

## **EXPERT REPORT CC**

### **INTERNATIONAL EXPERIENCE WITH REGARD TO “REFUSAL TO DEAL”**

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A “refusal to deal” occurs when the person who controls a given (tangible or intangible) asset rejects a third party’s request to get access to such an asset on reasonable commercial conditions. Comparative law shows that, under certain circumstances, a refusal to deal may be a sufficient and autonomous ground for the granting of compulsory licenses under patent laws, or as a general remedy under competition law to address abuses of a dominant position.

#### **Patent laws**

The refusal to deal as a ground for granting a compulsory license has been provided in many national laws, such as the patent laws of China, Argentina and Israel<sup>1</sup>.

The Chinese law, as revised in 1992, establishes the following:

“Where any entity which is qualified to exploit the invention or utility model has made requests for authorization from the patentee of an invention or utility model to exploit his or its patent reasonable terms and conditions and such efforts have not been successful within a reasonable period of time, the patent Administration Department under the State Council may, upon the request of that entity, grant a compulsory license to exploit the patent for invention or utility model” (Article 48).

Rule 72 of the Implementing Regulations subjects the request of a compulsory license according to article 48 of the Law, to the expiration of three years from the date of the grant of the patent, and further stipulates that the license should be predominantly for the supply of the domestic market.

Similarly, the Argentine patent law provides that a compulsory license may be granted if the patent owner does not grant a voluntary license after 150 days of a request by a third party on reasonable commercial terms and conditions (article 42). The refusal to deal may constitute an anti-competitive practice under the competition law (No. 22.262) but a determination of such a practice is not a condition for the granting of the compulsory license.

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<sup>1</sup> See Cohn, 1997, p. 27.

The German Patent Law (Text of December 16, 1980, as last amended by the Laws of July 16 and August 6, 1996) also provides for the granting of compulsory licenses in cases of refusal to deal:

“A non-exclusive authorization to commercially exploit an invention shall be granted by the Patent Court in individual cases in accordance with the following provisions (compulsory licence) if

1. the applicant for a licence has unsuccessfully endeavoured during a reasonable period of time to obtain from the patentee consent to exploit the invention under reasonable conditions usual in trade ...” (Section 24-(1))

It is important to note that the application of the previously mentioned provisions only requires proof of rejection of a request on reasonable commercial terms. It is not subject to the proof of dominant position or abuse. The existence of the patent (or utility model) is legally presumed to erect a barrier to competition, and the refusal to agree on reasonable terms and conditions is deemed, by itself, to constitute an improper use of the rights conferred.

In the United Kingdom and in other countries that have followed the model of UK patent law, refusal to deal may lead to a compulsory license in certain cases: when an export market is not being supplied, the working of any other patented invention which makes a substantial contribution is prevented or hindered, or the establishment or development of commercial or industrial activities in the country is unfairly prejudiced (Section 48.3.d of the UK Patent Act, as revised in 1977). Further, according to the UK Patents Act, 1977, section. 51, a license "as of right" may be ordered as a consequence of a Report by an Anti-Trust Authority that a patent holder has refused to grant licenses on reasonable terms against the public interest.

Similarly, in South Africa, a license can be granted in the case of the refusal to grant a license on reasonable terms, where trade or industry or agriculture or the establishment of a new trade or industry in the country is prejudiced, and it is in the public interest that a license be granted (section 56(2)(d), Patents Act No. 57 of 1978).<sup>2</sup>

In Canada, a compulsory license can be granted under the Patent Act in cases of refusal to license; a showing of anticompetitive effects is not necessary to establish this “abuse”<sup>3</sup>.

The granting of licenses due to "refusal to deal" has also been provided for in the area of breeders' rights. For instance, the law of Poland on plant varieties protection (1987) stipulates that a compulsory license may be granted when the title holder does not offer a license allowing third parties to meet unsatisfied needs of the national economy, or makes the grant of a voluntary license subject to unfair conditions (Article 29).

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<sup>2</sup> See also Austria's Patent Law (Federal Law of 1970, as last amended by the Law of May 23, 1984, amending the Patent Law and the Law Introducing Patent Treaties), Section 36(2); Ireland's Patents Act 1992 (of February 27, 1992), Section 70(2).

<sup>3</sup> See Gallini and Trebilcock, 2002, p. 30.

## The TRIPS Agreement

The TRIPS Agreement does not limit in article 31 the grounds that Members can establish in their national laws for the granting of compulsory licenses. It only determines the *conditions* therefore. This interpretation has been categorically affirmed by all Member States at the Doha WTO Ministerial Conference. Paragraph 5 (b) of the Ministerial Declaration on the TRIPS Agreement and Public Health (WT/MIN(01)/DEC/W/2, 14 November 2001) confirms that defining the grounds for such licenses is one of the “flexibilities” specifically permitted by the Agreement:

“5. Accordingly and in the light of paragraph 4 above, while maintaining our commitments in the TRIPS Agreement, we recognize that these flexibilities include: ...

b. Each member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.”

Although article 31 b) of the TRIPS Agreement only refers to the refusal of a voluntary license as a condition for granting compulsory licenses, it can be an autonomous ground for the granting thereof. This possibility has been expressly recognized by the WTO Secretariat<sup>4</sup>.

It is also interesting to note that the Chinese legislation was the object of careful scrutiny in the light of the TRIPS Agreement, during the process of accession of China to the WTO (concluded in November 2001) and that the “refusal to deal” provision survived such a scrutiny and was kept intact. Likewise, though USA filed a complaint against Argentina regarding several provisions of its patent law, including on compulsory licenses, the US government did not question the “refusal to deal” provision” mentioned above<sup>5</sup>.

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<sup>4</sup> See WT/CTE/W/8, 1994.

<sup>5</sup> See *Notification of Mutually Agreed Solution According to the Conditions Set Forth in the Agreement* (IP/D/18/Add.1, IP/D/22/Add.1, 2002).

## Competition law

Compulsory licenses based on “refusal to deal” can be granted in intellectual property cases under competition laws. Thus, in Australia, a compulsory license for “refusal to deal” may be granted unless the patentee can prove that it would equally refuse to license in a competitive situation<sup>6</sup>. A decision by Belgium courts in 1995 also imposed a compulsory license on two copyright collecting societies in favor of two cable distributors who had been refused the right to transmit by cable in Belgium the German Cable SATI. Refusing the authorization for a reasonable remuneration was deemed to be abusive<sup>7</sup>.

The refusal to deal has been considered in the USA in the context of the “essential facilities” doctrine under competition law. This doctrine has mainly dealt with the access to vertically integrated natural monopolies. It is based on cases discussing the unilateral refusal to deal under Section 2 of the Sherman Act<sup>8</sup>. In *MCI v AT&T*, the US Seventh Circuit Court designed a four-step test for determining whether access should be granted to a particular facility on the basis of the essential facilities doctrine:

- (1) control of the essential facility by the monopolist;
- (2) a competitor’s inability practically or reasonably to duplicate the essential facility;
- (3) the denial of the use of the facility to a competitor; and
- (4) the feasibility of providing the facility<sup>9</sup>.

The US patent law, as amended in 1988, provides that "no patent owner otherwise entitled to relief for infringement . . . of a patent shall be denied relief or deemed guilty of a misuse or illegal extension of the patent right by reason of his having . . . refused to license or use any rights to the patent . . . ." This amendment protects a patentee from a counterclaim of misuse; in applying it, courts have held that a patentee cannot be held liable for unilaterally refusing to sell or license a patent<sup>10</sup>. Alleged monopolists’ refusals to deal and conditional refusals to deal with respect to exclusive intellectual property rights continue, however, to be the subject of litigation and debate in the USA<sup>11</sup>.

There have been several cases in Europe relating to refusal to deal involving intellectual property rights, where concepts based on an essential facilities doctrine have been applied. The European Commission and courts have, in effect, considered in

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<sup>6</sup> See O’Byrne, 1992, p. 10.

<sup>7</sup> Latham, 1996, p. 25.

<sup>8</sup> The US Federal courts have analyzed refusal to deal cases either by expressly referring to this doctrine or just applying similar reasoning. In *Otter tail Power Co v the United States*, the US Supreme Court ruled that a dominant firm that controls an infrastructure or an asset that other companies need to make use of in order to compete has the obligation to make the facility available on non-discriminatory terms (Rahnasto, 2003, p. 144).

<sup>9</sup> See Rahnasto, 2003, p. 144.

<sup>10</sup> See Taladay and Carlin, 2002, p. 445.

<sup>11</sup> See, e.g., Jonathan Gleklen and Jeffrey MacKie-Mason in the July 2002 edition of Antitrust Source: <http://www.abanet.org/antitrust/source/july.html>

several cases whether the refusal to give third parties access to an essential facility constitutes an abuse of a dominant position, contrary to article 82 of the EC Treaty<sup>12</sup>.

In an early precedent (*Volvo AB v. Erik Veng (U.K.) Ltd*)<sup>13</sup> the ECJ had considered that ‘the right of the proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without its consent, products incorporating the design constituted the very subject matter of exclusive rights. It follows that an obligation imposed upon the proprietor of a protected design to grant to third parties, even in return for a reasonable royalty, a license for the supply of products incorporating the design would lead to the proprietor thereof being deprived of the substance of his exclusive right. The Court, however, provided three examples of situations where a refusal to licence may be abusive, if coupled with (1) an arbitrary refusal to supply spare parts to independent repairers, (2) overcharging for spare parts, or 3) ceasing to produce spare parts for a particular model when there were many vehicles of that model still on the road. In *Renault* the ECJ confirmed the judgment given in *Volvo*<sup>14</sup>.

The decision of the European Court of Justice (ECJ) of 6 April 1995 in *Magill*<sup>15</sup> established an important precedent in relation to refusal to deal in the context of intellectual property rights. The Court held that Radio Telefis Eireann (RTE) and Independent Television Publications Limited (ITP), who were the only sources of basic information on program scheduling, which is indispensable raw material for compiling a weekly television guide, could not rely on national copyright provisions to refuse to provide that information to third parties. Such a refusal, the Court argued, constituted the exercise of an intellectual property right beyond its specific subject matter and, thus, an abuse of a dominant position under Article 86 of the Treaty of Rome.

The court reasoned that RTE and ITP held a dominant position, because they were the only source in Ireland of the basic information necessary to produce weekly television programming guides and were thus in a position to reserve for themselves the secondary market for weekly television guides by excluding all competition from that market. The Court considered that whilst refusal to grant a license in exercising an intellectual property right is not of itself an abuse of a dominant position, it may be an abuse where special circumstances exist. Such circumstances included the lack of an actual or potential substitute for a weekly television guide, the existence of a specific, constant and regular demand for such a guide, and the fact that the refusal to grant a license to Magill to produce such a guide prevented the appearance of a new product on the market which RTE and ITP did not offer<sup>16</sup>.

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<sup>12</sup> Article 82. “Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

<sup>13</sup> (238/87), [1988] ECR 6211, [1989] 4 CMLR 122, CMR 14498. An almost identical judgment was given at the same time *Renault Maxicar* 53/87, [1988] ECR 6039 [1990] 4 CMLR 265 [1990] 1 CEC 267.

<sup>14</sup> See Rahnasto, 2003, p. 145.

<sup>15</sup> Cases C-241-242/91P [1995] ECR I-743.

<sup>16</sup> Latham and Geissmar, 1995, p. 9.

In the *Magill* case, the broadcasters' abusive conduct prevented the emergence of a new product on the market:

“The appellants' refusal to provide basic information by relying on national copyright provisions thus prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the appellants did not offer and for which there was a potential consumer demand. Such refusal constitutes an abuse under heading (b) of the second paragraph of Article 82 of the Treaty (*Magill*, para. 54).

Though some legal commentators have argued that the *Magill* Court required a finding of two markets, there is nothing in *Magill* which suggested that the application of Article 82 to an IP right necessarily required market leveraging (Fine, 2003, p. 2). The ECJ, in fact, considered that each broadcasting station was dominant over the information needed by the plaintiffs to compile a comprehensive TV guide. The doctrine elaborated in *Magill* may be directly applicable for the granting of a compulsory license of the basic patent in favour of the holder of an improvement patent, but it also lays the ground for consideration of other cases of anti-competitive conduct. The ECJ's judgment in *Magill* has been considered as an acceptance of the application of the essential facilities doctrine to intellectual property anti-trust cases and to anti-trust cases in general<sup>17</sup>.

In *Tiercé Ladbroke*<sup>18</sup> the Court of First Instance (CFI) of the EC held that PMI, which licensed the copyright of 12 race-course operators in France, was not obliged to license live film of French horse races to a firm that provided betting services (in fact, it was the leading provider of such services in Belgium). The court found that the refusal to license the applicant did not fall within the prohibition of Article 82 because it did not involve a product or service which was (a) essential for the exercise of the activity in question (that is, for which there was no real or potential substitute), or (b) was a new product whose introduction could be prevented and for which there was specific, constant and regular potential demand.

The facts in this case “were hardly supportive of an infringement of Article 82, even on a broad reading of *Magill*, since it was clear to the CFI that broadcasts of French horse races were not essential to the betting organization, Ladbroke, where bets were placed prior to any broadcast of the race in question. This decision, however, confirmed that preventing the emergence of a *new product* was not a *sine qua non* condition to compel access to an essential facility under Article 82. What really mattered was whether the IP holder, by refusing to license, was preventing access to an essential facility”<sup>19</sup>.

The essential facilities doctrine was also at stake in *Oscar Bronner*<sup>20</sup>. In this case, Mediaprint refused to distribute the papers of a smaller specialist firm, which alleged that the only national wide home delivery service in Austria was an essential

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<sup>17</sup> See Rahnasto, 2003, p. 145.

<sup>18</sup> *Tiercé Ladbroke v. Commission*, T504/93, [1997] ECR II 923, [1997] 5 CMLR 309.

<sup>19</sup> Fine, 2003.

<sup>20</sup> *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and Other*, (C-7/97), [1998] ECR I-7817, [1999] 4 CMLR 112, [1999] CEC 53.

facility. The ECJ rejected the complaint, since there were other ways of delivering the applicant's newspapers, and there were no proven technical, legal or economic obstacles to establish another national home delivery scheme (even if less efficiently). Again in this case, the decision—even if negative for the applicant—indicated that article 82 did not require that the dominant firm prevent the emergence of a new product, but rather, that its refusal of access to an essential facility be likely to eliminate competition on the relevant market. Interestingly, the Advocate General stated in this case that the role of competition law was to protect consumers rather than competitors:

“ . . . it is important not to lose sight of the fact that the primary purpose of Article 82 is to prevent distortion of competition—and in particular to safeguard the interests of consumers—rather than to protect the position of particular competitors” (para. 58).

More recently, the European Commission adopted, on the basis of the essential facilities doctrine, interim measures requiring IMS<sup>21</sup> to licence competitors the use of copyrighted information<sup>22</sup> in which IMS (the world largest supplier of data on pharmaceutical markets) was deemed to hold a dominant position. Two competitors in the data business, who used IMS' “bricks” model to compile and present their own information, were sued by IMS (who also obtained an injunction), for infringement of the data bases protection regime established under European law<sup>23</sup>. In the Commission's view, the “bricks” model had become a *de facto* industry standard. It held that the refusal of access to the brick structure (an essential structure with no substitute) was likely to eliminate all competition in the relevant market, and was not objectively justified. It also argued that IMS could obtain fees from the compulsorily licensed companies, and thereby its legitimate interest would not be prejudiced<sup>24</sup>.

In examining the case law in the EC, two experts have noted that

“The development of the essential facilities doctrine has been different in the EC and U.S. Unlike in the U.S., EC competition law imposes upon dominant firms a general duty to share as well as to supply competitors. Indeed, if a dominant firm tries to deny access to a facility as a means of deterring competition, it may be found to abuse its dominant position even if the facility is not “essential.” Moreover, the EC is more likely to consider the effect of exclusion on a competitor, rather than on competition as a whole, in evaluating whether access to a facility is required . . . The Magill decision shows clearly that IP rights cannot be used in all cases as a defense against an alleged abuse of a dominant position. Such an abuse can occur even where the IP holder has never licensed the subject

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<sup>21</sup> Interim order of the European Commission, 3 July 2001, O.J. 2002, L59/18, [202] 4 CMLR 58, [2002] CEC 2234.

<sup>22</sup> The information consisted of data about the German territory, which was divided into 1860 zones (“bricks”), including at least 4 pharmacies in each zone. This information allowed pharmaceutical companies to closely monitor sales, while avoiding the identification of sales made by individual pharmacies.

<sup>23</sup> European Directive 96/9, O.J. 1996, L77/20.

<sup>24</sup> *IMS Health v. Commission* (T-184/01RI), 10 August 2001, and *IMS Health v. Commission* (T-184/01R II), 26 October 2001. The Commission interim measures, however, were suspended by interim orders of the CFI, which questioned the former arguing that there was at least a serious doubt whether there was a duty for IMS to license its intellectual property rights, given that it was itself offering the same service as the companies requesting access.

IP. Magill, read in conjunction with generally applicable essential facilities case law, increases the risk that an IP holder in a dominant position in the E.U. may be forced to license its IP, particularly in cases where the IP can be alleged as essential to competition. Also, the ability of the IP holder to dominate a secondary market by enforcing the IP right becomes a potentially important consideration”<sup>25</sup>.

In sum, under EC law an intellectual property holder is not entitled to exclude competitors from the use of his rights when a license thereof is essential for competition -even if a license to the product has never been granted- such as where the refusal to license prevents the introduction of a new product or allows the intellectual property holder to monopolize a secondary market, or where there is no justification for the exclusion. The ECJ has not precisely defined what is meant by an “essential facility”. The test “seems to require only that the facility be essential, with no other conditions being required. While the court is restrictive in identifying a facility as essential, requiring access seems to follow automatically from the identification”<sup>26</sup>.

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<sup>25</sup> Taladay and Carlin , 2002, p. 450-451 and 452.

<sup>26</sup> Korah, p. 21.

## Access to an essential facility under SA law

The SA Competition Act defines ‘*essential facility*’ as “an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers” (Section 1 (1)(viii)). It provides that “it is prohibited for a dominant firm to... refuse to give a competitor access to an *essential facility* when it is economically feasible to do so” (Section 8 (b)).

The Competition Tribunal may “make an appropriate order in relation to a prohibited practice, including ...ordering access to an essential facility on terms reasonably required” (Section 58 (1)(a)(vii)).

However, a firm may apply to the Competition Commission to exempt from the application, *inter alia*, of section 8 (b) “an agreement or practice, or category of agreements or practices, that relates to the exercise of intellectual property rights, including a right acquired or protected in terms of ...the Patents Act, 1978 (Act No. 57 of 1978)” (section 10 (4)). Upon receiving an application in terms of this subsection, “the Competition Commission may grant an exemption for a specified term” (Section 10 (4A)).

A “resource” may be tangible or intangible. It is a “means of supplying what is needed, stock that can be drawn on, available assets”<sup>27</sup>. Like in the case law mentioned above, an “essential facility” may be a patent, as long as lack of access thereto prevents competitors from “reasonably provide goods or services to their customers” (Section 1 (1)(viii)). Patents erect an absolute impediment to provide protected goods, thereby by completely excluding competition.

The SA law provides for two tests for the application of the “essential facilities” doctrine.

First, a “dominant firm” must exercise control over the facility. According to Section 7, “a firm is dominant in a market if :

it has at least 45% of that market;

it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or

it has less than 35% of that market, but has market power.

“Market power” means the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers (Section 1 (1) (xiv)). The definition of the relevant market for purposes of establishing dominance requires a case-by-case-analysis. A standard definition is based on “a grouping of sales for which the elasticity of supply and the elasticity of demand are sufficiently low that if a single firm controlled all the sales it could profitably reduce output and charge a price higher than marginal cost”<sup>28</sup>.

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<sup>27</sup> *The Concise Oxford Dictionary*, Oxford University Press, 1989, p. 887.

<sup>28</sup> Hovenkamp, 1993, page 336.

Second, it must be “economically feasible” to grant access to a competitor. “Feasible” means “practicable, possible”<sup>29</sup>. Access by a competitor should be deemed economically feasible when it does not impede the continuous use of the resource by its owner under reasonable economic conditions. For instance, if a compulsory license of a patent were granted, since it would be non-exclusive, the patent owner would be able to exploit it in competition with the compulsory licensee in SA while, given the territoriality and independence of patent grants, his exclusive rights will be unaffected in other jurisdictions. In addition, the grant of a compulsory license is efficiency enhancing, as it may improve both allocative as well as dynamic efficiency<sup>30</sup>.

Finally, it is to be noted that a practices *may* be exempted under Section 10 (4A) when an agreement or practice, or category of agreements or practices, “relates to the exercise of intellectual property rights”. Such an exemption is discretionary for the competent authority, and the mere fact that a practice “relates to” the exercise of such rights does not provide grounds for an exemption. In assessing the circumstances that would justify an exemption to be conferred, the national competent authority will be bound to examine the situation created by the exercise of such rights in the light of the objectives of the Competition Act and other relevant national laws and international obligations applicable in South Africa.

The Competition Act is based on the concept that “an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans” (Preamble) and aims, *inter alia*, at providing “for markets in which consumers have *access* to, and can freely select, the quality and variety of goods and services they desire”. In the case of medicines, consumers do not only “desire” but *need* them for their health and survival.

Moreover, access to medicines (which are not a simple market commodity) is a component of the human rights to life and to health, that South Africa is bound to respect under its national law and its international obligations. Thus, article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) clearly sets forth a right to life and states that “this right shall be protected by law”<sup>31</sup>. The Human Rights Committee of the United Nations, which monitors implementation of the ICCPR, has interpreted that “the expression ‘inherent right to life’ cannot properly be understood in a restrictive manner and the protection of this right requires that states adopt positive measures.”<sup>32</sup> Moreover, the Human Rights Committee has defined the role of States in protecting human life to include obligations to eliminate epidemics.<sup>33</sup> Likewise, Article 4 of the African Charter of Human and People’s Rights (Banjul Charter) affirm the right for every human being to “respect for life and integrity of his person and states that no one may be arbitrarily deprived of this right”<sup>34</sup>, while Article 16 also recognizes the right of every individual to enjoy the “best attainable state of physical and mental health”

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<sup>29</sup> *The Concise Oxford Dictionary*, Oxford University Press, 1989, p. 354.

<sup>30</sup> See Correa, Carlos, 2003, p. 422.

<sup>31</sup> International Covenant on Civil and Political Rights, G.A. Res 2200(XXI), 21 U.N. GAOR Supp. (No. 16) at 52 U.N. Doc. A/6316 (1966) 999 U.N.T.S. 171 (entered into force 23 Mar. 1976) [ICCPR], at art 6.

<sup>32</sup> United Nations Human Rights Committee, General Comment No. 6: “The Right to Life”, A/37/40, CCPR 16<sup>th</sup> Sess. (1982).

<sup>33</sup> *Idem* para 5.

<sup>34</sup> African Charter of Peoples and Human Rights, adopted by the OAU on 17 June 1981, article 4.

and declares that States parties shall take “the necessary measures to protect the health of their people...”<sup>35</sup>.

In addition, Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” It also states that: “steps to be taken by the States Parties to the present Covenant to achieve the full realization of this rights shall include those necessary for... the prevention, treatment and control of epidemic, endemic, occupational and other diseases” and “the creation of conditions which would assure to all medical service and medical attention in the event of sickness”<sup>36</sup>. In its general Comment no. 14 on the “Right to the highest attainable standard of health”, the Economic, social and Cultural Rights Committee (ESCR Committee) explained that all health care facilities, goods and services- including medications and the provision thereof- should be: (a) available in sufficient quantity, (b) accessible to everyone without discrimination, (3) acceptable in the sense of respectful of medical ethics and customs; and (d)of good quality and scientifically appropriate. Accessibility in particular includes: (1) physical accessibility: “health facilities, goods and services must be within safe physical reach for all sections of the population, specifically vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS;” (2) economic accessibility: “health facilities, goods and services must be affordable for all;” (3) information accessibility: “accessibility includes the right to seek, receive and impart information and ideas concerning health issues” including pricing and treatments<sup>37</sup>.

Finally, it is important to note that article 27 of the SA Constitution follows closely the language of article 12 of the ICESCR ,and that in *Minister of Health et al v Treatment Action Campaign et al* case, the Constitutional Court interpreted that reasonable measures to implement the right to health include an obligation to expand access to Nevirapine (to prevent mother-to-child transmission of HIV) from 18 pilot sites to all public health centers in the country.

In sum, patents may, like in the case of key anti-retrovirals, allow the patent owner to control an *essential facility*. The European experience shows that, subject to certain conditions, intellectual property rights may be subject to compulsory licenses under such doctrine. But there is no universal doctrine of “access to essential facilities” and SA needs not to follow a particular articulation of this doctrine in any particular jurisdiction. A patented invention is a “resource” that may amount to an “essential facility” and refusal of access thereto may trigger the grant of a compulsory license as a remedy. Though the Competition Act allows for an exemption in cases where intellectual property rights are in force, this is a discretionary power subject to public interest considerations. In particular, the patent owner’s refusal to deal in relation to patented drugs may amount to the denial of constitutionally recognized human rights that the SA State is bound to comply with.

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<sup>35</sup> Banjul Charter, para. 17

<sup>36</sup> Article 12(2)(C) and (d), respectively.

<sup>37</sup> ESCR General Committee, Comment No. 14, para. 12.

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