

Managing the Nexus between Patent Pools and Competition in Light of the COVID-19 Pandemic: The Case of the UAE

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The reasoning to develop a strong patent regime is an old and straightforward one. Research and development (R&D) requires incentive and strong intellectual property regime provides that incentive. It is estimated that the total cost of developing a new drug, including the costs of capital and failed R&D efforts, amounts to billions of dollars. Without strong protection for these costs, there will be no economic justification for investment.

During normal times in today's complex world, to produce certain goods, any manufacturer would have to obtain licenses to several interrelated patents, something that is known as the complements problem. Where there are many patents to obtain, this will complicate matters for innovation and indeed could lead to underuse of technologies and heavy patent costs. In order to simplify the process, patent pools can be created between patent owners that bundle multiple pieces of intellectual property together, rather than on a patent-by-patent basis, into a single license so that they can license their patents to other parties collectively. As countries are still in the thick of fighting the COVID-19 health crisis and scientists and pharmaceutical companies are in the process of uncovering the molecular secrets of this novel coronavirus and developing potential vaccines, we need to revisit the issue of patent pools. Patent pools thus reduce transaction costs for licensees and preserve the financial incentive for patent holders to commercialize their products.

Countries such as the U.S and EU have extensive law and jurisprudence that deal the anti-competitive nature and practices of patent pools. For example, in the U.S, there is the Antitrust Guidelines for the Licensing of Intellectual Property (Antitrust Guidelines). The focus of antitrust examination will be on the formation or structure of the patent pool and whether this formation impairs competition. Courts assess most antitrust practices under a "rule of reason," which requires them to estimate the defendant's market power and the impact of some practice that is claimed to be unreasonably collusive or exclusionary. In the EU, there is the EC Technology Transfer Block Exemption Regulation and the Guidelines on Technology Transfer Agreements. The purpose of block exemption regulations is to provide a safe harbor for these agreements which meet the requirements of the regulation to be excluded from the application of Article 101(1) of the Treaty on the Functioning of the European Union. Such an exemption is good for business as its agreement may not be declared as an anticompetitive agreement under EU competition law. In order to enjoy the safe harbor protection, a certain predetermined market share threshold cannot be exceeded. According to article 3 of the EC Technology Transfer Block Exemption Regulation, technology transfer agreements may be eligible for the safe harbor when the combined market share of the parties does not exceed: 1) twenty percent if the agreement is concluded between actual or potential competitors; or 2) thirty percent if the agreement involves non-competing businesses.

Patents create a set of exclusive rights. For example, the UAE Patent Law provides the patent owner with the right to exclude third parties from making, using, offering for sale, selling, or importing for these purposes, the product without his consent. In other words, inventors who wish to use the patented product or technology will have to obtain permission from the patent holders. A collective rights management system like patent pools can be used for pharmaceuticals and the problem of access to these products in developing countries. The objective of the pool is to provide reasonable access to licensees and reasonable return to patent holders.

The pharmaceutical industry in UAE is several decades old, where the first domestic maker started business in the early 1970s. The pharmaceutical sector has been highly fragmented and its profits squeezed by competition. Some companies saw their operating income drop. Thus, the pharmaceutical industry was poised for a change. The problem of the intellectual property regime in UAE was acute in the pharmaceutical sector, where patented drugs were manufactured without licenses. The old Patents and Designs Law of 1978 was deemed to be inadequate. Under the old Patent Law of 1978, patent protection was only available for process patents. Patent protection for pharmaceutical and agricultural chemical products was excluded. The designated objective of the old law was to encourage domestic pharmaceutical companies to specialize in the production of cheap, generic versions of drugs. Now, the Patent Law requires inventions to be novel, inventive, and capable of industrial application. In UAE, the role of the Patents Office is to examine applications only for sufficiency of disclosure and clarity, definiteness and accuracy of the claims and formalities. Patent examiners in UAE rely on the substantive search and examination results of a corresponding application of a foreign patent office.

Neither UAE Patent Law nor the Regulation of Competition provides definition of patent pools. The Regulation of Competition sets examples of anticompetitive behavior such as agreement not to purchase from certain organization or organizations, limiting sale or supply to certain organization or organizations, and preventing or obstructing its/their ability to carry out its/their business. Licensing agreements can be used to aggregate patents of patent owners. Patent licensing allows companies to combine complementary factors of production and is generally pro-competitive. To avoid the anti-competitive effects of the pool and running afoul of competition law, the license terms and conditions will have to be carefully crafted. As of date, there are no examples whereby patent pools in the UAE were used to overcome patent barriers.

Absent clear mandate addressing patent pools in the UAE, local pharmaceutical companies can use some of the flexibilities available in the UAE Patent Law such as the experimental exception for research for an improved product or process and obtain a compulsory license from the original patent holder once the new product or process is patented. Using compulsory licensing to initiate patent pools can create all sort of legal problems and multinational drug companies would be hesitant to participate in any pool.

Health care providers or users can set up a patent pool. These entities can import the technology from other countries and then local pharmaceutical companies that license from the pool can produce the licensed product to serve local market. However, local companies, which are small in size and capacity, may not have the expertise and knowledge to set up the pool and manage it effectively. Perhaps, setting patent pools at the Gulf Cooperation Council level with the help of national governments can serve the interests of the public benefiting from economies of scale.

Higher drug prices would put a strain on the public health system, and for those UAE residents without health insurance, higher prices would require significant out-of-pocket expenditure that disproportionately harms the poorest patients. The increase in the prices of drugs in UAE represents one of the major threats to the health of the population, economic growth, and trade flows. The use of patent pools could create a win-win situation serving the interests of both the public and private sectors.