

Intellectual Property & Competition

Overview

- 1) Basic economic principles IP & competition policy
- 2) IP: legal monopoly not per se a market monopoly
- 3) IP: a 'normal' good in competition policy ?
- 4) Where should competition policy come in
 - 1) Agreements (settlements, cross)licenses, pools)
 - 2) Monopolization, abuse of dominance
- 5) Conclusion

Economic rationale of IP

IP key factor for innovation which is an essential long term driver of competition

IP solves problem of “tragedy of the commons”

- encourages innovation
- encourages distribution of technology

Economic rationale of competition policy

Economic rationale of competition policy: protecting level playing field for competitors v. promoting overall or consumer welfare

Modern approach based on industrial economics. Only 'hard core cartels' (competitors agree on sales prices, allocation of markets or clients, bid rigging) do not require analysis of competitive effects. Negative effects generally only if market power involved, and no compensating efficiencies present. Dynamic efficiencies taken into account more frequently

Competition policy focuses on competitive effects of agreements, monopolization /abuse of dominance, and mergers

Legal monopoly not per se a market monopoly

IP monopoly may have effect on

- markets for (components of) products using the IP technologies;
- markets for licenses of the IP technology;
- ‘innovation’ markets (?)

IP enforcement often very expensive and time consuming

IP market power dependent on ‘hold’ IP technology over market (‘technology footprint’)

IP: a 'normal' good in competition policy ?

IP technology often treated as 'normal' goods, but there are differences:

- blocking power concerns whatever action covered by IP scope
- number of (simultaneous) users/uses unlimited
- limited infringement detection and enforcement mechanisms
- scope and validity often uncertain

Where should competition policy come in ?

- Agreements to be prohibited:
 - (sham) hard core cartels between competitors
 - agreements resulting in clearly less overall or consumer welfare if compared to situation that would have existed in the absence of the agreement, taking into account long term effects on innovation of limiting prospect of recoupment of risky sunk (R&D) investments

Where should competition policy come in ?

Some types of agreements:

Settlements: generally only problems if no genuine legal dispute

IP licenses: generally only problems if exploitation of own technology of licensee is restricted without objective justification and restrictions on licensee are outside scope of licensed IP. EU and US guidelines and 'safe harbours' do provide extra legal certainty.

Where should competition policy come in ?

Cross licenses: often necessary to provide design freedom (‘cutting through patent thicket’). Absent ‘hard core’ situations generally no problem if not including restrictions as to exploitation own technologies.

Patent pools: often necessary to reduce hold-up risks as to standardized products. Absent ‘hard core’ situations generally no problem if pool includes only complementary patents, patents are licensed also separately, no obligation to apply standard, grant back obligation of blocking patents licensee only

Where should competition policy come in ?

Monopolization /Abuse of dominance:

Prohibition of refusal to license IP subject to fierce debate. In the US hardly possible after Trinko Judgment Supreme Court. European Court of Justice in IMS Health Judgment explained refusal to license could be infringement if:

- IP owner has a dominant market position
- refused technology is essential (not available to 'as efficient' operator) for offering 'differentiated' product not offered by owner of IP and for which there is potential consumer demand
- no objective justification for refusal
- refusal would eliminate all competition on product market and reserve such market for owner IP

Unjustified termination of a licence such as to eliminate the licensee as a competitor may be illegal.

Conclusion

- Competition policy scrutiny of agreements concerning IP should take into account dynamic efficiencies and the importance of IP for innovation and thus competition, and focus on combating 'hard core' situations
- Abuse of dominance is a concept easily wrongly applied; false application as to exploitation of IP may be contra productive for innovation and competition(as reflected in TRIPS)