### *2.2.2. The Intersection of IP and Competition Law*

Assessing a pharmaceutical company's behavior under competition law requires an extraordinarily careful approach by the respective authorities due to the tradeoff between static and dynamic economic efficiency, which will be discussed at length in chapter 3.2.[55] Perfect static competition, where the equilibrium price would equal only the marginal costs of drug, would not allow innovative pharmaceutical companies to appropriate superior returns required to recoup their R&D investments.[56] Dynamic competition would consequently be eliminated. *Jones* and *Sufrin* therefore argue that a functioning free market competition may require a certain degree of temporary dominance by a firm as long as the market is not (fully) foreclosed from the entry of new incumbents, which would then compete via substitutes.[57]

The promotion of dynamic competition is *inter alia* ensured by the legal regime of IP rights (see chapter 2.1.2.). Although the sector inquiry stresses conflicts between IP and competition law, it is decisive to understand that the primary intention of IP rights is to complement rather than to exclude EU competition law.[58] This however is not achieved– as the sector inquiry may imply – through IP and competition law being *in pari materiae* in the sense that they would share the common goal of facilitating innovation. More so, IP rights in general and the patent system more precisely, should be regarded as a sub-system serving the overall market economy by achieving progress through innovation.[59]

55 Whereas static efficiency considers resource allocation and welfare effects from the equilibrium price and quantity at a certain point in time, dynamic efficiency considers economic progress and welfare effects of market participants' behavior over a certain period of time. The resulting policy conflict is predominantly strong in pharmaceuticals due to the 'innovation dilemma' as discussed in chapter 2.1.1.

56 See e.g. Alison Jones and Brenda Sufrin, EC Competition Law Text, Cases, and Materials 3-10 (3rd edition Oxford University Press 2008) (providing a general overview of fundamental economic theories and competition law).

57 See Id. at p.586.

58 See Frank L. Fine, The EC Competition Law on Technology Licensing 14 (Sweet&Maxwell 2006).

59 See Hanns Ullrich, Wahrung von Wettbewerbsfreiräumen innerhalb der Schutzrechtsverwertung – Die Regelung des Innovationswettbewerbs im und durch das Patentrecht, in Sektoruntersuchung Pharma der Europäischen Kommission – Kartellrechtliche Disziplinierung des Patentsystems? 29, 42 (Bardehle, Pagenberg, Dost Altenburg, Geissele eds., Carl Heymanns Verlag 2010).

In contrast to US antitrust law, the European understanding consequently does not see IP rights as an exclusionary zone not subject to competition law, but clearly as being fully in the scope of its regulation.[60] Nevertheless, the *Microsoft* decision[61] confirmed that the mere existence of IP rights does not automatically lead to a dominant market position. As *Ullrich* and *Heinemann* emphasize, the decisive criteria rather are under what circumstances the IP right holder becomes market dominant and what role the IP ownership plays in that respect.[62]

This perspective complemented the precedent cases of *Magill*[63] as well as *Bronner*,[64] where the ECJ concluded that the exercise of an IP right might indeed constitute an Art. 102 TFEU abuse, but only under 'exceptional circumstances'.[65] In these special situations, IP rights may be considered a 'bottleneck monopoly', or what the EU Commission calls an 'essential facility'. Thereby, access to a competitor's IP would be indispensable for the rival, as *'there is no actual or potential substitute'* for it.[66]

It therefore seems clear that there is nothing like an IP-induced general privilege in the application of Arts. 101 and 102 TFEU.[67] Nevertheless, *Drexl* observes that competition authorities are generally used to rather safeguard static competition and fight price cartels, whereas exactly this complex relationship between static and dynamic efficiency is what makes

60 Compare Commission Communication, Executive Summary of the Pharmaceutical Sector Inquiry Report 18-19 (Jul. 8, 2009) with Rainer Bechtold et al., EG Kartellrecht Kommentar Art. 81-86 EG, EG-Kartell-VO 1/2003 § 2009 (2nd edition, C.H. Beck 2009) (emphasizing that also restrictive business practices in the sense of Art. 101 TFEU do not constitute an exception to competition law).

61 See Case T-201/04, Microsoft Corp. v. Comm'n, 2007 E.C.R. II-03601, § 691.

62 See Ullrich & Heinemann, supra note 48 at p. 162.

63 See Case C-241/91 and C-242/91, Radio Telefis Eireann (RTE) and Independent Television Publications (ITP) v Comm'n, 1995 E.C.R. I-743, § 50.

64 See Case C-7/97, Oscar Bronner, 1998 E.C.R. I-7791.

65 See Joseph Straus, Patentanmeldung als Missbrauch der marktbeherrschenden Stellung nach Art. 82 EGV?, 2 GRUR-Int 93 (2009) (referring to the Magill decision).

66 See Irina Haracoglou, Competition Law and Patents – A Follow-on Innovation Perspective in the Biopharmaceutical Industry 133 (Steven D. Anderman et al. eds., Edward Elgar Publishing 2008) (referring to supra note 64 at § 38, 41 and 44).

67 See Press Release IP/04/382, European Commission, Commission concludes on Microsoft investigation, imposes
conduct remedies and a fine (Mar 24, 2004).

it so hard for them to apply competition law to cases in the IP-heavy pharmaceutical sector.[68]

### *2.2.3. The 'More Economic Approach' to EU Competition Law*

The EU Commission has advocated for applying a 'more economic approach' to competition law. This is characterized by differentiated case-by-case decisions rather than strengthening per-se rules. Moreover, the approach calls for balancing pro- and anticompetitive effects of the conduct under investigation not on overall social welfare, but rather on consumer welfare.[69]

Central aspects of the 'more economic approach' stand in conflict with ECJ jurisprudence and previously articulated opinions by the EU Commission, which has substantially contributed to even further legal uncertainty for the pharmaceutical industry: A focus on consumer instead of overall social welfare implications is not supported by the ECJ, which has made clear that competition law is supposed to protect competitive market structures rather than competitors or consumers.[70] *Straus* interprets the EU Commission's discussion paper on the application of Art. 82 of the EC Treaty (now Art. 102 TFEU) as also supporting this more traditional perspective: In the paper, the EU Commission would articulate the objective of protecting competition, not competitors.[71] The more traditional perspective is also supported by *Gassner*, who concludes with reference to the *GlaxoSmithKline* decision[72] that negative effect on consumer welfare should be consid-

68 See Josef Drexl, Pay-for-Delay – Zur kartellrechtlichen Beurteilung streitbeilegender Vereibarungen bei Pharma-Patenten, in Sektoruntersuchung Pharma der Europäischen Kommission – Kartellrechtliche Disziplinierung des Patentsystems? 13, 22 (Bardehle, Pagenberg, Dost Altenburg, Geissele eds., Carl Heymanns Verlag 2010).

69 See Dieter Schmidtchen, Der „more economic approach" in der europäischen Wettbewerbspolitik – Ein Konzept mit Zukunft, in Internationalisierung des Rechts und seine ökonomische Analyse 473, 473 (Thomas Eger et al. eds., 2008).

70 See e.g. Joint Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, GlaxoSmithKline Services Unlimited v. Comm'n (under appeal – not published yet, see Case T-168/01, GlaxoSmithKlineServices Unlimited v. Comm'n, 2006 E.C.R. II-2969.

71 See supra note 65 at p. 100.

72 See supra note 70.