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Fordham Conference 2015 – Competition and IP Interplay

Daniel Byrne (Bristows) · Thursday, April 9th, 2015

There has been an explosion of anti-trust cases at the EC, which is of concern to the Deputy Director for Antitrust (European Commission) **Cecilio Madero Villarejo**. Some of these cases involve non-EU companies. It is the view of the EC that IPRs can be exercised in a way which falls foul of competition principles. He alluded to the distinction between the existence of IP rights and the exercise of those rights and said that is what they try to investigate in cases such as the standards essential case of Motorola.

He mentioned the case of *Lundbeck* as indicating that some (generics) companies might illegitimately prefer not to compete and to instead benefit from receiving a ‘monopoly rent’ from the patentee (innovator). Investigating such settlements requires an economic analysis, and is a consideration for companies who engage in and conclude settlement discussions. He did mention that the EC does not want to have to make decisions about the validity or value of patents, but dominant companies have additional responsibilities.

Robin Jacob’s view is that competition authorities are threatening innovation. He says the top 10 pharma companies spend £50 billion a year on research and development. As for governments, the UK gives the Medical Research Council 800 million, the American NIH gets \$30 billion. As for charities, the Wellcome Trust has a capital of £7 billion and the Gates’ Trust has \$37 billion. The pharma companies are therefore important and need to be able to fund this from the money earned from selling medicines. They only get 10 to 12 years of protection and will be out of business unless they develop more! He said that referring to the price of medicines as a ‘monopoly rent’ has unjustified overtones of disapproval. The fine on Lundbeck was 100 million euros, but he asked who could spend that better, Lundbeck or the EC? No-one knew if the patent was invalid or that there was some sort of dishonesty. It is a policy choice, but there are consequences, which include less medicines. The competition authorities ‘meddle’ with the innovative industries and should stick with investigating price-fixing deals for cement.

Mr Madero Villarejo responded that the money paid by pharmaceutical companies to PR agencies should probably also go to research and development. He noted that from time to time things are not always crystal clear and that dominant companies might be tempted to ‘pay for delay’ and extend their monopoly. This must be something that the EC can investigate and he has personal experience of companies not seeking to preserve their money to do R&D, but who are engaging in wrong-doing. The fines go back into the budget of the Member States so there is no money gained by the EC. He also noted that another sector inquiry into the single digital market will soon be launched.

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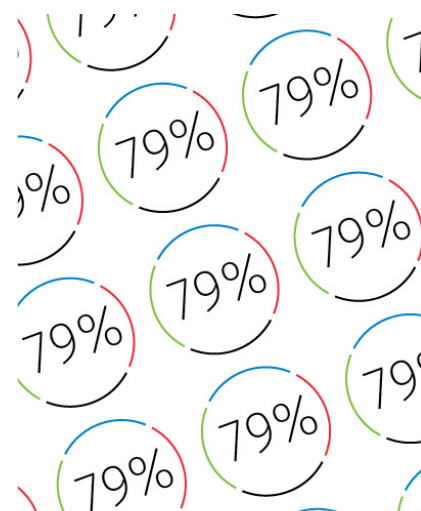
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