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EU Competition Law and its Relevance for the Technology Markets

Marco Botta

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Outline of the presentation

- Introduction to EU competition law: Art. 101-102 TFEU
- IP rights and their potential conflicts with EU competition law
- Cases of enforcement of Art. 102 TFEU which affect IP rights:
 - 1) Essential facility doctrine (*Oscar Bronner, MacGill, Microsoft*)
 - 2) Abuse of IP procedures (*Astra Zeneca*)
 - 3) Abuse of Standard Essential Patents
 - a) Patent ambush (*Rambus*)
 - b) Abusive court injunctions (*Motorola/Samsung; Huawei v. ZTE*)



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Introduction to EU competition law



Introduction

- **Objective:** to safeguard undistorted competition within the EU internal market
- **Complementarity with EU free movement rules:**
 - 1) EU free movement rules sanction the obstacles to the establishment of the internal market introduced by EU Member States
 - 2) EU competition law sanctions anti-competitive conducts by private undertakings which can obstacle the establishment of the internal market
- Sub-policies of EU competition law:
 - 1) **Antitrust law (Art. 101-102 TFEU; Reg. 1/2003)**
 - 2) Merger control (Reg. 139/2004)
 - 3) State aid law (Art. 107-108 TFEU; Reg. 659/99)



Art. 101(1) 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 EU MS and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: ...'*
- **Broad provision which cover every type of agreements** (i.e. i.e. written agreements, secret cartels, concerted practices, associations' decisions) independently by their nature from a contractual point of view
 - Non-exhaustive list of anti-competitive agreements in para. 2



Art. 101(1) TFEU - anti-competitive agreements

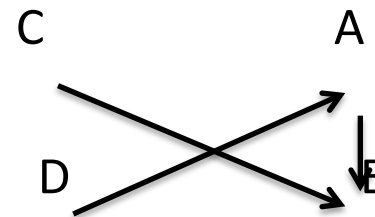
- **Types of competition law restrictions**
- **“Object” restrictions:** parties to the agreement have the intention to restrict competition (i.e. secret cartel)
- **‘Effect’ restrictions:** the agreement results in competition restriction (i.e. joint venture, vertical distribution agreement)

- **Types of agreements:**

Horizontal agreements



Vertical agreements



- Horizontal agreements may cause restrictions by object or effect
- Vertical agreements only by effect (i.e. foreclosure of the market)



Art. 101(3) TFEU

- **Four cumulative conditions necessary to exempt an agreement prohibited under Art. 101(1):**
 1. Agreement achieves a **general interest goal** (i.e. improvement production, distribution, technological innovation)
 2. **Consumers receive “a fair share” of the benefits**
 3. Agreement causes **“indispensable” restrictions** of the competition
 4. Agreement does **“not fully eliminate” the competition** in the market
- **Only agreements which restrict competition “by effect” can *de facto* satisfy these conditions** (i.e. secret cartels cannot be exempted!)
- **Vertical agreements are usually more likely to satisfy these conditions** in comparison to horizontal agreements.



Art. 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:...”***
- **Two cumulative conditions to violate Art. 102:**
 1. Undertaking enjoys **“dominant position”** within the relevant market → defined by CJEU case law and EU Commission practice
 2. Dominant undertaking commits an **“abuse”**; non-exhaustive list in Art. 102



Art. 102 TFEU

- **Abuses are ordinary commercial behaviours** (e.g. not to supply a competitor), which are in breach of Art. 102 TFEU when they are carried out by a dominant undertaking
- **Types of abuses:**
 - 1) **Exploitative abuses:** dominant company exploits its dominant position damaging final customers (e.g. excessive pricing, unfair contractual conditions). This type of abuse is rarely investigated by EU Commission → what is unfair and excessive???
 - 2) **Exclusionary practices:** dominant company tries to exclude a competitor from the market in order to preserve its dominant position → open list of abuses developed by CJEU case law
- **Art. 102 TFEU does not provide for any type of justification**



Enforcement Art. 101-102 TFEU

- **Two types of enforcement:**

- 1) Public enforcement (Reg. 1/2003 + national competition law):**

- a) Administrative decisions + judicial review on appeal
- b) Decisions of the EU Commission + 28 National Competition Authorities (NCAs)

- 2) Private enforcement (national civil law + new Damages Directive):**

- a) Claims for damage compensation started by harmed consumers/competitors in national civil courts due to anti-competitive conduct
- b) Follow-on v. stand-alone actions



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IP rights and potential conflicts with competition law



Objective IP

- **Objective:** promotion of innovation
- **IP grants an exclusive right of exploitation to the IP owner** → safeguard of IP owner incentive to innovate
- IP rights equivalent to property rights for physical property:
 - 1) IP owner can prevent a third party to use the IP (i.e. court injunction)
 - 2) IP owner can transfer its rights to a third party in exchange of a royalty fee (i.e. license agreement)



Types IP rights

- **Patents:**

- 1) Protect inventions which have industrial application
- 2) Patent owner has exclusive right of exploitation for 20 years
- 3) Registration at the Patent Office

- **Copyright:**

- 1) Protect artistic work
- 2) 60 years from the death of the author
- 3) No need of registration

- **Trademarks:**

- 1) Protect the brand which identifies a product
- 2) 10 years renewable
- 3) Registration needed



Conflict between IP and competition law

- **Common goal: promotion of innovation, which increases consumers' welfare** (i.e. new products at lower prices)
- **Opposite approaches to achieve same goal:**
 - 1) IP grants "exclusive exploitation rights" to inventors
 - 2) Competition law safeguards the free competition in the market, which results in maximization of consumers' welfare.
- **IP "exclusive exploitation rights" = "monopoly rights" in competition law**
- Cases of conflict more common for **patents**



Conflict between IP and competition law

- **Growing number of competition law investigations affecting high-tech industries**
 1. Software & hardware producers
 2. Media and telecom companies
 3. Pharmaceutical companies
- **Reasons:**
 1. Evolution of the quality of analysis in EU competition law
 2. Enforcement of EU competition law in liberalized industries (i.e. telecom)
 3. Shift towards knowledge society = growing importance of IP rights



Cases of enforcement of Art. 102 TFEU and IP rights

Essential facility doctrine



Essential facility doctrine

- **Type of abuse which derives from the “refusal to deal” type of abuse** (*Commercial Solvents*, 311/84) → dominant company cannot decide to stop supplying a buyer since the latter decides to enter in the same relevant market where the dominant company operates
- **The dominant company which owns an “essential facility” is obliged to provide access to the facility to its competitor at a reasonable and non discriminatory access price**
- The essential facility cannot be replicated, and in the lack of access the competitor would exit the market = **restriction of competition**
- Unlike refusal to deal, in the essential facility doctrine there is no previous contractual relation between the dominant company and the company demanding access to the essential facility → **dominant company is forced to help a competitor**



Oscar Bronner

- **Facts:**
 1. Request for preliminary ruling from Austrian Kartel Court
 2. Oscar Bronner was the publisher of Der Standard, new newspaper in 1990s
 3. Bronner asked Mediaprint, publisher of Kronen Zeitung and Kurrier , to get access to its home distribution service
 4. Bronner would pay Mediaprint to distribute Der Standard at home together with its newspapers
 5. Mediaprint rejected Bronner's request
- **Question:** was Mediaprint obliged to grant access to Bronner to its home distribution service, in view of its dominant position in the Austrian market for newspapers?



Oscar Bronner

- **CJEU's ruling:**
 - 1) **Dominant company** which owns an **"essential facility"** is **obliged to grant access to a competitor when 3 conditions are satisfied:**
 - a) Denial access to essential facility is **"likely to eliminate all competition"** in the relevant market → competitor would exit the market
 - b) Replication of essential facility is **"impossible"**
 - c) **No "objective justifications"** by dominant company for the refusal
 - 2) **Conditions not satisfied in this case:** Oscar Bronner could distribute Der Standard in kiosks or supermarkets; duplication home delivery service was very expensive, BUT not impossible (para. 42-46)



Relevance *Oscar Bronner*

- **CJEU accepted in principle essential facility doctrine, BUT it introduced high standard of proof** → 3 conditions difficult to be met
- **Reliance of essential facility doctrine in different sectors:** network industries (i.e. telecom, gas, electricity) and IP (i.e. patents, trademarks, copyright)
- **Essential facility doctrine rejected by US Supreme Court in *Trinko*:** essential facility doctrine **undermines incentives of the dominant company to invest in its essential facility**, and it restricts its property rights



EU essential facility doctrine and IP

- Recognized by the CJEU in **Magill** (C-241/91)
- Facts: Mac Gill published weekly lists of TV programs. Irish and UK TV refused to share the lists of their TV programs with Mac Gill = copyright
- **CJEU ruling:**
 1. IP rights deserve special protection
 2. BUT, violation of Art. 102 arises when 4 conditions are satisfied:
 - a) Access to IP is “indispensable” for the third party
 - b) Refusal prevents introduction “new product” for which there is consumers’ demand**
 - c) Refusal not justified
 - d) Refusal fully eliminated competition → third party forced to exit the market
 3. **“New product” condition not present in *Oscar Bronner***
- GC judgement in *IMS Health* (T-184/01) clarified that 4 conditions are cumulative



Microsoft

- **Facts:**

- 1) In 2004, EU Commission adopted a decision sanctioning Microsoft for abuse of dominance, and it imposed a fine of 500 million €. Two infringements:
 - a) Microsoft refused to grant interoperability information to Sun Microsystems in order to make the servers which relied on Windows and Sun operating system compatible → **refusal to grant access to essential facility**
 - b) Microsoft sold Windows only with Windows Media Player included → **abusive tying**
- 2) **Parallel antitrust proceedings in USA** → Microsoft accepted settlement in 2001 with Attorney Generals representing 9 US States:
 - a) Interoperability info to third parties granted via Microsoft Communications Protocol Program
 - b) Microsoft accepted to disactive automatic use of Media Player in Windows
- 3) Microsoft appealed EU Commission's decision to GC



Microsoft – GC's ruling interoperability info

- **Microsoft's main arguments:**
 - 1) Access to interoperability info = compulsory license which damages its patents and its incentives to innovate
 - 2) «New product» condition from *Magill* not satisfied: Sun would not introduce a new product, but only a new operating system for servers in competition with Windows
- **The GC upheld the EU Commission decision:**
 - 1) **Holding «IP rights cannot constitute objective justification** within the meaning of *Magill* and *IMS Health*»
 - 2) **«New product» condition: «the circumstances relating to the appearance of a new product...cannot be the only parameter** which determines whether a refusal to license IP right is capable of causing a prejudice to consumers within the meaning of Art. 102(b) TFEU....such prejudice may arise where there is a limitation not only of production markets, but also of technical development» (para. 647)



Cases of enforcement of Art. 102 TFEU and IP rights

Abuse of IP procedures



Astra Zeneca

- **Facts:**

- 1) Astra Zeneca is a major pharmaceutical company operating in Europe
- 2) In 1988, Astra Zeneca marketed Losec (i.e. pills against gastritis)
- 3) In 2000, Astra Zeneca's patent for Losec was close to expiration; **Astra Zeneca implemented 2 strategies to lengthen the duration of its patent:**
 - a) Under Directive 65/65/EEC, **Astra Zeneca applied for Supplementary Protection Certificates (SPC) in different EU Member States providing wrong info to patent offices on the date when the patent was first approved**
 - b) **Astra Zeneca de-registered the patent for Losec in some EU Member States, and it replaced it with a similar patent**
- 4) Producers of generic drugs submitted complaint to the EU Commission: conduct by Astra Zeneca did not allow them to market generic drugs = restriction of competition
- 5) EU Commission imposed a fine on Astra Zeneca for violation Art. 102 TFEU
- 6) EU Commission's decision upheld by GC with minor fine reduction
- 7) Final appeal to the CJEU



Astra Zeneca

- **CJEU's ruling:**
 - 1) «The concept of abuse is an objective concept» → patent misrepresentation by Astra Zeneca to get longer SPC protection breaches Art. 102 (para. 74-75)
 - 2) **The fact that Astra Zeneca could de-register a patent under Directive 65/65/EEC does not prevent prohibition Art. 102 TFEU** → «the illegality of abusive conduct under Art. 102 TFEU is unrelated to its compliance or non-compliance with other legal rules ...in majority of cases, abuses of dominant positions consist of behaviour which is otherwise lawful under branches of law other than competition law» (para. 132)
 - 3) **Dominant company «cannot use regulatory procedures in such a way as to prevent or make more difficult the entry of competitors on the market»** → dominant company's special responsibility (para. 134)
 - 4) CJEU upheld previous GC' judgement



Relevance of *Astra Zeneca*

- **First clear clash between EU competition and IP law** → EU competition law prevails since Art. 101-102 TFEU are included in the Treaty, rather than in secondary legislation (i.e. Directives)
- **In *Astra Zeneca*, CJEU did not only refer to IP rights, but to all «regulatory procedures» relied by dominant company to obstacle competitors** → potential broader scope



Cases of enforcement of Art. 102 TFEU and IP rights

Abuse of SEP



Standard Essential Patents (SEP)

- **Technology industries are characterized by Standard Setting Organizations (SSO):** they define a **common standard** applicable in the industry required to **ensure the interoperability of products** (e.g. mobile phone from different brands)
- **Standards are usually covered by several patents (SEPs)** owned by the members of the SSO
- **Patent owner has the duty:**
 - 1) **To disclose the existing patents** covered by the standard
 - 2) To negotiate a license agreement with any member of the SSO under **Fair and Reasonable Non-Discriminatory conditions (FRAND)**



SEP and abuse of dominance

- **Two new types of abuses of dominance have developed in the past years *vis a vis* the conduct of the SEP owner:**
 - 1) **Patent ambush:** patent owner does not disclose the existence of a patent when the standard is adopted, in order to ask high royalties at a later stage
 - 2) **Abusive injunctions:** SEP owner fails to negotiate license agreement with a third party, and it later asks in court an injunction to prevent the third party to use its patent, though the patent falls within the scope of the international agreed standard
- **Diverging considerations:**
 - 1) **IP gives priority to SEP owner** → safeguard innovation incentive
 - 2) **Competition law gives priority right of third parties to use the patent** → to foster competition within the industry



Rambus- patent ambush

- **Facts:**

- 1) Rambus was hardware producer → owned patent on Dynamic Random Access Memories devices (DRAMs)
 - 2) JEDEC was US semiconductor industry association → adopted new SEP on DRAM, which covered a patent owned by Rambus
 - 3) Rambus did not disclose existence of the patent when JEDEC adopted standard → to ask high royalty fee for license after standard adoption
 - 4) Commission investigated Rambus for patent abuse → new abuse of dominance under Art. 102 TFEU
 - 5) **In 2010, Commission and Rambus settled the case:** Rambus agreed on a worldwide cap of the royalties that it could demand to license SEP
- ***Rambus* was settled → no judicial review by GC/CJEU; new abuse of dominance introduced by Commission**



Abusive injunctions – *Motorola/Samsung*

- **Facts:**

- 1) Motorola and Samsung owned patents on GPRS and 3G mobile standards
- 2) Motorola and Samsung started negotiations with Apple to license SEPs under FRAND conditions
- 3) No agreement achieved → Apple continued to use SEPs for iPhones without having a license
- 4) Motorola and Samsung asked in a German court an injunction to prevent the sale of iPhones in Germany
- 5) Commission opened investigations on Motorola and Samsung → request of court injunction was considered in breach Art. 102 TFEU
- 6) **Cases closed in April 2014:**
 - a) **Motorola:** EU Commission adopted decision sanctioning Motorola
 - b) **Samsung: case settled** → Samsung agreed to negotiate for 12 months; royalty decided by court/arbitration if negotiations fail



Abusive injunctions – *Huawei v. ZTE*

- **Facts:**

- 1) Huawei owned SEP on 4G mobile technology → chosen as standard by ETSI
 - 2) ZTE produced base stations which relied on 4G technology
 - 3) Huawei and ZTE did not achieve agreement on royalty fee
 - 4) Huawei asked injunction at the Court of Düsseldorf
 - 5) Court of Düsseldorf sent to the CJEU a preliminary ruling request, asking whether the Huawei request of injunction could be considered as an abuse of dominance.
- **Question:** should the court consider the ‘willingness’ of the third party to negotiate, OR any request of injunction is automatically abusive (i.e. approach Commission in *Motorola/Samsung*)?



Abusive injunctions – *Huawei v. ZTE*

- **CJEU's ruling:**

- 1) SEP owner has the right to ask for court injunction to remedy a breach of its patent rights, BUT only after having truly attempted to positively conclude license negotiations with the potential licensees.
- 2) Steps of negotiations:
 - a) SEP owner should inform third party about its patent rights and make written offer to license SEP in accordance with FRAND terms
 - b) Third party could accept offer or make counter-offer
 - c) If parties do not achieve agreement, national court/arbitrator determines amount of the royalty
- 3) Only if third parties does NOT comply with steps of negotiations, SEP owner can ask for court injunction



Relevance – *Huawei v. ZTE*

- In *Huawei v. ZTE* CJEU had to balance different interests/rights:
 - 1) Private property right SEP owner *vis a vis* patent
 - 2) Right of the SEP owner to ask injunction to remedy a breach of its IP rights
 - 3) Business freedom and free competition enjoyed by third party
- CJEU ruling harmonizes different approaches previously followed by national courts and EU Commission on this issue



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Conclusions



Conclusions

- **EU competition and IP law share same goal: promotion of innovation, BUT different approaches:**
 - 1) IP safeguards incentive of the IP holder to innovate
 - 2) Competition law safeguards free competition within the industry
- Growing enforcement of competition law in technology industries → more cases of conflicts between IP and competition law



Conclusions

- **Cases of enforcement of competition law which affect IP rights:**
 - 1) **Essential facility doctrine:** patent owner is forced to 'share' the patent, when the latter is 'essential' for the third party to operate in the market (*Oscar Bronner, Macgil, Microsoft*)
 - 2) **Abuse IP proceedings** (*Astra Zeneca*)
 - 3) **Abuse SEP:**
 - a) **Patent ambush:** SEP owner 'hides' the existence of the patent to the Standard Setting Organization (*Rambus*)
 - b) **Abusive injunctions:** SEP owner asks for a court injunction to stop the third party, with whom it failed to conclude a license agreement, from using the SEP (*Motorola/Samsung; Huawei v. ZTE*)