What IP practitioners need to know about competition law – in an hour

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Agenda

1. Introduction to competition law
2. European competition regime – policy, economics and law
3. Article 101 TFEU – licence and settlement agreements
4. Article 102 TFEU – abuse of a dominant position

The content in these slides should not be relied upon as legal advice.

1. Introduction to competition law

What is competition law?

- Punishes companies who do not compete fairly and protects those who do
- Prohibits unfair collusion
- Maintains competitive market structure
- Prohibits abusive conduct
- Protects competition to promote consumer welfare and ensure efficient allocation of resources
- Preserves competition on price, service, quality and innovation

Why does it matter to me?

- Competition law potentially applies to all commercial dealings
- Infringements can have serious consequences
- The acquisition and exercise of IPRs – not immune …
  - *Microsoft*
  - *Qualcomm*
  - *Rambus*
  - *IPCom*
  - *AstraZeneca*
  - *Pfizer*
  - *GlaxoSmithKline*
  - *Teva…?*
  - *Motorola*
  - *Tetra Pak*
  - *Samsung*
  - *Servier*
  - *Lundbeck*
  - *Unwired Planet*
  - *Huawei*

The IP/competition relationship (1)

- Outright war or creative tension?
- Similar goals – different routes:
  - short term/long term
  - price competition/dynamic competition
  - long term consumer welfare

The IP/competition relationship (2)

Current controversies

- Is IP protection too long in some industries?
- Do ‘secondary’ patents warrant the same respect as ‘primary’ ones?
- What is the balance to be struck between static and dynamic competition?
- Are the potential rewards too great for some innovations?
- Is enforcement potentially problematic in some situations?
- Does more consideration need to be given to the commercial rationale for securing IP protection?
- Whose innovation efforts should be protected?
- Does competition law have any role at all to play in how IP is acquired and enforced?

Are there ‘special’ rules for IP?

- Special status of IP as a property right – Article 345 TFEU:
  - also protected by Article 17(1) of Charter of Fundamental Rights (EU)
- Cases have traditionally distinguished between “existence” and “exercise” of IPRs (CJEU, *Centrafarm*)
- **But…**
  - a balance has to be struck between maintaining free competition and the requirement to safeguard IPRs (CJEU, *Huawei v ZTE*)
  - competition authorities not competent to rule on validity of IP rights (GC, *Servier*)
  - cannot presume validity or infringement of the rights:

    “*The presumption of validity attached to [a] patent […] sheds no light, for the purposes of applying Articles 101 and 102 TFEU, on the outcome of any dispute in relation to the validity of that patent*” (CJEU, *Lundbeck*)

  - So cannot assume that restrictions / conduct should be viewed in the light of existing IPRs

2. European/UK competition regime – policy, economics and law

Sources of policy

Competition authorities around the world, notably:

- European Commission
- US FTC
- Bundeskartellamt
- French Competition Authority
- UK CMA
- Korean FTC
- Japanese FTC
- ACCA

Increasingly joined up (joint initiatives such as EC/FTC group on pharma mergers); also watch for reports by influential bodies such as the OECD

Economic underpinnings

- Key economic concepts:
  - demand substitutability
  - supply substitutability
  - potential competition
- Relevant to assessment of:
  - relevant product/geographic market
  - market dominance
  - effects on competition

Legal framework

- Prohibitions on anti-competitive agreements or concerted practices (Article 101 TFEU / Chapter I Competition Act 1998)
- Prohibitions on abuse of a dominant position (Article 102 TFEU / Chapter II Competition Act 1998)
- Prohibitions on mergers which substantially reduce competition (EU Merger Regulation; UK Enterprise Act)
- Supported by additional competition authority powers to investigate and punish, e.g.:
  - disqualification of directors (UK)
  - criminal cartel offence (UK)
  - fining powers (substantive and procedural infringements)
  - powers to carry out ‘dawn raids’ and to obtain information
  - powers to declare agreements unenforceable and to impose behavioural / structural remedies

3. Article 101 TFEU / Chapter I CA 98 – licence and settlement agreements

How is IP exploited? (1)

- Exploited and enforced by owner → Article 101 / Chapter I not relevant:
  - exercise of IP rights is not an infringement of Article 101 / Chapter I
  - no agreement between undertakings (even where different companies in a single corporate group)
  - (but consider abuse of dominance)
- Outright assignment → generally no Article 101 / Chapter I implications unless:
  - on-going contractual obligations on the assignor and/or assignee
  - similar analysis to licences
- Appointment of a licensee to make and sell products or provide services protected by IP rights → Article 101 / Chapter I ***may*** be relevant, depending on the terms of the agreement, the parties' market position, etc

How is IP exploited? (2)

- Different types of licence:
  - research and development collaborations
  - technology transfer agreements
  - mergers and joint ventures
  - IP rights dispute settlement agreements
  - merchandising
  - publishing

Similar principles apply in different contexts

- Commission has traditionally focused on technology licensing; but greater interest in brands and content in recent years:
  - *E-Commerce Sector Inquiry* / *Single Digital Market initiative*
  - various investigations (e.g. *Hollywood studios / Sky TV*; *Nike*; *Sanrio*; *NBC Universal Studios*)

IP licences & Article 101(1) / s.2 CA 98 (1)

- Do IP licences prevent, restrict or distort competition?
- Licences are generally pro-competitive:
  - additional competitor for the market
  - additional source of supply
  - new products to market when owner cannot exploit
  - development of new technologies and improvements
  - freedom to operate
  - return on investment
- ‘Pure’ licences which contain no restrictions – fine

IP licences & Article 101(1) / s.2 CA 98 (2)

- Many common provisions in licence agreements have been held by the Commission to infringe Article 101(1):
  - restrictions that can partition the market (exclusivity and sales restrictions) – particularly as between EU/EEA member states
  - downstream restrictions (RPM, customer restrictions)
  - non-compete obligations (if overly long in duration/broad in scope)
  - IP specific restrictions (grant back of improvements, no challenge provisions)
- Article 101(2) – void if not exempt
- Article 101(3) – automatic exception and block exemption

Availability of exemptions

- Notice on Agreements of Minor Importance
- Article 101(3) – automatic exception (if satisfy criteria)
- Technology Transfer Block Exemption (TTBE) – patents and know-how, software copyright and designs
- Vertical Agreement Block Exemption (VABE) (currently under review by the Commission and CMA) – ancillary IP licences
- R&D Block Exemption, Specialisation Block Exemption
- No block exemptions for trade mark or non-software copyright licences
- Principles can (generally) be applied
- See the Commission Guidelines: http://ec.europa.eu/competition/antitrust/legislation/legislation.html
- Exemptions currently adopted in UK

General principles for licensing: TTBE Guidelines (1)

- Commission Guidelines on the application of Article 101 to technology transfer agreements
- Recognition that licences can have positive effects
- But restrictions can cause problems:
  - inter-technology competition
  - intra-technology competition
- Hardcore vs non-hardcore restrictions

General principles for licensing: TTBE Guidelines (2)

- Some clauses almost never restrict competition:
  - confidentiality
  - no sub-licensing
  - no use after licence expiry
  - enforcement
  - minimum royalties/minimum output
  - obligations to apply a trade mark
- Parties are generally free to structure royalty payments as they wish, but caution needed where royalties run on post expiry and there is no right to terminate (*Genentech v Hoechst*; *Ottung v Klee*)

TTBE – a ‘safe harbour’

- ‘Safe harbour’ from application of Article 101(1)
- Legal certainty for companies
- Covers the licensing of technology (patents, know-how, software copyright, designs) for manufacture
- Available only for companies without market power (i.e. market share tests):
  - competitors – combined market share <20%
  - non-competitors – market share of each <30%
- Treats reciprocal licences between competitors least favourably
- Note: the safe harbour will **not** cover other agreements entered into between the same parties, even if in relation to the same product (unless truly ancillary to the main agreement) – see CJEU, *F. Hoffmann-La Roche v AGCM*

TTBE – ‘hardcore’ restrictions

- If ‘hardcore’ restriction – no safe harbour exemption for entire agreement
- A stricter hardcore list applies to agreements between competitors
- Examples of hardcore restrictions:
  - price-fixing
  - output limitation (competitors)
  - some market/customer allocation
  - certain sales restrictions (Note: can limit some passive sales)
  - obligation not to use own technology (competitors)

TTBE – ‘excluded’ restrictions

- Other restrictions – only the specific restrictions are not exempt:
  - no-challenge clauses
  - termination-on-challenge clauses in non-exclusive licences
  - exclusive grant-back obligations
  - obligation on licensee not to use own technology (non-competitors)
- All other provisions are exempt if parties fall within the market share thresholds
- ‘Excluded’ restrictions require individual assessment of anti-competitive and pro-competitive effects under Article 101(3)
- TTBE Guidelines give guidance on application of TTBE and on excluded restrictions/agreements outside its scope

Outside the block exemption

- Just because the TTBE does not apply (e.g. due to market share) agreements are not automatically restrictive of competition – need specific analysis
- Relevant factors for analysing agreements:
  - nature of the overall agreement
  - market position of parties, competitors, buyers
  - entry barriers
  - market maturity
  - effect of multiple restrictions
  - reciprocal licences
  - nature of specific restrictive clauses
- Detailed guidance on specific types of clauses in the TT Guidelines

Grant-back of improvements

- Licences often contain provisions under which the licensee must assign or license-back to the licensor improvements to the licensed technology
- Under the block exemption, all exclusive grant-back obligations fall outside the safe harbour and require individual assessment
- But: non-exclusive grant-back obligations are exempted
- (No longer a distinction between treatment of “severable” and “non-severable” improvements)
- Aim is to ensure that there are incentives for follow-on improvements
- Limited Commission guidance where an exclusive grant-back is outside the block exemption

Royalty payments post-expiry or revocation of IP

- Obligation to pay royalties post-expiry does not automatically infringe Article 101(1) (see *Ottung v Klee*)
- Payment of royalties during invalidity/infringement proceedings does not automatically infringe Article 101(1) (see *Genentech v Hoechst* & *Sanofi-Aventis*)
- Provided (in both cases) licensee has right to terminate on reasonable notice
- If it does not, TTBE unlikely to apply and agreement may be restrictive of competition

No-challenge clauses / termination-on-challenge clauses

- No-challenge clauses are excluded restrictions
- Generally in public interest to remove invalid IP from the market
- Guidelines state "*invalid intellectual property rights should be eliminated*"
- The right for a licensor to terminate an exclusive licence in the event of a licensee IP challenge is exempt up to the market share thresholds
- Termination-on-challenge clauses treated as excluded restrictions if they are part of a non-exclusive licence
- Increases ability of licensees to challenge licensed IPRs
- However, different rules apply to settlements (see below)

Settlement agreements

- Technology Transfer Guidelines acknowledge the benefits of settlement agreements (see para 235), but adopt a stricter approach than the previous version of the Guidelines
- Market sharing is of particular concern in the context of settling litigation – note that generic companies are viewed as potential competitors
- Settlement agreements (including outside the pharma sector) may infringe Article 101(1) / Chapter I if:
  - they contain restrictive clauses such as no-challenge provisions; and
  - they delay/limit the licensee's ability to launch product(s)
- In particular where agreement to the restrictions was 'induced' by payment or other benefit – so settlements entered into in conjunction with other commercial arrangements need particularly careful consideration

‘Pay-for-delay’ settlements: pharma cases – EU

Lundbeck and others **(citalopram)**

- Commission Infringement Decision issued June 2013
- Agreements concerning anti-depressant citalopram provided for “substantial payments and other inducements” from Lundbeck to the generic manufacturers
- Upheld by General Court (T-472/13) – under appeal to CJEU (C-591/16)
- Upheld by CJEU (C-307/18)

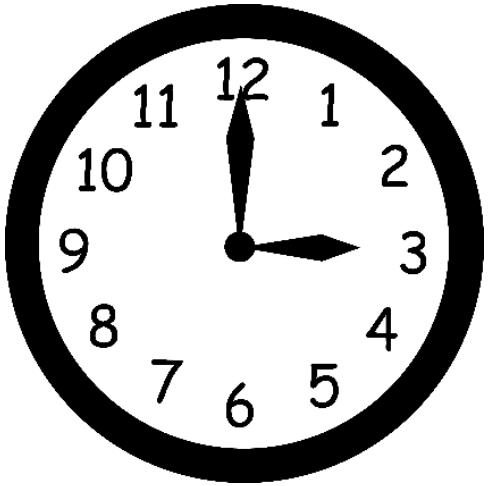
Servier and others **(perindopril)**

- Commission Infringement Decision issued July 2014
- Patent settlement agreements with generic competitors to delay generic entry of the drug perindopril
- Certain technology acquisitions by Servier held to have infringed Article 102
- Upheld by General Court with some exceptions (T-691/14) – under appeal by both parties to CJEU (C-201/19 P)

‘Pay-for-delay’ settlements: pharma cases – UK

Paroxetine decision

- CMA Infringement Decision issued February 2016
- Fined GlaxoSmithKline and three generic companies for entering into agreements to settle patent disputes concerning paroxetine hydrochloride (Seroxat – anti-depressant medication)
- Minor reductions in price after entry of generics under licence from GSK insufficient to outweigh restriction on competition
- Appeal heard by CAT February-March 2017
- Referred questions to the CJEU in March 2018, [2018] CAT 4
- CJEU judgment issued January 2020 (Case C-307/18)
- CAT supplemental judgment confirmed the infringement, but reduced fines in respect of abuse of dominance in May 2021



Technology pools

- Commission has acknowledged the pro-competitive effects of technology pools (particularly in the context of standardisation)
- The Technology Transfer Guidelines provide a ‘soft’ safe harbour for the creation of and licensing from technology pools
- The safe harbour is subject to the pool offering only **FRAND** (i.e. fair, reasonable and non-discriminatory) licences
- Other TTBE requirements must be observed – e.g. no penalty must be imposed on the licensee for challenging the licensed IPRs

Vertical agreements block exemption (1)

- VABE and Guidelines as of 1 June 2010; due to expire May 2022 – currently under review by EC and CMA
- Does not apply to IP licence agreements
- Vertical agreements often include ancillary IP rights licences
- IP rights provisions will be exempted if:
  - vertical relationship
  - purchaser requires the IP rights
  - IP rights are not main object – ancillary
  - IP rights provisions relate to use/supply of contract goods/services
  - not ‘hardcore’

Trade mark delimitation / settlement agreements

- Delimitation or co-existence agreements for similar or identical trade marks:
  - often used to settle trade mark disputes
  - in principle recognised as legitimate, but can infringe Article 101(1) if object or effect is to share markets/partition the EU (CJEU, *British American Tobacco*)
  - distinguish by trade dress or types of goods/services
- Trade mark settlement agreements may involve commitments around keyword search advertising such as refraining from advertising on another party's brands and negative matching:
  - may harm competition online
  - has been held to infringe US antitrust law (*FTC v 1-800 Contacts*)
  - EC E-commerce Sector Inquiry highlighted this as a practice of concern

Content licensing

- Clash between territorial nature of copyright / other content licences and ‘borderless’ EU internal market
- Case law shows that absolute restrictions on selling to customers outside of allocated territory will be treated as ‘by object’ restrictions of competition:
  - even though it may be unlawful for such sale to be made under relevant IP rules (*Football Association v Murphy & Ors*)
  - query if this is consistent with recent findings on potential competition in *Lundbeck* and *Generics UK*
  - NB recent CJEU finding that commitments given by Paramount and others in relation to EU film licensing were unlawful – but did not address the substance of the competition law basis for the commitments *(Canal+)*

Conclusions on licensing and settlement agreements

- Not all IP licences can benefit from the TTBE
- Risky to rely only on compliance with market share thresholds, given uncertainty over market definition
- Avoid ‘hardcore’ restrictions in any agreement:
  - don’t assume there is a justification for imposing contractual restrictions which mirror those afforded by the licensed IPRs
- Apply TTBE by analogy; otherwise, consider Commission Guidelines
- Watch out for agreements between licensors and licensees which go beyond the scope of the licence agreement (*Hoffman La Roche* C-179/16)

4. Article 102 TFEU – abuse of a dominant position

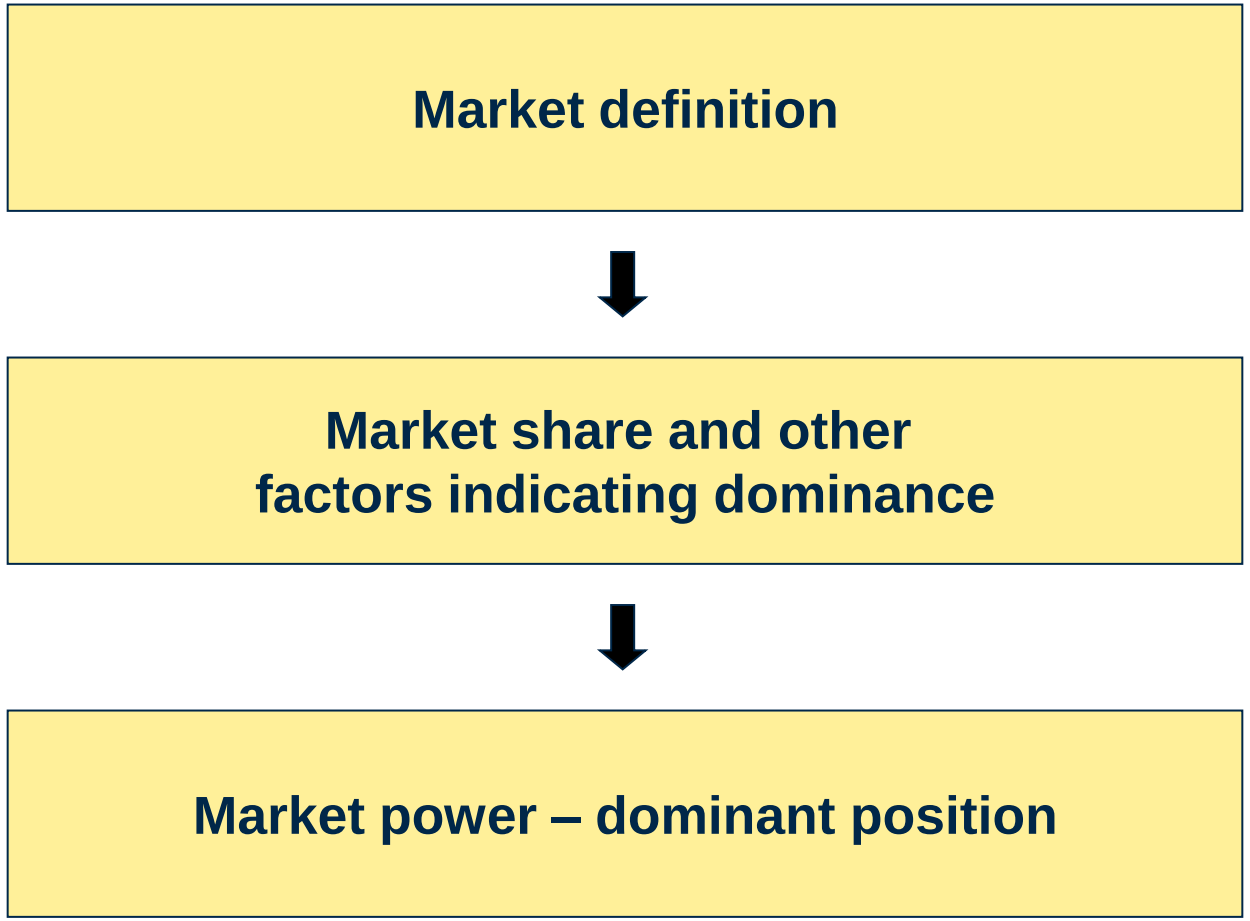
Article 102 TFEU / Chapter II CA 98

1. Is there a dominant undertaking or a group of undertakings?
2. Is this dominant position in the internal market or in a substantial part of it?

"***… a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately its consumers.***" (*United Brands v Commission*)

3. Is this dominance being abused?
4. Could this abuse of dominant position affect trade between Member States / in the UK?

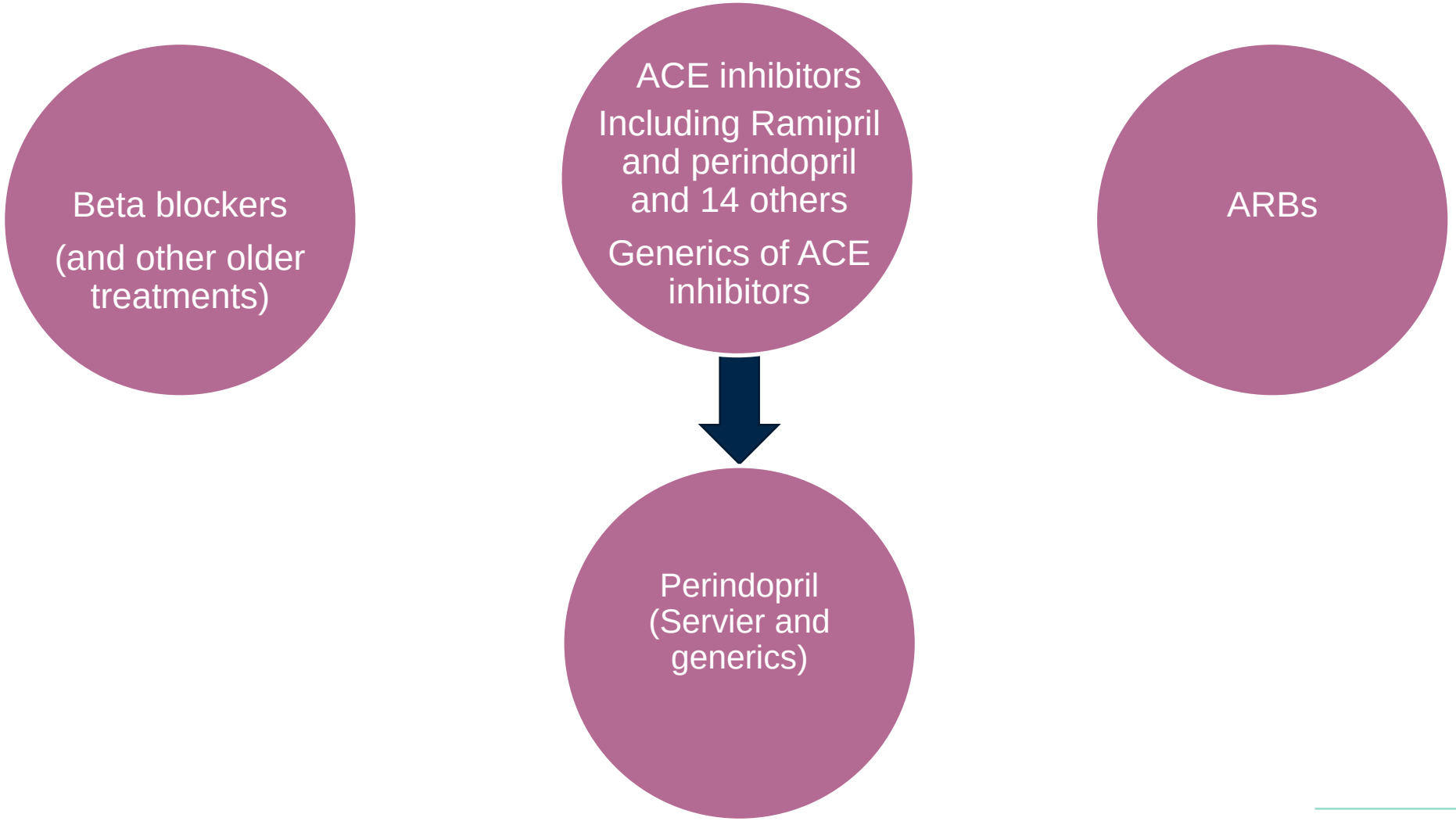
Dominant position – analysis



Relevant market

- Consider product and geographic markets
- What goods and services are substitutable from the perspective of the user?
- In pharmaceutical markets consider the role of the prescriber and relevant guidance:
  - which products are viewed as substitutable
  - different modes of action for different products may be indicative that they are in separate markets
- There may be a range of different possible markets – aim is to identify which products/services constitute competitive constraints

Relevant market – Pharma example (hypertension treatments/Servier)



Market power – dominance

- Consider the market share of the undertaking as well as the market share of its competitors
- Existing and potential competition
- Buyer power
- Barriers to entry, e.g.:
  - legal / economic regulation
  - IP rights (*Hugin v Commission*)
  - superior technology and ‘first mover advantage’ (*Hoffmann-La Roche*)
  - network effects – market ‘tipped’ to a particular product
  - sunk costs
- “Mere ownership” of an IPR cannot of itself confer a dominant position (*IMS Health*) – but that doesn’t mean that an IP protected product will not be in a market by itself

Abuse of a dominant position

- Possession of a dominant position is not unlawful, only abuse of it is contrary to Article 102 / Chapter II prohibition
- A dominant undertaking has a special responsibility not to allow its conduct to impair undistorted competition (CJEU, *Michelin*)
- Abuse is an objective concept – 'recourse to methods different from normal competition' (CJEU, *Hoffmann-La Roche*)
- The scope of the special responsibility varies 'in the light of the special circumstances of each case' (CJEU, *Tetra Pak*)
- Potentially there are 'super dominant' firms who possess a particularly extensive special responsibility

When can a refusal to license amount to an abuse?

- CJEU (*IMS Health*): "***A refusal to grant a licence […] cannot in itself constitute abuse of a dominant position. Nonetheless, the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct.***"
- Three conditions to be fulfilled:
  - the requesting undertaking must intend to offer new products / services for which there is a potential consumer demand
  - the refusal cannot be justified by objective considerations, and
  - the refusal is such as to reserve to the undertaking which owns the IPR the relevant market, by eliminating all competition on that market
- Broader approach subsequently taken in *Microsoft* – offering a new product is not the only way to fulfil the criteria; mere fact of owning IP cannot amount to an objective justification
- Yet use has remained rare, and limited to 'softer' IP (outside of standards cases)

Obligation to license SEPs (1)

- IPRs declared as “essential” to a standard (SEPs) must be licensed on Fair, Reasonable and Non-Discriminatory (FRAND) terms:
  - failure to agree to grant such a license may be a ‘patent ambush’ (*Rambus*)
- Many questions raised about the scope of the obligation to license on FRAND terms:
  - matter of contract law or competition law?
  - jurisdiction of courts to determine the issues?
  - hard-edged or soft-edged obligations?
  - is it permissible to seek injunctive relief under FRAND-encumbered SEPs against infringers?
  - at what level in the supply chain should licences be granted?
- Numerous disputes before courts and competition authorities around the world have grappled with these issues
- Answers have not always been consistent (or available at all…)

Obligation to license SEPs (2)

Relevance of competition law:

- Standard setting involves cooperation between competitors, and requirement to give access to others
- Holder of SEPs may have a dominant position as there is no alternative source for accessing the technology, and (generally) no possibilities for designing around
- Development of IPR Policies (including ETSI's) has involved review and shaping by competition authorities
- Seeking injunctive relief against a willing licensee has been considered to be an abuse
- Standard for assessing discrimination often equated to the competition law standard

Competition law and SEPs (3)

Commission interventions:

- *Samsung* – commitments decision; Samsung agreed to refrain from seeking an injunction under its SEPs against any entity which agrees to enter into a particular licensing framework
- *Motorola* – decision finding abuse through two courses of conduct:
  i. by seeking an injunction for its FRAND-committed SEPs against a 'willing licensee'
  ii. by insisting, under threat of enforcement of an injunction, that Apple give up its right to challenge the validity / infringement of Motorola's SEPs

CJEU case law – *Huawei v ZTE*:

- Abuse to seek injunctive relief unless SEP holder had first engaged in a good faith process to agree a licence with the infringer
- Detailed obligations laid down, but national decisions suggest these can be treated somewhat flexibly (*Unwired Planet v Huawei*; *Sisvel v Haier*)

Competition law and SEPs (4)

Unwired Planet v Huawei **(UKSC, August 2020)**

- Key findings:
  - FRAND undertaking enforceable against patentee as a matter of contract law
  - English Court has jurisdiction to determine global terms for FRAND licence
  - Injunction available if implementer infringes and does not take the licence declared by the Court
  - Only mandatory *Huawei v ZTE* step is to notify the alleged infringer before issuing proceedings
  - Non-discrimination obligation is not akin to a most-favoured licensee obligation

IP related abuse (1)

- The scope of the ‘special responsibility’ to ensure genuine undistorted competition is key
- Dominant undertakings entitled to protect their own commercial interests – including minimising erosion of sales
- Provided amounts to ‘competition on the merits’:
  - competition based on product quality, price, innovation, even “***strength of patented technologies***” (Commission, *Servier*)
  - in the interests of consumers
- But a dominant undertaking may not act with the purpose of strengthening its dominant position and abusing it

It therefore: “***cannot […] use regulatory procedures in such a way as to prevent or make more difficult the entry of competitors on the market, in the absence of grounds relating to the defence of the legitimate interests of an undertaking engaged in competition on the merits or in the absence of objective justification***” (CJEU, *AstraZeneca*)

IP related abuse (2)

- IP-related conduct which has been found not to be competition on the merits:
  i. Failing to inform national patent offices about basis for 'first marketing' date when obtaining SPCs (*AstraZeneca*)
  ii. Deregistering products after expiry of RDP (at a time when such deregistration prevented generics from relying on the clinical data) (*AstraZeneca*) (see also OFT, *Reckitt Benckiser*)
  iii. Strategy to buy out generic threats (*Servier*)
  iv. 'Anti-generic strategy' (*Servier*)
  v. Late/selective filing of SPC/divisional patent, threatened litigation (Italian Competition Authority, *Pfizer*)
  vi. Seeking to influence health authorities (Italian Competition Authority, *Pfizer*; by analogy *Hoffmann La Roche II* – under Article 101)
  vii. Denigrating competing generics resulting in reduced uptake of products (French Competition Authority, *Janssen-Cilag (Durogesic); Schering Plough (Subutex); Sanofi-Aventis (Plavix)*)
  viii. Seeking injunctive relief under a SEP without notice or prior consultation *(Huawei v ZTE)*

IP related abuse (3)

- Other conduct which may not be competition on the merits:
  - creation of a patent thicket (noted in *Servier*, but not clearly treated as part of the infringement): Servier's "*patent applications and ensuing patents made it more difficult, costly and lengthy for potential entrants to identify the scope of Servier's valid patent protection and thus develop a viable product for potential entry*"
  - strengthening quality standards under a Pharmacopoiea (*Servier*)
  - 'artificial extension' of patent protection by "strategically filing and withdrawing divisional patents"; also alleges denigration of competing generics "to create a false perception of health risks" (Commission investigation into Teva regarding Copaxone)

Thank you

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