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IP protection and European competition law

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*"The views expressed are those of the speaker and do not necessarily reflect those of DG Competition or the European Commission"

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How to marry IP protection and competition

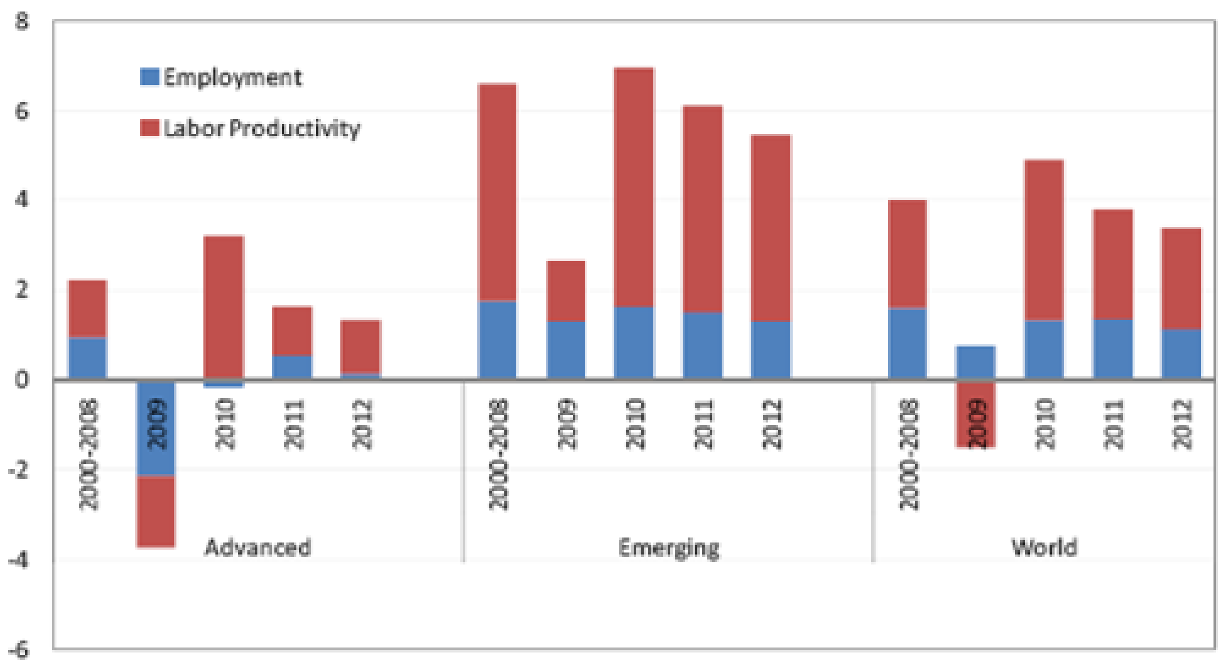
"It is of course a longstanding topic of debate in economic and legal circles how to marry the innovation bride and the competition groom. In the past some have argued that such a marriage will unavoidably lead to divorce because of conflicting aims of IPR law and competition law. But I think that by now most will agree that for a dynamic and prosperous society we need both innovation and competition.

Contrary to what some might think, competition is a necessary stimulus for innovation. IPR law and competition law have a complementary role to play in promoting innovation to the benefit of consumers. I therefore firmly belief in this marriage and, like in all good marriages, the real question is how to achieve a good balance between both policies. "

Mario Monti, Paris, 2004

The importance of innovation

Productivity remains a more important driver of economic growth than increases in employment.



Source: The Conference Board ***Total Economy Database***™, January 2012

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Intellectual property rights and competition law have largely common aims

In particular to stimulate innovation.

The <u>exclusive rights</u> created by the IP laws provide an incentive to create new and improved products and services.

<u>Competition</u> is also a fundamental driver of innovation. Firms under competitive pressure are less complacent and know that inventing a new or better product is the best strategy for increasing market share.

Like in any marriage there can be tensions

There can be scenarios where a **tension** between the use of IPR and competition law can arise, notably where IPR would lead to less rather than more innovation. In such cases competition law can put a limit on the "legal monopolies" granted by IPR and rectify the imbalance for the benefit of consumers. This is for example expressly recognised by Article 102 TFEU which considers *"limiting […] technical development to the prejudice of consumers"* as an abuse of a dominant position.

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No immunity from competition law

Paragraph 7 of the technology transfer Guidelines: *"The fact that intellectual property laws grant exclusive rights of exploitation does not imply that intellectual property rights are immune from competition law intervention."*

Article 101 is applicable to licensing agreements containing restrictions on licensor and/or licensee

Article 102 is applicable to abuse of a dominant position based on IPRs

Commission Guidance on Article 102

- In February 2009 Commission published a Communication: Guidance on the Commission's enforcement priorities in applying Article 82 of the Treaty (now Article 102 TFEU) to abusive exclusionary conduct by dominant undertakings
- Aims to provide a systematic and transparent effects-based approach, to clarify policy and facilitate a consistent approach throughout EU
- Applies to conduct involving tangible and intangible property
- The final text of the Communication can be found at:

  http://ec.europa.eu/competition/antitrust/art82/index.html

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Introduction to the 102 Guidance

- Focus on single dominance and exclusionary conduct
- General approach
  - Safeguarding the competitive process and not the protection of competitors
  - Effects on consumers
  - Objective necessity and efficiency defence
- To ensure that dominant firms do not impair effective competition by foreclosing rivals in an anti-competitive way thereby having an adverse impact on consumer welfare

Dominance and market power

- The extent to which a firm can behave independently of its competitor relates to degree of competitive constraints exerted on this firm
- A dominant firm enjoys substantial market power over a period of time (two years)
- Competitive constraints :
  - Imposed by actual competitors
  - By the threat of expansion of actual competitors and entry of potential competitors
  - By the bargaining strength of customers
- High market shares are only a first indication
- Low market shares (below 40 %) are a good proxy for the absence of substantial market power

Anticompetitive foreclosure

- For most types of conduct test of anticompetitive foreclosure
  - Foreclosure : access to market is hampered or eliminated
  - Anticompetitive : in such way that consumers are harmed
- Assess the current or likely future situation in the relevant market relative to an appropriate counterfactual
- Produce a convincing story of harm with the general factors in § 20 - such as the conditions of entry, the existence of scale/scope economies, network effects, the counterstrategies of competitors and customers, market coverage, actual effects and intent …- and the more specific factors mentioned in the conduct specific sections
- Small place for “hardcore” conduct (§ 22)

Objective necessity and efficiencies

- A dominant firm may justify conduct leading to anticompetitive foreclosure on the ground that efficiencies are sufficient to guarantee that consumers are not harmed

- The burden of proof is on the dominant firm to show that:
  - the efficiencies are the result of the conduct;
  - the conduct is indispensable: there is no less anticompetitive way;
  - the efficiencies outweigh the negative effects for consumers;
  - the conduct does not eliminate effective competition: exclusionary conduct which maintains or creates a position approaching that of a monopoly can normally not be justified on the basis of efficiencies

- The Commission/NCA/court makes the ultimate assessment of whether, considering the efficiencies, the behaviour is likely to lead to consumer harm

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Refusal to supply including refusal to license

- Also dominant firm in principle free to choose its trading partners, even if that denies possible competitors on a downstream market access to the dominant firm's product/facility/IPRs
- General concern not to undermine the incentives to invest in tangible and intangible assets at the basis of a more strict framework with three cumulative conditions for intervention
- Refused input needs to be objectively necessary to compete effectively in the downstream market: there is no actual or potential substitute to the input and replication would not be undertaken to a sufficient degree
- Refusal leads to elimination of effective competition: immediately or over time
- Refusal leads to consumer harm : a dynamic perspective. Do the negative consequences of the refusal to supply outweigh the negative consequences of imposing an obligation to supply

Refusal to supply including refusal to license

- Consumer harm may arise if refusal to supply prevents competitors from bringing new products or stifles innovation
- Efficiencies : the refusal to supply may be necessary to give the dominant firm incentives to develop its input or develop new product downstream
- Overall, balance of incentives to invest

- Union Courts have held in cases such as Magill (Joined Cases C-241/91 P et. al.), IMS Health (Case C-418/01) and Microsoft (Case T-201/04), a refusal to license an IPR by a dominant company may constitute an abuse of a dominant position within the meaning of Article 102 TFEU, which could be remedied by way of a compulsory license

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IPR in standards can sometimes lead to an anticompetitive outcome

In the antitrust case Rambus the Commission was, for the first time, confronted with the issue of "**patent ambush**" for an industry-wide standard for “Dynamic Random Access Memory” chips ("DRAMS"). In December 2009, the Commission adopted a decision that rendered legally binding commitments offered by Rambus Inc which, in particular, put a cap on its royalty rates for certain patents for DRAMs.

Article 101 TFEU

- Article 101(1) prohibits agreements that have as their object or effect to restrict or distort competition
- Article 101(3) declares the prohibition inapplicable if the agreement and its restrictions are indispensable to create efficiencies which benefit consumers, without eliminating competition

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Article 101 TFEU

- Article 101 thus implies an effects based approach: overall outcome for competition and consumers determines assessment

- Distinction between agreements that have as their object to restrict competition and agreements that have as their effect to restrict competition

Object or hardcore restrictions

- Agreements that have as their object to restrict competition are considered serious restrictions of competition (for instance price fixing cartel agreements)
- In case of such “hardcore” restrictions there is a presumption of negative effects under Article 101(1) + presumption it is unlikely that the conditions of Art 101(3) are fulfilled
- This does not exclude individual exemption in case of convincing evidence of likely efficiencies, but unlikely in particular in case of cartel agreements + high risk of fines
- Hardcore approach = the order of bringing forward evidence and showing effects is reversed
    - first likely efficiencies need to be shown by the defendant
    - before the likely negative effects are shown by the authority/plaintiff

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Restrictions by effect

Most agreements that fall within Article 101(1) are considered to be in the “agreements that have as their effect to restrict competition” category. This means:

- (a) Authority/plaintiff must show likely negative effects under Article 101(1)
- (b) Defendant must show likely efficiencies under Article 101(3) once likely negative effects are established (“consumer welfare test”)
- (c) “Safe harbour” created by so-called Block Exemption Regulations (BERs) for many types of agreements below certain market share thresholds => net positive balance presumed

  Exception: hardcore restrictions
- (d) Guidelines (GLs) help to interpret these BERs and provide guidance on a case by case assessment of negative and positive effects where the BERs do not apply (above the market share thresholds)

EU Competition Rules for Technology Transfer Agreements

- In 2004 Commission adopted Technology Transfer Block Exemption Regulation (TTBER) and Technology Transfer Guidelines (TTGL)
- Applicable since 1 June 2004
- Rules can be found at:

  http://ec.europa.eu/competition/antitrust/legislation/transfer.html

The basic features of the TTBER

- IPRs and licensing treated in principle like other property and agreements
- Applicable to the licensing of patents, know-how, design rights, software copyrights etc. (article 1)
- A wide block exemption with
  - a limited hardcore list (article 4 TTBER)
  - a limited list of excluded restrictions (article 5 TTBER)
  - market share thresholds (article 3 TTBER)
    - 20% for agreements between competitors
    - 30% for agreements between non-competitors
  - Additional safe harbour based on number of technologies (§ 131 TTGL)
- No presumption of illegality above the market share thresholds

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The underlying philosophy

- Emphasis of dynamic competition over static competition
  - Innovation is an essential long term driver of competition and consumer welfare
    - Licensing promotes innovation by disseminating technology and creating incentives for innovation
    - Licensing creates design freedom
  - Conclusion: licensing is generally pro-competitive and should be encouraged

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Expression of philosophy

- Incentives for licensing
  - Account of need to recoup investment
    - Licensor: also failed projects
    - Licensee: investment in licensed technology
      - Protection against intra-technology competition
        - » Favourable approach to exclusive licenses
        - » Favourable approach to territorial restrictions in agreements between non-competitors
  - Favourable approach to non-reciprocal licensing between competitors
  - Favourable approach to field of use restrictions

Distinction competitors vs non-competitors

- Competitors absent the licence?
- Actual or potential competitors on the product market or actual competitors on the technology market
- Blocking positions
- In-house users of technology may qualify as potential competitors on technology market outside TTBER

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Licensing between competitors

- Distinction between non-reciprocal and reciprocal agreements
  - Reciprocal: cross-licensing of competing technologies or technologies that can be used to produce competing products
  - Reason for distinction:
    - Risk of anti-competitive object and effect greater when reciprocal
      - Alignment of incentives and restraints in case of reciprocity
      - Non-reciprocity creates an asymmetry between technology flows and restraints

Pricing restrictions

- Hardcore:
  - Fixing of product prices
  - Reciprocal running royalties where licensing is a sham
  - Royalties on products produced with the licensee's own technology
  - In case of non-competitors: maximum and recommended prices exempted
- Outside hardcore the Commission will only rarely intervene

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Output limitations

- Only hardcore between competitors
- Hardcore:
  - Reciprocal restrictions on both parties
  - Restrictions on output produced with own technologies
- Non-reciprocal restrictions on (one of) the licensee(s) is block exempted

Territorial and customer restrictions

- Hardcore restrictions between competitors:
  - Exclusivity and territorial and customer sales restrictions between both parties in reciprocal agreement
  - Active and passive sales restrictions between licensees

- Hardcore restrictions between non-competitors:
  - Restriction of the licensee's passive sales
  - Restriction of the licensee's active and passive sales inside selective distribution system at the retail level

Restrictions on use of own technology

- Hardcore between competitors:
  - Restriction of the licensee to exploit its own technology
  - Restriction of the parties to carry out R&D unless indispensable to prevent disclosure of licensed know-how

Reflects aim of the TTBER to promote innovation

Competitive significance of technologies should not be reduced

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Excluded restrictions

- Obligations to exclusively grant back or assign severable improvements
- No-challenge clauses, however without prejudice to provide for termination
- Between non-competitors:
  - restriction of the licensee to exploit its own technology
  - restriction of the parties to carry out R&D unless indispensable to prevent disclosure of licensed know-how

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All other restrictions

- Safe harbour below the market share thresholds:
    - 20% for agreements between competitors
    - 30% for agreements between non-competitors
- No presumption of illegality outside the safe harbour
- Effects-based approach based on TTGL: looking at relevant factors such as nature of the agreement, market position of the parties and their competitors, position of buyers, entry barriers, maturity of the market etc. to assess likelihood of negative and positive effects

Patent Pools

- Patent pool consortium outside, but patent pool license within scope TTBER (TTGL § 41)
- Patent pools in TTGL (210-255):
  - creation of pool: no infringement of 101(1) if only essential patents included
  - creation of and licensing from pool: not unduly foreclose third party technology or limit creation of alternative pools
  - licensing from dominant pool: to be open, non-exclusive and at RAND conditions
  - if non-essential but complementary patents included: avoid foreclosure
  - if substitutes are included: likely to infringe Article 101(1)

Thank you