THE INTELLECTUAL PROPERTY AND ANTITRUST REVIEW

Third Edition

Editor
Thomas Vinje

THE LAWREVIEWS

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THIRD EDITION

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PREFACE

Intellectual property is taking a more and more central position in the global economy, and this is true not only in highly developed economies, but also in emerging ones. China and India, to take just two examples, are moving rapidly up the value chain and now have world-class technology companies for which intellectual property protection is crucial.

As the significance of intellectual property grows, so too does the relationship between intellectual property and antitrust law. Antitrust law constrains the exercise of intellectual property rights in certain circumstances, and both owners and users of intellectual property rights need to know how the two bodies of law interact and where antitrust draws lines for intellectual property. Intellectual property practitioners need to look beyond intellectual property laws themselves to understand the antitrust limits on the free exercise of rights.

The task of this book is, with respect to key jurisdictions globally, to provide an annual concrete and practical overview of developments on the relationship between antitrust and intellectual property. This third edition provides an update on recent developments, as well as an overview of the overall existing lay of the land regarding the relationship between the two bodies of law.

Key topics covered in this and future editions include the constraints imposed by antitrust on licensing, the circumstances under which a refusal to license intellectual property rights can be unlawful, the imposition of antitrust obligations on owners of standard-essential patents, the application of antitrust law to cross-border e-commerce, the growing importance of intellectual property issues in merger cases and the intense disputes regarding the application of antitrust law to patent settlements in the pharmaceutical industry.

As intellectual property continues to gain importance in the world economy, and as the number, resources and sophistication of antitrust authorities grows across the globe, new battles will be fought over the circumstances in which antitrust constrains intellectual property. Existing differences in the application of antitrust to intellectual property – already significant, and perhaps even greater than in intellectual property laws themselves – may grow, perhaps especially as more net intellectual property-consuming countries devote resources to antitrust enforcement. Future editions of this book will analyse these developments, and we hope the reader will find this to be a useful compilation and oft-consulted guide.

Finally, I would like to thank Ashwin van Rooijen and Axelle D'heygere for their important contributions to this third edition of *The Intellectual Property and Antitrust Review*.

Thomas Vinje
Clifford Chance LLP
Brussels
June 2018

Chapter 5

EUROPEAN UNION

Thomas Vinje[1]

I INTRODUCTION

According to the European Commission (EC), '[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 . . . . Nor does it imply that there is an inherent conflict between intellectual property rights and the [EU] competition rules. Indeed, both bodies of law share the same basic objective of promoting consumer welfare and efficient allocation of resources.'[2] This reflects the current global consensus that the overall goals of antitrust rules and intellectual property rights (IPRs) are consistent and that the two bodies of law are generally complementary. Nevertheless, circumstances do arise where exercises of IPRs conflict with antitrust laws and antitrust is deemed to prevail.

The EU competition rules on anticompetitive agreements, abuse of dominant position and merger control may be relevant to conduct involving IPRs. The most fundamental EU rules on competition are found in the Treaty on the Functioning of the European Union (TFEU), but secondary EU legislation and EC guidelines are also highly relevant.

Article 101 TFEU prohibits agreements and concerted practices that 'have as their object or effect the prevention, restriction or distortion of competition'.[3] Several pieces of EU secondary legislation and EC guidelines must be taken into account in applying Article 101 TFEU to IPR-related agreements. They include:

a Commission Regulation (EU) No. 316/2014 on the application of Article 101(3) of the TFEU to categories of technology transfer agreements (the Technology Transfer Block Exemption Regulation or TTBER);

b the Technology Transfer Guidelines;

c Commission Regulation (EU) No. 1217/2010 on the application of Article 101(3) of the TFEU to certain categories of research and development agreements (the R&D Block Exemption Regulation); and

d EC Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements, 2011 (the Horizontal Co-operation Guidelines).

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1 Thomas Vinje is a partner at Clifford Chance LLP. Special thanks go to Ashwin van Rooijen and Axelle D'heygere for their valuable assistance in preparing this chapter.

2 EC Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements 2014; paragraph 7.

3 Article 101 TFEU.

Article 102 TFEU prohibits the abuse of a dominant position. The EC's Guidance on its enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct by dominant undertakings (the Guidance in applying Article 102 TFEU) addresses conduct involving IPRs, in particular in relation to refusals to license IPRs.

The basic regulation on EU merger control is Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (the EU Merger Regulation). Under the EU Merger Regulation, the acquisition of IPRs may constitute a concentration triggering EU merger control. Full-function joint ventures to which intellectual property (and potentially other) assets are contributed may similarly require notification pursuant to the EU Merger Regulation. To the extent the EC identifies competition concerns regarding a concentration, the parties may seek to offer relevant remedies, including divestiture or licensing of IPRs.

II YEAR IN REVIEW

i Decision against Google

On 27 June 2017, the EC found that Google breached Article 102 TFEU in the market for general internet searches across the EEA by providing an illegal advantage to its own comparison shopping service in its search results, and fined Google €2.42 billion.[4] Google was found to have abused its dominant position by placing its own comparison shopping service in prominent places within its search results, while demoting rival services to less visible positions. In the press release announcing its findings, the EC described its decision as a precedent that 'establishes a framework for the assessment of the legality of this type of conduct'.[5] Google and its parent company, Alphabet, lodged an appeal against the decision before the European General Court (GC) on 11 September 2017.

The decision is significant as the fine imposed by the EC is the highest it has ever levied in antitrust history. The EC is conducting two further investigations into Google's practices and has come to the preliminary conclusion that Google abused its dominant position in both cases.[6] Its final decisions are currently pending. The EC is also investigating whether Google's copying (i.e., 'scraping') of original content (such as user reviews) from competing services (e.g., Yelp or TripAdvisor) can amount to abusive conduct under Article 102 TFEU.

ii Standard-essential patents

In recent years, the EC has looked into several competition cases involving alleged abuses of dominant positions by holders of standard-essential patents (SEPs). Originating from the 'patent wars', the EC's decisions in the *Motorola* and *Samsung* cases[7] were major steps towards bringing legal certainty to SEP owners and implementers. To date, the Court of Justice of the European Union (CJEU) ruling in *Huawei Technologies Co Ltd v. ZTE Corp*[8] is the only ruling by the CJEU dealing directly with the application of Article 102 TFEU to the exercise of SEPs, as described in Section IV. While recourse to injunctions is generally considered

4 Case AT.39740 *Google Search (Shopping)* [2017].

5 EC press release available at: http://europa.eu/rapid/press-release_STATEMENT-17-1806_en.htm.

6 Case AT. 40411 (*Adsense*) and Case AT.40099 (*Android*).

7 Case COMP/C-3/39.939 *Samsung Electronics – Enforcement of UMTS standard essential patents* and case AT.39985 *Motorola – Enforcement of GPRS standard essential patents*.

8 Case C-170/13 *Huawei Technologies* [2015].

to be a legitimate remedy for patent infringements, seeking injunctions for infringement of SEPs may be considered contrary to Article 102 TFEU where a potential licensee is willing to negotiate a licence on fair, reasonable and non-discriminatory (FRAND) terms.

On 29 November 2017, the EC published a Communication entitled 'Setting out the EU approach to Standard Essential Patents'.[9] The Communication attempts to tackle three main problems regarding SEPs: (1) opaque information about SEP exposure; (2) unclear valuation of the patented technologies reading on standards and the definition of FRAND; and (3) risks of uncertainty in the enforcement framework post-*Huawei*. In order to increase transparency on SEP exposure, the EC recommends that the quality and accessibility of information on standard-developing organisations' databases should be improved and that a new information tool should be developed and used during licensing negotiations. To manage diverging interpretations of FRAND, the EC sets out key signposts on the FRAND concept based on public consultation, an analysis of best practices, studies and national case law. The EC also provides guidance to clarify the circumstances in which a licensee can be considered willing to enter into a licence on FRAND terms post-*Huawei*, as described in Section IV.

iii E-commerce sector inquiry

Cross-border access to digital goods and services for consumers and businesses constitutes another area in which the intersection of competition law and IPRs is likely to trigger debate. On 6 May 2015, the EC adopted its Digital Single Market Strategy. In conjunction with this strategy, DG Competition launched its e-commerce sector inquiry, which aims to investigate to what extent measures restricting cross-border e-commerce are prevalent in the industry.

In particular, the EC has identified the practice of geo-blocking, defined by the EC as 'commercial practices whereby online providers prevent users from accessing and purchasing consumer goods/digital content services offered on their website based on the location of the user in a Member State different from that of the provider',[10] as a potential barrier to trade and as a potential violation of Article 101 TFEU.[11] Online providers may sometimes rely on IPRs to restrict cross-border sales, and hence IPRs are relevant to the e-commerce sector inquiry.

On 10 May 2017, the EC published its final report to the Council and the European Parliament setting out the main findings and conclusions from the sector inquiry in relation to the development of e-commerce for consumer goods and e-commerce in digital content.[12] The report confirms that the growth of e-commerce has resulted in the emergence and evolution of certain business practices that raise competition concerns.

In particular, in relation to e-commerce in various consumer goods, manufacturers are increasingly using selective distribution systems and contractual restrictions to better control product distribution. On 6 December 2017, the CJEU delivered its judgment in the case of *Coty Germany GmbH v. Parfumerie Akzente GmbH*.[13] Coty, a supplier of luxury

9 'Setting out the EU approach to Standard Essential Patents' is available at https://ec.europa.eu/docsroom/documents/26583.

10 Issues paper presenting initial findings of the e-commerce sector inquiry conducted by the Directorate-General for Competition; paragraph 32.

11 Issues paper presenting initial findings of the e-commerce sector inquiry conducted by the Directorate-General for Competition; paragraph 49.

12 EC press release available at: http://europa.eu/rapid/press-release_IP-17-1261_en.htm.

13 Case C-230/16 *Coty Germany GmbH v. Parfumerie Akzente GmbH* [2017].

perfumes in Germany, had imposed restrictions on its retailers that prevented them from selling Coty's products online, through third-party platforms such as Amazon and eBay. The Higher Regional Court of Frankfurt am Main asked the CJEU to clarify whether such an agreement contravened Article 101. The CJEU ruled that selective distribution systems that prohibit authorised distributors from using third-party platforms to sell luxury goods online do not contravene Article 101 if: (1) they have the objective of preserving the luxury image of such goods; (2) retailers are selected on the basis of objective criteria of a qualitative nature that are determined uniformly for all potential resellers and applied in a non-discriminatory manner; and (3) the criteria established do not go beyond what is necessary to preserve the luxury image of the product sold.

On 4 April 2018, the EC published a Competition Policy Brief[14] that considers the impact of *Coty* on marketplace bans. In this paper, the EC states that *Coty* provides more clarity and legal certainty to market participants by confirming previous case law and establishing a clear legal framework for assessing marketplace bans under Article 101.

In practice, the question of whether a marketplace restriction or ban contravenes Article 101 will only arise where the market share held by a supplier exceeds 30 per cent of the relevant market in which it sells the relevant goods or the market share held by a distributor exceeds 30 per cent of the relevant market in which it purchases such goods. Where neither of these market shares exceed 30 per cent, marketplace bans are block-exempted under Article 3 of the Commission Regulation (EU) No. 330/2010 (the Vertical Restraints Block Exemption (VRBE)).

Other contractual restrictions that might raise competition concerns, according to the Commission's final report, relate to resale pricing restrictions, restrictions on selling on online marketplaces, and territorial restrictions and geo-blocking. The report contends that geo-blocking is widespread throughout the EU and is implemented by way of restrictive agreements between suppliers and distributors rather than as a result of unilateral business decisions not to sell abroad.

In relation to e-commerce in digital content, the EC has found that the availability of licences from the holders of copyright in content is essential for digital content providers and a key determinant of competition. Certain licensing practices, including bundling, geo-blocking, long duration, and payment structures have been identified as making it more difficult for new online business models and services to emerge. Such restrictive business practices may infringe EU competition rules.

The EC does not consider that the findings of the sector inquiry necessitate an early review of the VBRE on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices, which expires in 2022. The EC intends to use the findings to target enforcement of EU competition law at the most widespread potentially infringing business practices that have emerged or evolved as a result of the growth of e-commerce.

iv Restrictions affecting cross-border provision of pay TV services

In July 2015, the EC issued a statement of objections (SO) to Sky UK and six Hollywood studios alleging violation of the EU competition rules in relation to each studio's licensing agreement with Sky UK for exhibition of its audiovisual content on Sky's pay-TV services. US film studios typically license audiovisual content, such as films, to a single pay-TV

14 'EU competition rules and marketplace bans: Where do we stand after the Coty judgment?' is available at: http://ec.europa.eu/competition/publications/cpb/2018/kdak18001enn.pdf.

broadcaster in each Member State. In the SO, the EC took the preliminary view that each of the six studios bilaterally agreed with Sky UK to contractual restrictions that prevent Sky UK from allowing EU consumers located in other Member States to access pay-TV series via satellite or online. To address the EC's concerns, Paramount, one of the six Hollywood studios, proposed the following commitments in April 2016: (1) when licensing its film output for pay-TV to a broadcaster in the EEA, Paramount will not enforce passive sales restrictions in existing or future pay-TV licence agreements; and (2) Paramount will not seek to bring an action before a court or tribunal for the violation of this clause in an existing licensing agreement.[15]

On 26 July 2016, the EC published its decision accepting Paramount Pictures' proposed commitments, which will last for five years.[16] The decision confirmed the EC's view that these clauses infringe EU competition law by prohibiting cross-border passive sales (i.e., the sales of services from one Member State into another in response to demands from customers not solicited by the seller). According to the EC, the restrictions have the effect of granting 'absolute territorial exclusivity' to Sky UK and eliminating cross-border competition between pay-TV broadcasters. Groupe Canal+, a French pay-TV broadcaster that entered into a licence agreement with Paramount, has appealed the decision before the GC.[17] The judgment of the GC is still pending.

III LICENSING AND ANTITRUST

i Anticompetitive restraints

Article 101(1) TFEU prohibits anticompetitive restraints in agreements between undertakings – including in licensing agreements – unless they are justified under Article 101(3) TFEU. Depending on the relationship between the parties and subject matter of the agreement, licensing agreements may be governed by a variety of EU regulations and EC guidelines in addition to the TFEU itself. These include the EC's Horizontal Cooperation Guidelines, the TTBER and the related TTBER Guidelines, the R&D Block Exemption Regulation, the Vertical Block Exemption Regulation and related Guidelines, and the Ec's Subcontracting Notice. Each of these instruments applies the principles contained in Article 101 TFEU to a particular type of agreement.

Many restraints qualified as anticompetitive by these instruments – such as restrictions on a buyer's freedom to determine its own resale price, or provisions restricting to whom or into which EEA territory the buyer may sell under a vertical agreement – are not specific (but apply equally) to agreements containing licences to IPRs. However, EU competition law also provides for rules on restraints specific to agreements dealing with IPRs, such as technology transfer agreements, research and development agreements, and specialisation agreements. Compared to vertical or horizontal agreements that are not intellectual property agreements, the above instruments generally provide IPR holders with additional leeway to impose certain restraints on licensees to preserve incentives to innovate. At the same time, restrictions on a licensee's ability independently to engage in research and development are generally considered anticompetitive.

15 EC press release available at http://europa.eu/rapid/press-release_IP-16-2645_en.htm.

16 EC press release available at http://europa.eu/rapid/press-release_IP-16-2645_en.htm.

17 Details of the appeal were published in the Official Journal on 6 February 2017 and are available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2017:038:FULL&from=EN.

It is beyond the scope of this chapter to provide an exhaustive overview of which restraints are and which are not considered anticompetitive in licence agreements, and most of the relevant rules have not changed in recent years. However, a number of rules specific to licensing agreements are worth highlighting here. First, we discuss territorial restrictions in copyright licences. Second, we discuss two changes introduced by the 2014 adoption of a new TTBER – both of which limit the scope of restraints that licensors could previously impose on licensees under the old TTBER.

Territorial restrictions and exhaustion

Some IPRs, such as copyright, are inherently national in scope as – notwithstanding a substantial degree of uniformity resulting from international treaties and harmonisation through EU Directives – they remain nationally defined rights. Right holders are, therefore, normally permitted to license their relevant rights on a national basis, and to prohibit licensees from marketing the licensed subject matter outside the licensed territory. However, the CJEU has adopted a strict approach to any restraints going beyond limitations based purely on the geographical scope of the underlying IPR. Thus, in its *Premier League* judgment, the CJEU ruled on a preliminary reference from a UK court in relation (*inter alia*) to contractual restrictions contained in licences granted by the United Kingdom's Premier League, which holds copyrights in broadcasts of relevant UK football matches. The Premier League had not only territorially limited the scope of its licences, but had also prohibited its licensees from selling decoder cards – which could be used to access the licensee's broadcasts from anywhere in the EEA – outside the licensed territory. The CJEU held that the latter restriction on sales of decoder cards amounted to a restriction by object pursuant to Article 101 TFEU.

The exhaustion doctrine limits right holders' ability to control circulation of a good incorporating their intellectual property after the first sale of each copy within the EEA: once a product incorporating the right holder's IPR has first been sold in the EEA with the right holder's consent, the right to authorise distribution of that product is exhausted, such that the right holder may not prevent the subsequent resale of that product into another Member State (parallel import). Insofar as copyright law is concerned, the exhaustion doctrine was long believed to apply only to physical products incorporating copyrights, such as books and DVDs. In *Oracle/UsedSoft*, however, the CJEU extended the scope of the exhaustion doctrine to cover software distributed in digital form.

Grant-back obligations

Unlike the old TTBER, the new TTBER no longer exempts exclusive 'grant-back' obligations, pursuant to which a licensee is required to license or grant back to the licensor on an exclusive basis any technology derived from or improving on that of the licensor. Whereas the old regime exempted exclusive grant-back obligations in limited circumstances, namely where they pertained only to 'non-severable' technology, or technology that necessarily infringes on the licensor's IPRs, exclusive grant-back obligations are now excluded entirely from the scope of the TTBER. While exclusive grant-back obligations are not considered hardcore restrictions, their compatibility with competition law will need to be assessed on an individual basis. Licensors may alternatively negotiate a grant-back provision on a non-exclusive basis.

No-challenge clauses

The new TTBER furthermore provides for a stricter regime on clauses limiting the licensee's ability to challenge validity of the licensor's IPRs. The old TTBER did not exempt clauses

prohibiting validity challenges, but did exempt clauses providing for termination of the licence agreement upon the licensee challenging validity. The new TTBER no longer exempts such 'termination on challenge' clauses unless the licence agreement is an exclusive one; thus, clauses limiting a non-exclusive licensee's ability to challenge the validity of the licensor's IPRs will need to be assessed on a case-by-case basis.

ii Refusals to license

The law on refusals to license IPRs by dominant companies has been established in a series of judgments by the CJEU, and most recently, the GC. In short, refusals to license will be deemed lawful in most circumstances. However, a refusal to license may be found to constitute an abuse of a dominant position under Article 102 TFEU in certain 'exceptional' circumstances – in particular where, without an objective justification, a dominant firm refuses a licence relating to an IPR that proves indispensable for rivals seeking to innovate or introduce new products such that the refusal risks eliminating effective competition in the same or an adjacent market. The case law applies both to outright refusals to license and to constructive refusals to license (i.e., licensing on terms that are prohibitive for rivals effectively to gain access to the licensed subject matter).

In *Microsoft*, the GC upheld a 2004 EC decision finding that Microsoft had abusively refused to license to rival developers of workgroup (or network) server operating systems the interoperability information required for such operating systems to interoperate (or communicate) with Microsoft's dominant Windows client PC operating system found on more than 90 per cent of PCs. Microsoft claimed that its interoperability information was protected by IPRs. The GC (and the EC) did not assess this claim but carried out their analysis on the basis that Microsoft's IPRs were presumptively valid and that unlicensed implementations of the interoperability information would infringe those rights.

Evidence assessed by the EC and the GC demonstrated that Windows' interoperability information was indispensable for rival developers of workgroup server operating systems to compete with Microsoft, and that there were no viable alternatives for this information. Upholding the EC's decision, the GC found that denying competing workgroup server operating system developers access to the interoperability information risked eliminating effective competition in the workgroup server operating system market, and indeed some rivals had already been marginalised. Moreover, Microsoft's refusal to license thereby prevented the emergence of innovative competing products that these rivals sought to introduce.

The GC rejected Microsoft's claim that its refusal to license was objectively justified. First, the GC found that it was industry practice for companies not in a dominant position to license the type of interoperability information that Microsoft refused to license. Second, the GC found that Microsoft itself had in fact licensed its own interoperability information before it came to occupy a dominant position.

Nonetheless, the GC's judgment appeared to leave some leeway for dominant firms to demonstrate that a refusal to license is objectively justified, in particular by showing that imposing a duty to license would undermine the firm's incentives to innovate. It is not entirely clear what type of evidence the dominant firm would need to put forward in this regard. The GC dismissed Microsoft's (mostly unsubstantiated) argument that its incentives to innovate would be diminished merely because the subject matter to which rivals sought access was protected by IPRs.

iii Unfair and discriminatory licensing

Certain licensing terms imposed by dominant firms may be deemed unfair or discriminatory and as such could be held abusive under Article 102(a) TFEU. A number of cases have in particular dealt with alleged excessive pricing by dominant right holders. Nonetheless, excessive pricing cases remain relatively rare due in part to the difficulty of establishing an appropriate counterfactual royalty in a but-for competitive market. *Lucazeau* is a 1989 CJEU judgment finding that a French copyright collecting society charged excessive licensing fees compared to the fees charged by collecting societies in other Member States. More recently, the EC pursued Standard & Poor's for alleged excessive royalties for securities identification numbers; however, in that case, the EC also preliminarily rejected Standard & Poor's claims of copyright protection of these numbers. In 2007, the EC opened an investigation into a complaint by rivals alleging that Qualcomm charged excessive royalty fees for a portfolio of patents, including SEPs, pertaining to telecommunications technology and standards. The EC ultimately closed its investigation without a finding of infringement after the rivals settled with Qualcomm in parallel US patent litigation proceedings. In the pharmaceutical industry, several national competition authorities have applied national and EU competition law to alleged excessive pricing conduct by originator pharmaceutical companies, in particular following significant price increases. The EC, however, has not yet pursued similar claims.

Discriminatory licensing practices may be found where a dominant licensor unjustifiably applies different terms to equal circumstances. Thus, for example, a dominant trademark licensor was found to have committed an abuse by charging licensees a higher licensing fee when they sourced their trademark-bearing products from a rival of the dominant company rather than from the dominant company itself. However, the reverse also applies: it may be abusive for a dominant right holder to apply equal terms to different circumstances. For example, charging royalties on all of a licensee's products regardless of whether or not the products actually implement the dominant licensor's IPRs can constitute an abuse.

iv Patent pooling

A patent pool is a combination of complementary patents from multiple right holders licensed to third parties. Pooling patents and making them available under a single licence can significantly reduce transaction costs, while the licence fee for the pool may well be lower than what a licensee would cumulatively pay by having to negotiate licences with each of the right holders having contributed to the pool. Patent pools are governed principally by the TTBER and accompanying guidelines. Unlike the old TTBER and guidelines, the guidelines accompanying the new TTBER provide for an explicit safe harbour exempting certain patent pool arrangements from antitrust scrutiny irrespective of the parties' market shares. The safe harbour applies to patent pools that, *inter alia*, pool only essential technologies and ensure that technologies that later prove non-essential are removed from the pool. Essential technologies are technologies that are necessary (as opposed to merely optional) to implement the technology to which the pool pertains, and for which no substitutes exist inside the pool. Furthermore, the patent pooling arrangement must provide for FRAND licensing terms, leave contributors free to license their technologies independently and preserve their freedom to develop competing technologies, leave parties free to challenge validity and infringement, and safeguard against the exchange of strategic information between contributors. Patent pools that do not meet the criteria of the safe harbour must be assessed individually based on the factors set out in the TTBER Guidelines.

v Software licensing

Software may be protected by different IPRs, including patents and trade secret rights; however, the most common form of intellectual property protection for software is copyright law, and many software licences, therefore, take the form of a copyright licence. While copyright laws within the EU are principally governed by national legislation, the EU Software Directive has harmonised many aspects of copyright law as applied to software across Member States. Among other things, the Software Directive prescribes mandatory copyright exceptions pursuant to which licensees can reverse engineer (through 'decompilation') a computer program in the interest of establishing interoperability. These exceptions were adopted in large part because of competition concerns that could arise were right holders able to prevent rivals from interoperating with their computer programs or from interoperating with other programs in the same way as the reverse-engineered program does (see Section III.ii).

Software licences between undertakings may be subject to Article 101 TFEU, in which case the above-mentioned rules on anticompetitive restraints would generally apply. The TTBER covers a subset of software licences, namely those agreements pursuant to which software is licensed to enable the licensee to produce goods or services, including through incorporation of the software into contract products.[18] The TTBER exempts covered licence agreements from antitrust scrutiny provided that (1) the parties' market shares do not exceed the market share thresholds in the TTBER and (2) the agreement does not contain any hardcore restrictions as defined in the TTBER.

The vast majority of software licences, however – including notably distribution licences and end-user licence agreements in contexts other than production – are not covered by the TTBER. Indeed, the TTBER does not apply to agreements 'the purpose of which is the mere reproduction and distribution of software copyright protected products as such agreements do not concern the licensing of a technology to produce but are more akin to distribution agreements'.[19] Such agreements are governed instead by the Vertical Block Exemption Regulation and the accompanying Guidelines on Vertical Restraints.

vi Trademark licensing

Competition issues in trademark licensing arise frequently because of the natural desire of licensors to control the exploitation of their marks by third parties and ensure such use does not conflict with the licensor's own business. Thus, trademark licence terms must be carefully drafted so as not to risk contravening Article 101 TFEU.

The following provisions are examples of terms that may occur in trademark licences and that may raise competition concerns in the EEA:

a restricting a licensee who is licensed for only part of the EEA from supplying in response to unsolicited orders from EEA territories that are outside the licence territory, as opposed to merely restricting active marketing elsewhere in the EEA. While restrictions on passive sales are unlawful whether or not the agreement authorises use of a trademark, passive sales restrictions are particularly likely to be found in agreements containing trademark licences;

18 Technology Transfer Guidelines: paragraph 63.

19 See recital 7 to the TTBER.

b absolute restrictions on the licensee's ability to challenge the validity of the licensed rights. In the case of an exclusive licence only, the risk can be reduced by changing a no-challenge restriction to a right for the licensor to terminate if a challenge is made; and

c where a licensor and a licensee are competitors in the relevant market, information-sharing provisions that may be included in trademark licences in the context of the licensor's exercise of quality control. This will require detailed analysis. Completely separating the team that manages the licence relationship from the licensor's own product team may be a partial solution.

Coexistence agreements, which could be considered as a type of licensing agreement, are agreements between unrelated owners of similar brands regulating each party's use and registration of its marks in a manner that the parties consider will avoid confusion. Although coexistence agreements are relatively common, early case law on enforceability of such agreements[20] indicates there could be concerns if it is not likely that either party could have effectively enforced its rights against the other, or if the agreed restrictions far outweigh the scope of the parties' rights, such that the restrictions imposed are not balanced out by the benefits of avoiding conflict and confusion.

Coexistence agreements can often be without limit of time. Accordingly, restrictions on challenging rights require careful consideration, especially with respect to challenges to rights based on non-use. Additionally, consider building in procedures for periodical review of the scope of the restrictions, in light of changing market circumstances.

IV STANDARD-ESSENTIAL PATENTS

An SEP is a patent that has been declared essential for implementing a technical standard adopted by a standard-setting organisation (SSO). SSOs generally require members in good faith to disclose patents that are or may be essential to the standard under development. To the extent a member has disclosed ownership of SEPs, the SSO will generally request the patent holder to commit to license these SEPs on FRAND terms before adopting a standard reading on such SEPs. The EC's Horizontal Guidelines explain FRAND commitments as a means of ensuring that IPR holders do not hinder the implementation of a standard 'by refusing to license or by requesting unfair or unreasonable fees (in other words excessive fees) after the industry has been locked-in to the standard or by charging discriminatory royalty fees'.[21] In other words, the FRAND commitment aims to offset potential anticompetitive effects of standardisation agreements, which are the result of a decision-making process among competitors to choose one technology over others. This type of agreement between competitors would generally not be tolerated under EU competition law, but the EC guidance recognises an exception where, among other criteria, FRAND commitments are required for essential IPRs to be incorporated into the standard.[22]

20 Case 35/83 *BAT v. European Commission* (Toltecs/Dorcet) [1985] ECR 363.

21 Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11/1, paragraph 287.

22 Id., Section 7.

Moreover, it is commonly accepted that standards are beneficial for the economy, facilitating interoperability and cross-border trade and fostering innovation;[23] standard-setting allows for a common technological specification to be established, enabling multiple devices and systems to be compatible regardless of manufacturer or the platform on which those devices or systems are being used. However, uncertainty as to how to apply EU competition law to the exercise of SEPs had led to a fierce debate in Europe.

Enforcement in the EU has centred on the issue of whether and in which circumstances seeking an injunction for an SEP against an alleged patent infringer constitutes an abuse of dominant position pursuant to Article 102 TFEU. The EC has considered this issue in its fully reasoned Article 7 infringement decision in the *Motorola* case, and made preliminary findings on this issue in its *Samsung* Article 9 commitments decision. The issue is also the subject of the CJEU's judgment in *Huawei Technologies Co Ltd v. ZTE Corp*, now the leading EU precedent on this subject.[24] The EC decisions and the CJEU ruling in *Huawei* have shed light on the theory of 'patent hold-up' through the threat or enforcement of injunctions. Other EU enforcement has sought to address questions as to how EU competition rules on excessive pricing and patent ambush apply to the SEP context (see Sections IV.iii and IV.iv). However, this body of cases by no means lays all questions to rest as to when exclusion on the basis of SEPs raises competition concerns.

i Market definition and dominance

The conduct of an SEP holder will only be found to infringe Article 102 TFEU if the SEP holder enjoys a dominant position on the relevant market. EU competition guidance relating to SEPs has cautioned that a dominant position must not be presumed.[25] In practice, however, the EC's approach to assessing dominance in SEP cases indicates that SEP holders will generally be found dominant where the SEP relates to widely used standards.

The approach to market definition taken by the EC is that each SEP is deemed a relevant market. In *Google/MMI*,[26] the EC held that because each SEP needs to be implemented to comply with a standard and, therefore, cannot be circumvented or substituted, each SEP constitutes a separate relevant technology market on its own.[27] In the EC's view, the lack of substitutability between SEPs reading on the same standard and thus the narrow market definition is warranted in particular where the standard on which the SEP reads cannot be substituted by other standards.[28]

This approach to market definition leads to each SEP holder having a 100 per cent market share on a narrowly defined market. Therefore, SEP holders face the challenge of

23 See, e.g., Horizontal Guidelines paragraph 308; case AT.39985 *Motorola – Enforcement of GPRS standard essential patents*, paragraph 46; and Regulation (EU) No. 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, OJ L 316/12, recital 3.

24 Case C-170/13 *Huawei Technologies* [2015].

25 The EC's Horizontal Guidelines note that 'there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power', paragraph 269.

26 Case COMP/M.6381 – *Google/MMI* is an EC merger decision in which the EC cleared the merger but made broad *obiter dicta* about the possibility that SEPs confer dominance and about the potential competition concerns raised by the exercise of SEPs.

27 Case COMP/M.6381 – *Google/MMI*, paragraph 54.

28 In *Motorola*, the EC found that the GPRS standard, to which Motorola's patent was essential, could not be substituted by any other mobile standards, and, given that GPRS is the most basic technology in use in mobile networks, on top of which 3G and 4G operate – GPRS (also referred to as 2G) backwards

demonstrating that they face competitive constraints that prevent them from exercising market power notwithstanding their 100 per cent market share. The EC did not accept Motorola's argument that its market power was constrained by the countervailing buyer power of Apple – the potential licensee in that case – by virtue of Apple's own portfolio of SEPs and non-SEPs. Rather, the EC took the view that it was impossible for Apple to find an alternative supplier of that particular essential technology, if Apple were to comply with the standard on which Motorola's patent reads.

Thus, although EC Guidance states that there is no presumption of dominance for SEP holders, in practice SEP holders with patents reading on widely used standards – for which alternatives are limited or non-existent – will likely face a finding of dominance.

ii Injunctions

The CJEU judgment in *Huawei* is the leading EU case setting out the circumstances in which the seeking and enforcing of injunctions for FRAND-encumbered SEPs against an alleged infringer will be deemed contrary to Article 102 TFEU. The judgment was handed down following a request for a preliminary ruling from the Landgericht Düsseldorf in the course of a national dispute between Huawei Technologies Co Ltd (Huawei) and ZTE Corp, together with ZTE Corp's German subsidiary (ZTE).[29] The Landgericht Düsseldorf sought guidance from the CJEU as to whether and in what circumstances a dominant SEP holder infringes Article 102 TFEU by seeking an injunction against a potential licensee.

The CJEU held that it is in principle possible for an SEP holder to infringe Article 102 TFEU by seeking an injunction for FRAND-encumbered SEPs.[30] In reaching this initial conclusion, the CJEU considered the balance between 'maintaining free competition' pursuant to Article 102 TFEU and protecting the fundamental rights to property (including intellectual property) and access to effective judicial remedy, guaranteed by Article 17(2) and Article 47 of the Charter of Fundamental Rights of the EU.[31] The CJEU noted that patent implementers require licences and that the act of seeking injunctive relief, as a manifestation of the right to exclude by opposing infringement, falls within the scope of IP rights.[32] However, referring to well established case law, the CJEU noted that the exercise of exclusive IP rights has been found to involve abusive conduct in exceptional circumstances.[33] The CJEU thus considered that the standard setting context, which renders SEPs indispensable, and the

compatibility was essential even where 3G and 4G networks were also available. This reasoning in relation to market definition is consistent with the EC's preliminary findings in its *Samsung* commitments decision, though in relation to a different standard (the UMTS (3G) standard).

29 Huawei held patents essential to the long-term evolution (LTE) wireless communication standard and had given a FRAND commitment in connection with these SEPs. ZTE's products implemented the LTE standard on which Huawei's SEP read, and the parties had sought to negotiate a licence agreement on FRAND terms. After the breakdown of the negotiations, Huawei brought an infringement action before the Landgericht Düsseldorf seeking to obtain an injunction, the recall of ZTE products implementing Huawei's SEPs and an assessment of damages. ZTE raised in defence that the action for an injunction and for the recall of ZTE products infringed Article 102 TFEU.

30 Footnote 4, paragraphs 53 and 54.

31 Id., paragraph 42 et seq.

32 See, e.g., case C-170/13 *Huawei Technologies* [2015], paragraphs 58 and 59.

33 Cited by the CJEU: *Volvo*, 238/87, EU:C:1988:477, paragraph 9; *RTE and ITP v. Commission*, C-241/91 P and C-242/91 P, EU:C:1995:98, paragraph 50; and *IMS Health*, C-418/01, EU:C:2004:257, paragraph 35.

irrevocable FRAND commitment as a condition on which the patent holder's patent became incorporated into the standard, qualified as exceptional circumstances within the meaning of the established case law.[34] Moreover, the CJEU found that the FRAND commitment created legitimate expectations by third parties that a licence would be available to them, which made a refusal to license and (by extension) the seeking of an injunction a potential abuse of a dominant position.[35]

Having established that seeking an injunction for SEPs could in principle infringe Article 102 TFEU, the CJEU went on to define the circumstances in which an injunction for SEPs would be permissible, and in doing so sought to balance two opposing interests: (1) that of potential licensee with the legitimate expectation created by the FRAND commitment that the SEP holder would provide a licence, against (2) that of the SEP holder to obtain FRAND remuneration for the use the SEP holder's patents.[36] The Court held that an SEP holder does not abuse its dominant position by seeking injunctive relief as long as the following conditions have been complied with:

a the SEP-holder must provide notice to the alleged infringer, 'specifying the way in which [the SEP] has been infringed';[37]

b the alleged infringer must be willing to conclude a FRAND licence and a written FRAND offer (specifying the royalty and royalty calculation method) must be forthcoming from the SEP holder;[38]

c the alleged infringer must 'respond to [the SEP holder's] offer, in accordance with recognised commercial practices in the field and in good faith, a point which must be established on the basis of objective factors and which implies, in particular, that there are no delaying tactics'.[39] When the alleged infringer is using the teachings of the SEP prior to concluding an agreement, it should, 'from the point at which its counter-offer is rejected, provide appropriate security, in accordance with recognised commercial practices in the field, for example, by providing a bank guarantee or by placing the amounts necessary on deposit';[40] and

d lastly, the Court held that 'an alleged infringer cannot be criticised either for challenging, in parallel to the negotiations relating to the grant of licences, the validity of those patents and/or the essential nature of those patents to the standard in which they are included and/or their actual use, or for reserving the right to do so in the future'.[41]

The CJEU furthermore held that the parties may agree to a third-party FRAND determination in the event of lack of agreement on licence terms following initial offer and counter-offer.[42]

The CJEU judgment provides a procedural framework for SEP holders to follow, which builds on a theory of harm and general approach similar to that in the EC's decisions in *Samsung* and *Motorola*. Although the reasoning of the CJEU ruling is not explicitly framed in terms of the willingness of the potential licensee – which, for example, was more central to

34 Footnote 4, paragraphs 50–52. See also, AG Wathelet's Opinion, paragraph 70 et seq.

35 Id., paragraphs 53 and 54.

36 Id., paragraphs 54–55.

37 Id., paragraph 61.

38 Id., paragraph 63.

39 Id., paragraph 65.

40 Id., paragraph 67.

41 Id., paragraph 69.

42 Id., paragraph 68.

the reasoning in the EC *Motorola* decision, where the lack of willingness of Apple was raised as an objective justification for Motorola's conduct[43] – the CJEU judgment imposes a number of requirements on the potential licensee as well as on the SEP holder, recognising that the conduct of the potential licensee has a direct bearing on the outcome of the competition assessment of the SEP holder's conduct.

As noted above, on 29 November 2017, the EC published a Communication entitled 'Setting out the EU approach to Standard Essential Patents'.[44] In this Communication, the EC provides additional guidance in the form of behavioural criteria used to assess whether an SEP licensee can be considered willing to enter into a licence on FRAND terms. The guidance, which is derived from national courts' application of *Huawei*, states that:

a an SEP licensee must receive 'sufficiently detailed and relevant information to determine the relevance' of an SEP portfolio and compliance with FRAND in order to assess a FRAND offer. This includes clear explanations regarding the portfolio patents' essentiality for a standard, the allegedly infringing products of the SEP implementer, the proposed royalty calculation and the non-discrimination element of FRAND;

b counter-offers should be concrete and specific. They should also contain 'information on the exact use of the standard in the specific product'; and

c there is a probable trade-off between the time considered as reasonable for responding to an offer and the detail and quality of the information provided in an SEP holder's initial offer.

While the guidance provided helpful clarifications, there remains substantial uncertainty around the definition of FRAND. Some of the questions left unanswered include whether an SEP holder can refuse to license to certain levels in the value chain (e.g., refuse to license to component makers while licensing only makers of finished products) and whether an SEP holder can charge a royalty based on the full value of a finished end product, even if the SEP holder's patent pertains only to a single component incorporated in that end product.

iii Patent ambush

A patent ambush occurs when an SEP holder deliberately hides the fact that it holds essential IPRs and starts asserting these essential IPRs only after the standard has been agreed upon. Since other undertakings are 'locked in' to use the standard once it is adopted, the patent holder will be able to extract higher royalties than would otherwise have been possible, allowing it to gain market power *ex post*. This behaviour falls foul of the EC's Horizontal Guidelines, which require 'good faith disclosure' of IPRs that might be essential for the implementation of a standard under development.[45]

Thus far, there have not been any prohibition decisions in which the EC conclusively found patent ambush to amount to an abuse of dominance. However, the commitment decision in *Rambus* suggests that such behaviour could constitute an abuse.[46] The EC posited that Rambus' deliberate and strategic failure to disclose its SEPs undermined the confidence in the standard-setting process and, more importantly, resulted in supra-competitive royalties

43 Case AT.39985 *Motorola – Enforcement of GPRS standard essential patents*, paragraphs 430–464.

44 'Setting out the EU approach to Standard Essential Patents' is available at https://ec.europa.eu/docsroom/documents/26583.

45 Horizontal Guidelines paragraph 286.

46 Case COMP/38.636 *Rambus*.

(i.e., royalties at a level that Rambus would not have been able to charge in the absence of its deceptive conduct). Therefore, the EC preliminary construed the patent ambush as excessive pricing in violation of Article 102 TFEU. Accordingly, the EC's theory of harm did not include any reference to the exclusionary object or effect of Rambus' conduct.[47] The EC did not establish that Rambus had indeed abused a dominant position but instead made legally binding commitments offered by Rambus pursuant to which it offered to negotiate five-year licences and introduced a maximum royalty rate.[48]

To minimise the risk of patent ambush, the European SSOs – in collaboration with the EC[49] – have all adopted IPR policies that impose, *inter alia*, an obligation on SEP holders to disclose their SEPs.

iv Excessive pricing of SEPs

An SEP holder may also engage in abusive conduct by licensing its essential patents on supra-FRAND terms. Such excessive pricing amounts to a breach of the SEP holder's FRAND commitment and could be considered an abuse of dominance under Article 102 TFEU.

However, by closing its investigation in *Qualcomm*,[50] the EC passed upon the only opportunity thus far to decide whether 'mere' supra-FRAND pricing of SEPs can constitute an abuse of dominance. Instead, it noted that the case had raised 'complex' issues and that regulators should be 'careful about overturning commercial agreements'.[51]

Qualcomm demonstrates the difficulty of pursuing supra-FRAND pricing as a purely exploitative abuse. Indeed, despite the EC's Horizontal Guidelines providing some guidance on potential methods of determining FRAND royalties for SEPs,[52] it remains difficult to establish what constitutes a FRAND rate, in particular if one accepts that not all technologies covered by SEPs contribute the same added value to a given standard. Further clarification cannot be found in the EC's decisions. Therefore, it remains an open question as to how the EC would determine that royalties actually charged were significantly above FRAND.

Nevertheless, charging a supra-FRAND price for an SEP licence could possibly be regarded as an exclusionary abuse under Article 102 TFEU, in the form of a constructive refusal to license. By requiring potential licensees to pay excessive royalty fees under the threat of an injunction, SEP holders could prevent effective access to the adopted standard.[53] Therefore, the threat or act of seeking injunctions has been considered by the EC as having

47 Under EU competition law, a dominant undertaking that imposes excessive prices infringes Article 102 TFEU.

48 Case COMP/38.636 *Rambus*, paragraph 71.

49 For example, the European Telecommunications Standardisation Institute (ETSI) changed its standard-setting rules to strengthen the requirement for early disclosure of essential IPRs, after the EC had expressed concerns that these rules did not sufficiently protect against the risk of patent ambush (Press Release 12 December 2005, IP/05/1565, http://europa.eu/rapid/press-release_IP-05-1565_en.htm?locale=en).

50 Case COMP/39.247 – *Texas Instruments/Qualcomm*.

51 European Commission, MEMO/09/516, *Antitrust: Commission closes formal proceedings against Qualcomm*, available at: http://europa.eu/rapid/press-release_MEMO-09-516_en.htm.

52 Horizontal Guidelines paragraphs 289–290.

53 Horizontal Guidelines paragraphs 269 and 287.

the potential to anticompetitively exclude, as well as exploit (through eliciting supra-FRAND royalty rates) potential licensees.[54] However, at this point, it is not clear how the EC would deal with a pure excessive pricing complaint relating to SEPs.

V INTELLECTUAL PROPERTY AND MERGERS

Under the EU Merger Regulation, the EC assesses whether a notified concentration would lead to a significant impediment to effective competition, including through creating or strengthening a dominant position in the EEA.[55]

Pursuant to Article 3(1) of the EU Merger Regulation, a concentration arises 'where a change of control on a lasting basis results from: (a) the merger of two or more previously independent undertakings or parts of undertakings, or (b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings . . . of direct or indirect control of the whole or parts of one or more other undertakings'.[56]

Below we focus on: (1) when the change of control of intellectual property assets, such as patents, know-how, trademarks and copyrights may trigger or contribute to triggering EU merger control; and (2) when the parties may be required to modify a proposed transaction and in particular when IPRs may be subject to divestment or licensing by the parties for the transaction to be cleared.

i Transfer of IP rights constituting a merger

The acquisition of intangible assets such as brands, patents or copyrights may be considered a concentration within the meaning of the EU Merger Regulation if the assets constitute a business with a market turnover. In the case of a transfer of licences for brands, patents or copyrights, without additional assets, such licences are exclusive 'at least in a certain territory' and transfer the turnover-generating activity. Furthermore, the granting of licences and the transfer of licences must be effected on a lasting basis (i.e., it must be capable of resulting in a structural change in the market).[57] However, 'lasting' need not mean the transfer is permanent or of indefinite duration.

The EC confirmed this approach in *Microsoft/Yahoo! Search Business* by finding that Microsoft's proposed acquisition of a 10-year exclusive licence to Yahoo's core search technologies amounted, together with the transfer of employees and customers to Microsoft, to the acquisition of the whole or a part of a business to which market turnover can be attributed.[58]

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54 See case AT.39985 *Motorola – Enforcement of GPRS standard essential patents*; and case COMP/C-3/39.939 *Samsung Electronics – Enforcement of UMTS standard essential patents*.

55 EU Merger Regulation, Article 2(2).

56 EU Merger Regulation, Article 3(1). In this chapter, the term 'merger' will be construed broadly to encompass any concentration falling within the EU Merger Regulation.

57 EC Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (Consolidated Jurisdictional Notice), paragraphs 24 and 18.

58 Case No. COMP/M.5727 – *Microsoft / Yahoo! Search Business*, decision of 18 February 2010, paragraphs 5 and 14–19. Similarly, in a decision falling within the scope of the previously applicable Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, the EC found that the acquisition of assets, including a reputable brand name, constituted a concentration within the meaning of the applicable Regulation: see case No. IV/M.890 – *Blokker/Toys 'R' Us (II)*, decision of 26 June 1997, paragraphs 12–16.

The transfer of IPRs may also amount to a concentration in the case of the creation of a full-function joint venture that performs, on a lasting basis, 'all the functions of an autonomous economic entity'.[59] In such circumstances, the joint venture must have sufficient resources, including intangible assets such as IPRs, to operate independently in a market.[60] Furthermore, the extension of the scope of an existing joint venture through the significant addition of IPRs may be considered a new concentration within the meaning of the EU Merger Regulation if the assets constitute a business generating a market turnover.[61]

In this context, the EC approved on 16 June 2015 in *PRSfM/STIM/GEMA/JV* the proposed creation of a joint venture for cross-border online music licensing and copyright administration services by three British, Swedish and German music collecting societies.[62] The parties provided the joint venture with sufficient resources to operate independently as a business, including all IPRs held by them. These include the IPRs relating to the copyright database of a preexisting joint venture between PRSfM and STIM, and to two of GEMA's licence processing tools.[63] The EC concluded that the transaction fulfilled the requirements of a full-function joint venture and, therefore, constituted a concentration within the meaning of the EU Merger Regulation.

ii Remedies involving divestitures of intellectual property

If the EC concludes that a notified concentration raises serious doubts as to its compatibility with the internal market, the parties may seek to resolve the EC's concerns by offering commitments (or remedies) before or after the initiation of proceedings, and thereby seek to obtain regulatory clearance of their concentration.[64] Following the modification of the concentration by the parties, the EC may declare the concentration compatible with the internal market and may attach certain conditions and obligations to its decision to ensure the parties' compliance with their commitments.[65]

The EC draws a distinction between two types of remedies that may involve intellectual property: (1) divestitures or exclusive licensing; and (2) granting access to IPRs to third parties on a non-discriminatory basis.

Divestiture or exclusive licensing of IPRs

The EC's recent decisional practice has confirmed its preference for divestiture commitments as a suitable remedy, as such remedies eliminate the possibility of an ongoing relationship between the parties and their competitors.[66] For instance, on 2 December 2015, the EC approved the proposed acquisition of Cytec by Solvay subject to Solvay divesting the entirety

59 EU Merger Regulation, Article 3(4).

60 Consolidated Jurisdictional Notice, paragraph 94.

61 Consolidated Jurisdictional Notice, paragraphs 106–108.

62 Case No. COMP/M.6800 – *PRSfM/STIM/GEMA/JV*, decision of 16 June 2015.

63 Case No. COMP/M.6800 – *PRSfM/STIM/GEMA/JV*, decision of 16 June 2015, paragraph 59.

64 EU Merger Regulation, Articles 6(2) and 8(2).

65 EU Merger Regulation, Recital 30, Articles 6(2) and 8(2).

66 Case No. COMP/M.7737 – *Honeywell/Elster*, decision of 21 December 2015; case No. COMP/M.7585 – *NXP Semiconductors/Freescale Semiconductor*, decision of 17 September 2015; case No. COMP/M.7559 – *Pfizer/Hospira*, decision of 4 August 2015; case No. COMP/M.7499 – *Altice/PT Portugal*, decision of 20 April 2015; case No. COMP/M.7420 – *ZF/TRW*, decision of 12 March 2015. See also EC notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Regulation (EC) No. 802/2004 (the Remedies Notice), Section III.i, and paragraph 38.

of its phosphor-based solvent extractants business, including all know-how, technical documentation and assistance required for the production of the divestment business, as well as all IPRs and relevant trademarks.[67]

Licensing arrangements may be deemed a suitable alternative in certain cases in which a divestiture of IPRs would not be feasible – for example, because of the characteristics of the technology or rights concerned, or where a divestiture would obstruct ongoing research.[68] For instance, in *GlaxoSmithKline/Novartis Vaccines Business (excl. Influenza)/Novartis Consumer Health Business*,[69] the EC accepted the granting of an exclusive and perpetual trademark licence for the Nimenrix vaccine to the purchaser as opposed to a full trademark divestiture, given the importance of the IPRs to the merged entity's retained business.[70] The EC has stated that licensing remedies should be as effective as divestitures in enabling the licensee to compete with the merged entity.[71]

Finally, the EC reaffirmed the acceptability of the scarcely used rebranding commitments in *Merck/Sigma-Aldrich*. Such commitments entail the granting of an exclusive, time-limited licence to use a brand.[72] In particular, rebranding commitments provide for a period within which the licensee must rebrand the product under the licensee's own brand.[73] Similarly, in *Honeywell/Elster* and *DEMB/Mondelez/Charger OpCo*, the EC accepted a remedy whereby the merged entity committed to a full transfer of the licence for a brand with a temporary licence back from the purchaser to the entity for the purpose of rebranding certain products that were not being divested.[74]

Access to IPRs

The EC's competition concerns may also be resolved if the parties commit to grant, on a non-discriminatory and transparent basis, access to key technology, such as patents, know-how or other IPRs, to third parties who may depend on the technology or IPRs for their activities in a downstream market.[75] Such an alternative remedy must have effects at least equivalent to a divestiture of the IPRs.[76]

This type of remedy may, for instance, require parties to commit to the disclosure of certain necessary information, such as information required for the interoperability of different systems or equipment, or to the granting of non-exclusive licences to their competitors on the

67 Case No. COMP/M.7777 – *Solvay/Cytec*, decision of 2 December 2015, Section IV.

68 Remedies Notice, paragraph 38.

69 Case No. COMP/M.7276 – *Glaxosmithkline/Novartis Vaccines Business (excl. Influenza)/Novartis Consumer Health Business*, decision of 28 January 2015.

70 Case No. COMP/M.7276 – *Glaxosmithkline/Novartis Vaccines Business (excl. Influenza)/Novartis Consumer Health Business*, decision of 28 January 2015, paragraphs 366 and 370–371.

71 Remedies Notice, paragraph 38.

72 Case No. COMP/M.7435 – *Merck/Sigma-Aldrich*, decision of 15 June 2015.

73 Remedies Notice, paragraphs 39–42.

74 Case No. COMP/M.7737 – *Honeywell/Elster*, decision of 21 December 2015, paragraphs 265–269; case No. COMP/M.7292 – *DEMB/Mondelez/Charger OpCo*, decision of 5 May 2015, paragraphs 702–706, in which the EC additionally stresses the importance of ensuring the proportionality of remedies to the relevant competition concern identified by the EC.

75 Remedies Notice, paragraphs 62 and 65. Recent examples include: case No. COMP/M.7873 – *Wordline/Equens/Paysquare*, decision of 20 April 2016; case No. COMP/M.7822 – *Dentsply/Sirona*, decision of 25 February 2016.

76 Remedies Notice, paragraph 61.

same conditions as prior to the concentration. For instance, the EC considered in *Dentsply/Sirona* that the parties' commitments adequately addressed its competition concerns following the parties' offer to extend Sirona's existing licensing agreements with its competitors by 10 years, as well as to provide the necessary know-how to these suppliers for the same length of time.[77]

VI OTHER ABUSES

While these types of conduct can potentially emerge in any industry that relies on IP rights, we will focus on the pharmaceutical sector, which has generated the vast majority of precedents. Indeed, the EC 2009 report on its Pharmaceutical Sector Inquiry (PSI) identified the below types of conduct as part of the 'tool box' that originator pharmaceutical companies (i.e., pharmaceutical companies marketing patented branded products) may use to delay or restrict the entry of generic medicines (i.e., non-branded medicines, which are identical (bioequivalent) to a branded drug in dosage, safety, strength, etc.).[78]

i Sham or vexatious IP litigation

It follows from the obligations imposed on dominant companies by Article 102 TFEU that, in specific circumstances, they may be deprived of the right to adopt a course of conduct that is not in itself abusive and that would even be unobjectionable if adopted by non-dominant companies.[79]

This can also be the case with respect to fundamental rights, such as the right of access to a court.[80] Under exceptional circumstances, instigating litigation, including IP litigation, can amount to an abuse of dominance.

In its 1998 *ITT Promedia* ruling – which it more recently upheld in *Protégé International*[81] – the GC confirmed the exceptional nature of 'predatory litigation' and established that bringing legal proceedings may be abusive under the following two cumulative conditions:

a legal proceedings brought cannot reasonably be considered as an attempt to assert rights of the undertaking concerned and can, therefore, only serve to harass the other party; and

b the action in question is conceived in the framework of a plan whose goal is to eliminate competition.

According to the GC, the actual validity or existence of the rights asserted is irrelevant in determining whether the court action is abusive. Instead, the GC inquires whether the legal action was intended to assert what the undertaking could, at that point in time, reasonably consider to be its rights.

77 Case No. COMP/M.7822 – *Dentsply/Sirona*, decision of 25 February 2016.

78 Commission Communication, Executive Summary of the Pharmaceutical Sector Inquiry Report (8 July 2009), 3.2.1 ff.

79 Case T-111/96 *ITT Promedia v. European Commission*, judgment of 17 July 1998, ECLI:EU:T:1998:183, paragraph 139.

80 See Article 47 of the Charter of Fundamental Rights of the EU.

81 Case T-119/09 – *Protégé International v. Commission*, judgment of 13 September 2012, ECLI:EU:T:2012:421.

In the same judgment, the GC ruled that a claim for the performance of a contractual obligation can be abusive if it 'exceeds what the parties could reasonably expect under the contract or if the circumstances applicable at the time of the conclusion of the contract have changed in the meantime'.[82]

Similarly, an interesting CJEU ruling under Article 101 TFEU is expected in *Genentech Inc. v. Hoechst GmbH*.[83] The CJEU's ruling will give insights into whether EU competition law precludes parties from enforcing patent licensing agreements, requiring royalties, after the invalidation of the patent.

ii Misuse of the patent process

As noted in Section IV, the EU courts have recognised that patent holders, including dominant ones, are generally free to obtain and exercise patent rights save in exceptional circumstances. However, in situations where a dominant firm seeks fraudulently to obtain patent protection, or where it seeks artificially to expand the effective scope or term of patent protection, Article 102 TFEU may apply.

The key EU precedent remains the CJEU's 2012 *AstraZeneca* judgment,[84] which upheld a GC judgment and EC decision finding that AstraZeneca had abused its dominance in two ways:[85]

a making false representations to patent authorities in various EEA Member States fraudulently to obtain or maintain supplementary protection certificates (SPCs) for its anti-ulcer medicine, Losec; and

b submitting requests to deregister the marketing authorisation for Losec capsules in Denmark, Norway and Sweden in combination with the withdrawal of Losec capsules from the market and the launch of 'new-generation' Losec tablets, thereby preventing generic competitors from relying on that marketing authorisation to enter the market.

SPCs effectively extend patent protection for the active substance in a drug to compensate for the time the right holder originally loses during mandatory marketing authorisation processes. In applying for SPCs, AstraZeneca had provided misleading information about the timing of obtaining it first marketing authorisation in the EU, which could result in the relevant authority granting longer SPC protection.

AstraZeneca argued that the alleged anticompetitive effects of its conduct could only materialise if the relevant public authorities were actually misled into granting the requested SPCs. The CJEU rejected this argument, stating that where it is established that behaviour is objectively of such a nature as to restrict competition, the question whether it is abusive in nature cannot depend on the contingencies of the reactions of third parties. Therefore, the fact that certain public authorities were not misled by AstraZeneca's false representations did not negate the abusive nature of AstraZeneca's conduct.[86]

82 Case T-111/96 *ITT Promedia v. European Commission*, judgment of 17 July 1998, ECLI:EU:T:1998:183, paragraph 140.

83 Case C-567/14, *Genentech Inc. v. Hoechst GmbH*, not yet published. This case was brought as a request for a preliminary ruling by the Paris Court of Appeal.

84 Case C-457/10 P, *AstraZeneca AB and AstraZeneca plc v. European Commission*, judgment of 6 December 2012, ECLI:EU:C:2012:770.

85 Case COMP/A. 37.507/F3 – *AstraZeneca*, decision of 15 June 2005.

86 Case T-321/05 *AstraZeneca v. Commission*, judgment of 1 July 2010 ECLI:EU:T:2010:266, paragraph 360.

AstraZeneca's second abuse marked the first time the EC dealt with 'evergreening' or 'product-hopping' practices.[87] These practices involve incremental reformulations of first-generation drugs to shield them from generic competition. Such incremental reformulations are presented as innovations to preserve patent protection, typically through the launch of a second-generation product to which sales are shifted before generic medicines competing with the originator's first-generation product enter the market.

AstraZeneca's attempt to deregister Losec capsules was found to affect generic entry in two ways. First, suppliers of generic alternatives could no longer use Losec capsules as a reference product to benefit from the abridged marketing authorisation process.[88] The abridged market authorisation process allows manufacturers of generics to refer to the results of the originator's pharmacological and toxicological tests and clinical trials, thus avoiding repetition of tests, saving resources and expediting market entry. Although owners of original proprietary medicines typically enjoy a right of exclusive use of the test results for a limited period (usually six to 10 years from the grant of the first market authorisation in the EU), this period had already lapsed in AstraZeneca's case. Second, demand was shifted away from generics and towards the new (patent-protected) Losec tablets before generics could enter the market, thus reducing their viability upon entrance.

The CJEU ultimately found that AstraZeneca's deregistrations of Losec's market authorisation did not qualify as competition on the merits or protection of AstraZeneca's legitimate commercial interests. AstraZeneca had failed to show that its deregistrations of Losec marketing authorisations were commercially necessary (or even useful).[89]

With regard to both abuses, the GC confirmed that while abuse of dominance is an objective concept that does not require the EC to demonstrate the deliberate nature of AstraZeneca's conduct, intention to cause harm nonetheless remains a 'relevant factor which may . . . be taken into consideration'[90] in establishing an abuse.

AstraZeneca makes clear that the manner in which an undertaking acquires IP protection can amount to a competition law violation.[91] Exploiting 'loopholes' in the regulatory system may entail a significant antitrust risk, even in the absence of intent to affect competition on the market.

iii Anticompetitive settlements of IP disputes

Settlements between patent holders and firms challenging patent validity are common and generally recognised as efficient tools to resolve patent disputes: they are cost-effective and provide legal certainty to the parties.[92]

87 These practices were also identified in the EC's Pharmaceutical Sector Inquiry. See Commission Communication, Executive Summary of the Pharmaceutical Sector Inquiry Report (8 July 2009), 3.2.6.

88 Article 4 of Council Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by Law, Regulation or Administrative Action relating to proprietary medicinal products, OJ 022, 9 February 1965 P. 0369–0373.

89 Case T-321/05 *AstraZeneca v. Commission*, judgment of 1 July 2010 ECLI:EU:T:2010:266, paragraph 812.

90 Case T-321/05 *AstraZeneca v. Commission*, judgment of 1 July 2010 ECLI:EU:T:2010:266, paragraph 359. See also paragraph 813.

91 Case COMP/A. 37.507/F3 – *AstraZeneca*, decision of 15 June 2005, paragraphs 742–743.

92 See M Besen, 'Antitrust Aspects – Misuse of Patents', in C Milbradt, ed., *Patent Litigation in Germany* (*GLP,* 2011), p. 282.

Nonetheless, competition concerns can arise where the defendant's claims challenging validity or infringement of the defendant's patent, or both, are sufficiently strong not to warrant concessions from the plaintiff in relation to timing and scale of market entry.

Patent settlements between originator companies and would-be generic entrants have come under scrutiny in the pharmaceutical sector. In a typical patent settlement scenario, a generic pharmaceutical company seeks to enter a market still protected by an originator company's patent. The generic company challenges validity and infringement of the originator's patent, with both challenges having an uncertain outcome. The originator and the generic supplier settle their dispute, with the generic supplier agreeing not to enter before a specific date – typically earlier than the date of patent expiry. The settlement usually involves some form of payment by the originator to the generic company. Such settlements are known as 'reverse payment patent settlements' or 'pay-for-delay settlements'.

Prior to the 2009 PSI Report, the compatibility of reverse payment patent settlements with EU competition law was considered a 'legal grey area'.[93] While the EC did not provide substantial guidance in its PSI report, it nevertheless identified patent settlements that (1) limit generic entry, and cumulatively (2) involve value transfers from originators to generic companies as warranting particular antitrust scrutiny.[94]

Contrary to cases involving misuse of the patent process,[95] the EU courts have yet to express their views on pay-for-delay cases.

In its 2013 *Lundbeck* decision, the EC provided its first analysis of pay-for-delay agreements.[96] The EC found that six (relatively short-term) patent settlements between originator Lundbeck and various companies intending to market generic versions of antidepressant drug citalopram had as their object the restriction of competition in violation of Article 101 TFEU.

Pursuant to these settlement agreements, Lundbeck agreed to make cash payments to the generic companies, or guarantee certain profits for them under distribution agreements or purchase their citalopram stock (to take it out of circulation), or a combination of these.[97] The EC alleged that, in return, the generic companies agreed to delay their entry in the EEA.[98]

93 According to a 28 January 2004 press release by the Danish Competition Authority, which at the time, together with the European Commission, was investigating a series of settlement agreements between Lundbeck and generic companies. The press release is available at: www.kfst.dk/Afgoerelsesdatabase/Konkurrenceomraadet/Styrelsesafgoerelser/2004/Undersoegelse-af-Lundbeck?tc=A23BBB6AE22D4D28A9CDB2A04F087E18.

94 Commission Staff Working Document, Technical Annex to the Commission Communication Part 1 (8 July 2009) available at: http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/staff_working_paper_part1.pdf, paragraphs 270, 277. ff. Commission Communication, Executive Summary of the Pharmaceutical Sector Inquiry Report (8 July 2009), 3.2.4.

95 See Section VI.ii.

96 Case COMP/AT.39226 – *Lundbeck*, decision of 19 June 2013.

97 Case COMP/AT.39226 – *Lundbeck*, decision of 19 June 2013.

98 Following up on the Pharmaceutical Sector Inquiry, the Commission has been closely monitoring patent settlement activity in the pharmaceutical sector. The latest Report on the Monitoring of Patent Settlements covers the year 2014, was published in December 2015 and is available at: http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/patent_settlements_report6_en.pdf.

The EC based its finding in *Lundbeck* on three key elements:

a at the time of the settlements, Lundbeck and the generic companies were at least potential competitors in the EEA as the validity and infringement of Lundbeck's challenged patents were highly uncertain;

b considerable value was transferred from Lundbeck to the generic companies, substantially reducing their incentive to continue independent efforts to enter the market and to challenge validity of the patents; and

c there was a link between the value transfer and the generic companies' decision to limit efforts for independent entry.[99]

The parties appealed the EC's decision before the GC. The GC dismissed the appeals of Lundbeck and others in its ruling issued in September 2016, confirming the EC's decision and the fines imposed.[100]

Notably, the GC confirmed the EC's view that agreements such as the ones that Lundbeck signed with the potential generic entrants can constitute by-object infringements[101] of competition law if combined with a series of factors, principal among which are reverse payments to the potential generic entrants. This is because, pursuant to the GC's ruling, these agreements replace the uncertainty of litigation over the validity and infringement of Lundbeck's patent with the certainty that the generic companies will not enter the market. To reach this conclusion, the GC relied on various factors, including an analysis of whether the generic companies could be considered Lundbeck's potential competitors and under what circumstances a reverse payment is compatible with competition law. The GC analogised Lundbeck's agreements to market exclusion agreements.

The GC also ruled that the restrictions contained in Lundbeck's agreements could not be justified as being objectively necessary to protect Lundbeck's IP rights (which would justify these restrictions under the ancillary restrictions test).[102]

Finally, the GC gave useful guidance on the legal test for determining under which circumstances the generic drug manufacturers with which Lundbeck concluded patent settlements could be considered 'potential competitors' of Lundbeck's patented or branded drug. As noted above, the existence of potential competition between the generic drug manufacturers and the patented or branded drug manufacturer is one of the conditions for a

99 Case COMP/AT.39226 – *Lundbeck*, decision of 19 June 2013, paragraph 661. A series of other important factors also taken into account by the EC were: the fact that value transferred by Lundbeck took into consideration the turnover or the profit the generic company expected had it successfully entered the market; the fact that Lundbeck could not have obtained the limitations on entry through enforcement of its process patents, the obligations on the generic undertaking in the agreement going beyond the rights granted to holders of process patents; and the fact that the agreement contained no commitment from Lundbeck to refrain from infringement proceedings if the generic undertaking entered the market with generic citalopram after expiry of the agreement.

100 Case T-472/13, *H. Lundbeck A/S, Lundbeck Ltd v. European Commission*, ECLI:EU:T:2016:449.

101 Again, a by-object infringement concerns conduct that is, by its very nature, harmful to the functioning of competition without the need to demonstrate (actual or potential) anticompetitive effects.

102 A contractual restriction can escape the Article 101(1) TFEU prohibition if it is ancillary to a main agreement that is itself not anticompetitive in nature and the main agreement would be impossible to carry out without the existence of the restriction in question. The fact that the main agreement would simply be rendered more difficult to implement/less profitable without the restriction in question is not sufficient to make the restriction lawful. (see case C-382/12, *MasterCard and Others v. Commission*, EU:C:2014:2201, paragraph 91).

reverse patent settlement to be found anticompetitive. The GC ruled that a generic company can be considered a potential competitor if it has real concrete possibilities of entering the market. The GC noted that the fact that the branded drug has an existing patent (which is presumed valid) does not necessarily mean that generic companies are not potential competitors. As long as generic companies can objectively launch generic versions of the branded drug, even 'at risk' of infringing the branded drug's patent, they are considered potential competitors of the branded drug. In short, even the possibility of an at-risk launch of a generic drug is considered by the GC as an expression of potential competition.[103]

In addition, contrary to the classic test for potential competition, which requires entry within a short period, the GC in *Lundbeck* accepted that potential competition could already exist several years before the expiry of the patent (at the time when the generic company begins development efforts for a generic version of the patented drug). The GC's judgment has received criticism on this point, as its thinking could result in generics that are more than five years away from entry being considered potential competitors of the branded drug.

The parties raised various arguments in defence of the reverse patent settlements. In particular, the generic companies argued that other reasons prevented them from entering the market, such as the fact that some of them had not obtained a marketing authorisation. The GC did not consider these arguments credible and instead noted that Lundbeck's willingness to enter into patent settlements indicated that it saw the generic manufacturers as a potential competitive threat.[104] The parties also argued that the settlements could lead to efficiency gains. The GC rejected this argument, as it held that the efficiency gains were not proven by the parties to the required standard of proof. In relation to the imposition and level of the fine, the GC held that it was not unforeseeable by the parties that the agreements were anticompetitive at the time of conclusion, and so the imposition of a fine was warranted. The fact that the EC in 2005 had expressed doubts as to whether the agreements were in fact anticompetitive did not make a difference in this respect, as this was merely a preliminary assessment, and significant emphasis was placed on the size of the reverse payment as a relevant factor in that assessment.

In July 2014, the EC fined originator Servier and five generic companies for having concluded patent settlements aimed at delaying entry of generic versions of the cardiovascular medicine perindopril. As in *Lundbeck*, the EC found that Servier's settlements violated Article 101 TFEU by object (i.e., removing the need for the EC to prove concrete harmful effects on competition).[105] However, unlike *Lundbeck*, the EC based its infringement decision against Servier also on Article 102 TFEU: the EC found that Servier had not only induced the settlements, but also acquired (scarce) technology essential to generic entry.

The GC's judgment on appeal is currently pending.[106]

On 17 July 2017, the EC issued a statement of objections to Teva and Celaphon for entering into a reverse patent settlement in 2005 regarding the sleeping disorder drug modafinil.[107] Its final decision remains pending.

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103 Case T-472/13, *H. Lundbeck A/S, Lundbeck Ltd v. European Commission*, ECLI:EU:T:2016:449, paragraph 149 et seq.

104 Case T-472/13, *H. Lundbeck A/S, Lundbeck Ltd v. European Commission*, ECLI:EU:T:2016:449, paragraph 168 et seq.

105 Case COMP/AT.39612 – *Perindopril (Servier)*, decision of 9 July 2014.

106 Case T-691/14 – *Servier SAS and Others v. Commission*.

107 The EC's press release on the *Cephalon/Teva* SO is available at: http://europa.eu/rapid/press-release_IP-17-2063_en.htm.

Patent settlements are driven by the parties' commercial considerations and thus come in many forms. Attempting to delineate some overarching rules, the EC stated in *Lundbeck* that 'settlements which are based purely on each party's assessment of the strength of the patent'[108] are, in principle, safe from prosecution, while limitations on the generic company's commercial autonomy achieved through 'inducements from the originator . . . aligning previously competing interests' may give rise to a by object restriction of competition.[109]

Determining whether generic suppliers present at least potential competition opens the door for the EC to tread dangerously close to assessing patent validity.[110] Potential competition is established when it is 'based on realistic grounds' while 'the mere theoretical possibility to enter a market is not sufficient'.[111] Lundbeck confirms that the possibility of invalidity of the originator's patent can be included in these 'realistic grounds'. According to the EC, this is reconcilable with the presumption of patent validity as reiterated by the CJEU in *AstraZeneca*.[112]

The EC and the courts have interpreted the notions of 'limiting entry' and 'value transfer' broadly.[113] 'Limiting entry of generic competition' could range from an absolute restriction on entry to limited forms of non-immediate or non-independent entry.[114] Similarly, 'value transfers' are not limited to direct monetary payments, but can also include more covert transfers of value.[115] A value transfer that cannot be adequately explained by or that considerably exceeds the value of the generic company's counter-performance will be, therefore, less easily defensible.[116]

VII OUTLOOK AND CONCLUSIONS

The EC and the CJEU are continuing to monitor the enforcement of EU competition laws involving IPRs, most notably in relation to disputes over the possible infringement of SEPs and potentially anticompetitive pay-for-delay arrangements in the pharmaceutical sector, but also in relation to EU merger control. There seems to be a continuing trend whereby competition laws override IPRs where their exercise threatens the technical development of products and stifles innovation.

108 Case COMP/AT.39226 – *Lundbeck*, decision of 19 June 2013, paragraph 659.

109 Ibid. This approach is similar to the EC's approach to 'co-existence agreements' between trademark owners; see Section III.vi.

110 See for instance the EC's analysis in *Lundbeck.* Ibid, paragraphs 667–671.

111 Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14 January 2011, page 1, point 10.

112 Case T-321/05, *AstraZeneca AB and AstraZeneca plc v. Commission*, judgment of 1 July 2010, paragraph 362.

113 Commission Staff Working Document, Technical Annex to the Commission Communication Part 1 (8 July 2009), available at http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/staff_working_paper_part1.pdf, paragraph 269.

114 For instance, entry as an exclusive distributor of the originator.

115 In *Servier* the EC found a value transfer to have occurred because Servier granted a licence to a generic company for specific EU Member States, which, in return, agreed to cease efforts to launch its generic perindopril in all other EU national markets.

116 Case COMP/AT.39226 – *Lundbeck*, decision of 19 June 2013, paragraph 660.

The 2015 *Huawei* judgment evokes new questions and has left many issues unsolved including: (1) the exact meaning of FRAND terms and particularly as to what 'reasonable' means with respect to royalties; (2) whether the judgment applies to portfolio licensing or cross-licensing; and (3) whether an SEP confers a dominant position on an SEP holder. While the 2017 policy paper published by the Commission provides behavioural criteria that can be used to assess whether a licensee can be considered willing to enter into a licence on FRAND terms, there remains substantial uncertainty around the definition of FRAND.

The GC's first ruling on the legality of reverse patent settlements confirmed that under specific circumstances these can constitute by-object infringements of competition law. Lundbeck has lodged an appeal on points of law to the CJEU, the decision on which is currently pending.

As part of the Digital Single Market Strategy and having published the final report of the e-commerce sector inquiry, the EC intends to use the findings to target enforcement of EU competition law at the most widespread potentially infringing business practices that have emerged or evolved as a result of the growth of e-commerce. Geo-blocking in particular is relevant in the context of the intersection of competition law and IPRs.

Appendix 1

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