



Intellectual Property
and Competition Law

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**Comments of the Max Planck Institute for Intellectual Prop-
erty, Competition and Tax Law (Munich)**

*on the DG Competition discussion paper of December 2005 on the applica-
tion of Article 82 of the EC Treaty to exclusionary abuses*

The Max Planck Institute for Intellectual Property, Competition and Tax Law is a research institute within the Max Planck Society for the Advancement of Science. With its expertise in these areas of law, and an emphasis on comparative analysis, it takes the economic and technological aspects of the law into account. The Max Planck Institute contributes to answering fundamental legal questions, and provides impulses for legal developments on the national, European and international levels.

The Max Planck Institute hereby submits its comments on the DG Competition discussion paper on the application of Article 82 of the EC Treaty to



exclusionary abuses.¹ Although some remarks will be made on the general analytical framework envisaged for exclusionary abuses, the focus of these comments will be on the Commission's approach to exclusionary abuses involving intellectual property rights.

I. GENERAL REMARKS

1. The Max Planck Institute welcomes the Commission's initiative to give guidance on the application of the competition rules on abuse of dominance. It also supports the Commission's endeavour to ensure a consistent competition policy throughout the different areas of competition law. The discussion paper on the application of Article 82 of the EC Treaty to exclusionary abuses is embedded in the broader reform process of the EC competition rules, which advocates an increased focus on the likely economic effects on the relevant market² and which has already been implemented in the field of Article 81 EC Treaty on anti-competitive agreements and in merger control. Simultaneously, the Commission has to respect the case-law of the European courts³ and the overall interest in legal certainty. The following comments take these factors into account as the basis of their analytical framework. However, since the discussion paper has to be considered only as an initial step for developing principles for the Commission's application of Art. 82 EC to exclusionary abuses, the Max Planck Institute deems it wise to broaden the scope of discussion to include an evaluation of the

¹ These comments were authored by a project group consisting of Prof. Dr. Josef Drexl, Dr. Beatriz Conde Gallego, Dr. Stefan Enchelmaier, Dr. Matthias Leistner and Mark-Oliver Mackenrodt. Professor Dr. Reto M. Hilty supports these comments. Professor Dr. J. Straus could not participate in the preparation of this Statement and could also not be consulted on short notice due to his overseas stay.

² Para. 4 Discussion Paper.

³ Paras. 5 and 7 Discussion Paper.



soundness of both the approach of the Commission in the discussion paper and the case-law of the European courts.

2. The Max Planck Institute welcomes the Commission's approach of dealing with exclusionary practices as only one category of abusive behaviour in the sense of Art. 82 EC.⁴ Protection against exploitative practices, in particular, is characteristic of European competition law and distinguishes it from the U.S. practice relating to Sec. 2 Sherman Act (monopolization). The objectives of European competition law must not be reduced to enhancing aggregate welfare (efficiency)⁵ in the sense of economic theory. It also protects the economic freedom of market agents and the interest in economic integration and strives for the participation of consumers in the benefits of competition (advocating a consumer surplus standard as opposed to an aggregate welfare standard).

II. ASSESSMENT OF EXCLUSIONARY ABUSES INVOLVING IPRs: REFUSAL TO LICENSE IPRs

3. The discussion paper deals with refusals to license within the more general framework of refusals to supply. However, the Commission fails to explain why the general requirements developed for refusal-to-supply cases would be an appropriate approach to refusals to license. The Max Planck Institute is aware of the fact that the ECJ also refers to this concept. Still, we have doubts as to the soundness of that ap-

⁴ Para. 3 Discussion Paper.

⁵ The notion of aggregate welfare is preferred in these comments to that of "consumer welfare". The notion of consumer welfare is open to misunderstanding. According to the Chicago School, a certain behaviour that reduces the level of competition, but increases productive efficiency in favour of the undertaking only, *i.e.*, without transferring benefits to consumers in the sense of Art. 81(3) EC, would be considered as increasing "consumer welfare". In order to underline the difference, we use the notion of "consumer surplus standard" when we talk about the approach of Art. 81(3) EC.



proach, at least in some cases. In the following we will therefore look at the overall relationship between IPRs and recommend building on the common goal of the two fields of law of promoting dynamic competition in developing a consistent approach to refusal to license (below A.). In the light of this analysis we will then evaluate the approach of the discussion paper of relying on general concepts for refusal-to-supply cases also for the assessment of a refusal to license (below B.). Based on the concept of dynamic competition, we will propose a different approach (below C.). It is our feeling that in specific situations the approach proposed by the discussion paper and our approach will usually reach identical results. However, we think that our approach is more consistent with the economics of IPRs. Our approach tries to assess the specific effects of an IPR on a given market by balancing its pro- and anti-competitive effects and would therefore provide more legal certainty for the application of Art. 82 EC. Finally, (below D.), we will comment on specific considerations of the discussion paper. This last part would be particularly helpful for the Commission if it decided to maintain its overall approach to refusal-to-license situations.

A. *Complementary goals of IPRs and competition law and the concept of dynamic competition*

4. In order to develop a sound approach to refusal-to-license cases, the Commission would be well-advised to look at the effects of a given intellectual property right on a market. Such effects of intellectual property rights are very specific and complex and require a thorough analysis. The discussion paper, in contrast, equates intellectual property rights with an input – similar to any other resources for production – and thereby risks losing sight of the specific economics of IPRs.



5. As the Commission itself explains in the Technology Transfer Guidelines, there is no fundamental conflict between IPRs and competition law. On the contrary, they share the common goal of promoting dynamic competition.⁶ The Commission, in this context, describes this modern view of the relationship of IPRs and competition law in most appropriate terms: “Intellectual property rights promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes. So does competition by putting pressure on undertakings to innovate. Therefore, both intellectual property rights and competition are necessary to promote innovation and ensure a competitive exploitation thereof.” It is recommended that the Commission build on and further develop this theory of complementarity for the application of Art. 82 EC.
6. Such analysis could distinguish between two different forms of competition: Intellectual property rights exclude competition “by imitation”, which can be expressed economically as a loss of allocative efficiency. However, such exclusion triggers competition “by substitution” for better, more innovative products – and thereby promotes dynamic efficiency. In this sense, a patent, for instance, only grants “legal exclusivity” to the extent that it excludes imitation. But it does not necessarily result in an economic monopoly. In a given case, different products that may be protected by patents each can compete in the same market. Even a patent that results in a market-dominant position today may be thrown from the throne tomorrow by a patent for a more innovative product. In this view, undertakings investing in innovation protected by patents often compete “for” the markets, and not necessarily in a given market.

⁶ Para. 7 Commission Notice – Guidelines on the application of Art. 81 of the Treaty to technology transfer agreements; OJ EC 2004 No. C 101, p. 2.



7. From these considerations, we may draw general conclusions as to the most appropriate approach to Art. 82 EC:

(a) Any application of Art. 82 EC to exclusionary practices should clearly distinguish between the general concepts of allocative efficiency and dynamic competition and should refer to this distinction when it comes to the treatment of refusal-to-supply cases. In contrast, the discussion paper in its introductory parts mostly refers to concepts of allocative efficiency only and combines this concept in unspecific ways with a concept of promoting innovation.⁷ In this context, it would be wise to be more explicit about the concept of dynamic competition, which in fact plays a major role when the discussion paper looks at refusal-to-license situations. Building on the concept of dynamic competition would be very helpful for developing a consistent approach to refusal to license, whereas the concepts applied to refusal to supply have greatly been developed for models depicting allocative efficiency only and may therefore be insufficient to translate the concept of dynamic competition into an adequate application of Art. 82 EC to refusal to license.

(b) The general concept of exclusionary practices should also be the starting point for the approach to refusal-to-license cases. However, it is insufficient to simply ask whether there is a detrimental effect on “competition” on a given – downstream – market.⁸ The question rather relates to the impact of a refusal to license on competition by imitation and competition by substitution. This distinction is most important. Whereas, in theory, the IP system allows substitution, such substitution may be hindered by the exclusivity of the IPR.⁹ A duty to license based

⁷ Para. 4 Discussion Paper.

⁸ See para. 222 Discussion Paper.

⁹ The *Magill* case provides a good example: Refusal to license the copyright in TV program listings protected inferior products from competition by more innovative products,



on Art. 82 EC would react to such failure of the IP system. In other cases – e.g., *de jure* or *de facto* standardisation of products – substitution may be impossible or highly unlikely. In such cases, one must ask whether Art. 82 EC should even allow imitation, so as to guarantee at least allocative efficiency. In both scenarios, the refusal to license has an exclusionary effect. However, it is of utmost importance whether the duty to license aims at guaranteeing competition by substitution or competition by imitation.

(c) We think that the general economic approach to competition law that assesses the effects of a given conduct in the relevant market is also appropriate for the analysis of IP-related cases in the framework of Art. 82 EC. In contrast, the approach of the ECJ, as recently further developed in the *IMS Health* judgment, that tries to legally balance the exclusivity of the intellectual property right on the one hand and the interest in protecting free competition on the other,¹⁰ seems to believe in an inherent conflict between the two fields of law and, therefore, fails to develop a consistent analysis of the economic effects of a given right on competition in the relevant market.

8. The discussion paper uses the term of intellectual property rights without further specification. However, intellectual property rights protect different subject-matter, pursue diverging objectives and apply different techniques.

(a) In contrast to the discussion paper, the Technology Transfer Block Exemption Regulation (TTBER) is limited to IPRs relating to technology, namely patent and software licenses. We do not argue, however, that guidelines on the application of Art. 82 EC should likewise be lim-

namely comprehensive TV guides; see Joined Cases C-241/91 P and C-242/91 P, *RTE and ITP v. Commission*, [1995] ECR I-743.

¹⁰ Case C-418/01, *IMS Health*, [2004] ECR I-5039, para. 48.



ited to “technology”. The concept of dynamic competition can also be applied to trade marks and copyrights. Trade marks provide information to customers and allow them to distinguish between different goods and services of different right holders in a given market. Thereby, competition between trade mark owners engenders investment in the quality of goods. National copyright laws pursue a whole range of economic, social and cultural objectives. Still, all copyright laws in the EU have one thing in common: they are meant to give incentives for creativity.

(b) In addition, there is a need for a broader approach to Art. 82 EC, covering all IPRs. In particular, the ECJ has so far had to develop its case-law on refusal to license outside the narrow area of technology, namely via cases dealing with design protection (*Volvo*) and copyright protection for TV listings (*Magill*) and for data bases (*IMS Health*). However, we recommend a cautious approach to transposing the patent/innovation paradigm to the copyright/creativity world. With regard to creativity, one has to take into account the fact that creativity in the classical copyright field – music, literature and art – still has to rely on the individual author who is not motivated exclusively by economic interests.

(c) However, a pure efficiency approach would reduce copyright law to an instrument for satisfying existing consumer demand in a given market, whereas, from the view of cultural policy, copyright law is expected to produce “innovative” and “progressive” creations that may be rejected by the market at the beginning, but prove to be most important for future-oriented cultural pluralism and creativity. Although we do not recommend excluding copyright as such, the Commission should work on an “economic approach” to copyright that takes into account the specific dynamic aspect of the creative process that distinguishes copyrights from patents. Likewise, the Commission should respect the



decision of many domestic legislatures to protect the creator as the initial right holder, as the source of creative activity. A creativity-oriented theory of markets for copyrighted works is currently most needed in the ongoing restructuring of the European system of collecting societies, where the Commission plays a major role by applying competition rules to such societies.

B. Evaluating the application of the general approach to refusal to supply to IP-related cases

9. Based on the foregoing considerations, we analyse the overall approach of the discussion paper dealing with refusal to license within the general framework of criteria on refusal to supply.
10. The discussion paper intends to capture cases of refusal to license by defining the intellectual property right as an input needed by a competitor for entering a different, however, related market. In such circumstances, refusal to license would have to be considered an abuse of a dominant position, provided that the refusal excludes the petitioner of the right from participating in the economic activity in the downstream product market (vertical foreclosure).¹¹ This approach is in line with the case-law of the ECJ. In *IMS Health*, the ECJ, following earlier decisions, required that the refusal to license exclude competition in a secondary market.¹² Since the right holder refused to license at all – and not only to some competitors – the Court argued that a potential or even a hypothetical market for the IPR would be sufficient. Whereas we do not deny that in some cases this approach might be useful for capturing refusal-to-license cases, especially in situations of discriminatory licensing and of termination of licensing agreements, we do not

¹¹ Para. 209 Discussion Paper.

¹² Case C-418/01, *IMS Health*, [2004] ECR I-5039, para. 40 ss.



think that the principles of “refusal to start supplying an input”, as offered in the discussion paper,¹³ constitute a sound approach to refusal-to-license cases.

11. As to “refusal to start supplying” cases, the Commission correctly requires market dominance on an upstream or a related market that might be used to restrict competition in another market.¹⁴ In the discussion paper, the Commission does not explain in which circumstances such market dominance would exist in an IP case. In fact, one would have to require that the right holder had a dominant position in the “potential” or “hypothetical” market for the IP license and was trying to restrict competition on the downstream product market by refusing to license. By singling out the market for a license as a proper market, this approach presumes that the IP right as such confers market dominance. This, however, may be true in some cases, but not in others. In the famous *Magill* case of the ECJ, the copyright in TV listings as such conferred market power to the TV stations by allowing them to control access to the necessary information as the subject-matter of protection.¹⁵ This information could not be substituted by any other information and, because of this, became a necessary input for the marketing of a comprehensive TV guide on the downstream product market. In the *IMS Health* case, in contrast, market dominance of the right holder did not exist in the potential market for the subject-matter protected by the IP right, but only in the market for the service of collecting information on the sale of pharmaceuticals. Despite the copyright of the right holder, the petitioner was able to develop its own system (brick structure) for collecting such information. However, it was unable to enter

¹³ Para. 225 et seq. Discussion Paper.

¹⁴ Para. 226 Discussion Paper.

¹⁵ Joined Cases C-241/91 P and C-242/91 P, *RTE and ITP v. Commission*, [1995] ECR I-743.



the service market with this structure since it could not convince the pharmaceutical companies to apply a different system for collecting information because of the switching costs such a migration would have entailed.¹⁶ Of course, the copyright owned by IMS Health did play a major role in foreclosing the product market. However, this does not change the conclusion that this was only so because of the specific circumstances in that market.

12. Accordingly, the distinction of two separate markets and the application of a refusal-to-supply analysis only makes sense in a situation in which the IP right itself produces market dominance irrespective of the market conditions on the downstream product market. This was so in the *Magill* case because the copyright itself excluded access to indispensable information. Such scenarios are characterised by an inherent deficiency of the IP system. In such situations, repairing the IP system – *i.e.*, excluding copyright protection for information – would be preferable to the application of competition law. However, in this case the ECJ had to accept national copyright law and was only able to react to the IP deficiency and to reach a pro-competitive outcome by intervening on the basis of Art. 82 EC.
13. Since IPRs as such do not confer market dominance on the right holder,¹⁷ the issue of whether there is market dominance on an upstream potential IP market needs careful consideration. In situations in which the IP system is not deficient, but competition would be restricted on a product market without the license because of specific external market conditions, the IP right only confers market dominance

¹⁶ Para. 229 of the Discussion Paper takes such switching costs, obviously relating to the *IMS Health* case, as an argument for the indispensability of the IP right. Thereby, the Commission, like the ECJ, disregards the fact that such indispensability explains only market dominance on the downstream product market, but not on the upstream market for subject-matter protected by the IP right.

¹⁷ Acknowledged by the Commission in para. 40, 1st indent, of the Discussion Paper



for that product market. Consequently, the refusal-to-supply analysis advocated by the Commission cannot be applied. In *IMS Health*, the ECJ did not notice this fundamental difference, but simply required that the copyright be an indispensable input for doing business in the service market.¹⁸ Thereby, the Court overlooked the fact that IMS Health did not have market dominance in the market for the subject-matter protected by the IP right, but only on the service market itself. Such a conclusion, however, does not mean that Art. 82 EC may not be applied. Since there is market dominance in the relevant market, the question still remains under which circumstances a refusal to license has to be considered an abuse. The analysis has to be based on the effect of the exclusive IP right on the incentive structure for innovation in the given market and the loss of allocative efficiency caused by excluding competition by imitation. In fact, the distinction between two different markets in *IMS Health* was in no way helpful in answering the vital question of whether Art. 82 EC intervention in the exclusive right may be justified.

14. Although a refusal-to-supply analysis may be applied in some cases, this does not mean that such an analysis is the best approach to refusal-to-license scenarios. Even in *Magill* the question still was whether an exception can be accepted to the exclusivity of the IP right under Art. 82 EC. To solve the problem, the ECJ developed the new-product rule. Accordingly, the discussion paper also argues that the general test for refusal-to-supply cases would be insufficient in IP-related cases and, therefore, requires an “additional condition”.¹⁹ Neither the ECJ nor the discussion paper offers a consistent “economic” reason for the additional condition. In fact, requiring it proves that the general test is insufficient and a better test could be developed. This other test would

¹⁸ Case C-418/01, *IMS Health*, [2004] ECR I-5039, paras. 45-47.

¹⁹ Para. 237 Discussion Paper.



have to be based on the economic effects of the IP right on the given market, taking into account, in particular, effects on dynamic competition.

15. The “indispensability” requirement of the Commission’s approach²⁰ has to be considered a most important element for any approach to the application of Art. 82 EC to intellectual property. So long as substitution is possible, e.g. by “inventing around” a patent, the IP system works and the exclusivity of the IP right should not be touched. The Commission is right in pointing out that the IP right may have to be considered indispensable in situations in which the protected technology has become the standard²¹ or where interoperability with the right holder’s product is necessary for a company to enter or remain in the market.²² The indispensability test is not specific to the general refusal-to-supply analysis. It may also be included in a different, IP-oriented test for the application of Art. 82 EC. However, whether access to the subject-matter of protection is indispensable can only be decided in view of the effects of the IP right on the given market. Therefore, a more thorough approach is required.
16. As to the requirement of the likely market-distorting foreclosure effect, the discussion paper argues that the elimination of competition on the downstream market would not be an absolutely necessary requirement, but rather prefers a concept of a distorting effect as compared to the earlier level of competition.²³ Again, the discussion paper does not

²⁰ Paras. 228-230 Discussion Paper.

²¹ In a standardisation situation, the German Federal Supreme Court in the *Standard Tight-Head Drum* Case recognised a duty to license a patent based on § 20(1) German Act Against Restraints of Competition, only a few months after the *IMS Health* judgment of the ECJ; see Federal Supreme Court (Bundesgerichtshof) of 13 July 2004, [2005] IIC 742 – *Standard Tight-Head Drum* (English translation).

²² Para. 230 Discussion Paper.

²³ Paras. 231-233 Discussion Paper.



appear sufficiently specific on IP-related cases. First, the discussion paper is not in line with the *IMS Health* judgement, where the ECJ explicitly required full elimination of competition in the downstream market.²⁴ Secondly and more importantly, the discussion paper does not distinguish between the effect on competition by substitution and competition by imitation. This is exactly where the discussion paper fails to pick up the concept of dynamic competition. A market-distorting foreclosure effect, as required by the discussion paper, can also be produced by the refusal to license to the competitor who only intends to imitate. By not making the distinction, the Commission reduces the analytical framework to a traditional neoclassical approach that only looks at allocative efficiency. Whether a mere reduction of competition by imitation – and a loss in allocative efficiency – justifies an exception to the exclusivity of the IP right is the question that needs to be answered in the first place. Therefore, an approach that analyses the effects of a refusal to license on the two types of competition would be much better suited to capture IP-related competition problems.

17. Beyond the general approach, the discussion paper proposes an additional condition for the application of Art. 82 EC to refusal-to-license cases. In doing so, the discussion paper sticks closely to arguments made by the ECJ in its case-law (*Volvo*, *Magill*, *IMS Health*) and finally adopts the new-product rule developed by the ECJ in *Magill* and *IMS Health*. Whereas in *IMS Health*, the ECJ clarified that the “prevention of the emergence of a new product” has to be considered a “cumulative” requirement,²⁵ the Commission seems to take this test as a mere “example” of exceptional circumstances that justify a duty to license.²⁶ In contrast to the general “economic” approach that relies on the ef-

²⁴ Case C-418/01, *IMS Health*, [2004] ECR I-5039, para. 47.

²⁵ Case C-418/01, *IMS Health*, [2004] ECR I-5039, para. 38.

²⁶ Para 239 Discussion Paper.



facts of a given behaviour on the relevant market, the approach of the ECJ in *IMS Health* is based on a legal balancing. The IP right and the freedom of its owner not to license are taken as a given legal decision that can only be outweighed by the interest in free competition if the petitioner intends to offer a new product and thereby contribute to the development of the secondary market, to the advantage of consumers.²⁷

18. The question remains whether the additional condition of the prevention of the emergence of a new product appropriately translates the concept of dynamic competition for the application of Art. 82 EC. In fact, the new-product criterion seems to reflect the concept of competition by substitution. According to this reading, Art. 82 EC would apply in situations in which the refusal to license – in contrast to dynamic competition – excludes competition by substitution. In conformity with the theory of complementarity, Art. 82 EC would guarantee dynamic competition in situations in which the IP law alone unexpectedly excludes substitution instead of creating incentives for competitors to invest in innovation. This approach worked perfectly well in the *Magill* case, in which the copyright allowed the TV stations to control information on their programs and excluded a comprehensive TV guide as a more competitive product from the market.
19. The question also remains whether there are cases in which Art. 82 EC may also be applied in order to enable competitors to imitate. We recommend that the Commission should carefully consider this question. Only a few weeks after the *IMS Health* judgment, the German Federal Supreme Court applied rules of German competition law on abuse of market dominance to allow a competitor to use a patent for an inven-

²⁷ Case C-418/01, *IMS Health*, [2004] ECR I-5039, para. 48 et seq.



tion that had been accepted as the industry standard.²⁸ The Court in this decision clearly relied on the concept of dynamic competition, according to which competition by imitation is excluded in order to promote competition by substitution.²⁹ According to the Court, the law has to take into account that in standardisation cases the market would not accept a more innovative product. The only way to compete with the patent holder is to imitate the standardised, patent-protected product. In its decision, the German Federal Supreme Court reacts to a situation which, so far, has not been brought before the ECJ. In the light of the new-product rule of *IMS Health* it seems questionable whether the ECJ would ever apply Art. 82 EC in order to allow imitation. The Commission, in contrast, is right in alluding to situations in which a technology protected by an IP right has become a standard.³⁰ German case-law demonstrates that, in standardisation cases in particular, a duty to license with the objective of allowing imitation should not be excluded in principle.

C. *Proposal for a different approach*

20. Notwithstanding the case-law of the ECJ, we deem it wise to launch a discussion on a specific IP-related test for the application of Art. 82 EC. This test should rely on the theory of complementarity and look at the specific effects of the IP right in the relevant market with regard to competition by substitution and competition by imitation.
21. The first requirement would be the answer to the question of whether the right holder has market dominance in a given market. In particular, in cases in which the right holder has not licensed to anyone but

²⁸ See footnote 21.

²⁹ See footnote 21, p. 746.

³⁰ Para. 230 Discussion Paper.



serves the product market himself, market dominance will most likely exist in the product market only. Whether market dominance exists has to be assessed carefully. Market dominance can arise from the technological superiority of the protected subject-matter or from additional, external market circumstances such as standardisation.

22. Secondly, a refusal to license can only be considered abusive in cases in which the basic mechanism of dynamic competition with a view to promoting innovation by substitution does not work. Therefore, Art. 82 EC can only be applied if substitution is excluded. Whether substitution is possible or not will regularly depend on the facts. In particular, in cases of *de facto* standards, e.g. those based on network effects in a given market, the analysis would require difficult predictions as to the stability of such a standard, i.e., as to whether and when the standard might be overthrown by superior technology. In contrast to a situation in which substitution is excluded, a merely very “successful” technology, one that gives rise to market dominance because it is technologically unlikely that it will have to face competition from superior technology in the foreseeable future, does not raise competition concerns. Accordingly, a distinction has to be made between merely “successful” and “indispensable” IPRs. Both may give rise to market dominance, but only the latter may justify intervention under Art. 82 EC. In legal terms, this second requirement is to be phrased as an “indispensability test”, since the petitioner will only be able to develop economic activity in the same market if the license is granted.
23. However, indispensability alone does not justify application of Art. 82 EC. In a third step, it will be necessary to assess the pro- and anti-competitive effects of a duty to license in the light of the concept of dynamic competition. In general terms, a licence would be justified whenever it would enable substitution by a different, potentially more innovative product. In such a situation, only the duty to license can guarantee



that the expected advantage of dynamic competition is attained. However, the duty to license might act as a counter-incentive to the right holder's initial investment for innovation. In such cases, the amount of royalties to be paid for the license must be sufficiently high to respond adequately to those negative effects.

24. In cases in which substitution is not possible, e.g. standardisation, application of Art. 82 EC requires a much more thorough analysis of the exclusionary effect of the refusal to license. In such situations, the advantage of the IP system of triggering dynamic competition between undertakings seems unattainable. Still, competition by imitation is excluded and consumers have to pay higher prices because of a loss of allocative efficiency. In this regard, the ECJ advocates a very narrow view of what benefits consumers.³¹ Consumers are not only interested in getting better products (dynamic competition); they are also and very much interested in price competition (allocative efficiency). Exclusion of imitation harms consumers when substitution is not possible. Nevertheless, a duty to license to the imitator may produce negative effects on the overall incentive structure of the IP system. If an investor foresees that he will have to share his innovation with competitors, he might be less willing to make the initial investment when competing for the market.³² On the other hand, the Commission rightly points out that access to the input induces a greater number of companies to invest in follow-on research and development,³³ whereas otherwise follow-on innovation could only be expected from the incumbent right –holder, who does not feel the pressure of competition.

³¹ Case C-418/01, *IMS Health*, I-5039, para. 48.

³² In the same sense para. 213 Discussion Paper.

³³ Para. 213 Discussion Paper.



D. Specific aspects of the discussion paper relating to IPRs

25. While the preceding comments tried to develop a more economically consistent, IP-specific approach to the assessment of refusal-to-license cases, it was not possible to comment more specifically on those parts of the discussion paper in which the Commission refers to intellectual property. The following comments are directly addressed to those parts in order to give more immediate guidance to the Commission.
26. In para. 213, the Commission presents a very good analysis of positive and negative effects of a duty to license on the long-term incentive structure of the IP system. These considerations should be maintained and could be integrated in the test suggested above (para. 24).
27. In para. 227, the Commission follows the ECJ's argument that a potential or even hypothetical market for an IPR would be sufficient for the assessment in the framework of a refusal to supply. The argument is made in the context of the dominance requirement. In this context, the Commission has to realise that the concept of a potential market does not answer the question of whether the right holder is dominant in such a market. External market factors like standardisation could cause market dominance to exist only in the downstream product market; the petitioner would in principle be able to produce or acquire an input to compete with the IPR in question, but would not be able to use it on the product market.
28. In para. 230, the Commission quite rightly identifies two scenarios of indispensable IPRs, namely those in which competitors might not be able to turn to any workable alternative technology and in which they are unable to "invent around" the right. The Commission mentions



technology that has become the standard as an example for the first problem and interoperability as a requirement for entering the market as an example for the second. Unfortunately, later parts of the discussion paper do not explain how these two scenarios should be dealt with under the “additional” new-product rule.

29. In para. 233, the Commission deals with the prevention of a new product in a not yet existing market. Therein, the Commission seems to allude to the new-product rule of the *Magill* and *IMS Health* judgments of the ECJ. Here it should be emphasised that the new-product concept alone does not argue for a new market. A right holder who refuses to grant a licence in order to prevent the introduction of a new, superior product and to serve the market with his inferior product (the *Magill* situation) restrains competition in an already existing market.
30. In para. 235, the Commission develops a “defence” in favour of the right holder according to which competition may be excluded for a certain period of time in order to allow the right holder to recover adequate returns on his investment. This defence seems flawed for a number of reasons. First, IP rights are usually not thought to protect investment as such, but certain innovative and creative achievements. Secondly, it is not the IPR itself that pays the investor but consumers who buy products that include the protected subject-matter. According to the theory of complementarity, the IP system should not be immunised against competition, but, on the contrary, the relevant product market should ideally be a competitive market so as to produce maximum incentives for innovation. Investment in innovation in this world of dynamic competition is typically risk-oriented. Whether investment by the pharmaceutical industry in research and development, for instance, would lead to useful, safe and marketable drugs responding to sufficient consumer needs is highly uncertain. Accordingly, the IP system only creates competitive incentives for investment, but does not guar-



antee any compensation of the investment made. Thirdly, the argument that IPRs should grant an economic monopoly for a certain period of time in order to allow the right holder to recoup his investment makes allusion to the Schumpeterian concept that considers market dominance a condition for a sufficient level of innovation. This concept is based on a static market structure analysis and conflicts with the modern concept of dynamic competition according to which pressure from competition promotes the highest level of innovation. Hence, the defence proposed by the Commission is incompatible with the overall approach of the Commission. There is no reason why the holder of an IP right should be able to rely on his interest in recovering adequate returns on his investment to preclude intervention under Art. 82 EC, which is designed to “re-establish” competition by substitution as the main objective of IP law. Nevertheless, the Commission is right in pointing out that, in order to maintain incentives to invest and innovate, the dominant firm must not be unduly restricted in the exploitation of valuable results of the investment. However, this consideration should not be considered as a defence, but within the framework of balancing the different pro- and anti-competitive effects of a duty to license (see above paras. 23 and 24) and of fixing adequate royalties.

31. In para. 236, the Commission tends to favour a duty to supply and to license when the investment would have been made even if the investor had known that he had to supply afterwards. As to the licensing of IPRs, the Commission mentions the example that investment leading to the IPRs has not been particularly significant and would have been made anyway. Such arguments are not beyond doubt, since IPRs are usually granted for specific achievements – inventions and creations – and not for investment. High investment may lead to little innovation and creativity and vice versa. Therefore, a distinction between high and low-investment IPRs contradicts the legal decision made in the context



of IP laws and, therefore, should not be advocated in the context of Art. 82 EC.

32. In para. 238, the Commission explains that the very aim of the exclusive right is to prevent third parties from applying the IPR to produce and distribute products without the consent of the right holder. Though this is true from an IP perspective, para. 238 would be the right place for the Commission to mention that by excluding imitation, IP law also pursues the aim of inducing competitors to compete by substitution (concept of dynamic competition).
33. We agree in substance with the statement made in para. 240, that a duty to license may be considered in order to enable competitors to invest in follow-on innovation even if the licensed technology would not be incorporated in clearly identifiable new goods and services. Here the Commission goes beyond a strict reading of the ECJ's cumulative new-product requirement and seems to accept a duty to license even with the result of mere "short-run" imitation. However, the Commission should clarify that such arguments of a higher level of follow-on innovation are not used unfoundedly. Hence, it would be wise to place the consideration of para. 240 within the general balancing approach taking into account all pro- and anti-competitive effects of a refusal to license (see above paras. 23 and 24). A consideration similar to para. 240 should be included with regard to a duty to license with the objective of granting competitors access to a standard.
34. In paras. 241 and 242, the Commission deals with refusal to supply information needed for interoperability as a specific subgroup of refusal to supply. Only in this context does the Commission refer to the concept of leveraging market power to another market. It is not clear whether there is a difference in substance between this leveraging theory and the preceding parts of the discussion paper on refusal to sup-



ply. In particular, para. 242 remains unclear as to the standard to be applied. By pointing out that even in cases in which such information is considered a trade secret it may not be appropriate to apply the same high standards for intervention as those described in the previous subsection, the Commission seems to understand the leveraging approach as a less strict standard. Maybe, in para. 242, the Commission alludes to the stricter standard of intervention in IP cases. It is true that trade secrets should not be considered an exclusive right comparable to IPRs. Trade secrets only enjoy protection under contract and tort law and are not thought as such to promote innovation. In cases in which the information needed for interoperability is protected by IPRs, there is no reason not to apply the general rules concerning refusal to license.

35. Intellectual property rights often play a role in controlling access to so-called aftermarkets for complementary goods. The Commission deals with these markets in the last part of its discussion paper in paras. 243-265. In several parts of this section, the Commission refers to IPRs. The overall question is which test applies in situations in which the right holder refuses to license the IPR to a competitor with the objective of excluding this competitor from the aftermarket: the more stringent test on refusal to license an IPR, or the specific test relating to aftermarkets. In para. 264, the Commission seems to adopt the second view. There, the Commission presumes that it is abusive for a dominant company to reserve the aftermarket for itself by excluding competitors from that market. As one example of such exclusive behaviour, the Commission mentions the refusal to license an intellectual property right. Whereas the Commission does not seem to require the stricter approach to refusal to license in these circumstances, it is quite questionable whether such a rule would be consistent with the case-law of the ECJ. For instance, in *Vo/vo*, the ECJ rejected a general duty to li-



cense a design right for spare parts under Art. 82 EC.³⁴ We recommend that the Commission apply the same analytical framework of refusal to license to cases in which the right holder excludes competition in aftermarkets. In sum, a duty to license should rely on a complete assessment of the pro- and anti-competitive effects of such a duty in the specific case.

³⁴ Case 238/87, *Volvo*, [1995] ECR 6211, para. 8 et seq.