

Intellectual Property & Antitrust 2020

Contributing editor
Peter J Levitas



Publisher

Tom Barnes

tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall

claire.bagnall@lbresearch.com

Senior business development managers

Adam Sargent

adam.sargent@gettingthedealthrough.com

Dan White

dan.white@gettingthedealthrough.com

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London, EC4A 4HL, UK

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Intellectual Property & Antitrust 2020

Contributing editor**Peter J Levitas**

Arnold & Porter Kaye Scholer LLP

Lexology Getting The Deal Through is delighted to publish the fourteenth edition of Intellectual Property and Antitrust, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Peter J Levitas of Arnold & Porter Kaye Scholer LLP, for his continued assistance with this volume.

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For further information please contact editorial@gettingthedealthrough.com

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United Kingdom

John Schmidt, Richard Dickinson, Zeno Frediani and Sarah Rosanowski

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INTELLECTUAL PROPERTY

Intellectual property law

- 1 Under what statutes, regulations or case law are intellectual property rights granted? Are there restrictions on how IP rights may be enforced, licensed or otherwise transferred? Do the rights exceed the minimum required by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)?

IP rights in the UK are protected by a combination of UK and EU legislation and UK common law.

Patents are protected under the UK Patents Act 1977, and substantive national patent law across Europe has been partially harmonised by the European Patent Convention 1973. Patent protection lasts for 20 years, and can be extended for medicinal and plant protection products by a supplementary protection certificate by up to five-and-a-half years, under EU Regulation 469/2009 (for medicinal products) and Regulation 1610/96 (for plant protection products). However, a manufacturing exemption relating to medicinal products for export purposes during the term of an SPC has recently been introduced by Regulation 2019/933.

Registered trademarks are protected under the UK Trade Marks Act 1994 and EU Regulation 2017/1001 (the EUTM Regulation). Unregistered trademarks, including the overall 'get-up' of a product or service, are protected by case law under the tort of passing off. Protection for both registered and unregistered trademarks can last indefinitely; registered trademarks must be periodically renewed.

Registered and unregistered designs are protected under the UK Copyright, Designs and Patents Act 1988 (CDPA) and Registered Designs Act 1949, and EU Regulation 6/2002 (the Community Designs Regulation). The duration of protection varies from three to 25 years, depending on the nature of the right.

Copyright protection is governed by the UK CDPA, and specific aspects of copyright law have been (and continue to be) harmonised by a number of EU Directives. The duration of copyright protection varies, depending on the nature of the work; literary, dramatic, musical and artistic works are protected for 70 years from the end of the year in which the author dies.

Databases are protected as copyright works under the CDPA, and by sui generis database right under Directive 96/9 (the Database Directive) as implemented by the CDPA. Copyright in a database lasts for 70 years, and sui generis database right for 15 years.

Trade secrets are protected by the common law of breach of confidence, and the UK has enacted legislation to implement the Trade Secrets Directive (2016/244).

The enforcement of IP rights across Europe has been harmonised to some extent by Directive 2004/48 (the Enforcement Directive). In addition to restrictions arising out of competition law, key restrictions on the ability to enforce IP rights include the risk of incurring liability

for groundless threats of IP infringement, the law of which has been significantly reformed in the UK by the Intellectual Property (Unjustified Threats) Act 2017, and specific defences to infringement and restrictions on available remedies for each right. The formalities for assignments and licences, and the effect of failing to register a transaction in relation to a registered right, vary between different rights and are provided for in the relevant legislation.

Responsible authorities

- 2 Which authorities are responsible for granting, administering or enforcing IP rights?

The UK Intellectual Property Office (IPO) is responsible for the grant and administration of UK patents, trademarks and registered designs. The European Patent Office is responsible for the prosecution (including post-grant opposition) of European patents. The EU Intellectual Property Office is responsible for the grant and administration of EU trademarks and registered Community designs.

The Trading Standards Authorities play a role in investigating IP infringement and conducting prosecutions for criminal IP enforcement, and the UK customs and border authorities can take action to assist in IP enforcement, but IP enforcement is primarily via civil litigation in the courts.

Proceedings to enforce IP rights

- 3 What types of legal or administrative proceedings are available for enforcing IP rights? To the extent your jurisdiction has both legal and administrative enforcement options for IP rights, briefly describe their interrelationship, if any?

IP rights are primarily enforced in the UK via civil court proceedings, and the English High Court is the most common venue. IP proceedings in the English High Court are heard in the Chancery Division, and different specialist lists are available:

- the Intellectual Property Enterprise Court (IPEC) can hear any IP claim of relatively low complexity and value: the IPEC is generally suitable for claims which can be tried in two days or less, damages are capped at £500,000 and recoverable legal costs are subject to a cap of £50,000;
- the Patents Court can hear claims relating to patents, registered designs, semiconductor topography rights and plant varieties. There is no cap on damages or recoverable legal costs; and
- all other IP claims can be heard in the Intellectual Property List of the Chancery Division, of which the Patents Court and IPEC are sub-lists.

Decisions of the English High Court can be appealed (with permission) to the Court of Appeal and the Supreme Court, and the UK courts can refer questions of EU law to the Court of Justice of the European Union.

The UK IPO offers a mediation service, which can mediate infringement disputes relating to all types of IP, and can also provide a non-binding opinion on infringement of a patent or supplementary certificate. However, the IPO cannot make a binding decision on infringement of any IP right.

Remedies

4 | What remedies are available to a party whose IP rights have been infringed? Do these remedies vary depending on whether one utilises judicial or administrative review or enforcement?

The remedies available in a civil action for IP infringement (in line with the Enforcement Directive) are an injunction to restrain infringement, an order for delivery up, erasure or destruction of infringing goods, damages or an account of profit, and a declaration that the right is valid and has been infringed. Copyright and trademark infringement can also give rise to criminal liability in certain circumstances; it is theoretically possible to pursue a private prosecution, but not common.

IP holders can also request the UK customs authorities to detain suspected infringing goods.

Nexus between competition and IP rights

5 | Do any statutes, regulations or case law in your jurisdiction address the interplay between competition law and IP law?

UK IP and competition legislation does not address the interplay between competition law and IP law.

UK IP case law has addressed the interplay between competition and IP law in cases where an alleged infringer asserts that IP rights in the relevant goods have been exhausted, or that the IP holder's behaviour in enforcing its rights is anticompetitive. UK IP case law relating to standard essential patents is discussed further in question 9.

The body of case law on the nexus between IPRs and competition law is largely driven by EU competition cases. For example, there have been a number of recent European cases in respect of reverse payment patent settlement agreements (question 25). There are also a number of cases on when the use of IPRs can amount to abuse of dominance (question 28).

Patent cooperation treaties and other agreements

6 | Does your jurisdiction participate in any patent cooperation treaties or other similar agreements?

The UK is a signatory to the WIPO Patent Cooperation Treaty, the Madrid Protocol, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the European Patent Convention and the Agreement on a Unified Patent Court, although the latter had not entered into force at the time of writing.

Remedies for deceptive practices

7 | With respect to trademarks, do competition or consumer protection laws provide remedies for deceptive practices?

It is theoretically possible for a dominant company to abuse its market power by engaging in deceptive practices. In such a case, the remedies would be the same as for other breaches of competition law (see questions 12 and 13).

The Consumer Protection From Unfair Trading Regulations 2008 (CPUT) prohibit unfair commercial practices, including copycat packaging

(promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer). CPUT is enforced by public authorities and can be relied on by consumers, but does not give rise to a right in favour of affected businesses.

Technological protection measures and digital rights management

8 | With respect to copyright protection, is WIPO protection of technological protection measures and digital rights management enforced in your jurisdiction? Do statutes, regulation or case law limit the ability of manufacturers to incorporate TPM or DRM protection limiting the platforms on which content can be played? Has TPM or DRM protection been challenged under the competition laws?

The UK has implemented EU Directive 2001/29 (the Copyright Directive), which requires member states to provide legal protection against the circumvention of TPMs and the removal or alteration of electronic rights management information, and ensure that the use of TPMs does not prevent the exercise of exceptions to copyright.

There have been no recent cases where TPM or DRM protection has been challenged as a breach of competition law. That said, as with other IPRs, it is theoretically possible for TPM or DRM-related conduct to be investigated and prohibited if its object or effect restricts competition.

Industry standards

9 | What consideration has been given in statutes, regulation or case law to the impact of the adoption of proprietary technologies in industry standards?

The European Commission has published guidelines (OJ 2001 C3/2), which are applied in the UK, on the applicability of article 101 of the Treaty on the Functioning of the European Union (TFEU) to standardisation and horizontal cooperation agreements. These provide that where technology is adopted as an industry standard the agreement must provide for access on fair, reasonable and non-discriminatory (FRAND) terms or it could be a breach of competition law.

The Commission decisions in *Motorola* (C-39985/2014) and *Samsung* (C-350/08) of April 2014 were the first to provide some guidance on the compatibility of standard-essential patent (SEP) injunctions with the EU competition rules. The Commission recognised that seeking an injunction is a legitimate remedy against a patent infringer, but it held that applying for an injunction based on SEPs may be an abuse of a dominant position where the patent holder has given a voluntary commitment to license on FRAND terms and where the injunction is sought against a licensee that is willing to enter into a licence agreement on FRAND terms. The CJEU's judgment in *Huawei v ZTE* (C-170/13) in July 2015 clarified the circumstances in which an injunction can and cannot be sought without infringing competition law and sets out a general roadmap of behaviour for both parties.

The English High Court has considered the principles relating to FRAND obligations in *Unwired Planet International Ltd v Huawei Technologies Co. Ltd & Anor* (Rev 2) [2017] EWHC 2988 (Pat). At first instance, the judge set out the correct approach for determining the FRAND rate, which should eliminate hold-up and reverse hold-up, and took into account the total royalty burden. Birss J also held (among other things) that:

- the FRAND undertaking given to the standard-setting body ETSI is a legally enforceable obligation; it is not necessary to rely on competition law to enforce the FRAND undertaking, and the boundaries of the FRAND obligation and competition law are not the same;
- there is only one set of licence terms that are FRAND in a given set of circumstances;

- FRAND characterises both the terms of the licence and the process by which it must be negotiated;
- offers in negotiation at rates that are not FRAND but do not disrupt or prejudice the negotiation are legitimate; and
- seeking an injunction on an SEP without giving prior notice will necessarily be an abuse of a dominant position. Seeking an injunction with sufficient notice is capable of being an abuse of dominance, depending on the circumstances; the judgment of the CJEU in *Huawei v ZTE* sets out standards of expected behaviour, but not a rigid set of rules that must be followed to avoid abuse.

Unwired Planet was appealed at the Court of Appeal (*Unwired Planet International Ltd & Anor v Huawei Technologies Co Ltd & Anor* [2018] EWCA Civ 2344). This upheld the first instance decision of Birss J in all material respects. Further decisions have confirmed the jurisdiction of the English court to grant a global FRAND declaration (*Conversant Wireless Licensing SARL v Huawei Technologies Co Ltd* [2018] EWHC 808 (Pat); *Huawei Technologies Co Ltd v Conversant Wireless Licensing SARL* [2019] EWCA Civ 38), and considered the extent to which corporate affiliates are bound by the ETSI FRAND undertaking (*Apple Retail UK Ltd v Qualcomm (UK) Ltd* [2018] EWHC 1188 (Pat)). At the time of writing, the Supreme Court had given permission to Huawei to appeal *Unwired Planet*, and to Huawei and ZTE to appeal *Conversant*.

COMPETITION

Competition legislation

10 | What statutes set out competition law?

UK competition law is contained in the following key statutes: the Competition Act 1998, the Enterprise Act 2002, the Enterprise and Regulatory Reform Act 2013 and the Consumer Rights Act 2015.

The provisions of Chapter I (prohibiting anticompetitive agreements) and Chapter II (prohibiting abuse of dominance) of the Competition Act mirror the EU equivalent found in articles 101 and 102 of the TFEU, respectively. Section 60 of the Competition Act provides that the UK courts must interpret these provisions in line with EU law, including European Commission decisions and European court judgments. Additionally, Regulation (EC) No. 1/2003 (the Modernisation Regulation) allows the UK competition authorities and courts to apply articles 101 and 102 of the TFEU themselves.

The Enterprise Act contains the UK’s merger control provisions. They apply to mergers that do not fall within the exclusive competence of the European Commission under the EU Merger Regulation (Council Regulation (EC) No. 139/2004). The UK operates a voluntary system for merger notifications.

The Enterprise Act also contains the cartel offence, a criminal law offence potentially affecting individuals involved in price-fixing, market sharing, bid rigging or output limitation.

IP rights in competition legislation

11 | Do the competition laws make specific mention of any IP rights?

No. UK competition law does not make specific reference to IPRs. However, EU law is directly applicable and therefore agreements that fall within one of the EU block exemptions will be exempt from the application of the Chapter I provisions and article 101 of the TFEU. A number of block exemptions make specific reference to IPRs:

- the Technology Transfer Block Exemption Regulation (Commission Regulation (EU) No. 316/2014) (TTBER);
- the R&D Block Exemption Regulation (Commission Regulation (EU) No. 1217/2010);

- the Vertical Agreements Block Exemption Regulation (Commission Regulation (EU) No. 330/2010); and
- the Specialisation Block Exemption Regulation (Commission Regulation (EU) No. 1218/2010).

Review and investigation of competitive effects from exercise of IP rights

12 | Which authorities may review or investigate the competitive effect of conduct related to exercise of IP rights?

The competition authority in the UK is the Competition and Markets Authority (CMA) and it reviews and investigates compliance with competition law. The CMA’s remit includes the review and control of the acquisition, sale or exercise of IPRs insofar as they affect competition. Conduct in the UK that may have an effect on trade between EU member states can come under the jurisdiction of the European Commission.

The CMA applies and enforces the Chapter I and II provisions concurrently with the sector regulators in relation to their respective areas. There are a number of sector regulators, for example: Ofgem (gas and electricity), Ofwat (water), Ofcom (telecommunications and post), ORR (rail and road), CAA (airport and air traffic), NHS Improvement (healthcare in England), the FCA and the PSR (financial services and payment systems). They can investigate potential breaches of competition law, impose fines, impose interim measures and give directions to bring infringements to an end. Both the relevant regulator and the CMA are likely to be involved in a Competition Act complaint in relation to a regulated industry.

The Competition Appeal Tribunal (CAT) is a specialist competition tribunal and hears appeals against the decisions of the CMA and the sector regulators made under the Competition Act. It also hears appeals from merger and market investigation cases. An appeal from the CAT can be made to the Court of Appeal.

Follow-on and standalone claims for competition law damages can be raised in the High Court and in the CAT.

Competition-related remedies for private parties

13 | Can a private party recover for competition-related damages caused by the exercise, licensing or transfer of IP rights?

Competition-related damages in respect of IPRs can be recovered in the same way as for breaches of competition law generally.

Private enforcement of competition-related damages comes in two forms: follow-on and standalone actions. Follow-on cases are claims for damages where the infringement of competition law has already been established by a competition authority (such as the Commission or the CMA). For these claims, the claimant can rely on the infringement decision and the action only assesses the quantum of damage suffered. In standalone cases, the claimant has to prove the breach of competition law before going on to the issue of damages. Both types of claim can be heard in either the High Court (or the Court of Session in Scotland) or the CAT.

The UK regulations (SI 2017/385) to implement the EU Damages Directive (Directive 2014/104/EU) came into force on 9 March 2017. The regulations apply to claims relating to cartels arising on or after 9 March 2017, although some aspects of the regulations apply to claims where the cartel existed before that date. The Directive seeks to facilitate competition law damages claims across the EU. In its consultation documents, the UK government stated that it considered that the UK rules were largely in line with the requirements of the Directive and therefore significant changes to UK legislation were not required. This was the case in particular following the reforms introduced by the Consumer Rights Act 2015. Nonetheless, the implementation of the Directive amended the Competition Act 1998, the Civil Procedure Rules and the CAT Rules in some significant respects.

The future development of private damages claims is unclear following the UK's vote to leave the EU. However, divergence seems unlikely, at least in the short term.

Competition guidelines

- 14 | Have the competition authorities, or any other authority, issued guidelines or other statements regarding the overlap of competition law and IP?

No. The CMA has not issued any specific guidance on the overlap of competition law and IP. However, the CMA will have regard to guidelines developed by the Commission. See, for example, the Technology Transfer Guidelines (OJ 2014 C 89/03), which set out the Commission's approach to assessing the competitive effects of technology transfer agreements.

Exemptions from competition law

- 15 | Are there aspects or uses of IP rights that are specifically exempt from the application of competition law?

No. In UK competition law there are no uses of IPRs that are specifically exempt from the application of competition law. However, a number of EU block exemptions make specific reference to IPRs (see question 11). Agreements covered by a block exemption will be exempt from the application of the Chapter I provisions and article 101 of the TFEU. There are no IPR-specific exemptions from the Chapter II provisions and article 102 of the TFEU.

Copyright exhaustion

- 16 | Does your jurisdiction have a doctrine of, or akin to, 'copyright exhaustion' (EU) or 'first sale' (US)? If so, how does that doctrine interact with competition laws?

The doctrine of copyright exhaustion is contained in national legislation. Sections 16(1)(b), 18(1) and 18(2) of the CDPA 1988 establish the copyright holder's exclusive right to issue (ie, distribute) copies of their work to the public. Section 18(3)(a) contains the principle of exhaustion, stating that the subsequent distribution of copies of a work will not infringe the copyright holder's distribution right.

The principle also applies to the UK as derived from the EU rules on the free movement of goods. Once a good has been placed on the market (ie, the distribution right has been exercised), there is no right to prevent the subsequent movement of that particular right throughout the EEA. The UK government's technical guidance on the 'Exhaustion of intellectual property rights if there's a no-deal Brexit' indicates that the UK will continue to apply the EEA exhaustion scheme following Brexit to provide continuity in the immediate term for businesses and consumers. However, exhaustion of rights may not apply to those goods imported from the UK to the EEA. Businesses conducting such imports may need to obtain the rights holder's permission to export the goods into the EEA.

Import control

- 17 | To what extent can an IP rights holder prevent 'grey-market' or unauthorised importation or distribution of its products?

The doctrine of copyright exhaustion is contained in national legislation as well as being contained in EU law from the perspective of protecting the free movement of goods (see question 16). Subject to the doctrine of implied licence, if a UK IPR holder markets its products outside the EEA, it can control the unauthorised import of those products into the EEA.

Jurisdictional interaction between competition laws and IP rights

- 18 | Are there authorities with exclusive jurisdiction over IP-related or competition-related matters? For example, are there circumstances in which a competition claim might be transferred to an IP court to satisfy subject matter jurisdiction? Are there circumstances where the resolution of an IP dispute will be handled by a court of general jurisdiction?

The single UK competition authority is the CMA. It is the body that reviews and enforces competition law complaints and investigations.

The CAT has jurisdiction to hear follow-on and standalone actions and to undertake fast-track actions for simple claims involving small and medium-sized enterprises. The High Court (and the Court of Session in Scotland) also has jurisdiction to hear competition cases.

As set out in question 3, IP proceedings in the English High Court are heard in the Chancery Division.

CP Rule 30.8 provides that claims dealing with article 101 or 102 of the TFEU or Chapter I or II of the Competition Act will be transferred to the Chancery Division.

MERGER REVIEW

Powers of competition authority

- 19 | Does the competition authority have the same authority with respect to reviewing mergers involving IP rights as it does with respect to any other merger?

Yes, the CMA has the same authority with respect to reviewing mergers involving IP rights (IPRs) as it does with any other merger. The acquisition or sale of IPRs alone will only amount to a relevant merger situation if it constitutes the acquisition or sale of a business. For this to be the case, the IPRs must constitute a business with a market presence to which a market turnover can be clearly attributed.

Analysis of the competitive impact of a merger involving IP rights

- 20 | Does the competition authority's analysis of the competitive impact of a merger involving IP rights differ from a traditional analysis in which IP rights are not involved? If so, how?

The UK competition authorities apply the same general competition law principles to mergers involving IPRs that they apply to mergers involving any other form of property. Under the Enterprise Act, the substantive assessment is whether or not the merger will result in a substantial lessening of competition.

The existence of IPRs can play a part in defining the relevant market in which goods or services are sold and, as a result, what market the competitive effects of the merger need to be assessed in respect of. For example, in a situation where a manufacturer holds significant IPRs that allow it to prevent other manufacturers from producing spare parts for its products, the substitutability of the other manufacturers' products could be reduced. This could result in a narrow definition of the relevant market for those spare parts. The strength of IPRs held by incumbent market participants may also be considered a barrier to entry into a market. Similarly, where parties hold complementary IPRs or IPRs for alternative technologies a merger could give rise to significant issues. Where licences are held, particularly in the medium or short term, more complex issues can arise on whether the IPRs are to be ascribed to the licensee or the licensor.

Challenge of a merger

- 21 | In what circumstances might the competition authority challenge a merger involving the transfer or concentration of IP rights? Does this differ from the circumstances in which the competition authority might challenge a merger in which IP rights were not a focus?

The UK competition authorities apply the same analysis to transactions involving the transfer of IPRs as they would apply to a transaction involving any other property. See question 20 for the role of IPRs in barriers to entry and definition of relevant market.

Remedies to address the competitive effects of mergers involving IP

- 22 | What remedies are available to address competitive effects generated by a merger when those effects revolve around the transfer of IP rights?

The main remedy applied to address the competitive effects of mergers involving IPRs is divestiture, either by licensing or assignment. The aim is that the parties acquiring the IPRs should be able to compete effectively with the merged entity.

The CMA has adopted the Competition Commission's guidance on merger remedies (CC8), which contains guidance on IPR remedies. According to the guidance, for licensing of IPRs to be effective as a remedy it must be sufficient to significantly enhance the acquirer's ability to compete with the merged entity. Such a remedy may not be effective if it needs to be accompanied by other resources (such as sales networks) to enable effective competition and these are unlikely to be available to the acquirers of the IPRs.

Given these difficulties in crafting effective IPR-based remedies, where possible, the UK competition authorities generally prefer to divest a business including IPRs rather than relying on IPR remedies alone. The view is that the business including the IPRs is more likely to include all that the acquirer needs to compete effectively with the merged entity.

The CMA recently consulted on updated guidance on merger remedies (CMA87con). However, insofar as it relates to IPRs, the current draft guidance does not make any significant changes.

SPECIFIC COMPETITION LAW VIOLATIONS

Conspiracy

- 23 | Can the exercise, licensing or transfer of IP rights create price-fixing or conspiracy liability?

The Chapter I provisions do not generally prevent IPRs from being enforced, licensed or transferred. However, these are treated in the same way as non-IPR conduct. That is, agreements that have as their object or effect the restriction, prevention or distortion of competition in the UK will breach the Chapter I provisions. IPR-related agreements that fix prices, limit or control production or supply, or involve market sharing or allocation are likely to be considered infringements. This means that the way an IPR is used can become subject to competition law enforcement (see, eg, the reverse payment settlement cases in question 25).

Under the Enterprise Act, it is a criminal offence for an individual to agree with one or more other persons to make or implement (or cause to be implemented) arrangements relating to at least two undertakings involving the following prohibited cartel activities: price-fixing, market sharing, limitation of production or supply and bid rigging. A person who is guilty of the cartel offence is liable for up to five years' imprisonment or an unlimited fine.

IPR pools, where two or more parties assemble a package of protected works either for their own use or for licensing to third parties,

can raise competition law liability. Such pools can create efficiencies for both the right holders and the right purchasers. However, they may limit third-party access to the pools or foreclose opportunities for rivals who are not part of the pool. This has not yet been examined in the UK, but the TTBER Guidelines (OJ C 89, 28 March 2014, pp 3–50) contain a framework for assessing the application of EU competition law to the pooling of protected works.

Scrutiny of settlement agreements

- 24 | How would a settlement agreement terminating an IP infringement dispute be scrutinised from a competition perspective? What are the key factors informing such an analysis?

In the same way as any other agreement, a settlement agreement terminating an IP infringement dispute must comply with UK and EU competition law. The TTBER Guidelines deal with this directly. They address the licensing of technology rights in settlement agreements as a means of settling disputes or avoiding a situation in which one party exercises its IPRs to prevent the other party from exploiting its own technology rights. These agreements can be caught by article 101 of the TFEU where the settlement leads to a delayed or otherwise limited ability of the licensee to launch the product on any of the markets concerned. If the parties to such an agreement were competitors and there was a significant value transfer from the licensor to the licensee, there may be a risk of it constituting market allocation or market sharing. Cross-licensing in settlement agreements may also be anticompetitive where the parties have a significant degree of market power and the agreement imposes restrictions that clearly go beyond what was required. Additionally, non-challenge clauses in settlement agreements may be caught by article 101 of the TFEU where an IPR was granted following the provision of incorrect or misleading information.

Agreements that could be problematic from a competition perspective include patent settlements that may lead to a delay of generic entry in return for a value transfer from the originator company to the generic company (see question 25). Settlement agreements in which the regulator considered the patent holder to have known that the patent did not meet the patentability criteria have also been scrutinised from a competition law perspective. In particular, regulators have shown interest where the patent was granted following the provision of incorrect, misleading or incomplete information.

Reverse payment patent settlements

- 25 | How have the competition laws been applied to reverse payment patent settlements in your jurisdiction?

In February 2016, the CMA fined GlaxoSmithKline (GSK) and a number of generic companies £45 million in respect of certain patent settlement agreements related to the antidepressant paroxetine (branded Seroxel by GSK). In the same investigation, the CMA issued a 'No Grounds for Action' decision in respect of IVAX Pharmaceuticals UK's agreement with GSK. The fined parties have appealed the CMA's decision to the CAT, which, on 8 March 2018, referred a number of questions to the CJEU. It will take some time for the approach to these agreements to be settled.

The ongoing case of *Secretary of State for Health and others v Servier Laboratories Ltd and others* [2013] EWCA Civ 1234 concerns patent settlement agreements relating to the patent for perindopril and alleged attempt to delay market entry. The claim was brought after the European Commission initiated an investigation into those agreements.

In September 2016, the General Court of the European Union (General Court) delivered its judgment in *Lundbeck* (Case T-472/13). The court dismissed the appeal against the Commission's decision and

found that, in specific circumstances, reverse payment patent settlements could amount to a restriction of competition by object. The General Court’s decision was appealed to the CJEU. Lundbeck, a Danish pharmaceutical company, appeared at the EU court along with several generics manufacturers for an oral hearing in January 2019. Lundbeck is expecting a final judgment in late 2019. While this is a European case, rather than a UK one, it will have a significant impact on the application of competition law in the UK to reverse payment patent settlements.

In December 2018, the General Court partially overturned the EU Commission’s decisions in *Perindopril (Servier v Commission and Krka v Commission)*, confirming that a patent settlement agreement can be a restriction by object. The General Court narrowed somewhat the EU Commission’s expansive reading of what constitutes a value transfer in the context of a patent settlement and also expressly permits settlements that are not pan-EU but that have different outcomes in different parts of the EU.

In July 2017, the European Commission adopted a Statement of Objections in respect of an agreement between Teva and Cephalon over allegedly delaying the sale of generic modafinil. The European Commission has indicated that it expects to conclude the case in 2019. These cases make it clear that reverse payment patent settlement agreements are still very much in the crosshairs.

(Resale) price maintenance

26 | Can the exercise, licensing, or transfer of IP rights create liability under (resale) price maintenance statutes or case law?

IPR licences are treated in the same way as other agreements in this context. A licence that imposes (directly or indirectly) a minimum resale price for goods or services will likely infringe the Chapter I provisions and article 101 of the TFEU. Price-fixing and resale price maintenance agreements are seen as hardcore restrictions and are also excluded from the block exemptions. For example, the TTBER exemption will not apply to price fixing.

In September 2018, the EU General Court upheld the European Commission’s refusal to reinvestigate GSK’s Spanish ‘dual-pricing’ distribution arrangements. The court found that the Commission lawfully deprioritised the case, because GSK’s conduct had long since ceased.

Exclusive dealing, tying and leveraging

27 | Can the exercise, licensing, or transfer of IP rights create liability under statutes or case law relating to exclusive dealing, tying and leveraging?

The Chapter I and Chapter II provisions do not generally prevent IPRs from being enforced, licensed or transferred. However, these are treated in the same way as non-IPR conduct and should be assessed on a case-by-case basis. IPR-related agreements dealing with exclusive dealing can infringe the Chapter I provisions. For example, an IPR-related exclusive dealing arrangement that prevents a manufacturer from distributing outside a certain territory may be seen as a form of market sharing. Additionally, a dominant company could infringe the Chapter II provisions by only granting a licence to a licensee who agrees to buy unrelated products or services.

Abuse of dominance

28 | Can the exercise, licensing, or transfer of IP rights create liability under statutes or case law relating to monopolisation or abuse of dominance?

Even a dominant company has the right to choose its trading partners and dispose of its IPRs freely. However, certain IPR-related conduct can

be seen as abusive and contrary to the article 102 and Chapter II provisions. Such conduct can include abusive defence of patent litigation, acquisition of competing technology, discriminatory licensing practices, refusal to license (in exceptional circumstances) and the charging of unfair prices for goods or services protected by IPRs. In October 2017, the CMA announced that it had launched four separate antitrust investigations into alleged anticompetitive practices regarding generic products in the pharmaceutical industry. Three of the cases were being examined for potential abuse of dominance (alongside alleged horizontal practices). In one of these cases (*MSD/Remicade*), the CMA issued a final decision in March 2019, deciding that, following the statement of objections, there were no grounds for action (ie, the case was closed without an infringement finding). One important point arising from this decision is that the CMA rejected the submission that the as-efficient competitor test (AEC price/cost test) would have prevented the CMA from finding foreclosure as established.

Over the past few years, a number of authorities (particularly the CMA) have started or completed investigations into excessive pricing of pharmaceuticals. One of the common features is that they involve products that at one stage were patent-protected. After patent expiry, the company, often following a sale of the product, changed the status from branded to generic and then increased the price by many multiples beyond the historic price. In finding that the prices were unfair, the authorities have typically relied (among other things) on the fact that the drugs had long been off-patent. In a long-running excessive price case against Pfizer and Flynn Pharma, in June 2018, the CAT held that the CMA had misapplied the relevant legal test. In December 2018, the Court of Appeal granted the CMA permission to challenge the CAT’s ruling, which is due to be heard in November 2019. This highlights the challenges faced by regulators when bringing these cases.

The strength of IPRs may also be considered a barrier to entry into a market, leading to a narrower market definition and, as a result, could make it more likely that the holder of the IPRs could be considered to be in a dominant position.

Refusal to deal and essential facilities

29 | Can the exercise, licensing, or transfer of IP rights create liability under statutes or case law relating to refusal to deal and refusal to grant access to essential facilities?

The refusal to grant a licence (ie, a refusal to deal) may constitute an abuse of dominance in exceptional circumstances. The UK position mirrors the EU competition law.

In 2013, the Court of Appeal dismissed an appeal by Chemistree Homecare Limited against the High Court’s refusal to grant it an interim injunction in a case concerning an alleged refusal to supply a patented medical product (*Chemistree Homecare Ltd v Abbvie Ltd* [2013] EWCA Civ 1338). The Court held that Chemistree did not have a real prospect of showing that Abbvie had a dominant market position. It had not provided sufficient evidence to establish that the relevant product market comprised only Abbvie’s product.

REMEDIES

Remedies for violations of competition law involving IP

30 | What sanctions or remedies can the competition authorities or courts impose for violations of competition law involving IP?

The remedies for violations of competition law involving IPRs are the same as those for breaches of competition law generally.

The CMA can accept binding commitments offered by the parties to address infringements of the Chapter I and II provisions (or articles

101 and 102 of the TFEU). It also has the power to impose financial penalties of up to 10 per cent of the worldwide turnover of an undertaking for such infringements. Additionally, it can give such directions as it considers appropriate to bring the infringement to an end. The CMA has a wide discretion in this respect, but can include directions to cease certain behaviour or to set up systems to prevent continuance of the infringements.

The CMA can also impose interim measures where it has a reasonable suspicion that there has been an infringement and the measures are necessary to protect the public interest or to prevent significant damage to particular persons or businesses. In such cases, it can give any directions that it considers appropriate to prevent the harm feared. There is no requirement that the directions be ones it could give in a final order, nor that the measures be temporary and conservatory.

The courts (including the CAT) can grant injunctions and award damages. The infringing party can also face criminal liability as described in question 23.

Competition law remedies specific to IP

31 | Do special remedies exist under your competition laws that are specific to IP matters?

No.

ECONOMICS AND APPLICATION OF COMPETITION LAW

Economics

32 | What role has competition economics played in the application of competition law in cases involving IP rights?

Regardless of whether IPRs are involved, economics plays an important role in competition law cases. Economic analysis is relevant at the stage of assessing the anticompetitive effects of behaviours and conduct, but it is also important in determining the relevant markets for goods and services.

RECENT CASES AND SANCTIONS

Recent cases

33 | Have there been any recent high-profile cases dealing with the intersection of competition law and IP rights?

In February 2016, the CMA (in a case started by its predecessor, the Office of Fair Trading (OFT)) fined GSK and two other pharmaceutical companies (the generic companies) in relation to anticompetitive patent settlement agreements. The CMA found that the generic companies agreed to delay the launch of their generic versions of the drug paroxetine in return for substantial payments by GSK. The CMA also found that GSK abused its dominant position in the UK market by seeking to delay the generic companies' entry into the market. The OFT had previously alleged that a third generic pharmaceutical company had entered into an anticompetitive agreement with GSK. However, the CMA issued a no grounds for action decision in respect of that agreement. The CMA's decision was appealed to the CAT, which, on 8 March 2018, referred a number of questions to the CJEU.

The CMA has recently closed and opened a number of investigations into excessive pricing of pharmaceuticals (see question 28).

The English High Court has recently decided several cases relating to the enforcement of SEPs and FRAND licensing obligations (see question 9).

Arnold & Porter

John Schmidt

john.schmidt@arnoldporter.com

Richard Dickinson

richard.dickinson@arnoldporter.com

Zeno Frediani

zeno.frediani@arnoldporter.com

Sarah Rosanowski

sarah.rosanowski@arnoldporter.com

Tower 42
25 Old Broad Street
London
EC2N 1HQ
United Kingdom
Tel: +44 20 7786 6100
www.arnoldporter.com

Remedies and sanctions

34 | What competition remedies or sanctions have been imposed in the IP context?

In 2010, the OFT fined Reckitt Benckiser £10.2 million (reduced from £12 million as part of an early resolution agreement) for the abuse of its dominant position on the market for the NHS supply of certain medicines. The claim related to product evergreening.

In 2016, the CMA fined GSK and two other generic pharmaceutical companies a total of £45 million for agreeing to delay entry of generic versions of paroxetine, for which GSK held certain patents in the UK. The CMA's decision was appealed to the CAT which, on 8 March 2018, referred a number of questions to the CJEU. In August 2019, the CMA provisionally accepted a £10.1 million settlement from Aspen over an agreement that prevented the entry of a competing version of the drug fludrocortisone. Unusually, Aspen has agreed to pay its customer, the NHS, £8 million without the government launching court proceedings. Aspen will additionally pay a maximum fine of £2.1 million if the CMA concludes that competition law was infringed.

There are also a number of cases in which the CMA has issued a statement of objections that may lead to fines at a later stage. For example, the CMA in February 2019 provisionally found that Auden Mckenzie and Waymade broke the law by agreeing not to compete for the supply of hydrocortisone tablets to the NHS.

UPDATE AND TRENDS

Emerging trends

35 | Are there any emerging trends or hot topics in the law of IP and antitrust policy? Have changes occurred recently or are changes expected in the near future that will have an impact on the application of competition law to IP rights?

The hot topic in all areas of UK law continues to be the United Kingdom's exit from the EU, which is due to take place on 31 October 2019. In the short term, UK law remains unchanged. The consequences for UK

competition and IP law will largely depend on the outcome of the exit negotiations and, in particular, the level of access to the single market and the corresponding level of free movement requirements. In October 2018, the Competition (Amendment, etc) (EU Exit) Regulations 2019 were published, which has since been approved by Parliament. This has the effect of adapting the EU competition regulations to become a set of domestic competition regulations in the event of, and only in the event of, a no-deal Brexit.

The CMA published guidance in March 2019 on the effect of a no-deal Brexit on merger control cases that are 'live' on exit day. In this field, there will be a high likelihood of parallel investigations by EU and UK authorities, with an increased burden to businesses. Divergent outcomes will also pose some risk, although EU case law is likely to remain influential in practice for some time.

Recently, a number of authorities have started or completed investigations into excessive pricing of pharmaceuticals. Notably, the European Commission's investigation in Aspen Pharma's pricing practices for cancer medicines is ongoing. The CAT also handed down its decision in the *Pfizer/Flynn* case (see question 28). Typically, they involve pharmaceutical products that at one stage were patent-protected. The regulators have focused on cases where they feel that some gaming of the system has occurred. The authorities have been at pains to point out that they do not want to become price regulators, but the trend of investigations into excessive prices is likely to continue. While the current focus is clearly on pharmaceutical products, other industries that rely on strong IP protection should consider keeping these developments on their radar.

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