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Webinar: What IP Practitioners need to know about competition law

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1. Introduction to competition law

- Competition law is a body of law which at a basic level aims at ensuring a level playing field for the benefit of consumers, and not just individual competitors. The various parameters of competition in this context include not only price, but also quality and innovation especially in the context of IP. Examples of IP rich companies who have been targets of competition investigations in the context of dealings with their IPRs in the last 20 years include Microsoft, Motorola, AstraZeneca, Samsung and Huawei.

- IP rights are usually viewed as granting monopolies or exclusive protection, whereas competition law is viewed as ensuring market access. They may at first seem to be in conflict with one another, but it makes sense to view the two bodies of law as achieving the same goal: fostering innovation for the benefit of consumers.

- The IP/competition relationship has a political dimension so approaches can fluctuate over time. For example, in the USA the Trump administration viewed antitrust law as having no place in the IPR sphere, and so the 'New Madison' approach suggested that any patentee was per se entitled to refuse to license a patent, whereas the Biden administration is likely to adopt a more balanced approach.

- EU cases have traditionally distinguished between the existence of IP and the exercise of IP which is commercial and subject to competition law. However, *Huawei v ZTE* (CJEU) demonstrated that it is not a straightforward distinction and a balance has to be struck between maintaining free competition and the requirement to safeguard IPRs. Another important development is *Lundbeck* (CJEU) in which the Court made clear that when considering conduct involving IP, you cannot presume that the IPR is valid.

2. European competition regime – policy, economics and law

- Sources of competition law policies include the European Commission and national competition authorities who are influenced by one another, such as in the joint initiative between the European Commission and US FTC group on pharma mergers.
- Competition law is subject also to underlying economics. At a simplistic level, the way in which the rules will apply depend on where given conduct is situated on a spectrum between a pure monopoly situation and perfect competition. Economics are also relevant when defining the relevant product and geographic market, for example.

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3. Article 101 TFEU – licence and settlement agreements

- IP is exploited in three ways: (1) by the IP owner where no agreement is involved, in which case Article 101 is not engaged even if different undertakings in the same group are involved as they will be considered as part of the same undertaking; (2) as an outright assignment where a company sells the IP rights which generally raises no implications under Article 101 unless there are ongoing contractual obligations on the assignor and/or assignee; (3) by appointment of a licensee in a licence agreement in which case Article 101 may be relevant depending on the terms of the licence.

- IP licences are generally pro-competitive. A pure permissive licence without restrictions will not raise competition concerns. However, licences with sales restrictions, exclusivity obligations, retail price maintenance etc. may raise competition law issues. Article 101(2) provides that if an agreement does contain a clause which is restrictive of competition, then it will be void and unenforceable, unless covered by an exemption.

- Relevant exemptions include the Technology Transfer Block Exemption (TTBE), R&D Block Exemption and Vertical Agreement Block Exemption (VABE). The TTBE Guidelines provide general principles for licensing. Price fixing and territorial restrictions are hard core restrictions which almost always restrict competition, whereas some clauses almost never restrict competition such as confidentiality and minimum royalties.

- The TTBE is a safe harbour from the application of Article 101. However it is subject to certain market share thresholds. It will also not cover subsequent developments of an agreement entered into between the same parties in relation to the same product. The TTBE also contains hard core restrictions and other restrictions which are not exempt such as no-challenge clauses and termination-on-challenge clauses in non-exclusive licences. Where an agreement falls outside the block exemption, this doesn't necessarily mean that it is automatically problematic. Instead its provisions need to be considered in more detail.

- Grant-back of improvements are not automatically covered by the block exemption. Exclusive grant-back obligations fall outside, and non-exclusive grant-back obligations fall within the exemption. The aim is to ensure that there are sufficient incentives for improvements to be made, although this raises the question of whose innovation the law is trying to foster here.

- No-challenge clauses are 'excluded restrictions' under the TTBE as competition authorities believe that it is in the public interest to remove invalid IP from the market. There is some scope to include terminate-on-challenge clauses, but those have been restricted to exclusive licences under the market share threshold. In practice, many patentees will decide to include a no-challenge clause anyway and hope it is sufficient to discourage a challenge, especially as a clause of this kind is unlikely to have such a significant impact on competition that it would jeopardise the entire agreement (outside of the 'pay-for-delay' context – see below).

- Settlement agreements are of interest to the competition authorities because of the concern that settling litigation is a form of disguised market sharing, especially where the agreement restricts the user of the IPR from launching its own product and there is an inducement on that party by payment or other benefit to enter into that agreement (so called 'pay-for-delay' agreements).

- Similar principles will apply to licensing other types of soft IP. Trademarks and copyright do not have the same exclusive aspects as patents, which means that they are less likely to restrict competition. Trade mark delimitation/settlement agreements may sometimes raise competition issues, such as those with commitments around keyword search advertising which have been held to infringe antitrust law in the US, and highlighted as a concern by the E-Commerce Sector Inquiry in the EU.

- Content licences are not covered by any exemption. Agreements which reinforce boundaries in the EU are viewed as restrictive and so absolute restrictions on selling to customers outside of allocated territory will be treated as 'by object' restrictions of competition. However, by analogy to the approach to potential competition in the CJEU *Lundbeck* judgment, prohibiting e.g. broadcasting in a territory which is subject to copyright protection arguably isn't anti-competitive, as there is no scope for accessing the market without a licence.

4. Article 102 TFEU – abuse of a dominant position

- Establishing a dominant position requires an assessment of, first, the market, and second, its market power (including market share and other factors). Defining the relevant market will not always be obvious but it may be prudent to assume a narrow definition (as exemplified in the General Court decision in *Servier*).

- The key concepts that define abuse of a dominant position are: (1) the special responsibility of the dominant undertaking not to allow its conduct to impair undistorted competition, and (2) that abuse is an objective concept characterised by recourse to methods different from normal competition.

- The CJEU held in *IMS Health* that a mere refusal to grant a licence cannot in itself amount to an abuse of a dominant position. However, exercise of the right may involve abusive conduct. The CJEU identified three conditions to be fulfilled for when a refusal to license may amount to an abuse (although subsequent cases have sometimes adopted a more nuanced approach):
    - The request undertaking must intend to offer new products/services for which there is a potential consumer demand (although "new" hasn't been defined by case law).
    - The refusal cannot be justified by objective considerations. It is not enough to claim that the IPR entitles to owner to refuse access.

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- The refusal is such as to reserve to the undertaking which owns the IPR the relevant market, by eliminating all competition on that market.

- IPRs that are essential to a standard (e.g. Standard Essential Patents, or SEPs) must be licensed on Fair, Reasonable and Non-Discriminatory (FRAND) terms. There is a question over whether competition law should apply in SEP enforcement. The US view on that point is that it shouldn't, and the English courts have dealt with this as a matter of contract law. However, competition law does remain relevant here because standardisation involves co-operation between competitors and without competition law, there wouldn't be a requirement to give access to implementers who were not part of the standardisation efforts. Holders of SEPs may also have a dominant position. Further, development of IPR policies (including ETSI's) has involved the input of the competition authorities in shaping the rules that apply, including FRAND licensing obligations.

- Dominant undertakings have a special responsibility to ensure genuine undistorted competition. There is a tension with the fact that dominant companies are at the same time allowed to apply for monopoly rights. They are also entitled to protect their interests including by minimising sales e.g. on patent expiry. However their conduct it has to amount to competition on the merits in the interests of consumers. An undertaking should not act in a way that strengthens its dominant position unless its conduct amounts to competition on the merits.

- Examples of IP-related conduct which have been found not to be competition on the merits include failing to inform national patent offices about basis for 'first marketing' date when obtaining SPCs (*AstraZeneca*), adopting a strategy of buying out generic threats, and having a more general anti-generic strategy (*Servier*).

- Examples of IP-related conduct which may not be competition on the merits (but where there is no clear decision in the EU) include the creation of a patent thicket and strengthening quality standards under a Pharmacopoiea (*Servier*). A development to watch is the Commission investigation into Teva regarding its patent coverage for Copaxone.