

*“Consumer welfare requires a balance between the need for patents and effective competition”*

By Laura Holt

## Abstract

Whilst intellectual property (IP) and competition law pursue the common aim of improving consumer welfare the interplay between the two presents a distinct dilemma. Competition law restricts activities that obstruct fair competition, IP law grants legal monopoly rights. Competition law attempts to promote innovative markets by maintaining competition. Consumer welfare is considered maximised where competitors strive to produce new, better and more affordable products. In contrast, IP law attempts to encourage investment in innovation by granting an exclusive legal right to exploit, guaranteeing the IP owner a chance of remuneration free from the burden of direct competition.

Competition law must consider how it interfaces with IP law to overcome the apparent dichotomy. This is currently a hot topic within European Community (EC) competition law after the record fines<sup>1</sup> imposed on Microsoft for stifling innovation by refusing to license copyright protected software to allow interoperability. It is submitted that such fines could also potentially be levied against patent owners using the same legal tests for abuse. However, since the tests used lack clarity patent owners are left unsure of the extent of their rights, undermining the very incentive the monopoly seeks to provide. The result is that despite special provision made for patents within EC competition law, the balance between the benefits of the patent monopoly and competition is tenuous.

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<sup>1</sup> Microsoft was fined an initial €97m, then a record, in March 2004. Another €80.5m in July 2006 for non-compliance with the EC ruling and on February 27 2008 a further €899m fine was imposed for charging 'unreasonable' prices to rivals for access to its dominant software, Commission Press release "Commission imposes €899 million penalty on Microsoft for non-compliance with March 2004 Decision" IP/08/318

# 1. EC Competition Law and Patents

Whilst domestic competition law and provisions within domestic patent law<sup>2</sup> provide control of anti-competitive behaviour within a country, in the context of the EC, it is practices which detract from the goal of a single market which are important. The European Competition Commission formulates policy and promotes competition in the EC by means of Articles 81 and 82 of the EC Treaty. In the absence of a ‘Community Patent’<sup>3</sup> (which seeks to unify patent law across the EC) the grant and enforcement of patents remains a matter for domestic law.

EC Competition law fully recognises the benefits of patents in generating incentives to innovate and the dissemination of knowledge. The ECJ<sup>4</sup> has confirmed this and IP rights are firmly recognised in EC legislation<sup>5</sup>. Nevertheless patents are subject to EC competition law restrictions. Immunity from the effect of EC competition law is not conferred because of compliance with domestic patent legislation. Moreover, the courts will not enforce IP rights if so doing infringes EC competition law<sup>6</sup>.

The difficulty is that too tight a restriction could be deleterious to innovation. Where companies cannot be sure of a guaranteed monopoly on their research investments, they may be dissuaded from carrying them out. Microsoft likened the European Commission’s recent ruling “*to opening the vaults of a bank and handing out money to passers by*”<sup>7</sup>. Furthermore, dissemination of knowledge could be hindered if, for example, the terms permitted in licensing agreements exclude those that are commercially indispensable to induce licensors to license their technology. On the other hand, too loose a restriction could prevent the development of new innovation as patent owners become able to block

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<sup>2</sup> The UK Patent Act 1977 for example contains compulsory licence provisions, s.48

<sup>3</sup> COM(2000) 412 final (not in force)

<sup>4</sup> Parke Davis & Co v. Probel (Case 24/67) [1968] E.C.R. 55

<sup>5</sup> E.g. Directive 2004/48/EC on the enforcement of intellectual property rights

<sup>6</sup> Intel Corp v. VIA Technologies Inc, [2002] EWCA Civ 1905, Philips Electronics NV v. Ingman Ltd [1998] 2 C.M.L.R. 839, British Leyland Motor Corp Ltd v. TI Silencers Ltd [1981] 2 C.M.L.R. 75

<sup>7</sup> T. BUCK, “Microsoft attacks Brussels in court”, Financial Times, 27 April 2006

the use of knowledge, charge at premiums and fail to innovate further in the absence of competition.

As a result of the careful balancing required the EC provides special provision for patents within its competition law. A good example of this is the considerable room for high return allowed for the patent<sup>8</sup>. This is deemed fair due to the high cost of innovation: “*the inventor is entitled to recover not only his production costs in the strict sense of reasonable profit margin but also his research and development expenditure*”<sup>9</sup>. Special Provision is also made in the application of Articles 81 and 82.

### **1.1 Article 81: the prohibition of anti-competitive agreements**

Article 81(1) prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which may limit competition in trade between Member States. With respect to patents Article 81 is particularly concerned with licensing agreements.

Licensing agreements can have pro-competitive effects such as enabling companies to benefit from synergies arising out of respective expertise and ensuring know-how is widely diffused throughout the single market. However, licensing agreements can also contain contractual restrictions which may be viewed as anti-competitive such as non-compete clauses which prevent a licensee handling competing goods, no challenge clauses which prevent the licensee challenging the validity of the right and clauses for the grant-back of know-how where licensees are compelled to license improvements.

Under Article 81(2) agreements offending 81(1) are void. Article 81(3) however renders 81(1) inapplicable to agreements with beneficial effects; it is through this Article that special provision for patents are made. This can be via block exemptions, in particular:

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<sup>8</sup> Parke Davis v. Probel (Case 24/67) [1968] E.C.R. 55

<sup>9</sup> Opinion of the Advocate General (M. Jean Mischo) in Consorzio Italiano della Componentistica di Ricambio per Autoveicoli and Maxicar v. Regie Nationale des Usines Renault (Case C-53/87) [1990] 4 C.M.L.R. 265.

the Research and Development (R&D) Block Exemption Regulation (2659/2000) and the Technology Transfer Block Exemption Regulation, TTBE, (240/1996 now replaced by 772/2004). These provide that certain agreements between parties with market shares below defined thresholds are exempt from Article 81(1).

The R&D Block Exemption Regulation acknowledges that research and development agreements do not generally give rise to competition concerns and the TTBE aims to encourage the dissemination of technical know-how in the Community. The TTBE guidelines also provide that there is no longer per-se a ban on no challenge clauses<sup>10</sup>, exclusive grant-back licences (provided they solely refer to improvements that cannot be separated from the licensed technology)<sup>11</sup> and non-compete restrictions (provided they do not restrict R&D or restrict the ability of the licensee to exploit its own technology)<sup>12</sup>. Together the exemptions aim to restrict behaviour which is anti-competitive whilst providing sufficient freedom for parties to create effective agreements.

Overall the availability of exceptions is dependent on the impact of the agreement on the competitive market structure of an industry. Under the TTBE licences between competitors are thus subject to stricter controls than those between non-competitors<sup>13</sup> and the R&D exemptions will not apply where a contractual provision restricts the freedom of a party from carrying out its own research in an unconnected field<sup>14</sup>. The underlying philosophy is that, despite possible benefits, an arrangement cannot be justified where competition may be eliminated<sup>15</sup>.

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<sup>10</sup> Para. 209. Commission Notice: Guidelines on the Application of Article 81 of the EC Treaty to Technology Transfer Agreements, 2004 O.J. (C 101) 2. These were previously prohibited following case law: Association des Ouvriers en Instruments de Precision (AOIP) v. Beyrard (Case 76/79) [1976] 1 C.M.L.R. D14, Windsurfing International v. Commission (Case C-193/83) [1986] 3 C.M.L.R. 489

<sup>11</sup> Para. 109. Commission Notice: Guidelines on the Application of Article 81 of the EC Treaty to Technology Transfer Agreements, 2004 O.J. (C 101) 2

<sup>12</sup> Para. 127. Commission Notice: Guidelines on the Application of Article 81 of the EC Treaty to Technology Transfer Agreements, 2004 O.J. (C 101) 2

<sup>13</sup> The TTBE applies only if competitors have combined market shares that do not exceed 20 percent (article 3.1). If the parties are non-competitors, none of them may have a market share in excess of 30 percent (article 3.2)

<sup>14</sup> Article 5(1)(a) Regulation 2659/2000

<sup>15</sup> The Commission does provide provision for 'drastic innovation' (e.g. CDs replacing the LP), where the innovator's licences of the breakthrough technology to its existing competitors may benefit from the more liberal regime applicable to non-competitors, Para.43. Commission Evaluation Report on the transfer of

The Commission's approach towards patent pools further illustrates this philosophy. A pool typically arises where parties combine technologies in a package that is mutually licensed between members. These have pro-competitive gains such as reducing end-product cost and offering one stop licensing of technologies covered by the pool. Despite these benefits the Commission considers a patent pool composed of *competing* patents will violate Article 81 since a pool that aggregates competing technologies and sets a single price for them eliminates competition<sup>16</sup>.

## 1.2 Article 82: the abuse of a dominant position

Article 82 is aimed at preventing exclusionary conduct and exploitation of customers by undertakings in dominant positions. Under Article 82 there is no presumption of dominance due to the existence of a patent. A special responsibility is however conferred on a dominant firm "*not to allow its conduct to impair genuine undistorted competition on the market*"<sup>17</sup>. For example, whilst non-dominant firms can charge royalties at whatever level the market can accommodate; dominant firms are restricted to be fair and not excessive<sup>18</sup>.

The test for dominance based on the existence of a patent is whether other means to compete are available that do not infringe the patent<sup>19</sup>. The standard setting process is an example of where patents can create dominance. Whilst normally the existence of a patent does not prevent alternative products being developed which circumvent it, once introduced into a standard, a patent attains a stronger position. Whilst the Commission recognises that standards can resolve interoperability issues and ultimately provide better

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technology block exemption regulation 240/96,2001 and as noted in F. CARLIN, "Technology Transfer - The review of the technology transfer block exemption", Competition Law Insight, 01/11/2003

<sup>16</sup> Para. 219-220 Para. 109. Commission Notice: Guidelines on the Application of Article 81 of the EC Treaty to Technology Transfer Agreements, 2004 O.J. (C 101) 2

<sup>17</sup> Para.57. *Nederlandsche Banden Industrie Michelin NV v. Commission of the European Communities* (Case 322/81) [1983] ECR 3461

<sup>18</sup> Para.17. *Sirena v. Eda Srl* (Case 40/70) [1971] C.M.L.R. 260

<sup>19</sup> Para.40. DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, December 2005, where it is highlighted that the creation of a barrier to entry can constitute dominance

value to consumers, it prohibits the use of a standard to hold up competitors by refusing to licence or doing so at high royalty rates. In October 2007, the Commission announced that it commenced proceedings against Qualcomm for charging disproportionate and discriminatory royalties when licensing patents essential to WCDMA standards used in 3G mobile phone services<sup>20</sup> and Rambus is currently accused of charging unreasonable royalties as a result of a patent ambush (when a member of a standardisation body fails to disclose patents which are later claimed to be essential)<sup>21</sup>.

### **1.3 The Protection of Competitive Market Structures**

The analysis thus far has highlighted how EC competition law will not tolerate patent exploitation that hinders competitive market structures. This was particularly evident in the *Tetra Pak Rausing SA v. Commission*<sup>22</sup> case where it was held that the mere acquisition of a patent right could constitute an abuse if it prevented competitors entering the market. When a patent is found to materially affect competitive market structures, EC competition law can significantly reduce the rights of patents owners.

The most controversial reduction in IP owner's rights is that of the compulsory licence. A compulsory licence requires an IP owner to grant market access despite its monopoly right. This may improve the competitive market structure, however can also lead to inefficient entry, encourage free riding and reduce incentives to invest and innovate. Although not relating specifically to patents, decisions in this area demonstrate the general approach of EC competition law towards IP and will be considered in greater detail.

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<sup>20</sup> Commission Press Release: Commission initiates formal proceedings against Qualcomm MEMO/07/389, 1st October 2007

<sup>21</sup> MEMO/07/330 of 23 August 2007. On 26/03/08 it was announced that the jury in the US found Rambus to have acted properly while a member of the standard-setting organization JEDEC. There has been no news from the Commission regarding this as of yet.  
[www.rambus.com/us/news/press\\_releases/2008/080326.html](http://www.rambus.com/us/news/press_releases/2008/080326.html)

<sup>22</sup> *Tetra Pak Rausing SA v. Commission* (Case T51/89) 1990 ECR II-309

## 2. Compulsory Licensing

It was concluded in *Volvo v. Veng*<sup>23</sup> that it is not *prima facie* an abuse under Article 82 for a dominant company to refuse to grant licenses. The case established that any obligation imposed by competition law on an IP owner to grant a licence in the primary market (the market in which the IP right granted a monopoly) would take away the very substance of the exclusive monopoly right. However the court went on to state that in secondary (dependent) markets there could be a duty to license. The reasoning was that an abuse would be established if the refusal did more than merely exercise rights to prevent a monopoly being infringed. This echoed the existence/exercise distinction which had been established in *Etablissements Consten SA and Grundig-Verkaufs-GmbH v. Commission*<sup>24</sup> where the court stated that its decision did not affect the grant of IP rights but only limited their exercise. To apply the distinction, the concept of specific subject matter (SSM) of the right concerned was developed; normally the exercise of the SSM will not offend against competition law. According to the ECJ the SSM of a patent consists in “*the exclusive right to use an invention with a view to manufacturing industrial products and putting them into circulation for the first time ... as well as the right to oppose infringements*”<sup>25</sup>.

This distinction is limited as an aid for establishing abuse as the SSM does not assist in the demarcation of conduct that can restrict competitive markets. The *Tetra Pak* case for example related to activity within the SSM. In “*Magill*”<sup>26</sup>, a case concerning copyright licences, whilst making reference to the “*essential function*”<sup>27</sup> of the IP the court considered that the competition provisions should be taken into account in determining

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<sup>23</sup> *Volvo v. Veng* (Case 238/87) [1989] CMLR 122

<sup>24</sup> *Etablissements Consten SA and Grundig-Verkaufs-GmbH v. Commission* (Case 56/64) [1966] ECR 299

<sup>25</sup> Para.9. *Centrafarm v. Sterling Drug* (Case C-15/74) [1974] 2 C.M.L.R. 480

<sup>26</sup> *Radio Telefis Eireann and Independent Television Publications Limited (Intellectual Property Owners Inc. intervening) v. E.C. Commission (Magill TV Guide Limited intervening)* (Joined Cases C 241–242/91P), [1995] 4 C.M.L.R. 718

<sup>27</sup> words equivalent to SSM

this essential function<sup>28</sup>. In that case it was the results of exercise that were subject to control rather than an exercise beyond the SSM<sup>29</sup>. This suggests the adoption of an effects based approach towards establishing abuse.

## 2.1 An Effects Based Approach

The effects based approach means that, on a case by case basis, it will be considered whether parties offend competition law. For IP owners this approach is far less friendly than the formalistic existence/exercise distinction since it creates a wider ambit of potential abuse. Under the existence/exercise distinction, provided an IP owner could establish that its activity was within the SSM, it could be certain its rights would not be diminished by competition law. Under the effects test it is not clear *ex-ante* what can constitute an abuse. This is of particular concern to consumer welfare as heightened legal uncertainty could make it difficult to estimate return on investment, meaning research intensive innovation does not emerge. Such problems with the approach were however avoided by the further condition in *Magill* that the exercise of IP would only constitute an abuse in ‘exceptional circumstances’.

The *Magill* decision stated that IP would offend competition law in certain exceptional circumstances and laid down criteria for such a finding. This provided IP owners with the tools to predict when their rights would be interfered with and thus security as to what was and was not acceptable. However, the conditions for exceptional circumstance laid down were referred to as sufficient rather than necessary<sup>30</sup> in the subsequent *IMS Health GmbH & Co OHG v. NDC Health GmbH & Co KG*<sup>31</sup> case and in the UK case of *Intel*

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<sup>28</sup> Para.28.Radio Telefis Eireann and Independent Television Publications Limited (Intellectual Property Owners Inc. intervening) v. E.C. Commission (Magill TV Guide Limited intervening)(Joined Cases C 241–242/91P), [1995] 4 C.M.L.R. 718

<sup>29</sup> I. HARACOGULOU, “Competition Law and Patents”, Edward Elgar Publishing (2008), chapter 5.2.1: The Existence/Exercise Distinction

<sup>30</sup> As noted by C HUMPE, “Article 82: Refusal to deal The Commission’s efforts to provide analytical guidance on the complex issues surrounding the law on refusal to deal merit cautious welcome”, Competition Law Insight 09/05/2006

<sup>31</sup> IMS Health GmbH & Co OHG v. NDC Health GmbH & Co KG, (Case C-418/01), [2004] All E.R. (EC) 813

*Corp v. VIA Technologies Inc*<sup>32</sup> the court decided that it was not inconceivable that the ECJ might widen its definition of exceptional circumstances; the Vice-Chancellor, Mummery L.J. stating that this “*approach seems to me warranted by the width of descriptions of abuse contained in Article 82 itself*”<sup>33</sup>. The initial clarity offered was thus blurred and after the finding of exceptional circumstances in *Microsoft Corp v. Commission of the European Communities*<sup>34</sup> it is submitted that the test has become rather vague.

## 2.2 The Microsoft Decision

The *Microsoft* case concerned (among other things)<sup>35</sup> the refusal, by Microsoft, to license its copyright protected interface for the Windows PC operating system (OS) to competing vendors of work group server OS. Microsoft was accused of leveraging its dominant position in the primary market to exclude competitors in a secondary market. The Commission found that exceptional circumstances warranting a compulsory licence were present and this was upheld by the ECJ.

Prior to the *Microsoft* decision, case law had suggested that the exceptional circumstances test was satisfied where, in the absence of an objective justification, the refusal is “*likely to eliminate all competition in the relevant market...[and]... is indispensable to carrying on business in as much as there was no real or potential substitute in existence.*”<sup>36</sup>. In establishing the first limb, the aspiring entrant had to show that without it, they would have been completely excluded<sup>37</sup>. With respect to the second limb, in *IMS* it was suggested that, a refusal to licence would be regarded as abusive only where “*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*

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<sup>32</sup> Intel Corp v. VIA Technologies Inc, [2002] EWCA Civ 1905

<sup>33</sup> Para. 48. Intel Corp v. VIA Technologies Inc, [2002] EWCA Civ 1905

<sup>34</sup> Microsoft Corp v. Commission of the European Communities (Case T-201/04) [2007] 5 C.M.L.R. 11

<sup>35</sup> The case also covered the illegal tie-in of Windows Media Player with the Windows operating system

<sup>36</sup> Para.41. Oscar Bronner GmbH & Co KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG (Case C-7/97) [1999] 4 C.M.L.R. 112

<sup>37</sup> European Night Services Ltd (ENS) v. Commission of the European Communities (Case T-374/94) [1998] 5 C.M.L.R. 718

*by the owner of the copyright, but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand*<sup>38</sup>.

Neither limb of this test was strictly satisfied on the facts of **Microsoft**. Microsoft's refusal to supply had not excluded all OS competition from the server market; there were alternatives available such as Novell's Netware, Linux and UNIX even though their respective markets were small<sup>39</sup>. Sun Microsystems, who sought the Commission's intervention, had stated that the reverse engineering process<sup>40</sup> was so complex that it could not obtain the interoperability information required before a new Windows version was released. It was thus held that the information was essential "*in order to remain a viable competitor on the market*"<sup>41</sup>. This decision widens the test of essentiality to include circumstances where a refusal to license affects the commercial viability of competitors even where alternative technology is available; "*a convenient facilities test*"<sup>42</sup>.

The second limb of the exceptional circumstances test was not satisfied since no new product was being obstructed. On the facts of **Microsoft** it was not clear that Sun intended to offer a new product to consumers. There was merely potential limitation of technical development that would otherwise be generated as a result of innovation spurred through competition. The Commission's finding was that: "*if Microsoft's competitors had access to the interoperability information that Microsoft refuses to supply, they could use the disclosures to make the advanced features of their own products [emphasis added]*"<sup>43</sup>.

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<sup>38</sup> IMS Health GmbH & Co OHG v. NDC Health GmbH & Co KG, (Case C-418/01), [2004] All E.R. (EC) 813 Para. 49

<sup>39</sup> Microsoft's share of the relevant server software market was estimated at around 60% with rival suppliers enjoying 5-25%.

<sup>40</sup> permitted under Article 6: Decompilation of the Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs

<sup>41</sup> Para. 360. Microsoft Corp v. Commission of the European Communities (Case T-201/04) [2007] 5 C.M.L.R. 11

<sup>42</sup> RIDYARD, "Compulsory Access under EC Competition Law" (2004) 25 E.C.L.R 669,670

<sup>43</sup> See para. 654. Microsoft Corp v. Commission of the European Communities (Case T-201/04) [2007] 5 C.M.L.R. 11 referring to recital 695 to the contested decision

The *Microsoft* case makes it clear that EC competition law finds abuse on a case by case basis considering the effects on competitive market structure. Infringement is not bound by an exhaustive checklist of exceptional circumstances. This approach provides a useful tool for protecting consumer welfare as it allows flexibility to enable competition law to catch a wide ambit of potential abuses. However, this approach does not provide clarity. There are no broad criteria against which a patent owner can determine what will constitute exceptional circumstances. For example, the widening of the new product and essentiality requirements in *Microsoft* means that now an IP owner might have to licence to parties *struggling* to compete when offering the *same* product. This is a significant incursion on the monopoly granted under IP law. It effectively revokes the granted monopoly. If IP owners cannot be sure of the extent of their rights this may act as a disincentive both to disseminating IP and investment in creating it. The law therefore needs to offer clarity by providing limits on the extent of the potential restrictions on IP before a balance can be reached between the benefits of competition and IP.

### 2.3 Limiting Competition Law Restrictions

Limiting mechanisms are present in the current law since an abuse will not be found, under Article 82 (despite a finding of exceptional circumstances) if objective justification is provided and Article 81 allows for similar justification through 81(3). However, these limiting mechanisms are inadequate.

Microsoft attempted to justify its refusal by submitting that its own incentive to innovate would have been reduced if a licence were granted<sup>44</sup>. That justification failed. It was held that the possible negative impact on the consumer as a result of Microsoft's loss of innovation incentive did not outweigh the positive impact on the level of innovation in the industry as a whole. Although the burden of proof fell on Microsoft to support its justification, it then fell to the Commission, where it proposed to make a finding of an abuse, to show that the arguments and evidence relied on could not prevail and, accordingly, that the justification could not be accepted. In doing so the Commission was

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<sup>44</sup> Para. 709. *Microsoft Corp v. Commission of the European Communities* (Case T-201/04) [2007] 5 C.M.L.R. 11

able to rely on an *assumption* that consumer harm would result from reduced competition. The court made it clear that EC competition law does not require proof of direct harm to consumers in order for its prohibitions to bite<sup>45</sup>. Protecting a competitive market structure in itself would safeguard the interests of consumers. The decision promoted the interests of competition based on speculative consumer harm.

Justification provision does not limit the extent of potential restrictions on IP where it can be nullified based on *speculative* theories. When abuse can be found where competitors are merely blocked without showing that consumer harm results, there is potential for the creation of a competitive structure which is based on governmental intervention as opposed to an evolutionary contest of the fittest. Qualcomm suggested that the purpose of complaints made against it were to enable complainants “*to renegotiate their licence agreements by seeking governmental intervention*”<sup>46</sup>. Whilst waiting for clear evidence of actual consumer harm may mean that enforcement comes too late when competition has been eliminated<sup>47</sup>, a failure at least to provide some evidence of likely harm (albeit indirect) risks creating a market in which competitors rather than consumers have the most to gain, an outcome that cannot be tolerated where competition law exists as a “*people’s policy*”<sup>48</sup>.

## 2.4 Consequences for Patents

It is perhaps questionable how far the refusal to license cases discussed concerning copyright applies to patents; in the obiter words of Laddie L.J. it is “*strongly arguable that not all intellectual property rights are equal. Some are more equal than others*”<sup>49</sup>. Indeed patents unlike copyright<sup>50</sup> have been through an examination process, meaning

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<sup>45</sup> Para. 664. *Microsoft Corp v. Commission of the European Communities* (Case T-201/04) [2007] 5 C.M.L.R. 11

<sup>46</sup> Hopson H., Treacy P., Taking on Qualcomm Patent abuse and FRAND in the spotlight, *Competition Law Insight*, 15/01/2008

<sup>47</sup> This was part of the reasoning behind the *Microsoft* decision

<sup>48</sup> Mario Monti, European Commissioner for Competition Policy, *Competition for Consumers Benefit*, 22 October 2004

<sup>49</sup> Para. 66. *Philips Electronics N.V. v. Ingman Limited*, [1998] 2 C.M.L.R. 839

<sup>50</sup> the compulsory licence in *IMS* was withdrawn in the end because in August 2000 the Frankfurt regional court decided that the database should not have been protected by copyright.

that the internal balances provided within the patent systems of the Member States should prevent anti-competitive abuse to some extent. The internal balances are reflected in the limitations on the subject matter, breadth and disclosure obligations of patent claims, its limited lifetime, and in exceptions such as compulsory licences for non-use of patents. Such provisions put limits on the extent of the monopoly granted.

The effectiveness of internal balances is currently restricted by the differences in domestic patent legislation, but even if the proposed Community patent were introduced it could not be relied upon to protect the consumer. Patent authorities cannot be expected to take account of anti-competitive effects of a patent at the point of conferring it. Competition authorities look at conduct after the patent has been granted when it is affecting the marketplace and therefore provide a second tier of regulation which is not restricted to the ‘one size fits all’ approach of the patent system. Indeed the World Trade Organisation agreement on Trade-Related aspects of Intellectual Property Rights (TRIPS), suggests the need for such supplementary regulation of IP<sup>51</sup>. The Commission exhibited such regulation when fining AstraZeneca €60 million for misusing patent system to delay market entry of competing generic drugs<sup>52</sup>.

It is thus likely that the approach taken under EC competition law towards the refusal to licence when considering copyright would equally apply to patents, despite the internal balance discussed. This was supported by Mummery L.J. in *Intel*, a case concerning patents, where he stated that in light of *Magill* the determination of abuse would require “*examination of the effects of the [patent]... policy on competition from other product*”<sup>53</sup>.

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<sup>51</sup> Article 8(2): Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology

<sup>52</sup> Commission Press Release: Commission fines AstraZeneca €60 million for misusing patent system to delay market entry of competing generic drugs IP/05/737, 15th June 2005

<sup>53</sup> Para.96. *Intel Corp v. VIA Technologies Inc* [2002] EWCA Civ 1905

### 3. Conclusion

Patents provide an incentive to innovate but they may in certain situations impair competitive market structures. Consumer welfare depends both on competition and innovation. Competition law must therefore balance the benefits of patents and competition. In general EC competition law seeks to ensure that the benefits of patents are allowed to exude. Patent pools and standards are therefore permitted even though they open the way for potential anti-competitive behaviour and block exemption is provided for agreements that promote innovation. However, as illustrated by the analysis of the EC approach towards compulsory licensing, it does not in fact achieve a balance between the benefits of patents and competition as it fails to provide certainty as to what will amount to abuse.

Furthermore, the law fails to adequately protect consumer welfare by not requiring some determination of likely consumer harm to establish abuse. Microsoft was fined simply because it “*impaired the effective competitive structure on the work-group server operating systems market by acquiring a significant market share*”<sup>54</sup>. In merger assessment the Commission specifically considers the consumer recognising that “*it is possible that efficiencies brought about by a merger counteract the effects on competition and in particular the potential harm to consumers that it might otherwise have*”<sup>55</sup>. Such an approach should be considered for cases involving IP. This could potentially both provide broad criteria for patent owners to judge their activity, offering certainty, and provide a limiting mechanism in competition law to prevent encroaching on patent practices which are not causing harm and possibly even benefits. It thus ensures a balance in which consumer welfare is the pivotal consideration, which is after all the *raison d’être* of competition law.

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<sup>54</sup> Para. 664. Microsoft Corp v. Commission of the European Communities (Case T-201/04) [2007] 5 C.M.L.R. 11

<sup>55</sup> Para. 76. Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03)