Lexis®PSL **Competition**

An overview of competition law and intellectual property

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The challenges of balancing intellectual property rights (IPR) and competition law are not new. At first sight, the aims of IPR and competition law may appear to be in opposition. Broadly stated, IPR holders have rights to control access to and charge others for use of their monopoly rights. Competition law aims to promote open markets and curtail abuse of market power. The Commission has acknowledged the potential concerns arising from the interaction between IPR and competition law and the perceived tension between them. It has also recognised that the two are, in fact, complementary, with each informing the other, so that a balancing exercise is required when determining whether any exercise of IPR is compatible with competition law. Even though intellectual property laws and competition laws are viewed as complementary, controversial issues can arise where competition law is applied to business activities relating to IPRs (eg refusal to license).

While the basic principles of competition law enforcement of Articles 101 and 102 TFEU have been applied to cases involving IPR for many years, in recent years, the Commission has confronted the apparent tension between IPR and competition in a number of novel interventions. The enforcement activity by the Commission in the pharmaceutical and mobile device industries in particular has raised new questions for the enforcement of competition law in IP-intensive cases. The issue of whether a dominant IPR-owner may be required to license their rights has also been controversial.
References:
Guidelines on the application of Article 101 TFEU to technology transfer agreements, para 7
Against this background it is useful to consider the extent to which competition law applies to the following questions that have arisen in relation to the ownership and protection of IPR:

- What competition law considerations apply to patenting practices such as the decision to seek (or not seek) IPR protection and an IPR owner's conduct before the regulatory authorities?
- What competition law rules apply to licensing of IPR?
- When can an owner of IPR be forced to license its IPR?
- What limits does competition law place on an IPR owner's ability to litigate to seek to protect its IPR such as by seeking an injunction and what restrictions does the law place on settling a dispute?

Key themes on the interplay between competition law and IPR

There are a number of key themes and developments that are emerging:

- 'New' or 'digital' economy is often the battleground. These industries, with smartphones and search being examples, are where some of the more difficult competition law cases involving IPR play out. They tend to display features such as falling costs, relatively modest capital requirements, high rates of innovation, and rapid and frequent entry and exit, as well as economies of scale in consumption (or what economists call 'network externalities'). Control over essential IPR or platforms may (but does not necessarily) mean that a company acquires a position of market power as a gatekeeper to other markets. This dynamic market has led to a growing body of IPR-related cases which raise theories of harm which, up to now, have not been tested in the EU Courts.
- Pay for delay cases. An area where the Commission shows every sign of continuing to take an aggressive and creative approach to competition law enforcement is in the pharmaceuticals settlement/pay for delay cases.
- Compulsory licensing. Historically the more controversial area for EU competition law enforcement was compulsory licensing of IPR. Interestingly, in the recent Standard Essential Patent (SEP) cases the Commission appears to be applying the same legal standard in the compulsory licensing cases (eg Magill, IMS and Microsoft) to the seeking of an injunction. The reasoning seems to be that the commitment to license SEPs on FRAND terms to a 'willing licensee' constitutes 'exceptional circumstances' justifying effectively a compulsory licence.
- Article 9 commitments. Article 9 continues to provide an alternative route for the Commission and the parties in competition cases involving IPR and access to proprietary information. In IPR cases this more flexible approach has a great deal to commend itself in circumstances where the balance between the rights of the proprietor and third parties may require a more nuanced outcome rather than prohibition or fines.
- The 2014 Technology Transfer Block Exemption (TTBE). The new rules are largely supportive of technology licensing, but they should be approached with caution as they signal a less benevolent approach than

previously. The requirements of the TTBE are not always straightforward to satisfy. Further, the TTBE and TTBE Guidelines address only Article 101 issues. Since, by definition, the subject-matter of the underlying arrangements may relate to a new product or technology existing precedents or approaches to market definition may have limited initial or ongoing relevance.

- Free movement rules. The rules on the free movement of goods (Articles 34 to 36 TFEU) prohibit Member States from imposing unjustified barriers to intra-EU trade. Article 36 permits Member States to legislate in order to protect IPRs subject to the limitations imposed by the free movement objectives. The EU 'exhaustion of rights' principle means that IPRs cannot be enforced to prevent the marketing of goods in one Member State if such goods have also been marketed in another Member State or with the IPR owner's consent.

Patenting practices

In the context of the proper balance between IPR protection and competition law there is a risk of the competition authority supplanting the role of the IPR approval authorities if it were to second guess the decision of those authorities to grant IPR protection. However, a number of patenting practices and conduct before regulatory authorities have been examined and questioned by the Commission under EU competition law.

The Commission's interest in the intersection between IPR and competition law and in particular the legitimacy of certain patenting practices was highlighted in its sector inquiry into the pharmaceutical sector. In July 2009, the Commission issued its final report in its 18-month inquiry. Although the Commission made no findings of infringement immediately following the inquiry, it highlighted various strategies by pharmaceutical companies that may present risks of blocking or preventing new products or generic entry. Areas of concern included patenting strategies (eg filing numerous patents, abusive or vexatious litigation, and opposing patent applications, secondary patents and marketing authorisations).

Competition law cases in the pharmaceutical sector, since the Commission's final report, have tended to focus on settlement agreements between originators and originators and generics (see further below on settlement agreements).
References:
Antitrust: shortcomings in pharmaceutical sector require further action (IP/09/1098)
Antitrust: shortcomings in pharmaceutical sector require further action—frequently asked questions (MEMO/09/321)
In September 2012, the Court of Justice upheld a finding by the Commission against AstraZeneca for violation of Article 102 TFEU. This case concerned alleged misleading and abusive conduct before the regulatory authorities. Recognising that some of the abusive behaviour was novel the Commission imposed a fine that was significantly lower than the maximum fine of 10% of turnover (this was slightly reduced on appeal to the General Court from €60m to €52.5m).
References:
Case C-457/10 AstraZeneca v Commission
For further analysis of the AstraZeneca decision, see further, Pharma case has wide competition impact.

Licensing of technology

In order to assist parties assess the compatibility of their IPR agreements and commercial practices under EU law, the Commission has issued block exemptions and guidance.

In relation to the application of Article 101 TFEU the Commission has issued a block exemption which specifically addresses technology transfer. This is the TTBE, the latest version of which was issued in March 2014.
References:
Regulation 316/2014
Where the TTBE does not apply, this does not mean that an agreement involving IPRs is necessarily anti-competitive and prohibited under EU law. The Commission has issued guidelines to assist parties to assess compliance of their licensing agreements with EU law (TTBE Guidelines).
References:
Guidelines on the application of Article 101 TFEU to technology transfer agreements
While the new rules do not represent a dramatic change in the Commission's approach to technology transfer, there are some important changes. As a result, parties to IPR licences in Europe may find that their ability to impose restrictions of competition in their agreements including bans on passive sales, grant-backs of improvements and non-challenge clauses is more constrained than previously.

The Commission has also updated its guidance on the assessment of settlement agreements and technology pools (see further below on these issues).

A significant number of agreements will fall outside the block exemption completely and be subject to self-assessment in accordance with Article 101 TFEU. Other block exemptions and guidance including the block exemptions on vertical restraints, specialisation and R&D and the Horizontal Cooperation Guidelines may apply to a commercial practice involving IPR.

See further, An overview of the Technology Transfer Block Exemption 2014.

For an overview of the different block exemptions and their potential impact on IPR agreements, see further, Applying block exemptions to IP agreements.

Patent pools and standard setting

The competition law assessment of IPR cases is more complex in cases where two or more players have licensed a package of technology rights to contributors and third parties (patent pools) and where the market in question is governed by technical standards. Both these areas have been subject to guidance by the Commission and have featured in recent competition enforcement activities.

The extended provisions of the latest version of the TTBE Guidelines clarify the application of the safe harbour to technology pools. The Commission notes that the concept of essentiality covers not only the position where the technology is essential for producing a particular product but where this is essential to meet a particular standard.

The TTBE Guidelines contain a detailed examination of technology pools, covering: (i) the formation and operation of the pool, and (ii) individual restraints in agreements between the pool and its licensees.

Agreements relating to the creation or operation of technology pools are not covered by the TTBE because they do not generally permit a licensee to produce contract products. As regards Article 101, such agreements are dealt with in the TTBE Guidelines.

The TTBE Guidelines provide a safe harbour for agreements dealing with the creation or operation of technology pools provided that conditions relating to the method of creating and operating a pool are satisfied.

The TTBE Guidelines also provide guidance on the assessment of pools that fall outside the safe harbour. Different considerations apply depending on whether the pool covers non-essential or complementary technologies.
References:
Guidelines on the application of Article 101 TFEU to technology transfer agreements, paras 252 and 261
Generally, the TTBE does not apply to agreements between the pool and its licensees because such agreements tend to be multi-party arrangements. However, it will still be necessary to assess those agreements under Article 101.

Patent pools may also support a de facto or de jure standard. Cooperation between competitors may occur in the definition of technical or quality requirements with which current or future production processes and methods or products must comply, for example to ensure compatibility between products that work together (standards) or cooperation in the setting of standard terms and condition of sale or purchasing (standard terms). Standard setting may give rise to additional competition law concerns through the foreclosure of new or improved technology (see further below in relation the Commission’s investigations of Rambus, Samsung Electronics and Motorola Mobility).

For an outline of the legal framework for assessment, see further, Patent pools: their advantages and risks.

For an overview of the standardisation process and leading cases, see further, Patent rights and the standard setting process.

Compulsory licensing of IPR

Refusal to license IPR is a complex area. In certain circumstances a refusal to license technology or IPR can be an abuse of dominance. Following the decisions in *Magill*, *IMS* and *Microsoft* (media player/interoperability) it is established that dominant companies will only be required to license technology/IPR in 'exceptional circumstances'. The exceptional circumstances in which such a compulsory licence may be ordered have not been defined exhaustively by the Commission or the EU Courts.

A dominant company may be able to resist an order for a compulsory licence of its IPR if it can establish that this would have negative effects on its incentives to innovate which would not be outweighed by the positive effects of an order to license.

In 2007, the General Court confirmed that Microsoft could be ordered to supply its inter-operability protocols to its rivals.

An owner of an IPR will only be required to license in 'exceptional circumstances', such as:

- the information was indispensable to competitors to develop competing products
- the refusal led to a risk that effective competition would be eliminated
- the refusal prevented the potential emergence of a new product
- there was no objective justification for the refusal.

As a result, Microsoft was required to supply its rivals with access to its inter-operability information.
References:
Joined Cases C-241/91 P and C-242/91 P, Magill
Case C-418/01, IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG
Case T-201/04, Microsoft Corporation v Commission
The Commission has stated that it will consider refusal to license IPR as an enforcement priority if all of the following circumstances are present:

References:

Guidance On The Commission's Enforcement Priorities In Applying Article [102 TFEU] to Abusive Exclusionary Conduct By Dominant Undertakings, para 82

- the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market
- the refusal is likely to lead to the elimination of effective competition on the downstream market, and
- the refusal is likely to lead to consumer harm.

For refusal to license and the Microsoft (inter-operability) case, see further, IP Rights and abuse of dominance.

Unreasonable licensing terms and conditions

Once a dominant IPR owner has decided to grant a licence, the question of whether the imposition of particular terms may be considered abusive is determined according to the general principles that apply in Article 102 cases. However, two aspects have raised particular issues in an IPR context: (i) charging of excessive royalties, and (ii) tying or bundling so as to foreclose competing products or services.

Excessive royalties

The imposition by a dominant company of selling prices that are unfair or disproportionate to the economic value of the product or service provided can constitute an abuse (so-called 'excessive pricing'). In *United Brands v Commission* the Court of Justice considered that charging a price that was excessive because it had no reasonable relationship to the economic value of the product supplied would be an abuse.

References:

Case 27/76, United Brands v Commission [1978]

Excessive pricing cases have been difficult to establish, not least since the Commission does not want to act as a price regulator. However, the Commission's anti-trust case against Rambus involved a pricing remedy where the Commission secured a five year royalty cap. The Commission considered that Rambus engaged in intentional deceptive conduct in the context of the standard-setting process by not disclosing standards that it later claimed were relevant to the JEDEC standard. As a result of this activity (a so-called 'patent ambush'), Rambus was found by the Commission to be in a position to charge higher royalty rates than it would otherwise have been able to. This was a novel case. Since this was a case involving commitments taken under Article 9 of Regulation 1/2003 its precedent value is limited.

References:

Case COMP/38.636 RAMBUS

For details on Rambus and abuse of FRAND licensing commitments, see further IP Rights and abuse of dominance.

Tying and bundling

Tying or bundling concerns the 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.

The General Court's 2007 decision in the Microsoft case upheld the Commission's 2004 decision that Microsoft had unlawfully tied its Media Player (WMP) with the Windows Operating System (WOS) thereby foreclosing innovation and limiting consumer choice. The case involved technical tying through the technical integration of one product (WMP) into another (WOS).

The General Court upheld the Commission's decision and confirmed that four conditions must be met for a tying case under Article 102:

References:

Case T-201/04 Microsoft Corporation v Commission

- the tying and tied goods are two separate products
- the undertaking is dominant in the tying product market
- the undertaking does not give consumers a choice whether to obtain the tying product without the tied product, and
- the tying forecloses competition.

A second major competition law probe in relation to Microsoft concerned an allegation of foreclosure contrary to Article 102 on the basis that Microsoft was tying its browser (Internet Explorer) to the WOS. Rather than the case being resolved with an infringement decision under Article 7 of Regulation 1/2003, Microsoft offered and the Commission accepted commitments under Article 9 of Regulation 1/2003.

References:

Case COMP/39.530—Microsoft (tying)

For unfair licensing terms and tying, see further, IP Rights and abuse of dominance.

Litigation by IP owners

The Commission's recent decisions and investigations in the area of IPR have focused somewhat on litigation and dispute resolution. While the Commission accepts that litigation is a legitimate recourse for an IPR owner seeking to protect its rights, this conduct may be abusive in certain circumstances.

Similarly, while settlement of disputes outside the courts is acknowledged by the Commission to be in the public interest, the Commission has not shielded away from reopening settlement agreements where it believes that the agreement concluded is anti-competitive.

References:

3rd Report on the Monitoring of Patent Settlements (period: January-December 2011), 25 July 2012, para 3

For details on abuse of the system of patent grant, see further, IP Rights and abuse of dominance.

For an outline of the standard setting process and the misuse of patents, see further, Patent rights and the standard setting process.

Vexatious litigation

The use of 'sham' litigation which is 'manifestly unfounded' and has no other purpose but to put pressure on the other party to agree to the dominant company's terms or otherwise force them out of business can amount to an abuse of a dominant position. The reasoning is that such litigation puts the weaker party in a situation where it has no option but to agree to the other party's terms or otherwise puts it in violation of its own contractual or legal obligations and without redress.

There is very limited case experience of the application of the principle by the Commission and EU Courts. The General Court has dismissed an appeal by Protégé International Ltd against a Commission decision to reject a complaint alleging breach of Article 102 TFEU by Pernod Ricard and claiming that litigation by the latter in assertion of its Wild Turkey brand was abusive. The General Court considered that there was at least a risk of confusion between the two brands and that therefore the *Promedia v Commission* conditions were not made out.

References:

Case T-111/96 ITT Promedia v Commission

The Commission did not apply the *Promedia v Commission* test in the recent cases involving Samsung and Motorola (see further below) and its boundaries remain uncertain.

References:

Case T-119/09 International v Commission

For reference to Promedia and Protégé in the Motorola case, see further, Motorola and the enforcement of patent rights.

Use of injunctions to protect IPR

In recent years and months the Commission has continued to focus its anti-trust interest on the so-called 'patent wars' between the mobile device companies. These cases involve allegations that there is an abuse of dominance where: (a) a dominant company seeks injunctive relief alleging infringement of its standards essential patents (SEP); (b) in some circumstances, the other party is willing to enter negotiations as to licensing on fair, reasonable and non-discriminatory (FRAND) terms; and (c) to which FRAND licensing the SEP owner had committed to respect.

On 31 January 2012, the Commission opened a formal investigation into whether Samsung Electronics had violated Article 102 by seeking injunctive relief against Apple based on allegations that certain of its SEPs for 3G mobile devices had been infringed. Samsung had committed to the European Telecommunications Standards Institute to license such SEPs on FRAND terms. Apple had shown that it was willing to negotiate a licence. On 29 April 2014, the Commission announced that it had accepted binding commitments from Samsung Electronics to address concerns that it had abused its dominant position by taking injunctive action against Apple. Samsung committed for a period of five years not to seek injunctive relief in the EEA in relation to all its SEPs for technologies implemented in smartphones and tablets against any company which agrees to a specific licensing framework.

References:

COMP/39.939—Samsung Electronics Enforcement of UMTS standard essential patents

On 6 May 2013 the Commission stated that it had sent a statement of objections to Motorola alleging that it had infringed Article 102 in relation to abuse of mobile SEPs through seeking injunctive relief against Apple in the German courts based on alleged infringements of certain of Motorola's GPRS SEP. Apple was willing to negotiate FRAND terms. In a second decision on 29 April 2014 the Commission concluded that Motorola Mobility had breached Article 102 TFEU by seeking and enforcing an injunction against Apple. The Commission did not impose a fine due to lack of legal precedent.

References:

Case AT.39985—Motorola—Enforcement of ETSI standard essential patents

For an exploration of the Motorola decision and its impact, see further, Motorola and the enforcement of patent rights.

Through these decisions the Commission has accepted that while seeking an injunction is a legitimate remedy for patent infringements this conduct may amount to an abuse of dominance in the context of SEPs where the licensee is willing to enter a licence on FRAND terms. However, what amounts to FRAND terms will be tested in future litigation. For example, in the Huawei Technologies case the German regional court of Dusseldorf has asked the Court of Justice a number of preliminary questions concerning the meaning of a 'willing licensee'. The Court of Justice's ruling is awaited.

For analysis of AG Wathelets's opinion in Huawei, see further, Huawei and SEPs—finding the middle ground.

For details on abuse of the system of patent grant, see further, IP Rights and abuse of dominance.

For an outline patent rights and the standard setting process, see further, Patent rights and the standard setting process.

Settlement agreements

The Commission takes the view that licensing in the context of settlement agreements is not, as such, restrictive of competition and can be pro-competitive where, in the absence of the agreement, it is likely that the licensee would be excluded from the market. However, individual terms may fall within Article 101(1) and are addressed in the TTBE Guidelines.

References:

Guidelines on the application of Article 101 TFEU to technology transfer agreements, section 4.3

The TTBE Guidelines provide that settlement agreements which lead to otherwise delayed or limited market entry may be restrictive of competition under Article 101(1). If the parties are actual or potential competitors and there is a significant value transfer from the licensor to the licensee, the Commission will be vigilant to the risk of market sharing. This reflects the Commission's interest in provisions which are frequently referred to as 'reverse payments' (in the current context, typically payments from the licensor to the licensee).

References:

Guidelines on the application of Article 101 TFEU to technology transfer agreements, para 239

The Commission's recent enforcement activity demonstrates that is maintaining its scrutiny of settlement agreements that it signalled in its pharmaceutical sector inquiry. In this context the Commission states on its website that:

> 'Patent settlements are a phenomenon highlighted by the sector inquiry and are of particular interest to the Commission. Patent settlements are agreements mainly between originator and generic companies settling a dispute about the validity or scope of the originator's patent. These agreements may sometimes restrict generic market entry in exchange for benefits transferred from the originator to the generic company (sometimes referred to as 'pay-for-delay' deals). Some patent settlements may violate EU competition rules'.

The Commission has also carried out five patent settlement monitoring exercises since the sector inquiry reinforcing its continued interest in this area.

In parallel, the Commission has issued decisions in cases involving settlement agreements in the pharmaceutical sector.

On 19 June 2013, the Commission imposed fines of €93.8m on Lundbeck and others (Citalopram) and a total of €52.5m on generic producers Alpharma, Merck KGaA/Generics UK, Arrow and Ranbaxy for preventing market entry of competing cheaper generic medicines of Lundbeck's branded citalopram, an antidepressant, in violation of Article 101 TFEU. According to Commission Almunia this case did not involve a settlement of patent litigation but a situation where Lundbeck 'simply paid other companies so that they would not compete'. Appeals in this case are pending.

References:

Case COMP/39.226 Lundbeck and others (Citalopram)

On 10 December 2013 the Commission fined Johnson & Johnson/Novartis (Fentanyl) €10.8m and Novartis €5.5m for agreeing to delay the entry into the Dutch market of a generic version of the drug fentanyl. This case involved a co-promotion agreement rather than a settlement of patent litigation.

References:

Case COMP/39.685 Johnson & Johnson/Novartis (Fentanyl)

On 9 July 2014, the Commission announced its decision fining Les Laboratoires Servier and others (Perindopril) (COMP/39.612) and five generic competitors nearly € 428 million for practices that delayed generic entry of the cardio-vascular drug perindopril. Again appeals in this case are pending. The Commission relied on both Article 101 and Article 102.

References:

Case COMP/39.612 Servier and others (Perindopril)

For problematic 'pay for delay' deals, see further Settlement agreements and Article 101 pitfalls.