Market Definition and Abuse of Dominance Issues in Licensing

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Agenda

1. Market definition
   - How markets are defined in competition law and why it matters
   - Market definitions in licensing markets
2. A dominant position
   - How dominance is assessed
   - The special responsibility of the dominant company
3. Abuse of a dominant position in the context of licensing
   - Why compliance with competition law is key
   - Different types of abuse in licensing situations

1. Market definition

The purpose of defining the relevant market

Identification of the boundaries of competition between companies, both geographically and according to the productor service sold

- Actual and potential competitors and substitute products that influence commercial decision of companies, such as pricing decisions
- Specific market dynamics, such as innovation cycles, regulatory barriers and IPRs, supply chains, and customer preferences

Framework for the analysis of market power and potential dominance

- Where a hypothetical single seller of a product could exercise market power
- Calculation of market shares in the relevant market allows the competition authorities to assess market power
- A (too) broad or (too) narrow definition of a market can have important consequences for the assessment of dominance

The relevant product market

- **Substitutability of products**: Which products are interchangeable with the product at issue?
  - Looking primarily at product characteristics, price, intended use

Demand-side substitutability:

Can consumers switch between products in the event of a (small but permanent) price increase?

- SSNIP test: Would a sufficient number of buyers switch to alternative products if a hypothetical monopolist would increase prices of a given product by 5-10%, to make the price increase unprofitable

Supply-side substitutability:

Can suppliers switch production to the relevant product “without delay” and “at negligible cost” to sell it on the relevant market?

The geographical scope of the market

Geographic scope = the area in which the undertakings concerned are involved in the supply and demand of products or services and which is **sufficiently homogeneous** and distinguishable from neighboring areas

Do companies in different areas constitute an alternative source of supply for consumers?

- Importance of national or local consumer preferences
- Current patterns of purchases
- Product differentiation

Do companies located in differing areas face impediments in developing their sales on competitive terms throughout the whole geographic area?

- Requirements for local presence: costs of and access to distribution networks
- Differing regulatory requirements / licensing per territory
- Transportation costs, import taxes
- Specific product requirements (cooling, shelf life, etc.)

Market definition – In a licensing context

- Relevant markets include technology markets (upstream) and product markets (downstream)

Technology markets: All technologies which, from a licensee perspective, are interchangeable or substitutable by reason of the technology's characteristics, their royalties and intended use; alternatively, the market can be defined by looking at the products incorporating the licensed technology rights (upstream input markets)

Product markets: All products which incorporate the licensed technology, and all other products which are regarded by the buyers as interchangeable or substitutable; contract product can be part of a final or an intermediate product market

- Geographic scope can differ for product markets and technology markets, depending on the relevant conditions of competition in these markets

Case example: Servier SAS and others v Commission

Servier filed a patent at EPO seeking protection for its medicinal product, perindopril

- After disputes regarding patents, Servier settled with, a.o., Krka in order for these companies to refrain from entering market with generic versions of the product

In its investigation, EC defined the market based on single molecule, perindopril

- According to EC, perindopril differed from other ACE inhibitors in terms of therapeutic use (classifying it under ATC5), leaving other products with same therapeutic function out of the market
- Perindopril constituted its own market, because of "inertia" of prescribing physicians

General Court annulled decision, rejecting EC's findings because of too narrow market definition

- EC focused too much on price criterion, but should have looked more on other competitive pressures (e.g. promotional efforts): Servier spent large sums marketing perindopril
- Physicians make prescription decisions based on other factors than price (therapeutic differences, patient's profile, ...)
- Attaching too much importance to price would mean dominance would become commonplace

EC appealed to ECJ; in its opinion AG Kokott stressed that holistic approach is needed to define relevant market, considering impact on finding of market share and dominance

- Main question: are there competing products which exert significant competitive constraints on the undertaking concerned?
- *"Account must be taken not only of the objective characteristics of the products in question, but also the **competitive conditions and the structure of supply and demand** on the market, and therefore **all the indicators of potential competitive constraints**"*

ECJ judgment still outstanding

Market definition – Reform of the Notice

EC in the process of adopting a new Market Definition Notice

Main goal of revision is to take developments in digital markets more into account, such as:

- Greater **emphasis on non-price elements** such as innovation and quality of products and services.
- Clarifications regarding the forward-looking application of market definition, especially in **markets that are expected to undergo structural transitions,** such as technological or regulatory changes.
- New guidance in relation to market definition in **digital markets**, for example multi-sided markets and “digital eco-systems" (e.g. products built around a mobile operating system).
- New principles on **innovation-intensive markets**, clarifying how markets should be assessed where companies compete on innovation, including through pipeline products.

New Notice was supposed to be finalized by Q3/2023, so adoption should take place shortly

2. A dominant position

A dominant position

Dominance = a position of economic strength enjoyed by an undertaking

- Enables company to **prevent effective competition** being maintained on the relevant market
- Affording company the **power to behave to an appreciable extent independently** of its competitors, its customers and ultimately of its consumers
- Exclusive IPR does **not** necessarily grant a dominant position

Collective dominance of a group of undertakings is also possible

- Connecting factors enable the undertakings to act together independently of their competitors, customers and consumers
- **Oligopolistic** markets are of particular concern

Being dominant is not illegal

- Market power as the result of **competition on the merits** is legitimate
- However, dominant companies have a "**special responsibility**" not to further distort competition which means that conduct which is usually a legitimate commercial strategy can become problematic
- In areas where a company is found to have market power, it might face **significant limits** on its freedom to decide its commercial strategy

How to assess a dominant position

High market share may lead to a presumption of dominance

- Usually share of ≥ 50% leads to presumptionof dominance; for company to rebut
- Market power can also exist at lower shares, though unlikely below 40%
- Overall assessment of competitive situation and landscape necessary – who exercises constraints on the company?
- Market definition is crucial as narrowly defined markets often lead to higher market shares
- Competition authorities can sometimes reverse engineer from conduct they believe to be exploitative to “find” dominance in a relevant market

Different methods for the calculation of market shares

- Usually via sales (value or volume), but other criteria used where more appropriate or available (e.g., monthly active users; capacity)
- Licensor’s market share: paid royalties (but may not always be available); licensor’s and all its licensees’ sales of products incorporating the licensed technology

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How to assess a dominant position

Barriers to entry and expansion: ease for potential competitors to enter the relevant market

- Network effects: user increase means value increase
- Regulatory costs: administration, compliance, …
- Investment costs: capital requirements, R&D investment, protection of IPRs, ...
- Switching costs: tendency for consumers to stick to a product
- Economies of scale and scope: large volume of production and sales

Existence of countervailing buyer power

Overall size and strength of the undertaking concerned

Vertical integration

- Ownership of two or more links in the supply chain: increased risk of a dominant position

3. Abuse of a dominant position in the context of licensing

Article 102 TFEU

Art. 102 TFEU

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Risks of abusing a dominant position

> *"Behavior which is such as to influence the structure of the market, where, as the result of the very presence of the undertaking the degree of competition is weakened, and which through* ***recourse to methods different from those which condition normal competition*** *(...), has the* ***effect of hindering the maintenance of the degree (or growth) of competition*** *still existing in the market"*
>
> CJEU

- **EC** (but also national authorities) **can investigate** after complaint or open *ex officio* investigation, imposing heavy fines and prohibiting the relevant conduct
- Fine can be up to **10% of the annual global group turnover**
- Any citizen or business that was harmed because of the abuse can bring an **action for damages** before national courts

Types of abuse in a licensing context

- The acquisition of a license by a firm in a dominant position which would strengthen that dominance.
- The application of abusive terms in granting a license, or the discriminatory refusal to grant a license to one party where other licenses have already been granted.
- A refusal on the part of an IPR-holder to grant a license to any third party at all.
- The misuse of a patent which was obtained in an anti-competitive way either by making misrepresentations to patent offices or by otherwise playing the rules.

Acquisition of a license by a dominant firm

Acquisitions as part of a strategy to protect market power

Tetra Pak®

Tetra Pak I (Case T-51/89, 1990)

- EC held that Tetra Pak had abused its dominant position on the market for aseptic milk carton and related packaging machines by acquiring its competitor and, with it, an exclusive license to a patented new technology
- General Court upheld the decision
- Application of Article 102 TFEU must be looked at in the light of all the circumstances, particularly the effect on the structure of competition in the market:
  - in *Tetra Pak I,* the firm held a 90% share of the relevant markets and the acquisition of the exclusive license would have prevented a new competitor from entering the market

Applying abusive license terms or refusing to license where other licenses have already been granted (I)

1. Excessive pricing:

- Charged royalties could infringe Article 102 TFEU as unfair licensing terms
- ECJ will seek to compare what it considers to be objectively similar situations and require justification on the part of the IPR-holder should large price differences be found.

Ministère Public v Tournier (Case 395/87, 1989)

- The case involved a French disco operator and the French collection society SACEM which required royalty payments based on a fixed rate of 8.25% of its total turnover. The ECJ compared the rates charged by SACEM with those charged by copyright management societies in other member states. Once it had been determined that SACEM charged rates significantly higher than its counterparts in other member states, the onus was on SACEM to justify the difference by reference to objective and relevant dissimilarities in copyright management between the member states.

- EC may also act to intervene under Article 102 TFEU where significant price increases are made after patent protection has expired

Aspen Pharma (Case AT.40394; commitments decision in 2021)

- In opening its first investigation into concerns about excessive pricing in the pharmaceutical industry, EC noted that the pricing of original medicines that are protected by patents is highly regulated. It also stated that prices generally fall significantly when a medicine goes off-patent.
- However, in this case, there were indications that Aspen Pharma had imposed significant and unjustified price increases for off-patent cancer medicines. Aspen's prices exceeded its relevant costs by almost 300% on average.

Applying abusive license terms or refusing to license where other licenses have already been granted (II)

2. Tying

- Tying of (the purchase of) one product to another product as part of an IPR licence

Google Android (Case T-604/18, 2022)

- While Android is free and open source, other Google apps aren't. This includes in particular the Play Store. To obtain a license to use the Play Store on their devices, OEMs had to enter into Mobile Application Distribution Agreements ('MADAs') with Google, which required them to pre-install Google Search (general search app) and the Chrome browser. This abuse could be characterized as leveraging: Google used its dominance in the market for Android app stores to gain market shares in the markets for browsers (Chrome) and general search (Google general search and Google Search app).

3. Restrictions on use/interoperability:

- Dominant rights holder imposes unreasonable restrictions on use, particularly if these create substantial barriers for customers wanting to switch to a different provider and prevent other providers from competing effectively

Thomson Reuters (Case AT.39654, commitments decision in 2012)

- Thomson Reuters' practice of prohibiting its customers from using RICs (= Reuters Instrument Codes (short, alphanumerical codes that identify securities and their trading locations)) to retrieve data from other providers' consolidated real-time data feeds, and preventing third parties from creating and maintaining mapping tables incorporating RICs that would allow the systems of Thomson Reuters' customers to inter-operate with consolidated real-time data feeds of other providers

Refusal to license

- Concerns the refusal by the dominant company to provide a license to another company, preventing that company from entering the market
- Refusal to license cannot in itself amount to an abuse of a dominant position

However, the exercise of an exclusive right may **in exceptional circumstances** involve abusive conduct:

1) The refusal to provide basic information by relying on copyright **prevented the appearance of a new product** for which there was potential consumer demand;
2) There was **no justification** for such refusal; and
3) The IPR-holders **reserved to themselves the secondary market** of weekly television guides by excluding all competition on that market, since they denied access to the basic raw material (in this case, information) necessary to compile a guide.

- Article 102 TFEU also applies where the concerned product or service was essential for the exercise of the activity in question.

Standard essential patents

- Where the patent has acquired SEP status as a result of the proprietor having irrevocably undertaken to the standard-setting body that it will license on FRAND terms, the right holder has created a legitimate expectation that licenses will be granted on ('FRAND') terms.

➢ Article 102 TFEU does not remove the SEP owner's ability to enforce the IPR, but requires that any alleged infringer of the SEP is notified of the alleged breach; and made a specific, written offer of a license on FRAND terms specifying the royalty and the way in which it has been calculated.

Motorola case (AT.39985, prohibition decision 2014)

- EC concluded that Motorola Mobility breached Article 102 TFEU by seeking and enforcing an injunction against Apple in Germany in relation to a smartphone SEP. The EC also found that it was anti-competitive to force Apple, under threat of enforcement of injunction, to give up its rights to challenge the validity of Motorola's SEPs.
- EC made clear that where SEP owner committed to license SEP on FRAND terms, seeking injunctions can distort licensing negotiations and lead to licensing terms that negatively impact consumer choice and prices. To be safe from injunctions, potential licensees need to demonstrate their willingness to agree on a FRAND terms license adjudicated by a court or arbitrator.

Patent ambush

- Concerns a situation in which a participant in the standard-setting process asserts proprietary rights that cover a proposed industry standard only after the standard has been adopted, and so claims a right to a royalty from all those adopting the standard.

Rambus

Rambus (Case AT.38636, commitments decision 2009)

- On 30 July 2007, the EC sent Rambus a statement of objections alleging that Rambus has breached Article 102 TFEU by claiming unreasonable royalties for use of certain patents. The EC considered that Rambus engaged in intentional deceptive conduct in the context of the standard-setting process. In particular, it engaged in a "patent ambush" by not disclosing standards that it later claimed were relevant to the JEDEC adopted standard. As a result of this patent ambush, Rambus was able to charge higher royalty rates than it would otherwise have been able to.

Patent pools

- The formation of a pool or collection of protected works or technologies may create competition concerns such as **limiting third party access** to the pool rights or **foreclosing opportunities for new, or rival, technologies** that are not in the pool. It may also **disadvantage customers** by requiring them to negotiate royalties or other licensing terms with a single collective body rather than being able to take advantage of competition between rights holders.

The entity managing the pool of work or technology may be subject to Article 102 TFEU as the pool may possess a *de facto* monopoly. If so, the managing entity must not unreasonably refuse to supply services to persons dependent upon the pool.

Pay for delay

Pay for delay

- Concerns an agreement by the dominant company with its (potential) competitor in order to the delay their entry to the market

GSK, Case C-307/18, Generics (UK) and Others, 2020

- Case was referred to CJEU by UK Competition Appeal Tribunal, following an appeal against the UK Competition and Markets Authority fining manufacturers of generic medicines and GlaxoSmithKline (GSK) 45 million pounds for settling a patent dispute with a deal permitting GSK to pay generic manufacturers a total amount of around 50 million pounds in exchange for refraining to enter the market with their own generic products.
- In essence, the agreement was intended to delay the potential entry of generic competitors into the UK market after GSK's patent for the active substance of the anti-depressant medicine paroxetine, and secondary patents, protecting some processes for the manufacture of the active substance, expired in 1999.
- The CJEU confirmed that a dominant company can also abuse its dominant position under Article 102 TFEU when concluding an agreement that violates Article 101 TFEU. The CJEU ruled that in objectively assessing whether there has been an abuse of a dominant position, the regulator has to evaluate the accumulative restrictive effects on competition, in particular exclusionary effects, resulting from GSK's various agreements with different generics manufacturers.

Patent misuse

Patent misuse

- Concerns the strategy of a dominant company to abuse the regulatory process to minimize the effect of the introduction of competing (generic) products

AstraZeneca (Case C-457/10 P, 2012)

- Between 1993 and 2000, AstraZeneca abused its dominant position in the market for proton pump inhibitors by blocking or delaying market access for generic versions of Losec, which at that time was the world's best-selling prescription medicine, and preventing parallel imports of Losec.
- AstraZeneca made misrepresentations to a certain number of EEA national patent offices with a view to obtaining supplementary protection certificates (SPCs) for Losec. By using misleading information when making SPC applications, which was relied on by the patent offices, it obtained additional patent protection in several member states. In addition, AstraZeneca misused the rules and procedures applied by the national medicines agencies that issue market authorizations for medicinal products. AstraZeneca requested the national medicines agencies in Denmark, Norway and Sweden to de-register the market authorizations for Losec capsules (having replaced the product with a tablet form). This was done with the intent to block the entry of generic products or parallel traders.

Thank you

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