



# The “Accommodation” of EU Competition Law to IPRs: Article 102

Steven Anderman Oxford 28 .06.14



# The “Accommodation’ Concept



- In *Actavis*, a recent US landmark “payment for delay” case, the Supreme Court, in a majority opinion, announced a major change of approach away from the “scope of the patent” doctrine when it stated that “patent-related settlement agreements can sometimes violate the antitrust laws.”
- The Court added that the courts should “accommodate patent and antitrust policies” in each particular case and made it clear that the rules of antitrust oversight applied to patent holders using a rule of reason analysis.
- This phrase is close to describing the EU position over the past few decades; a pattern of “accommodation” *within* a framework of restriction established by the competition rules.



# The Recent Case Law



- The EU pattern of “accommodation” in competition law has evolved in recent years, in response to a wide variety of commercial practices exploiting the exclusionary rights of their intellectual property.
- Refusals to licence blocking IPRs, *Magil, Microsoft*
- Extending the period of patent exclusivity by giving misleading information to obtain a Supplementary Protection Certificate *Astra Zeneca*;
- “Payments for delay” by firms with expiring patents on blockbuster drugs to generic competitors to delay their entry after the patent term has ended. *Lundbeck*
- Insistence by owners of Standard Essential Patents have insisted upon higher than FRAND payments despite a FRAND commitment. *Rambus, IPCo*
- Applying for injunctions to enforce Standard Essential Patents against willing licensees while under a FRAND obligation. *Huawei v ZTE*



# The Competition Law Results



- These cases make it clear that Article 102 TFEU can apply to prohibit the conduct of IP owners when they exercise their exclusionary powers in such a way as to threaten “effective competition” and consumer choice.
- Despite the understanding that the incentives of exclusivity for IPRs contribute to innovation and economic welfare, there is no complete immunity for the exercise of IPRs under the competition rules that is defined by the scope of the intellectual property right.
- Instead, IPRs once granted, are viewed as private property rights and as such the scope of their exercise is subject to restriction by public laws such as the competition rules. Such accommodation as there is takes place under and *within* the competition rules.



# The EU “Accommodation”



- Under the EU competition rules the “accommodation” has taken the form of a *partial immunity* for the exercise of exclusive rights in recognition of the contribution of the incentives of IPRs to innovation and economic welfare.
- The partial immunity is offered to “initial inventors” in acceptance of the view that the exclusivity rights of IPRs and their potential for supra competitive profits provide the incentives to inventors and innovation.
- However, this partial immunity is delimited by the overriding concern of the courts and the Commission to maintain “effective competition.”



# Effective Competition



- The EU courts view effective competition as a driving force to achieve consumer choice as well as consumer welfare.
- It is assumed that well functioning markets will provide goods and services in response to consumer choices (allocative efficiencies) and at the same time increase aggregate total output by promoting productive efficiencies.
- There is also an understanding today that effective competition acts as a spur to produce innovative efficiencies in addition to and alongside the initial inventor incentives of IPRs



# The EU Accommodation



- . As the European Commission expressed it “Rivalry between undertakings is an essential driver of economic efficiencies including dynamic efficiencies in the form of innovation. In its absence the dominant undertaking will lack adequate incentives to continue to create and pass on efficiency gains.”[ GP Para 30 ]



# The Partial Immunity



- The partial immunity offered by the courts when deciding individual cases under Article 102 consists of a reassurance to inventors that their “normal” use of IPRs will be viewed as legitimate competition, or “competition on the merits.”
- Even though a dominant firm has a “special responsibility” not to further weaken residual competition, the partial immunity applies to a wide range of commercial practices making use of exclusionary rights.
- Thus, an IP owner in a dominant position may legitimately exclude imitators from a market. It may enforce its rights against infringements and it has no obligation to licence its rights to imitators.





# The Limits to the Partial Immunity



- When, however, an IP owner's exclusionary powers are used as a means to threaten or impede "effective competition" without any objective justification they are no longer viewed by the courts as legitimate competition. They lose their immunity under Article 102
- For example, a refusal to licence an IPR which is an indispensable input to a *secondary* market. Or the use of a position of dominant market power by a patent owner to extract an unwarranted return have been held to be caught by the prohibition.
- In such cases, the application of the effective competition goal using the "competition on the merits" test results in determining the allowable scope of exercise of IPRs even where the IP owner has been adhering to the IP rules.



# The Commission's Approach



- Although the Courts use the competition on the merits criterion to decide Article 102 cases, the European Commission operationalizes its enforcement of the Courts' goals by reference to the criterion of consumer welfare and consumer harm.
- The Commission pursues its “consumer welfare” analysis in a particular market by determining whether exclusionary conduct will foreclose *as efficient* competitors and thereby cause consumer harm in the form of higher prices or lower output. In that sense, a finding of potential consumer harm is seen as a threat to effective competition as well as a loss of consumer welfare.



# The Commission's Approach



- The Commission has indicated that in embracing the consumer welfare approach, it also intends to take more of an “an effects based approach.” It intends to decide cases in a more economic way by looking more closely at the welfare effects of efficiencies and balancing these against the “consumer harm” of conduct by dominant firms in each case. *Guidance Paper* para. 54
- Moreover, it has maintained that in striking this balance, it will require convincing evidence of the higher standard of proof of a *likelihood* of anticompetitive effects. *GP* para.104
- However, it also acknowledges that it must enforce competition policy within the framework of the courts’ legal rules.



# The EU Court's Response



- The EU courts have begun to accept “consumer welfare” as a goal of EU competition law but have thus far proved unreceptive to a consumer welfare effects balancing approach under Article 102.
- For the courts, the crucial determinant of a threat to effective competition and consumer choice remains whether or not the commercial practice of the firm can be categorised as “competition on the merits,” or abusive conduct, i.e. into which of two legal categories does the conduct fall.





# The EU Court's Response



- The courts are reluctant to accept a method of determining anticompetitive conduct that opens the door to an economic balance of welfare effects.
- They accept that economic analysis should be used extensively in the measurement of market power.
- They also accept to some extent that economic thinking should play a role in determining the plausibility of the Commission's theory of anticompetitive harm. *Deutsche Telekom, Post Danmark, Tomra*
- However, they insist that the concept of abuse itself should be applied relying upon their rule based approach.



# The Court's Approach



- Thus, once firms are shown *to have broken the competition rules* by conduct that is not competition on the merits, the courts consider that it is enough to provide *plausible* evidence of a *potential threat* to effective competition.
- They will not require proof of concrete or even *likely* effects. A “potential” threat will be sufficient. *Telia Sonera, Astra Zeneca*
- Moreover, whilst the courts accept the possibility of efficiencies as objective justification, that test has been construed strictly so as not to allow an “unstructured” economic balance of efficiencies with anticompetitive effects. *Microsoft, Post Danmark*



# The Criticisms



- The application of the effective competition test by the courts and Commission has been criticised on the grounds of an inadequate recognition of the contribution of IPRs to innovation and economic welfare in the form of incentives to inventors.
- One charge is that there is inadequate recognition of the disincentives to innovation caused by the competition remedies of compulsory licence of IPRs.
- Another is that there is a failure to give adequate weight to the innovative efficiencies provided by IP protected inventions in the assessment of anticompetitive effect.
- Further, it has been argued that it would be more realistic on consumer welfare grounds to have a more economic assessment of anticompetitive effects in the interpretation of Article 102.



# The Economics in the Current EU Approach



- The courts are undoubtedly reluctant to incorporate economic analysis into the assessment of anticompetitive effects on economist terms.
- However, the criticisms fail to acknowledge the full extent of the economic thinking in the competition law approach as it applied to IPRs.
- In the first place, the criticism ignores or underplays the significance of the fact there is a balance struck *within* the system of IP law between the incentives offered to “initial inventor” rights and the rights of “follow on” and “cumulative” innovation that requires consideration.
- (i) The patent system, informational and transactional benefits





# The Blocking Effects of Exclusionary Rights



- (ii) The exceptions: experimental use, compulsory licences under patent laws for research, for blocking patents and for non-use of patents and rights to ‘reverse engineer’ computer programs. These are internal IP rules designed to create a balance between the incentives for first inventors and follow on inventors.
- The contribution of IPRs to “consumer welfare,” by stimulating innovative efficiencies, therefore, cannot be measured solely by the benefits of first inventor incentives, it must also take into account the potential consumer harms caused by practices such as “blocking” patents, unwarranted higher prices and the enforcement of unused patented inventions which are used to prevent follow on and cumulative innovation.



# The Innovation Balance



- In the recent cases, the competition authority and courts have found themselves in the position of attempting to ensure that the exclusionary rights provided by the IP laws are not used to obstruct or delay follow on innovation or lead to unwarranted higher prices for consumers. The Court and Commission's concern with protecting the driving force of effective competition provided by as efficient *competitors* in certain cases has extended to protecting follow on *innovators*.
- E.g. *Microsoft*, *Astra Zeneca*, the FRAND cases



# The Competition Cases and Innovative Efficiencies



- Insofar as that is the case, the enforcement of the competition rules is arguably making a contribution to economic welfare and dynamic or innovative efficiencies as well as upholding legal rules.
- As long as it continues to be difficult to prove empirically and forensically that restraints on first inventor rights have a greater harmful effect on consumer welfare than restraints on follow on innovation, it will be difficult to succeed with the argument that the Commission and Courts rules in this sphere of enforcement are inappropriate.



# The Courts and a More Economic Approach



- More generally, it is true that the EU courts' reluctance to engage in the exercise of balancing economic welfare effects stems from a wariness of the forensic problems of evaluating and weighing conflicting economic models offering evidence of probable welfare effects in a specialist area such as competition law.
- Some evidence for this is offered by the way the General Court has chosen to limit its review on “matters of assessment of economic and technical issues” and defer to the “margin of appreciation” or “margin of discretion” of the Commission on such issues. It prefers to restrict its powers of full review to “matters of fact.”



# Proving Efficiencies



- Yet even here the appropriate role for economic analysis in the enforcement of Article 102 is not altogether clear.
- Economic analysis is based on economic models which in turn are based on limiting assumptions and this weakens their claim to be “proof” in a legal sense.
- Moreover, the weighing of the effects of efficiencies in a balance of welfare effects is difficult for a court. Often it is possible to identify types of efficiencies but much more difficult to measure them.
- While it is possible to talk about economic welfare or consumer welfare effects in theory at an economy wide level, it is far more difficult to translate welfare effects into measurable factors into an appropriate methodology for individual cases.



# Proving Efficiencies



- In *The Antitrust Paradox*, Robert Bork famously analysed consumer welfare and discussed balancing welfare effects but his analysis of welfare effects relied more on welfare theory at the economy wide level rather than empirical measurement.
- His work was essentially at political economic rather than a proposed methodology for deciding individual cases.
- When Bork became a judge, he warned that economic analysis should not be taken so far. He thought that measurement of efficiencies for all practical purposes was “impossible.” He was not confident that judges would be capable of weighing economic evidence in the context of applying the rule of reason. As he put it, weighing effects in any direct sense will usually be beyond judicial capabilities” and is not needed.



# A Higher Standard of Proof



- Furthermore, it is worth noting that the standard of proof of likely anticompetitive effects is a high standard for a competition authority in the position of the European Commission and with its limited resources of specialist economists.
- That standard of proof is very close to if not identical to the standard of proof for damages for private parties in individual enforcement actions. It has long been used in the US antitrust cases when applying the rule of reason test. However, in the US, private enforcement is viewed as a major factor in the enforcement of antitrust laws along with the states and federal competition authorities.
- It is not at all clear why such a strict test should be grafted on to system such as the EU that relies almost entirely on public enforcement and has limited resources of economists.



# The Commission's Discovery



- The Commission itself perhaps seems to have recently discovered the difficulties accompanying the adoption of a welfare effects balancing test and a higher standard of proof of anticompetitive harm. It has observed the vulnerability of their work to the counter arguments of defence economists.
- The Commission continues to have the opportunity to argue its anticompetitive cases pragmatically. In the case of Article 102, as long as the Commission meets the Court's standard of proof of plausible potential effects, it will not be held to a higher standard of proof by the courts.
- Type A vs Type B errors