

Intellectual Property & Antitrust

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GETTING THE
DEAL THROUGH

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Intellectual property

1 Intellectual property law

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)?

Intellectual property rights (IPRs) are granted and protected by legislation that applies throughout the UK (England, Wales, Scotland and Northern Ireland). Such legislation applies to both registrable IPRs and those not capable of registration, and is the following:

- the Copyright Designs and Patents Act 1988 (CDPA);
- the Patents Act 1977;
- the Trade Marks Act 1994; and
- the Registered Designs Act 1949.

Names, get-up and unregistered marks are protected by common law under the tort of passing off. To establish a claim for passing off a claimant must establish goodwill in the UK; a misrepresentation by a defendant that is likely to lead the public to believe that the goods or services of the defendant are in fact those of the claimant; and damage that has been suffered by the claimant as a result of the misrepresentation (criteria set down in *Reckitt & Colman Products Ltd v Borden Inc and others* [1990] 1 WLR 491).

Unregistered design rights for designs created within the UK are also protected at the European Community level for a period of three years from the date on which the design was first made available to the public within the UK (being part of the EU). This protection cannot be extended beyond the initial three-year term.

Additionally, the common law of confidence (*Coco v Clark* [1969] RPC 41) protects trade secrets and know-how. The EU Trade Secrets Directive that was adopted by the Council of the European Union on 27 May 2016 will not have a substantial effect on the law in the UK given the existence of adequate common law protection, but will harmonise law across European member states. The UK will adopt its own Trade Secrets legislation by 2018, which will codify common law protections in accordance with the Directive.

IPR holders have the following rights:

- copyright: the duration of this is dependent on the nature of the copyright. Copyright protection for artistic, musical, dramatic and literary works will subsist for 70 years from the end of the calendar year in which the author dies (section 12 CDPA). Copyright in sound recordings will subsist for 50 years from which the sound recording is made or published (section 13A). Database protection lasts for 15 years from the end of the calendar year in which the database was made;
- design rights: UK unregistered designs are protected until the earlier of 10 years from first marketing or 15 years from creation;
- protection of registered designs lasts a maximum of 25 years;
- trademark protection lasts for a period of 10 years from registration and may be renewed for further periods of 10 years indefinitely; and
- patents protection lasts for 20 years.

Licensing and transfers

IPRs may be licensed. Assignments must be in writing and signed by the assignor. In accordance with the European Patent Convention (EPC) (article 72), to which the UK is a signatory, as part of a patent assignment, the assignee must also sign the assignment.

Separately, moral rights owned by the author of copyright (Chapter IV CDPA) cannot be assigned but may be waived by the author.

2 Responsible authorities

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

The United Kingdom Intellectual Property Office (UKIPO) is responsible for the granting of rights in respect of registered trademarks, registered design rights and patents throughout the UK. Assignments and licences may also be registered at the UKIPO. The European Union Intellectual Property Office (EUIPO) is responsible for the filing of any European trademarks and design rights.

3 Proceedings to enforce IP rights

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.

The UKIPO offer a number of mediation services, as follows:

- disputes about infringement of an IPR;
- disputes about IP licensing;
- trademark opposition and invalidation proceedings on relative grounds;
- disputes over patent entitlement (eg, whether a co-inventor was employee or consultant); and
- copyright-licensing disputes between collecting societies and users of copyright material regarding the terms and conditions of licences.

These mediation services are designed to facilitate prompt and cost-effective resolution of disputes. The UKIPO also has jurisdiction to deal with trademark oppositions, invalidity proceedings and cancellation applications.

EUIPO has jurisdiction in terms of opposition and cancellation applications for EU trademark disputes and for invalidity proceedings in respect of Community registered designs.

The majority of IPR disputes and enforcement of rights take place in court. There are distinctions between civil court procedures throughout the UK. In England and Wales the Intellectual Property Enterprise Court (IPEC) has jurisdiction to hear cases relating to copyright, design rights, trademarks and patents up to a threshold of £500,000. The IPEC has a small claims track for claims under the value of £10,000. Matters of greater complexity or where the value of damages exceeds £500,000 are subject to the jurisdiction of the High Court (Chancery Division). The Court of Appeal and Supreme Court have jurisdiction to hear appeals.

In Scotland, patents, registered design right and trademark disputes are subject to the exclusive jurisdiction of the Court of Session, irrespective of their value. The Sheriff Courts have jurisdiction to hear disputes below the value of £100,000 in relation to copyright disputes and design right disputes insofar as they relate to an order for delivery up (section 230 CDPA), order for disposal of an infringing article (section 231 CDPA), application by exclusive licensee having concurrent rights (section 235(5) CDPA). Where an action relating to intellectual property (as defined in the rule) is raised in the Court of Session, it must be brought under Chapter 55 of the Rules of the Court of Session. This includes actions brought under the Patents Act 1949, the Registered Designs Act 1949, the Patents Act 1977, the CDPA 1988, the Trade Marks Act 1994 and passing off.

4 Remedies

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 civil remedies available to IPR holders are injunctions (interdict in Scotland), damages and an account of profits (interim, interlocutory and permanent) and order for delivery up, erasure and destruction of infringing goods.

In respect of damages for copyright disputes, an owner of copyright may raise proceedings for damages in the UK in instances where the defendant is not domiciled in this jurisdiction. The court will have the jurisdiction to award damages in respect of the harm that occurred for infringement in that jurisdiction (*C-170/12 Pinckney*).

An infringer in copyright (section 107 CDPA) and trademark infringement cases may also face criminal liability.

5 Nexus between competition and IP rights

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

The UK IP legislation does not deal with the overlap with competition law. EU law is directly applicable and a number of EU block exemptions make specific reference to IPRs (see question 11). The body of case law on the nexus between IPRs and competition law is growing and is largely driven by EU competition cases. For example, there have been a number of recent European cases in respect of standard-essential patents (SEPs) and reverse payment patent settlement agreements. There are also a number of older European cases on when the use of IPRs can amount to abuse of dominance.

6 Patent cooperation treaties and other agreements

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

The UK is a signatory to the WIPO Patent Cooperation Treaty and Madrid Protocol regarding the international registration of trademarks. The UK is also a signatory to the EPC. The UK is also a member of EUIPO, the EU agency responsible for Community trademark and registered Community designs.

7 Remedies for deceptive practices

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

The Consumer Protection from Unfair Trading Regulations 2008 (as amended by the Consumer Protection (Amendment) Regulations 2014 SI 2014/870) prohibits unfair commercial practices, the promotion of unfair commercial practices and misleading commercial practices. Within the UK the Consumer Rights Act 2015, the main provisions of which came into force on 1 October 2015, gives authority to the Competition and Markets Authority (CMA) and trading standards authorities to enforce consumer protection law and investigate potential breaches.

8 Technological protection measures and digital rights management

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 circumvention of technological protection measures is covered under the Copyright and Related Rights Regulations 2003, which amended section 296 CDPA to make separate provisions for computer programs. Circumvention of TPMs can lead to civil liability and the provision of devices that aid the circumvention of TPMs can result in criminal liability.

Section 296ZE of the CDPA allows the user to benefit from 'permitted acts' (section 296ZE(1) CDPA) and to reach voluntary agreements (section 296ZE(1) CDPA) in order to exercise their rights. However, any complaint may be directed towards the Secretary of State by way of complaint form (section 296ZE (2) CDPA) should recourse be needed.

In the UK, TPMs have not been challenged under competition law. However, in principle, they could be challenged if they breach the provisions of the Competition Act 1998.

9 Industry standards

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

UK legislation does not impose any conditions on holders of IPRs in respect of proprietary technologies.

The European Commission (the Commission) has published guidelines (OJ 2001 C3/2), which are applied in the UK, on the applicability of article 101 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 FRAND terms (fair, reasonable and non-discriminatory) 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 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 Court of Justice of the EU'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.

Competition

10 Competition legislation

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 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 TFEU themselves.

The Enterprise Act contains the UK's merger control provisions and the cartel offence, a criminal law offence potentially affecting individuals involved in price-fixing, market sharing, bid rigging or output

limitation. 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.

11 IP rights in competition legislation

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

12 Review and investigation of competitive effects from exercise of IP rights

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 CMA and it reviews and investigates competition law. The CMA took over the competition law functions of the Office of Fair Trading (OFT) and the Competition Commission in 2014, including in relation to 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. The sector regulators are Ofgem (gas and electricity), Ofwat (water), Ofcom (telecommunications and post), ORR (rail and road), CAA (airport and air traffic), Monitor (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 stand-alone claims for competition law damages can be raised in the High Court and also, since 1 October 2015, in the CAT.

13 Competition-related remedies for private parties

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 stand-alone 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 damage suffered. In stand-alone cases, the claimant has to prove the breach of competition law before going on to the issue of damages.

Following entry into force of the Consumer Rights Act 2015 on 1 October 2015, there is a choice of forum for both follow-on and stand-alone actions. Both types of claim can be heard in either the High Court (or the Court of Session in Scotland) or the CAT.

The UK government is in the process of consulting on the implementation of the EU Private Damages Directive (Directive 2014/104/EU), which strives to facilitate private damages

actions following infringements of competition law, by harmonising rules on access to evidence, clarifying rules on compensation and establishing a rebuttable presumption that cartels cause harm.

The future development of private damages claims is unclear following the UK's vote to leave the EU. The timetable is such that the UK is under an obligation to implement the Directive by 27 December 2016. However, much of the content of the Directive exports UK concepts and principles (eg, disclosure) into the systems of other member states and many of the requirements set out in the Directive already exist in UK law. As such, divergence seems unlikely, at least in the short term.

14 Competition guidelines

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 2004 C101/2), which set out the Commission's approach to assessing competitive effects of technology transfer agreements.

15 Exemptions from competition law

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 TFEU. There are no IPR-specific exemptions from the Chapter II provisions and article 102 TFEU.

16 Copyright exhaustion

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 EU.

17 Import control

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 EU, it can control the unauthorised import of those products into the EU.

18 Jurisdictional interaction between competition laws and IP rights

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 stand-alone 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.

In England and Wales, Civil Procedure (CP) Rule 63.2 provides that claims under the Patents Act 1977, the Registered Designs Act 1949 and the Defence Contracts Act 1958 as well as claims relating to Community-registered designs must be started in the Patents Court or the Intellectual Property Enterprise Court. The CP Rule 63.13(1) provides that claims relating to matters arising out of the Trade Marks Act 1994 and other intellectual property rights must be started in: the Chancery Division; the Intellectual Property Enterprise Court; or, as set out in Practice Direction 63, a county court hearing centre where there is also a Chancery District Registry.

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

For the position in Scotland, see question 3.

Merger review

19 Powers of competition authority

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 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.

20 Analysis of the competitive impact of a merger involving IP rights

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.

21 Challenge of a merger

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.

22 Remedies to address the competitive effects of mergers involving IP

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.

Specific competition law violations

23 Conspiracy

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 24).

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.

24 Reverse payment patent settlements

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

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 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

Update and trends

The enforcement of SEPs is still important following recent cases and commitments and the outcome of a number of cases in respect of reverse patent settlement agreements, which we expect later this year, continues to be of interest.

The hot topic in all areas of UK law is the result of the UK's referendum to leave the EU. In the short term, UK law remains unchanged. To exit the EU, the UK government must trigger a formal process under article 50 setting in motion a two-year formal negotiation. There is legal and political uncertainty surrounding this process and how and when it will be triggered. The consequences for UK competition and IP law will largely depend on the outcome of these negotiations and, in particular, the level of access to the single market and the corresponding level of free movement requirements.

Key themes (subject to the outcome of the negotiations) are as follows:

- UK competition law is modelled on EU rules and is likely to remain largely intact (at least in the short term);

- UK businesses whose activities have an effect on trade between EU member states will continue to be subject to the EU regime; unless the UK introduces its own replacement provisions, businesses whose conduct and agreements affect only UK trade will no longer benefit from the 'safe harbour' of EU block exemptions, including the Technology Transfer Block Exemption; and
- advice given by UK lawyers who are not also members of the bar of an EU member state may cease to attract legal privilege, and so become disclosable in European Commission investigations. Law firms are already addressing this issue by seeking dual qualification.

A key IP issue will be the continuing validity of Community trademarks and registered designs, particularly where no UK equivalent protections are in place.

restrictions that clearly go beyond what was required. Additionally, non-challenge clauses in settlement agreements may be caught by article 101 TFEU where an IPR was granted following the provision of incorrect or misleading information.

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 seroxat 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 and 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 raised after the European Commission initiated an investigation into those agreements.

In September 2016, the General Court of the European Union 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. 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.

25 (Resale) price maintenance

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 TFEU. Price-fixing and resale price maintenance agreements are seen as hard-core restrictions and are also excluded from the block exemptions. For example, the TTBER exemption will not apply to price-fixing.

26 Exclusive dealing, tying and leveraging

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.

27 Abuse of dominance

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 August 2015, the CMA issued a statement of objections to Pfizer and Flynn Pharma alleging that each had abused a dominant position by charging excessive and unfair prices in the UK for an anti-epilepsy drug. The CMA is expected to reach a decision later in November 2016. In October 2016, the CMA launched an investigation into Concordia, which the CMA suspects is abusing its dominant position by charging excessive prices, including to the National Health Service. The CMA expects to reach a decision as to whether to issue a statement of objections in February 2017.

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.

28 Refusal to deal and essential facilities

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 was comprised only of Abbvie's product.

Remedies

29 Remedies for violations of competition law involving IP

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 TFEU). It also has the power to impose financial penalties of up

to 10 per cent of 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.

30 Competition law remedies specific to IP

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

No.

31 Scrutiny of settlement agreements

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?

Any settlement agreement terminating an IP infringement dispute must comply with UK competition law like any other agreement. It will be assessed on whether its object or effect is the distortion of competition in the relevant markets in the UK or whether it constitutes an abuse of dominance. However, there is no obligation to notify or register these agreements.

Economics and application of competition law

32 Economics

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

33 Recent cases

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 the 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.

34 Remedies and sanctions

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.



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