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IP Lawyer in the Competition Law Environment

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Understanding the relation between IP Law & Competition Law

- IPRs confer a monopoly – it's the essence of those rights
- Does that mean:

  that a grant and/or exercise of IPRs is always subject to competition law evaluation?

  or

  that IPRs should be excluded from the competition law assessment because the monopoly conferred by IPRs is based on specific legal provisions?

Fascinating how 2 legal provisions can produce tons of work for very expensive lawyers … and why should not take it away from them ☺

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Article 101 TFEU

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.

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

3. The provisions of paragraph 1 may, however, 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.

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Article 102 TFEU

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, there by 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.

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Article 101

- application to agreements and agreed behaviours

Article 102

- abuse of dominant position
- concentrated on individual undertaking
- IPR may be assessed as creating a *de facto* monopoly
- IPR's exercise by dominant company may be assessed as infringing Art. 102

Art. 102 does not prohibit the legitimate acquisition of monopoly and it rarely applies to acquisition of a IPR. It applies to the conduct of a dominant enterprise which may qualify as an abuse.

Forms of abuse:

- exploitative abuse (listed in 102) - rarely applicable to IPRs
- exclusionary abuse (defined by CJEU)

Exclusionary abuse

- acquisitions, predatory pricing, and refusals to supply and license

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An exclusive right (monopoly) to exploit an IPR does not automatically imply dominance*

- the owner must be a dominant
- in a given product market
- in rare instance an IPR and its enforcement may become an entry barrier and influence the finding that the owner has dominant position**

* CJEU; Deutsche Grammophon C-78/70

** Advocate General opinion; C-238/87

Volvo case (C-238/87)

- Volvo held a registered design right in the UK over the front wing panels for cars
- Veng imported these products, manufactured without authority from Volvo, and marketed them in the UK
- Volvo alleged infringement of its UK registered designs
- Veng's defence was that Volvo refusal to grant licence was an abuse of a dominant position when Veng was willing to pay a reasonable royalty for licence

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The CJEU held that the subject matter of registered design was the right to exclude third parties, so merely refusing to license was not an abuse.

However, conduct might be an abuse if it involved:

- the arbitrary refusal to supply spare parts to independent repairers;
- the fixing of prices for spare parts at unfair level or;
- a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation;

provided that such conduct is liable to affect trade between Member States.

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AstraZeneca case (C-457/10)

- AZ held a patent for omeprazole which prevented third parties from marketing a generic product to Losec
- Losec was the first PPI
- AZ's resources counted as much as the IPR in finding that the company held a dominant position in the relevant product market

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The EU Commission accused AstraZeneca for abusing its dominance in two ways: **using misleading statements to obtain supplementary protection certificates** ("SPCs") that extended its exclusivity in relation to Losec and **using regulatory procedures** to delay the authorization of competing generic products.

To what extent does a misleading statement count as breach of the competition law?

CJEU:

AZ's consistent and linear conduct, as summarised above, which was characterised by the notification to the patent offices of highly misleading representations and by a manifest lack of transparency, inter alia as regards the existence of the French technical authorisation, and by which AZ deliberately attempted to mislead the patent offices and judicial authorities in order to keep for as long as possible its monopoly on the PPI market, fell outside the scope of competition on the merits (p.93)

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Hilti case (C-53/92)

- Hilti AG was a manufactures of power-actuated fastening systems (nail guns, nails and cartridge strips)
- Commission' position:

„the actions of Hilti AG in pursuing, against independent producers of nails for Hilti nail guns, courses of conduct intended either to hinder their entry into and penetration of the market for Hilti compatible nails or to damage directly or indirectly their business or both, constitute an abuse of a dominant position within the meaning of Article 86 of the EEC Treaty"

- Hilti held numerous national patents in Europe and, i.a., refused to grant patent licenses for consumables to its nail guns; enforced patents against manufacturers & imports of cartridge strips; reduced its discounts to clients which bought consumables from a different manufacturer

- during the proceedings Hilti offered a permanent undertaking to:

(a) to implement on a permanent basis the undertakings given on 27 August 1985 in the above cases on an interim basis, namely not, within the EEC, either directly or indirectly to tie the supply of direct fastening cartridge magazines to the supply of direct fastening nails; and, as a consequence, not to aggregate purchases of cartridge strips with purchases of other products for the purposes of calculating discounts;

(b) to implement, for direct fastening products, in a manner consistent with the undertakings contained in (a) and subject only to the three exceptions listed below, a discount policy based on precise organic and transparent quantity/value discount schedules uniformly and without discrimination;

(The three exceptions referred to above are:
(i) meeting a competitive offer,
(ii) contracts individually negotiated with customers who customarily or given special requirements or circumstances refuse to deal with Hilti except on the basis of such a contract,
(iii) special promotions, properly so called. As a consequence of implementing such a discount policy certain types of discount would be eschewed including fidelity discounts and loyalty rebates.)

(c) not, except for objectively valid reasons, to refuse to supply direct fastening products to existing customers nor, in fulfilling any order, to limit the quantity of direct fastening products to be supplied; and to continue to report to the Commission on a quarterly basis any refusal to supply direct fastening products indicating the reason for such refusal;
(d) **to waive, as against present or future licences of right under its UK cartridge strip patent, its rights under its UK copyrights in its cartridge strip and, to the extent that they may exist in the EEC, under corresponding design rights in such strip**;
(e) to provide warranty cover for its direct fastening tools not only where original Hilti consumables are used in them but also where non-Hilti consumables of matching quality are so used;

(f) to implement a competition law compliance programme specific to the Hilti Group and along the lines approved of by the Commission in the National Panasonic case and to inform the Commission of the steps taken to implement such a programme.

2. Hilti AG undertakes to use its best endeavours to encourage the independent distributors in the EEC of its direct fastening products to adopt the undertakings referred to in 1 above as part of their own policy.

3. Hilti AG undertakes to continue to implement the above undertakings in paragraphs 1 and 2 until such time as it is found not to be dominant or circumstances change so that it is no longer dominant. And, in either event undertakes to inform the Commission in writing before ceasing to implement any of the above undertakings.
(Case T-30/89)

It is sufficient to prove that action of a dominant firm results in risk of eliminating existing levels of „effective” competition.

- preventive role of competition law

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Tetra Pak I case (T-51/89)

- Tetra Pak's market share in supply of equipment for sterilizing & filling aseptic cartons, as well as the cartons, was at 91,8%.
- Elopak was a licensee of Liquipak which had an exclusive licence from BGT and on the basis of this licence Elopak was attempting to develop a product competitive to TetraPak in the said market.
- TetraPak acquired Liquipak in that manner acquired the exclusivity of the BGT's license which led to end of collaboration between Liquipak and Elopak.

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Lundbeck case (T-472/13)

- Lundbeck's patent for CITALOPRAM* had expired, but the company held certain process patents which did not constitute insurmountable barriers to entry for generic producers.
- In fact, one generic producer had already started marketing its own generic version of citalopram and some other producers were preparing for market entry.
- In order to protect its market position, Lundbeck launched a number of proceedings against generic producers, claiming infringements of its process patents.
- In this context Lundbeck concluded six agreements with four groups of firms which were active in the production and sale of generic medical products.
- The pattern of all these agreements was the same: the generic producers committed not to enter the market and Lundbeck offered substantial payments in return.

*Citalopram is a blockbuster antidepressant medicine and was Lundbeck's best-selling product at the time

The Commission concluded that the agreements in question (pay-for-delay):

- **did not resolve or terminate any patent dispute** and the parties did not agree on any entry date for the generic company, but rather agreed on a period during which the generic company would be **excluded from the market**, without any guarantee of unrestricted market entry thereafter, in exchange for a considerable sum of money from Lundbeck;
- were **market sharing agreements** which constitute a violation of competition by object;
- The Commission claimed in its decision that **generic producers were at least potential competitors on the relevant market.**

The General Court:

- **fully upheld the Commission decision** and the fines imposed on the parties;
- confirmed the Commission's finding that Lundbeck and the generics were potential competitors at the time the agreements at issue were concluded as, absent the agreements, the generics would have had real concrete possibilities of entering the market;
- found that the Commission had been correct to conclude that **the agreements at issue constituted restrictions of competition by object.**

„It must be noted, in that respect, that the Commission did not find, in the contested decision, that all patent settlement agreements containing reverse payments were contrary to Article 101(1) TFEU; it found only that the **disproportionate nature of such payments**, combined with several other factors — such as the fact that the amounts of those payments seemed to correspond at least to the **profit anticipated by the generic undertakings if they had entered the market**, the absence of provisions allowing the generic undertakings to launch their product on the market upon the expiry of the agreement without having to fear infringement actions brought by Lundbeck, or the presence, in those agreements, of **restrictions going beyond the scope of Lundbeck's patents** — led to the conclusion that the agreements at issue had as their object the restriction of competition, within the meaning of Article 101(1) TFEU, in the present case." (Case T-472/13)

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Commission fines Lundbeck and other pharma companies for delaying market entry of generic medicines

INFRINGEMENT	FINES - LUNDBECK	FINES – GENERIC COMPANIES
Merck KGaA / Generics [UK] agreements		Merck KGaA: € 21 411 000 of which jointly and severally with Generics [UK] Limited: € 7 766 843
Arrow agreements		Arrow Group ApS: € 9 975 000 of which jointly and severally with Arrow Generics Limited: € 9 360 000 of the latter amount of which jointly and severally with Resolution Chemicals Limited: € 823 735
Alpharma agreement		Zoetis Products LLC and Xellia Pharmaceuticals ApS jointly and severally: € 10 530 000 of which jointly and severally with A.L. Industrier AS: € 43 216
Ranbaxy agreement		Ranbaxy Laboratories Limited and Ranbaxy (UK) Limited, jointly and severally: € 10 323 000
Total	**€ 93 766 000**	Total amount for generic companies: € **52 239 000**

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Thank you for your attention

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