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**Unilateral refusal to license intellectual property rights in EU competition law**

Intellectual property law in the European Union governs the creation and commercial exploitation of exclusive rights given by statutory law to a creator (or inventor). An EU Member State grants a creator a temporarily limited right – intellectual property right – to exclude others from any exercise of the protected intellectual property right as an incentive to promote creative works, innovation or to prevent market confusion. In other words, the main purpose why a state grants intellectual property rights stems from its pursuance of the above-mentioned public interest.

Member States typically limit the scope of intellectual property rights because an unlimited exclusive intellectual property right would initially promote innovation, however, it would subsequently result in an excessive monopolization that would also choke follow-on innovation. Consequently, Member States' policy on intellectual property law should find the right balance between private interest (to obtain exclusive rights and commercially exploit it) and public interest (to promote innovation). By virtue of balancing different interests, intellectual property rights are defined by numerous exceptions and limitations. Compulsory licensing of intellectual property rights – as a legal remedy against certain prohibited unilateral refusals to license intellectual property rights in the EU – is one of these limitations of intellectual property rights.

In most cases, proprietors of intellectual property rights have no obligation to deal with other parties, particularly competitors. Nevertheless, under exceptional circumstances, an intellectual property right holder has a duty to license certain intellectual property rights or else its conduct shall fall within the scrutiny of EU competition law. These extraordinary circumstances are governed by a legal doctrine called the essential facilities doctrine; a doctrine first developed by the U.S. Supreme Court's decision in *the United States v. Terminal Railroad Ass'n*. The essential facilities doctrine, under certain circumstances, forces an undertaking (a firm), holding a dominant position in the relevant (upstream) market, to allow customers, including competitors, access to the "essential facility"; a facility deemed to be indispensable to competition on the merits. Without access to that facility, competitors cannot effectively compete with a dominant firm controlling such an essential facility.

The notion of the essential facilities requires two markets, frequently expressed as an upstream market and a downstream market. Regularly, one firm is active in both markets. It usually holds a dominant position in the upstream market by controlling an essential facility. Whereas other firms or competitors are active or wish to become active in the downstream market and the only possibility to participate in the downstream market is to obtain access to such facility, controlled by a dominant firm in the upstream market. A downstream competitor wishes to access or purchase an input from the dominant integrated firm but is rejected. The essential facilities doctrine defines conditions under which the dominant firm will be mandated to supply under fair, reasonable and non-discriminatory terms.<sup>1</sup>

The essential facilities doctrine typically applies to natural monopolies and infrastructure networks. As an illustration, the essential facilities doctrine shall apply when an electricity transmission grid must be made available under fair, reasonable and non-discriminatory terms to a rival electricity generator because the production of electricity would not be economically feasible without access to an electricity transmission grid.

However, the principles embedded within the doctrine are also applicable to intellectual property rights. According to the Court of Justice of the European Union (the "CJEU"), intellectual property rights may, under extraordinary circumstances, be deemed as an essential facility indispensable to competition on the merits.<sup>2</sup> The relevant test about the applicability of the essential facilities doctrine to intellectual property rights is presented further below.

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<sup>1</sup> The essential facilities concept, OECD, Paris 1996, pp. 7.

<sup>2</sup> Joined Cases C-241/91 P and C-242/91 P, RTE and ITP v Commission, para. 50.

Furthermore, refusal to license intellectual property rights, as an abuse of a dominant position, is an exclusionary non-pricing practice because a dominant company has an intent to foreclose competitors from expanding their current market share or block the entry in the relevant downstream market to potential competitors by invoking the exclusivity of intellectual property rights. Therefore, specific refusals to license intellectual property rights might abuse a dominant position and, thus, violate Article 102 of the Treaty on the Functioning of the European Union (the “TFEU”).

According to EU competition law, dominant undertakings have a special responsibility to not harm competition on the merits in the EU. Namely, a dominant undertaking should not deprive its rivals an opportunity to compete. By virtue of this special responsibility, a threshold that some exclusionary practices are regarded as abusive is reduced in the EU vis-à-vis other jurisdictions such as the U.S.

Various jurisdictions, such as the U.S., undertook an unfavorable approach to the application of the essential facilities doctrine. Most U.S. courts and legal scholars quote Prof. Areeda that the essential facilities doctrine is less a doctrine than an epithet because: “[T]he essential-facilities doctrine is a flawed means of deciding whether a unilateral, unconditional refusal to deal harms competition.”<sup>3</sup> Moreover, most of the prominent U.S. scholars believe that the doctrine should almost never apply to intellectual property rights.<sup>4</sup>

Differently, according to EU jurisprudence, the essential facilities doctrine can be applied to intellectual property rights. The CJEU confirmed this notion in two far-reaching cases: *MaGill*<sup>5</sup> and *IMS Health*<sup>6</sup> and the General Court in *Microsoft*<sup>7</sup>.

In the aforementioned cases of *MaGill* and *IMS Health*, the CJEU has established a test to determine whether the essential facilities doctrine applies to intellectual property rights. The test is comprised of the following four elements, which must be cumulatively met:

- refusal to license intellectual property rights eliminates competition in the downstream market;

<sup>3</sup> Areeda, P. (1989). ESSENTIAL FACILITIES: AN EPITHET IN NEED OF LIMITING PRINCIPLES. *Antitrust Law Journal*, 58(3), pp. 842-844.

<sup>4</sup> See: Marquardt, P., & Leddy, M. (2003). THE ESSENTIAL FACILITIES DOCTRINE AND INTELLECTUAL PROPERTY RIGHTS: A RESPONSE TO PITOFISKY, PATTERSON, AND HOOKS. *Antitrust Law Journal*, 70(3); or Lipsky, A., & Sidak, J. (1999). Essential Facilities. *Stanford Law Review*, 51(5)

<sup>5</sup> Joined cases C-241/91 P and C-242/91 P., Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities.

<sup>6</sup> Case C-418/01, IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG.

<sup>7</sup> Case T-201/04, Microsoft Corp. v Commission of the European Communities.

- access to intellectual property rights is indispensable and it excludes actual or potential alternatives;
- refusal prevents establishment of a new product, for which a potential consumer demand exists; and
- refusal to license is not objectively justified.<sup>8</sup>

The in-depth analysis of the test's elements is not the subject matter of this article. Nevertheless, the most troublesome element of the test is the indispensability criteria. A too broad interpretation of the indispensability element will weaken the incentives to innovate, cause prejudice and therefore, harm public interest. Therefore, legitimately acquired statutory rewards, i.e. intellectual property rights granting exclusive rights, should only be deprived in extraordinary circumstances. The CJEU followed this notion in *IMS Health* when it held: “[t]hat, in order to determine whether a product or service is indispensable for enabling an undertaking to carry on business in a particular market, it must be determined whether there are products or services which constitute alternative solutions, even if they are less advantageous, and whether there are technical, legal or economic obstacles capable of making it impossible or at least unreasonably difficult for any undertaking seeking to operate in the market to create, possibly in cooperation with other operators, the alternative products or services.”<sup>9</sup>

When all elements of the essential facilities doctrine test are cumulatively fulfilled, the refusal to license intellectual property rights under fair, reasonable and non-discriminatory terms constitutes an abuse of a dominant position which infringes the EU competition law, and therefore, a dominant undertaking will be sanctioned with a fine of up to 10% of the dominant undertaking's annual turnover and obliged to license intellectual property rights regarded as the essential facility to other firms under fair, reasonable and non-discriminatory terms.

Notwithstanding the above, many issues arise with the application of the essential facilities doctrine test since the test is vague, lacks further case law interpretation in various industries and is thus encompassed with legal uncertainty.

Legal uncertainty also stems from the CJEU's jurisprudence. Two divergent types of application of the essential facilities doctrine to intellectual property arise. First, a more stringent and narrow application of the doctrine to intellectual property rights that derives from

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<sup>8</sup> Lévêque, F. (2005). Innovation, Leveraging and Essential Facilities: Interoperability Licensing in the EU Microsoft Case. in F.Lévêque & H. Shelanski (eds.), *Antitrust, Patents and Copyright. EU and U.S. Perspectives*. Cheltenham and Northampton. pp. 104.

<sup>9</sup> Case C-418/01, *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, para. 28.

the “traditional economy” was developed by the CJEU in cases *MaGill* and *IMS Health*, and second, a broader application of the doctrine to intellectual property rights emanating from the “new economy” (i.e. the IT sector with the presence of network effects) was developed by the General Court in *Microsoft*.

According to one commentator of the doctrine, by lowering the requirements of the essential facilities doctrine’s application to intellectual property rights, namely by interpreting elements of the test in a broader manner, the General Court has even established a new test which is applicable only to a whole new sector regarded as the new economy.<sup>10</sup> Whether the *Microsoft* case established a new branch of the essential facilities doctrine concerning the new economy or had it revised the previous jurisprudence, is not possible to know. Thereby, it is for the CJEU to decide and clarify this issues in the future cases.

In conclusion, the essential facilities doctrine holds that dominant firms may incur competition law liability if they fail to provide access to their facilities under fair, reasonable and non-discriminatory terms in exceptional circumstances. Further, the exclusive right forms an integral part of the proprietor's intellectual property right, thereby, the unilateral refusal to grant a license, even if it is the act of a firm holding a dominant position, cannot in itself constitute abuse of a dominant position, rather the infringement of EU competition law in this regard occurs only if all elements of the essential facilities test are cumulatively met. A different interpretation would mean that statutory incentives to promote creative works, innovation or to prevent market confusion would be gravely undermined. As a result, the essential facilities doctrine will likely seldomly apply to intellectual property rights in the EU; this notion is evidenced by the relative absence of recent relevant case law on the matter.

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<sup>10</sup> Graef I. (2011), TAILORING THE ESSENTIAL FACILITIES DOCTRINE TO THE IT SECTOR: COMPULSORY LICENSING OF INTELLECTUAL PROPERTY RIGHTS AFTER MICROSOFT, Cambridge Student Law Review, 7(1).