Competition policy, the TRIPS Agreement and New Technologies

Wolf Meier-Ewert
Counsellor
Intellectual Property, Government Procurement and Competition Division
WTO Secretariat
### Relevance of competition policy to specific elements of the WTO Agreements

<table>
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<tr>
<th><strong>TRIPS, Articles 8, 31 and 40:</strong></th>
<th><strong>GATS, Article VIII:</strong></th>
<th><strong>GATS, Article IX:</strong></th>
<th><strong>GATS, Telecoms Annex and Basic Telecom Negotiations, Reference Paper on Regulatory Principles</strong></th>
<th><strong>GPA:</strong></th>
<th><strong>TRIMS, Article 9:</strong></th>
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<td>• Members permitted to take measures to deal with anti-competitive licensing practices, other abuses</td>
<td>• issues concerning conduct involving monopoly and exclusive service suppliers</td>
<td>• consultations regarding anti-competitive business practices that restrain competition and thereby restrict trade in services</td>
<td>• Clear references to competition policy principles</td>
<td>• competition rules an essential counterpart</td>
<td>• issue of whether to implement complementary provisions on investment and competition policy in the course of a review of the Agreement</td>
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**Implication:** competition policy is present in the WTO framework, though in a piecemeal fashion.
THE TRIPS AGREEMENT
General considerations

- Important multilateral framework for IP and CP issues
- Helps to frame domestic law and policy
- Ensures transparency
- Provides access to TA
- Fosters convergence among jurisdictions
- Overall, TRIPS CP-related provisions are rather permissive
2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.
Article 8.2

Is not only about competition related abuses

More than just a permissive norm: Expression of the idea that WTO Members might need to take measures

Measures to be appropriate and consistent with TRIPS
Article 31

Other Use Without Authorization of the Right Holder

Does not prescribe specific grounds for allowing such use

(b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly;
(f) any such use shall be **authorized predominantly for the supply of the domestic market** of the Member authorizing such use;

(k) Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted **to remedy a practice determined after judicial or administrative process to be anticompetitive**. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur;
1. Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.

2. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, **consistently with the other provisions of this Agreement**, appropriate measures to prevent or control such practices, **which may include for example [1] exclusive grantback conditions, [2] conditions preventing challenges to validity and [3] coercive package licensing**, in the light of the relevant laws and regulations of that Member.
Article 40

- Permissive
- Recognition of direct interaction between IP licensing practices, on the one hand, and CP or transfer of technology, on the other
- Confirms right to adopt measures against certain anti-competitive licensing practices
- Illustrative list of possible anti-competitive measures
What is not stated in Article 40?

- The set of other practices (beyond those explicitly referred to in Article 40.2) which may constitute actionable abuses under Members’ competition laws.
- The standards under which such practices should be reviewed (e.g. per se or “rule of reason”). Article 40.2 refers to “appropriate measures”.
- The appropriate remedies to be employed (beyond the general requirement of consistency with other provisions of the TRIPS Agreement and compulsory licensing as a remedy (Article 31(k)))
TRIPS flexibilities and new technologies

Innovation Dimension

Access Dimension
More on CP and IP issues in this newly published book, edited by the WTO and WIPO.

Launch event with several author presentations (watch for free!):
Booklaunch Webinar – Competition Policy and Intellectual Property in Today’s Global Economy - YouTube