

# Competitive Restraints and Unilateral Exploitation of IP Rights (Art. 102 TFEU)

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- IP Policy and Competition Law – Exclusionary/Exploitative conduct
    - *Exclusivity*
    - Risks related to monopoly
    - Free Market and Competition law rules
    - Innovation and promotion of consumer welfare



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- *Parke, Davis & Co.* (C24/67, 1968) – IPR are not *per se* monopoly rights
  - European Commission Technology Transfer Guidelines para. 7
  - Balanced framework *but* clear that right holders should refrain from engaging in *abusive anticompetitive practices which may threaten effective competition on the market and/or lead to consumer harm*
  - Individual assessment



## Introduction (3)

- Regulation 1/2003 on the implementation of the rules on competition laid down in articles [101 and 102 TFEU]
- + Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to articles [101 and 102 TFEU] (Regulation 773/2004)
- → There are no special procedures for the Commission regarding IPRs under articles 101 or 102 TFEU



## Article 102 TFEU (ex Article 82 TEC)

*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.*



# Introduction (5) - Determination of the room of maneuver of competition law rules vis-à-vis IP law



- Distinction between ‘*existence and exercise*’ and ‘*the specific subject matter*’ of IPRs
  - Existence/Exercise
  - Specific subject matter of exclusive rights – *Volvo Veng* (238/87 at 8, 1988)
  - Need exceptional circumstances



# Evolution in the case law of the CJEU

- Variety of commercial practices by dominant IP right holders exploiting their exclusionary powers in a way which threatens or impedes ‘effective competition’ w/o objective justification:
  - *First cases: Hilti & Tetrapak (No. 1)*
  - *BRT v. SABAM (Abuse by collective owners of IPRs)*
  - *IMS Health, Magill and Microsoft (refusal to license)*
  - *Astra Zeneca (Abuse of regulatory proceedings)*
  - *ITT Promedia (Abuse of the right to sue)*
  - *Rambus & Huawei (Abusive enforcement – SEP and FRAND issue (see module 5))*



# First cases - *Hilti* (T30/89, 1991) & *Tetrapak* (No.1) (T51/89 1990)

## *Hilti*

- Anticompetitive practice: Tying
- Defense: prevent damages to users – rejected
- Question of tying/leveraging – try to use the dominant power in the market where the right holder has exclusive rights to obtain advantages or to block a secondary market on which it has no such rights
- *Tetrapak (No.1)*: exclusive license from patent holder (main competitor) on milk cartons – acquisition of exclusive license = AoDP?
  - Distinction with other cases: license





# Abuse by collective owners of IPRs (1)

## *BRT v. SABAM* (127/73, 1974)



- Role of performing rights societies
- Advantages
- Competition law issue:
  - Restrictions + rules of organizations
  - Obligations not absolutely necessary for the attainment of its legitimate objects
  - -> Potential breach of 102 TFEU
- National courts/competition authorities
- Rem: CJEU case law see, a.o., C437/09 *AG2R Prevoyance* (2011), C52/07 *Kanal 5* (2008), 395/87 *Tournier* (1989), joined cases 110/88, 241/88 and 242/88 *Lucazeau & others* (1989)



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## ■ E.g.: C351/12 *OSA v Léčebné lázně Mariánské Lázně a.s.* (27.02.2014)

- Fees appreciably higher than those charged in other MS + comparison made on a consistent basis - > difference indicative of an AoDP – Need objective justification
- Same if imposition of a price which is excessive in relation to the economic value of the service provided
- Role of national court
- Rem on Art 56 TFEU: monopoly = illegal restriction justified because of public interest + does not go beyond what is necessary. No equally efficient but less restrictive alternative



## E.g.: National Decision

- Spanish Markets and Competition Commission fined the society representing records companies (AGEDI) and the one representing music performers (AIE) (26.11.2015)

Abuse of dominant position? Level of fees and unjustifiably discrimination

Ref to *General Motors* (C26/75) and *United Brands* (C27/76)

See also: [Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market Text with EEA](#)



- IP holders + block “follow on” innovation
- *“Refusal to license a patent or other IPRs can lead to negative impacts on competition that it is justified to oblige the holders to license out their IPRs”*
- Exceptional circumstances: *”When a company needs access to the IPR to enter the market and effective competition would be eliminated if the license were not granted”*

Joaquín Almunia (Vice President of the European Commission responsible for Competition Policy Intellectual property and competition policy). IP Summit 2013 (Paris) SPEECH/13/1042



# Refusal to license: Essential facility doctrine

- *Tierce Ladbroke v. Commission* (C300/97, 1997) and *Oscar Bronner v. Mediaprint* (C7/97, 1998)
- Combination of refusal to deal and discriminatory practices
- Anticompetitive behavior:
  - *Refusal by an undertaking, which owns or controls a facility or an infrastructure to which competitors require access in order to provide a service to their customers, to allow that access*
  - *Access only on unfavorable and discriminatory terms that places new or existing competitors at a competitive disadvantage so that they cannot compete effectively*
- IPR? Exclusive IPRs can constitute the necessary ‘facility’



# Refusal to license: IP specific cases

## *Magill* (T69/89 and C241 and 242/91) and *IMS Health* (C481/01 P)

- Indispensability
- Emergence of a new product + consumer demand
- No legitimate justification
- Elimination of competition on a secondary market

REM: Does not change the fact that, *outside of these exceptional circumstances*, a right holder in a dominant position may legitimately enforce its rights against infringers and has *per se* no obligation to license



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## *Microsoft* (T201/04)

### Issue: AoDP?

- Refusal to disclose/supply interoperability information to competitors
- Barrier to entry/to expansion

### Assessment

- Refusal to supply interoperability information (and tying practices) – Indispensability
- New product requirement – not the only parameter – limitation of technical development also to be taken into account
- Objective justification: importance of incentives to innovate – burden of proof
- Elimination of all effective competition



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- Outcome 2004 – Fine of €497 million and obligation to disclose complete and accurate interface information to allow developers to compete efficiently
  - Additional fine in 2012 – €860 million
  - Question:
    - Usually: Pro-competitive to allow a company to retain for its own use facilities it has developed for its own business
    - Otherwise: Impact on internal R&D and IP investment – (dis-)incentive to invent/invest?





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- Methodology of 102 TFEU – Antitrust defense for ‘refusal to license’
  - Prerequisite: ‘exceptional circumstances’
    - a) Dominant position? Not automatic
    - b) Definition of potentially affected market? Difficulty of definition for market for technology
    - c) Abuse/ harm to effective competition? Case-by-case assessment
    - d) Sanction? Compulsory license on reasonable terms



# *AstraZeneca v Commission* (Cases T321/05 and C457/10)




## Facts

- Patent on Losec – treatment for ulcers
- Misleading information to several national patent offices (DE, BE, DEN, NOR, NL, UK) and national courts (DE, NOR)
- Overall strategy to keep generic drugs out of the market – Essentially:
  - Aimed at obtaining SPCs knowing that it was not entitled to them
  - Withdrawal from the market and selectively requested de-registration of market authorizations (MAs) for Losec capsules in certain MS while at the same time launching tablets and requesting MAs for them with the goal of preventing or delaying the entry of generic drugs on the market



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## Issue

-  Strategy to obtain IPRs – SPCs – not entitled to
-  Misuse of procedural rules and potential anticompetitive harm
-  “Consistent and linear” misleading conduct + “submission to the public authorities of misleading information liable to lead them into error”



## ■ Outcome: Anticompetitive effects?

### ■ Findings of the GC

- It is an abuse to submit *“to the public authorities misleading information liable to lead them into error and therefore to make possible the grant of an exclusive right to which an undertaking is not entitled, or to which it is entitled for a shorter period”*
- Reliance on *Hoffmann-la-Roche* – abuse in terms of influence of the structure of the market and effect of hindering the maintenance of the degree of competition existing or the growth of competition
- Special responsibility of a dominant company: AZ disallowed to provide misleading information + inform public authority of circumstances that might have led to the wrongful granting of an exclusive right even if these circumstances come to the attention of the dominant company after grant
- No need for intentional misrepresentation – objective assessment BUT bad faith and intention can be taken into account
- Fine: €52.5 million



## National application

- UK Office of Fair Trading (OFT), *Reckitt Benckiser* (2011)
- Lack of competition on the merits:
  - Withdrawal and delisting of medicines from NHS prescription channel post-expiry of patents and before generic listed
  - Prevented doctors from finding generic
  - NHS and patients had to pay more to acquire branded drug
- Reliance on 'intentional' factor – *“motivated by a desire to hinder the development of full generic competition to its Gaviscon portfolio in the relevant market”*



- General Court in T-111/96 *ITT Promedia* (1998), confirmed in T-119/09 *Protégé International* (2012)
- Bringing legal proceedings may be qualified as an abuse of dominance in “**wholly** exceptional circumstances”:
  - Caveat: Fundamental right of access to courts (Art 6 ECHR)
  - Strict test of abuse – 2 cumulative criteria: *an abuse cannot be characterized unless a dominant undertaking files a lawsuit:*
    - *Which cannot reasonably be considered as an attempt to establish its rights and can therefore only serve to harass the opposite party (= manifestly unfounded) and;*
    - *Which is conceived in the framework of a plan whose goal is to eliminate competition (= the aim is to eliminate competition)*



### Vexatious litigation or abuse of procedure

- Litigants have no reasonable grounds for their claims but anticipate that the costs of litigation will be lower in relation to the benefits to be obtained from the delay of entrance of a competing product on the market during the period of litigation
- Anticompetitive conduct:
  - Use of adjudicatory system to distort competition or to achieve a goal differing from the purpose of the creation of administrative or legal procedure
  - Artificially deter or delay competition on the market
- Not uniquely IP-related but possible; e.g., false claim of infringement to delay market entry
- However: Scarcity of cases



# Competition law approach (1)

## Distinction

- CJEU's standard: *Competition on the merits*
- Commission's standard: *Consumer welfare and consumer harm*

Question: Whether the exclusionary conduct will foreclose *as efficient competitors* and cause consumer harm in the form of higher prices or lower output

Effects based and economical approach >< Rule based approach of anticompetitive conduct

Balancing: Efficiency defense v. Consumer harm

Most cases = exclusionary abuses not exploitative abuses





# Competition law approach (2)

## Approach difficult for courts

- Economic analysis for market power but no more
- Prefer rule based approach for assessment of ‘abuse’
- Evolution in the case law – market based approach
- Particularities of market + exclusive IPRs

## Criticism

- On the one hand: Unbalanced situation vis-à-vis the contribution of IPRs to innovation and economic welfare – Compulsory licenses as remedy to breach of competition law = disincentive to innovate
- On the other hand: “Blocking” patents, excessively high prices and dubious enforcement tactics prevent follow on and cumulative innovation



## ■ Difficult task of ‘striking the right balance’

- Do restraints on first inventor rights have a **greater** harmful effect on consumer welfare than restraints on follow innovation?
- No empirical evidence
- Balancing exercise to be done by courts
  - Prob: Difficulty in evaluating and weighing economic models in terms of welfare
  - Helpful document - General application including conduct involving IPRs: [Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings](#)



## Limited incursion of competition law in IP

- On refusal to license: rare occurrence of 102 TFEU because of the principle of freedom to contract
- Objective of 102TFUE = prevent distortion of competition as safeguard of the interests of consumers more than protecting the position of competitors as such
- Internal balancing in IP laws: Interests of free competition and incentives for R&D
- Nonetheless: 102 TFEU = flexible enough to cover wide range of application



# Recent concerns: So-called “Patent Trolls”

## US concerns

- Pejorative use of the term – Non-Practicing Entities – Patent Assertion Entities
- Business model = acquire patents from third parties and generate revenue through assertion
- Different categories – US Federal Trade Commission [study](#) on PAEs
- Concerns: diversion of resources to litigation, low value settlements below expected costs (nuisance suits) – enforcement of weak software patents against SMEs
- Ex ante/ex post licensing



- Patent Trolling – EU concerns
- *“Whatever the name, these are organizations whose only commercial activity consists in licensing and enforcing patents” – Growing concern*
- *“According to some studies, 40% to 60% of all patent lawsuits in the US are initiated by patent trolls – including prominent ones targeting retailers and small businesses”*
- *“This has prompted our colleagues at the Federal Trade Commission to look more closely into the issue and better understand the impact of these organisations on innovation and competition”*
- *“For a variety of reasons, patent trolls have been less active in Europe than in the US. However, this could change in the future. You can rest assured that we are watching this space very carefully. DG competition will hold patent trolls to the same standards as any other patent holder”*



Almunia (2013)



## Patent Assertion Entities in Europe

*Their impact on innovation  
and knowledge transfer in  
ICT markets*

### PAEs?

- Non-practicing firms that solely acquire patents
  - Non-practicing firms that acquire patents but also develop them through R&D
  - Patent aggregators that may or may not develop patents by conducting R&D
  - Practicing firms that either acquire patents from third-parties or develop them by conducting R&D
  - Shell companies established by practicing firms to assert their patent rights
-  Business model: essentially = acquire and assert
-  Aim: generate revenue through licensing fees, royalties and damages

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- Use of patent portfolio - from 'freedom to operate' to assertion tool capable of stifling competition?
  - Privateering
  - Patent hold-up and rent-seeking – “Royalty stacking” situation – raises ‘Cournot complements’ problem – ultimately harmful to consumers?
  - Most assertion in Europe = SEPs -> FRAND as a constraint (see Module 5)
  - Need more economic/empirical work – monitoring – dynamic approach



# Recent concerns: The Unified Patent Court

- Almunia (2013): *From the perspective of competition policy, there is no doubt that the introduction of a unitary patent and the creation of a Unified Patent Court will cut costs for innovative firms and reinforce the internal market.*
- Potential issue: Not in the competence of the UPC to answer competition law – overlap with the powers of the Commission? NO
- Only to the extent that the antitrust defense relies on the enforcement of IPRs (*ITT Promedia* and cases in module 5)
- Other types of abuse = exclusive competence of competition authorities or courts





# Conclusive remark

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- Soundness of competition law intervention?
  - High hope and expectations for the UPC





# Thank you for your attention!



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