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Edited by

Abel M. Mateus

*Former President of the Portuguese Competition Authority,
Professor of Economics, New University of Lisbon, Portugal,
Visiting Professor, University College of London, UK and
New York University, USA*

Teresa Moreira

*Ministry of Economy and Innovation, Portugal, Teaching
Assistant, European Institute and IDEFF-Institute of
Economic, Financial and Fiscal Law, Faculty of Law,
University of Lisbon, Portugal*

Edward Elgar

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13. Abuses of dominant position, intellectual property rights and monopolization in EU competition law: some thoughts on a possible course of action

Inge Govaere

1. INTRODUCTION

It is not easy, not to say virtually impossible, to give an answer to the following question originally listed in the conference program: 'How the present debate and major conclusions on abuses of dominant position and monopolization will influence the future implementation of EU competition policy, from a legal perspective'. For one thing, Emil Paulis has already explained that there is still a lot of debate going on and very few conclusions to be drawn as to the direction the modernization process of Article 82 TEC should take.¹ In the current stage of debate it seems therefore more prudent to limit the ambitions of this chapter to putting forward some thoughts as to how this all *might* influence a future course of action, in particular in so far as the IP-antitrust interface debate in the EU is concerned. A second caveat concerns the attempt to adopt a strictly legal approach, complementary to the contribution by Patrick Rey which deals more specifically with the economic perspective.² With the plea for a less formalistic and more rule of reason oriented approach to Article 82 TEC, including the possibility of an efficiency defense, it will of course become all the more difficult clearly to separate the two perspectives in practice.

In legal terms the prevailing conclusion to be drawn so far from the modernization of EU competition law in general, as well as the more

¹ For the current state of the debate see the preceding contribution by Dr Emil Paulis.

² For the economist perspective see the following contribution by Prof. Patrick Rey.

effects-based approach advocated for Article 82 TEC, may be summarized as one of less legal certainty and more self-assessment by undertakings. Economic (context) analysis is increasingly required, which should lead to more tailor-made case-by-case results. A drawback is that this approach increases the risk of disparities between and distortions of the competitive conditions in the internal market, in particular when combined with a decentralization of EU competition law in an enlarged EU of 27 Member States. In spite of the pre-accession efforts fully to align to the *acquis communautaire*, the setting up of necessary administrative and judicial authorities in all the Member States, and in particular the introduction of the European Competition Network (ECN), which apparently functions quite well, it cannot be totally ruled out that a different assessment would be made of any given case by the different national competition authorities and national courts. Such may well be the price to pay for a more proactive role for the European Commission based on constructive dialogue and a better acceptance and respect of the rules by targeted undertakings. At first sight the decision by Microsoft not to appeal the ruling of the European Court of First Instance would seem to underline this view,³ although it will be suggested below that there may well be other reasons underlying that decision.

In search of a possible future course of action from a legal perspective, it seems opportune to proceed systematically on the basis of a series of rather straightforward questions. What is the Article 82 Review about? To what extent, if any, has a follow up been given to the most crucial aspects advanced therein? Is there a need for a new regulatory framework? What are the potential implications of the Lisbon Reform Treaty for Article 82 TEC? Are competition law and policy sufficiently elaborated on the basis

³ Microsoft Press Release of 22 October 2007, <http://microsoft.com/Presspass/press/2007/oct07/10-22MSStatement.msp?pf=t...>, consulted on 24 October 2007. The statement reads as follows:

At the time the Court of First Instance issued its judgment in September, Microsoft committed to taking any further steps necessary to achieve full compliance with the Commission's decision. We have undertaken a constructive discussion with the Commission and have now agreed on those additional steps. We will not appeal the CFI's decision to the European Court of Justice and will continue to work closely with the Commission and the industry to ensure a flourishing and competitive environment for information technology in Europe and around the world.

Case T-201/04, *Microsoft v. European Commission*, Judgment of the Court of First Instance of 17 September 2007, ECR (2007) II-03601.

of an innovation policy rationale in furtherance of the Lisbon strategy? Do they effectively contribute towards maintaining dynamic competition and efficiently target attempts to stifle innovation? Is Article 82 TEC an adequate remedy to counter harmful competitive practices that stifle innovation, such as a patent ambush in collective standard setting and leveraging subsequently to de facto standard setting? Is Article 82 TEC an adequate remedy to attempts to monopolize through potential abuses of the IP system? In other words, what are the apparent limits of Article 82 TEC that would seem to require further attention, if not urgent consideration?

2. THE ARTICLE 82 REVIEW BRIEFLY REVIEWED

Commenting on the pending publication of the Article 82 Review discussion paper of December 2005,⁴ Commissioner Neelie Kroes during her speech of 23 September 2005 at the Fordham Corporate Law Institute heavily emphasized that 'it is not our intention to propose a radical shift in enforcement policy'.⁵ It is well known that the Commission nonetheless proposed to take at least two important new directions which have triggered much debate.

a. What's New?

On the one hand the Commission expressly targets exclusionary abuses and proposes to focus more on the market foreclosure effect in order to establish an infringement. In a nutshell, consumer welfare is upgraded as a criterion, instead of just opening markets. The pursuit of free and undistorted competition, in the sense of competition free of obstacles, puts the focus on entry barriers. In line with the Lisbon Strategy to establish the EU as the most competitive knowledge economy by 2010, innovation is considered to be an important drive for competition. Although it is not as such expressly mentioned, it is apparent that the equation also applies vice versa, namely dynamic competition is equally indispensable to stimulate innovation.⁶ Not only is innovation by the dominant firm important but also the possibility to innovate for competing undertakings. The acknowl-

⁴ Article 82 Review Discussion Paper of December 2005. For the Press Release see IP/05/1626 of 19 December 2005.

⁵ SPEECH/05/537.

⁶ On the link between dynamic competition and innovation see Schumpeter, J., *Capitalism, socialism and democracy*, George Allen & Unwin, 1976, esp. at p. 83 concerning the process of 'Creative Destruction'.

edgement of the so-called 'innovation policy rationale' of competition law⁷ increasingly necessitates that specific attention is paid to the IP-antitrust interface, also in Europe.

On the other hand the Commission pleads in favor of allowing an efficiency defense to escape the effective application of Article 82 TEC as with Article 81 TEC. What is less clear is whether such an efficiency defense should be applied at the time of establishing the abuse, thus emphasizing the need for a rule of reason test analogous to Article 81(1) TEC. Or should the efficiency defense rather be invoked subsequently in order to obtain a derogation equivalent to Article 81(3) TEC, which would most likely entail a shift in burden of proof towards the dominant undertaking concerned. As will be seen below, the legal appraisal is necessarily different according to the method withheld.

b. Follow up

The Article 82 Review Discussion Paper itself, as the name suggests, has no legal value, but merely contains rather informal and clearly tentative proposals as to the future direction of EU competition policy. The public hearing held in June 2006 exposed to the fullest the controversial nature of some of the proposals as well as the need for the Commission to take clear decisions on certain key subjects.⁸ Since then, however, no clear answer has been provided to the many open questions. No formal decision has been published to provide guidance nor – in spite of the announcement

⁷ On the 'innovation policy rationale' of EC competition law see Ulrich, H., 'Expansionist intellectual property protection and reductionist competition rules: a TRIPS perspective', *Journal of International Economic Law* (2004) 401–430.

⁸ In her 'Closing Remarks at Public Discussion on Article 82 (abuse of dominance)' of 14 June 2006, Commissioner Neelie Kroes states the following: 'I am of course well aware that important decisions will have to be taken on several controversial subjects:

- How do we balance the need for clear rules of universal application, and the importance of getting the economic assessment right in individual cases?
- Should there be clear rules for both safe harbours and per se prohibitions?
- In terms of economic assessment: how far should we go? What needs to be proven? And who bears the burden of proof?
- How far should we rely on price-cost tests and in which circumstances?
- Should we engage in an initial assessment of the actual or potential impact before committing resources to a case, rather than primarily relying on a cascade of rebuttable presumptions?
- Should 'efficiencies' be included in the analysis of abuse of dominance and – if so – how?', SPEECH/06/376.

in the 2007 Annual Management Plan⁹ – has a Commission communication on the application of Article 82 TEC been issued so far. In order to obtain some degree of legal certainty, one should therefore analyze the different recent decisions in search of a consistent competition policy, or seek an informal guidance letter in individual cases.¹⁰ A crucial question is of course whether and to what extent the new direction proposed by the Commission in the Article 82 Review Discussion Paper can be based on the current regulatory framework or would require modifications.

3. IN NEED OF A NEW REGULATORY FRAMEWORK?

a. Market Foreclosure

The *Tetra Pak II* case¹¹ is illustrative of the potential legal difficulties that may arise when trying to put into effect the new policy orientations announced with respect to Article 82 on the basis of the current EC Treaty provisions. The focus on the market foreclosure effect in the Article 82 Review Discussion Paper does not seem to pose too many conceptual problems as it mainly reinforces, albeit more forcefully, the principles already emphasized early on by the ECJ in the *Hoffmann-La Roche* case.¹² Similarly, The CFI accepted in the *Tetra Pak II* case that whereas the acquisition of an exclusive license by an undertaking in a dominant position does not *per se* constitute an abusive behavior, due regard needs to be paid also to the factual circumstances, and in particular a market foreclosure effect.¹³

b. Efficiency Defense

The same easy conclusion cannot, however, be drawn with respect to the introduction of an efficiency defense under Article 82 TEC by analogy to

⁹ DG Competition Annual Management Plan 2007, 22 December 2006.

¹⁰ See Commission Notice on informal guidance to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), O.J. C 101/78 of 27.4.2004.

¹¹ Case T-51/89, *Tetra Pak II*, E.C.R. [1990] II-309.

¹² Case 85/76, *Hoffmann-La Roche v. Commission*, ECR [1979] 561.

¹³ Case T-51/89, *supra* note 11, esp. at para 23, where the CFI states that: '[i]f or the purpose of Article 86 (now Article 82), the circumstances surrounding the acquisition, and in particular its effects on the structure of competition in the relevant market, must be taken into account'.

Article 81(3) TEC. The CFI expressly and forcefully rejected such a reasoning by analogy to Article 81 TEC in *Tetra Pak II*. It pointed out that the EC Treaty does not provide for exemptions to Article 82 TEC whereas secondary legislation, such as a Commission Decision, may not derogate from the EC Treaty provisions.¹⁴ The implications of this ruling for the Article 82 Review Paper proposals are immediately apparent. Either one sticks to a 'maximalist' efficiency defense by analogy to Article 81(3) TEC, which would then first necessitate a Treaty revision to that effect¹⁵ – the Lisbon Reform Treaty might have been an excellent occasion to do so. Or else one pursues a more 'minimalist' efficiency defense, limited to a kind of rule of reason test similar to the one applied under Article 81(1) TEC.¹⁶

The two approaches are in theory not necessarily mutually exclusive, but only the 'minimalist' approach could probably already be put into effect, without a need for Treaty modification. Support for this may be found in the combined reading of two judgments of the ECJ. On the one hand, the ECJ acknowledged in the *Nungesser* case that the existence of

¹⁴ Case T-51/89, *supra* note 11, esp. at para 25.

¹⁵ At first sight this finding seems to be challenged by the subsequent *PIAU* judgment of the Court of First Instance (Case T-193/02, ECR [2005] II-209), and in particular at para 119, where seemingly a direct link is made between the application of Article 81(3) TEC and the conclusion that there is no infringement under Article 82 TEC. However, at para 117 it is explained that 'it follows from the above considerations regarding the amended regulations and the possible exemption under Article 81(3) that such an abuse has not been established', whereby it is underlined that *in casu* it did not concern anti-competitive quantitative restrictions on access to the occupation of player's agent, but rather qualitative restrictions that may be justified. As such it is not so much the fact that Article 81(3) TEC is applicable, but rather the reasons underlying that decision in this case, that may have implications for the assessment under Article 82 TEC.

¹⁶ In the same sense see the Opinion of AG F. Jacobs in Case C-53/03, *Syfait*, opinion of 28 October 2004, ECR [2005] I-4609. At para 72 he writes, 'In any event, however, as the Commission submits, it is clear that the Community case-law provides dominant undertakings with the possibility of demonstrating an objective justification for their conduct, even if it is *prima facie* an abuse, and I now turn to the issue of objective justification. I would add that the two-stage analysis suggested by the distinction between an abuse and its objective justification is to my mind somewhat artificial. Article 82 EC, by contrast with Article 81 EC, does not contain any explicit provision for the exemption of conduct otherwise falling within it. Indeed, the very fact that conduct is characterised as an 'abuse' suggests that a negative conclusion has already been reached, by contrast with the more neutral terminology of 'prevention, restriction, or distortion of competition' under Article 81 EC. In my view, it is therefore more accurate to say that certain types of conduct on the part of a dominant undertaking do not fall within the category of abuse at all.'

intellectual property rights, and in particular the need to stimulate innovation, should be taken into account by the Commission when establishing an infringement under Article 81(1) TEC.¹⁷ The ECJ accepted the argument that the granting of open exclusive licenses *in casu* constituted the only means of promoting competition between the new product and comparable products on the market, and held that a total prohibition of exclusive licenses would be detrimental to the dissemination of knowledge and new techniques in the EC. The ECJ thus seemed to acknowledge, already in 1982, that under Article 81(1) TEC economic realities, and in particular a concern for incentives to innovate, should be weighed against legal considerations in order not to jeopardize competition and innovation in the long run. On the other hand, the ECJ seems to apply a similar rule of reason or 'minimalist' efficiency test to Article 82 TEC in the recent *British Airways* judgment, which did not however concern intellectual property rights.¹⁸ Here the ECJ expressly stated that: '[i]t has to be determined whether the exclusionary effect... which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer. If the exclusionary effect of that system bears no relations to advantages for the market and consumers, or if its goes beyond what is necessary in order to attain those advantages, that system must be regarded as an abuse'.¹⁹ If a rule of reason or minimalist efficiency test is in principle accepted under Article 82 TEC, then similar efficiency concerns to the ones advanced under Article 81(1) TEC, including those relating to incentives to innovate, are likely to be duly taken into account.

c. Potential Implications of the Lisbon Reform Treaty

Conversely, the prospect of a new regulatory framework expressly allowing for a 'maximalist' efficiency defense to be applied any time soon appears to be rather slim. In the Lisbon Reform Treaty,²⁰ as in the past

¹⁷ Case 258/78, *Nungesser v. Commission* ('Maize seed'), ECR [1982] 2015, esp. at paras 53–58.

¹⁸ Case C-95/04 P, *British Airways v. Commission*, ECR [2007] I-2331. See also Drexler, J., 'The Relationship between the Legal Exclusivity and Economic Market Power: Links and Limits' in I. Govaere, H. Ullrich (eds.), *Intellectual Property, Market Power and the Public Interest*, P.I.E. Peter Lang, 2008, pp.13–34. He points out that 'efficiencies can outbalance harm to competition as long as they also benefit consumers and the conduct does not go beyond what is necessary'.

¹⁹ Case C-95/04 P, o.c., *supra* note 18, at para 86.

²⁰ See, for instance, the minor modifications made by Articles 105, 107 and 108 TFEU to the current Articles 85, 87 and 88 TEC.

Treaty modifications, the rules on competition on the whole have been only marginally reconsidered. Articles 81 and 82 TEC have basically remained unaltered since 1957 (the changes in numbering left aside, to become Articles 101 and 102 TFEU respectively) and, importantly, there has been no structural alignment whatsoever of Article 82 to Article 81 TEC.²¹ On the whole the Lisbon Reform Treaty does not appear to be drafted from a strongly pro-competition and pro-efficiency perspective. Contrary to the aborted Constitutional Treaty, which gave a rather prominent place to maintaining 'free' competition as an objective of the Union, the Lisbon Reform Treaty eliminates all direct references to competition altogether in the objectives (and activities²²) of the Union.²³ If anything, Protocol No 27 on the Internal Market and Competition, stipulating that 'the internal market as set out in Article 3 of the Treaty on the European Union includes a system ensuring that competition is not distorted' (which, it is important to recall, has the same legal status as Treaty provisions and may facilitate the use of Article 352 TFEU), appears to stress the continuation of a more instrumentalist approach to competition in pursuit of the internal market objective, and thus primarily in view of keeping the markets open.

Yet the internal market objective itself appears also to be given a new impetus by the Lisbon Reform Treaty. The newly formulated Article 3(3) TEU shows a move away from the traditional approach of targeting mainly barriers to intra-Community trade toward a more pro-active role for the internal market, *inter alia* working towards 'a highly competitive social market economy, aiming at full employment and social progress' and, very importantly, promoting 'scientific and technological advance'. The crucial question is therefore to what extent the competition rules, too, which are

²¹ As H. Schweitzer pertinently remarked during a conference on 'Intellectual Property, Public Interest and Market Power', held at the College of Europe in Bruges in April 2007, there would anyhow be an apparent problem if refusal to licence cases which may lead to the elimination of all competition in the market would be held to run afoul of Article 82(1) TEC and be subject to the 4 cumulative conditions now found in Article 81(3) TEC, including that competition with respect to a substantial part of the products is not eliminated, in order to be upheld.

²² The current Article 3(1) TEC listing the activities of the EC is repealed.
²³ There are conflicting views on the potential impact of the Lisbon Reform Treaty on EC competition law. According to some, including members of the Legal Service of the EC Commission, it does not really change much: see Lemaire, C., Waelbroeck, M., Petite, M., 'Quel sera l'impact du nouveau traité sur le droit de la concurrence? Régies juridiques', *Concurrences* [2008] 87–93. Others maintain the opposite view: see for instance Riley, A., 'The EU Reform Treaty and the competition protocol: undermining EC competition law', *E.C.L.R.* [2007] 703–707.

clearly linked to the internal market objective,²⁴ could and should play a pro-active role in that respect. In other words, the Lisbon Reform Treaty does not so much appear to have as much impact on the competition rules *per se* as it potentially has on the formulation of future competition policy. It is striking in that respect that the European Commissioner for Competition Policy, Neelie Kroes, has in a recent speech firmly taken the position that 'no, there is no need for a new competition policy for Europe. Instead, there is a need for a renewed commitment to competition policy in Europe'.²⁵

4. COMPETITION POLICY IN FURTHERANCE OF THE LISBON STRATEGY

a. DG Competition 2007 Annual Management Plan

It is therefore all the more important to search for current policy guidelines with respect to the existence of an innovation policy rationale underlying Article 82 TEC. In the abovementioned 2007 Annual Management Plan, the Lisbon Strategy to make the EU the most dynamic and competitive knowledge based economy in the world by 2010 is listed as a key objective also of competition policy. It is said to be necessary to ensure open and competitive markets inside and outside Europe, with the focus of action *inter alia* on key sectors for the internal market and the Lisbon strategy, such as telecommunications and presumably also IT at large. The focus of enforcement action is on 'the most harmful anti-competitive practices for the European economy', for instance 'certain types of abuses of dominant position' and 'erecting barriers to market entry through special or exclusive rights'.²⁶ In the line of the Article 82 Review Discussion Paper it is further on explained that the focus will be put on 'exclusionary practices with a view to providing a broader long term protection for consumers, taking into account efficiencies generated by undertaking's conduct', whereas enforcement 'should be pursued where barriers to the

²⁴ It is illustrative of the potential legal difficulties, for instance, that the new Article 3(b) TFEU lists, among the exclusive competence of the Union, not EC competition rules as such but rather 'the establishing of the competition rules necessary for the functioning of the internal market'.

²⁵ Kroes, Neelie, 'A renewed commitment to competition policy in Europe', Conference on the Place of Competition Law in the Future Community Legal Order, Brussels, 8 November 2007, SPEECH/07/689.

²⁶ 2007 Annual Management Plan, at p. 7.

market exist that cannot be overcome by potential competitors'.²⁷ It is not surprising therefore to find that the markets for innovative goods and services are listed among currently prevailing sector priorities. Beside enforcement competition advocacy also occupies a prominent place in the 2007 Annual Management Plan, in order to help 'shape the regulatory framework to promote competition' and 'to ensure that regulatory measures do not unduly and disproportionately interfere with the competitive process of markets'.²⁸ In particular the shortcomings of the enforcement approach under Article 82 TEC, as exposed in recent cases relating to alleged abuses of the IP system to acquire market dominance (discussed below), illustrate the importance of pursuing such a more preventive advocacy approach.²⁹

b. Importance of Targeting Harmful Competitive Practices that Stifle Innovation

The innovation policy rationale of Article 82 EC essentially targets harmful competitive practices that stifle innovation. A correct balance needs to be struck between offering sufficient incentives to invest in R&D and innovation, often in the form of intellectual property rights, and ensuring that dominant undertakings do not 'sit' on their innovation and thereby stifle further innovation by others or leverage such market power. It proves highly complex adequately to tackle the interface between intellectual property rights and competition law in practice. For one thing, Commissioner Neelie Kroes has repeatedly stated that aggressive competition, even by dominant undertakings, is fine as long as it is competition on the merits.³⁰ Similarly, in principle there appears to be nothing wrong with aggressive IP enforcement in the context of such competition on the merits, provided that it is based on viable intellectual property rights and transparency prevails as to exclusivity claims.

The appreciation of whether or not those conditions are fulfilled in any given case cannot be done merely on the basis of an effects-based analysis. It should not be forgotten that it is first and foremost the IP system itself that seeks to establish the proper balance between allow-

²⁷ *Ibid.*, at p. 14.

²⁸ *Ibid.*, at pt. 4.14.

²⁹ See *infra*.

³⁰ See for instance her speech at the Fordham Corporate Law Institute, o.c., *supra* note 5, where she unequivocally stated: 'I like aggressive competition – including by dominant companies – and I don't care if it may hurt competitors – as long as it ultimately benefits consumers'.

ing for temporary short-term restrictions on competition in order to provide incentives to invest in R&D, on the one hand, and furtherance of long-term competition and innovation, on the other hand. In the past the key to trigger such dynamic competition was often sought in the patent duration.³¹ Today, especially the rapid emergence of information technology markets has led to a shift in focus and exposed the necessity of keeping the markets open. As Josef Drexel has pointed out, the key to ensuring dynamic competition nowadays is rather to acknowledge that intellectual property enforcement may, of course, temporarily prevent *competition by imitation* but may not exclude *competition by substitution* of new products or services. Dynamic competition takes place when competitors may compete for better products or services, consequently the dominant undertaking will need to reinvest the (IP) profits in even better and technologically advanced products or services in order to try and maintain its position in the market. In this context, he points to the potential drawback of standardization in the face of intellectual property rights, pertinently remarking that 'undertakings will compete fiercely for the market as long as network effects have not yet led to a *de facto* standard, whereas later competition in the market may well be excluded if the *de facto* standard is controlled by intellectual property rights'.³² With respect to such harmful competitive practices there is clearly a need for competition law to intervene.

5. HARMFUL COMPETITIVE PRACTICES THAT STIFLE INNOVATION

Over recent years awareness has arisen about the fact that competition in the internal market may be unduly distorted due to a lack of transparency regarding the existence of intellectual property rights at the time of collective or *de facto* standard setting. This lack of transparency may be due to a voluntary act of 'hiding' or holding back the existence of intellectual property rights at the time of standard setting with the intention fully to exploit the exclusive right once included in the standard, the so-called 'patent ambush'.

³¹ On this discussion see Govaere, I., *The use and abuse of intellectual property rights in EC law*, Sweet & Maxwell, 1996.

³² Drexel, J., 'The Relationship between the Legal Exclusivity and Economic Market Power: Links and Limits', in Govaere, I. and Ullrich, H. (eds.), *Intellectual Property, Market Power and the Public Interest*, P.I.E. Peter Lang, 2008, pp. 13–34.

a. Collective Standard Setting and Patent Ambush

It is only with the initiation of the *Rambus* case in August 2007 that the EC Commission effectively applied Article 82 TEC to the 'intentional deceptive conduct in the context of the standard setting procedure'.³³ In the statement of objections, the Commission clearly identified two types of anti-competitive behavior: first of all, the patent ambush in a collective standard setting procedure;³⁴ secondly, the subsequent application of unreasonable royalties, in total disrespect of FRAND (fair, reasonable and non-discriminatory) conditions. Yet it is striking that the remedy withheld under EC competition law only relates to the second type of abusive behavior, through the imposition of FRAND conditions to licensing and royalties.³⁵ As it is only the abuse of an already existing dominant position and not the abusive acquisition of market power as such that is targeted by Article 82 TEC, it appears difficult for the Commission to impose a remedy to undo the initial patent ambush and the resulting standardization. Through the *fait accompli* effect of the patent ambush, the IP holder may thus confirm, if not increase, market power and may reap a benefit in the form of royalties for each use of the standard for the full duration of the IP right. Only the sharpest edges of the effect of the initial anti-competitive behavior will be removed through the imposition of FRAND conditions to the exploitation of the exclusive right.

The difficulty in applying Article 82 TEC *ex post* effectively to counter harmful competitive practices, such as a patent ambush, perfectly illustrates the importance of exercising *ex ante* control and to require transparency in the market as to the existence of IP rights. In EC law this can be done indirectly by virtue of Commission control under Article 82 TEC of practices of collective standard setting bodies. The *ETSI* (European

³³ The Commission sent a statement of objections to Rambus on 30 July 2007, COMP/38.636; see MEMO/07/330 of 23 August 2007. Similar behavior by Rambus was already the subject of antitrust procedures in the USA and was found by US Federal Trade Commission Order in August 2006 and February 2007 to constitute illegal monopolization: see for a detailed analysis and theoretical comparison to the EC: Petrisi, E., 'The case of unilateral patent ambush under EC competition rules', *World Competition* [2005] 25–42.

³⁴ For an analysis of EC and US approaches to patent ambush in collective standard setting, see also Staniszewski, P., 'The interplay between IP rights and competition law in the context of standardization', *Journal of Intellectual Law & Practice* [2007] 666–681.

³⁵ Similarly with respect to non-FRAND conditions see the Commission Memo 07/389 of 1 October 2007 with respect to anti-competitive practices by Qualcomm.

Telecommunications Standardization Institute) case is a good precedent in this respect.³⁶ The Commission announced the closure of its investigation on 12 December 2005 as ETSI agreed to introduce IP rules to prevent the occurrence of a patent ambush. Such rules were to include obligations as to early disclosure of relevant IP rights, fair and transparent procedures for standard setting and licensing subject to FRAND conditions.

b. De Facto Standard Setting and Leveraging

A weakness of the system is that the potential for such an *ex ante* control is naturally limited to avoiding patent ambush in collective standard setting procedures. It is not a useful tool to counter the harmful effect of *de facto* standard setting and leveraging, subsequently invoking IP rights on the results. The question is whether an adequate EC competition law remedy exists in order to prevent any undertaking from thus sitting on the results and leveraging market power to secondary markets, in particular where the *de facto* standard was achieved with a significant input of consumers and potential competitors. Such was the case in *IMS Health*, where the 1860 Brick structure became the *de facto* standard and economically indispensable for others to use.³⁷ Similarly, the recent EC *Microsoft* case involved a *de facto* standard for client PC services and the leveraging of market power to work group servers through, especially, the refusal to share indispensable 'interoperability' information or interface documentation.³⁸ Other than imposing a considerable fine for breach of Article 82 TEC, the only remedy open to the Commission consists of the obligation to give voluntary licenses providing access to indispensable/interoperable terms, even if protected by IP rights, under FRAND conditions, or else to impose a compulsory license.

Once again, Article 82 TEC cannot *ex post* be used to undo the root cause, that is, the *de facto* standard setting, but may only soften the most unwarranted consequences thereof, such as unreasonable royalties

³⁶ 'Competition: Commission welcomes changes in ETSI rules to prevent "patent ambush"', IP/05/1565 of 12 December 2005. The 'ETSI Guide on Intellectual Property Rights (IPRs)', was formally adopted by the ETSI Board on 25 January 2007.

³⁷ Case C-418/01, *IMS Health*, ECR [2004] I-5039.

³⁸ Case T-201/94, *Microsoft*, Judgment of 17 September 2007, ECR (2007) II-00000. Another important issue concerned bundling practices. The Commission's finding of an interoperability problem is not shared by all: see for instance Padoleski, R., and Renda, A., 'The European Commission's case against Microsoft: Kill Bill?', *World Competition* [2004] 513–566.

or discriminatory access. It is not surprising, therefore, that while the *Microsoft* case was pending before the Court of First Instance, the focus of action of the Commission was to enforce FRAND licensing conditions upon Microsoft by means of penalty payments.³⁹ The remedy imposed under Article 82 TEC could not, however, prevent Microsoft from reaping the full fruits of its standardization and leveraging strategy and further increasing its market share. This was so acknowledged by Commissioner Neelie Kroes, who stated openly that the ruling of the Court of First Instance upholding the Commission's *Microsoft* Decision was 'bitter sweet'.⁴⁰ Indeed, the Commission may have won the case as a matter of principle, but in practice the victory undoubtedly goes to Microsoft. The Court confirmed the well-foundedness of the Commission's Decision as to the anti-competitive lock-in effect of Microsoft's behavior to the detriment of consumers.⁴¹ Yet the remedies imposed by the Commission did not really prevent an important increase in market power for Microsoft. According to Neelie Kroes, at the time of the judgment Microsoft's market share already amounted to 80 % for work group servers instead of the 40 % when the Commission began its investigation, whereas its Media Player Format had already 'as a result of its conduct, come to dominate the market'.⁴² As a result, there is not really much more consumer choice subsequent to the *Microsoft* case than before.⁴³

This case perfectly illustrates the limits of Article 82 TEC to counter such anti-competitive practices. Microsoft has succeeded in what appeared to be its primary objective of leveraging market power and increasing its market share and consumer dependence. This practical result is not undone by the Commission decision or by the ruling of the Court. Such a finding may shed a different light on Microsoft's – at first sight perhaps surprising – decision not to appeal the September 2007 judgment. What would it

³⁹ IP/06/979 of 12 July 2006, announcing the imposition of a penalty payment of 280.5 million Euro and an increase of the daily penalty payment to 3 million Euro per day of non-compliance; and IP/08/318 of 27 February 2008 announcing an additional 899 million Euro penalty. Microsoft has announced it will appeal the latter.

⁴⁰ Neelie Kroes, 'Introductory remarks on CFO ruling on Microsoft's abuse of dominant position', SPEECH/07/539, Press Conference, Brussels, 17 September 2007.

⁴¹ *Ibid.*, where she underlines 'that the Court has confirmed the Commission's view that consumers are suffering at the hands of Microsoft'.

⁴² *Ibid.*

⁴³ Since then, the Commission has initiated new investigations against Microsoft relating to problems of interoperability disclosure as well as illegal tying practices: see MEMO/08/19 of 14 January 2008.

stand to gain, other than (potentially) a purely legal battle and (for sure) a lot of negative publicity? The current outcome does not prevent a further increase in market power, whereas it is unlikely that on appeal the possibility to impose non-FRAND licensing conditions would be accepted.

c. Transparency, FRAND Conditions and Monitoring

The inherent limits to the use of Article 82 TEC *ex post* as an effective remedy illustrate the necessity for the Commission to take a more proactive approach in order to keep the market open. It seems important for the Commission closely to monitor and to establish an early dialogue with undertakings engaged in standard-setting. The Philips CD-R Disk Patent Licensing investigation, which was closed in February 2006 following changes made to its CD-R Disk Patent Licensing Programmes by Philips,⁴⁴ is an interesting example in that respect. Philips *inter alia* agreed to discontinue the joint portfolio license programme, which included also Sony and Taiyo Yude besides its own CD-R disc patents. It agreed to offer individual licenses, the so-called Philips Only License Agreement, on revised terms. It would provide better and more transparent information as to CD-R standards and patent coverage, which is of course important *inter alia* to avoid a patent ambush. Also the Commission's concern for the respect of FRAND conditions is manifested by the fact that Philips further agreed to reduce the rate of royalties.

In view of the successful outcome of this investigation, the Commission concludes the press release by stating that 'The Commission intends to continue to closely monitor existing or new technology pools, in particular those that support or establish a *de facto* or a *de jure* industry standard in order to ensure that they comply with Community competition rules'.⁴⁵ This is a clear sign that such an approach of monitoring and early dialogue may well be expected to become the rule rather than the exception.

6. SHIELDING IP SYSTEMS FROM ABUSE

At the same time and as a complementary pro-active approach, the Commission seems to be trying to address the potential problem of market foreclosure in a comprehensive manner also from the perspective of the

⁴⁴ For the closure of the Commission investigation which was initiated in 2003, see IP/06/139, of 09.02.2006.

⁴⁵ *Ibid.*

IP system itself. Attention is increasingly paid not only to the drafting of IP legislation, but also the subsequent (ab)use of the IP system in order to acquire or maintain market power.

a. IP Regulatory Framework and Competition Concerns

Finding the proper balance between short-term restrictions on competition in order to stimulate research and development, and ultimately enhance competition in the long run is perhaps one of the most difficult elements when drafting intellectual property legislation.⁴⁶ It is of course crucial that the IP regulatory framework positively contributes towards dynamic competition and stimulates further innovation. It should thus never lead, of itself, to long-term closed markets and to a stifling of innovation. For a long time this balancing trick was performed mainly from the perspective of IP law. In view of the shortcomings of later remedies under competition law, the Commission is now urging that this question be addressed as early as the drafting stage also from a competition law perspective. It was already mentioned before that the Commission openly acknowledged the need for a more preventive advocacy approach in its DG Competition 2007 Annual Management Plan. The stated objective is, significantly, to help shaping the IP regulatory framework in order 'to promote competition'.⁴⁷ Although a more competition minded approach is to be welcomed, it is nonetheless clear that the promotion of competition cannot become the sole ruler of the IP regulatory framework.

An additional difficulty for the EU of course is constituted by the fact that the IP regulatory framework is still to a large extent determined at national level, so that differences in protection may exist from one Member State to the other, either because the IP legislation is different or, where national laws have been harmonized, because exclusivity is not obtained throughout the internal market. The Lisbon Reform Treaty seems to give a new impetus to the introduction of European-wide intellectual property rights, relaxing the Article 308 TEC procedure that was used for the Community trade mark⁴⁸ and the Community industrial designs regulations.⁴⁹ Article

⁴⁶ See in this respect, for instance, the discussions on the optimal patent duration by economists, as cited in Govaere, L., *The use and abuse of intellectual property rights in EC law*, Sweet & Maxwell, 1996, esp. at p. 21.

⁴⁷ DG Competition 2007 Annual Management Plan, o.c., at p. 15.

⁴⁸ Council Regulation (EC) No 422/2004 of 19 February 2004 amending Regulation (EC) No 40/94 on the Community trade mark, O.J. 2004 L 70/1.

⁴⁹ Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, O.J. 2002 L 3/1.

118 TFEU will allow for the creation of new European-wide IPR on the basis of qualified majority voting under the ordinary legislative procedure, although a special legislative procedure and unanimity are still needed for laying down the language rules applicable thereto. In the future an input at the drafting stage by DG Competition may be envisaged in the latter procedure as where national IP laws are being harmonized at EU level, but is probably less obvious when the initiative for IP legislation continues to be taken at the sole Member State level.

b. Abuse of Patent Procedures to Gain or Maintain Exclusive Rights

Besides increasingly paying attention to the pro-competitive drafting of IP legislation, the Commission nowadays also looks more closely at the way in which the IP system is exploited to the fullest in view of the acquisition of, or the extension of existing, exclusivity. In its *Astra-Zeneca* Decision of 15 June 2005, which is now contested before the CFI, the Commission for the first time sanctioned allegedly anti-competitive conduct, namely giving misleading information to national patent offices in order artificially to extend the duration of patent protection, as a breach of Article 82 TEC.⁵⁰ Similarly, on 22 February 2007 the Commission opened investigations for alleged misuse of the patent system in order to exclude potential competition in the *Boehringer* case.⁵¹ The underlying rationale of the Commission is easy enough to follow as it is closely linked to the previous point. Commissioner Neelie Kroes unequivocally stated in the press release announcing the *Astra-Zeneca* Decision: 'it is not for a dominant company but for the legislator to decide which period of protection is adequate. Misleading regulators to gain longer protection acts as a disincentive to innovate and is a serious infringement of EU competition rules'.⁵²

The open question is of course whether such misleading conduct, if verified, can at all adequately be sanctioned under the current EU competition rules. The weakness of the Commission's approach is that it rests on two potentially controversial assumptions. First of all, it is apparently

⁵⁰ O.J. L 332/24. On this case see Negrinotti, M. 'Abuse of Regulatory Procedures in the Intellectual Property Context: The *Astra-Zeneca* Case', in I. Govaere, H. Ullrich (eds.), *Intellectual Property, Market Power and the Public Interest*, P.I.E. Peter Lang, 2008, pp. 155-183.

⁵¹ Case COMP/B2/39246. According to the news item dated 1 April 2007 on the website of Boehringer, 'the Commission is taking an issue with certain patents filed by Boehringer Ingelheim for COPD treatments': see <http://www.boehringer-ingelheim.com/corporate/asp/news>, as last consulted on 07/11/2007.

⁵² IP/05/737 of 15 June 2005.

taken for granted that Article 82 TEC can be applied in a pro-active or preventive manner, as long as the potential harm to competition and to long-term innovation is clearly identified. This implies the acceptance of a *de facto* extension of the scope of Article 82 TEC to include also attempts at monopolization, which is currently not as such the case. Secondly, the Commission apparently assumes that an alleged misuse of the patent system in order to *acquire* exclusivity may constitute an abuse of a dominant position under Article 82 TEC.⁵³ Although there is perhaps much to be said in favor of such an approach, subject to caution for an overzealous application of competition rules to IP exclusivity,⁵⁴ hitherto the ECJ has been careful to stick to the so-called existence/exercise dichotomy of IP exclusivity under the competition rules. This basically implies that the ECJ does not hesitate to allow an interpretation of the competition rules which strikes down abusive exercise of intellectual property rights by IP holders but leaves all questions pertaining to their *existence* – or conditions of acquisition of such exclusivity – untouched.

Under Article 82 TEC, the focus of the ECJ has so far been put on trying to find workable criteria to pinpoint the presence of 'exceptional circumstances' that distinguish normal use from an abuse of exclusivity by IP holders. Much attention has been paid to the three well known conditions as first advanced by the ECJ in *Magill* and gradually specified in the subsequent series of refusal to licence cases.⁵⁵ This almost

⁵³ For a critical view on this see for instance Manley, M., Wray, A., 'New pitfall for the pharmaceutical industry', *Journal of Intellectual Property Law & Practice* [2006] 266–271.

⁵⁴ I have argued before that it is indispensable to find proper criteria in that respect, and have advanced the adoption of a so-called 'functionality test', focusing on the criterion of safeguarding the function of the specific IPR invoked: see Govaere, I., *The use and abuse of intellectual property rights in EC law*, Sweet & Maxwell, 1996, esp. at pp. 299–313. For an interesting discussion of different theories in the EC and the USA with respect to the IPR–competition law interface see Schweitzer, H., 'Controlling the unilateral exercise of intellectual property rights: a multitude of approaches but no way ahead? The transatlantic search for a new approach', *EUI Law Working Papers*, No 2007/31 of December 2007.

⁵⁵ Joined Cases C-241/91 P and C-242/91 P, *RTE v. Commission* ('*Magill*'), ECR [1995] I-743. In *IMS Health*, the ECJ has held the three '*Magill*' conditions to be cumulatively applicable: see Case C-418/01, *IMS Health*, ECR [2004] I-5039, at para 37. At para 36, the three conditions are summarised as follows: '[A]ccording to the summary of the *Magill* judgment made by the Court at paragraph 40 of the judgment in *Bronner*, the exceptional circumstances were constituted by the fact that the refusal in question concerned a product (information on the weekly schedules of certain television channels), the supply of which was indispensable for carrying on the business in question (the publishing of a general television guide),

leads to forgetting that in *Volvo* the ECJ had already given three different examples of abusive conduct by IP holders,⁵⁶ as well as that the CFI has pointed to 'factual circumstances of market foreclosure' and 'important price differences relating to comparable markets' as possible exceptional circumstances triggering Article 82 TEC in *Tetra Pak II* and *MicroLeader* respectively.⁵⁷

The *Astra-Zeneca* case does not fit into this picture. Instead, it impliedly raises the important question of principle whether the ECJ will proceed to distinguish between 'normal' existence, which continues to be left untouched by the competition rules, and 'abusive acquisition of exclusivity' (to exclude competition and stifle innovation) which may be sanctioned by the competition rules. If so, then also here workable criteria would need to be found.

If the CFI and ultimately the ECJ uphold this flexible interpretation of Article 82 TEC in the light of an innovation policy rationale, then it is likely that the Commission will, in the future, also scrutinize other potential misuses of the IP system. In this respect, for instance the so-called 'patent

in that, without that information, the person wishing to produce such a guide would find it impossible to publish it and offer it for sale (Magill, paragraph 53), the fact that such refusal prevented the emergence of a new product for which there was a potential consumer demand (paragraph 54), the fact that it was not justified by objective considerations (paragraph 55), and was likely to exclude all competition in the secondary market (paragraph 56).' On the meaning of these conditions see also the *Microsoft* case, Case T-201/04; Judgment of 17 September 2007, ECR [2007] II-0000. For a discussion of these cases and criteria see for instance Govaere, I., *Het actuele spanningsveld tussen EG-mededingingsregels en intellectuele eigendomsrechten*, in TMC Asser Instituut, *Actualiteit in het Europese Mededingingsrecht*, TMC Asser Press, 2006, pp. 57–72; Ritter, C., 'Refusal to deal and 'essential facilities': does intellectual property require special defence compared to tangible property?', *World Competition* [2005] 281–298; Mazzio, G., 'Did Apple's refusal to license proprietary information enabling interoperability with its iPod Music Player constitute an abuse under Article 82 of the EC Treaty?', *World Competition* [2005] 253–275; Temple Lang, J., 'Mandating access: the principles and the problems in intellectual property and competition policy', *European Business Law Review* [2004] 1087–1113; Derclaye, E., 'Abuses of dominant position and intellectual property rights: a suggestion to reconcile Community courts case law', *World Competition* [2003] 685–705.

⁵⁶ Case 238/87, *Volvo v. Veng*, ECR [1988] I-6211. At para 16 the ECJ gave the following three examples of abusive conduct: 'an arbitrary refusal to deliver spare parts to independent repairers, the fixing of prices of spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation'.

⁵⁷ Case T-51/89, *Tetra Pak II*, o.c.; Case T-198/98, *Micro Leader Business*, ECR [1999] II-3989.

continuation practices' or 'patent chains' readily come to mind. Studies related to the US market indicate that, for the period 1976–2000, 'while continuations are filed in 23 % of all patent applications, patents based on continuation applications represent 52 % of all litigated patents'.⁵⁸ The high share of such continuation patents in patent litigations illustrates that in many (but not all) cases such practice is used mainly artificially to delay or make more difficult the entry of competition in the market. There is no reason to believe that such a finding would not apply also to the EU market and thus might inspire an intervention by the Commission.

7. CONCLUDING REMARKS

By way of conclusion, it may suffice to point out that more guidance is urgently needed on how the use of Article 82 TEC could and should effectively contribute to the Lisbon strategy and to the promotion of open and innovative markets. In recent cases one may discern a more or less embryonic policy in pursuit of an innovation policy rationale of competition. But the development of a truly focused and coherent policy in that respect appears to be hampered by the limitations inherent in the Article 82 TEC remedies. *Ex post* action in the form of imposing FRAND conditions may often not be sufficient to remove the root causes that lead to a consumer lock-in and the stifling of innovation. A more *ex ante* course of action, including closely monitoring the markets, would therefore appear to be warranted. But in order to be truly effective, the latter approach would need to overcome some important – and not uncontroversial – hurdles. It would appear to be necessary to forge the acceptance not only of preventive action under Article 82 TEC in general, but also of a more direct interference of competition policy in the formulation and acquisition (and not only the exercise) of IP exclusivity.

⁵⁸ Lemley, M., and Moore, K., 'Ending Abuse of Patent Continuations', 2003, George Mason Law & Economics Research paper No 03-52; UC Berkeley Public Law Research paper No 140.