

Chapter 1

Intellectual Property and Competition Law: Understanding the Interplay



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1 Introduction

The most common concern from a competition law perspective is the possible violation of competition law due to the existence of patents/trademarks/copyright, which grant exclusive power that may potentially be abused by the Intellectual Property right (IPR) holders to the detriment of consumer welfare, as well as innovation. Hence, competition law is applicable to the area of intellectual property (IP) and may be invoked by the consumers, any interested/affected third party to ensure that the IP right holders are not abusing their (dominant, if not monopolistic) position. At the same time, IP rights holders may rely on competition law to protect themselves from unfair competition and encourage more competition and innovation in the market.

This chapter provides a general overview of the interplay between competition law and IPRs in such sectors as pharmaceuticals, information technology, luxury brands. It analyses potentially problematic agreements and practices from the point of view of the competition rules and provides some highlights of the latest investigations launched/conducted primarily at the EU level. It is concluded that recent enforcement of competition law in the sphere of IP (patents (standard essential patents (SEPs)), trademarks and copyright) in various industries shall significantly affect the legal landscape for the IP right owners; hence they should now, more routinely, consider competition law risks and implications in every step of their economic activity.

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2 IP and Competition Law: Main Concerns and Misuses

Competition law issues may arise in any area of IP: patents, trademarks, and/or copyright. In most cases it is the IP right holders with a strong market power (if not dominance) that have to be particularly cautious about competition law implications of their practices. As known ‘[...] the fact that an undertaking holds a dominant position is not in itself contrary to the competition rules. However, an undertaking enjoying a dominant position is under a special responsibility not to engage in conduct that may distort competition.’¹ Companies that have IP rights are perceived as dominant, and their activities fall under a special attention of the Competition Authorities more often nowadays. Following parts provide analysis of the main competition law issues in the three IP-related areas: patents, trademarks and copyright.

2.1 *Patents and Competition Law*

Patent holders are most likely to abuse market power via various practices, such as refusal to license, excessive pricing, unfair or discriminatory licensing, anticompetitive use of SEPs; abuse of dominance and delaying market entry of competitors via misuse of patent/regulatory process (supplementary protection certificates (SPCs)), excessive pricing, as well as concluding anticompetitive agreements (patent settlement agreements (PSAs)).

2.1.1 **Abuse of Market Power via Refusal to License and Seeking Injunctive Relief by SEPs: ‘Smartphone Patent Wars’**

The IP right holders may seek to lock competitors’ products from entering the market based on the SEP and thereby breach competition law. The SEP protects technology that is essential to a standard² (in other words, it is impossible to manufacture standard-compliant products without using such technologies covered by SEP). No alternative solution is possible, e.g. ‘slide to unlock’ technology is non-SEP since different technologies can be developed for unlocking a smartphone

¹Case COMP/C-3/37.792 *Microsoft* (2004) OJ L32/23, para 52.

²A standard sets out requirements for a specific item, material, system, service and ensures that products ‘communicate’/match with each other (e.g. A4 size paper, mobile phone charger, 4G, 3G telecommunication standards). Standards are set by the standard setting organizations (SSO), e.g. ETSI, etc.

screen. This would not be possible with SEPs.³ The SEP is not only relevant for the telecommunications, but also for audio/video, security and biometrics, transport, logistics, aerospace, energy generation, power electronics, industrial equipment, etc.

The SEPs confer significant market power on their holders, and potential to abuse it by adopting standards to exclude competitors or extract excessive royalty fees, cross-license fees to which the licensee would not otherwise agree to. The SEP protects the invention which is necessary and standard for the use of a certain technology. As operating in the downstream market is dependent on having access to the product in the upstream market, the SEP becomes an ‘essential facility’.⁴ The competition authorities worldwide have been focusing on this, amid concerns that ‘SEP owners may have been exploiting market power, and holding up innovation, through unreasonable or discriminatory licensing demands.’⁵ To alleviate these competition concerns, Standard Setting Organizations (SSOs) today require the SEP owners to commit to licensing their SEPs on fair, reasonable, and non-discriminatory terms (FRAND), which aims at bringing equilibrium in the compulsory licensing that the SEP implies. FRAND ensures accessibility of the technology incorporated in a standard to the manufacturers of standard-compliant product, and reward SEPs holders financially through licensing revenue.⁶

There have been several cases in relation to the SEPs, FRAND and interim injunctions as part of the patent infringement proceedings. This part will focus on *Samsung* and *Motorola* cases to demonstrate these issues and their interplay with the competition law more precisely. Both cases relate to Samsung and Motorola’s negotiations with Apple in Germany for the licensing of their respective mobile telecom SEPs. Those negotiations subsequently broke down, causing Samsung and

³Case AT.39939 *Samsung Electronics*-Enforcement of UMTS SEPs (2014) OJ C 350/8, para 7 states that:

Standards ensure compatibility and interoperability of telecom networks and mobile devices. Mobile devices typically implement a large number of telecommunication standards (such as the so-called third generation or ‘3G’ (UMTS) standard). These standards make reference to thousands of technologies, many of which are protected by patents. Patents that are essential to a standard are those that cover technology to which a standard makes reference and that implementers of the standard cannot avoid using in standard-compliant products. These patents are known as SEPs. SEPs are different from patents that are not essential to a standard (non-SEPs).

⁴Essential facilities doctrine: To prevent the competitive featured of the downstream market from being threatened by the concentrated structure of the upstream market and to develop competition in this former market, the obligation for undertakings in a dominant position to compulsorily enter into agreement with their competitors can be established.

⁵IP and Antitrust: Implications of Recent Cases and Likely Policy Developments in 2017’ (*Freshfields*, 2018) <<http://antitrust.freshfields.com/ip-and-antitrust>> accessed 8 January 2018.

⁶*Samsung Electronics* (n 3), states that:

(9) ETSI is one of the three European Standardisation Organisations. ETSI is officially responsible for producing standards and specifications supporting EU and EFTA policies and enabling an internal market in telecommunications. (10) The rules of ETSI impose two main obligations on companies participating in the standard-setting process: (i) to inform ETSI of their essential intellectual property rights (IP) in a timely fashion before the adoption of the standard, and (ii) to give a commitment to make their IP available on FRAND terms and conditions.

Motorola to bring patent infringement proceedings against Apple in the German Courts. In the context of those patent infringement proceedings they applied for interim injunctions for their respective SEPs. This encouraged the European Commission (EC) to open formal investigations against Samsung and Motorola to determine whether their conduct violated competition law i.e. whether they abused their dominant position.

In the *Motorola* case,⁷ the EC found that, although seeking interim injunction before courts is generally a legitimate remedy for holders of SEPs in case of patent infringements, Motorola violated the European Union (EU) competition law (Article 102 of the Treaty on Functioning of the EU (TFEU) which prohibits abuse of dominance) by seeking injunction in court against a willing licensee, Apple, on the basis of Motorola's SEP. Motorola declared the patent on which it sought injunction as essential to the implementation of the 2G European Telecommunications Standards Institute (ETSI) standard, and it committed to license the SEP to third parties on FRAND terms. Additionally, Apple agreed with Motorola that in case of dispute the German courts would set the applicable rate and Apple would pay royalties accordingly (all of which showed willingness to enter into the license agreement and to pay adequate compensation to the SEP holder). The EC also found it anticompetitive that Motorola insisted Apple to give up its right to challenge the validity or infringement of Motorola's SEP. Eventually, Motorola was ordered to eliminate the negative effects resulting from the injunction.⁸ In its infringement decision, the EC exercised its discretion (and exceptionally) did not impose a fine because of the divergent decisions of the EU Member States and the absence of the EU case law.

In the *Samsung* case,⁹ the EC decided not to proceed to an infringement action and instead accepted legally binding commitments¹⁰ offered by Samsung not to seek injunctions in relation to any of its present and future SEPs (e.g. Universal Mobile Telecommunications System (UMTS)) for mobile devices for a period of five years against any potential licensee that agrees to accept a particular licensing framework for the determination of FRAND terms and conditions during the standard-setting process in the ETSI. The detailed licensing framework provided for: (i) a negotiation period of 12 months; and (ii) if no agreement was reached, a third party FRAND determination by a court or arbitrator.¹¹

Therefore, as seen from the two cases, the EC's position is that where a patent holder has given a commitment to license on FRAND terms, and the potential

⁷Case AT.39985 *Motorola-Enforcement of GPRSs Standard Essential Patents* (2014) OJ 344.

⁸EU—Apple v Motorola/Press Release Anticompetitive Use of SEP' (*EPlawpatentblog*, 2014) <<http://www.eplawpatentblog.com/eplaw/2014/07/eu-apple-v-motorola-press-release-re-anti-competitive-use-of-sep.html>> accessed 8 January 2018.

⁹*Samsung Electronics* (n 3).

¹⁰Commitments offered to the EC, *ibid*.

¹¹'The EU Court of Justice Judgement in *Huawei v ZTE*—important confirmation of practical steps to be taken by Standard Essential Patent Holders Before Seeking Injunctions' (*Norton Rose* 2015) <<http://www.nortonrosefulbright.com/knowledge/publications/131306/the-eu-court-of-justice-judgement-in-huawei-v-zte-important-confirmation-of-practical-steps-to-be-taken-by-st#autofoo>> accessed 15 October 2017.

licensee is ‘willing’ to negotiate a licence on that basis, the seeking of an injunction by the SEP holder could constitute an abuse of a dominant position under Article 102 TFEU. This is on the basis that, in the EC’s view, the SEP holder can use the threat of an injunction to distort licensing negotiations and impose unjustified licensing terms on licensees.¹²

This position has also been confirmed by the Court of Justice of the EU (CJEU) in 2015 in its landmark judgement in *Huawei Technologies Co. v ZTE*.¹³ The CJEU stated that:

Article 102 TFEU must be interpreted as meaning that the proprietor of a patent essential to a standard established by a standardisation body, which has given an irrevocable undertaking to that body to grant a licence to third parties on fair, reasonable, and non-discriminatory (‘FRAND’) terms, does not abuse its dominant position, within the meaning of that article, by bringing an action for infringement seeking an injunction prohibiting the infringement of its patent or seeking the recall of products for the manufacture of which that patent has been used, as long as:

– prior to bringing that action, the proprietor has, first, alerted the alleged infringer of the infringement complained about by designating that patent and specifying the way in which it has been infringed, and, secondly, after the alleged infringer has expressed its willingness to conclude a licensing agreement on FRAND terms, presented to that infringer a specific,

¹²*ibid.*

¹³Case C–170/13 *Huawei Technologies Co. Ltd v ZTE Corp* EU:C:2015:477.

According to the facts of the case, Huawei Technologies, a multinational company active in the telecommunications sector, is the proprietor of, inter alia, the European patent registered under the reference EP 2 090 050 B 1, bearing the title ‘Method and apparatus of establishing a synchronisation signal in a communication system’, granted by the Federal Republic of Germany, a Contracting State of the EPC (‘patent EP 2 090 050 B 1’). That patent was notified to ETSI on 4 March 2009 by Huawei Technologies as a patent essential to the ‘Long Term Evolution’ standard. At the same time, Huawei Technologies undertook to grant licences to third parties on FRAND terms.

Between November 2010 and the end of March 2011, Huawei Technologies and ZTE Corp., a company belonging to a multinational group active in the telecommunications sector and which markets, in Germany, products equipped with software linked to that standard, engaged in discussions concerning, inter alia, the infringement of patent EP 2 090 050 B 1 and the possibility of concluding a licence on FRAND terms in relation to those products. Huawei Technologies indicated the amount which it considered to be a reasonable royalty. For its part, ZTE Corp. sought a cross-licensing agreement. However, no offer relating to a licensing agreement was finalised.

Nonetheless, ZTE marketed products that operate on the basis of the ‘Long Term Evolution’ standard, thus using patent EP 2 090 050 B 1, without paying a royalty to Huawei Technologies or exhaustively rendering an account to Huawei Technologies in respect of past acts of use. On 28 April 2011, Huawei Technologies brought an action for infringement against ZTE before the referring court, seeking an injunction prohibiting the infringement, the rendering of accounts, the recall of products and an award of damages.

In those circumstances, and having regard to the fact that an undertaking to grant licences on FRAND terms created legitimate expectations on the part of third parties that the proprietor of the SEP would in fact grant licences on such terms, a refusal by the proprietor of the SEP to grant a licence on those terms might, in principle, constitute an abuse within the meaning of Article 102 TFEU.

written offer for a licence on such terms, specifying, in particular, the royalty and the way in which it is to be calculated, and

– where the alleged infringer continues to use the patent in question, the alleged infringer has not diligently responded to that offer, in accordance with recognised commercial practices in the field and in good faith, this being a matter which must be established on the basis of objective factors and which implies, in particular, that there are no delaying tactics.

In conclusion, in the EU, a FRAND encumbered SEP holder would violate competition law if it sought an injunction in patent litigation against the implementer especially if the user acted in a way that was consistent with being a ‘willing licensee’.¹⁴

2.1.2 Abuse of Dominance via Misuse of Regulatory Procedures

Another aspect of interplay between patents and competition law may be seen via the IP holders using their right to the SPCs and abusing the regulatory procedures in relation to it. The SPC is a right that extends the duration of the exclusive right for the duration of marketing authorisation (which shall be no longer than five years in the EU). Often this right is abused by the patent holders to prevent/delay the entry of generic products in the market.

Among the most prominent examples of such abuse is the *AstraZeneca-Losec*¹⁵ case. The EC fined the Anglo-Swedish group AstraZeneca €60 million for misusing regulatory and patent strategies for one of its medicinal products, Losec. In particular, AstraZeneca was found guilty of delaying the market entry of competing generic products by: (a) deliberately making misleading representations before the patent offices and/or courts of several European Economic Area (EEA) Member States, and inducing them to grant extended patent protection for Losec in the form of SPCs to which the product was not entitled; and (b) preventing parallel imports by deregistration of Losec’s marketing authorisations (at that time, generic products could only be marketed, and parallel importers only obtain import licenses, if there was an existing reference marketing authorisation for the product).

As a result of the investigation, the EC concluded that AstraZeneca’s conduct amounted to an abuse of its dominant position. The EC’s decision was appealed to the General Court of the EU (GC).¹⁶ In its judgement the GC confirmed the EC’s findings, but reduced the fine to €52.5 million, as, in GC’s opinion, the EC did not provide evidence that AstraZeneca’s conduct was objectively of a nature intended to exclude parallel imports. At the same time, the GC rejected the argument that the conditions of competition would not be normal/the same on the pharmaceutical market and that exceptional circumstances would be required for a pharmaceutical manufacturer to hold a dominant position. Finally, the GC confirmed that, to

¹⁴Freshfields (n 5).

¹⁵Case COMP/A.37.507/F3 *AstraZeneca* (2005) OJ L 332/24.

¹⁶Case T-321/05 *AstraZeneca v Commission* (2010) ECLI:EU:T:2010:266.

constitute an abuse, a company's behaviour: does not necessarily need to have a direct effect on competition (the capacity to restrict competition may be indirect); and does not require an intention to cause harm (since abuse of dominance is an objective concept).

The case was further appealed to the CJEU.¹⁷ In its judgement, the CJEU rejected all of AstraZeneca's arguments, including its challenge of the relevant market definition and of the finding that AstraZeneca's patent and regulatory strategies constituted an abuse of a dominant position. Hence, the CJEU fully supported the position and findings of the GC.

2.1.3 Abuse of Dominance via Excessive Pricing

Excessive pricing may be regarded as a practice against competition rules if implemented by an undertaking in a dominant position in the relevant market. IP right holders do enjoy some form of market strength and very often are considered as dominant, hence they do bear an additional responsibility when it comes to their commercial practices. Setting up excessively high pricing by the patent holding undertaking may infringe competition law. One of the most recent examples is the EC's formal investigation launched in May 2017 into Aspen Pharma's pricing of five cancer drugs.¹⁸ The EC is investigating whether Aspen Pharma abused its dominant position within Article 102 TFEU by imposing significant price increases for the drugs in question. The EC also investigated allegations that Aspen Pharma threatened to (or did) withdraw the drugs in some EU Member States.¹⁹

Cases of unfair/excessive pricing as an abusive practice are notoriously complex, and the EC's investigation of Aspen Pharma led to allegations that it is acting as an unofficial price regulator together with the authorities that have primary responsibility for drug procurement. One of the main reasons for non-intervention of the competition authorities in such cases is the difficulty in evaluating what constitutes excessive. This is confirmed by a limited case law and practice currently in place. Some jurisdictions like the US do not consider conduct of undertakings with market power as merely exploiting customers that results in an abuse of dominance. Turkey follows the EU approach where excessive pricing is regarded as one of the practices that may be prohibited if practiced by a dominant company (indirectly via 'unfair pricing' concept under Article 102 of the TFEU).

¹⁷Case C-457/10P *AstraZeneca v Commission* (2012) ECLI:EU:C:2012:770.

¹⁸COMP/ 40394 *Aspen* (2017).

¹⁹The EC investigation does not include Italy because the Italian competition authority already adopted a relevant decision on 29 September 2016 concluding that Aspen abused its dominant position by setting 'unfair prices' (up to 1500% price increase) and imposing a fine of €5 million. See 'Antitrust: Commission Opens Formal Investigation into Aspen Pharma's Pricing Practices for Cancer Medicines' (*Europa*, 2017) <http://europa.eu/rapid/press-release_IP-17-1323_en.htm> accessed 8 December 2017.

Specific parameters for establishing the excessive prices as a violation of the EU competition law were first determined by the CJEU in the *United Brands*²⁰ case back in 1978. In order to determine that the excessive pricing exists, it is necessary to verify whether (i) the difference between cost incurred and price charged is excessive, and (ii) if yes, whether the price imposed is either unfair in itself or when compared with competing products.²¹ This ‘two-step’ test has been frequently applied by EC, as well as recently confirmed by the CJEU in its *AKKA/LAA*²² judgement in 2017. The CJEU in *AKKA/LAA* judgement emphasizes that the difference in rates following the price comparison must be significant and not temporary to be considered as appreciable and hence abusive. The concept of ‘significant’ is rather vague and subjective depending on the circumstances of each case. Even so, these factors are ‘merely indicative’ of abuse of a dominant position. In such situations, it is for the undertaking holding a dominant position to show that its prices are fair by reference to objective factors that may have an impact on management expenses; and it is up to the national competition authority to assess the circumstances of each specific case.

2.1.4 Anticompetitive Agreements: Restricting Competitors’ Entry to the Market or ‘Paying off Competition’

Patent holders prolonging their patent protection very often resort to anticompetitive agreements with potential competitors/new entrants and thereby ‘pay off competition’. This is particularly common for the pharmaceutical sector.

In the field of pharmaceuticals, there has been, for some time, competition concern about practices of pharmaceutical companies that might be delaying entry of new, innovative and cheaper generic medicines onto the market.²³ PSAs, like any other agreements, are subject to competition law, and under certain circumstances, these agreements may be considered contrary to competition law. As expiry of the patent term approaches and medicines lose patent protection, originators are increasingly confronted with the prospect of competition from generics (with significantly lower prices). Originators in many instances enter into patent-related procedures/disputes/litigation in order to delay the entry of generics in the market. Normally originators claim that their patents have been infringed by generics who have introduced their own versions of the product prior to expiry of the patents. Generics in turn deny such infringement and contest the validity of the patents. In such circumstances, PSAs are a fast and economical way to end patent

²⁰Case C-27/76 *United Brands and United Brands Continental v Commission* (1978) ECLI:EU:C:1978:22.

²¹*ibid*, para 252.

²²Case C-177/16 *Autortiesību un komunikēšanās konsultāciju aģentūra/ Latvijas Autoru apvienība v Konkurences padome* (2017) ECLI:EU:C:2017:689.

²³Freshfields (n 5).

disputes, particularly where both parties recognise the merits of settlement and decreased litigation costs.

In all PSA cases so far investigated by competition authorities, the ‘initial concerns stemmed from the fact that the settlements under scrutiny involved ‘large’ payments from patent holder to the generic entrant’.²⁴ Settlement agreements containing restrictions beyond the exclusionary zone of the patent (e.g. beyond its geographic scope, its period of protection etc.) or regarding patents for which the patent holder knows that the patentability criteria are not met (e.g. lack of inventive step, incorrect, misleading or incomplete information etc.) can also be regarded as problematic agreements.²⁵ PSAs can be categorised into agreements: with no limitation of generic entry; and with limitation of generic entry (with or without the transfer of money).

In the case of *Citalopram*,²⁶ the EC fined the Danish pharmaceutical group Lundbeck €93.8 million and four generic companies (Alpharma, Arrow, Ranbaxy and Merck) a total of €52.2 million. The EC found that the companies concluded agreements concerning citalopram/antidepressants in order to prevent the market entry of competing generic versions of citalopram following patent expiry. The agreements involved significant value transfers (by way of direct payments, as well as the purchase of generic citalopram stock for destruction) from Lundbeck to its generic competitors. The EC concluded that the agreements thus constituted ‘pay-for-delay’ agreements, which violated Article 101 TFEU. The case was appealed before the GC. Lundbeck believed that the EC’s decision contains several ‘serious legal and factual errors’,²⁷ and was requesting that the GC annuls the decision and/or reduces the fine imposed. Eventually the GC in September 2016 fully rejected Lundbeck’s arguments and fully upheld the EC’s findings and ruled that pay-for-delay agreements were in breach of EU competition law.²⁸ The GC also noted that ‘irrespective of any patent dispute, generics competitors agreed with Lundbeck to stay out of the market in return for value transfers [...] which

²⁴Pierre Regibeau, ‘Further Thought on ‘pay-for-delay’ Settlements’ (2014) 2 Concurrences 12, 19.

²⁵‘6th Report on the Monitoring of Patent Settlements (period: January–December 2014)’ (*Europa*, 2 December 2015) <http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/patent_settlements_report6_en.pdf> accessed 15 May 2016.

²⁶Case COMP/AT.39226 *Lundbeck* (2013).

²⁷‘Lundbeck Appeals European Commission Decision’ (*Lundbeck*, 2 September 2013) <<http://investor.lundbeck.com/releasedetail.cfm?ReleaseID=788105>> accessed 5 August 2014.

²⁸Cases T-472/13 *H. Lundbeck A/S and Lundbeck Ltd v European Commission* (2016) ECLI:EU:T:2016:449; T-460/13 *Sun Pharmaceutical Industries and Ranbaxy (UK) v Commission* (2016) ECLI:EU:T:2016:453; T-467/13 *Arrow Group and Arrow Generics v Commission* (2016) ECLI:EU:T:2016:450; T-469/13 *Generics (UK) v Commission* (2016) ECLI:EU:T:2016:454; T-470/13 *Merck v Commission* (2016) ECLI:EU:T:2016:452; T-471/13 *Xellia Pharmaceuticals and Alpharma v Commission* (2016) ECLI:EU:T:2016:460.

constituted a ‘buying-off of competition’²⁹ which is a restriction of competition that cannot be tolerated. Moreover, such agreements could not be justified by a legitimate need of IP rights protection.

In *Fentanyl* case,³⁰ the EC was concerned about a so-called ‘co-promotion’ agreement between the Dutch subsidiaries of the US pharmaceutical company Johnson & Johnson (Janssen-Cilag) and the Swiss company Novartis (Sandoz), entered in 2005. The main aim of the agreement was to avoid the companies competing against each other, thus depriving users of fentanyl in the Netherlands to access a cheaper painkiller. The agreement foresaw monthly payments from Janssen-Cilag to Sandoz if no generic product was launched in the Dutch market. Consequently, Sandoz abstained from entering the market with generic fentanyl patches for the duration of the agreement from July 2005 until December 2006. This may have delayed the entry of a cheaper generic medicine for 17 months and kept prices for fentanyl in the Netherlands artificially high. The key concern was that the agreed monthly payments exceeded the profits that Sandoz expected to obtain from selling its generic product, for as long as there was no generic entry. The EC concluded that the agreement breached Article 101 TFEU and imposed fines of €10,798,000 on Johnson & Johnson and €5,493,000 on Novartis.

In *Modafinil* case,³¹ the companies Cephalon and Teva settled patent infringement disputes in the UK and the US concerning Modafinil (a treatment for sleeping disorders). As part of the settlement agreement, Teva undertook not to sell its generic Modafinil products on EEA markets before October 2012 and a series of side deals were included in the settlement agreement. The EC opened an investigation to assess whether the PSA violated EU competition law. The investigation is still on going. Statement of objections was sent by the EC in July 2017 stating its preliminary view that a PSA concluded with Cephalon was in breach of EU competition law. Under the agreement, Teva committed not to market a cheaper generic version of Cephalon’s drug for sleep disorders, Modafinil. In other words, the originator company Cephalon agreed to pay Teva to keep its cheaper generic version of Cephalon’s sleep disorder drug Modafinil out of the market.

The *Perindopril* case,³² concerns an investigation by the EC of practices of the French pharmaceutical company Servier and several of its generic competitors³³ for potentially delaying the generic entry of Perindopril, a cardio-vascular medicine. The EC concluded that Servier had acquired competing technologies to produce perindopril to preserve its position with regard to Perindopril, which was about to reach the end of its patent protection; and induced its generic challengers to

²⁹Antitrust: Commission Welcomes General Court Judgements Upholding its Lundbeck Decision in First Pharma Pay-For-Delay Case (*Europa*, 2016) <http://europa.eu/rapid/press-release_MEMO-16-2994_en.htm> accessed 5 May 2017.

³⁰Case COMP/AT.39685 *Fentanyl* (2013).

³¹Case COMP/AT.39686 *Cephalon* (2011).

³²Case COMP/AT.39612 *Perindopril (Servier)* (2012).

³³Teva Pharmaceutical Industries, Unichem and its subsidiary Niche, as well as Matrix, which is now known as Mylan Laboratories, Krka and Lupin.

conclude patent settlements. By concluding the agreements, the competitors violated Article 101 TFEU and Servier also abused its dominant position under Article 102 TFEU. The EC imposed a €427.7 million fine³⁴ on the companies.

2.2 Trademarks and Competition Law

The most common competition law issues related to trademarks are anticompetitive restrictive agreements (clauses in the commercial contracts, e.g. prohibition to sell online, qualitative selective distribution, vertical restrictive agreements, etc.). It is not unusual for manufacturers/trademark owners to seek to impose contractual restrictions that prevent retailers from marketing their products via online marketplaces (such as PriceMinister, Amazon and Fnac.com) and internet auction sites (such as eBay). Such contractual clauses usually appear in selective distribution agreements for luxury or highly technical products.

On the one hand such contracts with online sales restrictions (normally in selective distribution contracts) may be claimed as anticompetitive due to their restrictive nature,³⁵ on the other hand the trademark owners may rely on its right to protect the reputation and image of the brand to justify the restriction, particularly when it comes to the luxury brands. Here we come across the issue of how to assess this luxury image or ‘an aura of luxury’ justification. It was recognised by the CJEU in *Dior*³⁶ case, whereby:

the proprietor of a trade mark can invoke the rights conferred by that trade mark against a licensee who contravenes a provision in a licence agreement prohibiting, on grounds of the trade mark’s prestige, sales to discount stores [...], provided it has been established that that contravention [...] damages the allure and prestigious image which bestows on them an aura of luxury.

The CJEU in *Coty Germany*³⁷ delivered its judgement upon the German court application for a preliminary ruling. The dispute under appeal was between Coty Inc. (Coty) and Parfümerie Akzente GmbH (Akzente, an authorized offline distributor of Coty). Coty was suing Akzente in the German court for violating a

³⁴Antitrust: Commission Fines Servier and Five Generic Companies for Curbing Entry of Cheaper Versions of Cardiovascular Medicine’ (*Europa*, 9 July 2014) <http://europa.eu/rapid/press-release_IP-14-799_en.htm> accessed 5 May 2017.

³⁵A ban on Internet sales, even in a selective distribution system, is generally prohibited as a hardcore restriction of competition. At the same time the manufacturers remain free to organise their selective distribution network and may require some quality standards.

³⁶Case C-59/08 *Copad SA. v Christian Dior couture SA and Others* (2009) ECLI:EU:C:2009:260.

³⁷Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH* (2017) ECLI:EU:C:2017:941 (*Coty* case).

condition under the selective distribution agreement that prohibits Akzente from selling Coty's luxury products (under brands Marc Jacobs, Calvin Klein and Chloe) on open third party online platforms (e.g. Amazon).

'Luxury image' argument that was relied upon by Coty and supported by the CJEU in this case implies that the manufacturer/trademark owner of branded goods shall be able to safeguard the image and prestige of its luxury brand(s), among other, by way of restricting online sales of its distributors on third party's platforms.³⁸

The CJEU here refers³⁹ to the *Pierre Fabre Dermo-Cosmétique*⁴⁰ 2009 criteria of the selective distribution systems that have to be observed for the selective distribution to be outside the scope of Article 101(1) TFEU: (i) re-sellers are chosen on the basis of objective criteria of a qualitative nature laid down uniformly for all potential re-sellers and not applied in a discriminatory fashion, (ii) the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use and, finally, (iii) the criteria laid down do not go beyond what is necessary.

The 'necessity' of the online sales restriction may be explained by the need to preserve the quality of the luxury goods. The quality of such goods is not just the result of their material characteristics, but also 'of the allure and prestigious image which bestow on them an aura of luxury.'⁴¹ The image enables consumers to distinguish them from similar goods. Hence, any impairment to that aura of luxury may affect the actual quality of those goods.⁴²

Such online sales restrictions provides the supplier with a guarantee that the goods in question will be exclusively associated with the authorized distributors, which is one of the objectives sought when recourse is made to the selective distribution system. Hence, the bans in relation to sales on third party online platforms in selective distribution systems shall not be treated as a per se restriction of competition law; and a 'luxury image' argument may justify any possible restrictive effect of such clauses.⁴³

³⁸The online sale restriction at issue is not absolute. It applies solely to the internet sale of the contract goods via third-party platforms which operate in a 'discernible manner'. See *ibid*, para 52. Hence, authorized distributors shall be permitted to sell the contract goods online: both (i) on their own websites (as long as they have an electronic shop window for the authorized store and the luxury aura of the goods is preserved), and (ii) via unauthorized third party platforms when the use of such platforms 'is not discernible to the customer' See *ibid*, para 55.

³⁹*Coty* case (n 37), para 52.

⁴⁰C-439/09 *Pierre Fabre Dermo-Cosmétique* (2011) ECLI:EU:C:2011:649.

⁴¹*Coty* case (n 37), para 25.

⁴²See also *Copad* (n 36), paras 24–26.

⁴³We repeat that the prohibition shall not be absolute and shall concern only sales of contract goods at third party platforms. Authorized distributors shall be permitted to sell the contract goods online via unauthorized third party platforms when the use of such platforms is 'not discernible' to the customer (although the CJEU has not provided any definition of the notion of 'discernible/not discernible to the customer').

The ‘luxury image’ justification could not be accepted by the competition authorities in France and Germany in the *Adidas* case. Following antitrust probes into online sales restrictions of Adidas in Germany and France, the competition authorities came to conclusion that producer cannot prohibit an authorised reseller from selling its products online by relying on the quality standard justification. Consequently, Adidas had to modify its selective distribution contracts and online sales policy accordingly.⁴⁴ Therefore, an absolute ban on online sales would be illegal; however, the trademark owners still have a chance to justify such restrictions by relying on the quality/brand/reputation protection argument. It is important that the restriction does not go far beyond the simple requirement of quality standards.

2.3 Copyright and Competition Law

Copyright covers computer programs and software. Companies holding copyright have been investigated by competition authorities more often in the modern (digital) world. Copyright provides some sort of economic power in the market, which may potentially be abused by way of tying, refusal to license, foreclose competitors, as well as using excessive royalties, if implemented by a dominant company. The most prominent example includes the *Microsoft* (refusal to deal and tying), *Intel* (loyalty rebates) and *Google* (‘favouring your own content’) cases, in all of which the companies-copyright owners were found to be abusing their market position via various practices.

In *Microsoft*⁴⁵ case in 2004, the EC found that the company was dominant and held a copyright for a computer program. The investigation commenced based on a complaint filed by Microsoft’s competitor to whom Microsoft refused to provide information on interoperability that would enable competitors to develop competing programs for workgroup servers compatible with the Windows platform. Following the investigation the EC fined Microsoft €497 million⁴⁶ for abusing its dominant position in the personal computer (PC) operating systems⁴⁷ and work group server services, as well as multimedia player market, including by way of (i) refusal to

⁴⁴On 18 November 2015, the Autorité de la concurrence (the French Competition Authority or FCA) obtained confirmation from Adidas that it will withdraw from its contracts any clauses prohibiting its distributors from using marketplaces for their online sales. ‘When Can Sales Via Online Platforms be Restricted?’ (*Eversheds Sutherland*, 23 December 2015) <<http://consumerhub.eversheds-sutherland.com/retail/when-can-sales-via-online-platforms-be-restricted/>>.

⁴⁵*Microsoft* (n 1).

⁴⁶See T-201/04 *Microsoft v Commission* (2007) ECLI:EU:T:2007:289.

⁴⁷As mentioned in para 71 of the *Microsoft* decision, the operating system product is copyrighted material and, as such, its use can be subjected to licensing conditions that are transferred across the distribution channel.

supply its competitors with interoperability information for operating PC Windows with other systems and to use that information for the purpose of developing/distributing products competing with Microsoft's own products, and (ii) the tied sale of Windows Media Player software together with the Windows client PC operating system, hence leaving no choice for consumers and foreclosing the multimedia player market to smaller competitors.

Normally tying is a good idea as it leads to better product offerings, however there is a risk of foreclosure effect where (i) the tied and tying products are distinct products (depends on customer demand), i.e. it is possible to buy those products separately; (ii) it is a lasting practice; and (iii) it is implemented by the dominant undertaking.

As for the refusal to provide information on interoperability that would enable competitors to develop competing programs for workgroup servers compatible with the Windows platform, it was found to be anticompetitive, since Microsoft is a dominant player and such information was indispensable (essential facility) for the smaller players to enter/stay the relevant market.

On the other hand, the EC's infringement decision in *Intel*⁴⁸ imposing a record €1.06 billion fine was appealed to the GC⁴⁹ and subsequently to the CJEU,⁵⁰ and eventually was referred back to the GC, who is now conducting the new assessment of the evidence and effects of the rebates system provided by Intel. The main message of the CJEU's judgement is that the anticompetitive effect of the loyalty rebates should not be presumed where the undertaking in question argues that its conduct is not capable of restricting competition in the market.

The *Intel* case started with a complaint before the EC brought by the Advanced Micro Devices (AMD) against Intel back in 2000. Following the investigation, the EC found that Intel indeed infringed Article 102 of the TFEU, i.e. abused its dominant position, in particular by granting (i) rebates on condition that original equipment manufacturers (OEMs) would purchase from it all or almost all of their x86 central processing units (CPUs) for use in their computers, and (ii) payments to the largest desktop computer distributor in the EU, Media-Saturn-Holding, on condition that it would be selling exclusively computers containing Intel's x86 CPUs. On top of that, according to the EC, Intel also (iii) provided payments to the OEM's for the postponement or cancellation of the launch of AMD CPU-based products or put restrictions on their distribution. The gravity of the infringements which affected the ability of Intel's competitors to compete justified the fine imposed by the EC.

The CJEU in *Intel* case did not overrule the EC's decision. It addressed three out of six grounds of appeal and referred it back to the GC. It is now for the GC to decide on whether to annul or uphold it (again) depending on the new assessment of

⁴⁸Case COMP 37/990 *Intel* (2014).

⁴⁹Case T-286/09 *Intel Corporation v European Commission* (2014) ECLI:EU:T:2014:547.

⁵⁰Case C-413/14 P *Intel Corporation Inc. v European Commission* (2017) ECLI:EU:C:2017:632.

the evidence and effects of the case at hand. The CJEU has ruled on the important issues, such as:

- EC's procedural obligations/Intel's right of defence: The CJEU criticised the EC for material procedural mistake affecting Intel's right of defence. This included failing to record adequately and take into account the evidence (a five hr interview with Intel's customer) that had been given by a third party.
- EC's territorial jurisdiction: The CJEU emphasized on the extraterritoriality of the EU competition law, i.e. that activity of an undertaking outside the EU may infringe EU competition law by its effect that is foreseeably 'immediate and substantial'. Behaviors which, while not implemented within the EU, but which have or likely to have an impact on the EU market serve as a basis for the EC's jurisdiction in such cases.
- The CJEU reminded that an undertaking suspected of having infringed Article 102 TFEU could argue that its behavior was not capable of restricting competition. In case such an objection is expressed, the EC is required to examine (i) the extent of the dominant position, (ii) the market coverage of the rebates at issue, (iii) the conditions, the duration and the amount of those rebates, and also (iv) the exclusionary effect of such behaviors on competitors who are at least as efficient as the dominant undertaking ('as efficient competitor test'/'adverse effect on competition (AEC) test'). Such an analysis may reveal the exclusionary effect of the behaviors at issue. This could be counterbalanced by advantages in terms of efficiency, which can benefit the consumer.

In summary, the CJEU's judgement in *Intel* case confirms the statement that the anticompetitive effect of the loyalty rebates should not be presumed where the undertaking in question argues that its conduct is not capable of restricting competition in the market.⁵¹ In such situations all the circumstances of the case must be analysed in order to correctly determine whether competition rules have been infringed. Additionally, this judgement is a reminder of the fact that the competition law has extraterritorial effect; and competition authorities must pay due care to the procedural formalities and right of defence of the undertaking(s) under investigation, e.g. to record all evidence, including interviews and meetings.

And finally, the *Google*⁵² case, where following the investigation EC decided to penalise Google €2.42 billion for an abuse of dominance by way of promoting its own comparison shopping service (favouring its own content) in its search results. In other words, Google's advertisements enjoyed higher number of clicks as a result of better display/visibility—i.e. Google's own services appeared at the top of the search results, while even the most highly ranked rivals' services appeared on average only on page four or so of Google's search results. According to the EC, such practices significantly affected competition in the market for comparison

⁵¹Previous case-law considered that exclusivity rebates granted by dominant undertakings were, per se, anticompetitive.

⁵²Case AT.39740 *Google Search (Shopping)* (2017).

shopping and allowed Google to make significant gains in traffic at the expense of its competitors and to the detriment of consumers. On the one hand, Google was found violating EU competition law by using its own search engine (software), Google Search, and favouring its own services over those of competitors by making Google's results more visible. But on the other hand, consumers could still visit other sites/platform to compare prices before buying online.

3 Conclusion

Competition law issues may arise in any area of IP: patents, trademarks, and/or copyright. In most cases it is the IPR holders with a strong market power (if not dominance) that have to be particularly cautious about competition law implications of their practices, since an undertaking enjoying a dominant position is under a special responsibility not to engage in conduct that may distort competition.

With regards to patents, the most common competition law issues here are related to the abuse of market power via various practices, such as: refusal to license/deal, excessive charges/pricing, unfair/discriminatory licensing, anticompetitive use of SEPs/abusing litigation by SEP holders; delaying market entry of competitors via misuse of patent/regulatory process (SPC), excessive pricing, as well as concluding anticompetitive agreements (PSAs).

When it comes to trademarks, the most common competition law issues that we may come across are anticompetitive restrictive agreements (clauses in the commercial contracts, e.g. prohibition to sell online, qualitative selective distribution, vertical restrictive agreements, etc.). It is not unusual for trademark owners to impose contractual restrictions that prevent retailers from marketing their products via online marketplaces. Such contractual clauses usually appear in selective distribution agreements for luxury or highly technical products and subject to strict criteria and/or 'luxury brand image' justification in relation to online sale prohibitions (as recently confirmed by *Coty* case).

Copyright, just like patents and trademarks, provides some sort of economic power in the market, which may potentially be abused by way of tying, refusal to license, foreclose competitors, as well as using excessive royalties, if implemented by a dominant company.

Recent enforcement of competition law in the sphere of patents (SEPs), trademarks and copyright in various industries shall significantly affect the legal landscape for the IP right owners; patent holders must now, more routinely, consider how competition law may impact the exercise of their IP rights. In that respect, competition compliance programs and competition law due diligence is very much advisable to identify and avoid competition law related risks.

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