INTELLECTUAL PROPERTY LAW IN THE INFORMATION SOCIETY

TENSION BETWEEN IP LAW AND COMPETITION LAW

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The topic of today

Impact of EU competition law on exercise of IPR, in particular IP licensing and refusal to license
MOTIVES BEHIND COMPETITION LAW

Economic theories clearly shows that competition between firms will make sure firms are

- unable to charge artificially high prices
- forced to innovate in order to maintain or increase their market position
- compelled to produce and offer the products that meet consumer demands

Key ideas

- Resources are allocated efficiently: Consumer demand’s impact
- Products are produced efficiently: Manufacturers strives to minimise costs

Important to note that competition law is not only about prices, but also about innovation.
THE TOOLS IN COMPETITION LAW

Regulation of market conduct

- Protection of competition – direct approach
- Restrictive agreements/concerted practices (TFEU 101) – Multilateral
- Abuse of dominant position (TFFEU 102) - Unilateral

Regulation of transactions (M&A)

- Protection of a market structure that leads to competition – indirect approach
- Prohibits transactions that will have significant detrimental effect on the competition, for example that one company buys all of its competitors and thereby establishes a monopoly
- Merger Regulations
ENFORCEMENT OF COMPETITION LAW

Enforcement by authorities
- EU Commission
  - Fines
  - Termination orders
  - Commitment decisions
- European Court of Justice
- EFTA Surveillance Authority
- National Competition Authorities
- Regulation EC No 1/2003

Enforcement by privates
- Damages – endorsed by the Commission –
- Individual action and class action
- Contractual nullity – creates uncertainty
- Injunctions
TENSION BETWEEN IP AND COMPETITION LAW

High Level

- IP law grants exclusive rights, and obviously these may be used to limit competition. It does this, among other reasons, to promote innovation.

- Competition law aims at abolishing monopolies and thereby increasing competition. It does this, among other reasons, to promote innovation and reduce prices.
SOME FUNDAMENTAL CONCEPTS

The relevant product market and geographic market

Vertical and horizontal agreements

Intra brand and inter brand competition
TFEU 101 - RESTRICTIVE AGREEMENTS

First paragraph

The prohibition

Second paragraph

Effect on the agreement

Third paragraph

Exceptions from prohibition
1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to 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.
TFEU 101 - RESTRICTIVE AGREEMENTS

First paragraph: The prohibition
Second paragraph: Effect on the agreement
Third paragraph: Exceptions from prohibition
TFEU 101(2) – CONSEQUENCES

“Any agreements or decisions prohibited pursuant to this Article shall be automatically void”.

- Introduces a risk connected to agreements in violation of TFEU 101
- You cannot rely on the agreement be enforceable
- Even if A performs his part of the agreement, he has no legally valid obligation that B shall

There are also provisions for setting fines, which can become very large.
The provisions of paragraph 1 may be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
EXEMPTIONS FROM PROHIBITION

Two ways to apply TFEU 101(3)
- Self-assessment (dangerous water)
- Block exemptions (safe harbour)

A block exemption establishes detailed, concrete conditions for being exempted.

Conditions have been carefully detailed in order to allow non-restricting agreements.

Various block exemptions exist:
- some related to specific industries (i.a. insurance) and
- some to related to specific transactions (i.a. technology transfers)

Non-fulfilment of one or more conditions does not mean the agreement illegal.
BLOCK EXEMPTION FOR TECHNOLOGY TRANSFER AGREEMENTS

COMMISSION REGULATION (EC) No 772/2004 of 27 April 2004

Scope: ‘technology transfer agreement’ means a patent licensing agreement, a know-how licensing agreement, a software copyright licensing agreement or a mixed patent, knowhow or software copyright licensing agreement, including...

Exemption: Pursuant to Article 81(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 81(1) of the Treaty shall not apply to technology transfer agreements entered into between two undertakings permitting the production of contract products.
Conditions

- Valid IP
- Market share thresholds:
  - Competing parties: 20% combined,
  - Not competing: 30% each

Black list: Certain hard-core restrictions are always prohibited

- Reselling prices
- Limitation of output (w/exceptions),
- Allocations of markets or customers (w/exceptions)
- Restriction on the parties research and development
COMMISSION NOTICE

Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements

(2004/C 101/02)

(Text with EEA relevance)

1. INTRODUCTION

1. These guidelines set out the principles for the assessment of technology transfer agreements under Article 81 of the Treaty. Technology transfer agreements concern the licensing of technology where the licensor permits the licensee to exploit the licensed technology for the production of goods or services, as defined in Article 1(1)(b) of Commission Regulation (EC) No 773/2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (the TTBER) (1).
RESTRICTIVE AGREEMENTS, CONT

Case C-193/83 Windsurfing International v Commission

- Windsurfing International had patented a sailboat rig.
- License to that patent was only supplied if you also paid to manufacture non-patented parts of the boat (sail board). Tying.
- See also the tying case T 201/04 against Microsoft for Windows and Windows Media Player (dealt with in accordance with TFEU 103 since Microsoft had a dominant position).
The contract is **void** and unenforceable
Commission may impose **fines**
**Exclusions** from public tenders (local legislation)
Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to 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.
ABUSE OF DOMINANT POSITION

The existence of a dominant position is not prohibited
The abuse of that dominant position is

Refusal to supply is probably the most important topic in relation to IPR and abuse of dominant position. Typical question is whether or not the refusal to grant licenses to IPR can be abuse of dominant position

Case C-238/87 Volvo v. Veng
- Product design protected in UK was produced abroad and then imported to UK
- The refusal to grant licenses is at the core of IPR
- Refusal to grant licenses cannot in itself be an abuse of dominant position
- Question is, what more does it take for a license refusal to be abuse?
- Examples: arbitrary refusal to supply spare parts to independent repairers
United Brands - Case 27/76 – Test of dominance

The dominant position ... relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.

Michelin I – Case 322/81 – Test of abuse

Practices which are likely to affect the structure of a market where, as a direct result of the presence of the undertaking in question, competition has already been weakened and which, through recourse to methods different from those governing normal competition in products or services based on traders' performance, have the effect of hindering the maintenance or development of the level of competition still existing on the market.
ABUSE OF DOMINANT POSITION

Cases 241/91 and C-242/91 (Magill)

- Irish television companies distributed TV guide in various formats.
- Magill collected these and distributed the TV guide for several TV channels.
- Magill was sued for copyright infringement, and their defence was that the broadcaster’s refusal to offer Magill a license was an abuse of dominant position.
- ECJ held that:
  - Ownership of copyright will never in itself be abuse.
  - The right to stop others from making copies are at the core of copyright, and exercising this right will never in itself be abuse.
  - But under exceptional circumstances a refuse may nevertheless be an abuse.
ABUSE OF DOMINANT POSITION, CONT

Those exceptional circumstances were:

- No actual or potential substitute for the product for which license is sought
- Seeking to introduce a new product on a secondary market
- The company concerned are reserving a secondary market for itself
- No objective justification for refusal to license

- Other decisions
ABUSE OF DOMINANT POSITION

Case 418/01 – IMS Health v NDC Health

- IMS provided information on pharmaceutical services to pharmacies using a structure were Germany was divided into bricks. This brick structure had become a de facto standard.
- That brick structure was protected by copyright.
- NDC based its own structure upon the brick structure, and demanded a license from IMS to market their product.
- ECJ uphold previous principles

Uncertainty still exists, to a large degree...
Refusal to supply interoperability information

- Microsoft thereby established barriers for competitor’s development of server products that were to be used in connection with PCs having installed Microsoft Windows.
- Microsoft thereby used its dominant position in the operating system for PC operating systems to maintain a market share in the server market.
- The case also dealt with Microsoft’s bundling of Microsoft Windows and Microsoft Media Player.

Browser choice case

- Bundling internet browser and Windows
- MS failed to comply with its commitments, Commission fined MS EURO 561 million
RECAP OF IMPORTANT HIGHLIGHTS

The three aspects of competition law

The interface between competition law and IP

TFEU 101: The prohibition and the exemptions. Consequences of breach. Tying as one very practical example.

TFEU 102: The prohibition. Consequences of breach. Refusal to license as a practical example.