

MANDATORY DEALING IN THE EUROPEAN UNION LAW: THE WAY OF THORNS

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1. INTRODUCTION:

The EC competition law deals with an abuse of a dominant position under Article 82 E.C., which provides that “any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States”.¹ Accordingly, Article 82 E.C. imposes three requirements for the conduct of an undertaking to fall within its scope, namely (i) a conduct of a dominant undertaking or a group of undertakings shall (ii) constitute an abuse (iii) causing an effect on trade between Member States.² Although unequivocally admitting a vital importance of all aforementioned requirements for the application of Article 82 E.C., the author of the present article focuses on the concept of abuse of a dominant position, since it constitutes a cornerstone of the case law on mandatory dealing. A non-exhaustive list of abuses under Article 82 E.C. leaves it for the Community courts to determine whether a particular conduct of a dominant undertaking constitutes an abuse of a dominant position.³ In the light of the special responsibility of a dominant undertaking “not to allow its conduct to impair genuine undistorted competition on the common market”,⁴ the Community courts continuously emphasised that “a course of conduct adopted by a dominant undertaking with a view to excluding a competitor from the market by means other than legitimate competition on the merits may constitute an infringement of Article 82 E.C.”.⁵ When the Court of Justice confirmed that refusal of a dominant undertaking to deal with its competitors may constitute an abuse of a dominant position, the Commission commenced a vigorous attack on monopolies, which arguably illegal conduct precludes effective development of healthy competition within the common market.⁶

¹ [2002] O.J. C 325/35.

² C. Stothers. “*Refusal to Supply as Abuse of a Dominant Position: Essential Facilities in the European Union*”. E.C.L.R. Vol. 22; No. 7. [2001]. p. 256

³ The non-exhaustive nature of the list derives from the wording of the article, which provides that “such abuse may, in particular, consist in...”. See Article 82 E.C. [2002] O.J. C 325/35. The ECJ also referred to the concept of abuse as “an objective concept relating to the behavior of an undertaking”. See Case 85/76 *Hoffmann La Roche & Co AG v Commission* [1979] E.C.R. 461.

⁴ Case 322/81 *NV Nederlandsche Banden-Industrie Michelin v Commission* [1983] E.C.R. 3461. See also Case T-83/91 *Tetra Pak International SA v Commission* [1994] E.C.R. II-755; Case T-65/89 *BPB Industries Plc v Commission* [1995] E.C.R. II-389; Case T-24/93 *Compagnie Maritime Belge Transports SA v Commission* [1996] ECR II-1201 and most recent cases Case T 191, 212 & 214/98 *Atlantic Container Line and Others v Commission* [2003] E.C.R. II-3275, Case T-210/99 *General Electric Company v. Commission* [2006] 4 C.M.L.R. 15.

⁵ Case 85/76 *Hoffmann La Roche & Co AG v Commission* [1979] E.C.R. 461; See also Case 322/81 *NV Nederlandsche Banden-Industrie Michelin v Commission* [1983] E.C.R. 3461; Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359; Case T 219/99 *British Airways Plc v Commission* [2004] 4 C.M.L.R. 19; T-210/01 *General Electric Company v. Commission* [2006] 4 C.M.L.R. 15.

⁶ Case 6 and 7/73 *Istituto Chيميотерапico Italiano S.p.A. and Commercial Solvents Corporation v Commission*. [1974] E.C.R. 223.

2. REFUSAL TO SUPPLY: THE COMMERCIAL SOLVENTS DOCTRINE

In the *Commercial Solvents* case, the Court of Justice emphasised that when an undertaking, which has a dominant position in the market for raw materials, refuses to supply its customer, it abuses dominant position by eliminating all competition on the part of this customer.⁷ The Court of Justice has also agreed with the Commission that a refusal to supply includes “making supplies conditional on control over further processing or marketing and supplying on discriminatory and unfair conditions”, as well as “making a constructive refusal”.⁸ Accordingly, the meaning of an abuse was not only aimed at “practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure”.⁹ Moreover, the outcome of the *United Brands* case¹⁰ demonstrates that “a dominant undertaking may infringe Article 82 by refusing to supply [even] in response to a perceived threat to its commercial interests”.¹¹ The Court of Justice expressly stated that “an undertaking in a dominant position... cannot stop supplying a long standing customer who abides by regular commercial practice, if the orders placed by that customer are in no way out of the ordinary”.¹² It was admitted that “the possibility of counter-attack is acceptable, but it must still be proportionate to the threat taking into account the economic strength of the undertakings confronting each other”.¹³ Thus, a refusal to supply becomes abusive, if it prevents or reduces competition from “anyone who may wish to use the product or service, unless objectively justified by some proportionate benefit to the competition structure”.¹⁴ Consequently, it can be stated as a general rule that a dominant undertaking bears the burden of justifying its refusal to supply, when existing customers are concerned.

Although the Court of Justice has unequivocally recognised “the importance of safeguarding free enterprise when applying the competition rules of the Treaty,” the outcome of the cases on refusal to supply demonstrates a heavy burden of proof imposed on a dominant undertaking.¹⁵ It appears that the Community courts accept justifications only in exceptional cases, for instance in the *BP* case the Commission decision that an undertaking “could legitimately discriminate between regular and occasional customers but not if this put the latter in danger of going out of business” was annulled by the court, holding that BP was entitled to treat an occasional customers less favourably than traditional customers.¹⁶ However, an attempt of *United Brands* to protect its commercial interests was considered as going “beyond legitimate relations”.¹⁷ The Court of Justice has also rejected *Commercial Solvents* justification that “it wished to enter the market for the derivative products”.¹⁸ This restrictive approach appears to be reasonably criticised for eliminating rational business

⁷ *Ibid.*

⁸ See for example, Case 27/76 *United Brands Company and United Brands Continental BV v Commission* [1978] E.C.R. 207, *Napier Brown British Sugar* [1990] 4 C.M.L.R. 196 and Decision 2001/892 *Deutsche Post AG - Interception of Cross Border Mail* [2001] O.J. L331/40. See also *Report on Competition Policy* [1983].

⁹ Note 2 *supra* at 257.

¹⁰ Case 27/76 *United Brands Company and United Brands Continental BV v Commission* [1978] E.C.R. 207.

¹¹ A. Jones and B. Sufrin. “*EC Competition Law: Text, Cases, and Materials*”. 2nd Ed. Oxford University Press. New York. [2004]. at 469.

¹² Note 10 *supra* at para. 182.

¹³ Note 10 *supra* at para. 190.

¹⁴ Note 2 *supra* at 257.

¹⁵ Case T-41/96 *Bayer AG v Commission* [2000] E.C.R. II-3383.

¹⁶ Case 77/77 *Benzine en Petroleum Handelsmaatschappij BV v Commission* [1978] E.C.R. 1513.

¹⁷ Note 10 *supra* at 207.

¹⁸ Note 6 *supra* at 223.

practices and restricting vertical integration of dominant undertakings in the common market.¹⁹

3. REFUSAL TO GRANT ACCESS: THE *ESSENTIAL FACILITIES* DOCTRINE²⁰

The Commission has successfully relied on *Commercial Solvents*, when prying open natural monopoly type industries within the Community. The following section of the article analyses Community soft law, decisions of the Commission and case law of the Community courts on refusal to grant access to essential physical infrastructure and indispensable service facilities.²¹

3.1. Access to Essential Facilities:

It must be acknowledged that there is “no conceptual difference between the *Commercial Solvents* doctrine and essential facilities doctrine”, with the only peculiarity of the former being applied to the cases, where an essential input is an infrastructure or service.²² According to essential facilities doctrine,²³ “a company which has a dominant position in the provision of facilities which are essential for the supply of goods and services on another market abuses its dominant position if, without objective justification, it refuses access to these facilities”.²⁴ From the 1980s onwards, the essential facilities doctrine became the main tool of the Community policy aiming at liberalisation of the Community market.²⁵

3.1.1. Access to Airport and Port Facilities:

In *Frankfurt*, the Commission found an undertaking holding “a dominant position on the market for the provision of aircraft facilities for the landing and take-off of aircrafts”²⁶ abusing its dominant position by denying potential competitors in the ramp-handling service access to the ramp.²⁷ The same “pry open” approach²⁸ had been envisaged in the

¹⁹ Note 11 *supra* at 510 – 511.

²⁰ It still remains controversial whether essential facilities doctrine exists in the Community legal order. For instance, see B. Doherty. “*Just What are Essential Facilities?*” C.M.L.R. Vol. 38; No. 2. [2001]. The Community courts neither accepted, nor rejected the existence of essential facilities doctrine in the Community legal order. For instance, see A. Jones and B. Sufrin. “*EC Competition Law: Text, Cases, and Materials*”. 2nd Ed. Oxford University Press. New York. [2004]. However, it has been widely accepted that the so-called essential facilities doctrine “is not an independent doctrine; rather it is one that has evolved from the principle applied in *Commercial Solvents*, albeit with a different name and with a particular sphere of application”. See R. Whish. “*Competition Law*”. 5th Ed. LexisNexis. London. [2001]. p. 664.

²¹ The author emphasises that the aforementioned corpus of legal rules is systematised regarding field of its application, rather than chronologic order.

²² R. Whish. “*Competition Law*”. 5th Ed. LexisNexis. London. [2001]. p. 668.

²³ An essential facility means one to which undertakings require access in order to produce goods or provide services for their customers, but which they could not reproduce themselves without prohibitive expense or inordinate delay. See F. Wooldridge. “*The Essential Facilities doctrine and Magill II: The Decision of the ECJ in Oscar Bronner*”. I.P.Q. [1999]. p. 256

²⁴ *Opinion of Advocate General Jacobs delivered on 28 May 1998. Case C-7/97 Oscar Bronner GmbH & Co KG v Mediaprint (1998) E.C.R. I-7791.*

²⁵ Note 22 *supra* at 668.

²⁶ Commission Decision *FAG-Flughafen Frankfurt/Main AG*. [1998] O.J. L72. para. 70.

²⁷ Note 28 *supra* at para. 71. The decision stands in the line with *Commission Report*, where Commission emphasised “determination to act against airlines holding dominant position, if they attempt to prevent the development or maintenance of competition” in the airline industry. See *XXI^{le} Report on Competition Policy*. Catalogue No: CM-76-93-689-xx-C [1992]. para. 218.

²⁸ S. White. “*Is There a Role for an “Essential Facilities” Doctrine in Europe?*” C.T.L.R. [1995]. p. 144.

Sealink decision, where Commission argued that a dominant undertaking infringed Article 82 E.C., when it “both owned and controlled and itself used an essential facility... and refused its competitors access to that facility or granted access to competitors only on terms less favourable than those which it gave its own operators”.²⁹ Thus, “a company in a dominant position cannot discriminate in favour of its own activities in a related market by using its power in one market to strengthen its position in another without objective justification”.³⁰ In *Stena*, the Commission has already required access to the essential facility on fair, equitable and non-discriminatory basis for the new entrants.³¹ In 1993 Report on Competition Policy the Commission recommended dominant undertakings to “take steps to separate its management of the essential facility from its use of it” by appointing “different employees responsible for the management of the port than for the management of the ferry service”, establishing “a non-discriminatory code of practices”, introducing “a consultation procedure involving other port users” and arranging “an independent arbitration in the event of a dispute”.³²

3.1.2. Access to Railway Facilities:

The first attempt of the Commission to apply essential facilities doctrine to the railway industry was concerned with a conditional exemption under Article 81(3) granted to the railway service operators entering into a joint venture agreement.³³ In *European Night Services*, the Commission insisted on a conditional clearance of the agreement requiring parent companies “to provide locomotives, train crews and train paths” on a non-discriminatory basis to “any other undertaking wishing to compete in the running of a similar service”.³⁴ The Court of First Instance quashed the decision, as the Commission failed to prove that train paths, locomotives and crews were “necessary or essential” and therefore “the mere fact of [ENS] benefiting from such service” does not prevent or hinder downstream competition on the relevant market.³⁵ The *European Night Service* caution of the Court of First Instance against an unconditional application of essential facilities doctrine was fully taken into consideration by the Commission in its next decision on the railway industry. In the *GVG* decision,³⁶ the Commission indisputably proved that by refusing to deal with the rival’s requests for access to the railway network and traction services, the dominant undertaking “abused its dominant position in the infrastructure market with foreclosure effects in the downstream market”.³⁷

²⁹ Commission Decision *Sealink/B&I Holyhead: Interim Measures* [1992] 5 C.M.L.R. 255.

³⁰ N. Maltby “Restrictions on Port Operators: *Sealink/B&I Holyhead*”. E.C.L.R. [1993] p. 224. See also Case C-260/89 *Elliniki Radiophonia Tileorasi (ERT) v DEP* [1991] E.C.R. I-2925.

³¹ Commission Decision *Sea Containers Ltd/Stena Sealink* [1995] 4 C.M.L.R. 84; Commission Decision *Port of Rodby* [1994] 5 C.M.L.R. 457. and Commission Decision *Port of Roscoff* [1995] 4 C.M.L.R. 677.

³² *XXIIIe Report on Competition Policy* [1993]. Catalogue No: CM-82-94-650-xx-C.

³³ Commission Decision *European Night Services* [1995] 5 C.M.L.R. 76.

³⁴ Note 11 *supra* at 485.

³⁵ Cases T-374-375, 384 and 388/94 *European Night Services v Commission* [1998] E.C.R. II-3141. para 215, 216, 221. Basically, the court established following criteria for certain facilities to be essential, namely (i) “infrastructure, products or services cannot be interchangeable”, (ii) “there must not exist viable alternative to potential competition” and (iii) “without getting access to such facilities, the competitor would be excluded from the market”. It is important to mention that in a case of existing customers, the refusal to supply/ grant access is an abuse *ipso facto*, however in a case of new entrants the court assesses whether the product, service or infrastructure constitute an “essential facilities”. See O. Stehmann. “Applying “Essential Facility” Reasoning to Passenger Rail Services in the EU – the Commission Decision in the *GVG*”. E.C.L.R. [2004].

³⁶ Commission Decision *GVG/FS* [2003] O.J. L11/17.

³⁷ O. Stehmann. “Applying “Essential Facility” Reasoning to Passenger Rail Services in the EU – the Commission Decision in the *GVG*”. E.C.L.R. [2004]. p. 392.

3.1.3. Access to Telecommunication Facilities:

In *BT*,³⁸ the Commission for the first time relied on essential facilities doctrine to encourage liberalisation of telecommunication market.³⁹ It found *BT* abusing its dominant position in the telecommunications systems market by taking measures to prevent certain private agencies from offering “telex messaging forwarding” type of services.⁴⁰ The Court of Justice has followed *BT* approach in the *Telemarketing* case,⁴¹ where “a state broadcaster refused to supply airtime to a telemarketer, thereby denying it an essential raw material by which it could then offer/provide its services”.⁴² The Court of Justice declared that the dominant undertaking abused its dominant position on the broadcasting market by refusing to grant competitors access to this essential facility and therefore effectively foreclosing downstream market of telemarketing services.⁴³ The aforementioned legal trend coincides with the general policy statement on liberalization of EU telecommunication industry reflected in the *Access Notice*.⁴⁴ The *Access Notice* expressly provides that the Commission “must ensure that the control over facilities enjoyed by incumbent operators is not used to hamper the development of a competitive telecommunications environment”.⁴⁵ Therefore, “a company which is dominant on a market for services and which commits an abuse contrary to Article 82 E.C. on that market may be required, in order to put an end to the abuse, to supply access to its facility to one or more competitors on that market”.⁴⁶

3.1.4. Access to Other Facilities:

For the sake of brevity it is suffice to say that in the name of facilitating development and encouraging private investment, the Commission has applied essential facilities doctrine to other “natural monopoly” sectors of EU economy.⁴⁷ For instance, the Commission has acknowledged application of essential facilities doctrine to oil and gas pipelines in *XXIIIrd Report on Competition Policy*.⁴⁸ However, vigorous attempts of the Commission to rely on essential facilities doctrine in cases tackling industries falling short of “inevitable” monopoly characteristics were less successful.

³⁸ Commission Decision N 82/861/EEC *British Telecommunication* [1983] 1 C.M.L.R. 457. See also Case C-41/83 *Italy v. Commission* [1985] E.C.R. 873.

³⁹ H. Ungerer. “Ensuring Efficient Access to Bottleneck Network Facilities. The Case of Telecommunications in the European Union”. Available on the Internet at http://europa.eu.int/comm/competition/speeches/text/sp1998_056_en.pdf at 3. Accessed on 10 January 2005.

⁴⁰ Note 38 *supra* at para. 30.

⁴¹ Case 311/84 *Centre Belge D'études de Marché - Télémarketing (CBEM) v SA Compagnie Luxembourgeoise de Télédiffusion (CLT) and Information Publicité Benelux (IPB)* [1985] E.C.R. 3261.

⁴² Note 28 *supra* at 114.

⁴³ *Ibid.*

⁴⁴ *Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector*. [1998] O.J. C265. p. 2.

⁴⁵ Note 44 *supra* at 25.

⁴⁶ *Ibid.*

⁴⁷ The Commission also relied on essential facilities doctrine in *ClearStream* decision, where “an undertaking dominant on the market for the provision of primary clearing and settlement services” was found abusing its dominant position by denying a competitor clearing and settlement services. See A. Jones and B. Sufirin. “*EC Competition Law: Text, Cases, and Materials*”. 2nd Ed. Oxford University Press. New York. [2004]. at 492. See also Commission Decision *Clearstream Banking AG and Clearstream International SA* [2004] IP/04/705.

⁴⁸ In regards to the oil and gas pipelines see *Disma Commission's XXIIIrd Report on Competition Policy* [1993] pp. 141-143.

3.2. *The Stumbling Block of Essential Facilities Doctrine: The Bronner Case*

When demanding access to the rival's home delivery service, a newspaper publisher relied before the Austrian national court on the *Sabena* decision⁴⁹, where Commission forced an undertaking to grant its competitors access to the computerised airplane ticket reservation scheme. The Austrian national court referred to the Court of Justice an issue on whether a refusal of an undertaking to grant access to its nation-wide newspaper delivery scheme constitutes an abuse of a dominant position.⁵⁰ Although leaving it for the referring Austrian court to decide on whether an undertaking in question was in a dominant position and whether its refusal to grant access to the home delivery scheme constituted an abuse of the dominant position, the Court of Justice provided detailed guidelines on the issue under consideration. The proponents of essential facilities doctrine heavily criticised the *Bronner* judgment for limiting the scope of its application, thus deviating from "the earlier cases that are seen as application of the doctrine", in particular the *Sabena* and *Aer Lingus* decisions of the Commission.⁵¹ The following section analyses the opinion of Advocate General Jacobs and judgment of the Court of Justice to address this criticism.

3.2.1. *Reassessing Essential Facilities Doctrine: AG Opinion in Bronner Case*

In the opinion submitted to the Court of Justice by Advocate General Jacobs, "the right to choose one's trading partners and freely to dispose of one's property" was acknowledged as a generally recognised principle.⁵² It was reasonably suggested that to avoid overextension of Article 82 E.C., interference with a dominant undertaking's freedom to contract requires a careful balancing of conflicting considerations.⁵³ The Advocate General emphasised that "an application of essential facilities doctrine... can be justified only in cases in which the dominant undertaking has a genuine stranglehold on the related market", which "might be the case... where duplication of the facility is impossible or extremely difficult owing to physical, geographical or legal constraints or is highly undesirable for reasons of public policy".⁵⁴ Therefore, a refusal to grant access should not amount to an abuse of a dominant position, unless it becomes extremely difficult for any other undertaking to compete on the relevant downstream market.⁵⁵ Finally, the Advocate General warned the Court of Justice that unmeritorious invocation of essential facilities doctrine would "lead the Community and national authorities into detailed regulation of the Community markets, entailing the fixing of prices and conditions for supply in large sectors of economy".⁵⁶ The Court of Justice agreed with the Advocate General on most of the points, when it concluded that a refusal of an undertaking to grant access to a nation-wide delivery scheme "does not constitute abuse of a dominant position within the meaning of Article 82 E.C.".⁵⁷

3.2.2. *The Tripartite Cumulative Test: The Bronner Paradigm*

In the *Bronner* case, the Court of Justice defined three requirements for an abuse of a dominant position, namely (i) a refusal is "likely to eliminate all competition in the

⁴⁹ Commission Decision *London European – Sabena* [1988] O.J. L 317/47.

⁵⁰ Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint* [1998] E.C.R. I-7791.

⁵¹ M. Bergman. "The Bronner Case – A Turning Point for the Essential Facilities Doctrine?" E.C.M. R. [2000] p. 62.

⁵² Note 24 *supra* at para. 56.

⁵³ Note 24 *supra* at para. 57.

⁵⁴ Note 24 *supra* at para. 65.

⁵⁵ Note 24 *supra* at para. 66.

⁵⁶ Note 24 *supra* at para. 69.

⁵⁷ Note 50 *supra* at para. 47.

downstream market on the part of the person requesting the service”,⁵⁸ (ii) a refused service is “indispensable to business in that downstream market, in that there would be no actual or potential substitutes in existence for it”,⁵⁹ and (iii) there is “no objective justification for the refusal”.⁶⁰ The author analyses the two newly emerged requirements of abuse, since requirement on objective justification has already been briefly addressed in the earlier discussion of the *Commercial Solvents* doctrine.

In regard to the first requirement on elimination of competition in the downstream market, it suffices to say that this requirement is just another way of saying whether the competitor “refused the service can continue to compete without that service”, which is a question of whether there are substitutes available to him”.⁶¹ Thus, the question of availability of substitutes should have already been addressed on the stage of determining the dominant position of the undertaking by analysing relevant product and geographical markets. The second requirement of the *Bronner* paradigm constitutes a mixture of substitutability and indispensability criteria. As regards indispensability criterion, the Court requires “proof that a second home-delivery service for a comparable circulation would not be economically viable” or in other words “whether anyone could realistically be expected to provide a substitute”.⁶² However, “the effect of such potential competition should already have been considered during the determination of the relevant market”.⁶³ Accordingly, the Court of Justice demanded nothing going beyond the *Commercial Solvents* doctrine, as if a dominant position of an undertaking under consideration was accurately defined, there should be no difficulties in meeting the same requirements of substitutability and indispensability on the later stage of determining an abuse. Thus, the Court of Justice clearly emphasised that a prejudice to other requirements of Article 82 E.C. would lead to unlikeable overextension and unmeritorious application of essential facilities doctrine.

3.2.2. Challenging *Sabena* and Distinguishing *Aer Lingus* Decisions:

The *Bronner* judgment was also heavily criticised for deviating from the earlier cases that have been seen as an application of essential facilities doctrine, in particular the *Sabena* and *Aer Lingus* decisions of the Commission.⁶⁴ Although paying due respect to the authority of the Commission, one should not forget that *Sabena* and *Aer Lingus*⁶⁵ escaped scrutiny of the Community courts. Therefore, the accuracy of the Commission’s analysis remained a fruitful ground for endless speculations. For instance, it is reasonable to suggest that the Commission was mistaken in defining a relevant market in the *Sabena* decision. For the purpose of this article it shall suffice to say that the Commission has classified the relevant market as a computerised reservation service, controversially leaving outside of its scope, less efficient and convenient, but still considerably popular ways of reservation by telephone and consultation by travel agencies of schedules and tariffs.⁶⁶ Therefore, it is rational to suggest that if there was an appeal against this decision under Article 230 E.C., the outcome of the case might be similar to that in the *European Night Services* case. As regards the *Aer Lingus* decision,⁶⁷ it appears that the case is concerned with a duty to deal under special

⁵⁸ Note 50 *supra* at para. 41.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ Note 2 *supra* at 259.

⁶² Note 50 *supra* at para. 44. Cf. R. Whish. “Recent Developments in Community Competition Law 1998/99” E.L.R. Vol. 25; No. 3. [2000] pp. 219 and 235.

⁶³ Note 2 *supra* at 259.

⁶⁴ Note 51 *supra* at 62.

⁶⁵ Note 49 *supra* at para. 14.

⁶⁶ *Ibid.*

⁶⁷ Commission Decision *British Midland/Aer Lingus* [1992] OJ L96/34.

responsibility of a dominant undertaking to compete solely on the merits, rather than with a refusal to grant access to essential facilities. As Commission has pointed out itself “a refusal to interline for reasons other than problems with currency convertibility or doubts about the creditworthiness of the beneficiary airline is a highly unusual step and has up to now not been considered by the European airline industry.... as a normal competition on the merits”.⁶⁸ Consequently, it is hardly possible to criticise the Court of Justice for deviating from the previously settled corpus of legal rules on refusal to grant access to essential facilities.

3.2.3. *Boundaries of Essential Facilities Doctrine:*

As regards criticism of the *Bronner* judgment for shifting essential facilities doctrine towards pure natural monopoly type cases, the author considers it rather as a complimentary ode. Indeed, “essential facilities, and the obligations on essential facilities owners... should be identified only in circumstances where competition does not and cannot be expected to operate”.⁶⁹ Its application may be justified “where economy of scale and investment logistics militate against the development of parallel infrastructures”⁷⁰ or “where replication is... against the public interest on other grounds, such as environmental considerations”.⁷¹ Moreover, in the light of gradually growing incapacity of public authorities to ensure effective and efficient operation of infrastructure, “the private sector must be permitted greater latitude to ensure that infrastructure meets rational economic criteria and related services are priced at long-term competitive levels”.⁷² The Court of Justice reflected most of the aforementioned considerations, when it reinforced the *Commercial Solvents* doctrine in *Bronner*, while at the same time leaving discretion to depart from the general rule in “exceptional circumstances”, such as those acquired in the *Magill* case.

4. REFUSAL TO LICENCE INTELLECTUAL PROPERTY: *MAGILL* DOCTRINE

There is “a perennially uneasy relationship between the ownership of intellectual property rights and the imperatives imposed by competition law” on undertakings holding a dominant position.⁷³ Despite sharing a common interest in promoting innovation, competition law and intellectual property law execute it “through diametrically opposed perspectives”.⁷⁴ Competition law acts “as a spur for innovation” by restricting market foreclosure, while intellectual property law encourages innovation by allowing IP holder “to reap monopoly profits”.⁷⁵ Thus, competition law applies case-by-case analysis on the “behavioural level”, whereas intellectual law operates on the “structural level”, where rewards and incentives apply to all relevant cases.⁷⁶ Accordingly, a conflict between competition law and intellectual property law may occur, when competition law interferes with “some of the behaviour that flows from the grant” of IP rights.⁷⁷ In other words, competition law accepts IP holder’s exclusive rights for intellectual creations, however it

⁶⁸ Note 67 *supra* at para. 25.

⁶⁹ D. Ridyard. “*Essential Facilities and the Obligation to Supply Competitors*”. E.C.L.R. [1996]. at 438.

⁷⁰ Note 28 *supra* at 110.

⁷¹ Note 11 *supra* at 482-483.

⁷² Note 28 *supra* at 115.

⁷³ B. Ong. “*Building Brick Barricades and Other Barriers to Entry: Abusing a Dominant Position by Refusing to Licence Intellectual Property Rights*”. E.C.L.R. [2005]. at 215.

⁷⁴ I. Maher. “*The Interface of EC Competition Law and Intellectual Property Rights: the Essential and the Creative*”. The Cambridge Yearbook of European Legal Studies. Vol. 7 [2005] p. 191.

⁷⁵ *Ibid.*

⁷⁶ A. Narciso. “*IMS Health or the Question Whether Intellectual Property Still Deserves a Specific Approach in a Free Market Economy.*” I.P.Q. [2003] p. 451.

⁷⁷ Note 76 *supra* at 452.

remains concerned with an IP holder erecting barriers to entry in “a downstream market which draws on these intellectual products as raw materials”.⁷⁸ One should remember that the solution of this conflict requires a careful balancing between facilitating competition through market entry by new competitors and preserving incentives for the dominant undertakings to invest and innovate. The following section analyses whether the Commission and Community courts found a suitable solution for both: IPR holders and their downstream competitors.

4.1. *The Scope of Interference with IPR: Volvo Case*

The Court of Justice clearly reversed IPO⁷⁹ argument that if a conduct of a dominant undertaking “consists of the exercise of a right classified by national law as ‘copyright’, such conduct can never be reviewed in relation to Article 82 E.C.”.⁸⁰ However, it has continuously emphasised that “the Treaty rules will not interfere with the ‘normal exercise’ of IP rights including actions to enforce an exclusive right to make or sell an IP protected product or refusing to grant a licence, even if it is an act of an undertaking holding a dominant position”.⁸¹ In the *Volvo* case⁸² the Court of Justice has acknowledged the right of IPR holder to exclude third parties from exploiting its design, as it “constitutes the very subject-matter of exclusive rights”.⁸³ Thus, the Court of Justice required some “additional factor” in conjunction with the elimination of competition from rivals in respect of IP protected product. It held that an exercise of IPR constitutes an abuse of a dominant position, if it is accompanied by “certain abusive conduct”, for instance an arbitrary refusal to supply original spare parts to independent repairers,⁸⁴ fixing prices of spare parts at unfair levels, and discontinuing production of spare parts for car that were still in circulation”.⁸⁵ The *Volvo* list of abusive conduct indicates that an IPR holder does not have “complete dominion over the exercise of its IP rights” in the dependent downstream market.⁸⁶ Thus, Article 82 E.C. may limit “the autonomy of the dominant undertaking to use IPR to exclude competitors from the aftermarket, even if it is not dominant on that aftermarket”.⁸⁷ The examples provided by the Court of Justice in *Volvo* case were not meant “to be exhaustive of the ‘plus factors’ which had to be present to convert a refusal to licence into an abuse of dominance, but neither were they entirely satisfactory given the uncertainty introduced into the commercial dealings of intellectual property right holders”.⁸⁸

⁷⁸ *Ibid.*

⁷⁹ Acronym for Intellectual Property Owners Association. See IPO official web page at <http://www.ipo.org/>

⁸⁰ Case C-241 & 242/91 *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* [1995] E.C.R. I-743 on appeal from Cases T-69-70/89, 76/89, *RTE, ITP, BBC v EC Commission* [1991] E.C.R. II-485, on appeal from *Magill TV Guide* [1989] O.J. L78/43.

⁸¹ S. Anderman, “Does the Microsoft Case Offer a New Paradigm for the ‘Exceptional Circumstances’ Test and Compulsory Copyright Licenses under EC Competition Law?” C.L.R. Vol. 1; Issue 2. [2004] p. 8.

⁸² Case 238/87 *AB Volvo v Erik Beng* [1988] E.C.R. 6211; Case 53/87 *CICCRA and Maxicar v Renault* [1988] E.C.R. 6039.

⁸³ Note 82 *supra* at para 8.

⁸⁴ Commission Decision *Liptons Cash Registers/Hugin* [1978] O.J. L22/23.

⁸⁵ Note 82 *supra* at para. 9.

⁸⁶ Note 81 *supra* at 10.

⁸⁷ *Ibid.*

⁸⁸ Note 73 *supra* at 218.

4.2. *The Balance of Interests: The Magill Paradigm*

In the *Magill* case⁸⁹ the Court of Justice provided that a refusal to licence new entrants constitutes an abuse of a dominant position, if following conditions of an “exceptional circumstances” test are met, namely (i) the IPR holder prevents the appearance of a new product which has potential consumer demand, (ii) the IPR holder effectively reserves to itself a secondary market by excluding all competition on that market and (iii) the refusal is not objectively justifiable.⁹⁰ The key element of the present discussion is a “new product” criterion of *Magill* paradigm due to the fact that the other conditions of “exceptional circumstances” test are “of a piece with all the previous cases on interference with ancillary markets”.⁹¹ The Court of Justice was mainly concerned with the threat of market foreclosure, rather than with the leverage of an IPR holder on an ancillary market. Thus, an introduction of a “new product” criterion was an attempt of the Court of Justice to adopt the *Commercial Solvents* doctrine to the needs of IP law through balancing the interests of the IPR holders and their competitors on the downstream market. On another hand the Court of Justice reinforced its position that an abuse of a dominant position acquires, when an IPR holder’s refusal is accommodated with “certain abusive conduct” under Article 82 E.C.. It found that a “prevention of a new product for which there is a potential consumer demand constitutes an abuse of dominant position”⁹² under Article 82(b), which provides “limiting production, markets or technical development to the prejudice of consumers” constitutes an abuse of the dominant position.⁹³ Although it appears reasonably clear that the *Magill* paradigm’s requirements are cumulative, the Court of Justice has not expressly pronounced on this highly important issue causing legal uncertainty evident from the subsequent cases on refusal to licence copyrights.

4.3. *Interpreting Magill Paradigm: Landbroke and IMS Cases:*

In the *Ladbroke* case⁹⁴ the Court of First Instance stated that “the refusal to supply the applicant could not fall within the prohibition laid down by Article 82 unless it concerned a product or service which was *either* essential for the existence of the activity in question, in that there were no real or potential substitute, *or* was a new product whose introduction might be prevented, despite specific, constant and regular demand on the part of consumers”. Thus, the Court of First Instance applied the “new product” criterion of the *Magill* paradigm with a new requirement on “indispensability of IP protected product” for the competition on the downstream market. One could follow a literal interpretation of the aforementioned passage of the judgment, to suggest that if a product or service is essential for the downstream competition, then there is no need for a new product and *vice versa* “a refusal to supply which precluded the introduction of a new product might constitute an abuse for that reason alone, even if the access demanded is not essential”.⁹⁵ However, a literal interpretation becomes difficult, when the aforementioned passage is put in context with the rest of the *Landbroke* judgment.⁹⁶ Thus, if the criteria were alternatives, the Court of

⁸⁹ Cases C-241-242/91 *P, RTE & ITP v Commission* [1995] E.C.R. I-743 on appeal from Cases T-69-70/89, 76/89, *RTE, ITP, BBC v EC Commission* [1991] E.C.R. II-485, on appeal from *Magill TV Guide* [1989] O.J. L78/43.

⁹⁰ Note 89 *supra* at para 52, 54-56.

⁹¹ Note 11 *supra* at 499.

⁹² H. Meinberg. “From *Magill* to *IMS Health*: The New Product Requirement and the Diversity of Intellectual Property Rights.” E.I.P.R. [2006] p. 401.

⁹³ Cf. A. Narciso. “*IMS Health* or the Question Whether Intellectual Property Still Deserves a Specific Approach in a Free Market Economy.” I.P.Q. [2003] p. 460.

⁹⁴ Case T-504/93 *Tierce Ladbroke SA v Commission* [1997] E.C.R. II-923. para. 131

⁹⁵ Note 11 *supra* at 502.

⁹⁶ Note 76 *supra* at 462.

Justice would have needed to deal with the “new product” requirement “in much more depth even if the truth is probably that the emergence of a new product was not blocked”.⁹⁷ Undoubtedly, an equivocal judgment of the Court of First Instance in the *Landbroke* case splits the opinion on whether the requirements of exceptional circumstances test are cumulative or alternative. Fortunately, the Court of Justice faced an opportunity to clarify the *Magill* judgment in *IMS*.

Although the *IMS* case⁹⁸ arose before the Court of Justice from a preliminary reference by a German national court, it would be appropriate first to address briefly the decision of the Commission on interim measures against *IMS*.⁹⁹ In the *IMS* decision the Commission has relied on a literal interpretation of the *Landbroke* case, thus insisting on non-compulsory nature of a “new product” criterion of the *Magill* paradigm.¹⁰⁰ It has considered that the mere fact of an IP protected product becoming a *de facto* industrial standard constitutes “exceptional circumstances” within the meaning of the *Magill* case.¹⁰¹ The Commission argued that a refusal to licence constitutes an abuse of a dominant position, if a copyrighted product is “indispensable for carrying on business on the downstream market” and refusal to licence copyrights threatens with elimination of all competition on that aftermarket.¹⁰² However, the Court of Justice acknowledged in its own *IMS* judgment that the Commission had been misguided in its reliance on a literal interpretation of the *Landbroke* case.

In *IMS*, the Court of Justice has expressly pronounced on a cumulative nature of the *Magill* exceptional circumstances test, when it stated that “in order for the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it is sufficient that three cumulative conditions be satisfied, namely, that ... refusal is preventing the emergence of a new product for which there is a potential consumer demand, that it is unjustified and such as to exclude any competition on a secondary market”.¹⁰³ The Court of Justice underlined the inescapability of the “new product” requirement for balancing “the interest in protection of copyright and the economic freedom of its owner, against the interest in protection of free competition”.¹⁰⁴ Thus, the refusal to licence copyrighted product indispensable for operation on the secondary market constitutes an abuse of a dominant position, when “the undertaking which requested the licence does not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the copyright, but intends to produce new goods or services not offered by the owner of the right”.¹⁰⁵ Unfortunately, the Court of Justice neither defined the concept of a “new product” nor provided any guidelines on the degree of novelty required by the court. However, if the Court of Justice “sticks to the meaning ‘new’ in the *Magill* case, then the product must definitely be different to be considered new”.¹⁰⁶ As regards requirement on elimination of competition on the secondary market, the Court of Justice held that “in order to assess whether the refusal to grant access to a product or a service indispensable for carrying on a particular business activity was an abuse, [it is necessary] to distinguish an upstream market,

⁹⁷ *Ibid.*

⁹⁸ Case C-418/01 *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* [2004] 4 C.M.L.R. 1543.

⁹⁹ Commission Decision *NDC Health/IMS: Interim Measures* [2002] O.J. L59/18.

¹⁰⁰ Note 99 *supra* at para. 180.

¹⁰¹ *Ibid.*

¹⁰² Note 99 *supra* at para. 181.

¹⁰³ Note 98 *supra* at para. 38.

¹⁰⁴ Note 98 *supra* at para. 48.

¹⁰⁵ Note 98 *supra* at para. 49.

¹⁰⁶ E. Derclaye. “*The IMS Health Decision and the Reconciliation of Copyright and Competition Law*”. E.L.R. [2004] p. 696.

constituted by the product or service and downstream market, on which the product or service in question is used for the production of another product or the supply of another service".¹⁰⁷ However, the Court of Justice accepted that an existence of a potential or hypothetical upstream market would be sufficient for the application of *Magill* paradigm.¹⁰⁸ Accordingly, "it was suffice to show that there were two different stages of production, with an upstream product that was indispensable to the supply of the downstream product".¹⁰⁹ Although this approach corresponds with the previous case law on mandatory dealing, it nonetheless attracts criticism for qualitative, rather than quantitative approach to assessment of factual situation. In addition, the *IMS* case was heavily criticised for unacceptable interference in the domain of IP law.

4.4. *The Extend of Interference with IP Law: IMS Case*

Undoubtedly, competition law should respond to anti-competitive conduct that flows from the grant of IP rights, however the dilemma remains "whether the *Magill* approach should be followed in all cases involving refusals to grant copyright licences" or "whether the role of competition law in circumscribing the proprietary rights of the copyright owner should be limited more precisely to the way in which copyright was used and abused".¹¹⁰ In the *Magill* case the essence of an abuse was a refusal "to provide basic information by relying on national copyright provisions", so preventing an appearance of a new product on the downstream market.¹¹¹ It appears that "copyright was therefore used as an instrument to deny access to information which the dominant firm was obliged to provide, under the 'special responsibility' imposed on it by established principles of European competition law".¹¹² Contrary, in the *IMS* case, the competitors demanded access to the copyrighted subject matter itself, rather than the information contained in the system for representation of regional pharmaceutical sales data. Thus, *IMS'* refusal to licence a copyrighted product was a 'normal exercise' of an IPR within the meaning of the *Volvo* case, as was concerned with an affirmation of *IMS* exclusivity in respect of the intangible subject matter which comprised its intellectual property rights. The anti-competitive nature of *IMS'* refusal to licence a copyrighted product is objectionable because of "the nature of the subject-matter that is claimed by way of copyright and the manner in which that subject-matter was developed with the participation of customers in the market".¹¹³ However, the aforementioned issues should be addressed "endogenously within the law of copyright, which has its own internal checks and balances to ensure that broader aspects of the public interest are properly accommodated within the framework of private rights created by the copyright system".¹¹⁴ It is clearly not for competition law "to resolve the shortcomings of an over-expansive copyright law or a failure by the customers properly to establish ownership of the copyright product".¹¹⁵ Thus, the Court of Justice has created a dangerous precedent, when competition law rules and principles interferes, supervises or even regulates issues that constitute an integral part of intellectual property law. However, even if one disagrees with the content of the judgment, the *IMS* case has significantly clarified previous case law on refusal to licence copyrighted subject matter.

¹⁰⁷ Note 98 *supra* at para. 42.

¹⁰⁸ Note 98 *supra* at para. 44.

¹⁰⁹ B. Ong. "Building Brick Barricades and Other Barriers to Entry: Abusing a Dominant Position by Refusing to Licence Intellectual Property Rights". E.C.L.R. [2005] p. 220.

¹¹⁰ *Ibid.*

¹¹¹ Note 109 *supra* at 223.

¹¹² Note 109 *supra* at 222.

¹¹³ B. Ong. "Anti Competitive Refusals to Grant Copyright Licences: Reflection of the *IMS* Saga". E.I.P.R. [2004] p. 508.

¹¹⁴ *Ibid.*

¹¹⁵ Note 74 *supra* at 206.

5. A NEW FORM OF THE EXCEPTIONAL CIRCUMSTANCES TEST: THE MICROSOFT PARADIGM?

An analysis of the case law on mandatory dealing would not be complete without at least brief comments on the recent decision of the Commission in *Microsoft*. In the *Microsoft* decision the Commission argued that a refusal to supply interoperability information to the existing competitors in the downstream market constitutes an abuse of a dominant position. Undoubtedly, the Microsoft copyrighted subject matter was an indispensable input for the innovative product which had a substantial demand. However, "it is evident from the market facts ... that Microsoft's refusal to supply this interface information has not eliminated all competition from the secondary market for server software, even if it has given Microsoft a competitive advantage".¹¹⁶ Nevertheless, "there is a risk of elimination of competition in the work group operating system market" due to the fact that "Microsoft's market share has increased swiftly" reaching dominance on the relevant market.¹¹⁷ Indeed, it might be suggested that "taking an appropriately dynamic view of the market, and in view of the tendency for some high tech markets to "tip", failure to provide access to interoperability information today will condemn the server software market to near-certain monopolization of the relevant market" in the near future.¹¹⁸ However, as it was correctly pointed out, this kind of conclusion "requires some heroic leaps in the empirical analysis as well as some elastic manipulation of the legal concepts".¹¹⁹ Thus, the Commission adopted "altogether a more open-ended approach in which it reserves the right to consider the costs and benefits of mandating access, given the facts surrounding the case".¹²⁰ An open-ended approach threatens with a shift towards a new "convenient facilities doctrine, in a sense that an access is demanded to an asset without which it would be jolly inconvenient for the rivals to compete, as they would need "to offer customers a better product in order to overcome the advantages of the incumbent".¹²¹ Consequently, all aforementioned critical points are mainly concerned with the intent of the Commission to go beyond "exceptional circumstances" of the *Magill* case, as Microsoft's refusal to licence has fallen short of an elimination of all competition on the relevant market. The following section briefly addresses these critical comments on the *Microsoft* decision.

Although expressly pronouncing on the cumulative nature of the *Magill* criteria, the Court of Justice did not offer an exhaustive list of exceptional circumstances that transform refusal to licence a copyrighted product into abuse of a dominant position within the meaning of Article 82 E.C..¹²² In the *Microsoft* decision¹²³ the Commission referred to "the totality of the circumstances", thus avoiding "the task of fitting these within the four corners of the 'exceptional circumstances'" of the *Magill* case.¹²⁴ Moreover, a further circumstance distinguishes the *Microsoft* case on the merits from the rest of the case law on refusal to licence intellectual property rights. Microsoft has opted for an "open system as a strategy to grow and achieve dominance," thus acquiring special responsibility under Article 82(b) E.C. to supply its existing customers even after leveraging on the downstream market. Therefore, compulsory copyright licence should also be awarded in the 'exceptional circumstances',

¹¹⁶ D. Ridyard. "Compulsory Access under EC Competition Law – A New Doctrine of "Convenient Facilities" and the Case for Price Regulation". E.C.L.R. [2004]. p. 670.

¹¹⁷ Commission Decision *Microsoft* [2004] COMP/C-3/37.792. para. 781

¹¹⁸ Note 116 *supra* at 670.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² Note 81 *supra* at 13.

¹²³ Commission Decision *Microsoft* [2004] COMP/C-3/37.792.

¹²⁴ Note 81 *supra* at 15.

when a dominant undertaking refuses “to supply interface code information or licence existing innovative downstream operators with predatory intent”.¹²⁵ Accordingly, a refusal to licence a copyrighted subject matter may result in abuse of a dominant position if (i) the refusal to licence a copyrighted subject matter is not objectively justifiable and (ii) the copyright holder refuses to licence existing downstream operators with predatory intent. Accordingly, the first requirement of the *Microsoft* paradigm ensures balance between competition law and intellectual property law, while the second one addresses predatory commercial strategies, which go beyond “competition on the merits” under Article 82(b) E.C.. According to the aforementioned considerations, it appears that the *Microsoft* paradigm corresponds with *Commercial Solvents* and other cases on mandatory dealing.

6. CONCLUDING REMARKS:

Despite facing comprehensive cases, the Community case law on mandatory dealing demonstrates consistency in application of Article 82 of E.C. Treaty. Although the Commission has continuously insisted on a conceptual independence of the essential facilities doctrine, the case law of Community courts demonstrates that all cases on mandatory dealing fall with the framework of the *Commercial Solvents* doctrine. The Community courts distinguish between cases on refusal to supply or to grant access to tangible property and cases on refusal to licence intellectual property rights. However, the emerging *Microsoft* paradigm clearly illustrates that “when considering exceptional circumstances test, regard has to be had to both sets of cases even if the test is not quite the same in both contexts”.¹²⁶ It must be admitted, though, that the Court of Justice has failed to tackle all vitally important issues arising out of the cases on mandatory dealing. For instance, further clarification is required on the “new product” and “objective justification” criteria, which constitute critical elements of exceptional circumstances test, “where the balance between different approaches to the promotion of innovation by competition law and IP law” should be addressed.¹ Furthermore, the *IMS* case clearly demonstrates that the Community corpus of legal rules on mandatory dealing is hardly a lock-pick to every lock. Thus, the Community and its Member States institutions should facilitate a process of harmonisation of intellectual property laws to avoid in the future disrupting interferences within the areas constituting an integral part of intellectual property law. It remains to be seen whether the Community judiciary will address aforementioned issues in the upcoming *Microsoft* judgment.

¹²⁵ Note 81 *supra* at 16.

¹²⁶ Note 74 *supra* at 210.

¹ *Ibid.*

BIBLIOGRAPHY

1. A. Jones and B. Sufrin. *“EC Competition Law: Text, Cases, and Materials”*. 2nd Ed. Oxford University Press. New York. [2004].
2. A. Narciso. *“IMS Health or the Question Whether Intellectual Property Still Deserves a Specific Approach in a Free Market Economy.”* I.P.Q. [2003].
3. B. Doherty. *“Just What are Essential Facilities?”* C.M.L.R. Vol. 38; No. 2. [2001].
4. B. Ong. *“Building Brick Barricades and Other Barriers to Entry: Abusing a Dominant Position by Refusing to Licence Intellectual Property Rights”*. E.C.L.R. [2005].
5. B. Ong. *“Anti Competitive Refusals to Grant Copyright Licences: Reflection of the IMS Saga”*. E.I.P.R. [2004].
6. C. Stothers. *“Refusal to Supply as Abuse of a Dominant Position: Essential Facilities in the European Union”*. E.C.L.R. Vol. 22; No. 7. [2001].
7. D. Ridyard. *“Essential Facilities and the Obligation to Supply Competitors”*. E.C.L.R. [1996].
8. D. Ridyard. *“Compulsory Access under EC Competition Law – A New Doctrine of “Convenient Facilities” and the Case for Price Regulation”*. E.C.L.R. [2004].
9. E. Derclaye. *“The IMS Health Decision and the Reconciliation of Copyright and Competition Law”*. E.L.R. [2004].
10. F. Wooldridge. *“The Essential Facilities doctrine and Magill II: The Decision of the ECJ in Oscar Bronner”*. I.P.Q. [1999].
11. H. Meinberg. *“From Magill to IMS Health: The New Product Requirement and the Diversity of Intellectual Property Rights.”* E.I.P.R. [2006].
12. H. Ungerer. *“Ensuring Efficient Access to Bottleneck Network Facilities. The Case of Telecommunications in the European Union”*. Accessed on 10 January 2005.
13. I. Maher. *“The Interface of EC Competition Law and Intellectual Property Rights: the Essential and the Creative”*. The Cambridge Yearbook of European Legal Studies. Vol. 7 [2005].
14. M. Bergman. *“The Bronner Case – A Turning Point for the Essential Facilities Doctrine?”* E.C.M. R. [2000].
15. N. Maltby *“Restrictions on Port Operators: Sealink/B&I Holyhead”*. E.C.L.R. [1993].

-
16. O. Stehmann. *"Applying "Essential Facility" Reasoning to Passenger Rail Services in the EU – the Commission Decision in the GVG"*. E.C.L.R. [2004].
 17. R. Whish. *"Competition Law"*. 5th Ed. LexisNexis. London. [2001].
 18. R. Whish. *"Recent Developments in Community Competition Law 1998/99"* E.L.R. Vol. 25; No. 3. [2000].
 19. S. White. *"Is There a Role for an "Essential Facilities" Doctrine in Europe?"* C.T.L.R. [1995].
 20. S. Anderman. *"Does the Microsoft Case Offer a New Paradigm for the 'Exceptional Circumstances' Test and Compulsory Copyright Licenses under EC Competition Law?"* C.L.R. Vol. 1; Issue 2. [2004].