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„The U.S. and the EU Intellectual Property and Essential Facilities Doctrine "

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ABSTRACT

The purpose of this thesis is to conduct a comparative research on essential facilities doctrine in intellectual property law in the EU and the U.S. The first research question of this thesis endeavors to answer which are the necessary conditions to apply the essential facilities doctrine for intellectual property rights in the EU and the U.S. The second question examines the comparative differences between the EU and the U.S. view on the essential facilities doctrine and the rationale for these differences. Finally, this thesis will try to support or refute the hypothesis whether the essential facilities doctrine should be applied to intellectual property rights by the European courts. In the U.S., a four-step test applies to the essential facilities doctrine. The test was established in the case of *MCI Communications* and is also applicable to intellectual property rights. In the EU, two different tests exist. A three-step test to apply the essential facility doctrine in general cases was developed in *Oscar Bronner*, and a four-step test when applying it to intellectual property rights. The latter test was developed by the CJEU in *IMS Health*. Due to the hostile approach in the U.S. against the doctrine from the U.S. Supreme Court, academic commentators, and the U.S. regulatory enforcement policy, the doctrine is not applicable to intellectual property rights. Differently, EU courts, scholars, and enforcement agencies recognize the application of the doctrine to intellectual property rights. The main goal when applying the doctrine is to evaluate between negative effects of compulsory licenses which reduce incentives to create and innovate and negative effects of anticompetitive conduct. Finally, the hypothesis set forth in the thesis that European courts should apply the essential facilities doctrine to intellectual property rights is confirmed.

ABSTRAKT

Das Ziel dieser Arbeit ist es, eine Vergleichsuntersuchung der wesentlichen Doktrin der Einrichtungen im Bereich des gewerblichen Rechtsschutzes in der EU und den USA durchzuführen. Die erste Forschungsfrage, die diese Abschlussarbeit zu beantworten versucht, lautet, unter welchen Bedingungen in der EU und in den USA die grundlegende Doktrin der Einrichtungen für geistige Eigentumsrechte anzuwenden ist. Die zweite Frage untersucht die Unterschiede zwischen der EU und den USA in Bezug auf die wesentliche Doktrin der Einrichtungen und die Gründe für diese Unterschiede. Schließlich wird diese These versuchen, die Hypothese zu stützen oder zu widerlegen, dass die wesentlichen Doktrin der Einrichtungen von den europäischen Gerichten auf die Rechte des geistigen Eigentums angewandt werden sollte. In den USA wurde der vierstufige Test zur Anwendung der grundlegenden Grundfunktionsdoktrin, der auch für die Rechte des geistigen Eigentums gilt, in MCI Communications gegründet. In der EU gibt es zwei verschiedene Tests. Ein dreistufiger Test wurde zur Anwendung der wesentlichen Anlagendoktrin in allgemeinen Fällen in Oscar Bronner entwickelt, und ein vierstufiger Test bei der Anwendung auf Rechte des geistigen Eigentums, der vom EuGH in IMS Health entwickelt wurde. Aufgrund feindseliger Ansätze in den USA gegen die Doktrin des Obersten Gerichtshofs der USA, akademische Kommentatoren und die Durchsetzungspolitik der USA ist diese Doktrin nicht auf Rechte des geistigen Eigentums anwendbar. Anders als in den USA, erkennen die Gerichte, Wissenschaftler und Strafverfolgungsbehörden der EU die Anwendung der Doktrin auf die Rechte des geistigen Eigentums an. Das Hauptziel bei der Anwendung der Doktrin ist die Bewertung zwischen negativen und positiven Auswirkungen der Zwangslizenz, die die Anreize zur Schaffung und Erneuerung verringern, sowie negativen und positiven Auswirkungen wettbewerbswidrigen Verhaltens. Die in der Dissertation dargelegte Hypothese, dass europäische Gerichte die wesentliche Doktrin der Einrichtungen auf Rechte des geistigen Eigentums anwenden sollten, wird bestätigt.

TABLE OF ABBREVIATIONS

CJEU – Court of Justice of the European Union.
Commission – European Commission
EU – European Union
U.S. – United States of America
FTC – Federal Trade Commission
TFEU – Treaty on the Functioning of the European Union

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1. INTRODUCTION

Antitrust law and intellectual property law often interact with each other. Intellectual property law bestows exclusive rights to innovators and creators and, as a result, a legal monopoly is created. Meanwhile, antitrust law tries to repair market failures by sanctioning dominant undertakings that abuse its dominance or monopolize a market.

The purpose of this thesis is to conduct comparative research on the essential facilities doctrine in intellectual property law in the EU and the U.S. The essential facilities doctrine was first established by U.S. courts.[1] If a facility is essential, a monopolist will be immune to competition on an upstream and downstream market because rivals will not be able to access it.[2] The essential facilities doctrine orders a company with a necessary infrastructure or facility an obligation to deal with its competitors in fair, reasonable, and non-discriminatory terms.[3] When applying the doctrine to intellectual property rights, a remedy is imposed on intellectual property right holders to license their exclusive right when all relevant conditions of a test set forth by case law are met.[4] That remedy is typically called a "compulsory license".

Generally speaking, one could say that a compulsory license which can be imposed on IP holders by a government agency or a court interferes with a private property owner's right to make decisions about his property. It is also often argued that it reduces incentives to innovate. Moreover, simply requiring a compulsory licensing is rarely enough because government authorities or courts will, when establishing a compulsory license as a remedy, also have to define price, access, terms and conditions of sale, etc.[5] Consequently problems arise relating to the so-called "partial expropriation" if the essential facility, the monitoring of remedy implementation, and the determination of appropriate remedy with the specific economic principles governing specific circumstances.

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[1] Renda, A. (2010). Competition-regulation interface in telecommunications: What's left of the essential facility doctrine. Telecommunications Policy, vol. 34 no. 1-2, pp. 24-25.
[2] Pitofsky, R. & Patterson, D. & Hooks, J. (2002). THE ESSENTIAL FACILITIES DOCTRINE UNDER U.S. ANTITRUST LAW. Antitrust Law Journal, 70(2), pp. 443.
[3] Associated Press v. United States, 326 U.S. 1 (1945)., para. 17-19.
[4] Graef I. (2011), TAILORING THE ESSENTIAL FACILITIES DOCTRINE TO THE IT SECTOR: COMPULSORY LICENSING OF INTELLECTUAL PROPERTY RIGHTS AFTER MICROSOFT. Cambridge Student Law Review, Vol. 7, No. 1, pp. 1.
[5] Pitofsky, *supra* note 2, pp. 443.

The first research question that this thesis endeavors to answer is to determine the necessary conditions in the EU and the U.S. to apply essential facilities doctrine to intellectual property rights. The second question examines the comparative differences between different views in the EU and the U.S. on the essential facilities doctrine and the rationale for these differences. Finally, this thesis will try to support or refute the hypothesis that the essential facilities doctrine should be applied to intellectual property rights by the European courts.

Three types of methodology are used. First, the thesis analyzes different theoretical views related to the application of the doctrine to intellectual property rights. Second, it examines the relevant jurisprudence in the EU and the U.S. Third, it conducts a comparative analysis to ascertain the divergence between the two jurisdictions.

The structure will be as follows: In chapter one, this thesis will explore the legal concept of essential facilities doctrine and its development over time. Chapter two (the essential facilities doctrine) will be divided into two segments. First, it will analyze the historical development of the essential facilities doctrine in the U.S. through the case law, which is further supported by academic commentary. Additionally, it will present the fundamental elements of the doctrine set forth by the U.S. courts to demonstrate when it should be applicable. Lastly, it will analyze enforcement policy and goals of the antitrust regulatory agency relating to the application of the doctrine in the U.S. Second, the thesis uses the same structure to present the applicability of the essential facilities doctrine in the EU. It provides a historical overview of the CJEU jurisprudence, which is supported by academic commentary. This chapter will be concluded with the Commission's enforcement policy and goals relating to the application of the doctrine.

After the basic theory and the case law regarding the essential facilities doctrine are examined, the application of the doctrine to intellectual property rights will be analyzed in chapter three. To understand the basic concepts and goals better, the link between competition law and intellectual property law is established. Afterward, this thesis examines the relevant case law regarding the application of the doctrine to intellectual property rights in both jurisdictions which is further supported by a theoretic commentary.

In the fourth chapter, the case law and academic commentary mentioned above were analyzed in order to conduct a comparative analysis with the purpose to determine, first, the differences between two jurisdictions when applying the essential facilities doctrine to intellectual property rights, and, second, to discover the rationale for divergence that occurred in the case law, academic doctrine, and different enforcement priority policies.

Finally, this thesis will try to support or refute the hypothesis that the essential facilities doctrine should be applied to intellectual property rights by the European courts. In the end, conclusions follow.

2. THE ESSENTIAL FACILITIES DOCTRINE

A legal doctrine named the essential facilities doctrine forces undertakings with a dominant position to grant competitors or customers access to an "essential facility", a facility presumed to be indispensable to competition on the merits. Without access to a facility, competitors cannot effectively compete with a dominant firm controlling such an essential facility. Both economic and legal perspectives regard the essential facilities doctrine as an obligation to deal. The doctrine is also viewed as an indirect price regulation because a dominant firm is obliged to deal under fair, reasonable, and non-discriminatory terms. Namely, a dominant firm's pricing policy is altered with an interference by a State acting as *iure imperii*, and a dominant firm can no longer set its prices without restriction. Further, the application of this doctrine will have an impact on consumer prices in the downstream market as a result of indirect price regulation. Normally, consumer prices will drop since a dominant firm would be restrained from exercising monopoly pricing. Different from direct price regulation, where prices are regulated *ex ante* by the regulatory authorities, the essential facilities doctrine may, in conjunction with an indirect price regulation, also diversify a market structure because the entry into the secondary market is facilitated. Meaning, that an implementation of the doctrine would cause new market entries, and therefore, increase competition on a relevant market.[6]

Moreover, the doctrine grants additional advantages to direct price regulation. Instead of regulatory agencies, competitors provide the expertise needed to locate the non-discriminatory prices and the price regulation is only restricted to the stage of manufacture.[7] Thereby, competition in relation to pricing in the retail market is not eliminated *per se*.

The essential facilities doctrine is normally applied to network industries (due to network effects), infrastructural facilities, and its accompanying services or legal monopolies because of their similarity to natural monopolies. A test to determine whether the facility is essential was established by the courts in cases, such as the *Oscar Bronner* in the EU and the *MCI*

[6] Bergman, M. A. (2001). The Role of the Essential Facilities Doctrine. The Antitrust Bulletin, 46(2), pp. 433.
[7] Bergman, *id.* Note 6. pp. 433.

Communications in the U.S., with the aim to prevent a wide and arbitrary interpretation of the doctrine since it could otherwise backfire and reduce incentives to innovate.[8]

[8] Bergman, *id.* Note 6. pp. 433 and 434.

2.1. Essential facilities doctrine in the U.S.

2.1.1 Historical Overview

According to the U.S. law, a general rule is that enterprises have no obligation to deal with other parties, especially competitors, as a result of freedom of contract principle. This basic principle, known as the Colgate principle, was developed in the case *the U.S. v. Colgate & Co.*[9]. However, the U.S. courts held that this principle has an exception called the essential facilities doctrine, which should be interpreted restrictively. The essential facilities doctrine was first developed by the Supreme Court's decision in *the United States v. Terminal Railroad Ass'n*[10]. The doctrine is a special case of an antitrust infringement called the refusal to deal which imposes bars on monopolist's actions to exclude competitors from the competition on the merits. Through history, the U.S. courts regularly applied the essential facilities doctrine in in a variety of different circumstances [11]

Liability is established by the application of the essential facilities doctrine when an enterprise that controls the essential facility refuses others the non-discriminatory and reasonable access to a product or service, which is necessary to compete with the firm that controls the facility.[12]

In *the U.S. v. Terminal Railroad Ass'n,* the Terminal Railroad Association controlled all railway bridges, switching yards, and other terminal facilities. They had control over all the entries and exits out of St. Louis which was an important railroad junction, hence blocking all possibilities for its competitors to offer railway transportation services to or through St. Louis. The U.S. Supreme Court viewed these actions as an illegal restraint of trade and an attempt to monopolize by the Supreme Court. The Court held that the most adequate remedy was to order admittance of non-member competitors to the Association, which is a remedy equivalent to a duty to deal.[13] Application of the essential facilities doctrine results in a similar

[9] United States v. Colgate & Co., 250 U.S. 300 (1919).
[10] United States v. Terminal Railroad Ass'n, 224 U.S. 383 (1912).
[11] Pitofsky, *supra* note 2, pp. 445-446.
[12] Pitofsky, *Id.* note 2, pp. 446.
[13] Renda, *supra* note 1, pp. 409-412.

remedy as set forth by the court in *the U.S. v. Terminal Railroad Ass'n*, namely, a compulsory obligation to deal.

In *Associated Press v. the United States*[14], the Supreme Court made a similar decision. Around 1200 newspapers created the Associated Press in order to establish an association that would promote sharing of generated and copyrighted news to other members of the organization. An Associated Press member in Los Angeles could obtain news reports from a member in Miami. Moreover, the Associated Press also had its own employees that were generating news. As a result, economies of scale were achieved. All new news generating entities were welcome to enter the association, subject to a specific requirement that they did not compete with the existing members of the Associated Press. The Court decided that the discrimination of competitors and the admission policy set by the Associated Press infringed Section 2 of the Sherman Act and the court imposed a duty to admit entities that would otherwise be denied. The decision raised debate and some leading academic scholars, such as Areeda, regard *Associated Press* as a problematic case.[15]

The Supreme Court in *Otter Tail Power Co. v. The United States*[16] decided about an electrical utility company Otter Tail, which sold electricity at both retail and wholesale markets and decided not to sell electricity on the wholesale market to its competitors on the retail market in order to prevent competition in the downstream market. The court held that the aforementioned conduct constitutes an illegal monopolization which, therefore, violates Section 2 of the Sherman Act. Otter Tail used its dominant position and foreclosed the possibility of new entries into the retail market.[17]

According to academic theory, these cases make clear that the essential facilities doctrine is a unilateral conduct, where a firm's refusal to supply in extraordinary circumstances, such as control of a natural monopoly which allows a dominant firm to exclude or prevent

[14] Associated Press v. United States, 326 U.S. 1 (1945).
[15] Areeda, P. (1989). ESSENTIAL FACILITIES: AN EPITHET IN NEED OF LIMITING PRINCIPLES. Antitrust Law Journal, 58(3), pp. 842-844.
[16] Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).
[17] Otter Tail, *supra* note 16, pp. 377-378.

competitors, constitutes a potential antitrust liability under the Section 2 of the Sherman Act and it is, thus, not an independent claim, but rather a monopolization claim.[18]

The Supreme Court decision in *Aspen Skiing Company v Aspen Highlands Skiing Corporation*[19], which is another highly criticized case, according to Lipsky, casts a shadow over the essential facilities doctrine.[20] Aspen Skiing owned three of the four major ski slopes in Aspen, and Aspen Highlands owned one. Both enterprises had started offering a discounted interchangeable ticket program in 1962 jointly. The ticket enhanced consumer welfare because skiers were flexible to ski on a mountain that they preferred and the ticket was cheaper.[21] In 1977-78, the parties could not agree on the division of revenue, which resulted in the termination of the interchangeable ticket program.[22] Aspen Highlands as plaintiff brought action against Aspen Skiing as a defendant and won the case on the grounds of violation of Section 2 of the Sherman Act. Aspen Skiing lost the case because unilateral termination of presumably profitable past dealings between parties implied a willingness to forgo short-term profits with an intent to accomplish an anticompetitive goal, such as excluding a competitor.[23] The application of the essential facilities doctrine was denied by the Supreme Court in *Aspen Skiing* and the court rather applied a broader doctrine of duty to deal.[24]

The case raised doubts with antitrust scholars, namely related to the dominant position of the defendant. Aspen is located in the Rocky Mountains where various ski resorts exist. Moreover, visitors that travel to Aspen come all around the world. Hence, skiers are not only local residents. The relevant market, according to producer substitutability, should not have made the relevant market Aspen, but, better, a larger universe of ski resorts in Colorado or even Europe and Canada.[25] The Court furthermore held that vertical integration was not a necessary requirement on the essential facilities case. The decision could have paved a way

[18] Pitofsky*, supra* note 2, pp. 447.
[19] Aspen Skiing v. Aspen Highlands Skiing, 472 U.S. 585 (1985).
[20] Lipsky, A., & Sidak, J. (1999). Essential Facilities. Stanford Law Review, 51(5). pp. 1207.
[21] Aspen Skiing, *supra* note 19, pp. 590.
[22] Aspen Skiing, *Id*., pp. 591-593.
[23] Aspen Skiing, *Id*., pp. 608, 610-611.
[24] Robinson, G. (2002). On Refusing to Deal with Rivals. 87(5) Cornell L. Rev., pp. 1231
[25] Lipsky, *supra* note 20. pp. 1209.

for a new radical path. However, it did not and the U.S. courts did not follow the reasoning given in the *Aspen Skiing* case.[26] Some scholars from both EU and U.S. legal systems believe that vertical integration is a necessary requirement for an application of the essential facilities doctrine. Thus, the case was subject to criticism.

In the view of the foregoing, prior course of dealing (as in *Aspen Skiing*), even in a longer period of time, according to Judge Posner, should not be a requirement necessary to establish an antitrust liability. In the *Olympia Equipment Leasing Co. v. Western Union Telegraph Co*.[27] case, he wrote: "[S]ince Western Union had no duty to encourage the entry of new firms into the equipment market, the law would be perverse if it made Western Union's encouraging gestures the fulcrum of an antitrust violation. Then no firm would dare to attempt a graceful exit from a market in which it was a major seller."[28] Furthermore, he wrote: "[I]f Western Union had known that by distributing a list of rival vendors it was undertaking a journey from which there could be no turning back (a journey it could not even interrupt momentarily) it would have been foolish to have embarked."[29] The dominant companies would consequently not conclude agreements, which increase consumer welfare if the courts rendered decisions in line with the approach suggested in *Aspen Skiing*.[30] However, different than other commentators, Fox held that the Supreme Court did not use the prior course of dealing as a deciding factor in *Aspen Skiing*. It only used it to shed a light on a profitable agreement and the defendant's willingness to refrain from a profitable contract.[31]

Somehow unexpectedly, the Supreme Court in *Aspen Skiing* reasoned its decision based on anticompetitive intent. Antitrust law abandoned an obligation to prove anticompetitive intent because, as Judge Posner wrote in *Olympia*, it is in the nature of an enterprise to strive towards obtaining a monopoly because a monopoly offers a path for a firm to make an

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[26] Marquardt*, infra* note 55, pp. 853 and 855.
[27] Olympia, 797 F.2d 370 (7th Cir. 1986).
[28] Olympia, *Id*., pp. 376.
[29] Olympia, *Id*., pp. 378.
[30] Carlton, D. (2001). A GENERAL ANALYSIS OF EXCLUSIONARY CONDUCT AND REFUSAL TO DEALWHY ASPEN AND KODAK ARE MISGUIDED. Antitrust Law Journal, 68(3), pp. 677.
[31] Fox*, infra* note 35, pp. 160.

increased profit. However, according to antitrust law, a firm should not try to monopolize a market in a manner that makes consumers worse off.[32]

The case *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko LPP*[33] is the latest case regarding essential facilities doctrine in the U.S. to be examined. Many observers thought that the U.S. Supreme Court would narrow the scope and clarify the circumstances where an enterprise with a dominant position could violate the Section 2 of the Sherman Act by refusing to deal with its competitors. However, the result was contrary to the expected and the law became less predictable.[34] A statement made by Skitol about lesser predictability may be false because the U.S. Supreme Court implemented a hostile approach towards the essential facility doctrine. Therefore, it rather clarified the position of the doctrine in the U.S. case law.

Verizon Communications Inc. v. Law Offices of Curtis v. Trinko LPP is a case about an incumbent telecom company that denied the complete access to the local loop to newly emerging local service rivals.[35]

Defendant Verizon Communications Inc. was the incumbent local exchange carrier (hereinafter "LEC") serving New York State. Until 1996, Verizon enjoyed an exclusive right within the local service area. In 1996, the new law was enacted and, as a result, the incumbent LECs' lost its legal monopoly in order to nurture competition on the market. Verizon is the incumbent LEC which shall under 47 U. S. C. §251(c) (the "Telecom Act") offer its network to potential competitors, including the provision of access to individual elements of the network on an "unbundled" basis. Verizon had a duty to offer the facilities so that competitors were able to interconnect on its facilities with the incumbent. Competitors could also buy services at the wholesale market and then resell them. Furthermore, the above-mentioned regulation imposes a duty upon Verizon to allow physical collocation which permits a rival to install its equipment on the premises of the incumbent. Moreover, Verizon was obliged to offer terms

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32 Olympia, *supra* note 27, pp. 379.
33 VERIZON COMMUNICATIONS INC. V. LAW OFFICESOF CURTIS V. TRINKO LLP, 540 U. S. ____ (2004).
34 Skitol, R. (2007). Three Years After Verizon v. Trinko: Broad Dissatisfaction with the Whole Thrust of Refusal to Deal Law. The Antitrust Source, pp. 1.
35 Fox, E. (2005). IS THERE LIFE IN ASPEN AFTER TRINKO? THE SILENT REVOLUTION OF SECTION 2 OF THE SHERMAN ACT. Antitrust Law Journal, 73(1), pp. 154.

that were reasonable and non-discriminatory. As a result, Verizon's competitors were consequently able to resell these unbundled network elements.[36]

A law firm Law Offices of Curtis V. Trinko was a customer of a local phone service provider AT&T which acted as a plaintiff in a class action brought against Verizon. Plaintiff claimed that Verizon breached its obligation by refusing to provide access to its systems and support operation on reasonable terms, hence disabling AT&T to provide a competitive service. The aforementioned conduct constitutes a violation of Section 2 of the Sherman Act and violation of regulatory obligations according to the claimant.[37] Verizon, contrary, wanted to dismiss the latter claim by arguing that their conduct was regulated by regulatory remedies and the former claim on the grounds that failure to cooperate with competitors was not comprised of the willful acquisition or maintenance of monopoly power. Both conditions are necessary when determining a violation of Section 2 of the Sherman Act.[38] Willful acquisition or maintenance of monopoly power are abusive practices and should, hence, be categorized differently than business growth that had occurred as a result of a superior product, business acumen, or historic accident.[39]

The Supreme Court decided that the Telecom Act and the above-mentioned regulatory duties had not created or precluded any new antitrust liability.[40] The Supreme court, therefore, had to assess the facts according to the existing antitrust rules. In the opinion of the Supreme Court, Justice Scalia wrote: "[I]f that allegation states an antitrust claim at all, it does so under §2 of the Sherman Act, 15 U. S. C. §2, which declares that a firm shall not "monopolize" or "attempt to monopolize." Ibid. It is settled law that this offense requires, in addition to the possession of monopoly power in the relevant market, "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U. S. 563, 570–571 (1966). The mere possession of monopoly power, and the concomitant charging of

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[36] Trinko *supra* note 33, pp. 2, 6 and 7.
[37] Trinko *id*. pp. 3.
[38] Trinko *id*. pp. 7.
[39] Bona Law PC. (2017) What Are the Elements for a Monopolization Claim under the Federal Antitrust Laws? https://www.theantitrustattorney.com/elements-monopolization-claim-federal-antitrust-laws/ (seen on 7.11.2018).
[40] Trinko *supra* note 33, pp. 7.

monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct."[41]

Enterprises may legally invest in infrastructure and acquire a monopoly as a result of it. Constraining them with the duty to deal with the facility to rivals under reasonable and non-discriminatory terms will reduce the incentives to invest in a facility that would increase consumer welfare. Thereby, such obligations are in conflict with the existing antitrust principles. Duty to deal will also require the courts to behave as regulatory authorities by identifying quantity, reasonable price, and other relevant terms necessary to enforce the obligation. In addition, obligatory negotiations between rivals could ease the occurrence of collusion by forming a cartel.[42] According to *the United States v. Colgate & Co*.[43] the Sherman Act does not restrict the "[R]ight of trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal, and, of course, he may announce in advance the circumstances under which he will refuse to sell."[44] Notwithstanding, the right of refusal to deal has its limits and, under extraordinary circumstances, it might constitute an anti-competitive behavior that infringes the antitrust law.[45] The Supreme Court cited the case *Aspen Skiing Company v Aspen Highlands Skiing Corporation* and put its rationale on the outer line of the violation of Section 2 of the Sherman Act.[46]

The Supreme Court concluded that Verizon's asserted insufficient assistance when providing services could not constitute a violation of antitrust pursuant to existing refusal to deal doctrine. The decision would be unchanged if the Supreme Court took the essential facilities

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[41] Trinko, *id*., pp.7.
[42] Trinko, *id*., pp.8.
[43] United States v. Colgate & Co., 250 U.S. 300 (1919).
[44] Colgate, *id*. pp 307.
[45] Trinko, *supra* note 33, pp. 8.
[46] Trinko, *id*. pp.8.

doctrine into account. According to Areeda, the doctrine is just an epithet and should not have been recognized. Thus, the Supreme Court decided not to recognize the doctrine in the present case. The doctrine could be invoked only provided that the facility is indispensable and access to it would not be available. Otherwise, the doctrine should not be applied because it serves no reason.[47]

The Supreme Court in *Trinko* again confirmed the general rule set forth by the Colgate principle that a firm has the freedom to deal or not to deal. Nevertheless, *Aspen Skiing* is an exception to the general rule. *Trinko* is a case in the field of a regulated industry and should, thus, be distinguished from *Aspen Skiing*. According to Fox, this is the current state of antitrust law in the United States of America.[48]

It can be concluded that the U.S. jurisprudence of the Supreme Court after *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko LPP* is hostile towards the essential facilities doctrine.

2.1.2. Applicability of Essential Facilities Doctrine

In spite of a hostile approach against the essential facilities doctrine, the U.S. Supreme court left a door partially open. Therefore, the essential requirements necessary to apply the doctrine have to be taken into account. Since the essential facilities doctrine is an exception of the general rule that a firm is free to select its contractual partners, it must be interpreted restrictively. Therefore, caution and conditions subject to rigid requirements must be met to apply the essential facilities doctrine.[49] The concept of the relevant doctrine must be comprised of not only market power but also of an exclusionary conduct requirement which is necessary to constitute monopolization under Section 2 of the Sherman Act.[50]

[47] Trinko, *id*., pp. 11.
[48] Fox, *supra* note 35, pp. 168.
[49] Pitofsky, *supra* note 2. pp. 448.
[50] Areeda, *supra* note 15. pp. 845 and 846.

Courts have developed a test that must be met before the court can order the defendant to grant rivals access to the essential facility. To establish antitrust liability, a plaintiff must cumulatively prove four elements set by the court in the *MCl Communications*[51]: “[T]he case law sets forth four elements necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.”[52] Should claimant successfully prove all four conditions, then the defendant could exculpate himself if he proves that refusal to grant access was based on a legitimate business reason.[53] In addition, according to Bork, the defendant can also justify a refusal to contract based on efficiency.[54]

Furthermore, according to some scholars, leveraging element on vertically integrated markets in unilateral conduct is of major importance when assessing essential facilities cases. Even though the court in *MCI Communications* did not include the leveraging theory into the test, it based its arguments on leveraging that allowed the firm controlling the essential facility to exclude competition in a related but separate market.[55] Areeda and Hovenkamp concluded that essential facilities doctrine must involve a vertically integrated monopolist on one side of the market that will prevent competition on the other side of the market by refusing to deal the facility to its competitors.[56]

Since essential facilities doctrine is a claim under Section 2 of the Sherman Act, antitrust jurisprudence and policy must be taken into account. The legitimate and legal acquisition of market power with business acumen, superior products or legally obtained intellectual property do not violate the antitrust laws.[57]

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[51] MCl Communications, 708 F.2d 108.
[52] MCI Communications, *Id.*, para. 192.
[53] Byars v. Bluff City News Co., 609 F.2d 843 (6th Cir. 1979).
[54] Bork, R. H. (1978, reprint 1993). The Antitrust Paradox. New York: Free Press., pp. 346.
[55] Marquardt, P., & Leddy, M. (2003). THE ESSENTIAL FACILITIES DOCTRINE AND INTELLECTUAL PROPERTY RIGHTS: A RESPONSE TO PITOFSKY, PATTERSON, AND HOOKS. Antitrust Law Journal, 70(3), pp. 850.
[56] Areeda, P., & Hovenkamp, H. (2002). Antitrust Law. New York. Wolters Kluwer Law & Business, pp. 771a.
[57] Marquardt, *supra* note 55. pp. 852 and 853.

2.1.3. Limitations of the essential facilities doctrine

The remedy awarded when applying the essential facilities doctrine is severe. Thus, courts and legal scholars address the importance of limiting the doctrine. Broad application of the doctrine would reduce incentives to invest and create, thereby decreasing consumer welfare, which is contradictory to antitrust policy.

The essential facilities doctrine should not meddle with antitrust policy. Thus, the courts must order a remedy that is possible to administer and increases consumer welfare. Moreover, the courts should apply general economic principles and theories while not acting like regulatory agencies.[58]

Duty to deal as a remedy in the essential facilities doctrine should not be forced unless substantial improvement of competition occurs in the market place by reducing prices, increasing output or innovation. A facility has to be critical to competitive vitality in the downstream market where a rival cannot compete and cannot duplicate the facility. Furthermore, even when requirements are fulfilled, refusal to deal can never be a *per se* violation because an objective economic justification always exculpates the defendant. The court should only impose such a remedy under a condition of adequate explanation based on empirical economic analysis and an ability to supervise the remedy imposed reasonably.[59]

The doctrine should be limited even further when applying it to intellectual property rights. The search for a competitive advantage on the market combined with the legal monopoly of the limited term granted by the state provides the incentives for encouragement and innovation of intellectual property. In addition, the legally obtained advantage will induce further innovation because competitors would like to preserve their market position. Intellectual property rights will award its proprietor the right to exploit the exclusive right given by the law. Should competition policy intervene with incentives given by the intellectual property law and decrease the potential economic return of it, innovation would decrease.[60]

[58] Lipsky, *supra* note 20. pp. 1188.
[59] Areeda, *supra* note 15, pp. 852.
[60] Marquardt, *supra* note 55, pp. 856.

According to Areeda, the essential facilities doctrine should not force enterprises to deal with their competitors when the former invested in achieving a competitive advantage by a legitimate business purpose.[61]

U.S. scholars have different views regarding the appropriate limitations of the doctrine. According to Pitofsky, when all elements of the *MCI Telecommunications* tests are successfully met, the facility can be considered as essential and monopolist will have an obligation to supply its rivals. Furthermore, he also emphasizes the importance of anticompetitive intent to harm rivals, even if it is not required to establish antitrust liability.[62] Contrary, according to Areeda and Marquardt, the test itself is not sufficient. Courts should also assess whether the business advantage was legitimately obtained and if the market was vertically integrated.[63] They also recognize that intention to outperform a competitor by obtaining a legitimate advantage is the basis of competition.[64]

Fox held that the antitrust policy has changed in recent years. Firms with a dominant position on the market enjoy more freedom as they had in the past as a result of more robust markets and ideology. Due to lower barriers of world trade, deregulation, and world competition, an enterprises' possibility to monopolize the market has decreased. Inefficient companies do not benefit from antitrust law at the cost of consumers because the law protects only as efficient companies as a dominant company.[65]

The change in antitrust policy can be seen by comparing *Aspen Skiing* to *Trinko*. The rule in *Aspen Skiing* prohibited excluding a rival by refusing to deal unless the dominant company could justify its unwillingness to deal. Whereas in *Trinko*, the Supreme Court accepted a confined theory. Antitrust claims shall be assessed cautiously because it is hard to distinguish legitimate conduct from anticompetitive. Monopoly firms have a right to refuse to deal. However, exceptions, such as the essential facilities doctrine, are a possible subject to narrow

[61] Areeda, *supra* note 15, pp. 850.
[62] Pitofsky, *supra* note 2, pp. 450.
[63] Marquardt, *supra* note 55, pp. 857.
[64] Areeda, P., *supra* note 15, pp. 845.
[65] Fox, supra note 35, pp. 155.

interpretation and extraordinary circumstances.[66]

The refusal to deal with cases and essential facilities doctrine cases cause distress and annoyance, particularly, when the courts have to assess the case as an independent infringement. The problem arises because categorization of claims puts antitrust at war with itself. The refusal to deal cases faces severe difficulties, such as imprecise methods of measuring market power, the unclear concept of market monopolization, and vagueness of valid business justification in the event of unwillingness to contract. The latter is problematic because the Supreme Court regarded in *Aspen Skiing* that not agreeing to the same terms of a profitable long-lasting contract is unreasonable. The problem, however, is that diligent firms do not conclude agreements that bind them on the same terms for an unlimited time.[67]

The essential facilities doctrine is further heavily criticized because it awards a compulsory obligation to deal with others. The most prominent critic of the doctrine is Areeda, who described the doctrine an epithet in the need of limiting principles.[68] However, according to Robinson, Areeda's statement is peculiar because the alternative to the essential facility doctrine which is an analytical framework is a rather non-theorized precedent of *Aspen Skiing*. He believes that: "[T]he analytical framework of the doctrine would have provided more "limiting principles" than resort to general monopolization doctrine." The reason why the Supreme Court opposed the essential facilities doctrine was that it was too limiting. The lower courts developed a set of criteria that should be acceptable and provide the necessary legal predictability in the duty to deal with cases. The criteria are limited enough to preclude some false positive decisions and, moreover, the lower courts are conservative with the application of the essential facilities doctrine.[69]

Areeda and Hovenkamp wrote about the inconsistency of the essential facilities doctrine with general antitrust purpose. The doctrine obliges a facility owner to share its facility with one or more competitors. The purpose of the antitrust law is to prevent monopolies from arising

[66] Fox, *Id*. Note 35, pp. 155.
[67] Robinson, *supra* note 24. pp. 1230.
[68] Areeda, P., *supr*a note 15.
[69] Robinson, *supra* note 24, pp. 1231 and 1232.

or to break them down when they appear. Obliging a firm to grant access is also inconsistent with consumer welfare as the main goal of antitrust law. Consumer welfare does not increase when a facility is shared because price and output would be the same as if they were when one monopolist used the input alone and it removes incentives for rivals to invest in their own alternative facilities, which allows them to compete.[70] They believe that the doctrine is detrimental and unnecessary and, thereby, should be abandoned.[71]

2.1.4. U.S. Department of Justice enforcement policy with regard to the essential facilities doctrine

In the light of *Trinko* decision, the U.S. Department of Justice adopted the competition enforcement policy regarding unilateral and unconditional refusals to deal with rivals. They took the same unfavorable approach as the Supreme Court and quoted 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." As a result, essential facilities doctrine and unilateral conduct should not play a significant part in the enforcement of section 2 of the Sherman Act.[72]

[70] Areeda, P., & Hovenkamp, H., *supra* note 56. pp. 771b.
[71] Areeda, P., & Hovenkamp, H., *supra* note 56. pp. 771c.
[72] Department of Justice, Competition and Monopoly: Single Firm Conduct under Section 2 of the Sherman Act, see at: http://www.usdoj.gov/atr/public/reports/236681.pdf. pp. 129.

2.2. Essential facilities in EU

Unilateral conduct by dominant undertakings[73] (such as refusal to supply) might abuse a dominant position and, thus, breaching Article 102 TFEU[74]. Such practices can be regarded as exploitative abuses, exclusionary practices, and actions that divide the European internal market. Refusal to supply, as an abuse of a dominant position, is an exclusionary non-pricing practice because a dominant company has the intent to foreclose competitors from expanding their current market share or block the entry in the relevant market to potential competitors. Under the EU competition law, the essential facilities doctrine is a subset of refusal to supply doctrine.

Competition policy and enforcement should not prevent companies from competing on the merits. It should rather reflect a perfect balance to prevent false positive[75] and false negative[76] decisions. Thereby, only dominant companies[77] whose abuses effect and harm competition on the relevant market can be found liable. When assessing the effects on competition in the essential facilities doctrine and refusal to supply cases, differentiation between horizontal and vertical market foreclosures have to be considered. In addition, a dominant company might, nonetheless, exculpate itself by applying some limited defenses based on objective justification and/or possible economic efficiencies that benefit the consumers.[78]

In accordance with EU competition law, but not with the U.S. antitrust law, dominant undertakings have a special responsibility not to harm competition, a responsibility that other not dominant firms do not have. Subject to that special responsibility, they should not use

[73] C-41/90, *Höfner*, para 21. "[T]he concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity."
[74] Treaty on the Functioning of the European Union.
[75] A (false) finding of antitrust violation, when certain conduct is not anticompetitive.
[76] A (false) finding of antitrust non-violation, when certain conduct is anticompetitive.
[77] C-85/76, Hoffman La Roche. Para 38. The CJEU wrote: "[T]he dominant position thus referred to relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it a power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."
[78] Whish, R., & Bailey, D. (2012). Competition Law. 7th edition. Oxford University Press. Oxford. pp. 697.

their market power to inequitably exclude competitors.[79] By virtue of special responsibility that dominant firms possess, the CJEU[80] established an extensive jurisprudence in the field of the essential facilities doctrine.

The essential facilities doctrine and the establishment of the relevant test required to determine applicability in the European competition law were first defined in the case *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG* (hereinafter "*Oscar Bronner*")[81].

The essential facility was also characterized by the Commission as a "[F]acility or infrastructure without access to which competitors cannot provide services to their customers"[82]. If a dominant firm controls an essential facility, it should not refuse to make it accessible or make available under unfair and discriminatory terms to competitors because such conduct would be otherwise regarded as an abuse of a dominant position unless a dominant undertaking provides objective justification.[83]

Similar to the *Colgate* principle set forth by the U.S. Supreme Court, undertakings subject to European competition law follow a general fundamental notion that every company may freely select its contractual parties. The following was also recognized by Advocate General Jacobs in his Opinion[84] in the *Oscar Bronner* case. However, general principles are subject to exceptions that require cautious justifications which shall be interpreted restrictively.

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[79] Case 322/81. NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities. para. 57.

[80] Court of Justice of the European Union.

[81] C-7/97, Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG.

[82] B&I Line plc v. Sealink Harbours Ltd., Commission Decision of 11 June 1992, [1992] 5 C.M.L.R. 255, para. 41.

[83] Goddard, R., (1999). THE "ESSENTIAL FACILITIES" DOCTRINE IN EC COMPETITION LAW. The Cambridge Law Journal, 58 (3), pp. 490.

[84] Opinion of Mr Advocate General Jacobs delivered on 28 May 1998. - *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*. - Reference for a preliminary ruling: Oberlandesgericht Wien - Austria. - Article 86 of the EC Treaty - Abuse of a dominant position - Refusal of a media undertaking holding a dominant position in the territory of a Member State to include a rival daily newspaper of another undertaking in the same Member State in its newspaper home-delivery scheme. - Case C-7/97.

In the European Union, competition law is enforced by the Commission and national competition authorities in administrative proceedings or private parties that bring claims to the EU member states' civil courts. The Commission established the "*Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*"[85] with the purpose to determine the enforcement priorities that will guide the Commission's action when applying Article 102 TFEU to the exclusionary conduct and to improve legal certainty, clarity, and predictability.[86] The Guidance is not a legally binding act for courts and national competition authorities. However, it is binding for the Commission when assessing abusive unilateral conducts.

Irrespective of what the current law on refusal to deal is, there are a lot of equitable explanations why the refusal to deal should be allowed. Customers may possess a bad credit rating or there could be a deficiency in stocks or difficulties in production. Another point to consider when determining the policy regarding refusal to supply is that ordering an obligation to deal might result in short-term economic consumer welfare because competitors could freeride on the essential facility. In the long term, however, it is better to allow firms' ability to abstain its facilities *vis-à-vis* its competitors because awarding an obligation to deal, even under appropriate and fair remuneration, may remove the incentives of both the dominant firm and its competitors to invest in the development of the facility.[87] Nonetheless, the present CJEU case law allows national competition regulators or courts to impose a remedy to dominant undertakings in the form of an obligation to deal. A remedy will be ordered solely subject to fulfillment of the established essential facilities test and economic analysis of detriment to competition that occurred from an undertakings' market conduct.

2.2.1. Historical overview

[85] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. (2009/C 45/02).
[86] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. (2009/C 45/02), para 2.
[87] Whish, R., & Bailey, D., *supra* note 78. pp. 697.

In the following sub-chapters, the thesis examines the evolution of the CJEU jurisprudence and theory relating to refusal to supply doctrine and the essential facilities doctrine in the EU. It will be assessed through vertical and horizontal foreclosure of the relevant market.

2.2.1.1. Vertical foreclosure

Vertical foreclosure emerges when a vertically-integrated firm decides to use its power in an upstream market to expel a competitor in a downstream market.[88] Most of CJEU jurisprudence involves a vertically-integrated company with a dominant position on an upstream market that refuses to deal with a new or existing customer[89] in a downstream market where a dominant company also competes or has established a subsidiary that is a direct competitor with its customer.[90] Refusal to supply an existing customer is more likely to infringe competition law than a *de novo* refusal to deal because if an existing customer made a particular investment to use a supplied product or facility, it is easier to argue that the product has become indispensable.[91] Nevertheless, a *de novo* refusal to deal might still occur.

Commercial solvents[92] was the first case where the CJEU dealt with a refusal to supply doctrine as an abuse of dominant position pursuant to Article 102 TFEU. Commercial Solvents Corporation is a firm incorporated in the State of Maryland, U.S.A. It sells and produces products based on nitroparaffins (nitropropane) and its derivatives (amino-1-butanol). Both products are a necessary ingredient for the manufacture of ethambutol, which is used as an anti-tuberculosis drug. Commercial Solvents acquired over 50% of the voting stock in Istituto Chemioterapico Italiano SpA (hereinafter referred to as "Instituto"), a company incorporated under Italian law. Instituto acted as a reseller of amino-1-butanol, which was produced by Commercial Solvents.[93]

[88] Whish, R., & Bailey, D., *id.* note 78. pp. 205.
[89] For more information, see: Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. (2009/C 45/02), para 84.
[90] Whish, R., & Bailey, D., *supra* note 78. pp. 205.
[91] Whish, R., & Bailey, D., *supra* note 78. pp. 699.
[92] *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities*. Joined cases 6 and 7-73.
[93] *Commercial solvents*, *id.* note 92. pp. 226.

Laboratorio Chemico Farmaceutico Giorgio Zoja SpA (hereinafter referred to as “Zoja”) was a customer of the Instituto for amino-1-butanol, which Zoja used to produce ethambutol products. A few years later Instituto decided to expand to the ethambutol product market. Subsequently, Commercial Solvents decided to stop exporting nitropropane and amino-1-butanol to the European Union because they would rather offer an enhanced intermediary product dextro-aminobutanol which can be used for the production of the ethambutol. Zoja placed an order for amino-1-butanol to the Instituto. However, Commercial Solvents replied that the goods are no longer available. Afterward, Zoja attempted to acquire the product on the world market but it was unsuccessful.[94]

The CJEU decided that Commercial Solvents-Instituto group had a dominant position on the relevant market because it had a universal monopoly in the manufacture and sale of the product concerned.[95] Furthermore, the CJEU decided that the market for raw materials necessary for the production differs from the market on which the final product is sold.[96] Commercial Solvents decided to stop the supply of the concerned products to help Instituto gain access to the downstream market of ethambutol.[97]

In paragraph 25, the CJEU decided that: “[A]n undertaking which has a dominant position in the market in raw materials and which, with the objective of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position,...”[98] Consequently, the court views the refusal to sell in the present case as an infringement of Article 102 TFEU. Because Commercial Solvents had an intent to prevent Zoja from accessing the amino-1-butanol, a penalty was imposed, ordering Commercial solvents – Instituto group to bring its conduct in compliance with the relevant law, and, therefore, supply the necessary above-mentioned materials to Zoja.[99]

94 *Commercial solvents*, *id.* note 92. pp. 226.
95 *Commercial solvents*, *id.* note 92. para. 9.
96 *Commercial solvents*, *id.* note 92. para. 22.
97 *Commercial solvents*, *id.* note 92. para. 24.
98 *Commercial solvents*, *id.* note 92. para. 25.
99 *Commercial solvents*, *id.* note 92. para. 46.

The *Commercial Solvents* case was, as mentioned before, the first case relating to refusal to supply as an infringement of competition law. Remedy imposed by the Commission and affirmed by the CJEU was similar to the essential facilities doctrine, although the court never mentioned it. According to the essential facilities doctrine, a dominant firm that abuses the dominant position with denying access to its facility has an obligation to supply customers in a downstream market under reasonable and non-discriminatory terms.

In the case of *Telemarketing,* the CJEU had dealt with a firm enjoying a legal monopoly. Centre belge is a company offering a service of telemarketing where an advertiser places a telephone number which consumers may call to obtain information or respond to the advertising campaign. In 1983, Centre belge entered into a 12-month exclusive agreement with Information publicité to run telemarketing on RTL television station aimed at the Benelux market. The telephone number shown on the television was that of Centre belge.[100]

Information publicité is a subsidiary of a Compagnie luxembourgeoise, a firm that runs RTL television station. Compagnie luxembourgeoise has a legal monopoly on the relevant market.[101]

After the expiry of an exclusive contract, Information publicité notified advertisers that RTL would no longer offer telemarketing advertising spots in Belgium unless a telephone number of Information publicité would be shown. Centre belge claimed an injunction to stop the abusive practice which was grounded on abuse of a dominant position.[102]

The court first decided that firms to which a Member State has granted exclusive rights are, nonetheless, subject to the European competition law.[103]

[100] Case 311/84, Centre Belge d'Etudes de Marché- Telemarketing (CBEM) v. SA Compagnie Luxembourgeoise de Télédiffusion (CLT) and Information Publicité Benelux (IPB). para. 3 and 4.
[101] *Telemarketing*, supra note 100. para. 6.
[102] *Telemarketing*, supra note 100. para. 5.
[103] *Telemarketing*, supra note 100. para. 16.

The CJEU wrote that conduct where a firm refuses to implement a telephone number of its customer in telemarketing constitutes a refusal to deal. The court further held that: "[R]efusal is not justified by technical or commercial requirements relating to the nature of the television but is intended to reserve to the agent any telemarketing operation broadcast by the said station with the possibility of eliminating all competition from another undertaking, such conduct amounts to an abuse prohibited by Article 86 (now Article 102 TFEU), provided that the other conditions of that article are satisfied." Restriction to provide a service by a dominant firm holding a legal monopoly which results in the elimination of competition in the downstream market, thereby, constitutes an abuse of a dominant position.[104]

Pursuant to the above-mentioned case law, one could consider that a firm should not refuse to sell if it holds a dominant position on the relevant market. The CJEU based its rationale on broad interpretations which refusal conduct constitutes abuse of dominant position. Conclusions by the court were not based on empirical economic analysis of the effect certain conduct had on competition. Such jurisprudence[105] could result in disincentives to invest, which would reduce consumer welfare. Thereby, the CJEU had to interfere, remove legal uncertainty, and define clear and consistent conditions under which the essential facilities doctrine should be applied.[106] An important difference between the EU and the U.S. competition law has to be indicated. In the past, the CJEU, contrary to the U.S. Supreme court, concluded that the main objective of competition law in the EU was not only consumer welfare but also the structure of the internal market, whereas the U.S. antitrust law protects only consumer welfare.[107]

The groundbreaking case in the European competition law related to the clarification of the essential facilities doctrine was the *Oscar Bronner* case. Oscar Bronner is a small daily newspaper publisher, manufacturer, distributor, and editor of the newspaper *Der Standard*

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[104] *Telemarketing*, supra note 100. para. 26 and 27.

[105] See also cases: (1) Case 77/77, Benzine en Petroleum Handelsmaatschappij BV v. Commission, (2) T-374/94, Europan Night Services and Others v. Commission.

[106] Evrard, S. J. (2004). ESSENTIAL FACILITIES IN THE EUROPEAN UNION: BRONNER AND BEYOND. Columbia Journal of European Law 491, 10(3). pp. 15.

[107] Case 501/06 P, GlaxoSmithKline Services and Others v Commission and Others. para. 63.

in Austria. In 1994, it held a market share of 3.6% of the Austrian daily newspaper market and 6 % of advertising revenues.[108]

Mediaprint Zeitungs- und Zeitschriftenverlag (hereinafter referred to as “Mediaprint”) is the largest daily newspaper publisher, manufacturer, distributor, and editor of the newspaper *Neue Kronen Zeitung* and *Kurier* in Austria. In 1994 it held a market share of 46.8% of the Austrian daily newspaper market and 42% of advertising revenues. They reached 71% of all newspaper readers in Austria.[109] It had established a nationwide home-delivery scheme which was operated by its wholly-owned subsidiary. The purpose of the scheme is a nationwide delivery of daily newspapers directly to subscribers in the early morning.[110]

Oscar Bronner brought a suit against Mediaprint in national court because Mediaprint allegedly abused its dominant position by refusing to provide Oscar Bronner with its nationwide home-delivery scheme against a fair and reasonable remuneration and terms. Oscar Bronner further argued that Mediaprint discriminated against it because they offered its scheme to a competitive daily newspaper *Wirtschaftsblatt*, which was also not published by Mediaprint. Moreover, Oscar Bronner argued that it had no reasonable alternatives because postal services would deliver its newspapers considerably later in the morning, subject to high and unprofitable costs.[111] The Austrian court stayed the proceedings and referred preliminary questions to the CJEU, namely whether the refusal to grant access to newspaper distribution scheme abuses a dominant position.[112]

If a firm has a dominant position on a relevant market the CJEU established the following test to determine whether a dominant undertaking was abusing a dominant position under the essential facilities doctrine. (1) The refusal is likely to eliminate all competition in the relevant market. (2) Refusal cannot be objectively justified. (3) Replication of the essential facility is

[108] *Oscar Bronner*, *supra* note 81. para. 4.
[109] *Oscar Bronner*, *id*. Note 81. para. 5 and 6.
[110] *Oscar Bronner*, *id*. Note 81. para. 7.
[111] *Oscar Bronner*, *id*. Note 81. para. 8.
[112] *Oscar Bronner*, *id*. Note 81. para. 11.

not possible because the facility is indispensable to conduct business on the market. It excludes actual or potential alternatives.[113]

In the case at hand, the CJEU decided that newspaper distribution scheme is not indispensable because any newspaper publisher can establish a new distribution scheme since there are no technical, legal or economic barriers to prevent that.[114] Furthermore the CJEU stated that a facility is not replicable when: "[T]he creation of such a system is not a realistic potential alternative and that access to the existing system is therefore indispensable, it is not enough to argue that it is not economically viable by reason of the small circulation of the daily newspaper or newspapers to be distributed."[115] The condition of indispensability is met only if replication of a facility is never economically viable.[116]

In his opinion, Advocate General Jacobs wrote that: "[I]t would be necessary to establish that the level of investment required to set up a nationwide home distribution system would be such as to deter an enterprising publisher who was convinced that there was a market for another large daily newspaper from entering the market."[117] As a result, Mediaprint did not abuse a dominant position against Oscar Bronner.

The second element of the aforementioned test is objective justification. The CJEU in *Oscar Bronner* never considered it because it found that the distribution scheme was not indispensable. According to Lang, two interpretations of objective justification are possible. (1) Refusal could be objectively justified from a view of competition policy when pro-competitive aspects prevail over negatives. (2) Refusal could also be objectively justified from a view of the facility owner. If a reasonable owner of the facility without any downstream economic interest decides to deny access to the facility when acting rationally, he is allowed

[113] *Oscar Bronner*, *id*. Note 81. para. 41.
[114] *Oscar Bronner*, *id*. Note 81. para. 44.
[115] *Oscar Bronner*, *id*. Note 81. para. 45.
[116] *Oscar Bronner*, *id*. Note 81. para. 46.
[117] Opinion of Mr Advocate General Jacobs delivered on 28 May 1998. - *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*. para. 68.

to.[118] E.g.: a rational behavior would be, as already mentioned above if a competitor was a bad debtor.

The first two conditions that were set up by the CJEU existed in the jurisprudence prior to *Oscar Bronner*.[119] Meanwhile, according to the test presented above, the third condition (indispensability element) was newly established by the court. It raises the bar to establish antitrust liability and thus, a remedy of an obligation to deal by a dominant firm because the sole criteria of a dominant position are no longer adequate. The test established in *Oscar Bronner* also clarifies the essential facilities doctrine in European competition law.[120]

The *Oscar Bronner* test is objective and not subjective (the view of a company requesting access). The test is a compound of three elements mentioned above which shall be cumulatively met. The fact that competitor is small, inefficient, efficient or well-financed should not change the legal obligation to deal if all necessary elements of the test are met. As a result, a dominant company is not bound to subsidize a weaker company or compensate its inefficiency. The objectiveness of the test is important because a facility would, thereby, not be indispensable only to the competitor asking for access, but rather to all actual and potential competitors.[121]

The test set forth in the *Oscar Bronner* case is applied in a more stringent manner than it was in the prior cases. Some scholars even argued that if the new indispensability element was applied strictly, the application of the essential facilities doctrine would be limited entirely to natural monopolies. Only such markets can never be economically possible, except when applying the essential facilities doctrine and ordering a remedy to grant access by imposing a duty to deal.[122]

[118] Lang, J. T. (2000). The Principle of Essential Facilities in European Community Competition Law - The Position since Bronner. 1 J. Network Ind. 375. pp. 385.
[119] *Commercial solvents*, *supra* note 92. para. 25, and Case 311/84 Telemarketing. para. 27.
[120] Evrard, S. J., *supra* note 106. pp. 17.
[121] Lang, J. T., *supra* note 118. pp. 381.
[122] Bergman, M. A., (2000). The Bronner Case – A Turning Point for the Essential Facilities Doctrine? 21 European Competition Law Review 59. pp. 61.

2.2.1.2. Horizontal foreclosure

Horizontal foreclosure emerges when a firm with a dominant position tries to exclude its competitor on the relevant market.[123]

One of the rare cases regarding refusal to deal with horizontal foreclosure is *United brands*[124]. United Brands Corporation was a firm incorporated in New Jersey, U.S.A. It was the largest player in the world market in the year 1974 with a worldwide market share of 35%. United Brands Continental B.V. was its European subsidiary incorporated under the law of the Netherlands which was responsible for selling bananas in the EU, except in the UK and in Italy.[125] United Brands refused to sell bananas to its customer Olesen in Denmark because it had collaborated in an advertisement campaign with the United Brands' competitor.[126]

The CJEU decided that a firm with a widely known brand, such as Chiquita Bananas, which is appreciated and valued by the customers, cannot refuse to supply a long-standing customer who undertakes business in accordance with common commercial practices.[127] Moreover, the CJEU held that refusal to sell bananas to customers who collaborated with competing brands would strengthen the position of United Brands on the relevant market because such policy would deter its customers from supporting the advertising of competitors' trademarks. Aforementioned conduct interferes with the independence of small and medium-sized distributors in commercial relationships as a result of an abusive practice by the firm holding a dominant position in the market.[128] Therefore, the CJEU held that United Brands abused the dominant position.[129] The CJEU also imposed a remedy, ordering United Brands to cease the ongoing infringements and start supplying the distributors under fair and reasonable terms.[130]

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[123] Whish, R., & Bailey, D., *supra* note 78. pp. 205.
[124] Case 27/76, United Brands Company and United Brands Continentaal BV v Commission of the European Communities. - Chiquita Bananas.
[125] *United Brands*, *id*. Note 124. pp. 210.
[126] *United Brands*, *id*. Note 124. pp. 210.
[127] *United Brands*, *id*. Note 124. para. 182.
[128] *United Brands*, *id*. Note 124. para. 192 and 193.
[129] *United Brands*, *id*. Note 124. para. 203.
[130] *United Brands*, *id*. Note 124. para. 297.

A horizontal refusal to supply may be regarded as abusive if a dominant company uses a disciplinary measure against its distributor who also sells competitors' products. A dominant firm wants to horizontally foreclose a competitor from the market by refusing to supply a long-standing customer who conducts business in an ordinary commercial practice and, in addition, cooperates with the dominant firm's competitors. In the above-mentioned case, United Brands wanted to exclude a competitor out of the relevant horizontal market. They never intended to exclude a competitor in a downstream market.[131]

United brands case is not the essential facilities case but rather a refusal to supply case since the essential facilities doctrine could only be applicable when denial of access would have eliminated competition in a downstream market.[132] The CJEU based its rationale on the grounds that such conduct forecloses competition horizontally.[133] If the court had applied the doctrine under the *Oscar Bronner* test, United Brands would have not abused a dominant position because access to bananas is not indispensable. Hence, the CJEU distinguishes in *United Brands* between mere horizontal refusal to supply and the essential facilities doctrine.

2.2.2. Applicability of Essential Facilities Doctrine in EU

Similar to the U.S. approach, the legal theory underlying European competition law regards freedom to contract as pro-competitive. The reasons are similar, namely, that refusal to grant access normally encourages the incumbent facility holder and competitors to invest in assets necessary to compete in the market. However, under some circumstances, an exception of this general rule must be established. When a firm owns a facility that is essential for the existence of competition or that causes significant detriment to competition, it could be pro-competitive to order a dominant firm to grant access to the essential facility under non-discriminatory terms. However, the before-mentioned remedy should never force a dominant firm to grant access at a loss. This exception is applicable only when a competitor cannot access goods or services elsewhere, he cannot build or invent them, and there is no objective justification for denial of goods or services. The exception is only feasible if possibly,

[131] Whish, R., & Bailey, D., *supra* note 78. pp. 708.
[132] Lang, J. T., *supra* note 118. pp. 375.
[133] Whish, R., & Bailey, D., *supra* note 78. pp. 708.

there is competition in the downstream market and it is achieved exclusively with access to a facility. Textbook cases where the duty to deal is an appropriate remedy are network industries (*e.g.* telecom networks, gas pipelines, electricity interconnection, etc.) where competitors need physical, electronic or contractual links to compete efficiently because the refusal to grant access to the essential facility would always eliminate all competition, contrary. Facilities in network industries are so important that states commonly impose *ex-ante* regulation with remedies, such as an obligation to deal. The latter's purpose is to liberalize the market and enhance competition.[134] Within the regulated sectors, the duty to deal is prescribed by legislation. In conjunction with an *ex-ante* regulation in the regulated sectors, competition law and the essential facilities doctrine exist parallelly. The difference between competition law and regulated sectors is the former's *ex-post* assessment of facts. Nevertheless, to justify an obligatory duty to deal objectively, a consequential pro-competitive effect in the downstream market is required, and only, therefore, the remedy would be consistent with the general competition policy.[135]

The essential facilities doctrine could adversely affect competition. Thereby, the following circumstances shall limit its scope:

- A facility shall never be essential when a dominant company has reached it through economies of scale. Moreover, it should be essential only if without it, a market would be foreclosed impassably or when the competitors would be in grave disadvantage where pursuing the business without access to a facility would not be financially feasible.[136]
- Moreover, a facility shall also not be regarded as essential when competitors can invest into their own facility solely or in a group and would not suffer from a perpetual inevitable economic handicap caused by a dominant firm's refusal to deal.[137]
- In addition, a dominant firm owning an essential facility and denying access as a result of objective justification would not violate competition law. Examples of objective justification would be as follows: a competitor is a bad debtor, presents a credit risk

[134] Lang, J. T., *supra* note 118. pp. 375 and 376.
[135] Lang, J. T., *supra* note 118. pp. 379.
[136] Lang, J. T. (1994). Defining Legitimate Competition: Companies' Duties to Supply Competitors and Access to Essential Facilities. 18 Fordham Int'l L.J. 437. pp. 487-488.
[137] Lang, J. T., *supra* note 118. pp. 382.

or has failed to perform its contractual obligation. A dominant firm may also refuse to deal unless it can achieve an adequate return on investment which was reasonably required to build a facility. A valid argument against imposing a duty to deal is also that a facility has reached full capacity and a dominant firm is, thus, unable to grant access.[138]

2.2.3. European Commission enforcement policy on the essential facilities doctrine

To enhance legal certainty, the Commission enacted Guidance on enforcement priorities in applying article 82 of the EC Treaty[139] (now Article 102 TFEU). Guidance on enforcement priorities in applying Article 102 TFEU was established after *Microsoft*[140] case and also after *Trinko* in the U.S. Therefore, the Commission could take both approaches (which will be analyzed further). Ultimately, the Commission implemented the following definition of refusal to deal: "[a] broad range of practices, such as a refusal to supply products to existing or new customers, refusal to license intellectual property rights, including when the license is necessary to provide interface information, or refusal to grant access to an essential facility or a network."[141]

Further, the Commission assumes in its Guidance on enforcement priorities in applying Article 102 TFEU that: "[T]ypically competition problems arise when the dominant undertaking competes on the downstream market with the buyer whom it refuses to supply."[142] However, refusal to supply will be deemed as illegal and an enforcement priority by the Commission, if the three following conditions are met. (1) Refusal to supply is linked to a product or service that is objectively necessary for effective competition in the downstream market. (2) Refusal is likely to exclude competition in the downstream market. (3) Refusal will result in prejudice

[138] Whish, R., & Bailey, D., *supra* note 78. pp. 708.
[139] The case will be analyzed below in chapter 3.X.
[140] Case T-201/04. Microsoft Corp. v Commission of the European Communities.
[141] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. (2009/C 45/02). para. 78.
[142] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. (2009/C 45/02), para 76.

to consumer welfare.[143] With aforementioned, the Commission, hence, takes a completely opposite approach to the U.S. Department of Justice. The former sees the essential facilities doctrine as an enforcement priority, subject to fulfillment of the necessary criteria, whereas the latter does not regard a refusal to deal as a meaningful part in antitrust enforcement.

[143] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. (2009/C 45/02), para 81.

3. APPLICATION OF THE DOCTRINE TO INTELLECTUAL PROPERTY

Under the essential facilities doctrine, intellectual property right holders are forced to license their otherwise exclusive rights to their rivals. Their obligation arises as a result of a legal remedy against the abuse of a dominant position when the narrow conditions set forth by jurisprudence that foreclose the competition in the relevant market are fulfilled.[144]

The substantive law of intellectual property is not subject to this master's thesis. However, for the purposes of it, the term "intellectual property" constitutes copyright, patents, design patents (US), designs (EU), and trademarks which, according to legal statutes, upon completion of all the necessary conditions stated by the law, gain a legal status called property which can be used to exclude others, sold, licensed, encumbered, etc.

[144] Graef, *supra* note 4. pp. 1.

3.1. The link between competition law and intellectual property law

In order to better understand the relationship between intellectual property law and competition law, the objectives and policies pursued by both legal branches have to be determined. To this end, both courts and scholars have made efforts to delineate a border between legitimate and unlawful use of intellectual property under the competition law.[145]

Intellectual property law governs the creation and commercial exploitation of exclusive rights which are given to its proprietor by the statutory law. A state follows public interest and it is in public interest to promote creative works, innovation or prevent market confusion. Intellectual property law is essentially about incentives to innovate and create.[146] To promote the aforementioned, a state provides an inventor or creator with a reward in the form of a temporarily limited exclusive right which gives him a competitive advantage in the market. After the limited exclusive right expires, an invention or work becomes freely available for exploitation, hence restoring competition again.[147]

Competition law endeavors to eliminate market failures and strives to protect consumer welfare. Nevertheless, EU has a different and at the same time, the same goal as the antitrust law in the U.S. At first glance, it promotes consumer welfare from new and improved products or services and lower prices. The enforcement should, therefore, only focus on exploitative abuses which detriment consumer welfare. This is the approach of the antitrust law in the U.S. where maximum efficiency is promoted and deadweight loss reduced.[148] However, consumer welfare is not the only goal of EU competition law. Single market integration[149] is also an important goal because the European market is not integrated to the extent the U.S.

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[145] Troberg, M. C. (2011). Differences between the U.S. and the EU in antitrust review of intellectual property: A comparative analysis of the essential facilities doctrine. The Interdisciplinary Centre for Competition Law and Policy. Global Antitrust Review. pp. 55.

[146] Hovenkamp, H. & Janis, M. D., & Lemley M. A., and others. (2016) IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law, Third Edition. Wolters Kluwer. pp. § 1.03.

[147] Turney, J. (2005). Defining the Limits of the EU Essential Facilities Doctrine on Intellectual Property Rights: The Primacy of Securing Optimal Innovation, 3 Nw. J. Tech. & Intell. Prop. 180. pp. 181.

[148] Kobak, Jr., J. B. (1995-1996). Running the Gauntlet: Antitrust and Intellectual Property Pitfalls on the Two Sides of the Atlantic, 64 ANTITRUST L. J. pp. 341.

[149] GlaxoSmithKline Services Unlimited, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P. para. 63.

is. Therefore, exclusionary abuses, such as refusal to supply raise on the ladder of enforcement priorities. Nonetheless, the CJEU has decided to shift competition law policy's goal in the most recent case *Intel*[150] where it prioritized the consumer welfare over internal market integration.[151] Whether future jurisprudence will confirm this change of competition law's main goal in the EU, it remains unknown.

Distinguished scholars such as Hovenkamp, Janis, and Lemley rejected a conclusion that intellectual property rights are monopolies and the antitrust law is designed to prevent monopolies. Therefore, both legal branches are in not conflict with one another. They wrote: "[i]ntellectual property rights do not *ipso facto* confer monopoly power. While they do permit product differentiation, and sometimes give the owner power over price, there is a vast difference between an exclusive right and the sort of economic monopoly that is the concern of antitrust law." Further, they wrote, it is too superficial to acknowledge that antitrust law does forbid monopoly because it rather only prohibits certain anticompetitive conducts designed to achieve market power.[152] As a result, both branches serve complementary aims of promoting consumer welfare, but each must restrict the scope of the other.[153]

The intellectual property law and the competition law have similarities. The goal of both branches is to maximize allocative efficiency (supplying consumer needs) and productive efficiency. When viewed in context, the two laws are not in conflict at all. Instead, they are interdependent efforts that promote efficient marketplace and dynamic competition through innovation.[154] Both the competition law and the antitrust law have a common objective to foster innovation.[155]

However, there is a difference in the way both legal branches pursue promoted goals. The competition law aims to bolster competition and foster innovation while restricting the way

[150] Case C-413/14 P, Intel Corporation Inc. v. European Commission.
[151] Brumec, M. (2018). Is predatory pricing in digital platform economy a rational business strategy?. Pravna fakulteta Ljubljana. pp. 32.
[152] Hovenkamp, H., & Janis, M. D., & Lemley M. A., and others., *supra* note 146. pp. § 1.03.
[153] Hovenkamp, H., & Janis, M. D., & Lemley, M. A. (2006). UNILATERAL REFUSALS TO LICENSE, Journal of Competition Law & Economics, Volume 2, Issue 1. pp.1
[154] Hovenkamp, H., & Janis, M. D., & Lemley M. A., and others., *supra* note 146. pp. § 1.03.
[155] Pitofsky, R. (2001). Challenges of the New Economy: Issues at the Intersection of Antitrust and Intellectual Property, 68 Antitrust Law Journal. pp. 917.

monopoly is created or maintained, whereas the intellectual property law encourages the establishment of exclusive rights to achieve the same goal.[156]

The debate regarding the relationship between intellectual property law and antitrust law makes two distinctions. First, there is a distinction between intellectual property right prior and post intellectual property issuance. Prior to issuance, a process (except in copyright) is supervised by a regulatory agency. Therefore, antitrust law has a relatively weak role in the field of regulatory control. In contrast, once an intellectual property is granted, it is regarded as a property right and subject to very limited regulatory control. Only after the issuance of the right, antitrust control is suitable. The second distinction is between practices that are recognized by the intellectual property law and those that are not. The antitrust analysis is significantly more appropriate when the conduct exercised by a firm is not authorized by the statutory law if a practice constitutes a violation providing that all the requirements necessary to establish an antitrust liability are met.[157]

3.2. U.S. approach

In the U.S. antitrust law, two different views relating the applicability of the essential facilities doctrine to intellectual property have emerged. In the following chapter, both aspects are examined.

Some scholars believe that, even if the classic essential facilities doctrine is related to natural monopolies as tangible assets, the doctrine is also applicable to intangible assets, such as intellectual property.[158] Whereas differently, other commentators think that the doctrine should not apply to intellectual property.[159]

[156] Troberg, M. C., *supra* note 145. pp. 55.
[157] Areeda, P. & Hovenkamp, H., *supra* note 56. pp. 704a.
[158] Pitofsky, *supra* note 2. pp. 452.
[159] See Lipsky, A., & Sidak, J. (1999). Essential Facilities. Stanford Law Review, 51(5)., or Areeda, P., & Hovenkamp, H. (2002). Antitrust Law. Wolters Kluwer Law & Business. New York. pp. 771c., or Marquardt, P., & Leddy, M. (2003). THE ESSENTIAL FACILITIES DOCTRINE AND INTELLECTUAL PROPERTY RIGHTS: A RESPONSE TO PITOFSKY, PATTERSON, AND HOOKS. Antitrust Law Journal, 70(3), pp. 859 and subsequent.

3.2.1. Pro-doctrine commentators and the case law

First, the paper analyzes the opinion of scholars, such as Pitofsky, Patterson, and Hooks. They support a theory that the essential facilities doctrine should apply to intellectual property. Their view will be supported by jurisprudence *in favorem* of the essential facilities doctrine.

Some U.S. courts have applied the doctrine to intangible assets, such as copyrighted databases or computer software. In the *Bellsouth Adv. Pub. v. Donnelley Info. Pub.* case, a district court applied the doctrine to telephone directory listings where a defendant claimed copyright protection. The court decided that the doctrine should be applied because the effect on competition by copyright is the same as with tangible facilities.[160]

Likewise, in the *Data General Corp. v. Grumman Systems Support Corp*.[161]case, the court decided to apply the essential facilities doctrine where a competitor was refused to obtain access to copyrighted diagnostic software. The claim was rejected. However, only since the plaintiff could not prove that the facility was essential and not as a result of the doctrine's non-applicability to intellectual property law. The U.S. Court considered that limitation of intellectual property rights by ordering a duty to deal may jeopardize incentives to innovate. Nevertheless, the scholars believe that under exceptional circumstances permitting antitrust injunctive reliefs, such as the duty to deal, may also stimulate innovation.[162]

Additionally, cases appear where the court applied the essential facilities doctrine to other intangible assets.[163] The court of appeals in the case *Data General Corp. v. Grumman Systems Support Corp*. paragraph 152 held: "[t]hat while exclusionary conduct can include a monopolist's unilateral refusal to license a copyright, an author's desire to exclude others from the use of its copyrighted work is a presumptively valid business justification for any immediate harm to consumers." However, the court further wrote that a plaintiff may prove the existence of exceptional circumstances and rebut such presumption.[164]

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[160] Bellsouth Adv. Pub. v. Donnelley Info. Pub., 999 F.2d 1436 (11th Cir. 1993).
[161] Data General Corp. v. Grumman Systems Support Corp., 761 F. Supp. 185 (D. Mass. 1991).
[162] Pitofsky, *supra* note 2. pp. 453.
[163] Pitofsky, *id*. Note 2. pp. 454.
[164] Data General Corp. v. Grumman Systems Support Corp., 36 F.3d 1147 (1st cir. 1994). para. 152.

In the *Image Technical Services, Inc. v. Eastman Kodak Co*. case [165], the court reviewed a decision that Kodak, a producer and servicer of copiers, had illegally monopolized the market for servicing the copiers by refusing to supply patented replacement parts. The decision imposed an obligation that Kodak shall offer patented parts under reasonable terms to its competitor in the service market. The court had dealt with tensions between antitrust liability and intellectual property in the U.S., namely, because intellectual property proprietors are not immune on antitrust liability, even if freedom of refusal to supply intellectual property right is given by the law.[166] In another case, regarding the same parties, the U.S. Supreme court in *Eastman Kodak Co. v. Image Technical Services* Inc.[167] wrote: "[T]hat power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if a seller exploits his dominant position in one market to expand his empire into the next."[168]

Similarly to the cases referred above, the court of appeals in *Intergraph Corp. v Intel Corp.*[169] concluded that an obligation to grant access to intellectual property may be awarded in exceptional circumstances if the plaintiff demonstrates anticompetitive intent.[170]

According to Pitofsky and others, the essential facilities doctrine is applicable to intellectual property in exceptional circumstances when it meets all four elements set forth in *MCI Communications*. As a result, according to them, the U.S. law permits a court to order injunctive relief of compulsory licensing of intellectual property rights which are regarded as "essential". Furthermore, they emphasized that the doctrine should be applied with caution.[171]

3.2.2. Anti-doctrine commentators and case law

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[165] IMAGE TECHNICAL SERVICES, INC. v. EASTMAN KODAK CO.[165], 125 F.3d 1195 (9th cir. 1997).
[166] Pitofsky, *supra* note 2. pp. 455.
[167] Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992).
[168] Eastman Kodak Co. *Id.* Note 167. pp. 480.
[169] INTERGRAPH CORP. v. INTEL CORP., 195 F.3d 1346 (Fed. Cir. 1999).
[170] Pitofsky, *supra* note 2. pp. 456.
[171] Pitofsky, *id.* note 2. pp. 462.

Second, the opinion of the majority of scholars, such as Marquard and Leddy, is presented. Their opinion is further supported by jurisprudence. They held that the essential facilities doctrine cannot be applied to intellectual property rights. Although, as the fierce opponents of the essential facilities doctrine, they acknowledge that intellectual property law does not grant immunity against antitrust law.[172] They believe that case law, fundamental principles, and policy of intellectual property law and antitrust law do not support the paradigm that the doctrine can be applied to intellectual property rights. Nonetheless, the scholars further add that the doctrine could be applicable with exceptional cases to tangible rights if exceptional circumstances occur when a facility would exclude all competition on the downstream market. However, the doctrine should never apply to intellectual property rights because a state gives an exclusive right to exclude others from using that right to promote innovation. Further, they emphasized that such extraordinary circumstances where compulsory licensing of intellectual property rights would be an appropriate remedy, according to their knowledge, had never arisen. Moreover, the doctrine should take into account that intellectual property rights create a legitimate monopoly which is granted by the U.S. Constitution. During the lawful temporal duration of the right, a reward in the form of the exclusive right which creates market advantage is given by the state with a purpose to foster innovation.[173]

The above-mentioned authors further wrote that they disagree with concluding arguments brought by pro-doctrine scholars that a remedy of compulsory licensing must be granted if intellectual property rights give their owners monopoly power in the relevant product market where competitors cannot duplicate the intellectual property right without infringing the original right and the right holders refuse to license intellectual property rights. Moreover, they also disagree with a cautious application of the doctrine.[174]

In addition, they disagree on the role of anticompetitive intent. Authors held that anticompetitive intent or failure to provide objective business justification cannot be relevant within the doctrine's application. Intent to grow or acquire a larger market share can only be

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[172] Marquardt, *supra* note 55. pp. 859.
[173] Marquardt, *supra* note 55. pp. 848.
[174] Marquard, *id*. Note 55. pp. 848.

regarded as exceptionally as problematic from the aspect of antitrust policy.[175] The purpose why enterprises invent and create is to obtain a legitimate competitive advantage which would increase their market share. Thus, intent cannot always be regarded as an element of an antitrust violation. Their hostile approach stems from a notion that the application of the essential facilities doctrine is a vague standard which undermines the procompetitive system of incentives and rewards since it undermines the objectives of intellectual property rights.[176]

U.S. courts have distinguished between exercising and exploiting a legitimate advantage over direct competitors by the incumbent and those where incumbent attempts to leverage its advantages from the upstream market to the downstream market. Marquard held that Pitofsky and others disregarded the leveraging criteria. Therefore, they thoroughly broadened the scope of the essential facilities doctrine too far beyond what the doctrine should stand for.[177]

The pursuit of establishing competitive advantage is a process that creates incentives for invention and creation of intellectual property. When a reward in a form of an exclusive right is granted, such grant normally has a positive effect on competition for the reason that competitors will attempt to hold their position in the market and start innovating themselves. Allowing rivals to gain access to intellectual property under fair terms creates a problem of free-riders. It undermines competitor's and incumbent's incentives to innovate since competitor does not wish to invest in the development of a facility, whereas incumbent withdraws from investing to prevent free-riders from obtaining its facility's competitive advantage.[178] If an incumbent knew that he would have to grant access to its facility, he would never have built a facility of that size or character in the first place.[179]

Furthermore, the test of the essential facilities doctrine set forth in the case *MCI Communications* should not be applicable to intellectual property cases because all elements of the test are always met when applying it to intellectual property rights. (1) A firm controls

[175] Areeda, P. & Hovenkamp, H. *supra* Note 56. pp. 805b.
[176] Marquard, *supra* Note 55. pp. 849.
[177] Marquard, *supra* Note 55. pp. 849.
[178] Marquard, *supra* Note 55. pp. 856.
[179] Areeda, *supra* note 15. pp. 851.

an intellectual property right; (2) it cannot be duplicated; (3) access is denied; (4) license could have been granted. Should the doctrine be applied to intellectual property cases, incentives to innovate would be considerably undermined. It has to be emphasized that this is not the policy of the intellectual property law and the antitrust law. Further, the court must also take into consideration the fact that intellectual property rights are legitimately acquired.[180] This statement written by Marquard and Leddy is not precise and is interpreted too narrowly since the criteria of duplication do not relate to the actual intellectual property right, but rather to duplication of the right in the relevant market. If a rival can develop an intellectual property right which serves as a substitute to the right in the case at hand the requirement of the test is not met.

Areeda held that the concept of the essential facilities doctrine has serious and questionable applications. He argued that the use of the doctrine has insufficient logic because under the intellectual property law, *e.g.* a patent holder has a right to exclude others. When applying the doctrine to intellectual property rights if a proprietor excludes the competitors with exclusionary intent (which is granted by the law), he would violate antitrust laws.[181]

As already mentioned above, intellectual property rights grant proprietor an exclusive economic right with a limited scope of duration. The right may or may not create a monopoly in an economic view which is relevant for the determination of the relevant market in the antitrust violation analysis. When determining market power and the scope of monopoly, two circumstances have to be considered: (1) rivals' ability to develop a competing intellectual property and (2) the quality of incumbents' innovation.[182]

Lipsky and Sidak are additional scholars that oppose the application of the essential facilities doctrine to intellectual property rights. Intellectual property stimulates innovation by offering large financial rewards or gaining other competitive advantages.[183] When the essential facilities doctrine is applied, a remedy granting mandatory access to a facility is imposed.

[180] Marquard, *supra* Note 55. pp. 857.
[181] Areeda, *supra* Note 15. pp. 849.
[182] Marquard, *supra* Note 55. pp. 856.
[183] Lipsky, *supra* Note 20. pp. 1187 and 1193.

Contrary to the doctrine, Intellectual property rights grant exclusive rights to generate incentives to create. Further, they held that the doctrine is incompatible with the intellectual property because the essential facilities doctrine would have to apply to the intellectual property that is one of a kind, valuable, indispensable to competition, and difficult to duplicate by default. Therefore, a policy which prevents the establishment of the desired inventions should not be pursued.[184]

Areeda and Hovenkamp wrote that the doctrine should be abandoned because it is not necessary and it causes prejudice.[185] In their work, they wrote about paragraph 773e of the Antitrust Law that: "[w]e may be left with two general caveats to be implemented by rough categorical judgments. The first caveat is that no essential facility rule should be used to deprive an otherwise lawful monopolist of its "legitimate" reward. The second caveat is that duties to deal should not be imposed in a way that chills desirable activities. In applying both caveats, we assume that price control or limitation of returns to "reasonable" levels will be deemed unavailable to the antitrust court. As the Supreme Court observed in Trinko, sharing obligations can undermine the incentive to invest." The authors, therefore, hold a hostile approach *vis-à-vis* the essential facilities doctrine. Similar, judge Posner holds a similar view that all unilateral refusals to supply should be regarded in compliance with antitrust laws.[186]

According to skeptics of the doctrine, the U.S. courts have consistently maintained the basic principle, namely, that intellectual property right holders can exclude others from obtaining their intellectual property right.[187] This premise is also endorsed by the U.S. regulatory agency. The antitrust law should not impose liability to a firm that unilaterally refuses to license intellectual property since it may undermine incentives to invest in innovation.[188] Jurisprudence, administrative case practice, and the majority of U.S. scholars regard doctrine as incompatible with intellectual property law and, hence, also with the antitrust policy.

[184] Lipsky, *id.* Note 20. pp. 1219.
[185] Areeda, P. & Hovenkamp, H. *supra* Note 56. pp. 771c.
[186] Richard Posner (2001), Antitrust Law. 2nd ed. University of Chicago Press. pp. 242-244.
[187] Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969). pp. 395 U. S. 135.
[188] U.S. Department of Justice and the Federal Trade Commission. (2017). Antitrust Guidelines for the Licensing of Intellectual Property. pp. 3. See at: https://www.justice.gov/atr/IPguidelines/download.

The administrative practice of the FTC and the relevant jurisprudence developed by the U.S. courts, where the case law is hostile in relation to the application of the essential facilities doctrine to intellectual property rights, will be analyzed below.

FTC practice

In the FTC case *Intel Corporation*[189], Intel was forcing personal computer manufacturers and developers to license its intellectual property to Intel. If manufacturers denied the license, Intel threatened to refuse to license Intel's intellectual property.[190] Intel used the leverage from the upstream market to obtain access to the customer's intellectual property.[191] In the process against Intel, the FTC held that: "[T]he Proposed Order does not impose any kind of broad "compulsory licensing" regime upon Intel. So long as it is otherwise lawful, Intel is free to decide in the first instance whether it chooses to provide or not provide information to customers, and whether to provide more information or earlier information to specific customers in furtherance of a joint venture or other legitimate activity. Moreover, the Order is limited to the types of information that Intel routinely gives to customers to enable them to use Intel microprocessors, not information that would be used to design or manufacture microprocessors in competition with Intel." The latter held a dominant position in the upstream market and used its intellectual property to strengthen its position through allegedly anticompetitive means. Nevertheless, the FTC decided that it was legitimate and lawful by Intel to refuse to license its intellectual property to competitors that want to compete with Intel in the upstream market.[192]

In the end, the case was settled due to other violations not related to the essential facilities doctrine and Intel agreed not to retain technical information or products related to intellectual property in the dispute.[193]

[189] Intel corp. FTC Consent Order, Docket Number: 9288.
[190] Intel Corp.,(23. April 1999). Analysis to Aid Public Comment. 64 Fed. Reg. 20,134.
[191] Marquard, *supra* Note 55. pp. 861.
[192] Marquard, *supra* Note 55. pp. 862.
[193] Pitofsky, R. (2001). Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy, 16 Berkeley Technology Law Journal. pp. 549 and 550.

The FTC took the same approach in the *EI DuPont De Nemours & Co*. case[194]. DuPont developed technology for titanium dioxide which was protected by intellectual property rights and gave it a substantial cost advantage against its rivals. DuPont exploited that advantage by increasing production, setting prices that prevented competitors from expanding, and refusing to license the technology to rivals. The FTC wrote that a firm may obtain a larger market share if the means of acquiring market share were legitimate and not illegal.[195]

Jurisprudence of the U.S. courts

In Zenith Radio Corp. v. Hazeltine Research[196] the Supreme Court considered whether the refusal to license patents by Hazeltine to Zenith, unless Zenith agreed to pay royalties from the patented products and the products outside of the sphere of the patented products, constitutes a violation of the antitrust law. The Court held that a patent owner can exclude others from using a patent. However, it cannot extend such rights beyond the established limits of the patent. A patent holder cannot condition licensing of his patent to a product not within the patent's scope of its exclusive rights.[197]

The case proves that the essential facilities doctrine is (when appropriately apprehended) consistent with the rules of antitrust rules applying to the license of intellectual property. Both laws denounce the efforts to leverage legitimately acquired market power on the upstream market to hinder competition in the secondary market. As a result, the essential facilities doctrine is consistent with the fundamental principle of intellectual property law. That refusal to license an intellectual property right in the market for which the right was innovated does not violate the antitrust law.[198]

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[194] EI DuPont De Nemours & Co., (1980). 96 F.T.C. 653, 1980 FTC LEXIS 14.
[195] Marquard, *supra* Note 55. pp. 862.
[196] Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969).
[197] Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969). pp. 395 U. S. 136.
[198] Marquard, *supra* Note 55. pp. 865.

In the *United States of America v. Studiengesellschaft Kohle, M.b.h*. case[199], Studiengesellschaft Kohle, a patent holder, refused to license a production process to its rivals. With such conduct, they obtained a significant market advantage to the extent that all other production processes were not economic. The lower court found that such conduct is abusive because no other economically viable options existed (this argumentation is similar to the CJEU jurisprudence). However, the Appellate Court held that: "[t]he protection of the patent laws and the coverage of the antitrust laws are not separate issues. Rather, the conduct at issue is illegal if it threatens competition in areas other than those protected by the patent, and is otherwise legal. The patentee is entitled to exact the full value of his invention but is not entitled to endanger competition in other areas by manipulating his patent monopoly."[200] The court wrote that such conduct is authorized by the patent law and, furthermore, it held that the challenged practice does not result in a general anticompetitive effect that would exceed the anticompetitive effects authorized *ex-ante* by the patent law.[201]

According to Marquard, no case in which a U.S. court decided that unilateral denial of the license of intellectual property would comprise of illegal exclusionary conduct prohibited by the antitrust law exists.[202] With regard to the cases cited by Pitofsky and others in The Essential Facilities Doctrine under U.S. Antitrust Law, he held that in *Data General Corp. v. Grumman Systems Support Corp,* and *Image Technical Services, Inc. v. Eastman Kodak Co*. cases, courts did not order compulsory licensing. Even more, the courts have specifically stated that no U.S. court has ever ordered compulsory licensing of intellectual property when applying the essential facilities doctrine.[203]

Further, he held that only in exceptional circumstances, such as fraudulent conduct or leveraging monopoly power outside the limits inherent in intellectual property rights refusal to license may be regarded as abusive. Monopoly power which derived from the legitimately

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[199] United States of America v. Studiengesellschaft Kohle, M.b.h., Director Max Planck, institut Fur Kohlenforschung, Appellant, hercules Incorporated, et al, 670 F.2d 1122 (D.C. Cir. 1981).
[200] United States of America v. Studiengesellschaft Kohle, M.b.h., Director Max Planck, institut Fur Kohlenforschung, Appellant, hercules Incorporated, et al, 670 F.2d 1122 (D.C. Cir. 1981). pp. 1128.
[201] United States of America v. Studiengesellschaft Kohle, M.b.h., Director Max Planck, institut Fur Kohlenforschung, Appellant, hercules Incorporated, et al, 670 F.2d 1122 (D.C. Cir. 1981). pp. 1135.
[202] Marquard, *supra* Note 55. pp. 866.
[203] Marquard, *supra* Note 55. pp. 868.

acquired intellectual property right is not sufficient to establish antitrust liability by itself. The only inconsistency with the two above-mentioned cases *vis-à-vis* other case law was that the former courts interpreted the doctrine in a broader manner. As a result, none of the cases support the idea of the doctrine, which establishes an obligation to license monopolist's intellectual property rights. The intellectual property rights obtained by the right holder result in a legitimate competitive advantage. A mere establishment of monopoly power by cause of business acumen should not violate antitrust law.[204]

The U.S. courts are extremely cautious to find liability on the ground of a firm's unilateral refusal to supply, even if an enterprise is a monopolist. The reluctance is even stronger when the firm refuses to license intellectual property rights since an option to exclude others from using the right (freedom to select somebody's contract partner) is the basic principle of the intellectual property law and the contract law.[205] By virtue of legal argumentation *a maiori ad minus*, *Trinko* is also relevant for intellectual property rights because the court said that unilateral refusals to deal are seldom, if ever, anticompetitive. If, according to U.S. courts, the doctrine should almost never apply to tangible assets, therefore, the doctrine should apply to intellectual property rights (intangible assets) even less.

[204] Marquard, *supra* Note 55. pp. 872.
[205] Hovenkamp, H. & Janis, M. D., & Lemley, supra note 153. pp. 42.

3.3. EU approach

3.3.1. A special relationship between intellectual property and the competition law in the EU

The European competition law considers the relationship between intellectual property rights and the competition law in two ways. One way relates to the application of Article 101 TFEU[206] to horizontal and vertical license agreements of intellectual property right, technology pools, agreements relating to technology standards, and also application of The Block Exemption Regulation 772/2004[207] for the technology agreements where situations that otherwise infringe Article 101 TFEU are exempted from the prohibition. Application of the above-mentioned provisions to intellectual property rights is not the subject matter of this thesis.[208] The second way relates to the application of Article 102 TFEU. It governs the manner in which dominant firms operate with their intellectual property rights. According to the European competition law, refusal to license intellectual property is, under certain circumstances deemed abusive in conjunction with an application of the essential facilities doctrine.

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[206] Article 101 TFEU reads as follows: 1. "[T]he following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,
which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."
[207] Commission Regulation (EC) No 772/2004.
[208] For more information see: Whish, R., & Bailey, D., *supra* note 78. pp. 767 and subsequent.

Pursuant to the established jurisprudence of the CJEU, which is mentioned in the following chapters below, firms that exercise their intellectual property rights are not excluded from the application of competition law. This paradigm is similar to the U.S. antitrust policy.

Intellectual property law was established in order to find the right balance between private and public interests to promote innovation and creative works. To enhance incentives to innovate, a state grants certain exclusive rights that allow an inventor or author to legally protect their intangible property. In the EU, intellectual property rights are subject to the national laws of the member states. EU intellectual property legislation and the CJEU jurisprudence try to harmonize certain aspects of national rules in fragments. The largest achievement of the EU intellectual property law is the harmonization of rules relating to trademarks by the Trade Mark Directive[209] and Trade Mark Regulation[210] and community designs by Community Design Regulation[211].

Competition law should assess an exercise of intellectual property rights by a dominant firm cautiously. Establishing a broad liability with a remedy that awards an obligation to license intellectual property to rivals may reduce incentives to invest in innovation.[212]

Nevertheless, according to EU law, intellectual property may sometimes restrict competition. When a firm acts in an infringing manner, competitiveness, growth, and consumer welfare suffer. Yet, competition policy should not only limit the scope of intellectual property rights but it should rather work hand-in-hand with the intellectual property policy to achieve an environment with incentives to innovate and increase the consumer welfare.[213]

[209] Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks.
[210] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark.
[211] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.
[212] Fox, E. M. (2005). Monopolization, Abuse of Dominance, and Refusal to License Intellectual Property to Competitors—Do Antitrust Duties Help or Hurt Competition and Innovation? How Do We Know?. European Competition Law Annual. pp. 633.
[213] European Commission. Intellectual property and competition. 19th IBA Competition Conference, Florence 11 September 2015 – version 01. See at: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/intellectual-property-and-competition_en

A typical attribute of intellectual property is that a state grants an exclusive right to induce creative and innovative behavior. Although an exclusive right holder may exclude others from producing, distributing, reproducing, etc., an intellectual property proprietor is not necessarily a monopolist in an aspect of competition law because other intellectual property rights may also be part of the same relevant market. The notion that intellectual property rights bestow exclusive rights upon its proprietors, whereas competition law endeavors to maintain markets open, therefore, that there is a fundamental tension between these two branches of law, is false.[214] Both legal areas, instead, share the same goal of promoting consumer welfare and efficient allocation of resources since innovation is a pivotal element in the competitive market economy.[215]

The Department of Justice and the Federal Trade Commission apply the same policy as the European Commission when enforcing antitrust law issues related to intellectual property rights. Antitrust enforcers and courts also agree on the notion that both legal branches pursue the same aims of increasing consumer welfare and promoting innovation.[216]

3.3.2. Historic overview of the CJEU jurisprudence

Article 102 TFEU forbids the abuse of a dominant position, whereas the law of intellectual property grants exclusive rights which by virtue of public interest cannot exist without exceptions and limitations. Article 102 TFEU is one of the limitations that confine the scope of exclusivity of intellectual property rights. The relevant question is how far the competition law can interfere with intellectual property rights. The CJEU wrote that bare ownership cannot infringe Article 102 TFEU. However, the latter Article can be applied when a firm abuses a dominant position.[217] The following limitation is proportionate and in accordance with Article 8(2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights

[214] Whish, R., & Bailey, D., *supra* note 78. pp. 769.
[215] Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, 2014/C 89/03. para. 7.
[216] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007). pp. 1. See at: https://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf.
[217] Case 24-67, Parke, Davis and Co. v Probel, Reese, Beintema-Interpharm and Centrafarm.

(TRIPS)[218]. In accordance with TRIPS, the appropriate measures can be taken against the abuse of intellectual property rights, provided that right holders unreasonably restrain trade or adversely affect the international transfer of technology.

The first two cases related to the essential facilities doctrine and its application to intellectual property rights in the EU were *Volvo v. Veng*[219] and *Renault*[220] but only the former case will be presented because the facts are similar and there is no need to introduce both. In these two cases, the CJEU developed the fundamental principles relating to the duty to deal with intellectual property rights.[221]

Volvo, a car manufacturer was a proprietor of a registered design for the front wings of a car it produced. According to the law, registered design grants the owner an exclusive right to make and sell the protected subject matter. These front wings are required to effectively repair the body of the car. Volvo refused to grant licenses to manufacturers of spare parts, therefore precluding them to produce front wings. Veng imported the protected body parts which were manufactured by spare part manufacturers without obtaining an appropriate license, thereby, infringing the design held by Volvo.[222] The relevant legal question was whether the act of omission to license design to manufacturers constitutes an abuse of a dominant position.

The CJEU decided that the essence of a registered design is to exclude third parties from producing and selling. An obligation that would grant an obligatory license, even under reasonable economic terms, would deprive the owner of this exclusive right, hence, refusal to grant a license alone cannot constitute an abuse of a dominant position.[223]

[218] Treaty governed by public international law. Only states and international organisation can be its contracting members.
[219] C-238/87, AB Volvo v. Erik Veng (UK) Ltd.
[220] Case 53/87, Consorzio italiano della componentistica di ricambio per autoveicoli and Maxicar v Régie nationale des usines Renault.
[221] Evrard, S. J., *supra* note 106. pp. 7.
[222] Volvo v. Erik Veng. *supra* note 219. para. 3 and 4.
[223] Volvo v. Erik Veng. *supra* note 219. para. 8.

However, if a firm exercises its exclusive right, such as car front wings, the conduct may be prohibited by Article 102 TFEU if a firm holds a dominant position and exercises its exclusive rights in an abusive manner, such as refusal to supply protected spare parts to independent repairers, price-fixing of spare parts at an unfair price, or deciding to stop producing spare parts when models are in circulation.[224] The legal remedy available to combat such abuse could be to impose a compulsory license which would limit the scope of an exclusive right.[225] This was the case where the CJEU established a possibility to regard the exercise of exclusive rights as abusive if a firm holds a dominant position in the relevant market. Yet, the court did not fully determine the notion of abusive practices that relate to the use of intellectual property rights and also the court failed to establish a test that would prevent arbitrary and erroneous decisions.

The second was the case *Magill*[226], which is an important case in the jurisprudence of CJEU regarding the essential facilities doctrine and its application to intellectual property rights.

Most households in Ireland and 30-40% of households in Northern Ireland could receive TV programs broadcasted by RTE, ITV, and BBC. At that time, no extensive weekly TV guides were available on the market of Ireland and Northern Ireland. TV stations published their own TV guides which included only their own programs. According to the Irish and the UK legislation, these TV guides were protected by copyright. TV stations offered their TV guides to daily newspapers under license free of charge, subject to certain conditions. Daily newspapers got only the program for the next day or, in the event of holidays, for the next two days in advance.[227]

Magill TV Guide Ltd. undertook an effort to develop a comprehensive weekly TV guide. However, the publication of the guide was prevented by TV stations who obtained injunctive reliefs that prohibited publication of it.[228] Magill complained to the Commission, which

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[224]Volvo v. Erik Veng. *supra* note 219. para. 9.
[225] Graef, *supra* note 4. pp. 2.
[226] 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.
[227] MaGill, *supra* note 226. para. 6-9.
[228] MaGill, *supra* note 226. para. 10.

adopted a decision, finding that TV stations abused a dominant position and ordered a remedy that infringers should cease their acts and start supplying their weekly programming to Magill.[229]

The CJEU wrote that mere ownership of intellectual property cannot by itself constitute a dominant position. However, in the present case, information related to TV stations' TV programs can only be obtained by TV stations themselves because they are the only source of this information. TV stations are, therefore, *de facto* monopolists over the information used for the creation of a comprehensive TV guide.[230]

The court cited all the relevant findings from the case *Volvo v. Veng.* The existence of an exclusive right by itself cannot constitute an abuse. However, if proprietor exercises its exclusive right in an abusive manner, in exceptional circumstances, he can engage in abusive conduct.[231]

The question that arises is whether copyright proprietors can prevent any undertaking (a notion of a company in the EU competition law) from publishing a comprehensive weekly TV guide which consists of copyrighted information.[232] First, the CJEU found that there was no actual or potential substitute for a weekly TV guide and that consumer demand was present.[233] Second, there was no objective justification by TV stations in the activity of TV broadcasting or that of publishing a TV guide.[234] Third, refusal to provide information prevents the appearance of a new product.[235] In conclusion, TV stations preserved the downstream market for TV guides to themselves by denying access to essential information, which was indispensable for the establishment of a TV guide.[236] The CJEU wrote that under such circumstances, TV stations abused their dominant position.

[229] MaGill, *supra* note 226. para. 11 and 12.
[230] MaGill, *supra* note 226. para. 46 and 47.
[231] MaGill, *supra* note 226. para. 49 and 50.
[232] MaGill, *supra* note 226. para. 51.
[233] MaGill, *supra* note 226. para. 52.
[234] MaGill, *supra* note 226. para. 55.
[235] MaGill, *supra* note 226. para. 54.
[236] MaGill, *supra* note 226. para. 56.

As a result, the Commission can impose an obligation to deal, such as a compulsory license for the copyrighted works to the infringers, in order to ensure the effectiveness of its decision after finding that undertakings infringed Article 102 TFEU.[237]

The court in *Magill* did not define the term "new product". The problem arises when one tries to distinguish an old product versus the new product. Another unanswered question is whether TV stations would exculpate themselves by offering a complete TV guide.[238]

Furthermore, the CJEU did not establish an absolute rule again when the refusal to grant a license would constitute an infringement of competition law but provided a rationale based on facts of the case.[239]

Magill caused a fierce debate between scholars. The question arose whether the test was too broad and, thus, the compulsory licenses were given too easily. Some scholars, however, thought that *Magill* was a case with exceptional circumstances and should be interpreted in a manner that compulsory licenses of intellectual property rights should be questionable under overbreadth or because of different reasons, such as a question whether there even is a copyright protection in a list of programs, since it does not show a lot of real artistic, original, and intellectual values.[240] Other scholars wrote that compulsory license in *Magill* is justified as a result of being a by-product of TV broadcasting which is not a product of creative activity and should, therefore, be subject to competition. Monopoly situation did not arise from intellectual property rights, but rather from a strong position of firms in the upstream market.[241]

In the *IMS Health* case[242], IMS and NDC are competitors in tracking the sales of pharmaceutical and healthcare products. IMS provides data on regional sales of

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[237] MaGill, *supra* note 226. para. 91.
[238] Evrard, S. J., *supra* note 106. pp. 12.
[239] Vinje, T. (1995). The Final Word on Magill, 6 Eur. Intell. Prop. Rev. 297, 300.
[240] Korah, V. (2002). Symposium: the Federal Circuit and Antitrust: The Interface between Intellectual Property and Antitrust: The European Experience, 69 Antitrust L.J. pp. 801 and 810.
[241] Ridyard, D. (1996). Essential Facilities and the Obligation to Supply Competitors under UK and EC Competition Law, 8 Eur. Competition L. Rev. pp. 438 and 446.
[242] Case C-418/01, IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG.

pharmaceutical products in Germany customers formatted according to the brick structure. Bricks are created by taking into account numerous factors, such as borders of municipalities, the density of population, postcodes, transport connections, the geographical distribution of pharmacies, and doctors' surgeries.[243] Brick structures were marketed and distributed free of charge to pharmacies and doctors' surgeries and had become an industry standard to which its customers adjusted their distribution systems. IMS set up a working group with its clients in pharmaceutical industries with the intent to optimize and improve market segmentation. The magnitude of this working group is the subject of dispute between IMS and NDC.[244] IMS also refused to grant a license for a system protected by copyright to NDC and, hence, precluded NDC the possibility to compete on the German market since the system has become an industry standard.

Firstly, the court decided to what extent IMS can involve its clients from the other side of the market in the development of database protected by copyright. In paragraph 28 of *IMS Health,* the court cited the *Oscar Bronner* case from paragraphs 43 and 44 "[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." The court went further: the creation of alternatives must not be economically viable.[245]

To analyze whether the refusal to license is abusive, the degree of user participation in the development of the structure and the cost related to purchasing the studies on regional sales on the basis of an alternative structure are factors must be considered to determine whether the copyright protected structure is indispensable.[246]

[243] IMS Health, *supra* note 242. para. 3 and 4.
[244] IMS Health, *supra* note 242. para. 5.
[245] IMS Health, *supra* note 242. para. 28.
[246] IMS Health, *supra* note 242. para. 30.

Secondly, the court decided whether the refusal to grant a license for the product protected by copyright in the above-mentioned circumstances establishes abusive conduct.

The court wrote that a right of reproduction is an exclusive right of the intellectual property rights proprietor and that a dominant firm cannot in itself abuse a dominant position by refusing to grant a license. However, the court cited *Volvo v. Veng* that an exercise of an exclusive right may under extraordinary circumstances involve an abusive practice.[247]

In paragraph 38 of *IMS Health*, the CJEU further cited *Magill* and *Oscar Bronner* that: "[I]n 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 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."

In order to exclude any competition on the downstream market, according to the CJEU jurisprudence, it is sufficient if the potential or hypothetical market was recognized. That is when products or services as input would be indispensable to supply the actual demand. The element of exclusion of competition on a downstream market is fulfilled, as the court decided in paragraph 45 of *IMS Health* when "[t]wo different stages of production may be identified and that they are interconnected, inasmuch as the upstream product is indispensable for the supply of the downstream product".[248]

Regarding the element of preventing the emergence of a new product, the CJEU summarized the notion of Advocate General in his Opinion. The public interest in the preservation of competition can overcome the private interests of the intellectual property right owner only when refusal to grant license bars the establishment of a downstream market to the disadvantage of consumers and their welfare. However, competitor asking for access must

[247] IMS Health, *supra* note 242. para. 34. and 35.
[248] IMS Health, *supra* note 242. para. 44 and 45.

intend to produce a new product or services not offered by a dominant firm for which a potential consumer demand exists and not only copy the one already provided.[249]

It is also necessary to determine whether the refusal to deal would be justified by objective review.[250]

The CJEU has established a test in *IMS Health* from the case *Magill* in conjunction with a test established in the case *Oscar Bronner* according to which the essential facilities doctrine would be applicable to intellectual property rights. The test is comprised of the following four elements: (1) access to intellectual property rights is indispensable; (2) refusal prevents establishment of a new product, for which a potential consumer demand exists; (3) refusal to license is not objectively justified; (4) refusal to license intellectual property rights eliminates competition in the downstream market.[251]

Since the case was referred for a preliminary ruling to the CJEU under Article 267 TFEU by the *Landgericht Frankfurt am Main*, the court decided that it is for the referring court to decide whether the conditions set forth in the test were met. If conditions are fulfilled, the refusal to license copyrighted work under reasonable, fair, and non-discriminatory terms constitutes an abuse of a dominant position.

The case was important because CJEU further clarified the rules and criteria defined in prior cases and stated that competition in the downstream market must be eliminated.[252]

The cases mentioned above substantiate that the CJEU did not apply the essential facilities doctrine consistently. The older judgments were never adopted comprehensively since a new

[249] IMS Health, *supra* note 242. para. 48.
[250] IMS Health, *supra* note 242. para. 51.
[251] 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.
[252] Müller, U. and Rodenhausen, A. (2008). The Rise and Fall of the Essential Facility Doctrine. European Competition Law Review 310. pp. 325.

condition was added in every subsequent case. Some scholars even argue that the doctrine was applied differently in each case.[253]

The latest case when applying the essential facilities doctrine to intellectual property was the case *Microsoft*[254]. The Commission found in its decision that Microsoft had abused a dominant position by refusing to grant access to interoperability information[255] and imposed a fine of 497 million EUR[256]. Microsoft had appealed to the Court of First Instance (now General Court).

Microsoft is a software development company that markets a wide variety of software products and is best known for its operating system software for personal computers and workgroup servers. [257] In the year 2000, Microsoft had a 90% market share in the market for operating systems for personal computers. Therefore Windows operating system was a *de facto* industry standard for personal computers.[258]

Sun Microsystems (hereinafter referred to as the "Sun") is a company which supplies servers and server operating systems. Sun wanted to obtain information from Microsoft. However, the latter refused to give information and technology necessary to connect and interoperate Windows operating system developed by Microsoft with the workgroup server operating system developed by the Sun. Microsoft did not provide information and technology. Therefore, the working group server operating system developed by the Sun could not completely interoperate with the Windows operating system.[259]

Sun was one of the largest competitors to Microsoft in the workgroup server market. The conduct of Microsoft restricted rivals to offer other servers than those developed by Microsoft which ran on Windows operating system. Microsoft's policy not to disclose

[253] Graef, *supra* note 4. pp. 5.
[254] Case T-201/04, Microsoft Corp. v Commission of the European Communities.
[255] Commission Decision COMP/C-3/37.792 Microsoft [2004] OJ L32/23. para. 546.
[256] Miscrosoft, *supra* note 254. para. 46.
[257] Miscrosoft, *supra* note 254. para. 1.
[258] Commission Decision COMP/C-3/37.792 Microsoft [2004] OJ L32/23. para. 448 and 472.
[259] Miscrosoft, *supra* note 254. para. 2 and 7.

copyright protected information foreclosed competition on the market for working group serves.[260]

The Court of First Instance upheld the decision of the Commission. The court, the same as the Commission, applied the four-element test set forth in the *IMS Health* case. The decision and explanation with regard to each element of the test are analyzed below.

First, indispensability requirement will be satisfied when two distinct stages of manufacture could be recognized. Both stages have to be interconnected and the product or service offered in the upstream market must be indispensable for market entry in the downstream market.[261] Although there are at least a few different alternatives to achieve minimal level interoperability with a non-Microsoft operating system[262], the court decided that rivals can only compete viably in the downstream market when their products can fully interoperate with Windows operating system.[263] The refusal to grant interoperability information prevented Microsoft's competitors of using an industry standard.[264]

When comparing the indispensability requirement in *Oscar Bronner* with *Microsoft,* the standard was lowered in the latter case. In *Oscar Bronner,* the court wrote that it is not conclusive whether the product or service to which access is claimed is the most favorable option considering that economically viable alternatives exist. Differently, in *Microsoft*, the court decided that competitors must be granted the same operability with Microsoft's products as Microsoft itself. It follows that as long as alternatives do not put competitors in a comparable situation as a dominant firm the information and technology, necessary to establish interoperability, is deemed indispensable.[265]

The second requirement is the exclusion of competition on a secondary market. The court held that this condition would not only be fulfilled when all competition is eliminated because

[260] Graef, *supra* note 4. pp. 5.
[261] Miscrosoft, *supra* note 254. para. 335.
[262] Miscrosoft, *supra* note 254. para. 345.
[263] Miscrosoft, *supra* note 254. para. 374 and 375.
[264] Miscrosoft, *supra* note 254. para. 392 and 421.
[265] Graef, *supra* note 4. pp. 6 and 7.

this is not in line with the objectives of Article 102 TFEU. The sufficient standard is rather to prove that refusal to license would *likely* eliminate all effective competition.[266] Even more, the Commission had to intervene by virtue of the significant presence of network effects in the market.[267]

The second requirement is closely connected to the indispensability requirement. Therefore, it was not surprising that the former condition was met. However, the test was again applied less stringently than in the prior case law. In *Magill* and *IMS Health,* the secondary market would not be able to exist because the refusal to license intellectual property rights would foreclose that market. *E.g.*: One cannot create a comprehensive TV guide without the necessary information regarding the TV program schedule.[268] Meanwhile, in Microsoft, competition in the relevant market would not have been completely eliminated but would rather be hampered because rivals could assure at least a minimum level of interoperability.[269]

Third, refusal to grant access to intellectual property must prevent the establishment of a new product for which there is at least potential consumer demand. The Commission did not identify the new product. Nonetheless, the Court wrote that the establishment of a new product is not the only detriment to consumer welfare. The harm also occurs when a limitation to technical development appears.[270] Since Microsoft prevented the license of interoperability information, its rivals were deterred from the development of new work group server operating systems, which resulted in detriment to consumer welfare. Moreover, due to the absence of interoperability, consumers were locked-in to Microsoft's products and lacked potential choice between different products.[271] New product requirement was interpreted in a broader approach because the limitation on technical development also fulfills the criteria of the third element of the above-mentioned essential facilities doctrine

[266] Miscrosoft, *supra* note 254. para. 561 and 563.
[267] Miscrosoft, *supra* note 254.. para. 562.
[268] Killick, J. (2004). IMS and Microsoft judged in the cold light of IMS. 1(2) The Competition Law Review 23. pp. 39.
[269] Graef, *supra* note 4. pp. 7.
[270] Miscrosoft, *supra* note 254. para. 647.
[271] Miscrosoft, *supra* note 254. para. 650-653.

test (prevention of a new product), as it has a similar effect as prevention of a new product to consumer welfare.[272]

The fourth and the last element of the test is that a dominant company has no objective justification to exculpate itself from competition law liability. Microsoft claimed that intellectual property rights objectively justify a refusal to license of its interoperability information because it has invested significantly to establish the software and that products achieved are just a reward for their investment.[273] The Court argued that intellectual property rights could never be an objective justification because no conduct would otherwise constitute an abuse of a dominant position in conjunction with intellectual property rights.[274] The Court has never determined what constitutes an objective justification defense[275]. Therefore, this part of the test is encompassed by a cloud of legal uncertainty.

Microsoft further argued that duty to license would have a negative impact on its incentives to innovate. However, the Court stated that Microsoft failed to prove their argument because it did not state which technologies would otherwise not be invented.[276] Moreover, the court held that disclosure of information which facilitates interoperability is a normal practice for operators which Microsoft itself had followed in other markets because such disclosure allows follow-on innovation which can make operator's products more attractive and valuable.[277] As a result, there was no objective justification and, therefore, all elements of the test were successfully fulfilled.[278]

Argumentation given by the Court was again vague and has, therefore, not clarified the test under which a remedy of the compulsory license may be granted. Legal uncertainty regarding the element of objective justification is problematic because a dominant firm cannot exculpate itself when other elements of the test are fulfilled. Moreover, the Court cited the

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272 Howarth, D. & McMahon, K. (2008). Windows has Performed an Illegal Operation': the Court of First Instance's Judgment in Microsoft v Commission. 29 European Competition Law Review 117. pp. 121.
273 Miscrosoft, *supra* note 254. para. 666.
274 Miscrosoft, *supra* note 254. para. 690.
275 Howarth, D. & McMahon, K., *supra* note 272. pp. 124.
276 Miscrosoft, *supra* note 254. 697-698.
277 Miscrosoft, *supra* note 254. para. 702.
278 Miscrosoft, *supra* note 254. para. 710.

prior jurisprudence regarding the application of essential facilities doctrine to intellectual property rights. However, it had departed from the standards set forth in the prior case law. The elements of indispensability, the establishment of a new product, and elimination of competition were all interpreted in a much broader manner.[279] The result is a more lenient approach regarding the application of the essential facilities doctrine in the market of information technology (hereinafter referred to as "IT").[280]

Graef wrote that deviation from the prior case law may be subject to *Microsoft* being the first case that deals with intellectual property in the IT sector.[281] The Court based some of its arguments to the special features of IT as a subdivision of the "new" economy. First, the Court recognized the importance of standards in the IT market by writing that Microsoft had established a *de facto* standard in the relevant market, which prevented its rivals from using such standard.[282] Second, the Court held that network effects were present in the market.[283] Third, the refusal to license by Microsoft would create a lock-in situation where consumers would essentially be reduced to having only one choice.[284] Fourth, the Court indicated the industry practice of disclosing interoperability information by virtue of which the products of disclosing party become more valuable.[285] This concept is also called the indirect network effect.[286]

The Court was aware of the specific circumstances which arise in the IT sector. By lowering the requirements of the essential facilities doctrine, it established a new test which is applicable only to a whole new sector regarded as the new economy. By making the test more lenient, the Court could remedy the negative consequences occurred by Microsoft's refusal to license. However, for other sectors of the economy, more stringent conditions may still be applicable, since the duty to deal negatively affects incentives to innovate.[287] Some scholars

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[279] Graef, *supra* note 4. pp. 9.
[280] Graef, *supra* note 4. pp. 1-2.
[281] Graef, *supra* note 4. pp. 9.
[282] Miscrosoft, *supra* note 254. para. 392.
[283] Miscrosoft, *supra* note 254. para. 562.
[284] Miscrosoft, *supra* note 254. para. 650-652.
[285] Miscrosoft, *supra* note 254. para. 702.
[286] Graef, *supra* note 4. pp. 9.
[287] Graef, *supra* note 4. pp. 9.

held that the emergence of the new economy should result in the emergence of a special view on the essential facilities doctrine.[288]

Whether the *Microsoft* case established a new branch of the essential facilities doctrine concerning the new economy or had it revised, the prior case law in the traditional economy is not possible to know as well. Thereby, it is for the CJEU to decide and clarify this problem in the next cases to come.

[288] For more infromation related to the effect of new economy on competition law, see: Graef, *supra* note 4. pp. 10 and subsequent.

4. COMPARATIVE ANALYSIS

When assessing comparative analysis between two legal systems in the case at hand, first, similarities and, second, differences between the two jurisdictions when applying the essential facilities doctrine to intellectual property rights should be analyzed.

4.1. Similarities

The most obvious part is that both legal systems protect intellectual property rights and protect competition on the merits by implementing competition law. In the present legal systems, both legal branches also pursuit the same goal to foster innovation, growth, and an increase of consumer welfare.

The mere existence of an intellectual property right does not constitute a dominant position in the relevant market *per se*. Therefore, an assessment whether intellectual property rights create a sufficient market power to be regarded as a dominant position in a relevant market shall be made in both jurisdictions. A sheer use of exclusive intellectual property rights also cannot constitute abusive conduct *per se*.

Both legal systems have in common that the competition policy should not interfere and undermine the fundamental principles of intellectual property policy.[289] If the competition law interferes with intellectual property, it should do it only when the competition liability would improve consumer welfare, i.e. positive effects of antitrust remedy would be greater than the sum of detriment caused by (1) an abusive practice and (2) welfare gained by the establishment of an intellectual property right in question.

[289] Czapracka, K. (2009). Intellectual Property and the Limits of Antitrust: A Comparative Study of U.S. and EU Approaches. Edward Elgar Publishing. pp. 36.

4.2. Differences

Article 102 TFEU focuses on the abuse of a dominant position, whereas Section 2 of the Sherman Act concentrates on the manner in which a dominant undertaking expands, acquires, or maintains monopoly power. According to the U.S. antitrust law, a firm does not violate antitrust law by charging monopoly prices if the monopoly was legally acquired.[290] The European competition law, however, takes a different approach. The abuse of a dominant position has a broader approach because companies may abuse a dominant position with less market power than it would be required under Section 2 of the Sherman Act. Abusive practices in the EU are interpreted in a broader manner than in the U.S. Due to divergence within legislation, the competition law policies also differ.

The elements needed to convert monopoly power into monopolization under Section 2 of the Sherman Act may include performance, behavior or conduct, and the purpose or intent. The U.S. antitrust law, thus, also focuses on the role of anticompetitive intent[291] when analyzing anticompetitive conduct which is not relevant criteria according to the EU competition law.[292]

Another difference is that the U.S. antitrust law pursues the increase of consumer welfare, whereas the EU competition law also adds internal market protection to its competition policy, which further widens the scope of possible abuses. The differences mentioned above are one of the reasons why enforcement approach relating to the essential facilities doctrine in the EU and the U.S. varies.

The abuse of a dominant position in the EU or monopolization in the U.S. is the area of the competition law with lots of dissimilarities and there is little convergence between two legal systems. There is a large gap when comparing the essential facilities doctrine and even a greater divergence with regard to the doctrine and its application to intellectual property rights.[293]

[290] Areeda, P., *supra* note 15. pp. 847.
[291] For more information see: Areeda, P. & Hovenkamp *supra* Note 56. pp. 601.
[292] Troberg, M. C., *supra* note 145. pp 56.
[293] Troberg, M. C., *supra* note 145. pp 56.

The main difference is that the U.S. courts have never implemented an antitrust remedy of compulsory licensing to intellectual property rights by virtue of the fundamental principle of the intellectual property law. Meanwhile, the EU courts regard competition law as an appropriate manner to remedy infringed intellectual property rights by imposing an obligation to license to the right holder when abusing a dominant position.[294]

Courts in both jurisdictions took a different approach regarding the subject matter of this master's thesis. The U.S. courts regard an application of the essential facilities doctrine unfavorably, thereby, the U.S. court continue to refuse its application due to its questionability. Whereas differently, the EU court continuously apply the essential facility doctrine, and regard it as an appropriate legal remedy which adequately enhances competition on the merits. The aforementioned approach undertaken by the courts regarding the application of the essential facilities doctrine was confirmed by the most recent case law by the U.S. Supreme Court in *Trinko* and, in the EU, by the General Court in *Microsoft*.

In the U.S. the essential facilities doctrine is considered as an exception to the *Colgate principle*, which establishes freedom to contract, i.e. there is no obligation to deal with the competitors. In the EU, on the contrary, dominant firms have a general duty to deal, if certain conditions are met, by virtue of a special responsibility not to hinder competition. The obligation to deal in the EU goes beyond the framework set by the U.S. courts.[295]

When one puts fundamentally different views regarding the application of the essential facilities doctrine to intellectual property rights, the two jurisdictions further differ in the application of the appropriate test necessary to determine the application of the doctrine to intellectual property rights.

In the U.S. the test was set forth by the case *MCl Communications*[296] where court held: "[T]he case law sets forth four elements necessary to establish liability under the essential facilities

[294] Czapracka, K. (2009)., *supra* note 289. pp. 36.
[295] Troberg, M. C., *supra* note 145. pp. 56.
[296] MCl Communications, 708 F.2d 108.

doctrine: (1) control of the essential facility by a monopolist, (2) a competitor's inability to duplicate the essential facility practically or reasonably, (3) the denial of the use of the facility to a competitor, and (4) the feasibility of providing the facility."[297]

In the EU the CJEU established a test in *IMS Health* according to which the essential facilities doctrine would be applicable to intellectual property rights. The test is comprised of the following four elements: (1) access to intellectual property rights is indispensable, (2) refusal prevents the establishment of a new product for which a potential consumer demand exists, (3) refusal to license is no objectively justified, (4) refusal to license intellectual property rights eliminates competition in the downstream market.[298]

The test regarding the application of the basic essential facilities doctrine which was, in the EU, set forth by the *Oscar Bronner* case strongly resembles the test set forth in *MCI Communications*. However, when the courts want to apply the doctrine to intellectual property rights, the test in the U.S. stays the same. Meanwhile, as mentioned above, in the EU, the new element is added in the form of prevention of the establishment of a new product for which at least a potential consumer demand exists. Therefore, the EU test necessary to establish competition law liability when applying the essential facilities doctrine to intellectual property rights differs from the test in the U.S.

By publishing enforcement guidelines, the European Commission decided to put intellectual property rights under larger antitrust scrutiny than the U.S. Department of Justice or FTC. The reason for such different enforcement policies lies in the divergent established case law in both jurisdictions. The U.S. courts almost do not apply the essential facilities doctrine at all, whereas the EU courts apply it even in intellectual property cases.

With the established U.S. case law in *Trinko*, a statement by the U.S. antitrust enforcers in the report of the Antitrust Modernization Commission in 2007: "[a]ntitrust liability for unilateral, unconditional refusals to deal with rivals should not play a meaningful part in Section 2

[297] MCI Communications, *Id.*, para. 192.
[298] Lévêque, F., *supra* note 251. pp. 104.

enforcement," and unfavorable approach towards the essential facilities doctrine by various academic commentators, a consensus was reached in the U.S. that unilateral refusal to deal has to be rejected.[299] The academic community, the case law, and antitrust enforcement agencies in the EU, contrary, regard the doctrine as appropriate.

[299] Troberg, M. C., *supra* note 145. pp. 66.

4.3. The explanation for the divergence between two jurisdictions

The most important explanation for the divergence between two legal systems is different languages and goals of the Sherman Act and TFEU. It is true, that both jurisdictions promote consumer welfare. However, the EU competition law also has to protect the integration of EU markets. It has to focus on the prevention of national restraints and the prohibition of discrimination on the grounds of nationality[300].[301] The treaty has also been interpreted in a way that serves the single market imperative.[302]

Intellectual property rights in the EU are subject to national laws of the member states mostly with some fragmentations of the EU legislation. These rights were restricting the free movement of goods and market integration. Thus, the CJEU favored the latter, often when assessing the conflict between intellectual property rights and free trade.[303] The Court has, therefore, constrained intellectual property rights at times to enhance free trade within internal market, which caused significant criticism.[304]

EU companies, holding a dominant position, also have a special responsibility to maintain competition on the merits, i.e. a dominant firm should not prevent its rival the possibility to compete. Therefore, a special responsibility, a threshold that certain exclusionary practices are regarded as abusive is lower in the EU.[305] The U.S. antitrust law, on the contrary, does not follow the same notion of special responsibility of dominant firms. [306]

Both jurisdictions regard unilateral refusals to deal in violation of the antitrust law if certain conduct has a negative effect in the market. The focus in the EU in this connection is to measure the direct impact on the structure of effective competition and the indirect impact on consumer welfare. As a result, it is not necessary to show direct consumer harm to hold a

[300] Case 7/82, GVL v. Commission.
[301] Whish, R., & Bailey, D. *supra* note 78. pp. 19-24.
[302] Fox, E. M. (1983). Abuse of a Dominant Position Under the Treaty of Rome – A Comparison with U.S. Law, the Fordham Corporate Law Institute, Antitrust and Trade Policies of the European Economic Community. pp. 368.
[303] Troberg, M. C., *supra* note 145. pp. 76.
[304] Forrester, I. S. (2003). EC Competition Law as a Limitation on the Use of IP Rights in Europe: Is there a Reason to Panic? European Competition Law Annual: What Is an Abuse of a Dominant Position.? pp. 505.
[305] Troberg, M. C., *supra* note 145. pp. 77.
[306] Troberg, M. C., *supra* note 145. pp. 56.

dominant company liable for violating the antitrust law. Differently, the U.S. courts focus more on the evidence of actual output effects. Therefore, consumer harm must be implicated to establish antitrust liability.[307] Earlier CJEU competition cases also put competitors' preferences into consideration, whereas U.S. cases are more concerned with an efficient market.[308] Although, recent cases decided by the CJEU, such as case *Intel*, move more towards an economic analysis of the facts in the competition law, where an effect on competition has to be empirically considered with competition policy goals much closer only to consumer welfare, rather than also pursuing the protection of the internal market structure.

Further, the capability of enforcement is much higher in the EU because a member state and their competition authorities may also enforce the competition law on the European or the national level. As a result, there are many more possibilities that the essential facilities doctrine cases would emerge. However, enforcement on different levels comes with a danger of too broad interpretation of the doctrine likewise, which could decrease consumer welfare from the economic point of view because it may reduce incentives to innovate.[309]

Since courts assess facts of the cases in the absence of empirical analysis, presumptions (*e.g.* interoperability in network industries promotes innovation, competition, and consumer welfare) take an important role when judges are confronted with the essential facilities doctrine. However, presumptions are almost never expressed and also differ in the EU and in the U.S. As a starting point, courts or agencies should at least state the presumptions when assessing the essential facilities doctrine cases and then make a step further and substantiate these presumptions by conducting empirical studies.[310]

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[307] Troberg, M. C., *supra* note 145. pp. 77.
[308] Fox, E. M. (2002-2003). What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect, 20 Antitrust Law Journal. pp. 392.
[309] Troberg, M. C., *supra* note 145. pp. 79.
[310] Fox, E. M. (2005). Monopolization, Abuse of Dominance, and Refusal to License Intellectual Property to Competitors—Do Antitrust Duties Help or Hurt Competition and Innovation? How Do We Know?. European Competition Law Annual. Hart Publishing. pp. 643.

4.4. Should the essential facilities doctrine be applied to intellectual property in the EU?

Some commentators wrote that the U.S. position on the application of essential facilities doctrine is out of step with the international practice because the U.S. academic theory, jurisprudence and enforcement policy all regard the doctrine as questionable.[311]

The U.S. approach when applying the doctrine is too narrow. When the U.S. courts apply the doctrine to intellectual property rights, they demand the fulfillment of stringent conditions which are only met in the event of extraordinary exclusionary conduct. Moreover, the required conduct to fulfill the essential facilities doctrine test is so "extraordinarily exceptional" that it almost does not exist.

Exceptional situations regarding the exercise of intellectual property rights which foreclose the downstream market occur more frequently than anticipated by the U.S. scholars. Such circumstances can be found in the facts of the jurisprudence of the CJEU mentioned above.

When applying the essential facilities doctrine, the European courts should always apply the four-step test, set forth by the CJEU in *IMS Health*. European courts should also distinguish between the application of the doctrine in new (*Microsoft*) and traditional (*Oscar Bronner*) economy and, furthermore, try to weigh between the anticompetitive effect of an intellectual property right with a possible negative impact on innovation and the procompetitive effect a compulsory license would grant. The CJEU should also clarify some of the vague terms (legal standards) the essential facilities doctrine test offers, predominantly related to the interpretation of objective justification and new product. As a result, the court would reduce the legal uncertainty encompassing the doctrine.

If a compulsory license reduces incentives to create and innovate by a dominant company and its rivals, and furthermore, the procompetitive gain is not significant enough, as a result,

[311] Waller, S. W. & Tasch, W. (2010). Harmonizing Essential Facilities. 76 Antitrust Law Journal. pp. 759 and 767.

the essential facilities doctrine with a remedy of obligation to deal should not be applied. The essential facilities are, nonetheless, still an exception from a general rule. However, when all conditions are cumulatively met, the doctrine should still have a future in the European jurisprudence. Denying the use of the doctrine would remove an effective remedy from the arsenal of the competition law.[312] Hence, the hypothesis that was set forth in the introduction, that the European courts should apply the essential facilities doctrine to intellectual property rights, is confirmed.

Fox wrote that the key task for a court or a regulatory agency is to resolve an answer to a principal question: how do we predict whether a refusal to license has a meaningful net adverse effect on innovation and an antitrust remedy of duty to license will have a meaningful net positive effect? The answer is empirical analysis. In addition, the courts should stop sweeping the relevant questions under the rug and answer the following essential questions. (1) When are significant net innovation benefits resulting from compulsory licenses or obligation to deal? (2) What evidence is decisive and what is adequate to support such a conclusion? (3) Which default presumptions did the court base its rationale on and are the presumptions empirically and theoretically justified?[313] An empirical analysis of the business practice in question is the most appropriate tool to determine whether the essential facilities doctrine should be applicable.

[312] Stratakis, A. (2006). Comparative Analysis of the U.S. and EU Approach and Enforcement of the Essential Facilities Doctrine. 8 European Competition Law Review. pp. 442.
[313] Fox, E. M., *supra* note 310. pp. 643 and 645.

5. CONCLUSION

The purpose of this thesis was to determine the necessary conditions to apply the essential facilities doctrine to intellectual property rights in the U.S. and the EU. Later, a comparative analysis was conducted to define the differences between two jurisdictions and reasons for the occurrence of this divergence. Finally, the hypothesis set forth in the introduction that the essential facilities doctrine should be applied to intellectual property rights by European courts was confirmed.

The essential facilities doctrine equips antitrust authorities with a remedy that obliges a dominant firm which exercises its intellectual property rights abusively to compulsory license intellectual property rights which are regarded as essential to competition. This remedy imposes an extensive violation of dominant firms' intellectual property rights. Excessive use of the doctrine will reduce incentives for innovation although, in extraordinary circumstances, procompetitive effects gained from such remedy may sometimes override the negative effects.[314]

In the U.S., the four-step test to apply the basic essential facilities doctrine which also applies to intellectual property rights was established in *MCI Communications*. According to the test, a monopolist firm has to control the facility, rivals cannot reasonably duplicate it, the use of the facility was denied, and the feasibility to provide the facility to competitors has to exist. However, due to the hostile approach against the doctrine from the U.S. Supreme Court, academic commentators and the U.S. regulatory enforcement policy, the doctrine is not applicable to intellectual property rights.

In the EU, two different tests exist. A three-step test to apply the essential facility doctrine in general cases was developed in *Oscar Bronner* and a four-step test when applying it to intellectual property rights. The latter test was developed by the CJEU in *IMS Health*. According to the test, access to intellectual property rights should be indispensable, refusal to license prevents competition in the secondary market, refusal further prevents the

[314] Bergman, *supra* Note 6. pp. 433.

emergence of a new product, and lastly, refusal is not objectively justified. The EU competition law, contrary to the U.S. antitrust law, recognizes the application of the essential facilities doctrine even to intellectual property rights. When all conditions of the test are fulfilled, a remedy of the compulsory licensing of intellectual property rights which are regarded as an "essential facility" is imposed.

The CJEU went even a step further in *Microsoft*. It has lowered the fundamental requirements of the test when applying the essential facilities doctrine to intellectual property rights in the IT sector. Whether a more lenient test that the CJEU has developed established a new branch of the doctrine concerning the new economy or just revised a prior more stringent test shall be seen in future cases. The former notion would be better since a too broad application of the doctrine would undermine the balance between public and private interests that intellectual property law pursues, namely creating incentives to innovate and create.

The fundamental reason for contrasting differences regarding the application of the doctrine in both jurisdictions lies in the language and goals of the Sherman Act and the TFEU. While both jurisdictions promote consumer welfare, TFEU broadens its goals to protect the integration of the EU markets and focus on the prevention of national restraints.[315] However, the CJEU is making a step closer towards economic assessment (with consumer welfare as a primary objective of the competition law in the EU) in the recent abuse of dominant position cases. Whether the policy of the application of the doctrine to intellectual property rights in the EU will change and whether the EU jurisprudence would make a step closer to the U.S. shall be seen in the future. Notwithstanding the aforementioned, a more economic approach to the European competition law should be accompanied by and should base on an empirical analysis of the facts of the case and its effect on the consumer welfare.

Another reason causing dissimilarities between jurisdictions are different presumptions, set forth by the case law and the legal theory. Since courts mostly apply the doctrine in the absence of empirical analysis, presumptions (*e.g*. interoperability in network industries promotes innovation, competition, and consumer welfare) take an important role when

[315] Whish, R., & Bailey, D. *supra* note 78. pp. 19-24.

judges are confronted with the essential facilities doctrine. However, presumptions are almost never expressed or empirically proven.[316]

If compulsory license reduces incentives to create and innovate by a dominant company and also its rivals and the procompetitive gain is not significant enough, as a result, the essential facilities doctrine with a remedy of obligation to deal should not be applied. The essential facilities are, nonetheless, still an exception from a general rule. However, when all conditions are cumulatively met, the doctrine should still have a future in the European jurisprudence. Denying the use of the doctrine would remove an effective remedy from the arsenal of the competition law.[317] Hence, the hypothesis set forth in the introduction of this thesis that European courts should apply the essential facilities doctrine to intellectual property rights is confirmed.

[316] Fox, E. M., *supra* note 310. pp. 643.
[317] Stratakis, A., *supra* note 312. pp. 442.

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