Compulsory dealing under Article 82 EC: a synthesis for debate

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Robert O'Donoghue

CLEARY GOTTLIEB STEEN & HAMILTON LLP

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Overview

1. The four categories of refusal to deal
2. Category #1: first licences to rivals
3. Category # 2: subsequent licences to rivals
4. Category # 3: subsequent licences to customers
5. Category #4: the remedy principle
6. Summary of principles

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1. The four categories of refusal to deal

- Category # 1: first licences to rivals – the "essential facility" analogue
- Category # 2: subsequent licences to rivals
- Category # 3: subsequent licences to customers (*Clearstream*)
- Category # 4: the remedy principle (*Volvo*, *Micro Leader*)

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2. Category # 1: first licences to rivals

- Debate whether ECJ conditions in *IMS* are sufficient or necessary. Commission says former in *Microsoft* proceedings.
- True that *Volvo* set out different, non-exhaustive conditions to *IMS*
- But no *necessary* contradiction between *Volvo* examples and subsequent cases:
  - Excessive pricing: licence merely a remedy
  - Refusal to supply parts for models in circulation and refusing to supply parts to independent repairers more akin to tying
- Legitimacy of duty to deal for unilateral refusal must be elimination of all competition.
- If so, remainder of debate seems to turn on “new product” and whether this is necessary or merely a proxy for consumer harm

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2. Category # 1: first licences to rivals

- Six (sufficient?) cumulative conditions:
  - A refusal to deal
  - Two “markets”
  - Input indispensable for competition on the second market
  - Refusal to deal would eliminate competition
  - Refusal prevents emergence of a “new product”
  - No objective justification for refusal

2. *Refusal to deal*

- Outright refusals covered, obviously
- Constructive refusals also covered: "the concept of refusal to supply covers not only outright refusal but also situations where dominant firms make supply subject to objectively unreasonable terms." (*Deutsche Post*)
- Not clear what "unreasonable" means. Price squeeze principles perhaps helpful
- Discrimination under Article 82(c) may also offer evidence of unreasonableness (*Clearstream*)

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2. *Two "markets"*

- Reasons for this (rather formal) condition not entirely clear
- Seems to reflect anti-competitive leveraging concerns
- Advantage in one market normally legitimate
- Nature of the second market not clarified until *IMS* preliminary ruling (2004)
- Court confirmed that an actual market is not needed: a "hypothetical" or "potential" market is enough

2. Meaning of "potential" market

- Cannot not mean anything that rivals desire: everything is a "potential" market by this definition
- ECJ's clarification that market must correspond to a "stage of production" mildly helpful
- Stage of production must mean: (1) something identifiably distinct (e.g., an intermediate product); and (2) inherently capable of being marketed

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2. *Indispensable input*

- "It must be determined whether there are products or services which constitute alternative solutions, even if they are less advantageous." (*IMS*, ECJ, para. 28)
- "It must be established, at the very least, that the creation of those products or services is not economically viable for production on a scale comparable to that of the undertaking which controls the existing product or service," including the time reasonably required to produce them. (*IMS*, ECJ, para. 28)
- Cost of duplicating the allegedly essential facility constitutes a barrier to entry such that "it deters any prudent undertaking from entering the market." (AG Jacobs, *Bronner*, para. 66)
- In short, there must be no actual or potential "viable alternatives" to the dominant firm's input or the cost of such alternatives is "prohibitively expensive and would not make any commercial sense." (*European Night Services*, para. 209)

2. *Elimination of competition*

- The corollary of "indispensability:" if not indispensable, hard to see how competition would be eliminated
- Surprisingly, standard of foreclosure not clear
- Some confusion in *IMS*, *Bronner*, and *Microsoft* about whether standard is: (1) foreclosure of requesting party; (2) foreclosure of all competitors; (3) foreclosure of competition; and (4) by how much
- Correct principles seem clear
  - Standard cannot be exclusion of requesting party: that would protect competitors, not competition
  - No need to prove 100% market share in each case either, except, perhaps in IP cases
  - Test is "substantial" elimination of competition

2. *"New product"*

- *Magill* case based on "exceptional circumstance" that refusal prevented emergence of "new product"
- Based on the notion that: (1) consumer welfare is not increased by clones; and (2) there needs to be some exceptional harm to justify a licence
- Not clear whether "new product" was a cumulative or alternative requirement: Commission in *IMS* said that it was alternative
- ECJ in *IMS* made clear that it was cumulative, at least in IP cases: the refusal should prevent the emergence of a new product for which there is potential and unsatisfied consumer demand.
- Not satisfied where the requesting party wishes to offer goods or services already offered by the dominant firm

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2. New product

- Meaning of a new product:
  - Criticised by commentators as “problematic,” leading to “undesirable consequences,” or “lacking solid economic foundation.” (Geradin, Ridyard).
  - But this is only true if reduced to debates about degrees of novelty, which would be fruitless (e.g., different colour/layout TV guides).
  - Product should: (1) be a new kind of product (see *Magill*, *Holyhead,* cf. *IMS*); (2) expand the market rather than steal sales; and (3) arise in the same market as the IP owner’s product.

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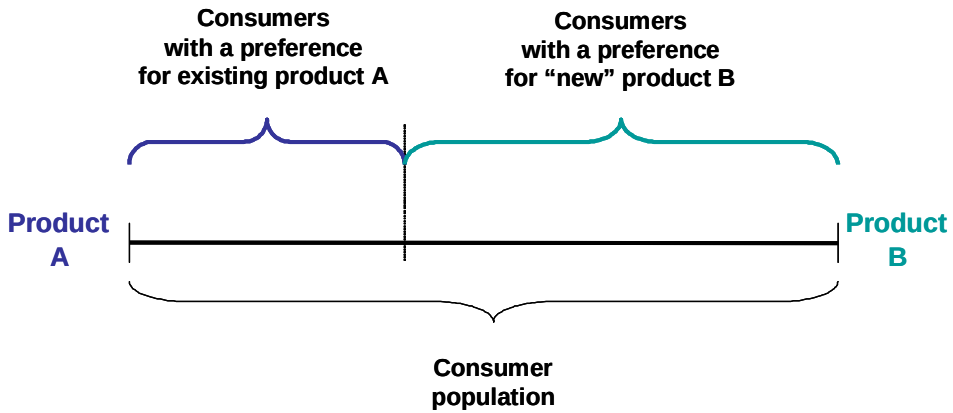
2. New product



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2. Objective justification

- Usual defences available, e.g., licensee unsuitable, unreliable, or unsatisfactory as a trading party or use of property unlawful (*T-Mobile/VIP* (Ofcom))
- Issues of security and quality degradation also relevant defences (*DuPont Hologram* (OFT))
- Specific IP defences, e.g., IP owner intended to bring new product to market itself prior to request for licence
- Is valuable nature of IP a defence? *DuPont Hologram* suggests perhaps:

> "Unprocessed HPF is the product of research and development by DuPont. The effect of treating every new product which, at the time of its discovery, had unique properties as an essential facility (if this product was a necessary input into a downstream market), would be to permit an excessive degree of interference with the freedom of undertakings to choose their own trading partners. As stated above, competition law should have this effect only in exceptional circumstances."

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3. Category # 2: subsequent licences to rivals

- If dominant firm has given one compulsory licence to a rival, does it have to licence others?
- Raises issues of foreclosure (Art. 82(b)) and discrimination (Art. 82(c))
- Three possible views:
  - A duty to licence every rival meeting the non-discrimination conditions of Art. 82(b). No: would be odd if second licence was *much* easier to get than the first
  - A duty to licence no one else if there was one licensee on the grounds that not "all competition" had been eliminated. No: open to serious abuse
  - A duty to licence if market is still not competitive. Yes: preserves integrity of duty to deal principles.

4. Category # 3: subsequent licences to customers

- Issue is discrimination (Art. 82(c))
- Duty to grant subsequent licence to customer only applies if the dominant firm has made one licence: otherwise, no discrimination
- Conditions of Art. 82(b) must be met: (1) equivalent transactions; (2) difference in treatment; (3) competitive disadvantage; and (4) no objective justification.
- Objective justification is key: otherwise, the value of first contracts could be undermined
- Not clear whether "essential facility" is also a requirement. *Clearstream* (2004) suggests yes.

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5. Category #4: The remedy principle

- Duty to deal not limited to situations where substantive violation alleged is a refusal to deal
- Duty to deal may also be a remedy for *another abuse.*
- *Volvo*: excessive prices + IP. See also *DSD*.
- *Micro Leader*: duty to deal *facilitates* another abuse (discriminatory pricing)
- *Microsoft*?

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6. Summary of principles

- *First licences to rivals*: six cumulative conditions outlined above. Sufficient but perhaps not necessary
- *Subsequent licences to rivals*: also subject to the six conditions and need to show that market is not already reasonably competitive with presence of other players
- *Subsequent licences to customers*: issue is discrimination under Art. 82(c) and, arguably, an additional requirement that the input is essential. Objective justification in any event vital
- *Remedy principle*: licence may be a proportionate remedy for another abuse or cumulative abusive behaviour

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