Intellectual Property and Competition in a Globalised Economy
Abuse of IP rights in the Light of Article 102 TFEU

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IP and Antitrust: General Principles

- Undeniable tension between rewarding innovation with monopoly (IP rights) and encouraging competition

- Pursuit of Harmony:
  - IP rights are not immune from competition law
  - No “inherent conflict” between IPRs and EU competition rules:
    - Same basic objective of promoting consumer welfare
    - “Both intellectual property rights and competition are necessary to promote innovation” (Technology Transfer Guidelines, ¶ 7)
IP and Antitrust: EU Regulatory Framework

- Competition rules: European competition rules highly developed in substance and actively enforced

- IP laws still substantially governed by the national laws at Member State level
  - BUT: EU directives harmonise many aspects of national rules on IP protection, including the enforcement of IP rights and some unitary EU IP rights (trademark, design rights) have been created

- EU competition law has constrained national law and exercise of national IP rights in many areas

- Each conflict involves anxious debate; usually competition has prevailed
IP & Abuse of Dominance: Compulsory Licensing
IP & Abuse of Dominance: Compulsory Licensing

- When does Article 102 override the exclusive right conferred by law?
  - *Volvo-Veng* (1988): Generally not, but …
  - *Magill* (1991): Yes, exceptionally, if refusal blocks consumer access to a specific new product
    - The BBC would not deliver a multi-channel TV guide and used copyright to prevent consumers getting one
  - *IMS* (2004): Yes, if four conditions are met:
    - indispensable, absolute, not just desirable;
    - new product, consumer demand not met;
    - no objective justification;
    - elimination of all competition
  - *Microsoft* (2007): Yes, if it would help develop new products?
Microsoft Judgment of 2007 (1)

- **Nature of Sun’s request**
  - Endowing Microsoft’s competitors with the capacity to participate perfectly in a Windows server network as a full member of the family, not as an outsider
  - Microsoft had to undertake laborious and costly research to document the way its software interacts and licence the results of this research (specifications) to its competitors

- **When must a dominant company license its IP?**
  - Ensure viable competition, not just weak competition
    - Simply surviving in the market does not suffice: must ensure viability
  - Elimination of effective / viable competition in absence of license
    - Substantial market share of competing products did not exclude Microsoft’s possible duty to license
    - Foresight: applies even if elimination of competition may be some years ahead (damage to consumers or competitors?)
Microsoft Judgment of 2007 (2)

- Absence of objective justification
  - Unclear what would suffice as justification, since secrecy and effort are rejected

- Licence may promote technical development (not the emergence of a specific new product)
  - No guidance as to what would qualify as “technical development”
  - Aimed at a rival seeking a license to produce the same product as the dominant player but simply adding an additional feature
  - Process rather than product approach: no specific new product needs to be identified
  - Difficult to see the limiting principles
IP & Abuse of Dominance: Pharmaceutical Sector
Pharmaceutical Sector Inquiry - Background

- Launched on 15 January 2008
  - Numerous questionnaires sent to stakeholders (originators, generics, marketing authorisation authorities, parallel traders, wholesalers and national competition authorities): millions of items in response

- Preliminary report published on 28 November 2008 and Final Report published on 8 July 2009

Something 'rotten' in EU pharmaceutical sector…
Pharmaceutical Sector Inquiry – Main Issues

- Conduct of pharmaceutical companies
  - The European Commission believes that competition in the pharmaceutical sector is imperfect

- Delays in generic entry, including because of:
  - Patent litigation, notably when based on secondary patents
  - Patent settlement agreements

- Decline in number of new medicines reaching market
  - “Defensive patenting”

- Skepticism about the utility of patents
Pharmaceutical Sector Inquiry – Implications (1)

- Both agreements and abuse of dominance are at stake

- Patent settlement agreements will be the biggest issue going forward as Article 101 TFEU applies to all companies
  - 1st Monitoring Exercise (January 2010): companies had to provide the Commission with all settlement agreements concluded between July 2008 and December 2009
  - 2nd Monitoring Exercise (January 2011): Commission asks for all settlements concluded in 2010

- Still unclear what the Commission’s position is...

- Critique
  - Settling litigation is normally a positive step; judges are unpredictable
  - A situation where the generic enters market prior to patent expiry may be viewed differently from a situation where the generic exits the market
  - US concerns about patent settlements do not easily translate to Europe given regulatory differences (no Hatch-Waxman in EU)
Pharmaceutical Sector Inquiry – Implications (2)

- When asked in the early 1970s by Henry Kissinger about the impact of French Revolution, Zhou Enlai, then Premier of China, responded “it is too soon to say.”

- The same can be said about the impact of an inquiry on the European pharmaceutical industry: so far there has been a large amount of stress and debate, but not much new policy.
Pharmaceutical Sector Inquiry – Implications (3)

- Guidance might emerge in a number of pending cases:
  - Boehringer (COPD) – formal proceedings opened on 29 March 2007
  - Servier (perindopril) – formal proceedings opened on 8 July 2009
  - Investigation into generic practices in France – dawn raids conducted on 6 October 2009
  - Lundbeck (citalopram) – formal proceedings opened on 7 January 2010
  - Nexium (esomeprazole) – dawn raids in several Member States on 30 November 2010

- Commission’s theory: AstraZeneca abused dominant position by blocking or delaying market access for generic versions and preventing parallel imports of Losec (omeprazole)

- Two abuses:
  - AstraZeneca provided misleading information to national patent offices and courts; and
  - AstraZeneca misused regulatory procedures by selectively de-registering marketing authorisations (MAs)
AstraZeneca – General Court (2010)

- Commission Decision largely upheld
- Lack of transparency:
  - AZ had to disclose all relevant facts and any underlying legal interpretation
  - Had AZ been transparent about its particular interpretation of SPC Regulation and/or requested a rectification, its conduct may not have been abusive

- Intent is not a necessary condition for abuse, nor sufficient to establish an abuse
  - Abuse as objective concept
  - Legal standard: AZ “could not reasonably be unaware”
  - “Good faith” no objective justification unless pro-active transparency

- Conduct still classified as anti-competitive even when such conduct is remedied prior to having an effect (or effect occurs only after dominance)
IP & Abuse of dominance:
Standards
Standard setting agreements – Rambus controversy

- Inventors of the asynchronous DRAM

- Discussion in JEDEC among manufacturers of DRAMs whether to incorporate this new technology in industry standard for the DRAM

- Was there a duty to disclose status of patent applications?

- “Patent ambush”.
  - Complainants asserted that Rambus had in 1991 to 1994 intentionally concealed that it had patents and patent applications which were relevant to technology used in the JEDEC standard, and subsequently claimed royalties for those patents; Rambus claimed that its technology had been hijacked by JEDEC members

- When industry members negotiate standards, each is likely to seek its own advantages rather than “higher” industry benefits

- Desire for clarity to disclose as to what is obligatory
  - Settled in 2009, following Rambus’ commitment to offer licences with maximum royalty rates for certain memory types and memory controllers in the future
Standard setting agreements
Horizontal Guidelines (1)

- Criteria under which the Commission will not take issue with a standard-setting agreement (“safe harbour”):
  - unrestricted participation for all competitors in the markets affected by the standard setting;
  - transparency of the standard-setting procedures;
  - effective access to the standard on fair, reasonable and non-discriminatory (“FRAND”) terms; and
  - a clear and balanced intellectual property rights (“IPR”) policy.

- Individual assessment of agreements outside the safe-harbour (“effects-based” features):
  - Freedom to develop alternative standards and products
  - Access to the standard
  - Market shares of the goods and services based on the standard
  - Discrimination against any participating or potential members
  - Sufficiently transparent disclosure of IPRs
Standard setting agreements
Horizontal Guidelines (2)

- Standardisation agreements may only be caught under Article 101(1) TFEU if the parties involved have market power

- The Guidelines are an improvement on the position taken by the Commission in early stages of the Rambus case

- The Guidelines are still very prescriptive and not practical in every specific instance

- Many arrangements not covered by the Guidelines can nonetheless be justified as procompetitive