IP and competition: increasing awareness of lack of uniformity between legal procedures and practices

Kluwer Patent Blog
August 30, 2019

Kluwer Patent blogger

Please refer to this post as: Kluwer Patent blogger, 'IP and competition: increasing awareness of lack of uniformity between legal procedures and practices', Kluwer Patent Blog, August 30 2019, http://patentblog.kluweriplaw.com/2019/08/30/ip-and-competition-increasing-awareness-of-lack-of-uniformity-between-legal-procedures-and-practices/

How do competition law and intellectual property work together? That is the main focus of the book 'The interplay between competition law and intellectual property', which was published by Kluwer Law International earlier this year. The book, focusing on sectors such as pharmaceuticals, IT, telecoms, energy and agriculture in eleven of the world's most active jurisdictions, provides an in-depth understanding of how this interplay reveals itself among the different legal systems. A short interview with the editors, Gabriella Muscolo, Commissioner of the Italian Antitrust Authority and Marina Tavassi, President of the Court of Appeal of Milan, both expert in the field of IP and competition laws.

Which findings were most surprising to you?

"Although competition law as well as intellectual property law are substantially uniform sets of rules, in Europe and even worldwide, when procedural rules and case law are at stake, experts in the field still acknowledge a lack of harmonization between legal procedures and practices and clashes in enforcement jurisprudence.

However, dialogue between national and supra-national courts, networking among NCAs, enhanced cooperation between the latter and judges and global litigation on the one hand increase awareness of the lack of uniformity and, on the other hand, contribute to creating a more balanced regulatory environment."

Are there fields of industry or specific countries in which you see a particular imbalance between competition law and IP law?

"Rather than speaking of imbalance in specific sectors or countries, we would like to highlight the divergent approach to the trade-off between IP and competition in Europe and the US, which mainly depends on the different rationale of competition law in the two systems.

Indeed, while in the US competition policies are traditionally geared towards efficiency in the sense of lower-priced products, in the EU the objectives of antitrust are broader, ultimately focused on consumer welfare and also related to fairness and equality. For instance, with regard to exploitative abuses, the pure efficiency-oriented US policy prevents the existence of excessive pricing cases, while in Europe the issue has recently been revitalized by several cases in the pharmaceutical sector.

However, recent developments in the debate on both sides of the Atlantic are leading to increasing convergence. For example, for cases of excessive pricing, on the one hand these are niche cases in Europe. On the other hand, several US scholars have recently argued that there is no reason, in principle, why the Sherman Antitrust Act (1890) should not address also the unilateral imposition of excessive pricing.

What should be the leading criteria when trying to find a balance between the competition law and IP?

"In principle, competition law and IP law do not have conflicting goals: indeed, the two systems are synergic because both aim to foster economic growth and protect consumer welfare. In exceptional and specific circumstances, however, an abuse of the IPRs may result in illicit anti-competitive behaviour.

The main criteria for striking the balance between exceptionally conflicting interests should be to maintain markets open and contestable without hindering innovation.

Returning to the example of the pharma sector, it is of the utmost importance to underline how the recent excessive prices cases in Italy and the UK concern medicines that have long since been off-patent, for which it has not been necessary to remunerate R&D expenditure and, consequently, the case presented no risk of distorting innovation[1].

Moving to a different market, that of high technology, enforcement actions on digital markets should also ensure that the potential for innovation, and hence consumer welfare, is fully protected."

Generics are widely seen as an alternative for expensive medicinal products. Are generics the solution indeed? Or does exclusionary and exploitative behaviour occur with generics as well, as a recent lawsuit in the US **seems to indicate**?

"As was highlighted by the European Commission's inquiry into the pharmaceutical sector in 2009, effective competition from generic medicines and, more recently, biosimilars, typically represents a vital source of price competition in pharmaceutical markets and nowadays significantly drives down prices for generics by an average of 50 percent.

However, anti-competitive behaviour may also occur with generic drugs. For example, reference could be made to pay-for-delay agreements whereby the generic company agrees to limit, or delay, its independent entry into the market in exchange for the benefits transferred by the originator. Over the last decade, pay-for-delay agreements have been found to be anti-competitive in a number of proceedings, including those concluded by European antitrust authorities. As an example, which at first glance seems very similar to the recent US case you mentioned, one could cite the Servier Case of 2014[2].

[1] See the decision of the Italian Antitrust Authority No. 26185, dated 29 September 2016 in the case A480 – Price increase of Aspen's drugs. The English text of the decision is available here. Other similar cases followed the Italian Aspen case: see the decision of the UK Competition and Markets Authority (CMA), dated 7 December 2016, where the CMA found that Pfizer and Flynn have each abused their respective dominant position by imposing unfair prices for phenytoin sodium capsules manufactured by Pfizer (decision in case CE/9742-1). However, on June 7, 2018, the UK Competition Appeal Tribunal (CAT) set aside part of this decision. The decision of the CAT is available at this webpage.

[2] The decision of the European Commission is available at this webpage.