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IPRs and the application of Articles 81 & 82

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Some basic questions



- Are IP and competition law having conflicting aims?
- Are IP laws striking the right balance?
- Does protection of innovation require a different competition policy?
- Should IPRs and licensing be more immune from competition policy?

Basic features of TTBER and TTGL



- A wide block exemption with
 - a limited hardcore list
 - a limited list of excluded restrictions
 - market share thresholds
 - 20% for agreements between competitors
 - 30% for agreements between non-competitors
 - Additional safe harbour based on number of technologies
- No presumption of illegality outside the scope of the BE
- Underlying philosophy: licensing is generally beneficial for consumers as it allows for quick dissemination and provides incentives for (follow-on) innovation

Refusal to supply/license



- General concern about incentives to invest in tangible and intangible assets – a specific framework
- Focus on input foreclosure
- Refusal to license only in exceptional circumstances abusive
- Cumulative conditions for intervention
- Input needs to be objectively necessary to compete effectively in the downstream market: there is no actual or potential substitute to the input and replication would not be undertaken to a sufficient degree
- Elimination of effective competition: immediately or over time

Refusal to supply/license



- Consumer harm:
 - may arise if refusal to supply prevents competitors from bringing new products or stifles innovation
 - a dynamic perspective: do the negative consequences of the refusal to supply outweigh the negative consequences of imposing an obligation to supply

- Overall, balance of incentives to invest

- However, when it is manifestly clear that there can be no negative effects on the incentives to invest, for instance where regulation imposes an obligation to supply or where the upstream position of the dominant firm was financed by state aid, the usual test of likely anti-competitive foreclosure applies

Conclusion



- In principle IPRs treated like other property rights while taking into account specificities
- General reticence to intervene in case of refusal to license: approach based on the case law, with the cumulative conditions for intervention put in a somewhat wider perspective
- Comparison with US difficult to make because of ongoing debate in US
- Recent DoJ Report: refusal to supply should not play a meaningful role in section 2 enforcement