Refusal to deal in the field of technologies as a form of abusing of a dominant position in European and Eurasian unions law

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Abstract. Nowadays the objective of strengthening scientific and technological bases is not only the goal of individual states but an objective of integration organisations as well. Both European and Eurasian legal systems consider competition a key element for economical and technological development. Rivalry between various research institutes is an essential driver of economic and scientific efficiency, in absence of which the dominant undertaking would lack adequate incentives to continue to create. Sometimes further technological development is impossible without an access to technological solutions owned by dominant undertaking refusing to grant such access. In this case it is necessary to find a due balance between intellectual property rights of such owing undertaking and necessity of requesting company. The EU case law developed a test allowing to assess whether the refusal to make a deal granting an access to a new technology complies with EU law or amounts an abuse of a dominant position. This paper deals with key elements of this test – i.e. (1) the refusal must be likely to eliminate all competition in the market on the part of the person requesting the service; (2) the refusal must be incapable of being objectively justified; (3) the service in itself must be indispensable to sustain the business; (4) there must exist no actual or potential substitute for the service in question – and studies perspectives of using the same test within Eurasian Economic Union.

1. Foreword
Both European and Eurasian legal systems consider competition a key element for economical and technological development.

In the European Union the principle of free competition, as enshrined in Articles 119 and 120 Treaty on the functioning of the European Union (hereinafter – TFEU), is one of the foundational elements of the Internal market. One of the internal market’s key elements and, thus one of the Union’s main objectives, as provided in Article 3(3) TEU, is a highly competitive social market economy, aiming at full employment and social progress. Protocol 27 to the Treaty of Lisbon establishes that the Internal market as set out in Article 3(3) TEU includes a system ensuring that competition is not distorted, i.e.

1 Jones, Alison, and Sufrin, Brenda, EU Competition Law: Text, Cases, and Materials, Sixth edition, 2016, OUP Oxford, P. 34; Frenz, Walter, Handbook of EU Competition Law, 2016, Springer, ISBN 978-3-662-48591-0, P. 3; Cruz, Julio Baquero, Between Competition and Free Movement: The Economic Constitutional Law of the European Community, 2002, Oxford – Portland Oregon, P. 65; Braun, W. David, European Competition Law: A Practitioner’s Guide, 2005, Kluwer, The Hague, P. 6.
2 Case C-52/09 Konkurrensverket v TeliaSonera Sverige AB [2011] ECR I-00527, para. 20.
a system protecting competition from restrictions. This protection against distortions of competition is based on securing equal opportunities for all market participants.

Basic rules protecting competition in the EU are stipulated in Articles 101 and 102 TFEU. More specifically, Article 101 TFEU prohibits 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. Article 102 TFEU, in its turn, interdicts abuses by one or more undertakings of a dominant position within the internal market or in a substantial part of it in so far as it may affect trade between Member States. Article 105(1) TFEU stipulates that the Commission is the authority responsible for ensuring the application of the principles laid down in Articles 101 and 102.

The Commission, having responsibility to ensure the application of the principles laid down in Articles 101 and 102 TFEU, stressed in its relevant Guidance on Enforcement Priorities that it is not in itself illegal for an undertaking to be in a dominant position, and such a dominant undertaking is entitled to compete on the merits.

The Court has consistently held that a finding that an undertaking has a dominant position is not in itself a ground of criticism of the undertaking concerned, and cannot deprive it of its entitlement to arrange its own affairs, protect its own commercial interests, taking all reasonable steps it deems appropriate to this end.

We should bear in mind that rivalry between undertakings is an essential driver of economic efficiency, in absence of which the dominant undertaking would lack adequate incentives to continue to create and pass on efficiency gains.

Although it is not in itself illegal for an undertaking to be in a dominant position, as underlined by the Commission, dominant undertaking has a special responsibility not to allow its conduct to impair genuine undistorted competition on the market. As consistently held by the Court, ‘abuse’ is an objective concept referring to the behavior of a dominant undertaking that influences the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those governing normal competition in products or services, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

Quit familiar approach was chosen by Eurasia Economic Union Member States, Under Art. 76 Treaty on the Eurasian Economic Union actions (inaction) of the business entities (market entities) with a

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3 Case C-18/88 GB-Inno-BM [1991] ECR I-5941, para. 25; Case C-462/99 Connect Austria [2003] ECR I-5197, para. 83; Joined Cases C-327/03 and C-328/03 ISIS Multimedia Net and Firma 02 [2005] ECR I-8877, para. 39; Case C-49/07 Motosykletistikii Omnospondia Ellados NPID (MOTOE) v Elliniko Dimosio [2008] ECR I-4863, para. 51; Case C-280/08 P Deutsche Telekom AG v European Commission [2010] ECR I-09555, para. 230.

4 Article 105(1) TFEU.

5 European Commission ‘Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings’ [2009] OJ C45/7, para. 1.

6 Case 322/81 Nederlandsche Banden-Industrie-Michelin v Commission [1983] ECR 3461, para. 57; Joined Cases C-395/96 P and C-396/96 P Compagnie maritime belge transports and Others v Commission [2000] ECR I-1365, para. 37; Case C-52/09 Konkurrensverket v TeliaSonera Sverige AB [2011] ECR I-00527, para. 20.

7 Bronner, para. 26.

8 Case 2776 United Brands v Commission [1978] ECR 207, para. 189; Case T-65/89 BPB Industries and British Gypsum v Commission [1993] ECR II-389, para. 69; Joined Cases T-24/93 to T-26/93 and T-28/93 Compagnie maritime belge transports and Others v Commission [1996] ECR II-1201, para. 107; Case T-228/97 Irish Sugar v Commission [1999] ECR II-2969, para. 112; Case T-203/01 Michelin v Commission [2003] ECR II-04071, para. 55.

9 European Commission ‘Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings’ [2009] OJ C45/7, para. 30.

10 European Commission ‘Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings’ [2009] OJ C45/7, para. 1.

11 Case 322/81 Michelin v Commission [1983] ECR 3461, para. 57; Case T-228/97 Irish Sugar v Commission [1999] ECR II-2969, para. 112; Case T-203/01 Michelin v Commission [2003] ECR II-04071, para. 55.

12 Case 85/76 Hoffmann-La Roche v Commission [1979] ECR 461, para. 91; Case 322/81 Michelin v Commission [1983] ECR 3461, para. 70; Case C-62/86 AKZO v Commission [1991] ECR I-3359, para. 69; Case T-228/97 Irish Sugar v Commission [1999] ECR II-2969, para. 111, Case T-203/01 Michelin v Commission [2003] ECR II-04071, para. 54.
dominant position are forbidden in case they are resulted in prevention, restriction, elimination of the competition and (or) infringement of interests of other persons. For the purposes of this article dominant position means the position of a business entity (market participant) (group of persons) or several business entities (market participants) (groups of persons) on a certain goods market, that gives such a business entity (market participant) (group of persons) or such business entities (market participants) (groups of persons) the ability to exert decisive influence on the general conditions of circulation of the good on the relevant goods market, and (or) eliminate from this market other business entities (market participants), and (or) impede access to this goods market for other business entities (market participants).

In this paper we will study specific form of abuse of dominant position – refusal to deal.

2. Refusal to deal concept in European law

In Commercial Solvents the Court first held that an undertaking holding a dominant position in the market of raw materials and which, with the object 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 within the meaning of Article 82 TEC (presently 102 TFEU)\(^{13}\). In Télémarketing\(^{14}\), where the input sought was TV air time, the Court referred to Commercial Solvents, thus confirming that the same rules apply to cases involving intangible property.

Under Article 17(1) of the Charter\(^{15}\), everyone has the right to own, use and dispose of their lawfully acquired possessions. Thus, as pointed out by the Commission, any undertaking, including a dominant one, is free in its choice of trading partners and may dispose of its property freely\(^{16}\). As held in Magill\(^{17}\) and other instances\(^{18}\), a refusal by a dominant undertaking to deal does not per se constitute abuse of a dominant position. Any intervention entailing an obligation to contract would thus first require careful consideration\(^{19}\) and can only be applied in exceptional circumstances\(^{20}\). Therefore, a close scrutiny of factual an economic context is in order to establish the existence of the alleged abuse\(^{21}\).

The conditions under which a refusal by a dominant undertaking to grant access to its property is deemed abusive were clarified by this Court in Bronner\(^{22}\), and are the following: (1) the refusal must be likely to eliminate competition in the market on the part of the person requesting the service; (2) the

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\(^{13}\) Joined Cases 6/73 and 7/73 Istituto Chimioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities [1974] ECR 00223, para. 25.

\(^{14}\) Case 311/84 Centre Belge d’études de marché – Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB) [1985] ECR 3261, para. 26.

\(^{15}\) Charter of Fundamental Rights of the European Union (2007/C 303/01) Official Journal of the European Union, C 303, 14 December 2007.

\(^{16}\) European Commission 'Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' [2009] OJ C45/7, [75].

\(^{17}\) Joined cases C-241/91 P and C-242/91 P Radio Télévis aux États-Unis (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities [1995] ECR I-743, para. 49, 50.

\(^{18}\) Case 238/87 AB Volvo v Erik Veng (UK) Ltd. [1988] ECR 6211, para. 7 and 8; Case C-418/01 IMS Health & Co OHG v NDC Health GmbH & Co KG [2004] ECR I-5039, para. 38; AG Jacobs Opinion in Case 53/03 Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline AEVE [2005] ECR I-4609, para. 53.

\(^{19}\) Joined cases C-241/91 P and C-242/91 P Radio Télévis aux États-Unis (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities [1995] ECR I-743, para. 50; Case C-418/01 IMS Health & Co OHG v NDC Health GmbH & Co KG [2004] ECR I-5039, para. 35; Case T-201/04 Microsoft Corp v EC Commission [2007] ECR II-3601, para. 319, 330, 331, 332 and 336; European Commission 'Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' [2009] OJ C45/7, [75].

\(^{20}\) Magill, para. 50; Bronner, para. 26; Volvo, para. 7, 8; Case T-198/98 Micro Leader v Commission, [1999] ECR II-03989, para. 56.

\(^{21}\) AG Jacobs Opinion in Case 53/03 Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline AEVE [2005] ECR I-4609, para. 53.

\(^{22}\) Case C-797: Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG [1998] ECR I-7791, para. 41.
refusal must be incapable of being objectively justified; (3) the service in itself must be indispensable to sustain the business; (4) there must exist no actual or potential substitute for the service in question.

2.1. Elimination of competition on a certain market

Prior to assessing whether a certain behaviour of a dominant undertaking constitutes an abuse, it is essential to determine the relevant market: a determination of the relevant market is a necessary prerequisite for establishing anti-competitive behaviour by a dominant undertaking, the absence of the alleged market as such renders any abuse impossible.

However as pointed out by the Court and the Commission, for a refusal to be abusive, it is not necessary for the refused product to have ever been traded. It is merely required that there is actual demand from potential purchasers and that a potential market, or a hypothetical one, can be identified. As the Court stressed in IMS Health, this would be the case where an undertaking seeks to obtain certain products or services if they are indispensable to carry on a particular business. Secondly, it follows from the Court’s and the Commission’s practice that in certain circumstances a dominant undertaking shall be obliged to open up its facilities to a new client. In the doctrine it is even argued that any distinction between dominant firms’ duties towards new and existing customers is arbitrary, as all these customers are subject to the requirement that the requested input be essential.

As a second point, when following the Bronner test, it should be noted that the exclusive use of certain product or technology for captive purposes by all players in the market satisfies the criteria of being likely to eliminate all competition on the part of the party requesting the product or technology in question. In this situation there is no alternative for the input that constitutes an essential facility in a certain market. As was recently stressed by the Court in Microsoft, a mere risk of elimination of competition is sufficient for action to be taken under Article 102 TFEU, as to wait until the elimination of competitors was sufficiently imminent would ‘clearly run counter to the objective of that provision, which is to maintain undistorted competition in the common market and, in particular, to safeguard the competition that still exists on the relevant market’.

At the same time as stressed by AG Jacobs in its Opinion in Syfait, there is a narrow range of circumstances in which a dominant undertaking will be obliged to open up its facilities or license its intellectual property rights to a third party for the first time, and for this to be the case, some exceptional harm to competition must be shown. As held by the Court in United Brands, a dominant undertaking is not obliged to meet orders which are out of the ordinary. Allowing access to a company’s facilities

23 Joined Cases T-68/89, T-77/89 and T-78/89 Società Italiana Vetro SpA and Others v Commission [1992] ECR II-10403, para. 159; T-69/99 Adriatica di Navigazione SpA v Commission [2003] ECR II-0534, para. 27.
24 Case C-418/01 IMS Health & Co OHG v NDC Health GmbH & Co KG [2004] ECR I-5039, para. 44; also see AG Tizzano Opinion in Case C-418/01 IMS Health [2003] ECLI:EU:C:2003:537, para. 57.
25 European Commission ‘Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abuse Exclusionary Conduct by Dominant Undertakings’ [2009] OJ C45/7, para. 79, 84.
26 Case C-418/01 IMS Health & Co OHG v NDC Health GmbH & Co KG [2004] ECR I-5039, para. 44.
27 See generally Case 238/87 AB Volvo v Erik Veng (UK) Ltd [1988] E.C.R. 6211; Case 53/87 Consorzio italiano della componentistica di ricambio per autoveicoli and Another v Renault [1988] E.C.R. 6039; Magill; Case T–504/93 Tiere Ladbroke SA v Commission [1997] E.C.R. II–923; Bronner; IMS Health; and Microsoft.
28 Port of Redcar [1994] O.J. L55/51; ACI Channel Tunnel [1994] O.J. L224/28; European Night Services [1994] O.J. L259/20; Eurotunnel [1994] O.J. L354/66; Ijsselecentrale [1991] O.J. L28/32; British Midland/Aer Lingus [1992] O.J. L96/34; and London European/Sabena [1988] O.J. L317/47.
29 AG Jacobs Opinion in Case C-53/03 SYFAIT v Glaxosmithkline, para. 66.
30 Ritter, Cyril, “Refusal to Deal and Essential Facilities: Does Intellectual Property Require Special Deference Compared to Tangible Property?” [2005] World Competition: Law and Economics Review, Vol. 28, No. 3, at P. 3, citing G.B. Abbamonte and V. Rabassa, “Foreclosure and Vertical Mergers: The Commission’s Review of Vertical Effects in the Last Wave of Media and Internet Mergers: AOL/Time Warner, Vivendi/Seagram, MCI Worldcom/Sprint” [2001] ECLR 214, at 215; and R. Subiotto and R. O’Donoghue, “Defining the Scope of the Duty of Dominant Firms to Deal with Existing Customers under Article 82 EC” [2003] ECLR, 683, at 680.
31 Microsoft, para. 561.
32 AG Jacobs Opinion in Case 53/03 Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline AEVE [2005] ECR I-4609, para. 66.
too easily would disincentivise both the competitor gaining access and the dominant undertaking allowing access from investing in such facilities, and ‘the mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it’

2.2. A justification of a refusal to deal
As held by the Court and stressed by the Commission, a dominant undertaking’s conduct may be justified by substantial efficiencies it produces that counterbalance or outweigh any anticompetitive effects, and ultimately benefit consumers. Consumer welfare is one of the EU’s highest priorities and this priority can outweigh the risks of distortion of competition.

The conditions for a justification on the grounds of producing efficiencies to be substantial are: that these efficiencies (e.g., technical improvements in the quality of goods or services) have been realised as a result of the conduct; that the conduct is indispensable to the realization of these efficiencies, and there are no less anti-competitive alternatives to the conduct capable of producing the same efficiencies; that the efficiencies outweigh any likely negative effects on competition and consumer welfare in the affected markets; and that the conduct does not eliminate effective competition.

As follows from the practice of the Court and the findings by the Commission, the ultimate goal of the Union is to protect an effective competitive process and not simply competitors. Consequently, competitors who deliver less to consumers in terms of price, choice, quality and innovation may have to leave the market. Notably, innovation is even more important for the purposes of competition analysis in an industry as dynamic as the online platforms sector. As was stressed by the European Parliament ‘competition policy should contribute to promoting and enforcing open standards and interoperability in order to prevent technological lock-in of consumers and clients by a minority of market players’.

2.3. Indispensability of the requested product or technology for production of new products or technologies.
Next element to be examined in order to qualify a refusal to deal as abusive one is the absence of actual or potential substitutes for the service in question. Following the Brooner test, these potential

33 Opinion of AG Jacobs in Bronner, para. 57.
34 Case C-209/10 Post Danmark A/S v Konkurrenceradet EU:C:2012:172, para. 41; Case C-95/04P British Airways v EC Commission [1978] ECR 207, para. 86; Case C-52/09 Konkurrensverket v TeliaSonera Sverige AB [2011] ECR I-527, para. 76; European Commission ‘Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings’ [2009] OJ C45/7, para. 28; Akman, Pinar, The Theory of Abuse in Google Search: A Positive and Normative Assessment under EU Competition Law. July 19, 2016, P. 31.
35 European Commission ‘Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings’ [2009] OJ C45/7, para. 28.
36 Case C-209/10 Post Danmark A/S v Konkurrensverket EU:C:2012:172, para. 42; European Commission ‘Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings’ [2009] OJ C45/7, para. 30.
37 See generally Case C-62/86 AKZO v Commission [1991] ECR I-3359 and Case T-271/03 Deutsche Telekom v Commission [2008] ECR II-477.
38 European Commission ‘Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings’ [2009] OJ C45/7, para. 6.
39 European Commission ‘Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings’ [2009] OJ C45/7, para. 6.
40 Graef, Inge, Stretching EU competition law tools for search engines and social networks [2015] Internet Policy Review, 4(3). DOI: 10.14763/2015.3.373, available at: http://policyreview.info/articles/analysis/stretching-eu-competition-law-tools-search-engines-and-social-networks, P. 1, 3.
41 Report on competition policy 2009, European Parliament resolution of 20 January 2011 on the Report on Competition Policy 2009 (2010/2137(INI)) OJ C 136E, 1.5.2012, p. 60–70, para. 19.
42 Magill, para. 52, 53; Bronner, para. 41, 44, 45; Case T-504/03 Tiercé Ladbroke v Commission [1997] ECR II-923, para. 131; Microsoft, para. 421; Joined cases T-374-375, 384 and 388/94 European Night Services v EC Commission [1998] ECR II-3141, para. 208; European Commission ‘Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings’ [2009] OJ C45/7, para. 83.
substitutes should be subject to a number of limitations: foreseeability (temporal limitation), and technical, legal and economic feasibility (factual limitation). A potential substitute, in this regard, must be a realistic one. In assessing whether there are such substitutes, it is to be established whether it is economically viable to create an alternative service (i.e., to replicate the input), and whether there are any ‘technical, legal or economic obstacles’ that would render such replication impossible, or at least ‘unreasonably difficult’. These obstacles may lie, i.a., in the prohibitive cost of and/or time reasonably required for reproducing the input. The Commission also points out it must be assessed whether competitors could effectively duplicate the input concerned “in the foreseeable future”. An input shall be regarded impossible to replicate if it involves a natural monopoly, where there are strong network effects or when it concerns so-called “single source” information. Account shall also always be taken of the dynamic nature of the industry and, in particular, whether or not market power can rapidly dissipate.

The indispensability test is virtually the same for new entrants and already existing competitors. In Bronner, for instance, the Court held that the service must be indispensable ‘to carrying on’ the business. More recently, the Court stressed in Microsoft, and the Commission later reiterated, that for an input to be indispensable, it is not required that, without the refused input, no competitor could ever enter or survive on the downstream market. Thus, for the indispensability condition to be satisfied, it merely needs to be established whether the product or a service sought constitutes an essential facility, i.e., a product or service that is objectively necessary to be able to compete effectively on a downstream market.

As for intangible property, the most relevant case-law would be Magill and IMS Health. As held by the Court in these two cases, in order for the refusal by an undertaking owning 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 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 this context the ‘new product’ criterion is a condition that the undertaking requesting the license must not limit itself ‘essentially to duplicating the goods or services already offered on the secondary market by the owner of the intellectual property right, but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand’. This requirement was most scrupulously analysed in Microsoft, where it was stressed that it is sufficient that the new

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43 Bronner, para. 45.
44 Petit, Nicolas. *Theories of Self- Preferencing under Article 102 TFEU: A Reply to Bo Vesterdorf*. 2005. Available at http://dx.doi.org/10.2139/ssrn.2592253, 12.
45 Bronner, para. 44.
46 Joined cases T-374-375, 384 and 388/94 *European Night Services v EC Commission* [1998] ECR II-3141, para. 209.
47 European Commission Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C45/7, para. 83.
48 European Commission Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C45/7, footnote 3 to para. 83.
49 European Commission Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C45/7, footnote 3 to para. 83.
50 See generally *Case 238/87 AB Volvo v Erik Veng (UK) Ltd* [1988] E.C.R. 6211; *Case 53/87 Consorzio italiano della componentistica di ricambio per autoveicoli and Another v Renault* [1988] E.C.R. 6039; Case T-504/93 *Tierce Ladbroke SA v Commission* [1997] E.C.R. II-923; Bronner; IMS Health, para. 44.
51 *Commercial Solvents*, para. 25; *Télémarketing*, para. 26; Magill, para. 53; also see generally United Brands, and Microsoft.
52 Bronner, para. 41.
53 *Case T-201/04 Microsoft Corp v EC Commission* [2007] ECR II-3601, para. 428, 560-563.
54 European Commission Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C45/7, para. 83.
55 European Commission Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C45/7, Para. 82.
56 *IMS Health*, para. 49.
product contains substantial elements that result from the licensee’s own efforts\textsuperscript{57}. A product shall be considered new if it differs in terms of performance, security and functionality, and offers enhanced functional capabilities or advanced features that consumers value more than those of the dominant undertaking’s product\textsuperscript{58}. Lastly, the concerned criterion does not require a concrete demonstration that the licensee’s product will attract customers who do not buy the products offered by the existing dominant supplier, - a mere potential demand for the new product shall be sufficient\textsuperscript{59}. A refusal to allow follow-on innovation (\textit{i.e.}, the development of new products) is therefore to be differentiated from a refusal to allow copying\textsuperscript{60}.

More importantly, the Court stressed that the concerned criterion is to be considered by reference to the provision of Article 102(b) TFEU that prohibits abuses consisting in limiting production, markets or technical development to the prejudice of consumers\textsuperscript{61}. The circumstance relating to the appearance of a new product is thus to be considered in the context of the damage to the interests of consumers\textsuperscript{62}. A limitation of consumer choice\textsuperscript{63} and a technological lock-in of consumers should be paid an even closer attention to in circumstances where the relevant market is characterized by short innovation cycles and dynamic development of technologies. This corresponds well with the Commission’s position found in its latest Report on Competition Policy specifically with respect to the Digital Single Market, and in connection with the Google Search investigation. Namely, the Commission pointed out that amongst primary goals of competition enforcement are encouraging all industry participants to innovate, and ensuring that European consumers have as wide a choice as possible of innovative products\textsuperscript{64}.

Summing up the Court’s and Commission’s approach as described by Advocate General Tizzano in his Opinion in \textit{IMS Health} is that “the refusal … may be deemed abusive only if the requesting undertaking does not wish to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the intellectual property right but intends to produce goods or services of a different nature which, although in competition with those of the owner of the right, answer specific consumer requirements not satisfied by existing goods or services”\textsuperscript{65}.

3. Refusal to deal concept in Eurasian Economic Union law
Eurasian Economic Union law has now such elaborated concept of refusal to deal. In fact Treaty on Eurasian Economic Union just stipulates that refusal to deal could be a type of abuse of a dominant position but case law of the Court of Eurasian Economic Union provides any further clarifications.

Refusal to deal as a form of abuse of a dominant position is stipulated in Art. 76(1)(4) Treaty on Eurasian Economic Union. This article prohibits economically or technologically unreasonable reduction or termination of goods production if there is a demand for these goods or orders are placed for its deliveries with the possibility of its profitable production, and also if such reduction or such termination of goods production isn't directly provided for by this Treaty and/or other international agreements of the member States.

Secondary law of Eurasian Economic Union contains only one reference to above mentioned provision. According to Supreme Eurasian Economic Council Decision of 19.12.2012 N 29 on criteria for qualifying a market as transboundary the Eurasian Economic Commission may qualify as an abuse of a dominant position if the goods sold or purchased by business entities cannot be replaced by other goods when consumed (including when consumed for production purposes), an increase in the price of

\textsuperscript{57} Microsoft, para. 631.
\textsuperscript{58} Microsoft, para. 639-642.
\textsuperscript{59} Microsoft, para. 638.
\textsuperscript{60} Microsoft, para. 632.
\textsuperscript{61} Microsoft, para. 632, 643.
\textsuperscript{62} Microsoft, para. 646.
\textsuperscript{63} Microsoft, para. 652-653.
\textsuperscript{64} Report on Competition Policy 2015. Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 15.6.2016 COM(2016), p. 5.
\textsuperscript{65} Opinion of Advocate General Tizzano in Case C-418/01 IMS Health & Co OHG v NDC Health GmbH & Co KG [2004] ECR I-5039, delivered on 2 October 2003, para. 62.
a product does not cause a corresponding decrease in demand for this product, information about the price, conditions of sale or purchase of this product available on the relevant product market to an indefinite circle of persons.

As we can see the criteria applied in Art. 76(1)(4) Treaty on Eurasian Economic Union and Supreme Eurasian Economic Council Decision of 19.12.2012 N 29 are very familiar with criteria applied in the EU. Taking into consideration that the Court of Eurasian Economic Union when considering cases pays close attention to European legal practices there are good grounds for believing that Eurasian Economic Union case law will follow the pattern formed within European Union.

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66 See generally para. 7 of EAEU Court Advisory Opinion of 30.10.2017