellectual Property and EU Competition Law*, Oxford University Press, Oxford, UK, p.80.

<sup>29</sup> Anderman and Schmidt 2011, p.58.

tendency to consider market shares as a preliminary indication of dominance.<sup>30</sup> However, market share is not the decisive criterion since market structure, product differentiation, barriers to expansion/entry and countervailing buyer power should also be examined.<sup>31</sup> However, sufficiently narrow market definitions may lead to finding of high market shares and accordingly may contribute to the finding of dominance. For example in *Magill* and *IMS Health*<sup>32</sup>, the dominant undertakings were found to have *de facto* monopoly and in *Tetra Pak II*, Tetra Pak was assessed to hold 92 percent of the market for non-aseptic milk cartons. *AstraZeneca*<sup>33</sup> also confirms the importance of high market shares as *prima facie* evidence of dominance<sup>34</sup> since the possession of IPRs is capable of creating dominant position and moreover preventing the effective competition in the market.<sup>35</sup>

Furthermore, another point to be taken into consideration is how the existence of IPRs may affect actual and potential substitutes to the extent they may constitute barriers to entry.<sup>36</sup> In *AstraZeneca*, the Court assessed that patent protection contributed to the market power when it was utilized to put significant pressure on competitors and to force them to enter into patent settlements.<sup>37</sup> In addition, an advanced approach to the potential contestability of the markets has attracted attention to IPRs to assess if they could constitute barriers to entry for potential competitors.<sup>38</sup>

### 2.3. The Role of IPRs in the Assessment of Abuse

At the intersection of IPRs and Article 102 TFEU, the case law illustrates two segments of cases: First segment consists of the classic IP-competition law

<sup>30</sup> MONTI, G. (2006), “The Concept of Dominance in Article 82”, <http://www.lse.ac.uk/collections/law/staff%20publications%20full%20text/monti/ECJdominancepaper.pdf>, Date Accessed: 10.03.2015.

<sup>31</sup> Anderman and Schmidt 2011, p.59.

<sup>32</sup> Case C-418-01 *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* [2004] ECR I-5039.

<sup>33</sup> COMP/A. 37,507/F3 *AstraZeneca*, EuC, T-321/05 *AstraZeneca v. Commission* para 270, Case C-457/10 *AstraZeneca v. Commission* [2012] CJE/12/158.

<sup>34</sup> SUBIOTTO QC R., F. MALONE, D. R. LITTLE, C. DE BROSSES and S. SUCIU (2011), “Recent EU Case Law Developments: Article 102 TFEU”, *Journal of European Competition Law & Practice*, No:2(2), p. 138.

<sup>35</sup> OTTAVIANO, I. (2012), “Industrial Property and Abuse of Dominant Position in the Pharmaceutical Market: Some Thoughts on the AstraZeneca Judgment of the EU General Court”, G. Caggiano, G. Muscolo and M. Tavassi (eds.), in *Competition Law and Intellectual Property: A European Perspective*, Walters Kluwer, Croydon, p. 193.

<sup>36</sup> Anderman and Schmidt 2011, p.59.

<sup>37</sup> *Ibid.*, p.60.

<sup>38</sup> HEINEMANN, A. (2008), “The contestability of IP protected markets”, J. Drexl (ed.), in *Research Handbook on Intellectual Property and Competition Law*, Edward Elgar, Cheltenham, p.54.

intersection cases where refusal to license and tying are dealt on the line of *Volvo-Renault*, *Magill*, *IMS Health* and *Microsoft*. Under the first segment, the principle is that the exercise of IPRs does not constitute abuse of dominant position itself; however, exceptional circumstances doctrine with strict conditions has been acknowledged.

In parallel to the IPR holders' discovery of new methods to exploit their IPRs, new forms of abuses have arisen. Second segment of the case law shows an atypical pattern of facts where new abuse types have been detected and accordingly new remedies have been developed. Under this segment, there are miscellaneous types of abuses which are relatively new such as patent ambush in *Rambus*, misuse of regulatory procedures and selective deregistration of market authorization for certain products in *AstraZeneca*.

### 2.3.1. First Segment

#### 2.3.1.1. Refusal to License

As asserted above, in several cases, the Court has set forth the general rule that the mere existence of IPRs does not correspond to dominant position and the mere exercise of an IPR does not amount to abuse of dominant position. The Court has illustrated this rule and the conditions for an exception to it by the jurisprudence it has developed as examined below.

##### 2.3.1.1.1. IBM

In *IBM*<sup>39</sup>, the Commission alleged that IBM was in abusive conduct by delaying disclosure of interface information which provided an artificial advantage to IBM itself and created an obstacle to its competitors in adapting their products to the new IBM 375 mainframe computer.<sup>40</sup> The case was resolved by Commission's acceptance of IBM's undertakings to provide interface information and announce the changes in advance. The Commission mentioned that there could be special circumstances where the IPR holder could be obliged to grant license to existing players and/or new entrants.<sup>41</sup> It has been argued that, in *IBM* priority was given to access to interoperability over rewarding incentives and this was consistent with the *Volvo* judgment.<sup>42</sup>

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<sup>39</sup> Commission Decision of 18 April 1984, IV/30.849-*IBM personal computer*.

<sup>40</sup> Anderman and Schmidt 2011, p.99.

<sup>41</sup> *Ibid.*, p.95.

<sup>42</sup> *Ibid.*, p.111.

### 2.3.1.1.2. *Volvo and Renault*

In *Volvo v. Veng (Volvo)* and *Conzorzio v. Renault (Renault)*, the Court discussed whether there could be an abuse of dominant position with the involvement of IPRs. In both cases, car manufacturers Volvo and Renault refused to license their design right of body parts to independent producers, namely Veng and Conzorzio, who wanted to produce spare parts. In *Volvo*, while Veng was importing wing panels, Volvo brought an action against Veng on the grounds of infringement of its design right. In response, Veng claimed that Volvo's refusal to license spare parts of Volvo motor cars constituted an abuse of dominant position. In *Renault*, Maxicar and the Conzorzio brought a lawsuit and claimed the annulment of Renault's design right and that their production of spare parts did not constitute unfair competition. Renault argued that the Conzorzio and Maxicar infringed its design right. In response, Conzorzio and Maxicar alleged existence of abuse of dominant position by refusal to grant license. The Court did not find abuse in either of those cases since neither the infringement action nor the refusal to license could correspond to abuse on their own; yet the Court gave the first examples on what could constitute an abuse despite the existence and exercise of IPRs. The non-exhaustive examples given by the Court were (i) the arbitrary refusal to supply spare parts to independent repairers, (ii) price fixing for spare parts at an unfair level and (iii) a decision no longer to produce spare parts for a specific model even though that model is still in circulation.<sup>43</sup>

These judgments sent a signal to the IPR holders, who had been exploiting their IPRs in an extensive way with the complementary products such as spare parts and software programmes, that there was a limit to their exploitation and set the foundation for the "exceptional circumstances" test which has become the central point in the case law afterwards.<sup>44</sup>

### 2.3.1.1.3. *Magill*

After giving examples on how an IPR exercise may constitute an abuse, in *Magill*, the Court ruled on abuse and provided a categorical guidance on abuse cases with IPRs. Upon the refusal by broadcasting companies to license their copyrights on

<sup>43</sup> *Renault*, para 18, *Volvo*, para 9.

<sup>44</sup> MAZZIOTTI, G. (2005), "Did Apple's refusal to license proprietary information enabling interoperability with its iPod music player constitute an abuse under Article 82 of the EC Treaty?", <http://escholarship.org/uc/item/7sv460b7>, Date Accessed: 10.03.2015, p.17.

their TV listings, Magill alleged abuse of dominant position due to the refusal and asked for compulsory license. Refusal by the broadcasters was found to be an abuse since it fulfilled the following criteria established by the Court<sup>45</sup> which eventually became the checklist to assess abuse with an IPR: (i) The refusal to supply or license is indispensable to the exercise of a particular activity on a neighbouring market, (ii) the prevention of the emergence of new product for which there is potential consumer demand, (iii) elimination of competition in the secondary market and (iv) non-existence of any objective justification. These criteria are similar to the ones applied in abusive conduct cases where there is a refusal to supply products which are not covered by IPRs.<sup>46</sup> However, the additional criterion brought by *Magill* is the condition (iii) the prevention of emergence of a new product *i.e.* “new product requirement”.

Upon *Magill*, it has been proposed that if an IPR holder has a dominant position with an essential facility; it will find itself under an obligation to license despite the exclusive rights for exploitation granted by the IPR<sup>47</sup> and that this judgment has allowed the compulsory licensing to be applied in horizontal situations.<sup>48</sup>

#### **2.3.1.1.4. Post-Magill: Bronner and IMS Health**

The conditions of *Magill* have been adjusted in *Bronner* and *IMS Health* cases.

##### **2.3.1.1.4.1. Bronner**

In *Bronner*<sup>49</sup>, Bronner’s request to access to the newspaper distribution system which was owned by Mediaprint was refused; however, at the end of the proceedings, the Court did not detect abusive conduct. Even though *Bronner* did not involve IPRs, it introduced the exceptional circumstances test to essential facility doctrine and confirmed the conditions for indispensability.<sup>50</sup> Moreover, the Court mentioned the need for the balance of interests since duty to license interfered with the dominant undertaking’s freedom to contract; however the *Bronner* balancing formula has not been upheld in subsequent case law.<sup>51</sup>

<sup>45</sup> *Magill*, para 53-56.

<sup>46</sup> Joined Cases 6779 and 7/79 *Commercial Solvents v Commission* [1974] ECR 223.

<sup>47</sup> Anderman and Schmidt 2011, p.97.

<sup>48</sup> KANTER, D. (2006), “IP and Compulsory Licensing On Both Sides of the Atlantic – An Appropriate Antitrust Remedy or a Cutback on Innovation?”, [http://www.whitecase.com/files/Publication/fecf8cb1-714e-4b4d-8f47-b181c643e9d5/Presentation/PublicationAttachment/87f75f2f-4081-44d2-9224-b5f8d766198a/article\\_kanter\\_ip%20and%20compulsory%20licensing.PDF](http://www.whitecase.com/files/Publication/fecf8cb1-714e-4b4d-8f47-b181c643e9d5/Presentation/PublicationAttachment/87f75f2f-4081-44d2-9224-b5f8d766198a/article_kanter_ip%20and%20compulsory%20licensing.PDF), Date Accessed: 10.3.2015, p. 2.

<sup>49</sup> Case C-7/97, *Oscar Bronner GmbH & Co KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GbmH* [1988] ECR I-7791.

<sup>50</sup> Anderman and Schmidt 2011, p.108.

<sup>51</sup> EZRACHI, A. (2011), “Competition Law Enforcement and Refusal to License: The Changing

### 2.3.1.1.4.2. IMS Health

IMS Health was the copyright holder of the brick structure which was a data analysis system for the pharmaceutical industry in Germany and it sold the data it had collected to the manufacturers. When NDC and AzyX tried to operate in the market with their data system, they could not succeed since IMS Health's brick structure system had become *de facto* industry standard. When they applied for a license, IMS Health declined. Upon complaint, the Commission decided on an interim measure with a duty to license; however, the Court of First Instance suspended the Commission's interim measure as the necessary requirements to decide on interim measure were not properly established. Thereafter, the Commission withdrew the interim measure.

In *IMS Health, Magill* conditions have been clarified to be cumulative. Furthermore, the third of *Magill* conditions was extended by the Court of First Instance by recognizing that potential or fictional market would be sufficient. This is a vital development in case law since the sufficiency of fictional downstream market increases the likelihood of obligation to grant a license to the competitor.<sup>52</sup> This extension was reiterated by the Court in *Microsoft* judgment along with other aspects of exceptional circumstances doctrine.<sup>53</sup> Another adjustment of the *Magill* conditions in *IMS Health* concerns the new product requirement as suggested by the Advocate General<sup>54</sup> and accepted by the Court;<sup>55</sup> in order for a product to be regarded as new it should not be a mere replication and duplication. However, the "improvement" requirement has been criticized for not having been established clearly as it is vague.<sup>56</sup>

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Boundaries of Article 102 TFEU", S. Anderman and A. Ezrachi (eds.), in *Intellectual Property and Competition Law: New Frontiers*, Oxford University Press, Oxford, p. 97.

<sup>52</sup> Ezrachi 2011, p. 98.

<sup>53</sup> *Microsoft*, para 335.

<sup>54</sup> Opinion of AG Tizzano in Case C-418/01, *IMS v NDC*, delivered on 2 October 2003, para 66.

<sup>55</sup> *IMS Health*, para 49.

<sup>56</sup> TROBERG, M. C. (2011), "Differences between the US and the EU in Antitrust Review of Intellectual Property: A Comparative Analysis of the Essential Facilities Doctrine", <http://www.roschier.com/sites/default/files/Differences%20between%20the%20US%20and%20the%20EU.pdf>, Date Accessed: 10.03.2015, p. 72. The reiteration of the new product requirement has been welcome; however, it has been argued that what has been meant by such condition has still been left in the dark. See GÜRZUMAR, O. B. (2006), *Zorunlu Unsur Doktrinine Dayalı Sözleşme Yapma Yükümlülüğü*, Seçkin, Ankara, Türkiye, p. 211. The author argues that said condition should not be arbitrarily generalized and it must carefully be examined in each specific case with a focus on its probable impacts, p.165.

### 2.3.1.1.5. Microsoft

Upon a complaint by Sun Microsystems, the Commission assessed that Microsoft was dominant in both personal computer operating systems market and work group server operating systems market. After the assessment of dominance, the Commission found Microsoft in breach of Article 102 TFEU stating that (i) it was using its dominant position in the Windows PC operating system market to obtain dominance in the workgroup server operating system market and media player markets by refusing to supply adequate interoperability information to block development and distribution of compatible products and (ii) tying Windows Media Player to Windows operating system.

Microsoft appealed against the Commission decision; yet the Court of First Instance upheld the Commission decision in most aspects. Microsoft did not appeal against the judgment of the Court of First Instance. Microsoft had patent and trade secret protection over the information protocols<sup>57</sup>; however, it has been claimed that the Commission and the Court of First Instance acted upon the presumption that interoperability information was protected by IP law even though they have not reached that conclusion explicitly.<sup>58</sup>

The remedies ruled on were as follows: In relation to interoperability, the ability for two software products to exchange information mutually for each to function as foreseen,<sup>59</sup> Microsoft was ordered to make certain interoperability information available and to allow the use of that information on reasonable and non-discriminatory terms. In relation to tying, Microsoft was ordered to create a new product by selling Windows without Windows Media Player. The tying offense is examined below.

The extension of Article 102 TFEU in *Microsoft* can be summarized as follows:

First, in relation to the condition of the appearance of a new product, the Court added technical development within that category. It has been estimated that this evolvement would be welcomed by competition authorities in contrast to the advocates of IP protection as it might have significant consequences for IPR holders.<sup>60</sup> However, it has been assured that such concerns can be overcome; the

<sup>57</sup> Peritz 2011, p. 57.

<sup>58</sup> WHISH, R. and D. BAILEY (2012), *Competition Law*, Oxford University Press, Oxford, UK, p. 800.

<sup>59</sup> Turner 2010, p.31.

<sup>60</sup> VESTERDORF, B. (2008), "Article 82 EC: Where Do We Stand After the Microsoft Judgment?", Global Antitrust Review ICC Annual Competition Law and Policy Lecture, <http://www.icc.qmul.ac.uk/GAR/Vesterdorf.pdf>, Date Accessed: 10.3.2015, p.8.

extended new product requirement which includes technical developments must be interpreted restrictively as well.<sup>61</sup>

Secondly, the Court widened the indispensability notion, which signifies that compulsory licensing is absolutely necessary and the applicant needs to demonstrate its inability to reach the aimed goal,<sup>62</sup> by including economic indispensability since even though access to market was technically possible, the Court found that the condition of indispensability was fulfilled due to economic viability of interoperability information.<sup>63</sup> By allowing economic viability to be covered under the extended indispensability condition in addition to objective indispensability; the Commission was given a wide margin of appreciation.<sup>64</sup>

Thirdly, the Court lowered the threshold by requiring the likelihood of elimination of competition; rather than requiring the actual elimination of competition<sup>65</sup>. The Court said that, it is not required that *all* competition on the market would be eliminated; instead it is sufficient that all *effective* competition would be eliminated. It has been argued that this modification rendered the conditions of finding of an abuse less strict and the shift is welcomed by most people as “there is room for some effective and not just some, however toothless competition”.<sup>66</sup>

*Microsoft* has brought forth severe criticisms from market definition to the assessment of parties’ allegations, from remedies to the approaches and the legal reasoning of the Commission and the Court. Under this section, only criticisms within the scope of this article shall be examined.

One of the criticisms raised at *Microsoft* is whether the Commission was qualified to require and then decide on whether an IPR had innovative value or not as if it were a patent authority.<sup>67</sup> Thus, it has been argued that, since the IPR holder naturally expects royalty, a royalty of zero (or even close to zero) undermined IPRs and the incentives for innovation and productivity underlying them and such lack of royalty would constitute a misguided competition policy and a risk

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<sup>61</sup> Ibid., p.9.

<sup>62</sup> Kanter 2006, p.12.

<sup>63</sup> Ezrachi 2011, p. 99.

<sup>64</sup> Vesterdorf 2008, p.10

<sup>65</sup> Ezrachi 2011, p. 99.

<sup>66</sup> Vesterdorf 2008, p.8.

<sup>67</sup> MARSDEN, P. (2007b), “Unfair and Unreasonable”, *Competition Law Insight*, p. 3.

of violating global trade rules.<sup>68</sup> Therefore, the following question arises: What should be the basis to calculate a reasonable royalty? On the one hand, an IPR holder is entitled to receive an appropriate return for its investment; on the other hand, compulsory licensing is not meant to compensate for full appreciation value on the downstream market because if it were accepted otherwise, this would lead to monopoly prices on both markets.<sup>69</sup> As a result, a balance should be struck and the calculation should be cost based and a portion must be added for an appropriate return on the investment.<sup>70</sup>

With regard to the grant of interoperability information, it should be noted that in contrast to mandated access which can be cut off, granted information can never be taken back; therefore, the remedy cannot be undone. As the secrecy itself is valuable and the disclosure in effect is divestment and since there is no “undo button” in information sharing, there should be a higher burden of proof on the complainants and the competition authorities.<sup>71</sup>

### 2.3.1.2. Tying

Tying occurs when a product’s supplier requires the buyer to buy a second product, the tied product, and it may take various forms such as contractual tying, technical tying, bundling etc<sup>72</sup>. The tying case-law has frequent involvements of IPRs as it can be seen from *Hilti*, *Tetra Pak II* and *Microsoft* cases. In *Tetra Pak II*, Tetra Pak was found to engage in abusive conduct with its practice to tie the machines for the sterilization and filling of liquid food cartoons to the purchase of cartoons, the maintenance of machines and the purchase of spare parts. Tetra Pak was also found to have conducted predatory pricing as a result of disparities which could not have been explained by market conditions.<sup>73</sup> Tetra Pak argued that tying constituted a commercial usage since there was a natural link between the cartoons and filling machines.<sup>74</sup> However, the Court of First Instance refused this argument on the ground that the IPR holder could not extend the IPR to the

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<sup>68</sup> Ibid., p. 3-4.

<sup>69</sup> Anderman and Schmidt 2011, p.122.

<sup>70</sup> Ibid.

<sup>71</sup> MARSDEN, P. (2008), “Article 82 And Structural Remedies After Microsoft”, [http://www.biiicl.org/files/3554\\_art\\_82\\_and\\_structural\\_remedies\\_\(marsden\).pdf](http://www.biiicl.org/files/3554_art_82_and_structural_remedies_(marsden).pdf), Date Accessed: 10.03.2015, p.12.

<sup>72</sup> Whish and Bailey 2012, p. 689

<sup>73</sup> *Tetra Pak II*, para 160.

<sup>74</sup> Anderman and Schmidt 2011, p.139.

uncovered product.<sup>75</sup>

In *Hilti*, Hilti refused to honour its guarantees to its customers if they were to use a third party nail in their guns and this was found to constitute an exploitative abuse. Hilti's safety and quality arguments were not accepted by the Court on the ground that they were found to be inconsistent.

In order for a tying or bundling to constitute an abusive conduct, following criteria should be met: (i) There should be two separate markets, (ii) the relevant undertaking must be in a dominant position in the tying market, (iii) the customers should be coerced into buying two products together and (iv) tying must be likely to foreclose competition and also there must be no objective justification.<sup>76</sup> The Commission, as upheld by the Court, found all conditions fulfilled in *Microsoft*. The Commission identified two product markets for tying: operating system market and media player market. Even though Microsoft argued that there was one integrated product and there was no demand for an operating system without a media player,<sup>77</sup> the Commission reached the conclusion that Windows PC OS and Windows Media Player constituted two separate products. Microsoft was found to be in dominant position as it held 90 per cent of the operating systems market for personal computers.<sup>78</sup> With regard to the coercion requirement, the Commission's determining question was whether there was a possibility to purchase the products separately as an alternative or not. This requirement was considered to be fulfilled despite the fact that Windows Media Player was offered freely and the customers could download different media players if they wished to do so.<sup>79</sup> In relation to the foreclosure of the competition, the Commission had asserted that said tying had the risk to foreclose media player market.<sup>80</sup> Finally, in relation to objective justification attempts, Microsoft's arguments on efficiency defense, reduced transaction costs and technological integration were not accepted neither by the Commission nor the Court<sup>81</sup>.

The remedy decided upon was to make available Windows PC OS without Windows Media Player (Windows N). This remedy did not serve for any purpose

<sup>75</sup> *Tetra Pak II*, para 83, 131.

<sup>76</sup> *Microsoft*, paras 839-71 and Enforcement Guidelines on Article 82, para 50.

<sup>77</sup> *Microsoft I* Commission decision, paras 404, 405, 800, 804.

<sup>78</sup> *Ibid.*, para 432.

<sup>79</sup> *Ibid.*, paras 75, 833, 834, 968-970.

<sup>80</sup> *Ibid.*, paras 841-654.

<sup>81</sup> Anderman and Schmidt 2011, p.140-141.

since (i) both the untied and the tied versions had the same price as their costs were almost the same because the cost of adding Windows Media Player was almost zero and (ii) the untied version was not appealing to consumers in practice as the alternate product that Microsoft was obliged to offer was a product with lower quality. Finally, the last remedy decided on was the appointment of a monitoring trustee; however, the Court annulled it stating that the Commission had gone beyond its powers.<sup>82</sup>

### **2.3.1.3. Conclusion on First Segment**

Considering the explanations provided above, for the first segment, the following conclusion may be reached:

Regarding the assessment of refusal to license cases, the steps to be followed are as follows:<sup>83</sup> (i) the establishment of market dominance in a relevant market, (ii) the determination on whether competition by (a possible) substitution operates or not; in other words, the indispensability test, (iii) the assessment of pro- and anti-competitive effects of a duty to license, and (iv) the examination of the effects of compulsory licensing under the concept of dynamic competition on the incentive structure of IP system. After emphasizing the evaluation of effects on the incentive in the determination of compulsory licensing; some authors remark that even though the IPR holders' incentives may be expected to be reduced; the overall incentives to innovation shall be guarded for two reasons: First, the exclusivity held by the IPR holder shall compensate the reduced incentive and secondly, where competition by substitution is not possible, compulsory licensing should be perceived as an attempt to correct an anomaly which is not covered by the rationale of IPRs.<sup>84</sup>

With regard to tying, from the IPR holders' point of view, it is simply another method to exploit the IPR. However, in situations where the IPR holders' market power coincides with dominance with the help of the IPR, tying may create an available ambiance for coercion where the IPR holder is capable of coercing its customers to buy products together and foreclosing competition in the downstream

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<sup>82</sup> Microsoft, para 1278.

<sup>83</sup> GALLEGIO, B. C. (2008), "Unilateral refusal to license indispensable intellectual property rights – US and EU approaches", J. Drexl (ed.), in *Research Handbook on Intellectual Property and Competition Law*, Edward Elgar, Cheltenham, p. 236-237.

<sup>84</sup> Ibid.

market.<sup>85</sup> On the other hand, in high-tech industry where innovation is provided with the introduction of “new generation” of products such as new generation of mobile phones; tying has been argued to have commercial logic.<sup>86</sup>

To clarify it briefly, the high-tech industry is very much linked to what is called the “new economy”<sup>87</sup>, the foremost component of which can be put as information and communication technologies. What make these technologies “new” are frequent entry and exit and the rapidity of innovation; where a particular attention should be given to economies of scale not only in terms of production; but also from the perspective of consumption, under the concept of network externalities. Such a rapid innovation, especially when supported by IPRs, temporarily paves the way of monopolization at first; however, when combined with the network externalities afterwards; dominant position may occur more permanently and a “lock-in” situation may arise.

Therefore, the practice of tying deserves a more delicate approach, since, on an extreme ground, any product or service can be separated into smaller pieces to be sold; yet this separation ends at some stage.<sup>88</sup> Smartphones, to be taken as an example, are acclaimed by consumers “for generating new secondary markets and adding value by integrating the functions of many different products that were, until recently, only available separately”.<sup>89</sup> When evaluating tying to be either pro or anti-competitive,<sup>90</sup> it should be considered that the overextension of the competition rules to such integrated products may prevent innovation and decrease the consumer and/or total welfare; however, insufficient application of these competition rules cause higher prices. That is why an appropriate balance between IPRs and competition should be established in terms of tying especially in industries where innovation (by means of which dynamic efficiency is sought for) lies at the heart. Finally, another important remark is that competition law remedies are problematic with regard to high-tech industry since by the time

<sup>85</sup> Anderman and Schmidt 2007, p. 72.

<sup>86</sup> Ibid.

<sup>87</sup> POSNER, R.A. (2001), “Antitrust in the New Economy”, *Antitrust Law Journal*, No:68(3), p. 925-943.

<sup>88</sup> BORK, R.H. (1978), *The Antitrust Paradox: A Policy at War with Itself*, Free Press, New York, US, p. 378-79.

<sup>89</sup> AU, T. H. (2012), “Anti-Competitive Tying and Bundling Arrangements in the Smartphone Industry”, *Stanford Technology Law Review*, No:16(1), p. 190.

<sup>90</sup> In U.S practice, first tying was considered as a per se violation, while afterwards analysed under the rule of reason doctrine.

these remedies arrive, the market, which evolves very quickly as it concerns high-tech products, may have already amended itself.<sup>91</sup>

### 2.3.2. Second Segment: Miscellaneous Types of Abuse

In parallel to the newly developed methods of the exploitation of IPRs in industries where IP strategies play a key role in competition, abuse of dominant position has been established in various cases. This segment contains miscellaneous cases and differs from the classical IP-competition law intersection cases with their pattern of facts as described below.

As illustrated above, there is a more or less established category of IPRs-competition law intersection cases, with a checklist on how to assess abuse of dominant position with the involvement of IPRs and the remedies in case of such assessment. On the other hand, thanks to the “creativity” of the IPR holders on their exploitation strategies, various types of abuses have been encountered with. Due to the diversity of these abuses and the inappropriateness to list them under a specific abuse category, they may be referred as “miscellaneous types of abuse”; however in time, several categories may emerge among them.

These abuses are categorized as miscellaneous types of abuse as they do not show a single or a similar pattern of facts since these facts differ according to IPR holders’ methods to exploit their rights and their creativity on their maximization for enforcement on a wide spectrum. On the other hand, it is noteworthy to state that some abuses should be labeled cautiously and some cases stand out with their facts. Under this title, individual abuses are briefly mentioned below and under subtitles, patent ambush, infamous *AstraZeneca* judgment and Pharmaceutical Sector Inquiry Report, which provide hints as to what else may constitute miscellaneous types of abuse, are examined.

First, **unlawful acquisition of technology** may constitute an abuse as in *Tetra Pak I*<sup>92</sup>. In this case, the acquisition of a company, having an exclusive license for the patents involving the only viable competing technology, and obtaining a patent for all minor technical characteristics or modifications was found to be the strengthening of an already existing dominant position and therefore abusive. Secondly, **demanding excessive royalties** may constitute an abusive conduct as

<sup>91</sup> MONTI, G. (2004), “Article 82 EC and New Economy Markets”, C. Graham and F. Smith (eds.), in *Competition Regulation and the New Economy*, Hart Publishing, Oxford, p.23.

<sup>92</sup> Case T-51/89 *Tetra Pak Rausing v Commission* [1990] ECR II-309.

in *Qualcomm*<sup>93</sup>. In *Qualcomm*, upon complaint, the Commission investigated whether the owner of patents in the European standard for third generation (3G) mobile phones had failed to license its technology on fair, reasonable, and non-discriminatory (FRAND) terms, but afterwards Commission did not pursue since it deemed the case was no longer an administrative priority.<sup>94</sup> Finally, **vexatious behavior and abuse of process** are established to constitute abuse. In *Osram/Airam*<sup>95</sup>, Airam filed a complaint to the Commission claiming that Osram's registration of a trademark as a dominant undertaking, knowing that that trademark was in use, was an abusive conduct. The Commission held that the registration of a trademark by an undertaking, which knows that a particular trademark could lead to risk of confusion with a similar trademark, could constitute abuse. The proceedings have ended with the settlement of the parties' agreement.

### 2.3.2.1. Patent Ambush

A subcategory that has emerged under "new" abuses cases, or under "miscellaneous" types of abuse as referred in this article is patent ambush.

A patent ambush means that an undertaking participating in an industry-setting activity is operating in a misleading manner by not disclosing the existence of patents that would be necessary for anyone using the standard and such act allows that undertaking to be able to demand unreasonable royalties as the patent holder.<sup>96</sup> An important example of patent ambush is the *Rambus* case. The Commission issued a statement of objections alleging that Rambus had engaged in abusive conduct by patent ambush. The subject matter of the *Rambus* case concerns the claims that the practices of Rambus were deceptive regarding the existence as well as the applications of patents, which were afterwards alleged to have become the essential input in terms of the adopted industry standard, and by means of its patented technology, Rambus enjoyed a legal monopoly as its patent became indispensable. The case ended with a settlement where Rambus offered to have a worldwide cap on its royalties for five years and the Commission agreed to end the proceedings. However, it marked a new category of abuse with IPRs.

<sup>93</sup> Case T-48/04 *Qualcomm v. Commission* [2009] ECR II-2029.

<sup>94</sup> Whish and Bailey 2012, p. 804; Commission MEMO /07/389, 1 October 2007; Commission MEMO /09/516, 24 November 2009.

<sup>95</sup> XI<sup>th</sup> Report on Competition Policy (1981), point 97, p.66.

<sup>96</sup> Whish and Bailey 2012, p. 806.

### 2.3.2.2. AstraZeneca

From the Commission decision in June 2005 until the finalization by the judgment of the Court in December 2012, *AstraZeneca* proceedings have been followed quite carefully by both private sector actors and the public sector authorities.

*AstraZeneca* is a case of misuse of regulatory procedures where there was a pattern of misleading representations in order to acquire supplementary protection certificates for drugs. As upheld by the Court<sup>97</sup>, the Commission found AstraZeneca dominant on the market for protein pump inhibitors which were a category where Losec, a drug that AstraZeneca was the patent holder, was the leader and the Commission declined to include antihistamines in the relevant market considering that they did not provide significant competitive restraint.<sup>98</sup> In relation to the market definition, it has been claimed that the Court's approval of market definition of the Commission in *AstraZeneca* may encourage the Commission to pursue narrow market definition for drugs particularly when a new drug enters the market and demonstrates improvement compared to existing drugs.<sup>99</sup> In *AstraZeneca*, two abuses as submission of misleading information and selective deregistration of market authorization are detected and sanctioned. These abuses are summarized as follows:

#### 2.3.2.2.1. First abuse in *AstraZeneca*: Submission of Misleading Information

AstraZeneca was found to be in abusive conduct in two ways: First, AstraZeneca had applied to obtain "supplementary protection certificates" (the SPCs) which are documents that extend patent protection period by providing an extra five years in order to compensate the period between the filing for a patent and the grant of market authorization. However, it was found to be engaging in an abusive conduct based on the assessment that it tried to obtain the SPCs by providing misleading information. The issuance of the SPCs depends on "the first authorization to place the product on the market". Whereas the common interpretation was the date when the national authority granted the authorization; AstraZeneca considered the date as the date when all administrative steps had been completed and the marketing authorization became effective which corresponded to the date when the national government approved the price of the product. According to the Commission,

<sup>97</sup> *AstraZeneca*, paras 31-60.

<sup>98</sup> HULL, D. W. (2010), "The AstraZeneca Judgment: Implications for IP and Regulatory Strategies", *Journal of European Competition Law & Practice*, No:1(6), p. 501.

<sup>99</sup> *Ibid.*

AstraZeneca misled the authorities by not explaining its own interpretation and if the authorities had known such interpretation they might not have provided the SCPs at all or for the same length. The Court upheld that there was a submission of misleading information to public authorities, such act was liable to grant the relevant undertaking an exclusive right that was not deserved in the beginning, and therefore it constituted a practice outside the scope of competition on the merits since misleading public authorities created regulatory obstacles to competition by the unlawful grant of exclusive rights to the dominant undertaking.<sup>100</sup>

Even though AstraZeneca argued that abusive conduct could only exist when a dominant undertaking acquired and/or enforced its invalid patent intentionally; the Court did not accept this argument and held that providing misleading information for the grant of an exclusive right constituted a practice outside the competition on the merits which may be particularly restricting competition.<sup>101</sup>

As it can be seen from the facts, *AstraZeneca* case raised several questions. Since the abusive conduct involved provision of misleading information, the conditions to determine whether a conduct was misleading or not was questioned. In this regard, the Court stressed that the answer depended on each individual case;<sup>102</sup> however, it can be argued that the relevant criteria are not properly established and the threshold to find abusive conduct is so vague that “it harbours a troubling potential for IP owners”<sup>103</sup>. Because if the concept of “misleading” is not defined adequately, it gives a wide margin of discretion to the Commission; moreover, such inadequate definition might have a “chilling effect on innovation” which could eventually lead to the undermining of the value of IPRs and “dilute the competitive restraints they are designed to foster”<sup>104</sup>.

Another important issue in relation to the *AstraZeneca* case where there is an abusive conduct through the breach of regulatory rules is the relevance of intention. The Court set forth that the establishment of a deliberate intention was not necessary; however found that AstraZeneca had intended to give misleading information.<sup>105</sup> As upheld by the Court of Justice, the General Court stated in para 356 that:

<sup>100</sup> *AstraZeneca*, para 99.

<sup>101</sup> Whish and Bailey 2012, p. 805.

<sup>102</sup> *AstraZeneca*, para 99.

<sup>103</sup> Hull 2010, p. 502.

<sup>104</sup> Ibid.

<sup>105</sup> *AstraZeneca*, para 93.

“proof of deliberate nature of the conduct and the bad faith of the undertaking in a dominant position is not required for the purposes of identifying an abuse of dominant position”.

Upon ruling that the finding of intention was not a requirement, the Court stated that such intention would be taken into account. “Abuse does not require the proof of intent; however, the existence of fraudulent intention altogether is not without importance”<sup>106</sup> which means that the Court does not require the evidence of intention to harm; however, such subjective element may be utilized as a proof for finding abuse.<sup>107</sup> A question that is raised with regard to the relevance of intention is whether the mere use of IP procedures constitutes abusive conduct or not when the applicant party has no intention of using or licensing it<sup>108</sup> for instance in a case where a dominant undertaking obtains a patent not to exploit itself, but to prevent a rival from developing a competing product.<sup>109</sup>

In addition to the criteria to decide when misleading information constitutes an abuse and the relevance of intention, another aspect that has raised questions is “the effects” of the particular conduct. The Court upheld that it was not relevant that AstraZeneca did not succeed to obtain the SPC protection beyond the original patent protection period because AstraZeneca’s conduct was very likely to result in the grant of the SPCs and if they were to be granted; such grant would produce significant anticompetitive effects.<sup>110</sup> Finally, it has been discussed that the Court set a low threshold for finding of an abuse in case of submission of misleading information since the Court does not require neither the intention nor the anticompetitive effect and finds it sufficient that the dominant undertaking should have been reasonably aware that its conduct was likely to mislead and eventually there would be anticompetitive effects.<sup>111</sup>

#### **2.3.2.2.2. Second Abuse in AstraZeneca: Selective Deregistration of Market Authorization**

AstraZeneca withdrew the capsule form of the drug Losec and the market authorization it had obtained for that capsule form and instead started selling the

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<sup>106</sup> Ottaviano 2012, p. 194.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid., p. 200.

<sup>109</sup> See Section Pharmaceutical Sector, p. 28.

<sup>110</sup> AstraZeneca, para 111.

<sup>111</sup> Hull 2010, p. 502.

drug in tablet form; however such modification did not allow generic companies to market their capsule formed drugs and prevented parallel imports of the original capsule formed drug from low-price member states into those which required market authorization.<sup>112</sup>

It has been discussed that the manipulation of IP procedures may not only enlarge the scope of the underlying IPRs in an unlawful manner and constitute an abuse of dominant position but also such manipulation may violate the fundamental freedoms and constitute an offense to single market.<sup>113</sup>

Some authors agree with the Court and the Commission that AstraZeneca's behaviour was unlawful since such behaviour was capable of eliminating competition and reducing consumer welfare since the SPCs protected the market power enjoyed by the patent holder and the unlawful acquisition and holding of such market power and the withdrawal of market authorization could delay the generic entry and the parallel import and thus could prevent the decrease in market prices.<sup>114</sup> It was claimed that the manipulation of this IP related procedure was merely a tool for AstraZeneca to prolong its market dominance and it could neither be rationally explained nor justified.<sup>115</sup>

The Court held that a dominant undertaking's commercial strategy is acceptable only if it is within the scope of competition on the merits. According to Court's assessment, the withdrawal of the capsule form and the introduction of the tablet form were legitimate as they did not make generic entry more difficult; however, the withdrawal of the market authorization for the capsule form constituted an abusive conduct as it raised legal barriers and it was not an investment which was designed to contribute to competition on the merits. The Court's analysis of the withdrawal of market authorization is found to be unsettling particularly for those companies that are active in pharmaceutical industry since they strongly rely on IP and regulatory strategies. Such narrow interpretation of competition on the merits is argued to be uncertain and trouble-signalling for dominant undertakings in relation to their commercial strategies<sup>116</sup>.

<sup>112</sup> *Ibid.*, p. 501.

<sup>113</sup> MAGGLIOLINO, M. and M. L. MONTAGNANI (2011), "AstraZeneca's Abuse of IPR-Related Procedures: A Hypothesis of Anti-Trust Offence, Abuse of Rights, and IPR Misuse", *World Competition*, No:34(2), p. 246.

<sup>114</sup> *Ibid.*, p. 248.

<sup>115</sup> *Ibid.*, p. 253.

<sup>116</sup> Hull 2010, p. 503.

In case of a misuse of IP procedure such as in *AstraZeneca*, one of the questions that arise is which branch of law holds the priority: the specifically related IP law or competition law? The interference of IP related procedure may be found to constitute an abusive conduct; however, the ban on the application of the related IPR constitutes a violation of the specific IP law concurrently. It has been proposed that the Court has given preference to the IP protection for the duration of the exclusivity aiming to protect the investment on innovation; however, once the exclusivity expires the legitimate conduct is considered to fall under the prohibition in Article 102 TFEU.<sup>117</sup> Moreover, it has been argued that the fact that both EU law and/or national law have foreseen their own remedies for wrongfully obtaining IPRs does not mean that such conduct cannot constitute abuse of dominant position as well.<sup>118</sup>

On the other hand, it has been claimed that the European institutions do not have particular competence in IP legislation and that European IP law does not have a doctrine of misuse of IPRs; therefore it has been suggested that in circumstances where there is a violation of both competition law and the regulations in regulated markets; the competition law can play a residual law for two reasons: First, the regulator is in charge of the proper functioning of the relevant regulated market and secondly, an antitrust remedy could “over-deter” when such remedy is “prone to false positive”<sup>119</sup>.

Although European IP law does not have a doctrine of misuse of IPRs like U.S. IP misuse doctrine,<sup>120</sup> it has been questioned whether the EU law provides an equivalent misuse doctrine. At first glance, it doubtfully exists on an EU-level since IPRs have a nationwide scope; however, potential sources of misuse equivalence are theoretically put forward; one of which arises from case-law on exercise beyond the substantive scope of IPR in question.<sup>121</sup> The other ground is the emergent Community abuse of rights doctrine stating that a conduct, which does not amount to breach of TFEU Articles 101 and 102, may nevertheless

<sup>117</sup> Ottaviano 2012, p. 198.

<sup>118</sup> Turner 2010, p.86.

<sup>119</sup> Maggliolino and Montagnani 2011, p. 259.

<sup>120</sup> FLANAGAN, A., F. GHEZZI and M. MONTAGNANI (2010), “The Search for EU Boundaries: IPR Exercise and Enforcement as ‘Misuse’”, A. Flanagan and M. Montagnani (eds.), in *Intellectual Property Law: Economic and Social Justice Perspectives*, Edward Elgar Publishing, Cheltenham, p.115.

<sup>121</sup> As found not justifiable under the Article 36 of EC Treaty (governing exceptions to freedom of movement principle).

violate the aforesaid emergent policy.<sup>122</sup> With reference to *AstraZeneca*, it has been argued that competition law is confirmed to remedy the existing attitude towards IP problems.<sup>123</sup> The preference for competition law rather than the abuse of rights doctrine stems from its harmonized structure and accessibility especially for small businesses within the Member States.

On the issue whether patent law alone should sanction the patent misuse cases or not, it has also been argued that competition law is better furnished and patent law alone cannot solve the problem since it is originally designed to watch and punish the infringing third parties and not the patent holders.<sup>124</sup> It should be remembered that invalid patents are capable of damaging the balance between the increase in innovation and the restriction on competition as the consumers are affected by enduring cost of reduced competition; however, they do not receive the benefits of increased innovation.<sup>125</sup> In order to maximize the innovation, the legal regime should (i) stop existing misuse and its effects, (ii) return the wrongfully attained benefits of the misuse, (iii) deter future violations and (iv) compensate the infringed parties; for instance if the consumers are not reimbursed for illegal overcharge and if the patent holder has obtained and benefited from the patent in an unlawful way, why should the other firms and the consumers who have been suffered not be compensated? It has been discussed that the patent law is established in a way only to achieve the first goal; however the three remaining goals can be achieved via competition law; therefore, two branches of law should be perceived as interdependent serving for the goal of innovation maximization and in addition to IP law, competition law is entitled to intervene and foresee its own prohibitions and sanctions.<sup>126</sup>

Furthermore, it has been argued that both the Commission and the Court are likely to apply Article 102 TFEU when a matter is regulated by sector-specific rules<sup>127</sup>; therefore, competition law cannot be the exclusive answer; as a result, a reform of IP rules has been suggested.<sup>128</sup>

<sup>122</sup> Flanagan et al. 2010, p.126-127.

<sup>123</sup> Ibid., p. 139-140.

<sup>124</sup> Leslie 2009, p. 1269, 1270, 1285.

<sup>125</sup> AYRES, I. and P. KLEMPERER (1999), "Limiting Patentees' Market Power Without Reducing Innovation Incentives: The Perverse Benefits of Uncertainty and Non-Injunctive Remedies", [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2255&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2255&context=fss_papers), Date Accessed: 10.03.2015, p. 1019.

<sup>126</sup> Leslie 2009, p.1282-1286.

<sup>127</sup> Troberg 2011, p. 78.

<sup>128</sup> SIRAGUSA, M. (2012), "The EU Pharmaceutical Sector Inquiry. New Forms of Abuse and

### 2.3.2.3. Pharmaceutical Sector Inquiry Report

In July 2009, the Commission issued a Pharmaceutical Sector Inquiry Report (Inquiry Report) and declared that it would intensify the scrutiny of possible abuses of patenting in the pharmaceutical sector.<sup>129</sup> Inquiry Report recognizes the innovative nature of IPRs with the exclusivity it provides; however, certain categories of unilateral conduct are pointed out in relation to their likelihood to raise competitive concerns. These categories are: (i) vexatious litigation, (ii) misuse of patent system, (iii) abuse of process and (iv) miscellaneous commercial behaviours.<sup>130</sup> With regard to vexatious litigation, the Commission declared that the enforcement of patent rights is legitimate; however, anticompetitive concerns might arise. On the other hand, misuse of patent system may appear in form of either patent cluster or divisional patents. Regarding abuse of process, as demonstrated above with *AstraZeneca* case, it may occur as misleading behaviours in administrative process to acquire or prolong a patent and/or a certain authorization. Finally, miscellaneous commercial behaviours correspond to numerous commercial strategies which vary in parallel to the specifications of the pharmaceutical industry such as marketing strategies and contact with doctors and pharmacists. Finally, it has been suggested that the Inquiry Report is critical in situations where a dominant undertaking obtains patent not to exploit itself, but to obstruct a rival from developing a competing product (defensive patenting).<sup>131</sup>

### 2.3.2.4. Conclusion on Second Segment

The line between the legitimate exercise of IPRs and “new abuses” or “miscellaneous types of abuse of IPRs” as referred in this article should be drawn delicately. As consistently held by the Court, the exercise of an IPR may constitute abusive conduct only in exceptional circumstances and the same strict principle should be applied for the new segment of IP-competition law intersection cases.<sup>132</sup>

Article 102 TFEU”, G. Caggiano, G. Muscolo and M. Tavassi (eds.), in *Competition Law and Intellectual Property: A European Perspective*, Walters Kluwer, Croydon, p. 187.

<sup>129</sup> Pharmaceutical Sector Inquiry Report (DG Competition Staff Working Document) dated 8 July 2009, and the Commission Communication (executive summary). See [http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/staff\\_working\\_paper\\_part1.pdf](http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/staff_working_paper_part1.pdf) and [http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/communication\\_en.pdf](http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/communication_en.pdf), Date Accessed: 10.03.2015.

<sup>130</sup> Siragusa 2012, p. 179.

<sup>131</sup> KALLAUGHER, J. (2011), “Existence, Exercise, and Exceptional Circumstances: the Limited Scope for a More Economic Approach to IP Issues under Article 102 TFEU”, S. Anderman and A. Ezrachi (eds.), in *Intellectual Property and Competition Law: New Frontiers*, Oxford University Press, Oxford, p.120.

<sup>132</sup> Siragusa 2012, p. 184-185.

A critical issue in new segment of cases is the relevance of intention. The Court has consistently upheld that the abuse is an objective concept and the subjective intention of the dominant undertaking is not considered during the assessment of the alleged abuse. However, as *AstraZeneca* judgment illustrates; even though the Court declared the intention was irrelevant; it acknowledged that it was not without importance. This new segment of cases, within the context of vexatious behaviour and misuse of IPRs, demonstrates that the finding of the abuse is closely linked to the finding of subjective intention as to whether there is the intention to cause harm to competitors or not. Furthermore, it should be affirmed that the reliance on intention is unsettling for three reasons:<sup>133</sup> First, the desire of undertakings to eliminate their competitors is in the very nature of competition. Secondly, competition law is based on the effects and accordingly, to sanction intention itself without effects should not be unlawful, whereas to sanction the effect without intention can be deemed lawful. Thirdly, such reliance could inspire varying interpretations which could lead to legal uncertainty.

In conclusion, even though the relevance of intention is risky to recognize, it is as important for the Court to assess dominance with an effect-based approach. In our opinion, as the new segment of cases shows, intention is to be taken into consideration at certain point by virtue of the very nature of this new segment; however it cannot be relied on arbitrarily. While the risks of subjective intention should be avoided, an effect based approach in these cases should be strictly advocated.

## CONCLUSION

Due to the exclusivity they provide, IPRs are generally considered as a barrier to entry; however, they are at the very core of the competitive process as they transform knowledge into legally protected products that can be the subject of legal transactions in various types such as assignment and licensing.<sup>134</sup>

While an IPR grants exclusivity to its owner; competition law aims to keep the market open for as many people as possible and this causes many commentators to fall for the simplistic and wrong assumption that there is an inherent tension between IP law and competition law.<sup>135</sup> As both encourage innovative efficiency by stimulating competition by substitution, the competition rules and IP rules are in harmony with each other.<sup>136</sup>

<sup>133</sup> Siragusa 2012, p. 186.

<sup>134</sup> Heinemann 2008, p.57.

<sup>135</sup> Whish and Bailey 2012, p. 769.

<sup>136</sup> Heinemann 2008, p.71.

In 2008, Vesterdof said whether through a direct action or a preliminary ruling the Court might find the opportunity to examine and decide on the delicate balance between IP law and competition law. Due to the necessity to safeguard the interests of both branches of law and to enable them to function properly, the delicate balance must be struck very carefully. As discussed in this paper, there have been several cases on the said intersection; however, a general rule that can be applied has not been developed so far and such expectation would be unrealistic. This is because the practices of the undertakings and relevant legal issues that arise are various; just as the positions and the market power of the undertakings in the relevant markets are different depending on market definition.

On the other hand, the essential rule is that the exercise of IPRs may be unlawful only under exceptional circumstances and a remedy of compulsory licensing may be ruled. However, the authorities should act attentively and compulsory licensing should be ruled restrictively in a way in order to ensure that the dominant undertakings would have an incentive to widely license their IPRs to avoid such compulsion.<sup>137</sup> For the first segment of the cases such as *Magill*, *IMS Health* and *Microsoft*; the legal criteria are established to a certain degree and legal certainty is achieved to a certain extent as depicted above. Under the second segment of the cases, dominant undertakings are alleged to violate Article 102 TFEU with various instruments they have developed recently. For instance, in *AstraZeneca*, the issue is whether the undertaking's misuse of rules to obtain IPRs is abusive rather than whether *the exercise* of already obtained IPR is abusive or not.

Another important point is that, should the conclusion reached in pharmaceutical sector in *AstraZeneca*, which states that the misuse of legal rules to obtain IPRs could constitute an abuse when a dominant undertaking violates regulatory rules, whether intentionally or not, with no direct or specific relation to competition law, is applied in other regulatory areas; legal uncertainty could arise in a troubling manner.

Furthermore, the relevance of intention is a vital issue. Even though the second segment of cases differs from the former one with pattern of facts, the Court has established that intention is irrelevant in these second segment cases as well. Even if only a limited role were to be attributed to intention, the establishment

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<sup>137</sup> Mazziotti 2005, p.34.

of intention as a criterion is troublesome and it is likely to lead to varying interpretations with legal uncertainty, mostly on the nature, timing and proof of intention.

With regard to the balance to be struck in cases at this intersection, the Court should require an economic approach since it may intervene even before the grant of exclusivity. In its Guidance Paper,<sup>138</sup> the Commission declares that it will focus on market functioning, consumer benefit and effective competition. In other words, the Commission based its analysis of exclusionary conduct on foreclosure and consumer harm.<sup>139</sup> In addition, the Commission stated that it would carefully assess the circumstances for the intervention and recognized that wrongful intervention might cause reduction in incentives, competitors' trying to free ride dominant undertakings' investments and also consumer harm.

Furthermore, should the Commission pursue a more economic approach, it will have to explain its decisions such as in informal guidance, non-infringement decisions or prohibitions more thoroughly and this will provide legal clarity to both the authorities and the practitioners.<sup>140</sup> Moreover, the economic-based approach shall avoid over-enforcement and reluctance of investment in innovation;<sup>141</sup> therefore, the authorities should be more sensitive "*when faced with clear harm (to IP) for speculative gain (of inventions not yet invented)*"<sup>142</sup>.

In order not to undermine IPRs, it should be remembered that the logic behind the grant of exclusivity is to reward and foster innovation for further developments. Having said that, underlying policies and values of IPRs must be respected and rather than allowing free-riders, the Commission should allow competitors to bargain to agree on a FRANDly (Fair, Reasonable and Non-Discriminatory) price.<sup>143</sup>

<sup>138</sup> Communication from Commission, Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the Treaty to the Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C 45/02.

<sup>139</sup> SIRAGUSA, M. and G. FAELLA (2013), "Trends and Problems of the Antitrust of the Future", E.A. Raffaelli (ed.), in *Antitrust between EU and national law X = Antitrust fra diritto nazionale e diritto dell'Unione europea*, Bruylant, Bruxelles, p.297.

<sup>140</sup> MARSDEN, P. (2009), "Checks and Balances: EU Competition Law and the Rule of Law", *Competition Law International*, No: 5(1), p. 24.

<sup>141</sup> Troberg 2011, p. 81.

<sup>142</sup> MARSDEN, P. (2007a), "Microsoft v. Commission - With Great Power Comes Great Responsibility", *Competition Law Insight*, p. 5.

<sup>143</sup> Marsden 2008, p. 12.

Finally, any intervention of Article 102 TFEU should be implemented in a way to preserve the benefits of technological progress<sup>144</sup> and should be limited to exceptional situations where the conditions are set forth and applied restrictively with legal certainty. Otherwise, one may find itself in a situation where what one hand gives, the other takes away.

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<sup>144</sup> BOCHECK, R. (2012), “Intellectual Property Rights & Compulsory Licensing: The Case of Pharmaceuticals in Emerging Markets”, *World Competition*, No:35(4), p. 630.

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