Antitrust limits on intellectual property rights

Intellectual property rights (IPRs) generally give the creator an exclusive right over the use of his or her creation during a certain period of time, allowing the owner to prevent the unauthorised use of its IP and to exploit it by, inter alia, licensing it to third parties. The importance of the protection and enforcement of these rights has long been recognised by EU law and policy. The Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights of the European Union specifically acknowledge the importance of IP protection. Numerous policy statements from the European Commission (the Commission) and other European institutions recognise the crucial importance of protecting and enforcing IP to ‘the EU’s ability to stimulate innovation and to compete in the global economy.’

However, it is clear that IPRs are not absolute rights. As far back as the 1960s, the European Court of Justice (now CJEU) drew a distinction between the ‘grant’ or existence of IPRs and the ‘exercise’ of those rights, and found that an IP owner could be prevented from exercising its IPRs to the extent necessary to give effect to the Treaty prohibition on anti-competitive agreements. This view has been further confirmed by the Commission’s Technology Transfer Guidelines, where it is clearly stated that: ‘[t]he fact that intellectual property laws grant exclusive rights of exploitation does not imply that intellectual property rights are immune from competition law intervention […]’.

In circumstances where the enforcement of IPRs appears to undermine or infringe other rights and laws, the challenge for the Commission and the EU Courts has been to strike a fair balance between adequate IPR protection and those other rights and laws. While this balancing exercise is not unique to the interface between IP and antitrust law, it is in the area of antitrust enforcement that we have seen most of the tension in how far IP owners can be legitimately limited in using their IPRs.

In line with previous statements made by Joaquín Almunia suggesting that cases involving IP are likely to remain on the Commission’s radar, the newly appointed Commissioner, Margrethe Vestager, announced a forthcoming proposal to launch a competition inquiry in the e-commerce sector. Therefore, access for consumers and businesses to digital goods and services constitutes another area in which the intersection of competition law and IPRs is likely to trigger future debate.

This article analyses recent developments in the area of IP and antitrust enforcement, including two Commission decisions in the smartphones and pharmaceuticals industries which reflect a bold approach and raise new questions on the limits antitrust rules can place on IPRs.

In particular, the article focuses on the following questions:

- When do antitrust rules force an IP owner to grant a licence to a third party?
- What limits do antitrust rules place on litigation by IP owners, including the use of injunctions to protect their IP?
- What limits do they impose on settlements of threatened or pending litigation?

Unilateral conduct of IP owner and article 102 TFEU

The circumstances under which an IP owner may be compelled to license its technology or refrain from litigation to enforce its IPRs are generally governed by the antitrust rules regulating unilateral conduct, namely article 102 TFEU. Article 102 TFEU prohibits abuses of a dominant position. A company will infringe article 102 TFEU if:

- it is found to be dominant in the relevant market;
- it engages in conduct that constitutes an abuse of that dominant position; and
- there is no objective justification for its alleged abusive behaviour.

In looking at these criteria, it is necessary to assess whether ownership of an IP is per se sufficient to render a company dominant or whether there are other factors playing a role in this assessment. In assessing market power, and therefore dominance, the Commission will examine:

- the constraints imposed by other companies and the market structure;
- the constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors; and
- the existence of countervailing buyer power.

These criteria are equally applicable when it comes to analysing the position of an IP holder in the market.

As a result, the mere ownership of an IP does not make an IP holder dominant. It will depend, among other things, on whether there are substitutable technologies available in the market and on whether it is envisaged that actual or potential competitors would launch technologies that could substitute the protected technologies. Where a technology has become an indispensable input for competitors, a refusal to grant access to that technology, by refusing to license IPRs, may be potentially abusive; however, this does not equate ownership of IPRs to dominance. This approach has also been followed in the United States, where the Supreme Court has acknowledged that IPRs do not necessarily confer market power.

The dominance assessment under EU law becomes more complex in cases where the market at issue is governed by a technical standard. Usually, licences for many patents are necessary to manufacture a product that complies with a standard, and the ownership of those patents is not generally concentrated in the same IP holder. This means that an IP holder who only owns one or several of the multiple standard essential patents (SEPs) that read upon the standard may impede the manufacturing of products. For example, it could refuse to license its SEPs on fair reasonable and non-discriminatory (FRAND) terms or hold up the patent until its patented technology has been incorporated in the standard with the view to charge excessive or discriminatory royalties.
Standardisation creates a specific context at the intersection of IP and antitrust law. While the Commission considers that SEPs can confer ‘significant market power on SEP holders’, it also acknowledges that, despite the fact that an SEP holder could control the product or service market to which the standard relates and thus could behave in anti-competitive ways, there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power. The question of market power can only be assessed on a case-by-case basis. This was recently confirmed in the Motorola Decision, as well as in the Samsung commitments decision. In each case, the Commission respectively considered Motorola and Samsung’s 100 per cent market share in the licensing of certain technologies to be only one element in the assessment of dominance and took into account several other factors in the broader market conditions before reaching the conclusion that Motorola and Samsung held a dominant position.

Finally, even if an IP owner was deemed to be dominant, it is important to remember that being in a dominant position is not, in itself, illegal. On the contrary, while dominant companies have a special responsibility not to impair competition in the EU, dominant companies are entitled, and encouraged, to compete on the merits. Antitrust law only punishes the abuse of a dominant position.

Compulsory licensing

Compulsory licensing occurs when the owner of an IPR is compelled to grant a licence to a third party under article 102 TFEU. As a general rule, the owner of an IPR is entitled to determine whether it will license its IPRs and, if so, how and to whom. A mere refusal to license does not per se amount to an infringement of article 102 TFEU. Following a series of high-profile article 102 cases, starting back in the late 1980s with Magill and followed by IMS and Microsoft, it has been established that an IP holder may be compelled to license its technology to a third party under ‘exceptional circumstances’. In practice, the ‘exceptional circumstances’ test has proven difficult to apply. The ‘exceptional circumstances’ have not been exhaustively defined by either the Commission or the EU courts and thus a case-by-case analysis is required.

Compulsory licensing and EU case law

Magill

Magill is the landmark case in which the ECJ upheld a duty to license an IPR. Each of the BBC, RTÉ and ITP – broadcasters in the UK and Ireland – published weekly television guides containing detailed information of their TV programmes. Magill TV Guide Ltd wanted to publish the three TV broadcasters’ listings in a single weekly publication. At the time there was no such publication, but there was an obvious demand for it. However, the TV broadcasters refused Magill’s request for a licence to use the information. The case was eventually heard by the ECJ, which upheld the General Court’s (GC) judgment that the broadcasters were under an obligation to provide Magill with the listings.

The ECJ concluded that the refusal to license an IPR was not, in itself, an abuse of a dominant position, but it could be regarded as such in ‘exceptional circumstances’. According to the ECJ, such exceptional circumstances arose in that case, given that:

- the TV broadcasters were the only source of the indispensable ‘raw material’ (ie, basic information on programme scheduling);
- Magill wanted to put together a weekly listing magazine which sought to introduce a new product on the market where there was an increasing unsatisfied demand for such a product;
- there was no justification for the refusal based on copyright protection; and
- by denying access to the information, the TV broadcasters were reserving the downstream market of TV guides for themselves excluding all potential competitors.

Shortly after Magill, the ECJ reiterated the ‘exceptional circumstances’ test in Oscar Bronner, although the object of the refusal was not an IP-protected product or service. In that case, the alleged dominant service provider was not considered to have abused its dominant position by refusing to supply the requested service, inter alia, because the ECJ considered that the requested service was not indispensable to the complainant’s business.

The test was again applied in Ladbrokes, although the IP owner in that case, Paris Mutual International, was not required to license its copyright to its betting shop competitor Ladbrokes. The GC pointed out that, whereas in Magill the refusal to license prevented Magill from entering the market, in this case, Ladbrokes was not only already active in the market but had the higher market share; and whereas in Magill the licence of IP was essential in order to access and compete in the market for TV guides, in Ladbrokes the IPRs were not indispensable for betting shop operators to be active in the market. Moreover, the GC found that the refusal to license IPRs in Ladbrokes did not impede the bringing to the market of a new product.

IMS Health

IMS was another major case on compulsory licensing that added further colour on how the test initially elaborated in Magill would be applied. The ECJ confirmed its long-established principle that a mere refusal to license an IPR does not per se constitute an abuse of dominant position. However, in ‘exceptional circumstances’ where the actions of the IP holder go beyond the natural protection of the IPR, there might be an abuse of dominance in the form of refusing to license. The ECJ made the following clarifications in relation to the test established in Magill:

- it is sufficient if a ‘potential’ or ‘hypothetical’ separate market can be identified to establish the likelihood of excluding all competition on a secondary market;
- the absence of objective justification needs to be conducted on a case-by-case basis; and
- a potential licensee’s intention to merely duplicate a product or service that a potential licensor already sold in the secondary market is not sufficient to satisfy the requirement of bringing a new product to the market.

Microsoft I

The 2007 GC’s Decision in Microsoft I went a step further in elaborating the obligation to license under article 102 TFEU and broadened the scope for compulsory licensing beyond what the ECJ had envisaged in Magill. In 2004, the Commission fined Microsoft €497 million for abusing its dominant position in the PC operating system market. The Commission concluded that Microsoft had abused its dominant position by refusing to supply competitors with interoperability information impeding them from developing and distributing products competing with Microsoft in the work group server operating system market. The GC upheld the Commission’s decision.

With respect to the indispensability and elimination of competition in a secondary market, the GC, in line with IMS Health, agreed with the Commission that Microsoft was able to impose
a de facto standard for work group computing. Therefore, non-Microsoft work group server operating systems had to be capable of interoperating with Windows PC and server operating systems on a non-discriminatory basis in order to compete on the market.28

Apart from confirming the obligation to license,29 Microsoft I is particularly relevant because of the approach the GC took in relation to the ‘new product’ requirement. Indeed, the GC did not find it necessary to show that a specific new product (such as the TV guide in Magill) would have been introduced into the market if the interoperability information had been shared. The GC explained that the ‘new product’ criterion should be interpreted as including any restriction on technical development.30 Accordingly, Microsoft’s refusal to share information prevented competitors from effectively competing in the work group server operating system market. This interpretation significantly widened the strict approach originally adopted in Magill.

Compulsory licensing in the Commission’s Guidance on Article 102
The Commission confirmed its approach to refusal to license IPRs in its Guidance on Article 102.31 The Commission will intervene if:

• the refusal relates to a product or service that is objectively necessary to compete effectively on a downstream market;
• the refusal is likely to lead to the elimination of effective competition on the downstream market;
• the refusal is likely to lead to consumer harm; and
• there is no objective justification for such refusal.32

The Commission refers to Microsoft I, Magill and Oscar Bronner in its Guidance on article 102 when explaining how ‘product or service that is objectively necessary’ should be interpreted. It also explains that when deciding whether a refusal leads to consumer harm, it will analyse whether the refusal would prevent the introduction of an ‘innovative product’ to the market or whether it would stifle follow-on innovation.33

Conclusion
The EU Courts’ case law and the Commission’s Guidance on article 102 set out the general parameters for assessing when compulsory licensing is required. While it is true that the precise legal standard may be difficult to apply in practice and continues to give rise to a number of questions, it is clear that in ‘specific circumstances’ EU antitrust law requires dominant companies to license their IPRs and, as a result, a case-by-case analysis is required. Future cases should shed additional light on the scope and application of compulsory licensing. However, given the Commission’s current preference for commitment decisions instead of prohibition decisions,44 it may take some time before clear guidance emerges.35

Vexatious litigation
The refusal to license IPRs to third parties has for a long time been the main focus of enforcement and debate in this area. The Commission’s recent decisions and investigations in the smartphone and pharmaceutical industries have shifted the focus somewhat onto potential abusive litigation, including injunctions and patent settlements by IP owners.

There remains very little precedent in the area of abusive litigation. The few available EU Court cases set the bar very high in terms of what the Commission would need to show to successfully establish that by litigating or threatening to litigate against an alleged infringer, the IP owner is abusing a dominant position.

In ITT Promedia, both the Commission and the GC stated that entering into litigation, which is ultimately the expression of the fundamental right of access to justice, could not in itself be considered an abuse of dominant position.36 However, initiating litigation would be abusive if the dominant firm brings an action which is ‘manifestly unfounded’ (ie, only to harass the opposite party); and the claim is brought with the aim of eliminating competition. The GC has specified that these two criteria should be interpreted and applied restrictively as they constitute an exception to the fundamental right of access to courts.

In Protégé International Ltd, the GC upheld this two-step test.37 Protégé alleged that Pernod Ricard had abused its dominant position in the Irish whiskey market by filing legal proceedings against Protégé in relation to the latter’s application for registration of the Wild Geese trademark. The GC rejected Protégé’s claim that initiating litigation was abusive. The Court emphasised that access to justice is a fundamental right and therefore it is only in wholly exceptional circumstances that the bringing of litigation could amount to an abuse of a dominant position. The Court stated that the cumulative conditions set in ITT Promedia were not met in this case given that Pernod Ricard’s trademark Wild Turkey contained the word ‘wild’ and that there thus existed a potential risk of confusion between the two brands. As a result, the GC found that initiating proceedings against the registration of Protégé’s trademark could be justified.

In practice, the successful application by the Commission of the above-mentioned criteria in establishing an abuse of dominance will be very challenging, particularly in relation to the ‘manifestly unfounded’ criterion. The Commission did not apply the ITT Promedia test in its recent Samsung commitment decision. As far as the Motorola decision is concerned, the Commission distinguished ITT Promedia on the basis that Motorola had committed to license its SEP on FRAND terms. The Commission also considered that the legal criteria set out in ITT Promedia were not necessary to substantiate a finding of abuse in the context of the seeking of injunctions. Rather, the Commission emphasised that in order to determine whether an undertaking has abused a dominant position, it is necessary to consider all relevant circumstances of the case.

Injunctions and the threat of injunctions in the context of SEPs
There is a tendency on the part of the Commission to view the area of SEPs as fundamentally different to other areas where the Commission has tackled compulsory licensing and abusive litigation, mainly because in the context of a standard setting body, the IP owner will generally have given a commitment up front to license any technology incorporated in a standard on FRAND terms.

While the Commission considers recourse to injunctions a legitimate remedy for patent infringements, such conduct may be abusive in the context of SEPs where the potential licensee is willing to negotiate on FRAND terms. Since injunctions generally seek to prohibit the sale of the competing product allegedly infringing the patent, seeking (or threatening to seek) injunctions against potential licensees willing to negotiate on FRAND terms may exclude potential competitors and lead to other harmful effects (eg, higher royalties than would otherwise be charged). The recent decisions in Motorola and Samsung provide some degree of legal clarity in those industries where standards and FRAND-encumbered SEPs play a role. In both cases, the Commission clarified that in the standardisation context, where the SEPs’ holders have committed to license their SEPs and do so on FRAND terms, it is anticompetitive to seek to exclude competitors from the market by seeking injunctions on the basis of
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SEP if the licensee is willing to take a licence on FRAND terms. In those circumstances, the seeking of injunctions may distort licensing negotiations and lead to unfair licensing terms, with a negative impact on consumer choice and prices. It should be preliminarily observed that Samsung was a commitment decision, as opposed to a prohibition decision imposed upon the finding of an infringement, and therefore its precedential value is more limited compared to that of the Motorola case. However, the Samsung decision confirmed the reasoning in Motorola and effectively implemented the ‘safe harbour’ concept established in that case.

Motorola

When the GPRS standard was first adopted, Motorola declared some of its patents essential and committed to license them on FRAND terms. Motorola subsequently sought and enforcement against Apple in Germany on the basis of one of its SEPs. The Commission found that this conduct amounted to an abuse of Motorola’s dominant position where Motorola had committed to license on FRAND terms and Apple had been a willing licensee (Apple had agreed to take a licence and be bound by a determination of the FRAND royalties by the relevant German court). In establishing Motorola’s dominant position, the Commission considered that it was indispensable for manufacturers of mobile devices to comply with the GPRS standard and that industry players were locked in to that standard. The Commission rejected Motorola’s argument that Apple had countervailing buyer power and held that the enforcement of the injunction was abusive and capable of anti-competitive effects. In particular, the injunction resulted in a temporary ban on Apple’s online sales of iPhones and iPads to consumers in Germany and forced Apple to enter into an onerous settlement whereby it had to give up its invalidity and non-infringement claims. According to the Commission, such settlement was contrary to a strong public interest requiring invalid and non-infringed patents to remain open to challenge in the courts.

This case clarifies that the GPRS standard-setting context and the provision of commitments to license SEPs on FRAND terms constitute ‘exceptional circumstances’ in which seeking to enforce an injunction may be held to be abusive under article 102. Furthermore, it suggests a ‘safe harbour’ for standard implementers who are willing to take a licence on FRAND terms; if they want to be safe from injunctions based on SEPs by the patent holder, they can demonstrate that they are a willing licensee by agreeing that a court or a mutually agreed arbitrator adjudicates the FRAND terms.

Samsung

The Samsung decision also concerned the seeking of preliminary and permanent injunctions against Apple before courts in Germany, France, Italy, the Netherlands and the UK, on the basis of several of Samsung’s UMTS SEPs. Samsung had committed to license these SEPs on FRAND terms within the framework of the European Telecommunications Standards Institute. In December 2012, the Commission informed Samsung of its preliminary view that it considered Apple to be a willing licensee and, on those grounds, Samsung's seeking of injunctions could infringe article 102 TFEU. The Commission subsequently accepted Samsung’s commitments to no longer seek injunctions in the EEA on the basis of a broad range of its SEPs that relate to technologies implemented in smartphones and tablets against licensees who signed up to a licensing framework to determine the terms of the licence. Broadly, the licensing framework provides for a negotiation period of 12 months and, if no agreement is reached, a determination by a court or an arbitrator of what constitutes FRAND terms. It should be preliminarily noted that the exceptional character of the Samsung decision has been confirmed by the Commission, which clarified that it should not necessarily be viewed as a template for future cases. In this commitment decision, the Commission effectively applied the legal standard developed in the context of compulsory licensing to the seeking of injunctions. While it referred to a line of leading compulsory licensing cases including Magill, IMS and Microsoft I, the Commission did not mention the case law on vexatious litigation or the ‘manifestly unfounded’ test developed inITT Promedia. In line with the Motorola decision, it considered that ‘exceptional circumstances’ existed because of the standard setting context and the commitment to license SEPs on FRAND terms. According to the Commission, there was no objective justification for the refusal based on the need to protect IPRs, commercial interests, public interest in the standardisation process or in terms of efficiencies that could benefit consumers.

Conclusions

The Commission considered that its finding of abuse through seeking injunctions fully respects the requirement that a fair balance is struck between the fundamental rights and freedoms at stake including the rights linked to IP and the right of access to a tribunal and the freedom to conduct a business, all of which are enshrined in the Charter or Fundamental Rights of the European Union. It also took the opportunity in Samsung to clarify that a ‘willing licensee’ is one willing to have FRAND terms determined by a court or arbitrators and to be bound by such determination. While the exact meaning of the notion will ultimately be determined on a case-by-case basis, the Commission has confirmed its view that a potential licensee cannot be considered ‘unwilling’ merely because it is contesting the validity of the patent it seeks to procure a licence for. On the other hand, the Commission did not provide further guidance as to what may constitute FRAND terms and considered national courts and arbitrators to be better placed to carry out that assessment.

Meanwhile, in the context of a preliminary reference made by the German regional court of Düsseldorf to the CJEU concerning questions on the meaning of ‘willing licensee’ in the context of SEPs, advocate general Wathelet opined that ‘a mere willingness on the part of the infringer to negotiate in a highly vague and non-binding fashion cannot, in any circumstances, be sufficient to limit the SEP-holder’s right to bring an action for a prohibitory injunction’. He further suggested that the seeking of injunctive relief will attract antitrust liability only if the implementer has shown itself to be ‘objectively ready, willing and able’ to conclude a licence agreement. Additionally, he emphasised that such conduct would ‘not constitute an abuse of a dominant position if the infringer’s conduct is purely tactical and/or dilatory and/or not serious’. Under the Commission’s test in Motorola and Samsung, seeking an injunction would be presumed to be abusive unless the SEP holder proves, as part of the objective justification assessment, that the implementer was unwilling. The legal standard envisaged by AG Wathelet would appear to differ and potentially to shift the burden of proving that an SEP holder did not honour a FRAND commitment, and therefore that the implementer is ‘willing’, on the competition authority or licensee. The CJEU is expected to deliver its ruling in spring 2015.

Settlement agreements

In the whole context of the limits of legitimate IP protection and related litigation, the Commission is continuing its surveillance and
investigations of patent settlements and more broadly arrangements involving ‘pay for delay’. The antitrust principles being developed in this area will be of general application, but given the apparent prevalence of settlement agreements in the pharmaceutical industry, the Commission has been focused on this sector. In contrast with compulsory licensing and vexatious litigation, which are generally based on unilateral conduct and therefore enforcement is based on article 102 TFEU, settlements are generally subject to article 101 TFEU as they involve agreements between the IP owner and the alleged infringing party.

The Commission’s inquiry into the pharmaceutical sector, which was launched in 2008 and was the subject of a report in 2009, revealed several practices that could lead to anti-competitive effects in the EU market, including patent settlement agreements between originator companies and generic companies. The Commission’s main concern relates to pay-for-delay patent settlements, whereby an originator company eliminates or delays entry of cheaper competing generics through significant payments or benefits to the generic company who agrees not to enter or to postpone entry. Although the Commission recognises that settlements can be a legitimate mechanism in the hands of companies to end patent-related disputes, the Commission appears increasingly sceptical that any settlement agreement that involves the transfer of value from an originating company to a generic company in return for delaying generic entry could comply with antitrust rules. Arguably, the Commission’s concerns in this area should relate only to those agreements that may potentially infringe competition rules by including restrictions outside the scope of the patent; for example, where entry is delayed beyond the expiry of IP protection or extends to products or processes not covered by IP protection.

However, this requires the Commission ultimately assessing the strength of the licensor’s technology, which may be better determined by a national court or a patent office. In the end, these views still have to be tested in the EU Courts, but in the meantime the Commission has reached a decision in three pay-for-delay cases while another investigation is ongoing.

On 19 June 2013, the Commission issued its first decision in a pay-for-delay case. The Commission imposed a fine of €93.8 million on Lundbeck and fines amounting to €52.2 million on several generic companies. Lundbeck was found to have paid generic producers significant lump sums not to enter the market, purchased generic producer’s stock for the sole purpose of destroying it, and offered generic producers guaranteed profits in its distribution agreements. The Commission concluded that the agreements between Lundbeck and its generic competitors infringed article 101 TFEU. It is important to note that the Commission considered this case different from other cases involving settlements of patent disputes where ‘generic companies are not simply paid off to stay out of the market’. Commission Vice-President Almunia explained in his statement that: ‘Lundbeck did not prevent market entry by successfully enforcing its patent rights; rather, it simply paid other companies so that they would not compete […] they shared the monopoly rents among themselves.’

On 10 December 2013, the Commission fined Johnson & Johnson and Novartis €16 million for delaying market entry of generic painkiller fentanyl. Similar to Lundbeck, this case also did not involve the settlement of a patent dispute as such. The Commission found that the parties had entered into a ‘co-promotion agreement’ under which Sandoz, a subsidiary of Novartis, agreed not to enter the market for fentanyl, where Johnson & Johnson’s protection had just expired, in exchange for monthly payments. According to the Commission, the agreement had the effect of prolonging Johnson & Johnson’s protection beyond its natural scope and delaying generic entry and the parties’ internal documents revealed that the parties wanted ‘to keep the high current price’ and that Novartis was willing to give Sandoz ‘a part of [the] cake’ in exchange for not entering the market.

In both cases, the Commission considered the agreement to restrict competition ‘by object’. As a result, the Commission was not required to examine the effects of the agreement on the market. Another important consequence is that as restrictions by object, these pay-for-delay agreements are unlikely to be able to benefit from article 101(3) TFEU, which provides for the possibility of justifying an agreement that would otherwise be anti-competitive on the basis that the positive effects outweigh the restrictive effects. The Commission’s position with regard to pay-for-delay agreements is arguably at odds with the United States’ Supreme Court’s findings in FTC v Actavis where the Supreme Court rejected the Federal Trade Commission’s position that such agreements should be considered per se illegal and held that a rule of reason should be applied.

Finally, in its most recent decision, the Commission fined Servier and five generic companies €427.7 million for delaying entry of cheaper versions of perindopril, a cardiovascular drug. In contrast to the previous two cases, Servier involves a series of settlements reached in the context of genuine patent disputes. It also involves Servier’s purchase of a ‘non-protected’ technology, which as a result was not available to generic companies and which the Commission found delayed their entry. According to the Commission, between 2005 and 2007, almost every time a generic company challenged Servier’s patents before the courts, Servier entered into a settlement agreement whereby the generic company would refrain from entering the market in exchange for a share of Servier’s profits. In addition to finding an infringement under article 101 TFEU, interestingly, the Commission also chose to rely on article 102 TFEU. It found that Servier had abused its dominant position, although pending publication of the decision, it is not entirely clear what conduct was considered abusive.

It now remains to be seen whether the Commission’s findings in both Lundbeck and Servier will be upheld on appeal.

Notes
1 Article 345 TFEU states: ‘The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.’
2 Article 36 TFEU acknowledges that derogations to the Treaty-enshrined principles of free movement of goods between EU member states may be justified on grounds of ‘the protection of industrial and commercial property’. Further, article 17 of the Charter of Fundamental Rights of the European Union provides that ‘Intellectual Property shall be protected’.
4 Guidelines on the application of article 101 of the TFEU to technology transfer agreements, OJ 2014/C 083/03, paragraph 7. See also, for example, Joined Cases 56/64 and 58/64 Consten and Grundig [1966] ECR 429.
5 Guidelines on the application of article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, 2014/C 89/03, paragraph 7.
6 In its Decision in C-70/10 Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) [2011] ECR I-11959, the ECJ acknowledged the need to ‘strike a fair balance between, on the one hand, the right to intellectual property, and, on the other, the
freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information’.

6 Berlin, 26 March 2015.

7 Case AT.39939 – Samsung-Enforcement of UMTS standard essential patents, 29 April 2014 (Samsung); and Case AT. 39985 Motorola – Enforcement of GPRS standard essential patents, 29 April 2014 (Motorola).

8 Guidance on the Commission’s enforcement priorities in applying article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ 2009 C45/7 (Guidance on article 102), paragraph 12.

9 See Guidance on article 102, paragraph 12.

10 Guidelines on the applicability of article 101 TFEU to horizontal co-operation agreements, OJ 2011 C11/1 (Horizontal Guidelines), paragraph 269. See also Illinois Tool Works Inc v Independent Ink, Inc, 547 US 28 (2006). Interestingly, this approach was advocated years before in Jefferson Parish Hospital District No. 2 v Hyde, 466 US 2 (1984) by four concurring Justices. These Justices supported the idea that it is a ‘common misconception’ to presume that ‘a patent or copyright, a high market share, or a unique product’ by itself demonstrates market power. As Justice O’Connor explained then, ‘[w]hile each of these three factors might help to give market power to a seller, it is also possible that a seller in these situations will have no market power: for example, a patent holder has no market power in any relevant sense if there are close substitutes for the patented product’ (cited in Ariel Katz, Making Sense of Nonsense: Intellectual Property, Antitrust, and Market Power, Arizona Law Review, Vol. 49:837, p849).

11 See, for example, Case COMP/M.6381 – Google/Motorola Mobility (2012), paragraph 59.


14 Antitrust Decisions on SEPs – Motorola Mobility and Samsung Electronics – Frequently asked questions, Brussels, 29 April 2014; and Standard-essential patents, Competition policy brief, June 2014.

15 Horizontal Guidelines, paragraph 269.

16 See paragraph 223.

17 It examined a number of other factors including the widespread adoption of the relevant standard; Samsung’s commitment to license its SEPs on FRAND terms encouraged network operators and device manufacturers to adopt the relevant standard; the heavy investments made by industry players in the relevant infrastructure thus locking them into the relevant technology; the lack of substitute technologies; and the absence of effective countervailing power by licensees. Samsung Decision, paragraphs 45–51.


21 See Magill, paragraphs 53–56.


24 See Ladbroke, paragraphs 130–131.

25 See IMS Health, paragraphs 34–35 citing Magill, paragraphs 49–50 and Volvo, paragraphs 8–9.

26 According to the Commission and the GC, Microsoft also abused its dominant position by tying its PC operating system to its Windows Media Player.


28 The court noted that ‘the following circumstances, in particular, must be considered to be exceptional: in the first place, the refusal related to a product or service indispensable to the exercise of a particular activity on a neighbouring market; in the second place, the refusal is of such a kind as to exclude any effective competition on that neighbouring market; in the third place, the refusal prevents the appearance of a new product for which there is potential consumer demand’, Microsoft I, paragraph 332.

29 See Microsoft I, paragraph 643.

30 See article 102, paragraphs 75–90.

31 See article 102, paragraphs 28–31.

32 See article 102, paragraph 87.

33 See, for instance, the Samsung Decision.


38 The GPRS standard, part of the GSM standard, is a key industry standard for mobile and wireless communications.
39 European Commission press release: Commission finds that Motorola Mobility infringed EU competition rules by misusing standard essential patents, 29 April 2014.
40 Standard-essential patents, Competition policy brief, June 2014.
41 Antitrust Decisions on SEPs – Motorola Mobility and Samsung Electronics – Frequently asked questions, Brussels, 29 April 2014.
42 UMTS stands for Universal Mobile Telecommunications Service. It is a key standard for mobile and wireless communications.
44 Opinion in Case 170/13 Huawei Technologies Co Ltd v ZTE Corp, ZTE Deutschland GmbH, para. 50.
45 Opinion in Case 170/13 Huawei Technologies Co Ltd v ZTE Corp, ZTE Deutschland GmbH, para. 103(1).
46 Opinion in Case 170/13 Huawei Technologies Co Ltd v ZTE Corp, ZTE Deutschland GmbH, para. 103(3).
47 The ruling is also likely to influence the Commission’s assessment of an antitrust complaint filed before it by ZTE against Vringo in relation to Vringo’s alleged refusal to license its essential technology on FRAND terms.
50 Such agreements are continuously monitored by the Commission since the closing of its sector inquiry and a yearly report is published on the outcome of this monitoring.
51 See 3rd Report on the Monitoring of Patent Settlements (January–December 2011), published on 25 July 2012, paragraph 3. The Report also notes that the Commission’s focus on such settlements did not impose a general decrease in unproblematic agreements but had the positive effect of restraining competitively harming settlements.
54 In 2011, the Commission opened an ex officio investigation in relation to an agreement between Cephalon, Inc and Teva Pharmaceutical Industries Ltd that may have delayed the entry of Modafinil generics in the market (see http://europa.eu/rapid/press-release_IP-11-511_en.htm).
58 Case AT.39685, 10/12/2013, Fentanyl. Not yet published.
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