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Competition agency guidelines and policy initiatives regarding the application of competition law vis-à-vis intellectual property: An analysis of jurisdictional approaches and emerging directions

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Staff Working Paper ERSD-2018-02 **6 March 2018**

World Trade Organization

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COMPETITION AGENCY GUIDELINES AND POLICY INITIATIVES REGARDING THE APPLICATION OF COMPETITION LAW VIS-À-VIS INTELLECTUAL PROPERTY: AN ANALYSIS OF JURISDICTIONAL APPROACHES AND EMERGING DIRECTIONS

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Manuscript date: 4 March 2018

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Abstract

Competition agency guidelines, policy statements and related advocacy are an important vehicle for policy expression and the guidance of firms across the full spectrum of anti-competitive practices and market conduct. The role of guidelines and policy statements has, arguably, been particularly important in the context of the competition policy treatment of intellectual property rights, given the complexity of this area, the importance that competition agencies attach to it, and its importance for innovation, technology transfer and economic growth. As such, this important normative material also provides a useful empirical foundation for mapping relevant trends and the evolution of policy thinking over time and across jurisdictions. In this light, the paper examines the competition agency guidelines, policy statements and related initiatives regarding intellectual property (IP) of the following three sets of jurisdictions: (i) the United States, Canada, the European Union and Australia; (ii) Japan and Korea; and (iii) the BRICS economies (Brazil, China, India, Russia, and South Africa). It focuses, to the extent possible, on a common set of issues addressed in one way or another in the majority of these jurisdictions, comprising: (i) the treatment of licensing practices, including refusals to license; (ii) anti-competitive patent settlements; (iii) issues concerning standard-essential patents (SEPs); (iv) the conduct of patent assertion entities (PAEs); and (v) competition advocacy activities focused on the IP system. Additionally, while the primary focus of the paper is on competition agency guidelines, policy statements and advocacy activities relating to IP, reference is also made to enforcement and case developments where they are helpful in illustrating relevant approaches and trends. Overall, the analysis suggests, firstly, that, in contrast to the situation prevailing twenty or thirty years ago, interest in the systematic application of competition law vis-à-vis IP certainly is no longer a preoccupation of only a few traditional developed jurisdictions. Secondly, we find evidence of significant cross-jurisdictional learning processes and partial policy convergence across the jurisdictions surveyed. Thirdly, the analysis also reveals the continuing potential for coordination failures in regard to the approaches taken by national authorities in this area, for example where jurisdictions take different approaches to specific practices such as refusals to license and/or give differing weights to industrial policy as opposed to consumer welfare or other objectives in their policy applications.

Key words: competition agency guidelines, intellectual property, antitrust, innovation, licensing agreements, refusal to license, anti-competitive patent settlements, standard-essential patents (SEPs), patent assertion entities (PAEs), competition advocacy.

JEL classifications: K21, L4, L41, L43, O3, O34

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I. Introduction

Competition agency guidelines, policy statements and related advocacy activities are an important vehicle for policy expression across the full spectrum of anti-competitive practices and for the guidance of firms in determining their market conduct. They are also, often, a revealing window into the thinking of agency officials and professional staff regarding the problems they are grappling with, thus providing an empirical foundation for mapping the trends and evolution of such policy thinking across diverse jurisdictions and over time. An early, influential example of such guidelines was the Merger Guidelines adopted by the US Department of Justice in 1968,[2] which embodied and set out clearly the structure-conduct-performance paradigm of industrial organization and competition policy analysis that was prevalent at the time.[3] Subsequent Guidelines on mergers issued in 1982 signalled a clear distancing of the Justice Department from that paradigm, in favour of an approach that was more receptive to arguments concerning economies of scale and scope, and better grounded in contemporary microeconomic theory.[4] Since then, a series of further revisions to the Merger Guidelines, in addition to the issuance of Guidelines respecting other areas of competition policy analysis, has communicated effectively the continuing evolution of the US agencies' thinking regarding diverse aspects of their competition policy mandates.[5] Furthermore, the use of agency guidelines to clarify and communicate enforcement approaches has proliferated across many other jurisdictions.

The role of competition agency guidelines and policy statements has, perhaps, been particularly important in the context of the competition policy treatment of intellectual property rights (IPRs). There are at least three reasons for this. First, in many jurisdictions, there has been little in the way of jurisprudence or enforcement experience to rely on in this area. This is notwithstanding that the agencies deem the area to be an important one and consider it useful and instructive to set out their views. Second, we suggest, the complexity of the subject calls out for clarification and guidelines or similar policy statements that set out broad organizing principles (while, of course, also distinguishing special situations and contexts) are an effective tool. Third, international instruments such as the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (WTO TRIPS Agreement), while clearly acknowledging the importance of the competition policy-intellectual property (IP) nexus, provide little in the way of concrete guidance on specific enforcement issues.[6]

A comparative assessment of guidelines and policy statements of competition agencies in relation to the role of IPRs and related firm practices provides a rich source of insights regarding related issues. First, the relevant instruments manifest clearly the importance that the agencies and their stakeholders attach to the subject as an underpinning of innovation, technological diffusion, and economic dynamism. Second, and as in other competition policy subject areas, in the majority of cases the guidelines or other policy statements do not merely set out a policy stance but inform us directly of the agencies' thinking on underlying issues of economic policy. Third, as will be pointed out throughout the paper, a comparison of relevant guidelines and policy statements shows a significant degree of cross-jurisdictional learning and convergence on key policy issues. This is not at all to suggest that a state of full 'harmonization' has been achieved or is consciously sought, or is necessarily even desirable.[7] Still, the degree of convergence in

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[2] The 1968 Merger Guidelines, available at https://www.justice.gov/archives/atr/1968-merger-guidelines.

[3] As explained by Williamson, the structure-conduct-performance paradigm held that monopolistic prices and poor performance were principally the consequence of market concentration, entry barriers, and other 'structural' factors. More current thinking emphasizes the role of firm behaviour in addition to market structure in generating adverse performance. See Oliver E. Williamson, *The Merger Guidelines of the US Department of Justice - In Perspective* (US Department of Justice, 2002). Available at https://www.justice.gov/archives/atr/merger-guidelines-us-department-justice-perspective.

[4] Williamson, *id*.

[5] See, for related discussion, William E. Kovacic, 'The Modern Evolution of US Competition Policy Enforcement Norms' (2003) 71 Antitrust L.J. 377.

[6] See Robert D. Anderson and Anna C. Müller, 'Competition policy and the WTO TRIPS Agreement: an essential platform for policy application, and questions unresolved', to be published in Robert D. Anderson, Nuno Pires De Carvalho and Antony Taubman (eds.), *Competition Policy and Intellectual Property in the Global Economy* (Cambridge, Cambridge University Press, World Intellectual Property Organization and World Trade Organization, forthcoming).

[7] A lack of overt coordination in this area can, no doubt, bring with it benefits as well as costs. In particular, the resulting scope for experimentation in policy approaches can assist in refining such approaches and in sifting out those that are less useful. See, on this point, A. Douglas Melamed, *International Antitrust in an Age of International Deregulation* (US Department of Justice, 1997). Available at https://www.justice.gov/atr/speech/international-antitrust-age-international-deregulation. Nonetheless, as will be argued below, a complete lack of coordination with respect to the competition policy-IP

enforcement stances and in underlying thinking that our comparative analysis reveals is – we suggest - an impressive testimony to the power of ideas in this subject area and in competition policy analysis generally.[8]

This paper sets out our comparative analysis. For ease of understanding and assimilation, the jurisdictions examined are treated in three groups: (i) the United States, Canada, the European Union and Australia (all examples, in our view, of developed jurisdictions with significant experience in this area); (ii) Japan and Korea, whose policies initially took a somewhat different approach, guided by industrial policy considerations, but now appear to be converging towards those of the first group of countries; and (iii) the five 'BRICS' economies - Brazil, China, India, Russia and South Africa - all 'new or prospective entrants', relatively speaking, to this subject area, which in most cases have not yet issued formal guidelines on the competition-IP interface but are giving thought to the underlying issues. Wherever possible, trends and developments in all these countries are discussed with reference to the evolution in underlying thinking that is set out in the related analysis of Anderson and Kovacic.[9]

To the extent possible, we refer to a common set of issues addressed in the majority of these jurisdictions, namely:[10] (i) the treatment of licensing practices, including refusals to license; (ii) anti-competitive patent settlements; (iii) issues concerning standard-essential patents (SEPs); (iv) the conduct of patent assertion entities (PAEs); and (v) competition advocacy activities relating to the IP system.[11] Another methodological point to note is that the concept of 'guidelines' is employed liberally. In the case of the European Union and Japan, reference is made to 'Block Exemptions' and/or 'Technology Transfer Regulations' that have played a broadly similar role. In the cases of Brazil, India, the Russian Federation and South Africa, reference is made to policy advocacy, jurisprudence and/or ideas articulated by the responsible bodies that have not yet crystalized into a guideline or regulation as such. Additionally, while the primary focus of the paper is on competition agency guidelines, policy statements and advocacy activities, reference is also made to enforcement and case developments where they are helpful in illustrating relevant approaches and trends.

To foreshadow some of the key findings to emerge from our analysis, first, in contrast to the situation prevailing twenty or thirty years ago, interest in and concern with maintaining an appropriate balance between IP and competition law and policy certainly is no longer a preoccupation of only a few (mainly developed) jurisdictions. Rather, interest in this issue has migrated across (at least) the BRICS economies which are an important focus of the analysis in this paper.[12] Such interest is clearly manifested by the diversity of guidelines, exploratory policy statements and advocacy efforts across a wide array of countries that is documented in this paper. In many respects, this is salutary: it reflects rapidly diffusing awareness of the role of competition policy in addition to IP in promoting innovation and technological diffusion, and therefore of the importance of both policy instruments for economic growth, development and prosperity.

Second, the proliferation of guidelines and policy initiatives which is documented herein nonetheless also carries the potential for inter-jurisdictional conflicts and coordination failures. Both the IP system and (at least arguably) competition policy are tools that demand a modicum of coordination across jurisdictions. This is because the application of both sets of tools may entail cross-jurisdictional spillovers. The need for minimum standards to ensure due protection for the rights of innovators while incentivizing disclosure of socially valuable information and preventing

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interface can bring with it significant negative spillovers, owing in particular to: (i) the public good characteristics of IP-protected assets (knowledge and creative adaptations); and (ii) the importance of the issues entailed for innovation, technological diffusion and economic growth.

[8] See also Robert D. Anderson and William E. Kovacic, 'The application of competition policy vis-à-vis intellectual property rights: the evolution of thought underlying policy change', forthcoming in Anderson et al, above note 6. Preliminary text available at https://www.wto.org/english/res_e/reser_e/wpaps_e.htm.

[9] Anderson and Kovacic, above note 8.

[10] See, for an early precursor of this approach, Robert D. Anderson, 'The Interface between Competition Policy and Intellectual Property in the Context of the International Trading System' (1998) 1(4) *Journal of International Economic Law* 655-678.

[11] By contrast, IP-related 'unfair competition' practices in the sense of Article 10*bis* of the Paris Convention of 1883 are not generally addressed in this paper.

[12] In fact, broadly similar interests are evident also in other countries, as well. See, regarding the cases Chile and Pakistan, respectively, Maximiliano Santa Cruz and Pilar Trivelli, 'The evolution of competition policy in Chile: foundations, enforcement experience and significance *vis-à-vis* intellectual property rights' and Joseph Wilson, 'Competition policy and intellectual property rights: a perspective from Pakistan', forthcoming in Anderson et al, eds., above note 6.

free riding is, of course, a core rationale underlying the WTO TRIPS Agreement.[13] The need for a degree of cross-jurisdictional coordination through binding international agreements is, perhaps, less universally acknowledged with respect to competition law and policy; yet the possibility of cross-jurisdictional spillovers is widely acknowledged, for example in the case of varying stances across jurisdictions towards mergers that impact across national markets.[14] Arguably, the need for a modest degree of coordination with respect to the competition policy-IP interface (as compared to other aspects of competition policy) is particularly compelling, given the fungible nature of the underlying assets that are affected (knowledge and creative adaptations/innovations).[15]

Third, as we will show, a very significant cross-jurisdictional learning process has already taken place with respect to core elements of the competition policy-IP interface. This is not at all to suggest that the learning process is complete or that an optimal state (if such exists) has been reached; indeed, as has been stated, our analysis points clearly towards the possibility of conflicts in the approaches taken by national authorities in this area, for example where emerging jurisdictions give differing weights to industrial policy as opposed to consumer welfare or other objectives in their policy applications.[16] The point is simply that the policy initiatives and trends that are documented in this paper appear to be informed by and, in many respects, to build on the evolving perceptions, experiences and thinking processes described by Anderson and Kovacic.[17] Indeed, this accords broadly with the overall perception articulated by Anderson, Kovacic and other observers of competition policy as a dynamic field in which progressive learning processes figure importantly as a driver of policy innovation and applications.[18]

An important related question that emerges from our analysis is whether there is a need for a further cross-jurisdictional learning process and, eventually, a greater degree of coordination (whether voluntary or otherwise) concerning the policy issues, applications and initiatives that are discussed in this paper.[19] The overall purpose of the paper is not to resolve this question but to provide food for reflection on pertinent issues. The closing section of the paper sets out related thoughts.

The remainder of the paper is organized as follows: Part II considers the approaches of the fore-runners in this area of competition policy analysis (the United States, Canada, the European Union and Australia). Part III considers the cases of Japan and Korea. Part IV examines developments concerning the new/prospective entrants that we consider, namely the five BRICS economies, Brazil, China, India, the Russian Federation and South Africa. In each case, an effort is

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[13] As expressed in Article 7 of the Agreement itself; see also the informal account of the TRIPS negotiations in in Jayashree Watal and Anthony Taubman (eds.), *The Making of the TRIPS Agreement': Personal insights from the Uruguay Round Negotiations* (World Trade Organization, 2015).

[14] See Richard A. Epstein and Michael S. Greve, 'Chapter 1: Introduction, the Intractable Problem of Antitrust Jurisdiction', in Richard Allen Epstein and Michael S. Greve (eds.), *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy* (AEI Press, 2004).

[15] It is significant, in this regard, that Article 40 of the TRIPS Agreement presumes the need for at least a degree of enforcement cooperation between jurisdictions regarding competition issues. In particular, Article 40:3 of the Agreement provides as follows: "Each Member shall enter, upon request, into consultations with any other Member which has cause to believe that an intellectual property right owner that is a national or domiciliary of the Member to which the request for consultations has been addressed is undertaking practices in violation of the requesting Member's laws and regulations on the subject matter of this Section, and which wishes to secure compliance with such legislation, without prejudice to any action under the law and to the full freedom of an ultimate decision of either Member. The Member addressed shall accord full and sympathetic consideration to, and shall afford adequate opportunity for, consultations with the requesting Member, and shall cooperate through supply of publicly available non-confidential information of relevance to the matter in question and of other information available to the Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality by the requesting Member." See, for related discussion, Anderson and Müller, above note 6, and, more generally, Eleanor M. Fox, 'International antitrust: edging towards a global framework with our feet on ground', forthcoming in Anderson et al, above note 6.

[16] See, for an early articulation of related concerns, Joel Davidow, 'The New Japanese Guidelines on Unfair Practices in Patent and Know-How Licences: An American View' (1988) 12(4) *World Competition Law and Economics Review* 5-22.

[17] Anderson and Kovacic, above note 8.

[18] See, for broader reflection on this point, Kovacic, above note 5; William E. Kovacic, 'The Intellectual DNA of Modern US Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix' (2007) *Colum. Bus. L. Rev.* 1.; William E. Kovacic and Marianela Lopez-Galdos, 'Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Regimes' (2016) *Law & Contemp. Probs.*, *79*, 85. Available at http://heinonline.org/HOL/Page?handle=hein.journals/lcp79&div=49&g_sent=1&casa_token=&collection=journals; and Anderson and Kovacic, above note 8.

[19] See also Fox, above note 15.

made to follow (to the extent possible) a common method of analysis, encompassing: (i) the policy and statutory context; (ii) the scope of relevant guidelines and/or policy statements; (iii) the doctrinal content of relevant instruments; and (iv) other issues. Part V draws together elements of the analysis across the various jurisdictions, including in tabular form. Part VI provides concluding remarks.

II. Traditional developed jurisdictions: the United States, Canada, the European Union and Australia

This part of the paper examines competition agency guidelines, policy initiatives and advocacy activities relating to IP in the United States, Canada, the European Union and Australia. In each of these jurisdictions, the competition policy treatment of IPRs has undergone a far-reaching evolution over time. Antiquated 'per se' approaches to IPR licensing practices previously viewed as irredeemably harmful to competition have largely given way, over the years, to 'rule of reason' or case-by-case approaches. At the same time, attention has focused on a new set of policy concerns relating e.g. to anti-competitive patent settlements, standard-essential patents and the activities of patent assertion entities (or 'trolls'). As well, competition agencies in these four jurisdictions have increasingly devoted significant resources to advocacy efforts aimed at ensuring the integrity of IP regimes and their consistency with competition policy objectives and pursued related enforcement activities.[20] The following provides additional details with respect to each of these jurisdictions.

1. The United States

(1) Introduction and context

As outlined in greater detail in Anderson and Kovacic, in the United States, guidelines and other policy statements issued by the US federal competition ('antitrust') agencies have been an important tool for the elaboration of enforcement standards and policy with respect to the exercise of IPRs. Over time, they have had a very significant impact not only on US judicial decisions and Supreme Court doctrines in this policy area, but also on analytical and enforcement approaches in other jurisdictions. The relevant guidelines have a long and interesting history reflecting both extensive enforcement experience and a far-reaching evolution of economic thinking with respect to the underlying issues.[21]

To briefly summarize elements of this history, in the 1970s, the Antitrust Division of the US Department of Justice articulated what came to be known as the 'nine no-nos'. These were a set of perceived anti-competitive IP licensing practices that, at a minimum, would attract systematic scrutiny by the Division[22] and that were described as acts which 'in virtually all cases [were] going to lead to antitrust trouble because of their adverse effect upon competition'.[23] In the 1980s, a dramatic reversal of the Department's enforcement policy took place in this area. The 'nine no-nos' were explicitly repudiated in a series of speeches and related activities intended to persuade the courts regarding the pro-competitive benefits of licensing practices and the harmful effects of an overly strict approach to the enforcement of competition law in this area.[24]

In the 1990s, the Department of Justice and the Federal Trade Commission (FTC), while continuing to emphasize the pro-competitive effects of most 'restrictive' licensing practices in the majority of cases, also showed a greater awareness of, and disposition to intervene in, apparent cases of anti-competitive abuse. This approach was codified in a set of 'Antitrust Guidelines for the Licensing of Intellectual Property' that was jointly issued by the Justice Department and the Federal Trade Commission ('the US Agencies') in 1995.[25] Those Guidelines established a new approach with respect to the treatment of IPRs under competition law in the US (also, as described below, generating much interest abroad). Coinciding with the development and release of the US Guidelines, the 1990s and the first decade of the new millennium witnessed a significant increase in the number of US enforcement cases that have touched on the exercise of IPRs in one way or another.

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[20] See also Anderson and Kovacic, above note 8.

[21] *Ibid*.

[22] *Ibid*.

[23] Bruce Wilson, Deputy Assistant Attorney General, Department of Justice, 'Myth or Reality? Or Straight Talk from "Alice in Wonderland"' (Remarks before the American Patent Law Association, 21 January 1975).

[24] Richard Gilbert and Carl Shapiro, 'Antitrust Issues in the Licensing of Intellectual Property: The Nine No-No's Meet the Nineties' (1997) *Brookings Papers: Microeconomics* 283-336.

[25] The 1995 US DOJ-FTC Guidelines. Available at https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/0558.pdf.

In January 2017, the US Agencies issued an updated version of the US Guidelines[26] that carried over the main elements and analytical approaches of the 1995 Guidelines while further elaborating on their application in particular respects.[27] For clarity, the present (2017) Guidelines were issued just prior to the assumption of office by the current US Administration. Since the current Administration took office, however, the revised US Guidelines have been cited favourably by the new US Assistant Attorney-General for the Antitrust Division, Makan Delrahim, who appears to be sympathetic to their overall approach, while possibly wishing to give even greater emphasis to the promotion of innovation and to the dynamic aspects of competition in the US enforcement authorities' work.[28]

(2) Scope of the current US Guidelines

The above-mentioned revised 'Antitrust Guidelines for the Licensing of Intellectual Property' maintain the US Guidelines' earlier focus on licensing practices as such. In particular, they do not address other important topics at the intersection of IP and competition policy, notably SEPs and anti-competitive patent litigation settlements.[29] As we shall see below, this is in contrast to approaches taken e.g. in Canada and some other jurisdictions. These issues have, to be sure, been addressed in the US in related Policy Statements and enforcement initiatives which are also noted below.

(3) Doctrinal content of the US Guidelines

i. Overall Framework

Since 1995, the US Guidelines have been firmly grounded in a 'rule of reason' approach under which the exercise of IPRs is viewed neither as being intrinsically contrary to competition principles nor as always in keeping with such principles. This approach is maintained and further elaborated in the 2017 version of the Guidelines which articulate and rely on three related principles. These, in turn, derive directly from the evolution in economic thinking described by Anderson and Kovacic, and are increasingly accepted by competition agencies worldwide:[30]

- The US Agencies regard IP as being essentially comparable to other forms of property. Such property is neither exempted from scrutiny, nor particularly suspect under the US antitrust laws;
- The Agencies do not presume that IPRs necessarily confer market power in any particular case. Rather, this is a question to be evaluated on a case-by-case basis;[31] and
- The Agencies take the view that IP licensing arrangements are generally pro-competitive in that they enable firms to combine complementary factors of production in efficient ways.

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[26] The 2017 US DOJ-FTC Guidelines. Available at https://www.justice.gov/atr/IPguidelines/download.

[27] See Anderson and Kovacic, above note 8.

[28] See Makan Delrahim, Assistant Attorney General, Antitrust Division, US Department of Justice, *Take It to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law*, Remarks to the USC Gould School of Law - Application of Competition Policy to Technology and IP Licensing, Los Angeles, California, 10 November 2017, available at https://www.justice.gov/opa/speech/file/1010746/download. Separately, Delrahim has observed that 'A deep-seated concern for protecting incentives to innovate underlies many of the changes in U.S. antitrust law over the past several decades, and it is no coincidence that we have enjoyed a period of staggering innovation over that time. But in an ever-evolving marketplace, success is not a static outcome. We must continue to think critically about how best to calibrate our enforcement decisions to promote competition and innovation'. Makan Delrahim, Assistant Attorney General, Antitrust Division, US Department of Justice, *Good Times, Bad Times, Trust Will Take Us Far: Competition Enforcement and the Relationship Between Washington and Brussels*, Remarks at the College of Europe, Brussels, Belgium, 21 February 2018, available at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-college-europe-brussels.

[29] See, for related discussion, Joseph Farrell, Richard Gilbert and Carl Shapiro, *Proposed Update of DOJ/FTC IP Licensing Guidelines*, 7 September 2016. Available at https://www.justice.gov/atr/file/890491/download.

[30] See, e.g., the discussion of Canada's guidelines in the next section, which embodies similar principles, in important respects.

[31] This approach has now been explicitly endorsed by the Supreme Court in *Illinois Tool Works, Inc. v. Independent Ink, Inc.* 126 S. Ct. 1281 (2006).

ii. The treatment of licensing practices

The 1995 US Guidelines indicated that the impact of licensing arrangements on competition would be assessed with reference to three types of markets: (i) markets for intermediate or final goods embodying IP; (ii) markets for specific existing technologies; and (iii) 'innovation markets'.[32] The distinction between horizontal and vertical relationships was emphasized. The Guidelines identified concerns that may arise in regard to the implications of licensing arrangements for market structure, coordination and foreclosure, and stressed the significance of exclusivity conditions as a factor raising potential concerns. They also established structural 'safety zones' (market situations in which licensing arrangements are unlikely to be challenged, absent compelling circumstances, due to the presence of sufficient competition in a market to pre-empt the possibility of market power being exploited).[33]

The 2017 version of the US Guidelines, while carrying over the main elements and approaches noted above, updated and elaborated on them in certain respects.[34] In particular, the updated Guidelines: (i) incorporate references to Supreme Court rulings that have accepted and validated the enforcement agencies' view that patents do not necessarily confer market power on the patentee; (ii) affirm that a unilateral refusal to assist competitors generally will *not* trigger antitrust liability; and (iii) clarify that resale price maintenance agreements are not *per se* illegal and are evaluated under the rule of reason.[35] The 2017 Guidelines also drop previous references to the concept of innovation markets in favor of the more concrete concept of research and development markets, reflecting general scepticism regarding the value added by the former concept.[36]

iii. Refusals to License

In the US, the right to exclude has long been considered as one of the most important rights possessed by IP owners.[37] Reflecting this position, the 2017 US Guidelines note that:

> Intellectual property law bestows on the owners of intellectual property certain rights to exclude others. These rights help the owners to profit from the use of their property. An intellectual property owner's rights to exclude are similar to the rights enjoyed by owners of other forms of private property. The antitrust laws generally do not impose liability upon a firm for a unilateral refusal to assist its competitors, in part because doing so may undermine incentives for investment and innovation.[38]

This passage would appear to rule out any possibility of the US agencies' initiating enforcement action solely on the grounds of a refusal to license in the manner that, for example, the European Commission has done.[39]

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[32] The 1995 US DOJ-FTC Guidelines, above note 25.

[33] See 1995 US Guidelines, above note 25, pp. 22 et seq. The principal indication that firms are operating within a safety zone is that four or more independently controlled technologies, in addition to the technology controlled by the parties to the arrangement under examination, are present in the market.

[34] See the 2017 US DOJ-FTC Guidelines, above note 26.

[35] *Ibid*.

[36] See also generally Hartmut Schneider, James W. Lowe, Leon B. Greenfield, Mi Hyun (Angela) Yoon, *Facelift for Two Millennials: DOJ and FTC Update Guidelines for IP Licensing and International Enforcement*, 24 January 2017. Available at https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179883656.

[37] Assistant Attorney General Makan Delrahim, *Competition, Intellectual Property, and Economic Prosperity*, Remarks at the U.S. Embassy in Beijing, Beijing, China, 1 February 2018, available at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-us-embassy-beijing.

[38] See the 2017 US DOJ-FTC Guidelines, above note 26.

[39] Supporting this stance, the US Guidelines cite the 2004 US Supreme Court opinion in the *Trinko* case, in which the Court observed that 'to safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anti-competitive conduct'. See *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP,* 540 US 398, 407-08 (2004), Opinion of the Supreme Court of the United States. Available at https://supreme.justia.com/cases/federal/us/540/02-682/opinion.html. See, for parallel analysis and comparison with the EU approach, Part II(3) below and, Willard K. Tom and J. Clayton Everett, Jr., 'Competition policy, intellectual property and network industries: post-1995 enforcement experience in the US and EU', forthcoming in Anderson et al, above note 6.

(4) Other enforcement issues addressed by the US competition agencies separately from the 1995 and 2017 Licensing Guidelines

Beyond the treatment of licensing practices which is the focus of both the 1995 and 2017 US Guidelines, the US Agencies have, increasingly, addressed themselves to a set of issues not directly covered by those Guidelines. Guidance on the agencies' stance towards these issues has been provided in enforcement decisions, speeches and other policy statements. Three specific areas of focus merit mention.

i. Anti-competitive Patent Settlements

A first important area of focus concerns the anti-competitive effects of 'pay for delay' agreements through which brand-name drug companies seek to delay entry to specific relevant markets by potential generic competitors. This has been a focus of activity, in particular, for the US Federal Trade Commission, for more than a decade.[40] As the Commission itself has observed:

> One of the FTC's top priorities in recent years has been to oppose a costly legal tactic that more and more branded drug manufacturers have been using to stifle competition from lower-cost generic medicines. These drug makers have been able to sidestep competition by offering patent settlements that pay generic companies not to bring lower-cost alternatives to market. These 'pay-for-delay' patent settlements effectively block all other generic drug competition for a growing number of branded drugs. According to an FTC study, these anti-competitive deals cost consumers and taxpayers $3.5 billion in higher drug costs every year. Since 2001, the FTC has filed a number of lawsuits to stop these deals, and it supports legislation to end such 'pay-for-delay' settlements.[41]

The views articulated by the Commission were reflected, in most though not all respects, in the majority opinion of the US Supreme Court in the important case of *FTC v. Actavis, Inc.*[42]

ii. Standard Essential Patents (SEPs)

The Department of Justice, with the support of the FTC, has had an important focus on disputes involving standard essential patents (SEPs) that a patent owner (or prior owner) has committed to license on fair, reasonable and non-discriminatory (FRAND) terms.[43] The degree of interest and concern is such that, in 2013, the Department issued a joint policy statement on this issue together with the US Patent and Trademark Office (joint DOJ-PTO policy statement).[44] As explained by the Department:

> Our innovation-led economy relies on standards [which are] ubiquitous in modern life [...]. While standards offer our economy great efficiencies and offer consumers and businesses new, advanced products, standard-setting is not without risks to competition [...]. When industry designs a standard that incorporates patented technology owned by participants in the standard-setting process, there is the risk of future patent hold-up. Once a standard becomes established, firms implementing the

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[40] See Federal Trade Commission, *Pay-for-Delay: When Drug Companies Agree Not to Compete*. Available at https://www.ftc.gov/news-events/media-resources/mergers-competition/pay-delay (last accessed on 31 January 2018).

[41] *Ibid*.

[42] *FTC v. Actavis, Inc,* Supreme Court of the United States, Syllabus, October 2012. Available at https://www.supremecourt.gov/opinions/12pdf/12-416_m5n0.pdf. See also, for a detailed discussion, Anna C. Müller and Antonella Salgueiro, 'Reverse patent settlement agreements in the pharmaceutical sector from a competition policy perspective: enforcement and regulatory issues', forthcoming in Anderson et al, above note 6.

[43] Renata Hesse, *A Year in the Life of the Joint DOJ-PTO Policy Statement on Remedies for F/RAND Encumbered Standards-Essential Patents* (Remarks to the Global Competition Review GCR Live IP & Antitrust USA Conference, 2014); available at https://www.justice.gov/atr/file/517771/download.

[44] See US Department of Justice and US Patent and Trademark Office, Policy Statement on Remedies for Standard-Essential Patents Subject to Voluntary F/RAND Commitments. Available at https://www.justice.gov/sites/default/files/atr/legacy/2014/09/18/290994.pdf; see also Hesse, above note 43.

> standard may find switching away more difficult and expensive. This lock-in confers market power on the owners of the incorporated patents.[45]

To address this concern, the 2013 joint DOJ-PTO policy statement emphasizes the risk that a FRAND-encumbered patent holder may try to recapture some of the enhanced market power that it would have enjoyed had it not entered into the FRAND commitment by seeking an exclusion order to pressure an implementer to accept more onerous terms than those consistent with the FRAND commitment.[46] An example of such an exclusion would be an order barring importation of relevant products. In August 2013, the US Trade Representative relied on the DOJ-PTO policy statement when disapproving an exclusion order issued by the US International Trade Commission against certain Apple Inc. products, thereby clearly highlighting the relevance of the issue also as a matter of international trade policy.[47]

Recently, there have been signs of a possible forthcoming further shift in the US enforcement stance with respect to this issue. In particular, in commenting on the treatment of standard-setting organizations, in November 2017, Assistant US Attorney General for the Antitrust Division, Makan Delrahim, noted, in remarks before a panel, that:

> I worry that we as enforcers have strayed too far in the direction of accommodating the concerns of technology *implementers* who participate in standard setting bodies, and perhaps risk undermining incentives for IP *creators*, who are entitled to an appropriate reward for developing break-through technologies.[48]

Still, it remains to be seen what specific changes in enforcement approaches may follow.

iii. Patent Assertion Entities (PAEs)

A third important focus of interest for the US competition enforcement agencies has concerned the role and behaviour of PAEs, sometimes referred to as 'trolls'.[49] These are entities whose primary business is acquiring patents for the purpose of asserting them against existing products or services, instead of practicing, enabling, or developing the technology for the benefit of the consumer. In 2016, the FTC released a study of PAEs. While recognizing the importance of infringement litigation in protecting patent rights, the FTC has also acknowledged that nuisance infringement litigation can tax judicial resources and divert attention away from productive business behaviour.[50] Therefore, to keep balance, the FTC proposed reforms to:

> (1) address discovery burden and cost asymmetries in PAE litigation;
>
> (2) provide the courts and defendants with more information about the plaintiffs that have filed infringement lawsuits;
>
> (3) streamline multiple cases brought against defendants on the same theories of infringement; and
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> (4) provide sufficient notice of these infringement theories as courts continue to develop heightened pleading requirements for patent cases.[51]

Again, it remains to be seen whether these concerns will be carried forward by the current US Administration.

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[45] Renata Hesse, *IP, Antitrust and Looking Back on the Last Four Years* (remarks presented at the Global Competition Review, 2nd Annual Antitrust Law Leaders Forum, Miami, Florida), 8 February 2013. Available at https://www.justice.gov/atr/speech/ip-antitrust-and-looking-back-last-four-years.

[46] See US Department of Justice and US Patent and Trademark Office, above note 44.

[47] Hesse, above note 45.

[48] Delrahim, above note 28. See also Crowell & Moring LLP, *Antitrust, Standard Development, and Essential Patent Licensing: The Antitrust Division Returns to Sound Enforcement Principles*, 22 November 2017, available at https://www.lexology.com/library/detail.aspx?g=1abc710f-0d87-4840-a94a-31b2dcc1c4b6. See, for related discussion, Anderson and Kovacic, above note 8.

[49] See FTC, *Patent Assertion Entity Activity: An FTC Study*, October 2016. Available at https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf.

[50] FTC, above note 49.

[51] *Ibid*.

(5) Competition advocacy regarding the IP system

As discussed in Anderson and Kovacic, apart from their enforcement activities in relation to the foregoing and other issues, the US competition agencies, especially the FTC, have engaged in extensive advocacy activities relating to the competition-IP interface, and to the scope and application of IPRs generally.[52] A core purpose of such activities is to help prevent the issuance/recognition of ill-founded rights that potentially weaken competition or impede follow-on innovation without serving valid off-setting purposes.[53] An important example of such activity that had an impact beyond the US was the FTC's 2003 report analysing 'The Proper Balance of Competition and Patent Law and Policy'.[54] In 'The 2015-2016 Competition Advocacy Contest', the International Competition Network (ICN) and the World Bank Group (WBG) recognized that the FTC significantly increased awareness of the competitive dynamics of markets characterized by disruptive innovation through a series of advocacy instruments (workshops, blogs, opinions and letters) targeted to both legislators and regulators.[55]

Overall, the United States is clearly a leading and influential jurisdiction with respect to issues concerning the competition-IP interface, and the original source of analytical approaches now used, with variations, in multiple other jurisdictions (see below). Within the US, an economics-based 'rule of reason' approach to the treatment of licensing practices and other pertinent conduct, emphasizing concern for the preservation of incentives for innovation, is now well-entrenched. The current US Guidelines, focused on licensing issues, reflect this approach and are complemented by policy statements and other informal guidance on newer issues such as anti-competitive patent settlements, issues concerning SEPs, and PAEs. Without doubt, the US experience has been a very important source of learning for the rest of the world concerning pertinent issues. Still, as will be discussed below, in important respects other jurisdictions have now 'caught up to' the US and are becoming policy innovators in their own right.

2. Canada

(1) Introduction and context

Canada is another jurisdiction in which the role of IP has long been an important focus of activity for the national competition authority, the Competition Bureau (previously the Bureau of Competition Policy). The Canadian approach to relevant issues has been undeniably influenced by developments in the US, while also being guided by Canada's particular economic circumstances and policy context.[56]

Prior to the 1980s, competition law enforcement authorities in Canada (as in other jurisdictions) tended to view IPRs with suspicion, as 'statutory monopolies'. Systematic efforts were made by the relevant authorities to limit the proliferation and the scope and impact of such rights. Beginning in the 1980s, the Canadian authorities progressively adopted key elements of the more permissive stance regarding the treatment of IP licensing and other practices that the US competition agencies were advocating at the time. Greater recognition was given to the importance of incentives for innovation and the dissemination of new technology, and the idea that IP and competition laws constituted two complementary government policy tools to promote an efficient economy took root.[57]

Reflecting these trends, the Canadian Competition Act of 1986, which replaced the previous (and by then antiquated) Combines Investigation Act of 1910, incorporated specific provisions

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[52] See Anderson and Kovacic, above note 8.

[53] *Ibid*.

[54] FTC, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy,* 2003. Available at https://www.ftc.gov/sites/default/files/documents/reports/promote-innovation-proper-balance-competition-and-patent-law-and-policy/innovationrpt.pdf.

[55] World Bank Group (WBG), *The 2015 – 2016 Competition Advocacy Contest: How to Build a Culture of Competition for Private Sector Development and Economic Growth*. Available at http://www.worldbank.org/en/events/2015/10/30/the-2015---2016-competition-advocacy-contest-how-to-build-a-culture-of-competition-for-private-sector-development-and-economic-growth#5.

[56] See, generally, Robert Anderson, S. Dev Khosla, and Mark F. Ronayne, 'The Competition Policy Treatment of Intellectual Property Rights in Canada: Retrospect and Prospect', in R. Shyam Khemani and William Thomas Stanbury (eds.), *Canadian Competition Law and Policy at the Centenary* (Halifax: Institute for Research on Public Policy, 1991).

[57] Anderson et al, *id.*

applicable to anti-competitive abuses of IPRs.[58] In the late 1990s, the Competition Bureau initiated work on guidelines to set out its enforcement policies with regard to these provisions. The first Intellectual Property Enforcement Guidelines (IPEGs) were published in 2000.[59] The Guidelines discussed the circumstances in with the Bureau would seek to restrain anti-competitive conducts associated with the exercise of IPRs in order to maintain competitive markets. The approaches taken built upon the Competition Bureau's past enforcement experience; relevant court decisions; and the approaches taken in the US and in other jurisdictions. Notably, the Canadian IPEGs adopted a case-by-case approach to the treatment of licensing and related arrangements that was broadly comparable to the approach of the US Guidelines.[60]

More than a decade later, the Canadian Bureau initiated a two-stage process to update its 2000 IPEGs. The first stage was initiated in April 2014 with the release of a first draft for public consultations.[61] This draft update took account of amendments[62] to the Competition Act that have occurred since the release of the 2000 IPEGs, as well as the Bureau's enforcement experience. This first stage was formally completed in September 2014 with the publication of a preliminary version of the updated IPEGs.

The second and more complex phase of the IPEGs update centred on how the Competition Act could be applied by the Bureau in several 'new' areas, including issues of particular importance to technology companies and firms in patent-intensive industries.[63] A draft of the revised Guidelines was released for public comment in June 2015.[64] The process was completed with the release, in March 2016, of the final version of the updated IPEGs.[65] The main revisions embodied in the 2016 IPEGs included clarification of the Bureau's positions on patent settlements, the conduct of PAEs and the conduct of companies that own standard SEPs – all highly topical issues. In March 2017 the Guidelines were honoured with the title of Most Innovative Soft Law (IP section) at the 2017 Antitrust Writing Awards.[66]

(2) Scope of the 2016 Canadian IPEGs

The 2016 Canadian Guidelines are comprehensive in their approach. In contrast to the US and some other jurisdictions, in addition to licensing practices, they also cover 'newer issues' such as anti-competitive patent settlements, PAEs, SEPs and other practices.

(3) Doctrinal content of the Canadian Guidelines

iv. Overall Framework

Like the US Guidelines, the Canadian IPEGs are premised on the notion that IPRs are, in material respects, comparable to other forms of property. At the same time, the IPEGs acknowledge that IP has important characteristics that distinguish it from other forms of property,

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[58] The Canadian Competition Act of 1986. Available at http://laws.justice.gc.ca/eng/acts/C-34/index.html.

[59] The 2000 Intellectual Property Enforcement Guidelines. Available at http://publications.gc.ca/collections/Collection/RG52-34-2000E.pdf.

[60] See Anderson and Kovacic, above note 8.

[61] Available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03715.html.

[62] For example, amendments to the Competition Act included changes to the criminal conspiracy provisions and the introduction of the competitor collaboration provision.

[63] Early in the process, the Bureau also released a white paper describing its preliminary views as to how the Competition Act could be applied to potentially anti-competitive patent litigation settlement agreements. In developing this further update of the IPEGs, the Bureau took into consideration its past enforcement experience, relevant court decisions, and guidelines/benchmarks/other documents published in other jurisdictions (e.g. in the US, and the EU). Available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03935.html.

[64] This draft attracted significant attention and several comments and inputs were received, including from Apple, the American Bar Association (ABA), the American Intellectual Property Law Association, the Canadian Bar Association (CBA), Cirterion Economics, Ericsson, Fraunhofer, Google, the Intellectual Property Owners Association, Microsoft Corporation, Multiple Companies, Qualcomm Inc., Universities Allied for Essential Medicines, and from US Federal Trade Commissioner Joshua D. Wright and Judge Douglas H. Ginsburg. See http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03991.html.

[65] Updated Intellectual Property Enforcement Guidelines, 2016. Available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04031.html.

[66] Competition Bureau Canada, *Competition Bureau recognized for innovative approach to intellectual property, Competition Bureau Canada*, 27 March 2017. Available at https://www.canada.ca/en/competition-bureau/news/2017/03/competition_bureaurecognizedforinnovativeapproachtointellectualp.html.

notably, that it is: (i) easy and inexpensive to copy; and (ii) non-rivalrous in consumption (i.e., its use by one user does not preclude use by another).[67]

The 2016 IPEGs distinguish two broad categories of conduct involving IP or IPRs: (i) those involving something more than the mere exercise of IP rights; and (ii) those involving the mere exercise of IPRs, and nothing more.[68]

The IPEGs indicate, first of all, that the Bureau applies the general provisions of the Competition Act[69] to deal with conducts falling in the first group.[70] For example, these provisions apply when IPRs form the basis of an agreement between entities (e.g. transfer, licensing arrangement, and agreement to use or enforce IPRs), and when the alleged harm is the result of the agreement, rather than the mere exercise of IPRs.[71] The Bureau may, in certain circumstances, seek to challenge the arrangement under the Competition Act if IP is used to engage in conducts that create, enhance or maintain market power.

The special remedies available under Section 32 of the Competition Act are used only for conduct involving the mere exercise of IPRs.[72] Moreover, the Guidelines make clear that, in this case, the Bureau will intervene only in very rare occasions and only when there are no available remedies under the relevant IP laws. The application of Section 32[73] requires evidence that competition has been unduly prevented, lessened or restricted (this approach, i.e. that the mere exercise of IPRs does not necessarily confer market power, is similar to the approach taken in other jurisdictions, including the US).[74] The IPEGs note that these conditions are only expected to be met in very rare circumstances and that in most cases, the application of Section 32 would likely undermine innovation incentives.[75] In practice, Section 32 has only been used in two cases (which were both amicably settled).[76]

ii. Licensing Practices

Pursuant to the above scheme, in Canada licensing practices are governed by a case-by-case approach that draws upon/is broadly similar to the US approach. Particularly in licensing cases, the Competition Bureau does not challenge the fundamental right of the IP holder, but the alleged competitive harm that may stem from such licensing arrangement. Thus, in applying the Act, it may limit to whom and how the IP owner may license the IP, namely, in cases involving licences to firms that would have been actual or potential competitors without the arrangement.[77]

iii. Refusals to License

The Competition Bureau is of the view that a refusal to license an IPR does not amount to something other than the 'mere exercise' of the granted right. However, the ownership of a large number of IPRs in a certain area, and the subsequent refusal to license may cause a substantial lessening or prevention of competition in that particular market. In this sense, the Guidelines mention a two-step analysis to determine whether it would seek to have an application brought

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[67] The IPEGs, above note 65, Section 3.2.

[68] The IPEGs also refer to a third scenario involving IP to be resolved outside the Competition Act. For example, an illegitimate extension of IP right (where the patent holder claims that its patent covers products that are outside the scope of his patent) could include anti-competitive behaviours.

[69] The IPEGs, above note 65.

[70] Under the IPEGs, the 'mere exercise of an IP right' refers to the owner right to unilaterally exclude others from using IP. Usually, it would also include the right of the IP owner to use its IPRs or not. It specifies that the unilateral exercise of the IP right to exclusion does not contravene the general provisions of the Competition Act, no matter how much competition is affected. See above note 65.

[71] The guidelines acknowledge that application of the Competition Act in this way may impose limits to whom and how the IP owner may license, transfer or sell its IP, but that the fundamental right of the IP owners to do so is not questioned.

[72] The special remedies include: (a) declaring void the challenged agreement, arrangement or licence; (ii) directing the grant of licences (except for trademarks); (iii) revoking a patent; (iv) directing that the registration of a trademark or integrated circuit topography be expunged or amended; and (v) directing any other acts be done as the Court may deem necessary. See Section 32 of the Competition Act, above note 58.

[73] The following two steps would be looked at by the Bureau: First, the mere exercise of an IP right has substantially and adversely affected competition in the relevant market. Second, the application of the special remedies would not alter the incentives of the relevant stakeholders to conduct research and development.

[74] See, e.g. the discussion of the US' guidelines, and Anderson and Kovacic, above note 8.

[75] As a possible example (see example no. 8), the IPEGs refer to a network industry (e.g. network effects could exist when the expected benefits increase with the number of other users).

[76] See *R. v. Union Carbide of Canada Limited*, 9 December 1969 and *R. v. Union Carbide of Canada Limited*, 19 June 1971.

[77] Section 4.2.1 of the 2016 IPEGs, above note 65.

under Section 32 of the Competition Act and if the refusal to license the IP would adversely alter firms' incentives to invest in research and development in the economy.[78]

iv. Anti-competitive patent settlements

As previously mentioned, the 2016 IPEGs provide clarity on the Bureau's positions on 'new' issues.[79] They address, in significant detail, issues concerning reverse-payment settlements between brand name and generic competitors.[80] Three specific situations involving such settlements are discussed:

- The first situation relates to the 'entry-split settlement', where a generic company proposes to enter the market on or before the expiry of the patent. Generally, the Bureau will not review settlements in such cases, absent a payment to the generic firm by the brand-name company.[81]

- The second situation considered in the IPEGs concerns settlements involving a payment to the generic firm, in which the brand-name firm provides financial compensation to the generic company in addition to allowing it to enter the market on or before the expiry of the patent. This type of agreement may be reviewed for adverse effects under the Competition Act.[82]

- The third set of circumstances concerns the possible application of the criminal provisions of the Competition Act.[83] The IPEGs indicate that such application will be considered if (i) the agreement between the generic firm and the brand-name company prevents the market entry of the generic beyond the expiry of the patent; (ii) the settlement restricts competition to products unrelated to the subject of the patent; or (iii) the agreement is a 'sham'.[84]

Intriguingly, the IPEGs refer explicitly to differences between the regulatory regimes governing pharmaceuticals in Canada and in other countries (i.e. the US and the EU) that may affect the incentives to enter into an agreement and the terms of such agreement. In particular, in Canada, there is no guaranteed exclusivity period for the first generic company to enter the market (as opposed to the US, where, pursuant to the Hatch-Waxman Act, the first filer has a 6-month-exclusivity).[85] This, the Bureau considers, could potentially limit the incentives for certain potential anti-competitive settlements between brand drug and generic firms.[86]

v. Standard Essential Patents (SEPs)

The 2016 IPEGs also address concerns arising from and related to patents that are essential to collaboratively determined industry standards.[87] The Bureau recognises the value and benefits of industry standards for competition (lower costs of production, increased choice for consumers,

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[78] Section 7.1, Example 8 of the 2016 IPEGs, above note 65.

[79] The 2016 IPEGs, above note 65.

[80] See section 7.3 of the IPEGs, which builds on a white paper released by the Canadian Bureau in September 2014. The white paper provided background information on the pharmaceutical industry and regulatory regime in Canada; the provisions of the Competition Act that may be applicable to reverse-payment settlements; and the Bureau's preliminary views as to how the Act could apply to reverse-payment settlements. See *Patent Litigation Settlement Agreements: A Canadian Perspective*, 23 September 2014. Available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03816.html.

[81] The Bureau's view is that such an agreement reflects a compromise on the patent merits between the parties, which is based on each party's hope of success in the proceedings under the Patented Medicines Notice of Compliance Regulations. The greater the likelihood that the patent would be valid and infringed, the latter in the patent term the generic would be expected to enter the market (and vice-versa).

[82] See the 2016 IPEGs, above note 65.

[83] Provided for in Section 45 of the Competition Act (Conspiracies, Agreements or Arrangements between Competitors), above note 58.

[84] The 2016 IPEGs, above note 65.

[85] S.Res. 287 (111th): Honoring the 25th anniversary of the enactment of the Drug Price Competition and Patent Term Restoration Act of 1984 (the Hatch-Waxman Act), available at https://www.govtrack.us/congress/bills/111/sres287/text.

[86] See section 7.3 of the 2016 IPEGs, above note 65: 'The Bureau recognizes that there are significant differences in the regulatory regimes governing pharmaceuticals in Canada relative to other jurisdictions and that these may have implications for both the incentives of parties to reach settlements and the terms of settlements that may occur in Canada'.

[87] The 2016 IPEGs refer to two main types of industry standards: (i) the interoperability standard, which ensures that products produced by different firms can interoperate; (ii) the performance standard, which in turn defines minimum requirements (performance or security) for products. See above note 65.

and potential innovation incentives). At the same time, industry standards could raise competition concerns (e.g. by reducing competition on the price, banning certain innovative technologies, denying access to the standards or providing access under discriminatory terms).

The IPEGs clarify that, generally, the review of joint conduct involving participants to standard development organizations will be conducted under the civil provisions of the Competition Act (Section 90.1) and in accordance with the analytical framework described in the Bureau's 2009 Competitor Collaboration Guidelines.[88] The Bureau does not review such conduct under the criminal conspiracy provisions of the Competition Act unless there is clear evidence that the intention was to facilitate the conclusion of an agreement prohibited under Section 45(1) of the Act. Anti-competitive behaviours by the holder of a SEP, i.e. patent ambush[89] or hold-up activities are most likely to be reviewed under the civil provisions of the Competition Act dealing with abuse of dominant position (Section 79), as they involve 'something more' than the mere exercise of patent rights. The Bureau also recognises that this is an area in which understanding is evolving and indicates that relevant aspects of the IPEGs may need to be reconsidered in light of experience and new developments.

vi. Patent Assertion Entities (PAEs)

The role of PAEs has undergone discussion and debate in Canada. The 2016 IPEGs provide guidance on the circumstances that could trigger scrutiny by the Bureau and on reviewed provisions of the Competition Act. For example, they clarify that the assignment of a patent right to a PAE only for the purpose of more effective enforcement does not raise concerns under the Competition Act.[90]

(4) Competition advocacy regarding the IP system

As in the US, the Canadian Competition Bureau has a long and extensive record of advocacy by which it sought to exercise influence on the substance and content of IP policy, precisely as a means of addressing competition issues. Examples include research-based interventions before public inquiries into matters including the operations of copyright collectives and the terms of patent protection in the pharmaceutical industry. As well, the Bureau has sponsored two scholarly volumes addressing the competition policy-IP interface more generally.[91]

Furthermore, on 19 February 2018, the Canadian Bureau, consistent with its commitment to keep pace with emerging issues in the digital economy, published a Report on Big data and Innovation: Implications for competition policy in Canada summarizing key competition policy and enforcement themes related to big data.[92] The report outlines key, overarching themes that emerged from big data in the context of enforcement and analysis related to mergers, monopolistic practices, cartels and deceptive marketing practices. In particular, it highlights that although global developments in technology have allowed firms to harness data in ways that drive innovation and quality improvements across a range of industries, the use of big data by firms may raise challenges related to competition law enforcement.[93] Therefore, the Competition Bureau, while adopting its tools and methods to this evolving area, will continue its investigations and analysis to be guided by fundamental competition law enforcement principles.[94]

Overall, therefore, Canada is clearly another important jurisdiction with rich experience in this area. Arguably, the new Canadian Guidelines are among the most comprehensive in the world, containing up-to-date policy guidance on a variety of issues, and taking into account lessons learned in other advanced economies as appropriate.

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[88] The Bureau's Competitor Collaboration Guidelines, December 2009. Available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf.

[89] A patent 'hold-up' or 'patent ambush' could occur, e.g. when the patent holder purposely omit to disclose its patent to a standards development organization during the standardization process, and then later invoke the undisclosed patent when access to its technology is needed to implement the agreed standard.

[90] The 2016 IPEGs, above note 65.

[91] Anderson and Kovacic, above note 8.

[92] The Canadian Competition Bureau, *Big data and innovation: Competition Bureau highlights key themes for competition policy and enforcement in Canada,* 19 February 2018. Available at https://www.canada.ca/en/competition-bureau/news/2018/02/big_data_and_innovationcompetitionbureauhighlightskeythemesforco.html.

[93] *Ibid.*

[94] *Ibid.*

3. The European Union

(1) Introduction and context

In the European Union (EU), the elaboration of a competition policy stance relating to IP issues emerged in several stages in the post-WWII context of gradual European integration and progressive strengthening of competition institutions. As a first step, in the light of competition policy's role in supporting efforts to establish and maintain a single market, the 1957 Treaty of Rome granted the European Commission the authority to establish a common competition policy.[95] Its system of 'undistorted competition' resulted in a competition regime with a strong, 'constitutional' character.[96] Since its inception, EU competition law pre-empted the national competition laws of individual EU member States in case of conflict, i.e. if the anti-competitive behaviour concerned 'may affect trade between EU member-states'.[97] Competition policy in the EU thus played – and plays – an important role in ensuring that the benefits from the economic integration are not frustrated either by private or public restrictions of competition within the single market, whether in the form of cartels and anti-competitive abuses of dominance or mergers, or potentially distorting national industrial policies.[98]

Interestingly, integration and coordination with regard to IP law and policy in the EU advanced at a slower pace than with regard to competition policy. For example, the laws governing national trademark registration in the EU were first harmonized in 1989 and the EU trademark, covering the entirety of the single market, was only created in 1994.[99] Still, today, (technical) inventions can be protected in Europe either by national patents, granted by the competent national IP authorities in EU member states or by European patents consisting of a 'bundle of national patents' granted centrally by the European Patent Office – which is not an EU institution and whose grant decision has to be validated in each designated state within a specific time limit.[100] The territorially limited nature of IPRs granted at the national level thus created a potential for conflict with single market considerations[101] going beyond and in addition to 'traditional' competition concerns present in other jurisdictions. Nevertheless, the general need to foster and reward innovation was recognized at all times.

In 1984 and 1988, the Commission adopted its first block exemptions for patent and mixed patent and know-how licences.[102] Imposing limits on territorial market restrictions permitted in licensing agreements, these exemptions maintained the objective of market integration pursued in EU competition policy.[103] They mainly identified certain obligations in licensing agreements to which the exemption from the application of competition rules would automatically apply ('white list'), and to which the exemption would not apply ('black list'), leaving only few provisions to a case-by-case review ('grey list'). These first exemptions were replaced by the Regulation on

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[95] The Treaty of Rome, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:xy0023.

[96] Kiran Klaus Patel and Heike Schweitzer (eds.), *The historical foundations of EU competition law* (Oxford University Press, 2013). Available at http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199665358.001.0001/acprof-9780199665358.

[97] Today, the task of enforcing EU competition law to a large extent has been assigned to national competition authorities. See also http://ec.europa.eu/competition/antitrust/nca.html (last accessed on 10 January 2018).

[98] See Thorsten Käseberg and Arthe Van Laer, 'Competition Law and Industrial Policy: Conflict, Adaptation, and Complementarity' in Patel and Schweitzer, above note 96.

[99] See the European Commission, *Trade mark protection in the EU.* Available at https://ec.europa.eu/growth/industry/intellectual-property/trade-mark-protection_en (last accessed on 13 February 2018).

[100] See the European Commission, *Patent protection in the EU,* available at https://ec.europa.eu/growth/industry/intellectual-property/patents_en; and European Patent Office, *The patenting process,* available at https://www.epo.org/learning-events/materials/inventors-handbook/protection/patents.html (last accessed on 10 January 2018). The Commission is active in the implementation of a patent package. When it comes into force, it will establish a European patent with unitary effect and a new patent court.

[101] See e.g. with regard to copyright: Directorate General for Internal Policies, *Copyright territoriality in the European Union*, 2010. Available at http://www.europarl.europa.eu/RegData/etudes/note/join/2010/419621/IPOL-JURI_NT(2010)419621_EN.pdf.

[102] See Commission Regulation (EEC) No 2349/84 of 23 July 1984 on the application of Article 85 (3) of the Treaty to certain categories of patent licensing agreements, available at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31984R2349, and Commission Regulation (EEC) No 556/89 of 30 November 1988 on the application of Article 85 (3) of the Treaty to certain categories of know-how licensing agreements, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31989R0556.

[103] Anderson and Kovacic, above note 8.

Technology Transfer Agreements of 1996 (the 1996 Regulation),[104] which was intended to reflect contract practice and to simplify technology licensing.[105]

Both the 1996 and previous regulations were criticised for their relatively narrow scope of application and formalistic character which, according to some commentators, contributed to a 'strait-jacket' effect.[106] As required by the 1996 Regulation, and inspired by the new approach implemented in the 2000 Vertical Agreements Block Exemption, [107] in December 2001 the Commission adopted a midterm Evaluation Report.[108] This was taken as an opportunity to start a thorough review of EU policy towards IP licensing agreements and led to an early repeal of the Regulation, which was scheduled to expire in 2006. The report explicitly compared the EU practice with that of the US, referred to work undertaken in OECD competition policy roundtables, and explained that the stricter approach to territorial restrictions in the EU as compared to the US was due to 'the additional market integration objective which EC competition policy has'.[109]

Giving greater weight to modern economic thinking, and recognizing that the possible anti-competitive effects of particular licensing and similar practices need to be balanced against their pro-competitive effects, the 2004 Regulation[110] shifted towards a more flexible approach covering a wider set of IPRs.[111] Limited 'safe haven' thresholds were introduced within which licensing arrangements would be automatically exempt. Prior notification requirements were abolished. This basic approach is maintained and further expanded in the Technology Transfer Block Exemption Regulation of 2014 (TTBER, the 2014 Regulation), adopted together with a set of Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union (the EU Treaty) to technology transfer agreements (the Technology Transfer Guidelines).[112] Through these instruments, the EU has effectively embraced a modern, economics-based approach to licensing and other practices that nonetheless preserves the distinct institutions and modalities of EU competition law.[113]

Concurrent with these developments, the EU Commission has engaged in both important competition advocacy activities (see below) and a vigorous program of enforcement activity relating to anti-competitive abuses of dominant position that potentially impact on IPRs and their exercise. Indeed, in addressing such 'single-firm conduct', particularly in the context of network industries, the Commission has clearly displayed a greater willingness to intervene than, for example, the current US competition authorities.[114] For example, the Commission's decisions in

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[104] See Commission Regulation (EC) No 240/96 of 31 January 1996 on the application of Article 85 (3) of the Treaty to certain categories of technology transfer agreements and relevant Guidelines, available at http://eur-lex.europa.eu/eli/reg/1996/240/oj.

[105] For details, see Terry R. Broderick, 'EC regulation for Technology Transfer Agreements' (1996) *International Business Lawyer* 24(9), 403-407.

[106] See, for pertinent background, Luc Peeperkorn, Lars Kjolbye and Donncadh Woods, 'Commission adopts new safe harbour for licensing of patents, know-how and software copyright' (2004) *Competition Policy Newsletter No 2*, pp. 14 – 16. Available at http://ec.europa.eu/competition/publications/cpn/2004_2_14.pdf.

[107] See Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31999R2790.

[108] See Commission Evaluation Report on the Transfer of Technology Block Exemption Regulation No 240/96, COM (2001) 786 final, available at http://ec.europa.eu/transparency/regdoc/rep/1/2001/EN/1-2001-786-EN-F1-1.Pdf.

[109] *Ibid*, paras. 46 et seq.

[110] The 2004 Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements and Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements.
Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:123:0011:0017:EN:PDF.

[111] See Philip Lowe and Luc Peeperkorn, 'Singing in Tune With Competition and Innovation: The New EU Competition Policy Towards Licensing' (2004) *International Antitrust Law & Policy: Fordham Corporate Law 2004,* Chapter 14; see also David I. Bainbridge, *Intellectual Property* (7th edition, Pearson, 2008), p. 842 et seq and Steven D. Anderman (ed.). *The Interface between Intellectual Property Rights and Competition Policy* (Cambridge: Cambridge University Press, 2007).

[112] Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.093.01.0017.01.ENG. New accompanying Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements (valid for 12 years) ('the Technology Transfer Guidelines'). Available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014XC0328(01).

[113] For historical background see Anderson and Kovacic, above note 8.

[114] See, for supporting analysis and discussion, Delrahim, above note 28, and William E. Kovacic, 'From Microsoft to Google: Intellectual Property, High Technology, and the Reorientation of US Competition Policy and

cases such as the *Microsoft Media Player* cases, *Intel* and *Google* have, in many respects, taken a more pro-active stance towards the conduct in question than US authorities have been prepared to countenance, the latter often citing concerns about avoiding excessive regulation and preserving incentives for innovation and voluntary exchange (see, for further discussion, Part II(3)(vi), below).

(2) Scope of relevant instruments

Licensing agreements that restrict competition and abuses of dominance, where market power is conferred through IPRs, are generally prohibited under Article 101 of the Treaty on the Functioning of the European Union (the EU Treaty), subject to the TTBER and the guidance provided in the Technology Transfer Guidelines. First, the TTBER creates a safe harbour for licensing agreements that meet its terms, i.e. where the licensor authorizes the licensee to use its technology[115] for the production of goods and provision of services; and the arrangement creates positive economic externalities. Such agreements are deemed to have no anti-competitive effects or, if they do, it is assumed that the positive effects of the agreement outweigh the negative ones. Technology for these purposes includes know-how, patents, design rights or software copyright. Additionally, and unlike its predecessors, the TTBER also covers trademark licensing under some circumstances, i.e. if it is directly related to the production or sale of the contract products.[116]

Second, the Technology Transfer Guidelines provide guidance on the application of the TTBER and EU competition law to technology transfer agreements that fall outside the safe harbour of the TTBER, including multi-party agreements in the form of patent pools. In light of the European Commission's recent experience, the Guidelines also give guidance on particular issues such as patent settlement agreements.[117]

(3) Doctrinal content of the EU Regulation and Guidelines

i. Overall Framework

As outlined above, since 2004, the EU has gradually been shifting towards a more flexible economic-based approach, designed to stimulate innovation and preserve a level playing field in the Single Market.[118]

The Technology Transfer Guidelines articulate and are based on the following principles:[119]

- The revised regime continues to reflect the view that licensing is in most cases pro-competitive.[120] The fact that IP laws grant exclusive rights of exploitation, however, neither implies that (i) IPRs are immune from competition law intervention; nor (ii) that there is an inherent conflict between IPRs and the Union competition rules.

- Both IP and competition laws share the same basic objective of promoting consumer welfare and an efficient allocation of resources.

- Both IPRs and competition are necessary to promote innovation and ensure a competitive exploitation thereof. Innovation constitutes an essential and dynamic component of an open and competitive market economy. IPRs promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes. So does competition by putting pressure on undertakings to innovate.

ii. Licensing Practices

The TTBER, which applies to technology transfer agreements, i.e. licensing practices, sets a maximum market share threshold and lists certain prohibited 'hardcore restrictions' (such as, for

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Practice' (2013) 23 *Fordham Intell. Prop. Media & Ent. L.J.* 645. Available at http://ir.lawnet.fordham.edu/iplj/vol23/iss2/9.

[115] Technology for these purposes includes know-how, patents, design rights and software copyright.

[116] See the Technology Transfer Guidelines, above note 112.

[117] European Commission, *Antitrust: Commission adopts revised competition regime for technology transfer agreements*, 21 March 2014. Available at http://europa.eu/rapid/press-release_IP-14-299_en.htm.

[118] Anderson and Kovacic, above note 8.

[119] See the Technology Transfer Guidelines, above note 112.

[120] European Commission, above note 117.

example, resale price maintenance). To qualify for the exemption provided by the TTBER – i.e. to be within the 'safe harbour', the parties to the agreement must meet the market share threshold and the agreement must not contain any of the 'hardcore restrictions'. As in the 2004 Regulation, the combined market share for the parties on the relevant market(s) must not exceed 20 per cent if they are competitors and 30 per cent if they are not. The list of 'hardcore' restrictions equally differs according to whether the agreement is between competitors or non-competitors.[121] A very limited number of specific obligations in licensing agreements are excluded from the exemption, i.e. exclusive grant-backs and clauses allowing no patent validity challenges, which have to be assessed on a case-by-case basis. Similarly, if an agreement is not covered by the TTBER it is not automatically considered anti-competitive, but will require self-assessment for compliance by the parties and their advisers as the benefit of the block exemption is withdrawn.

For agreements not falling within the 'safe harbour', the Technology Transfer Guidelines establish as a general rule that in order to not be considered anti-competitive, an agreement should: (i) improve the production or distribution of goods (or services) or promote technical or economic progress; (ii) provide consumers a 'fair share' of the resulting benefit; (iii) the restrictions an agreement contains should be indispensable to the achievement of the above benefits; and (iv) not allow substantial elimination of competition on the markets concerned.

iii. Refusals to License

Refusals to license not linked to SEPs are not explicitly addressed in the Guidelines, and continue to be assessed under the criteria established by relevant jurisprudence, which allows for compulsory licensing under certain, restrictive conditions pursuant to the essential facilities doctrine.[122]

Under exceptional circumstances, owners of IPRs are obliged to grant access to their non-duplicable facility.[123] In this sense, the Court introduced the possibility of compulsory licensing under Article 102 of the EU Treaty as long as the refusal prevents the appearance of a new product, for which there is potential consumer demand, no objective justification exists, and it is likely to exclude competition on the downstream market.[124] The Court also sought to provide a balance between the economic freedom of the IPR owner and competition by stating that competition law prevails only where the refusal to grant a licence prevents the development of a secondary market to the detriment of consumers.[125] Later on, a further interpretation of the standard for liability for a refusal to license IP was provided,[126] as well as, a broader interpretation of the 'new product' criterion. Rather than finding that the creation of a particular new product is

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[121] The 'hardcore' restrictions for competitors include: restricting a party's ability to determine prices when selling to a third party (resale price maintenance); reciprocal output/production caps; restricting the licensee's ability to exploit its own technology or a restriction on either party from carrying out independent research and development unless in the latter case, this is indispensable to prevent the disclosure of the licensed know-how to third parties; and the allocation of markets or customers between the parties (subject to a fairly complex set of exceptions). For non-competitors the 'hardcore' restrictions also include resale price maintenance as well as certain restrictions on passive sales on the part of the licensee (though there are a number of exceptions to this restriction) and restrictions on sales to end users by a licensee within a selective distribution system which operates at the retail level.

[122] See Case T-201/04 - *Microsoft v. Commission*, Judgment of 17 September 2007; available at http://curia.europa.eu/juris/showPdf.jsf?text=&docid=62940&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=175728; Case C-481/01 P(R) - *NDC Health v. IMS*, Order of 11 April 2002, available at http://curia.europa.eu/juris/showPdf.jsf?text=&docid=47253&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=175728; Case C-7/97 – *Bronner v. Mediaprint*, Judgment of 26 November 1998, available at http://curia.europa.eu/juris/showPdf.jsf?text=&docid=43749&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=175728; and Joined cases C-241/91 P and C-242/91 P - *RTE and ITP v. Commission*, Judgment of 6 April 1995, available at http://curia.europa.eu/juris/showPdf.jsf?text=&docid=98207&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=177710. For commentary, see James Turney, 'Defining the Limits of the EU Essential Facilities Doctrine on Intellectual Property Rights: The Primacy of Securing Optimal Innovation' (2005) 3 *Nw. J. Tech. & Intell. Prop*. 180. Available at http://scholarlycommons.law.northwestern.edu/njtip/vol3/iss2/5.

[123] *RTE and ITP v. Commission*, above note 122.

[124] *Ibid*, paras. 54-56.

[125] Case C-481/01 *IMS Health v. NDC Health*, Judgement of the Court (Fifth Chamber) of 29 April 2004, para. 48. Available at http://curia.europa.eu/juris/showPdf.jsf?text=&docid=49104&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=260345.

[126] See also Tom and Clayton Everett, Jr., above note 39.

prevented, the Court stated that this new product requirement should be read so as to also include any restriction of further technical development.[127]

iv. Anti-competitive Patent Settlements

The Technology Transfer Guidelines provide guidance on patent settlement agreements[128] in light of the Commission's recent experience in cases involving Lundbeck,[129] Servier,[130] and Johnson & Johnson and Novartis[131] which have all concerned 'pay-for-delay' arrangements in patent settlement agreements.

The Guidelines recognise that such agreements are based on a value transfer from one party in return for a limitation on the entry and/or expansion on the market of another, and therefore may be caught by Article 101(1) of the EU Treaty. In examining cases of such agreements, the Commission is particularly attentive to the risk of market allocation/sharing if the parties to an agreement are actual or potential competitors and there was a significant value transfer from the licensor to the licensee.

Moreover, in 2009, the European Commission conducted an important and widely publicized competition inquiry into the pharmaceutical sector. As a result of this inquiry, the Commission has been monitoring patent settlements between originator and generic companies and publishing annual Reports in order to better understand the use of this type of agreement in the European Economic Area and to identify those settlements that delay generic market entry to the detriment of the European consumer.[132]

v. Standard Essential Patents (SEPs)

In addition to licensing arrangements, the Guidelines cover technology pools, SEPs and settlement/non-assertion agreements which may contain potential restrictions on competition that could fall within the scope of Article 101 of the EU Treaty but neither of which are covered by the TTBER. Agreements establishing technology pools and setting out the terms and conditions for their operation are not covered by the block exemption, and are therefore assessed under the guidelines taking account of a variety of factors.[133]

With regard to SEPs, the guidelines specify that the Commission will assess such arrangements according to the same principles as those applied to technology pools. There will normally be a requirement that the technologies which support such a standard be licensed to third parties on FRAND terms, including to third party competitors, in order to counter-act any substantial exclusionary effects. These principles have also been addressed in detail in Commission decisions[134] and European Court of Justice jurisprudence,[135] in particular with regard to abuses of dominance deriving from the seeking of injunctive relief against willing licensees where the proprietor of an SEP has given an undertaking to the standardisation body to grant licences on FRAND terms.[136]

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[127] *Microsoft v. Commission*, above note 122, para. 647.

[128] For details, see the Technology Transfer Guidelines, above note 112, section 4.3.

[129] Case AT.39226 – *Lundbeck*, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39226/39226_8310_11.pdf.

[130] Case AT.39612 – *Perindopril (Servier)*, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39612/39612_12448_6.pdf.

[131] Case AT.39685 – *Fentanyl*, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39685/39685_1976_7.pdf.

[132] European Commission, *Pharmaceuticals: Sector inquiry and follow-up*. Available at http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/. See also Pierre Arhel, 'Enforcement of competition law in relation to intellectual property in the European Union', forthcoming in Anderson et al, above note 6.

[133] For details, see the Technology Transfer Guidelines, above note 112, section 4.4.

[134] Case AT.39985 - *Motorola - Enforcement of GPRS Standard Essential Patents*, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf; and Case AT.39939 - *Samsung - Enforcement of UMTS Standard Essential Patents*, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1501_5.pdf.

[135] Case C-170/13 - *Huawei Technologies v ZTE Corp., ZTE Deutschland GmbH*, Judgment of the Court (Fifth Chamber) of 16 July 2015, available at http://curia.europa.eu/juris/document/document.jsf?docid=165911&doclang=en.

[136] In *Huawei Technologies v. ZTE Corp.* (see above note 135), the Court set out in detail the process to be followed by the IPR holder, who is obliged to (i) alert the alleged infringer of the infringement complained about by designating that SEP and specifying the way in which it has been infringed and upon expression, by

Furthermore, in November 2017, the European Commission published a 'Communication to the Institutions on Setting out the EU approach to Standard Essential Patents', which sets out a general, non-binding framework that can be used by SEP holders and implementers to reach an agreement on licensing terms.[137] The Commission in particular highlighted that 'the creation of patent pools or other licensing platforms, within the scope of EU competition law, should be encouraged. They can address many of the SEP licensing challenges by offering better scrutiny on essentiality, more clarity on aggregate licensing fees and one-stop- shop solutions'.[138]

(4) Issues addressed by the EC separately from the TTBER and the Guidelines: Patent Assertion Entities

Interestingly, issues surrounding PAEs are not expressly addressed in the Guidelines.[139] Rather, the views of the Commission have been articulated in enforcement decisions, speeches and relevant reports.[140]

The European Commission has confirmed in this regard that it does not consider the business model of PAEs as such anti-competitive, as enforcing and monetising IP is a perfectly legitimate way of doing business.[141]

In 2016, the European Commission conducted a Study of PAEs in Europe.[142] While the study acknowledges that the impact of PAE activity on innovation depends on a number of factors, in particular the quality of the asserted patents, it does not formulate a unified assessment methodology and suggests that activities by PAE should be subject to a case-by-case analysis. It recognizes possible welfare-enhancing effects of PAE activity that may result from their role in ensuring that companies, in particular, micro, small and medium-sized enterprises, universities, and other organizations which have limited capability to engage in IP monetization obtain adequate remuneration from their R&D investments.[143]

Unlike the FTC study (also conducted in 2016), which makes four specific recommendations for legislative and judicial reform, the European Commission study puts forward two 'soft' policy recommendations.[144] It suggests that large-scale assertion of low-quality patents can be limited (i) by maintaining high standards in patent granting procedures in Europe, and (ii) by increasing patent ownership transparency and increasing the clarity of FRAND licensing commitments for SEPs.[145] Moreover, in a recent Communication the EU Commission stated that PAEs should be subject to the same rules as those applied to any SEP holder, including after the transfer of SEPs from patent holders to PAEs.[146]

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the infringer, of the willingness to obtain a licence, (ii) to present to that alleged infringer a specific, written offer for a licence on FRAND terms, in accordance with the undertaking given to the standardisation body, specifying, in particular, the amount of the royalty and the way in which that royalty is to be calculated. Should the alleged infringer not accept the offer made to it, it may rely on the abusive nature of an action for a prohibitive injunction or for the recall of products only if it has submitted to the proprietor of the SEP in question, promptly and in writing, a specific counter-offer that corresponds to FRAND terms. Furthermore, where the alleged infringer is using the teachings of the SEP before a licensing agreement has been concluded, it is for that alleged infringer, from the point at which its counter-offer is rejected, to provide appropriate security, in accordance with recognised commercial practices in the field, for example by providing a bank guarantee or by placing the amounts necessary on deposit.

[137] EU Commission, Communication to the Institutions on Setting out the EU approach to Standard Essential Patents, November 2017. Available at https://ec.europa.eu/docsroom/documents/26583.

[138] *Ibid.*

[139] For a discussion, see Geradin, Damien, 'Patent Assertion Entities and EU Competition Law' (2016) *George Mason Law & Economics Research Paper* No. 16-08. Available at https://ssrn.com/abstract=2728686 or http://dx.doi.org/10.2139/ssrn.2728686.

[140] See details provided below.

[141] Alexander Italianer, then Director-General for Competition of the European Commission, *Shaken, not stirred: Competition Law Enforcement and Standard Essential Patents,* Mentor Group – Brussels Forum, 21 April 2015. Available at http://ec.europa.eu/competition/speeches/text/sp2015_03_en.pdf.

[142] The Joint Research Centre (JRC) of the European Commission, *Patent Assertion Entities in Europe: Their impact on innovation and knowledge transfer in ICT markets* (Luxembourg: Publications Office of the European Union, 2016) ('the EC Study'). Available at https://ec.europa.eu/jrc/en/publication/eur-scientific-and-technical-research-reports/patent-assertion-entities-europe-their-impact-innovation-and-knowledge-transfer-ict-markets.

[143] The EC Study, *id*.

[144] On the FTC Study on PAEs see part II.1(4)iii.

[145] The EC Study, above note 142.

[146] EU Commission, above note 137.

Overall, litigation by PAEs has been less active in Europe than in the US.[147] Consequently, the study notes that the expectation of observing a large scale rise in patent assertion activity in Europe is limited.[148]

(5) Competition advocacy regarding the IP system

Similarly to the US and Canadian competition agencies, the EU Commission has been active in research-based competition advocacy work relating to IPRs, particularly in the context of the pharmaceutical, telecoms and e-commerce sectors.[149] In relation to the e-commerce sector, in 2017, the Commission published its 'Final Report on the E-commerce Sector Inquiry' in the context of its Digital Single Market Strategy which observed that certain practices may restrict competition by unduly limiting how products are distributed throughout the EU, potentially limiting consumer choice and preventing lower prices online.[150] As noted by the Directorate-General for Competition, the inquiry's findings allow the Commission to target its enforcement of EU antitrust rules in e-commerce markets.[151] This is particularly relevant in the light of recent enforcement cases such as *Google*, *Amazon* and *Facebook*.[152] Although the sector inquiry did not focus particularly on big data and competition, it did confirm the increased relevance of data, as well as, pointed to possible competition concerns relating to data-collection and usage.[153]

(6) Related enforcement activities

As noted at the outset of this section, concurrent with its policy initiatives and related advocacy, the EU Commission has engaged in a vigorous program of enforcement activity relating to anti-competitive abuses of dominant position that also impact on IPRs and their exercise.[154] Noteworthy highlights include the following:

- The *Microsoft Media Player* cases, in which the Commission required that Microsoft offer for sale a version of its Windows Operating System that did not contain the Windows Media Player; disclose certain information to competitors that was deemed necessary for competitive access purposes; and pay a fine of 497 million euros (about $613 million).[155] These remedies went beyond those that had been imposed in related US litigation, and elicited critical feedback from the US.[156]

- The *Intel* case, which has been going on for almost 17 years. In 2017, the Court of Justice of the European Union reversed the ruling of the General Court, which initially upheld the European's Commission's €1.06 billion fine for Intel's alleged abuse of its dominant position through a loyalty/exclusivity rebate scheme for its x86 central processing units.[157] Such practices rather than being seen as restrictive of competition

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[147] Alexander Italianer, then Director-General for Competition of the European Commission, mentions the following factors: First, in Europe, the loser pays for a court battle – which increases the risks for whoever brings the case. Second, damage awards are generally much lower. Third, the courts are specialist patent courts – which reduces uncertainty about the outcome. See above note 141.

[148] The EC Study, above note 142, p. 44.

[149] Available at http://ec.europa.eu/competition/publications/.

[150] The European Commission, *Final report on the E-commerce Sector Inquiry*, 10 May 2017. Available at http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf.

[151] Directorate-General for Competition (European Commission), *EU competition policy in action,* 2017. Available at https://publications.europa.eu/en/publication-detail/-/publication/b11a5d15-c5ca-11e7-9b01-01aa75ed71a1.

[152] For more details see Case AT.39740 — *Google Search (Shopping)*, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1516198535804&uri=CELEX:52018XC0112(01); Case AT.40153 — *E-Book MFNS and related matters*, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2017.264.01.0007.01.ENG&toc=OJ:C:2017:264:TOC; Case M.8228 – *Facebook/Whatsapp*, available at http://ec.europa.eu/competition/mergers/cases/additional_data/m8228_494_3.pdf.

[153] *Final report on the E-commerce Sector Inquiry*, above note 150, para. 54-56.

[154] See also Pierre Arhel, 'Enforcement of competition law in relation to intellectual property in the European Union', above note 132.

[155] *Microsoft v. Commission*, above note 122.

[156] Robert D. Anderson, 'Systemic Implications of Deeper Trans-Atlantic Convergence in Competition/Antitrust Policy', in Simon J. Evenett and Robert M. Stern (eds.), *Systemic Implications of Transatlantic Regulatory Cooperation and Competition* (World Scientific Publishing Company, 2011), chapter 7, pp. 197-240.

[157] Ian Giles and Jay Modrall, *Major victory for Intel as CJEU sends case back to General Court for re-examination*, 12 September 2017, Kluwer Competition Law Blog. Available at http://competitionlawblog.kluwercompetitionlaw.com/2017/09/12/major-victory-intel-cjeu-sends-case-back-general-court-re-examination/.

by object, are now to be analysed under an effects-based approach. The case has been remitted back to the General Court, where Intel has a new chance to overturn the decision or achieve a significant reduction of the fine.[158]

- The *Google* case,[159] in which the Commission found that 'Google abused its market dominance as a search engine by promoting its own comparison shopping service in its search results, and demoting those of competitors […]. It [thereby] denied other companies the chance to compete on the merits and to innovate. And most importantly, it denied European consumers a genuine choice of services and the full benefits of innovation' and imposed the fine of €2.4 billion.[160] US commentary on the decision has emphasized how difficult it would be to bring a similar case in the US, given prevailing differences of competition law doctrine and evidentiary standards: 'Pursuing a US case against Google would be more complicated than in Europe, antitrust experts said, because of a higher standard of evidence needed to prove wrongdoing by the search giant. Rather than go to court, the FTC closed a similar investigation against Google in 2013 in exchange for Google's changing some of its business practices'.[161]

- The *Qualcomm* case, in which the European Commission has fined Qualcomm €997 million for abusing its market dominance in LTE baseband chipsets by preventing rivals from competing in the market.[162] Qualcomm has faced a series of antitrust rulings and investigations from regulators across the globe (see discussion in relation to China, below).[163]

Overall, in its recent enforcement cases, the EU Commission has clearly gone beyond the degree of activism with respect to competition law enforcement that is manifested in this area in other leading jurisdictions, notably the US. The reasons for this would appear to lie in both differing judicial precedents and competition policy philosophies.[164] According to Kovacic:

> The European Union has not encountered the limitations faced by the US antitrust agencies in using its law enforcement powers to address claims of exclusion involving intellectual property. EU doctrine governing abuse of dominance sets more stringent limits upon companies than prevailing judicial interpretations of the Sherman, Clayton, and FTC Acts. In *Microsoft* and *Intel*, the European Commission obtained remedies notably more substantial than DOJ or the FTC attained in their cases, respectively. In *Google*, the European Commission seems poised to gain concessions related to search practices that emerged from the FTC's inquiry unscathed.[165]

More recently, the current US Assistant Attorney General for Antitrust has called for continuing dialogue in this area, noting that 'European competition law still imposes a 'special duty' [to safeguard competition] on dominant market players, while we in the U.S. do not believe any such duty exists'.[166]

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[158] Case C-413/14 P - *Intel v. Commission*, available at http://curia.europa.eu/juris/liste.jsf?num=C-413/14&language=en#. See also Laurent De Muyter, Alexandre Verheyden, *Rewarding Loyalty: ECJ Holds that Loyalty Rebates Do Not Per Se Restrict Competition*, 28 September 2017, Kluwer Competition Law Blog. Available at http://competitionlawblog.kluwercompetitionlaw.com/2017/09/28/rewarding-loyalty-ecj-holds-loyalty-rebates-not-per-se-restrict-competition/.

[159] *Google Search (Shopping),* above note 152.

[160] European Commission - Press release, *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service*, Brussels, 27 June 2017. Available at http://europa.eu/rapid/press-release_IP-17-1784_en.htm.

[161] *E.U. fines Google a record $2.7 billion in antitrust case over search results*, Washington Post, 27 June 2017. Available at https://www.washingtonpost.com/world/eu-announces-record-27-billion-antitrust-fine-on-google-over-search-results/2017/06/27/1f7c475e-5b20-11e7-8e2f-ef443171f6bd_story.html?utm_term=.f9322df28277.

[162] European Commission - Press release, *Antitrust: Commission fines Qualcomm €997 million for abuse of dominant market position*, Brussels, 24 January 2018. Available at http://europa.eu/rapid/press-release_IP-18-421_en.htm. Detailed reasons for the decision still have to be released.

[163] The New York Times, *Qualcomm Accused of Anticompetitive Practices by F.T.C.,* 17 January 2017. Available at https://www.nytimes.com/2017/01/17/business/qualcomm-accused-of-anticompetitive-practices-by-ftc.html.

[164] See Anderson and Kovacic, above note 8.

[165] Kovacic, above note 114.

[166] Delrahim, above note 28.

In sum, therefore, the European TTBER and accompanying Guidelines can be described as modern instruments establishing a strong and pro-active system with regard to the assessment of IPRs and their exercise under competition law. A clear move towards more flexible and effects-based analysis is visible, and the initial focus on single market considerations, while still an important underpinning of European competition law, is now one of many factors taken into account. Notwithstanding this, in the area of single-firm abuses of dominant position, the EU continues to bring cases and especially to impose more far-reaching remedies than other established jurisdictions have been inclined to do. Enforcement activities have been matched by a strong record of policy advocacy.

4. Australia

(1) Introduction and context

Australia's competition system dates from the beginning of the 20th century. Its first competition act, modelled in some respects on US antitrust law, was adopted in 1906.[167] However, for most of the century, competition policy enforcement in Australia remained weak and issues concerning the competition policy and IP interface were not addressed.[168]

In the 1960s, Australia's competition law was replaced by the Trade Practices Act of 1965 (the 1965 Act). Although the 1965 Act established a system for the examination of certain restrictive agreements and practices based on the broad test of public interest, it was widely thought that orderly cartels and restraints would de-fuse capital-labour conflicts and maintain social peace better than full competition.[169]

Over time, a need for further reforms became evident. The 1965 Act was replaced by the Restrictive Trade Practices Act of 1971. Both Acts laid the foundations for the Trade Practices Act of 1974 (the 1974 Act) which, by shifting competition policy towards a proscriptive enforcement approach, launched a new era of competition law in Australia. The 1974 Act was the first regulation to address the treatment of IP issues by exempting certain types of transactions involving IP from its application. The 2010 Competition and Consumer Act (CCA), which renamed and amended the 1974 Act, incorporates a similar IP-exemption.[170]

More recently, various policy reviews, including an inquiry by the Australian Productivity Commission finalized in 2016,[171] have recommended the further amendment of Australia's competition legislation to deal more specifically with aspects of the competition-IP interface.[172] The underlying concern is that some IP licensing and assignment activities may give rise to competition concerns, specifically in the pharmaceutical and communication sectors. Although the recommendations are yet to be implemented, the Government has pronounced its support for some of them while referring others to further consultation, indicating a more active approach to the IP-competition interface.[173] As discussed below, the Competition and Consumer Act has important potential application in relation to IP, and IPRs have long been a focus of competition advocacy activities in Australia.

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[167] Australia's first statute in the field of competition law - the Australian Industries Preservation Act of 1906 (the 1906 Act) - prohibited entering into a contact or combine 'with intent to restrain train or commerce to the detriment of the public'. See OECD, Country studies: Australia – The Role of Competition Policy in Regulatory Reform, 2009, p. 9. Available at http://www.oecd.org/daf/competition/sectors/45170413.pdf.

[168] See OECD, above note 167, p. 7.

[169] The Trade Practices Act of 1965. Available at https://www.legislation.gov.au/Details/C1965A00111.

[170] The Competition and Consumer Act (the CCA), available at http://www6.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_act/caca2010265/.

[171] Productivity Commission Draft Report, 2016, p. 388. Available at http://www.pc.gov.au/inquiries/completed/intellectual-property/draft/intellectual-property-draft.pdf.

[172] This recommendation is not a new one, as it was already included in the 1993 Hilmer Report, p. 150, available at http://ncp.ncc.gov.au/docs/National%20Competition%20Policy%20Review%20report,%20The%20Hilmer%20Report,%20August%201993.pdf; and the 2015 Harper Report (Competition Policy Review Report), p. 41, available at http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf.

[173] The Department of Industry, *Innovation and Science of Australia, Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements,* August 2017. Available at https://www.industry.gov.au/innovation/Intellectual-Property/Documents/Government-Response-to-PC-Inquiry-into-IP.pdf.

(2) Scope of the IP exemptions in the Competition and Consumer Act

Conditions in licensing agreements are exempted from the CCA's provisions on anti-competitive practices as long as they are limited to patents, registered designs, copyright, trademarks and circuit layouts, and where, broadly, the condition relates to products that are the subject of the application of the IPR (subsection 51(3) of the CCA). The IP exception does not, however, extend to the prohibitions relating to the misuse of market power and to resale price maintenance.[174] More generally, outside the terms of the above-noted exception, the CCA applies to the exercise of IPRs.

For example, the transfer of an IPR, whether by licence or assignment, which results in an increase in market power and a consequential substantial lessening of competition might be subject to sections 45 (Contracts, arrangements or understandings that restrict dealings or affect competition) and 50 (Prohibition of acquisitions that would result in a substantial lessening of competition); and the decision by an IP owner to refuse to license IP rights to another person might be subject to the potential application of section 46 (Misuse of market power) (see relevant discussion below).[175]

(3) Doctrinal content/Proposed amendments to the CCA

i. Overall Framework

Although the CCA itself does not provide guidance on the treatment of IP issues, recently the Australian Competition and Consumer Commission (ACCC) has been active in the advocacy related to the competition-IP interface.

Generally, the ACCC recognizes that competitive markets serve the interests of consumers and the community by providing strong incentives for suppliers to operate efficiently, be price competitive and innovative; therefore, arrangements that detract from competition should be retained only if public interest benefits outweigh any anti-competitive detriment.[176] Similar to competition authorities in other advanced jurisdictions, in the recent Pfizer case, the ACCC has indicated that it will take action when concerned about alleged anti-competitive patent settlements (see relevant discussion below).[177]

ii. Licensing Practices

The inclusion of terms that restrict the ability of the licensee to compete with the owner or rights holder or restrict or limit the scope of the licence in terms of pricing, territory or customers in licensing agreements may be a breach of several CCA provisions if these terms or conditions do not fall within one of the IP exceptions in Section 51(3).[178]

The precise extent of the Section 51(3) exception is unclear and has been subject to limited judicial review. In 1980, the Australian High Court stated, in *obiter dicta*, that Section 51(3) goes no further than determining the scope of restrictions that a patentee may properly impose on the use of the patent but not conditions that are collateral to the patent.[179] This is contrary to the

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[174] The CCA, above note 170.

[175] The 2015 Harper Report, above note 172.

[176] WTO, Trade Policy Review, Report by the Secretariat, WT/TPR/S/312/Rev.1, 21 July 2015, available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=133397,130634,96007,99874,78162,81969,69566,80263,47669,18420&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

[177] Simon Uthmeyer and Anna Parker, *Competition law scrutiny of patent settlements - a new focus in Australia?,* 15 November 2016. Available at https://www.dlapiper.com/en/australia/insights/publications/2016/10/life-sciences-spotlight-asia-pacific/competition-law-scrutiny-of-patent-settlements/.

[178] Kathryn Edghill and Jane Owen, 'Australia: Chapter 1', in *The Intellectual Property and Antitrust Review* (Thomas Vinje, ed., Second Edition, 2017). Available at https://thelawreviews.co.uk//digital_assets/d8692bd5-442a-4470-ad8e-1aeac28d304d/TIPAR2-full-book-PDF.pdf.

[179] In *Transfield Pty Ltd v. Arlo International Ltd* (1980) 144 CLR 83 as cited in Edghill and Owen, above note 178.

2015 Federal Court's decision in *ACCC v. Pfizer Australia Pty Ltd* where it was noted that the Section should not be given a narrow construction.[180]

In cases when anti-competitive restraints do not fall within the IP exceptions in Section 51(3), the following CCA provisions apply:[181]

- The prohibition on the making or giving effect to agreements, arrangements or understandings that have the purpose, effect or likely effect of substantially lessening competition in a market (Section 45 of the CCA);

- The prohibition on exclusive dealing in Section 47 of the CCA (by, for example, the holder of an IPR making the licensing of the right conditional on the acquirer accepting a restriction on its rights to deal with competitors);

- The prohibition on the making and giving effect to provisions of agreements between competitors by which one or more is restricted, prevented or limited from supplying goods or services to, or acquiring goods or services from, particular persons or classes of person (a primary boycott), which is also prohibited (Section 4D/Section 45 of the CCA); or

- The prohibition on misuse of market power in Section 46 of the CCA (not subject to the exception in Section 51(3)).

Engaging in unfair and discriminatory licensing may also breach the CCA and the Australian Consumer Law (set out in schedule 2 to the CCA; the ACL).[182] First, licensing practices are subject to the Section 46 of the CCA (the prohibition on misuse of market power), if the right holder has a substantial degree of market power and may constitute an abuse if agreements are entered into for the purpose of substantially damaging or eliminating a competitor or preventing or hindering a person from entering or competing in a market.[183]

Second, such actions might be subject to Section 21 of the ACL, particularly where the party imposing the unfair and discriminatory licensing is in a stronger bargaining position than the licensee or where undue influence or pressure is brought to bear. Thirdly, licensing practices are subject to Section 25 of the ACL related to the prohibition on unfair contract terms in standard form consumer contracts or small business contracts.[184]

iii. Refusals to license

Refusal to license IPRs is not in itself prohibited by the CCA, in the sense that the Act does not oblige a party to license its IPRs.[185] Nonetheless, agreements between competitors not to license IPRs to third parties may constitute exclusionary practices prohibited by the CCA and the grant of exclusive licences may constitute an anti-competitive exclusive dealing practice if it is likely to have a substantial effect on competition.[186] Both prohibitions, however, in some circumstances would be set aside by section 51(3) of the CCA. In cases where a licensor has a substantial degree of market power, the Australian High Court has recognised that it is not the purpose of Section 46 to determine how that party should choose its licensees.[187]

iv. Anti-competitive patent settlements

Anti-competitive patent settlements have not been subject to consideration by the Australian courts. The only decision which addresses anti-competitive effects of 'pay-for delay' launch of generic pharmaceuticals is the 2015 decision in the above-mentioned Pfizer case.[188] The

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[180] *ACCC v. Pfizer Australia Pty Ltd,* available at https://www.australiancompetitionlaw.org/cases/current/2015-nsd242-pfizer.html. See also Edghill and Owen, above note 178.

[181] See Edghill and Owen, above note 178.

[182] The Australian Consumer Law, available at http://consumerlaw.gov.au/the-australian-consumer-law/legislation/.

[183] See Edghill and Owen, above note 178.

[184] *Ibid*.

[185] *Ibid*.

[186] See the CCA, above note 170.

[187] See Case 205 CLR 1 - *Melway Publishing Pty Ltd v. Robert Hicks Pty Ltd*, High Court of Australia, 2001. Available at http://eresources.hcourt.gov.au/showCase/2001/HCA/13 as cited in Edghill and Owen, above note 178, p. 3.

[188] *ACCC v. Pfizer Australia Pty Ltd,* see above note 180.

court found that a pre-patent expiry tie-up of pharmaceutical products, together with bundled offers and a special rebate fund available to pharmacists who entered into the exclusive arrangement was not a misuse of market power, as the conduct had been engaged in to improve the chances of pharmacies continuing to deal with Pfizer and its atorvastatin products rather than returning immediately to their usual generic supplier. The court found that this was not conduct pursued by Pfizer for the purpose of deterring or preventing a person from engaging in competition, but for the purpose of Pfizer remaining competitive.[189]

v. Standard Essential Patents (SEPs)

There are no related provisions or guidelines expressly dealing with technologies in industry standards, although agreements, arrangements or understandings to include such technologies in order to restrict competition in a market might be subject to contravene the CCA.[190] Along these lines, a compulsory licence may be granted in cases of conflicts with the CCA provision dealing with the restrictive trade practices, in connection with a patent. SEPs have received little attention, both in relation to FRAND terms and patent ambush.

To date, Australian courts have not yet delivered judgment on the question of whether a conduct involving SEPs amounts to a breach of the CCA.[191] Although there have been a few examples involving SEPs,[192] in these cases the parties reached a settlement before the Federal Court was able to hand down its decision. In circumstances where the SEP is essential to the relevant standard, it is likely that an Australian court would conclude that the holder of the SEP has a sufficient degree of market power to be subject to the prohibition in Section 46 of the CCA.[193]

vi. Patent Assertion Entities (PAEs)

The ACCC has not expressed an official view or guidance on patent assertion entities. Likewise, case law involving possible infringements has been minimal and so far, participants in digital and software industries were able to largely avoid the 'patent troll' threat and were not liable of anti-competitive practices.[194]

(4) Proposals under consideration directed at the IP system

In order to ensure that an appropriate balance exists between incentives for innovation and investment and the interests of both individuals and businesses in accessing ideas and products, the Australian Government has initiated a review of the treatment of IPRs under the CCA.[195] The review, initiated in 2013 and finalised by an independent Review Panel in 2015, noted:[196]

> The rationale for exempting conditions in licences or assignments of IP rights is flawed. The rationale assumes that the imposition of conditions in licences and assignments cannot extend the scope of the exclusive rights granted to the IP owner and therefore cannot harm competition (beyond the effect of the original grant of the IP right). In many instances, that will be the case; but in those instances the licence or assignment would not contravene the competition law in any event, making the exception unnecessary. However, in other instances, the assumption will not apply. In fields with multiple and competing IP rights, such as the pharmaceutical or communications industries, cross-licensing arrangements can be entered into to resolve disputes that impose anti-competitive restrictions on each licensee. The Panel

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[189] See Edghill and Owen, above note 178.
[190] The CCA, above note 170.
[191] Edghill and Owen, see above note 185, p. 5.
[192] *Vringo Infraestructure Inc v. ZTE (Australia) PTY LTD* (2013), *Vringo Infrastructure Inc v. ZTE (Australia)* (2013)*; Apple Inc. & Anor v. Samsung Electronics Co. Limited & Anor* (2011).
[193] Edghill and Owen, above note 178, p. 6.
[194] Examples of cases are *Vringo Infraestructure Inc v. ZTE,* above note 192; and *Upaid Systems LTD v. TELSTRA Corporation LTD* (2013). See Chris Williams and Tom Platt, *Are patent troll a threat to e-commerce in Australia?*, (Gilbert and Tobin, 2015), p. 2. Available at https://www.gtlaw.com.au/file/8461/download?token=beiVRclq.
[195] Australian Competition Law, *Intellectual Property Arrangements*. Available at https://www.australiancompetitionlaw.org/reports/2016ip.html (last accessed on 7 December 2017).
[196] The 2015 Harper Report, above note 172.

considers that arrangements of this type should be examinable under the competition law.[197]

While recommending repealing the existing broad IP exemption, the Review Panel considered that IP licences should remain exempt from the 'per se' cartel provisions of the CCA when and as they impose restrictions on goods or services produced through application of the licensed IPR. IP licensing or assignment arrangements that are at risk of breaching provisions on anti-competitive practices (Part IV of the CCA), but which are likely to produce offsetting public benefits, could be granted an exemption from the CCA through notification or authorisation processes.[198]

In response, the Australian Government entrusted the Australian Productivity Commission (the Commission) with an inquiry into Australia's IP arrangements.[199] The Commission's inquiry lasted 12 months and the final report was released in December 2016.[200] Importantly, the report built upon the US, Canadian and EU experience with regard to the competition-IP interface.[201] In its Report, the Productivity Commission suggested, *inter alia*:

(i) to repeal the existing IP exemption (section 51(3) of the CCA) and issue guidance on the application of the CCA to IP (recommendation 15.1); and

(ii) to introduce a system of transparent reporting and monitoring of settlements between originator and genetic pharmaceutical companies to detect potential pay for delay agreements as a part of broader guidance on the application of the CCA (recommendation 10.2).[202]

Although the suggested repeal of the IP-related exemption clause in the CCA has also been previously mentioned in official reports on policy review,[203] as well as, widely supported by scholars, lawyers and businesses, there has also been criticism regarding possible disadvantages for IP rights holders.[204] The Government's response to the Productivity Commission's inquiry was released in August 2017, and though it supported the Commission's recommendations in principle, it also recognized 'that there is no fundamental conflict between IPRs and competition policy; rather they share the purpose of promoting innovation and enhancing consumer welfare'.[205]

With regard to recommendation 15.1 on repeal of the Section 51(3) of the CCA and the issuance of guidance on the application of the CCA to IP, the Government noted that it plans to seek to repeal the IP-related exemptions and it also stressed the importance of appropriate regulation in cases when 'there is evidence of anti-competitive conduct associated with IP licensing arrangements'.[206] The Government added that immediate costs and benefits of removing the IP exemption are finely balanced. However, looking ahead, increased cross-licensing may occur in growth industries such as pharmaceuticals and communications, which would considerably increase the benefits associated with removing the exemption.

The Government also acknowledged that recommendation 10.2 on introducing a reporting regime for potentially anti-competitive conduct between pharmaceutical patent owners and generic manufacturers 'would improve transparency and would better equip the ACCC to detect anti-competitive behaviour'.[207] The proposed new monitoring regime would therefore mean that 'pay for delay' patent settlements between originator and generic pharmaceutical companies would be subject to a greater competition law scrutiny. The ACCC's submission to the Productivity Commission also indicates that the ACCC intends to apply the monitoring regime to a broad range

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[197] *Ibid*, pp. 41-42.
[198] *Ibid*, p. 42.
[199] For more information on Australia's Productivity Commission see https://www.pc.gov.au/about/core-functions; and on the Public Inquiry http://www.pc.gov.au/inquiries/completed/intellectual-property#report.
[200] Intellectual Property Arrangements, Productivity Commission Draft Report, April 2015. Available at http://www.pc.gov.au/inquiries/completed/intellectual-property/draft/intellectual-property-draft.pdf.
[201] *Ibid*, p. 394.
[202] See the 2015 Harper Report, above note 172.
[203] See above note 172.
[204] Jacob Greber, *WTO Chief Economist Challenges Productivity Commission View on IP*, 19 May 2016. Available at http://www.afr.com/news/economy/wto-chief-economist-challenges-productivity-commission-view-on-ip-20160518-goxypf.
[205] The Department of Industry, Innovation and Science of Australia, see above note 173.
[206] *Ibid*, p. 17.
[207] *Ibid*, p. 12.

of agreements, including agreements entered into outside Australia that have an effect in Australia.[208]

The proposal for a reporting and monitoring regime has raised some concerns in relation to the compliance costs and burden that it will put on companies subject to the regime, and whether there is real need for additional monitoring in Australia. For example, the Intellectual Property Committee of the Law Council of Australia, noted that 'there is no empirical evidence relied upon [...] to support the proposition that pay-for-delay settlements are occurring with any frequency in Australia which might justify any special or particular enforcement procedures to be deployed by the competition regulator [...]'.[209]

(5) Competition advocacy regarding the IP system

The ACCC has been widely acknowledged for its work in the area of competition advocacy. In 2017, the agency has been honoured with an international award by the WBG and ICN for its role in elevating competition policy to the national economic agenda.[210] An example of an important recent report touching directly on the interface of competition policy and IPRs is the Report on Genes and Ingenuity: Gene patenting and human health, which discusses various forms of anti-competitive conducts in relation to patents (or other IPRs) and genetic material or technologies.[211] Similarly to the Report by the Australian Productivity Commission discussed, the Report refers to the need to reframe the IP exemption in order to achieve an appropriate balance between the needs of the IP system and the wider goals of competition policy.

Overall, among the 'established' and developed economies, Australia is something of a 'latecomer' with regard to the issuance of detailed formal guidance regarding the IP-competition interface. However, recent efforts hold the promise that Australian institutions will benefit and take into account the latest insights and lessons learned in other jurisdictions, and will establish itself among the most modern guidelines in the coming years.

5. Summary observations

The interface of competition policy and IP rights has been an important preoccupation of competition agencies in the US, Canada and the European Union for the past several decades. Recently, it is also receiving important attention in Australia. The enforcement guidelines or regulations and other policy statements adopted in the former three jurisdictions take account of their differing initial circumstances and statutory contexts. They, nonetheless, show an important degree of convergence across the three jurisdictions, based on shared economic thinking and mutual learning processes. Based on the indications to date, Australia seems likely to follow this broad trend in establishing its own guidelines.

Unsurprisingly in the light of the geographical proximity and economic and cultural ties, the process of convergence occurred more quickly in the case of Canada and the US. The 1994 North American Free Trade Agreement (NAFTA) already, to a limited extent, recognized the competition-IP interface.[212] The differing approach that was maintained in the EU for an extended period reflected the core concern of EU competition policy to create a unified European market. Undeniably, this concern shaped the first set of block exemptions for patent and mixed patent and know-how licences adopted in 1984, which were subsequently criticised (including by the Commission itself) for their legal formalism and intrinsic suspicion of IPRs. The relevant instruments, adopted by the EU since that period, continue to reflect residual differences in both policy application and legal form. They, nonetheless, show the clear influence of the modern, economics-based approach to competition policy that originated largely in the US and Canada.

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[208] Uthmeyer and Parker, above note 177.

[209] *Ibid*.

[210] ACCC, *ACCC awarded international prize for competition advocacy*, 2017. Available at https://www.accc.gov.au/media-release/accc-awarded-international-prize-for-competition-advocacy.

[211] Australian Government, *Genes and Ingenuity: Gene patenting and human health* (ALRC Report 99), 2014. Available at https://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC99.pdf.

[212] The Competition Chapter in the NAFTA defines monopoly as an entity, including a consortium or government agency, that in any relevant market in the territory of a Party is designated as the sole provider or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant. Available at http://www.sice.oas.org/Trade/NAFTA/chap-15.asp#Chap.XV.

III. Japan and Korea: Initially an Alternative Approach

The elaboration of a competition policy stance with respect to the exercise of IPRs in Japan and Korea emerged in the post-WWII context of economic recovery and industrialization. Initially, as will be discussed below, both jurisdictions shaped their relevant policy instruments to prioritize the rapid dissemination of new technologies. More recently, a significant reorientation has taken place in the treatment of IP licensing arrangements under Japan's and Korea's competition laws, from one of legal formalism and stress on industrial policy objectives to a more economics-based approach that broadly resembles the US, Canadian and the EU approaches in its methodology and effects, while still differing from those other jurisdictions in aspects of its nomenclature.

1. Japan

(1) Introduction and context

Japan's Guidelines on the application of competition policy vis-à-vis IP were an important element of policies designed to support the country's economic recovery after WWII. Over time, the Guidelines have evolved, reflecting both Japan's interest in balancing the rights of IP exporters and importers, progress in economic thinking and cross-jurisdictional learning processes.

The establishment of Japan's Antimonopoly Act (the AMA) in 1947 and the creation of the Japanese Fair Trade Commission (the JFTC) in 1949 were broadly inspired by the antitrust enforcement experience in the US.[213] However, in the light of national development strategies, Japan's competition policy also placed significant emphasis on promoting the assimilation of foreign technology.[214] This objective was reflected in the Guidelines for International Technology Introduction Agreements, adopted by the JFTC in 1968 (the 1968 Guidelines). Although the 1968 Guidelines formally applied to Japanese companies licensing abroad, practically, it had the effect of limiting the restrictions foreign licensors could impose on Japanese licensees.[215] Similar to the first US and EU approaches, the 1968 Guidelines included nine restrictions which were generally treated as unacceptable ('black' list)[216] and a list of conditions/restrictions which were normally viewed as acceptable ('white' list).[217] They were, *inter alia*, designed to ensure access of domestic companies to foreign technology on favourable terms, and allowed these companies to export technologically-advanced products worldwide.

Responding to rising international pressures for liberalization in this area in the late 1980s, the JFTC in 1989 introduced new Guidelines for the Regulation of Unfair Trade Practices with Respect to Patent and Know-How Licensing Agreements (the 1989 Guidelines). The 1989 Guidelines were applied without discrimination to both international and domestic licensing agreements having an effect on the Japanese market.[218] Similar to the initial EU approach, in addition to existing 'white' and 'black' lists, the 1989 Guidelines introduced a 'grey' list of trade practices that were likely to be unfair but subject to closer, case-by-case scrutiny. The introduction of the 'grey' list in the updated version of Guidelines provided greater flexibility and permissiveness in the review of licensing agreements.[219]

Eventually, the 1989 Guidelines were replaced by a further set of Guidelines for Patent and Know-How Licensing Agreements under the AMA in 1999 (the 1999 Guidelines). The newer Guidelines were characterized by a shift towards 'a rule of reason' approach, broadly similar to the approach followed by the United States and other advanced economies. Importantly, the new set introduced a 'dark grey' list of measures (previously black-listed) that were highly likely to fall within the category of unfair trade practice, but subject to case-by-case scrutiny rather than black-

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[213] E.M. Hadley, *Antitrust in Japan* (1970), pp. 125-126 as cited in Joel Davidow, above note 16, p. 5.

[214] Hideki Ogawa, 'New Technology Licensing Guidelines in Japan' (1989*) World Competition Law and Economics Review* 13: 63.

[215] Davidow, above note 16, p. 6.

[216] Practices covered included restrictions on the freedom of the licensee to set prices; restrictions which continued after the relevant technology rights expired; required purchase rules; certain types of exclusive dealing requirements and certain types of export restrictions.

[217] Such as restrictions, licenses for research only, etc. See Davidow, above note 16, p. 7.

[218] An introductory clause of the 1989 Guidelines. In practice, however, application of the new Guidelines to domestic licences would have occurred only if the domestic licensee complained to the JFTC. See Davidow, above note 16, p. 8.

[219] Davidow, above note 16, p. 8.

listing. In addition to patent and know-how licences, the Guidelines also applied to other forms of IP.[220]

This trend towards 'a rule of reason' approach and the broadening of the scope of application is further evidenced in developments leading to the modern set of rules currently in force. The JFTC adopted the Guidelines on Standardization and Patent Pool Arrangements in 2005 (Patent Pool Guidelines),[221] and the Guidelines for the Use of Intellectual Property under the Antimonopoly Act (the IP Guidelines) in 2007 as a replacement of the 1999 Guidelines.[222] Subsequently, the Guidelines on Standardization and Patent Pool Arrangements in 2007, and the IP Guidelines were amended in 2010 and 2016.

(2) Scope of IP-related competition instruments

The legitimate exercise of IPRs is exempted from competition scrutiny under Article 21 of the AMA. For such practices to be qualified as legitimate, they should not be deemed to be contrary to the aim of the IP protection system.[223] In this manner, bringing a lawsuit against an infringer, a refusal of license, or licensing with a field restriction are all exclusive prerogatives of the IP owner. The AMA is only then concerned when competition is restricted or suppressed through the use of such rights.[224]

The AMA uses a set of terms and notions which differ in some respects from those used by other major jurisdictions in addressing anti-competitive issues, e.g. 'private monopolization', 'unreasonable restraint of trade' and 'unfair trade practices'.[225]

First, 'private monopolization' is defined as business activities aimed at excluding or controlling the business activities of other enterprises and causing a substantial restraint of competition in a particular field of trade.[226] It refers to unilateral conducts similar to those under the circumstances of abuses of dominant market positions that are used elsewhere, although a dominant market position is not a legal requirement for private monopolization. It is noteworthy that even if a conduct does not cause substantial restraint of competition, such conduct would be illegal as an unfair trade practice when it falls into specific cases prescribed by the AMA ('per se illegality').

Second, the term 'unreasonable restraint of trade' is roughly equivalent to anti-competitive agreements. It refers to business activities of a number of enterprises, by contract or agreement, to mutually restrict or conduct their business activities in such a manner as to fix, maintain or increase prices, or to limit production, technology, products, facilities or counterparties.

Third, the IP Guidelines provide a set of principles to determine whether restrictions might constitute 'unfair trade practices': (i) a possible deprivation by an entrepreneur of competitors' or other parties' trading opportunities that directly impedes their ability to compete; (ii) a possible reduction in pricing, acquiring customers and other means; and (iii) tendency to impede fair competition.[227]

The AMA, thus, reviews anti-competitive conducts from the perspectives of private monopolization, unreasonable restraint of trade and unfair trade practices.[228] It also addresses anti-competitive mergers and acquisitions (excessive concentration of economic power).[229]

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[220] Jiyoung Han, *Study on Intellectual Property Licensing under Antimonopoly Law in the US, Europe, Japan and Korea*, 2005. Available at https://www.iip.or.jp/e/e_summary/pdf/detail2004/e16_14.pdf.

[221] The text of the Guidelines on Standardization and Patent Pool Arrangements (2005), available at http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/Patent_Pool.pdf.

[222] The text of the Guidelines for the Use of Intellectual Property under the Antimonopoly Act (2007, 2016) is available at http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/IPGL_Frand.pdf.

[223] Masako Wakui, 'Intellectual Property and Antitrust in Japan', in Roger D. Blair and D. Daniel Sokol (eds.), *Antitrust, Intellectual Property, and High Tech* (Cambridge, 2017), p.144.

[224] *Ibid*.

[225] The AMA. Available at http://www.jftc.go.jp/en/legislation_gls/amended_ama09/amended_ama15_01.html.

[226] The AMA, above note 225.

[227] See the IP Guidelines, above note 222.

[228] Chapters II and V of the AMA, above note 225.

[229] Chapter IV of the AMA, above note 225.

Furthermore, the Act includes a 'General Designation' article, by which the JFTC can prescribe certain practices as per se anti-competitive, and thus, prohibited.[230]

The IP Guidelines follow the same approach as that of the AMA in applying its principles to IP areas. The focus of the IP Guidelines is on IPRs that are concerned with 'technology' as defined in the Guidelines and their use in licensing agreements and patent pools.[231] The Guidelines set out in detail the principles applied to such agreements and illustrate activities that are likely to fall within categories of private monopolization, unreasonable restraint of trade, and unfair trade practices.[232]

The Patent Pool Guidelines clarify the principles applicable to the assessment of standard specifications and patent pool arrangements under the AMA.[233]

(3) Doctrinal content of Japan's Guidelines

i. Overall Framework

Since 1999, Japan's IP Guidelines have shifted towards 'a rule of reason' approach that derives directly from the evolution in economic thinking.[234] This approach is maintained and further elaborated in relation to new issues such as SEPs and FRAND conditions in the 2016 version of the Guidelines which are based on the following principles, similar to those applied in previously described jurisdictions:[235]

- Protection of IP is generally pro-competitive in that it encourages firms to conduct research and development and may serve as a driving force for creating new technologies and products based on the technologies.

- Competition in technology sectors and with regard to products subject to IPRs, however, may be considered to be unreasonably diminished if a right-holder refuses to license out its technology or imposes conditions that restrict research and development, production, sales or any other business activities, depending on how such refusals or restrictions are imposed and the specific conduct to which the restrictions apply.

- The competition agency does not presume that IPRs necessarily confer market power in any particular case. Rather, this is a question to be evaluated on a case-by-case basis.

Similarly to the EU approach, the IP Guidelines provide a safe harbour for abuse of dominance cases where companies have a total share of the product market of 20 per cent or less, or there are at least four parties holding rights to alternative technologies.[236] This safe harbour, however, is not applied to hardcore restrictions such as those on sales price, quantitative or market share restrictions, and territorial active or passive sales restrictions, or exclusive grant-backs.

ii. Licensing Practices

As seen above, the legitimate exercise of IPRs is exempted under the AMA.[237] The IP Guidelines reconfirm that limiting the scope of use of a technology is generally considered as the legitimate right of IPR holders, except when there is evidence of competition-restricting effects. Setting a condition for licensing may correspond to private monopolization, depending on the particular circumstances.

Unfair trade practices, as defined above, include exclusive grant-back obligations if the technology developed by the licensee could be implemented independently from the originally

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[230] Chapter I, Article 2(9)6 of the AMA, above note 225.

[231] As used in the IP Guidelines, 'technology' refers to any technology protected under the Patent Act, the Utility Model Act, the Act Concerning the Circuit Layout of a Semiconductor Integrated Circuit, the Plant Variety Protection and Seed Act, the Copyright Act and the Design Act and to any technology protected as know-how. See IP Guidelines, Part 1(2)(i), above note 222.

[232] Part 3 and 4 of the IP Guidelines, above note 222.

[233] The Patent Pool Guidelines, above note 221.

[234] See Anderson and Kovacic, above note 8.

[235] See Introduction to the IP Guidelines, above note 222, Part 1(1).

[236] See the IP Guidelines, above note 222, Part II (5).

[237] Article 21 of the AMA: 'The provisions of this Act do not apply to acts found to constitute an exercise of rights under the Copyright Act, Patent Act, Utility Model Act, Design Act or Trademark Act', above note 225.

licensed patented technology.[238] Other unfair trade practices include package licensing (tying in/bundling arrangements), which is considered to be illegal unless it is essential for the licensee to use the technology. Certain types of royalty arrangements might be classified as prohibited if as such they impede fair competition, for example, royalties based on standards that are unrelated to the use of licensed technology, or royalties for technology after the expiry of the IPRs.[239]

Patent pools, cross licensing among competitors, and multiple licensing schemes under which numerous competitors are licensees of the same technology may constitute unreasonable restraints of trade under the IP Guidelines.[240] In this sense, agreements among IP owners who separately own IPRs lie in general outside of the "exercise of the right" exemption, and thus, are to be analysed on a case-by-case basis.[241] In assessing anti-competitive effects of patent pooling, the JFTC takes into account factors such as: essentiality of the pooled patent in relation to the other ones that also form part of the pool; independence of the party operating the patent pool; and the overall level of competition in the relevant market. Although cross-licensing is deemed to be generally lawful, the IP Guidelines acknowledge that in cases in which cross-licensing results in strengthening the market power of the licensor or in diminishing licensees' incentive to innovate, it may be considered as an unreasonable restraint of trade.

iii. Refusals to License

The IP Guidelines recognize that refusing to grant a licence or filing a lawsuit to seek an injunction against unlicensed entrepreneurs using the technology is an IPR exercise, and normally not considered as anti-competitive. However, any such activity that deviates from or runs counter to the intent and objectives of the IP system is not considered as a mere exercise of IPRs.[242] If such activity substantially restraints competition in a particular field of trade, or if the refusal is related to a patent obtained by fraud, it will be considered as private monopolization that is prohibited under the AMA.

The IP Guidelines describe five situations in which a refusal to license may be anti-competitive: [243]

(i) patent pool members refuse to grant a licence to a new entrant or hinder the new entrant from using the technology;

(ii) an entrepreneur obtains from an IPR holder the right to a technology which is influential in a particular product market and then refuses to license the technology to others (interception);

(iii) an entrepreneur collects all of the rights to a particular technology without using all of them and refuses to license them to its competitors (concentration of rights);

(iv) IPR holders jointly establish a product standard and then refuse to grant licences to block the development or manufacture by a competitor of any other product compliant with a standard; and

(v) an SEP holder declares its willingness to grant licences under FRAND conditions but then refuses to license or seeks injunction.

Additionally, the IP Guidelines clarify that private monopolization may not be uniformly determined according to the manner of the conduct, but judged specifically by examining the intent and effects of the individual conduct (case-by-case/rule of reason approach).

iv. Standard Essential Patents (SEPs)

In light of Japan's policy to promote investment, research, and development in order to create positive economic externalities, the 2016 amendment of the IP Guidelines elaborates on the issues related to SEPs and FRAND conditions.[244]

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[238] See the IP Guidelines, above note 222.
[239] *Ibid*, Part 4 (5).
[240] *Ibid,* Part 3(2).
[241] See Wakui, above note 223, p.152.
[242] The IP Guidelines, above note 222, Part 1 (1).
[243] The IP Guidelines, above note 222.

The IP Guidelines generally recognize that FRAND commitments by SEP holders promote their investment in research and development. Nonetheless, as discussed previously, in cases where an SEP holder refuses to license under FRAND conditions and/or seeks an injunction, such acts may constitute either (i) private monopolization if they result in the exclusion of a company from the market, and thus substantially restrict fair competition (limiting the scope of the use of technology), or (ii) an unfair trade practice if such act does not meet the standard of private monopolization, but has an adverse effect on fair competition (imposing conditions on the use of technology).[245]

The relevant provisions of the AMA also apply to a party which took over or is entrusted to manage the FRAND-encumbered SEPs. The Guidelines clarify that the determination of such case shall be judged based on the situation of both sides in licensing negotiations. Moreover, the fact that a licensee challenges a SEP holder does not necessarily indicate that the challenger is not a willing licensee, as long as this party undertakes licensing negotiations in good faith according to normal business practices.[246]

Moreover, competition issues in relation to standard specifications and patent pools are addressed more specifically in the Patent Pool Guidelines. The Guidelines clarify the AMA principles with regard to standardization of specifications and patent pooling activities which: (1) restrict prices of new products with specifications; (2) restrict development of alternative specifications; (3) unreasonably extend the scope of specifications beyond the necessity for ensuring compatibility; (4) unreasonably exclude technical proposals from competitors in the development or improvement of specifications; and (5) exclude competitors from specification development activities.[247]

v. Anti-competitive Patent Settlements and Patent Assertion Entities (PAEs)

Anti-competitive patent settlements and PAEs are not specifically addressed in the current version of the IP Guidelines. In fact, the JFTC has never applied the competition laws to reverse payment patent settlements. In 2015, the JFTC and the Competition Policy Research Center published a joint research Report on Competition and R&D Incentives in the Pharmaceutical Product Market.[248] The Report stated that while reverse payment activities have raised significant competition concerns in the EU and the US, these are unlikely to arise in Japan under the current regulatory system and market structure for pharmaceutical products. The incentives to engage in reverse payment schemes might, however, increase if the market shares of generic pharmaceuticals further increase in the near future. Therefore, the Report suggested that the JFTC should continue to monitor relevant developments in this area.[249]

(4) Competition advocacy regarding the IP system

Over the years, the JFTC has issued a set of guidelines in relation to Japan's competition policy, institutional proceedings, the interpretation of existing norms, and the competition – IP interface.[250] Concerning the latter, in addition to the above-mentioned IP and Patent Pool Guidelines, the JFTC has previously published Guidelines Concerning Joint Research and Development under the AMA.[251]

Japan's competition agency has been also active in research-based competition advocacy work including related to IPRs.[252] In 2017, the JFTC's Competition Policy Research Center

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[244] For relevant discussion see Xiaoping Wu, 'Interplay between Patents and Standards in the Information and Communication Technology (ICT) Sector and its Relevance to the Implementation of the WTO Agreements', WTO Working Paper ERSD-2017-08 of 7 April 2017. Available at https://www.wto.org/ENGLISH/res_e/reser_e/ersd201708_e.pdf.

[245] The IP Guidelines, above note 222.

[246] *Ibid*, Part 3 (1)(i)(e).

[247] See the Patent Pool Guidelines, above note 221.

[248] Atsushi Yamada and Yusuke Nakano, *Intellectual Property & Antitrust: Japan*, December 2017. Available at https://gettingthedealthrough.com/area/17/jurisdiction/36/intellectual-property-antitrust-2018-japan/.

[249] *Ibid*.

[250] For more details on Japan's competition guidelines see the JFTC, *Guidelines*, available at http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.html.

[251] The text of the Guidelines Concerning Joint Research and Development under the Antimonopoly Act (1993). Available at http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/jointresearch.pdf.

[252] The JFTC, *Reports of Study Groups, Results of Fact-Finding Survey etc.*, available at http://www.jftc.go.jp/en/policy_enforcement/survey/index.html.

conducted a Study on Data and Competition Policy.[253] The Study indicates possible risks of competition being impeded and the interests of consumers being harmed as a result of concentration of big data in certain enterprises. While the Study Group highlights that the AMA is applicable to most competition concerns related to the collection and utilization of data, some issues such as 'digital cartels' and monopolization and oligopolization of digital platforms still need to be addressed.[254]

Overall, the Japanese approach can be described as having evolved from essentially providing industrial policy tools to providing modern guidelines with regard to the IP-competition interface. Some systemic differences in approach, with the distinction between private monopolization, unreasonable restraints of trade, and unfair trade practices, rather than the classic binary distinction between anti-competitive agreements and abuse of dominance can still be observed, even though the substantive outcomes sought to be achieved may not differ in practice.

2. Korea

(1) Introduction and context

Similarly to Japan, Korea adopted its export-oriented industrialisation strategy in the 1950s. The period of 1950-1980 was characterized by extensive government intervention in markets and support to domestic family-owned corporations (chaebols*)*. As a result, on the one hand, rapid economic development was achieved; on the other hand, severe monopolistic activities of the chaebols made the domestic economy vulnerable. Rising inflation, followed by the oil crisis in the 1970s, became the main turning point for the establishment of a competition policy aimed at correcting negative effects of economic concentration in large conglomerates.[255]

The Korean competition regime was established in the 1980s with the adoption of the Monopoly Regulation and Fair Trade Act of 1980 (the MRFTA) and the creation of the Korean Fair Trade Commission (the KFTC) in 1981.[256] The MRFTA excluded from its application the 'justifiable exercise of the right under the Copyright Act, the Patent Act, the Utility Model Act, the Design Protection Act or the Trademark Act'.[257] Further guidance on the competition-IP interface was provided in 2000 when the KFTC introduced the Review Guidelines on Unfair Exercise of Intellectual Property Rights (the IPR Guidelines).[258]

The importance of IPRs has been increasing over the last decades due to the needs of increased productivity in order to achieve continuous growth. Since the 2008 global financial crisis, the Korean government considers the promotion of IPRs as a key priority; however, the need for effective control of potential abuse has also been recognized.[259] These developments are particularly relevant to cases involving the IT sector in Korea, which is highly dependent on IP.

Korea's experience in this area also illustrates the potential for inter-jurisdictional conflict that is inherent when different jurisdictions apply their competition laws to the conduct of multinational enterprises. In 2005, in litigation related substantially to the same conduct as in the EU and US Media Player cases mentioned briefly above, the Fair Trade Commission of Korea contrastingly ordered Microsoft to: (i) sell in Korea a version of its Windows operating system that includes neither Windows Media Player nor the Windows Messenger functionality; (ii) facilitate consumer downloads of third party media player and messenger products selected by the Commission; and (iii) not sell in Korea a version of its server software that includes Windows Media Services. In response, the Antitrust Division of the US Department of Justice issued a press release highlighting alleged possible adverse effects of the KFTC order:

> The Antitrust Division believes that Korea's remedy goes beyond what is necessary or appropriate to protect consumers, as it requires the removal of products that consumers may prefer. The Division continues to believe that imposing 'code removal'

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[253] The JFTC, *Report of Study Group on Data and Competition Policy,* 6 June 2017. Available at http://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170606.files/170606-4.pdf.

[254] Id, pp. 65-67.

[255] Hwang Lee, *Development of Competition Laws in Korea*, ERIA Discussion Paper Series, November 2015. Available at http://www.eria.org/ERIA-DP-2015-78.pdf.

[256] The MRFTA, available at http://www.wipo.int/edocs/lexdocs/laws/en/kr/kr024en.pdf.

[257] Article 59 of the MRFTA, above note 256.

[258] The IPR Guidelines, available at http://www.ftc.go.kr/www/cmm/fms/FileDown.do?atchFileId=FILE_000000000079690&fileSn=0.

[259] Hwang Lee, 'Competition Law and Intellectual Property in Korea', in Blair and Sokol, above note 223.

> remedies that strip out functionality can ultimately harm innovation and the consumers that benefit from it. We had previously consulted with the Commission on its Microsoft case and encouraged the Commission to develop a balanced resolution that addressed its concerns without imposing unnecessary restrictions. Sound antitrust policy should protect competition, not competitors, and must avoid chilling innovation and competition even by 'dominant' companies.[260]

While the KFTC is known for its active enforcement policies, including in relation to novel areas such as FRAND-related issues, the legal and economic reasoning in the KFTC's cases to a large extent supports deference to IPRs.[261] The 2010, 2014 and 2016 amendments of the IPR Guidelines embraced and communicated effectively the continuing evolution of Korea's Guidelines towards a more flexible, effects-based approach as the application of abuse of market dominance rules was prioritized over those on unfair business practices to pursue economic efficiency.

(2) Scope of the IPR Guidelines

Although the MRFTA provides an exemption clause for the exercise of IPRs,[262] the Guidelines nevertheless prescribe that even if certain practices are not expressly specified, if they deviate from the prescribed legitimate exercise, they may fall under the application of the MRFTA.[263] The Guidelines are applied to enterprises based in Korea and to foreign enterprises 'whose contracts/resolutions inside or outside of Korea affect the Korean market'.[264]

The IPR Guidelines clarify the application of the MRFTA provisions on abuse of dominance and unfair trade practices to the exercise of IPRs. The IPR Guidelines provide specific criteria for reviewing potentially abusive exercise of IPRs in relation to the acquisition of patents, grant-backs, royalty clauses, refusals to license, limitations of the scope of the licence, and imposition of unjust conditions for the grant of a licence. The Guidelines also address potentially unfair practices in the context of patent pools, cross-licensing, technology standards, use of patent infringement lawsuits, settlement agreements and patent-assertion entities (PAEs).

In addition to the IPR Guidelines, the KFTC adopted a general set of the Guidelines for the Review of Unfair Trade Practices in 2004 which establish criteria to examine violations of the MRFTA by providing concrete examples of unfair trade practices.[265]

(3) Doctrinal content of the Guidelines

i. Overall Framework

Korea's IPR Guidelines are broadly grounded in a 'rule of reason' approach comparable to those of other major jurisdictions, which articulate and rely on the following principles:

- Competition law and IP law share the same goals, such as promoting innovation and consumer welfare;
- The determination of whether or not the exercise of IPRs is anti-competitive requires a balancing of the procompetitive effects and the alleged anti-competitive effects. Due consideration is given not only to immediate effects, but also to longer-term effects in light of expected technology innovation;
- The mere existence of an IPR does not confer market power; and
- Safe harbours are used to promote technology transfer.[266]

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[260] US, Department of Justice, 'Statement of Deputy Assistant Attorney-General J. Bruce McDonald Regarding Korean Fair Trade Commission's Decision in its Microsoft Case'(Press Release, 7 December 2005; available at http://www.usdoj.gov/atr/public/press_releases/2005/213562.htm). See also Anderson, above note 156.

[261] See Lee, above note 259.

[262] See above note 256.

[263] Para 2(c) of the IPR Guidelines, see above note 258.

[264] Para 2(b) of the IPR Guidelines additionally clarifies that 'an application of the Guidelines shall be made regardless of whether or not the foreign enterpriser has any operations in Korea or whether the counterparty in a transaction is a Korean enterprise or consumer', above note 258.

[265] The Guidelines for Review of Unfair Trade Practices of 2004, available at http://www.ftc.go.kr/solution/skin/doc.html?fn=e203fae4a70668325aa24c2af79bec23c3c890e0781de6f92a1a02766caa8bb5&rs=/fileupload/data/result/BBSMSTR_000000002411/.

Pursuant to the IPR Guidelines, the IPR holder is not presumed to have a dominant position solely based on its holding IPRs. However, in case of SEPs, the Guidelines clarify that 'if it is impossible to substitute for the technology for a certain period of time and a licence is necessary to manufacture a product, the owner of the IPR can be regarded as highly likely to have market dominance in the relevant market'.[267]

Similarly to other jurisdictions, in particular the EU, a safe harbour for certain categories of conduct is provided in Korea. For such conduct, businesses with a share of less than 10 per cent of the relevant market are exempted from the review by the KFTC, and if the business's market share is difficult to calculate, any business whose annual sales is less than KRW 2 billion, is deemed to qualify.[268]

ii. Licensing Practices

Licensing agreements are subject to the MRFTA provisions on unfair trade practices. The IPR Guidelines list the following acts of potentially unfair exercise of licensing agreements: (i) anti-competitive consideration for the grant of a licence; (ii) refusal to license; (iii) limitations on the scope of a licence; and (iv) the imposition of unfair conditions for the grant of a licence.[269]

In its analysis whether the patent holder's inclusion of relevant terms in a licensing agreement is anti-competitive, the KFTC considers the following factors:[270]

- Whether the added conditions are essential in implementing the relevant patented invention;
- Whether the conditions contribute to promoting the implementation of the relevant technology; and
- Whether the patent rights relating to the conditions have been exhausted.

The IPR Guidelines also address potentially unfair licensing practices in the context of patent pools, cross-licensing and technology standards.[271]

iii. Refusals to License

A refusal to license by a patent holder is generally considered as a legitimate exercise of the IPR in question. Some practices, however, such as unduly refusing to license, might go beyond the legitimate scope. Among other, the Guidelines refer to:[272]

- A refusal to license out to a certain enterprise together with a competitor without a legitimate reason;
- Unduly refusing to license out to a certain enterprise; and

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[266] See Lee, above note 259.

[267] Section II.2.C. of the IPR Guidelines, see above note 258.

[268] The Guidelines for Review of Unfair Trade Practices, above note 265.

[269] The Guidelines for Review of Unfair Trade Practices list the following as a possible violation of the MRFTA: 'The intellectual property right owner forces the sale of other goods or services after concluding a licence contract, e.g., patent right'. For the full text of the Guidelines, see above note 265.

[270] See Lee, above note 259.

[271] The specific types of practices that the IPR Guidelines consider as potentially unfair in the context of patent pools include:(i) the act of unfairly agreeing on the conditions limiting the price, volume, territory, counterparts of the trade or technical improvement, etc., related to a patent pool in the course of the management of a patent pool; (ii) the act of unfairly rejecting the grant of licence to non-participants in the patent pool or concluding a licence agreement with such non-participants on discriminatory conditions; (iii) the act of unfairly making other enterprisers share knowledge, experience, technical achievement, etc., that they obtained independently in the course of the management of a patent pool; (iv) the act of unfairly including invalid patents or patents inessential for the joint working in a patent pool and requiring the taking of a licence for all technologies in the patent pool, including such invalid or inessential patents, as a package; and (v) the act of making a licensee suffer excessive disadvantages by imposing a package royalty much higher than the amount of royalties for each patent in a patent pool combined. See IPR Guidelines, above note 258.

[272] See Lee, above note 259.

- A refusal to license to enhance the effectiveness of other unfair practices, such as refusing to grant a licence to another party if the latter rejected unreasonable conditions imposed by the patent holder.

iv. Anti-competitive Patent Settlements

The Korean IPR Guidelines contain a separate section addressing anti-competitive settlement agreements in patent disputes. It is recognized that by sustaining the exclusivity of an invalid patent and by preventing an entry of competing enterprisers into the market, an unfair settlement may interfere with consumers' welfare.[273] Due to this clause in the IPR Guidelines, patent disputes between brand-name drug giants and generic companies are increasing.[274] Based on a recent decision in the GSK case,[275] the KFTC aims at monitoring patent abuse in the pharmaceutical sector and at improving relevant instruments.[276] In this manner, it has instituted since 2015 a system which mandates the notification of any settlement between an original drug patent owner and a generic producer, including the details of the agreed terms, conditions, and other related information.[277]

v. Standard Essential Patents (SEPs)

The 2016 amendment to the IPR Guidelines provided more clarity to the definition and scope of allowable activities involving SEPs. Prior to the amendment, the concept of 'standard' technology had a broad definition that included 'technology widely used as the actual standard in the relevant field of technology'. Therefore, *de facto* SEPs were equally regulated as SEPs approved by standardization bodies. The 2016 amendment limited the definition of 'standard' to the 'standards selected by standardisation bodies', and accordingly, the definition of SEPs was stipulated as 'patents that require the voluntary commitment by the patent owners to FRAND terms for adoption as standard technologies'.[278]

The IPR Guidelines list the following unlawful anti-competitive acts relating to SEPs: (i) unreasonably avoiding or circumventing licensing on FRAND terms to strengthen monopolistic power in the relevant market or exclude competitors; (ii) unreasonably refusing to grant licences for SEPs; (iii) discriminating in the SEP licence terms, or imposing of royalties at an unreasonable level, thereby restricting competition; (iv) imposing a condition that unreasonably restricts the exercise of relevant patent rights held by the licensee or unreasonably imposing the condition that the licensee provides a cross-licence to its non-SEPs.[279]

The IPR Guidelines recognize that an unlimited right of SEP holders to seek injunctive relief for patent infringement might result in so-called 'patent hold-ups'. Accordingly, if a SEP holder that made FRAND commitments seeks injunctive relief for patent infringement against a willing licensee, such an act is likely to restrict competition in the relevant market beyond the justifiable scope of patent rights.[280]

vi. Patent Assertion Entities (PAEs)

Korea was the first jurisdiction to introduce provisions on so-called non-practicing entities (NPEs) in the 2014 version of the IPR Guidelines. NPEs are defined as 'entities that generate profit by practicing patents while not manufacturing or selling goods or providing services using the patent' (and can thus be compared to the PAEs addressed in other jurisdictions' guidelines).[281]

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[273] Dave B. Koo, Kee Hong Chun and Kyung Yul Lee, *IP & Antitrust 2017: Korea*, 20 October 2017. Available at http://globalcompetitionreview.com/jurisdiction/1004778/korea.

[274] Lee, above note 259.

[275] Case No. 2012 Du 24498 - *Glaxo*, Supreme Court Decision of 27 February 2014. For more details see KFTC. The 2012 Annual Report, p. 75. Available at http://www.ftc.go.kr/solution/skin/doc.html?fn=eb12ef8605beea9dbb86af86b8f5ef20b87abab2e9ebb1781cc1e8596dc5491f&rs=/fileupload/data/result/BBSMSTR_000000002404/.

[276] Lee, above note 259.

[277] See Koo et al., above note 273.

[278] *Ibid.*

[279] The IPR Guidelines, above note 258, section 5.A.

[280] *Ibid*, section 5.B.

[281] *Ibid*, section I.3.A(7).

While recognizing the procompetitive effect of NPEs in terms of commercialization of IPRs, rewarding innovators, and acting as an intermediary, the Guidelines stipulate that they might have an incentive to abuse patents since they do not undertake manufacturing.[282]

(4) Competition advocacy regarding the IP system

The KFTC generally recognizes the role of competition advocacy as pivotal in reforming anti-competitive regulations.[283] Over the last years, in addition to the KFTC's investigation activities and issued guidelines,[284] the agency has effectively monitored the abuse of the IPRs in the pharmaceutical and ICT sectors, thereby promoting competition.[285]

Overall, Korea's approach to the competition-IP interface has evolved from serving principally as a tool aimed at promoting the dissemination of new technologies to providing modern guidelines with regard to IPR. The continuing evolution of the IP Guidelines with regard to 'new issues' such as SEPS and NPEs reflects the most recent developments, including those in the IT industry, which constitutes a significant share of Korea's economy.

3. Summary observations

In both Japan and Korea, the early content of national competition policies was shaped by national development strategies, and particularly by the need to facilitate access to modern technologies originating abroad. The treatment of IP under their competition laws was used to supplement and overcome the limits of general development strategies and, at the appropriate moments, to implement new paradigms in economic development.[286]

In recent times, Japan's and Korea's treatment of IP issues under their respective competition laws has largely shifted toward a more economics-based approach that broadly resembles, in key respects, the US, Canadian and the EU approaches. Still, the potential for conflict has been evident at least in the case of Korea. In addition to traditional issues related to licensing agreements, Korea's and Japan's Guidelines on the interface between IP and competition policy continue to evolve to address new challenges such as those concerning SEPs and FRAND licensing.

IV. The BRICS Economies (Brazil, China, India, Russia and South Africa): Establishing their own Approaches

An important development in the economic policy framework for the global economy, whose effects and implications have arguably not yet been fully assimilated, is the remarkable proliferation of competition regimes around the world that occurred around the beginning of the 21st century. Since the late 1980s, the number of jurisdictions in the world having competition laws and related enforcement regimes has increased from around 30 to more than 130, including about 90 developing or transition economies.[287] Contemporaneously, very important emerging and transition economies (e.g., Brazil, China, India, the Russian Federation and South Africa) that previously either had no competition laws at all or had limited or antiquated regimes established active, modern competition regimes as a core element of their overall development strategies.

In the first decades of their competition regimes, the BRICS economies achieved very significant accomplishments.[288] Their policy stances with respect to the competition policy-IP interface, in any case, are emerging and, in some cases, remain unsettled. This part of the paper delves into relevant developments in the individual jurisdictions.

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[282] Lee, above note 259.

[283] Won Joon Kim, *Competition Advocacy Role of the Korea Fair Trade Commission.* Available at http://www.jftc.go.jp/eacpf/05/APECTrainingProgram2002/Korea.pdf.

[284] The KFTC, *Laws and Guidelines*, available at http://www.ftc.go.kr/eng/cop/bbs/selectBoardList.do?key=526&bbsId=BBSMSTR_000000002411&bbsTyCode=BBST11.

[285] The KFTC, Annual Report 2016. Available at http://www.ftc.go.kr/eng/cop/bbs/selectBoardList.do?key=517&bbsId=BBSMSTR_000000002404&bbsTyCode=BBST11.

[286] See, for example, Davidow, above note 16.

[287] In the 1970s, only around ten jurisdictions had organized competition systems. See, OECD, *Challenges of International Co-operation in Competition Law Enforcement*, 2014. Available at http://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf.

[288] See, generally, Frederic Jenny and Yannis Katsoulacos (eds.), *Competition Law Enforcement in the BRICS and in Developing Countries* (Springer, 2016).

1. Brazil

(1) Introduction and context

Brazil's competition policy emerged in several stages in the 1950s. At that time, the Government implemented price control policies and other market interventions in many sectors, and regulated most of the country's largest industrial, transportation, and financial enterprises.[289] The first Competition Law (No. 4137) of 1962 established the Administrative Council for Economic Defence (CADE) – Brazil's competition agency. In the existing economic conditions at that time, CADE, however, had a marginal economic impact as its authority extended only to private firms.

In 1988, coinciding with a series of significant economic reforms in Brazil, such as a privatisation program, the new Constitution of Brazil recognized competition as a key component of Brazil's economic order. Subsequently, the new competition law No. 8.884 was enacted in 1994 (the 1994 Law). The 1994 Law elaborated on the competition policy stance in relation to IP by stating that possession or ban of the use of industrial or IP rights or technology would be deemed as a violation of the economic order.[290]

In the course of the development, during the Uruguay Round of Multilateral Trade Negotiations of the TRIPS, Brazil attached significant importance to the maintenance, in the Agreement, of scope for the issuance of compulsory licences and other measures to address abusive practices by national authorities.[291]

A new structure of the Brazilian competition policy regime[292] was established by the Law No. 12.529 of 30 November 2011 (the Competition Law).[293] Although the new Competition Law redesigned and broadened the legal framework in relation to IP, Brazil has not established guidelines dealing with competition-IP interface specifically. However, CADE's stance, towards some relevant issues can be derived from enforcement decisions[294] and more general competition policy guidelines which are described below.

(2) Scope of relevant statutory provisions

The Competition Law of 2011 addresses the relationship of competition policy to IP in several regards. First, the Competition Law refines and expands a non-exhaustive list of potentially anti-competitive practices. In addition to horizontal/vertical agreements and unilateral abuses[295] of market power, the listed practices include (i) the abusive exercise or exploitation of industrial property, IP, and technology or trademark rights; and (ii) the monopolization or prevention of the exploitation of industrial or IP rights or technology.[296] The previous law contained looser language indicating only the possession of or ban on the use of industrial or IPRs or technology as a potentially anti-competitive practice.

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[289] OECD, IDB, 'Competition Law and Policy in Brazil, A Peer Review' (2010), p. 10. Available at https://www.oecd.org/daf/competition/45154362.pdf.

[290] Article 22 of the 1994 Law. Available at http://en.cade.gov.br/topics/topics/legislation/laws.

[291] Piragibe dos Santos Tarrago, 'Negotiating for Brazil', Watal and Taubman, above note 13, chapter 12.

[292] As initially established by the 1994 Law, three agencies comprise the Brazilian competition policy regime (BCPS): the CADE, the National Secretariat for Consumers of the Ministry of Justice (SENACON) and the Secretariat for Economic Monitoring in the Ministry of Finance (SEAE). Brazilian Competition Law redefined the structure and responsibilities of the government agencies in charge of administering the BCPS. With a view to consolidating the investigation of anti-competitive conduct, merger control, and first-instance (administrative) adjudication into CADE. The SDE remained in charge of consumer protection. The SEAE has an important role on issues that arise from the interface between the enforcement of the Brazilian Competition Law and the application of rules issued by regulatory agencies, as well as the measures related to trade and industrial policies.

[293] The Competition Law of 2011. Available at http://en.cade.gov.br/topics/topics/legislation/laws.

[294] Importantly, while the Anglo-American concept of binding judicial precedent does not exist in Brazil, under CADE's Internal Regulations, legal certainty is only achieved if CADE rules in the same way at least ten times, after which they codify a given statement via the issuance of a binding statement. For additional information see Ana Paula Martinez, 'Competition Policy and Life Cycle Management: The Brazilian Experience', in Giovanni Pitruzzella and Gabriella Muscolo (eds.), *Competition and Patent Law in the Pharmaceutical Sector. An International Perspective* (Wolter Kluwer, 2016), p. 373.

[295] Listed unilateral practices include both exploitative and exclusionary practices, including refusals to deal and limitations on access to inputs or distribution channels, and predatory pricing. See Article 36 of the Competition Law, above note 293.

[296] *Ibid.*

Second, the Competition Law requires a notification of concentration acts to CADE.[297] The Law lists as concentration acts among, others associative agreements, consortiums or joint ventures between two or more companies.[298] Even though this provision does not explicitly refer to agreements related to IPRs, CADE's stance towards licensing agreements is reflected in Resolution No. 17 of 2016, which states that any associative agreement with duration of two years or more, where the involved parties are competitors sharing the risks and results of the underlying economic activity should be notified.[299] The term 'economic activity', also defined in the same resolution, includes even acquiring assets on a non-profit basis, provided that the activity may be run by a private company seeking profit. In that sense, the prior notification of certain research and development agreements is covered by the law. [300] For vertical agreements, notification is only compulsory if they involve an 'economic activity' that involves a competitive relationship between the companies.

Third, compulsory licensing of IPRs is explicitly mentioned in the Competition Law among possible remedies for conditional clearance of mergers and possible penalties for an anti-competitive conduct. Previously, Brazil's competition legislation had limited the possibility of compulsory licensing to patents held by an infringer.[301] Although not mentioned in the Competition Law, the Law on Industrial Property provides that patents may be subject to compulsory licences when the holder exceeds its rightful use through the abuse of economic power.[302]

(3) Doctrinal content/ enforcement experience in relation to IP

i. Overall Framework

Brazil's competition system provides for 'a rule of reason' approach[303] in the consideration of all market concentrations and anti-competitive practices, including abuse of dominance.[304] In this context, CADE analyses net effects of the conducts under investigation. If the dynamic efficiencies resulting from the exercise of the IPR are not higher than the static inefficiencies, the conduct is deemed anti-competitive and leads to the imposition of sanctions by CADE.[305]

In line with other jurisdictions, CADE classified anti-competitive practices concerning IPRs as violations resulting from fraud or abuse in the registration procedure of the IPR, and violations arising from the abuse of the IPR itself.[306]

Anti-competitive effects may also be caused by the abusive exercise of IPRs, when the rights are not exercised in accordance with their social and economic purpose. Such abuses, among other practices, consist of: (a) horizontal restraints, such as licensing agreements entered into between parties active in the same segment, which may lead to anti-competitive restraints such as the division of markets; (b) resale price maintenance clauses; (c) tie-in sales, when the licence of a

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[297] *Ibid,* article 88.

[298] *Ibid,* article 90.

[299] Resolution No. 17 of 18 October 2016, which regulates the notification's hypothesis of associative contracts referred to on paragraph IV, Article 90, of the Competition Law, and repeals CADE's Resolution No. 10, from 29 October 2014. Available at https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQAh8mpB9yNv-GMnqtuY9s5zbnPvfnYiuBhvl7asLinWf2UjGqpzfMMnV20eEelmaWH0I7Q3sVlrFJpAoVYj1uowW0inIaqf.

[300] Leonardo Rocha e Silva, Daniel Costa Rebello and Raul Nero Perius Ramos, *CADE issues new guidance on associative agreements*, 21 November 2016. Available at https://awards.concurrences.com/IMG/pdf/lps_rll_rnp_abex_pinheiro_21-11-16.pdf. See above note 292.

[301] Articles 38 and 61 of the Competition Law. In case of mergers, the Administrative Tribunal of Economic Defense (the Tribunal) 'may fully approve the act of economic concentration, reject it or partially approve it, in which case it will determine the restrictions [including compulsory licensing] to be observed as conditions to validate the act'.

[302] Article 68 of the Law on Industrial Property No. 9.279 of 14 May 1996 (in Portuguese). Available at http://www.wipo.int/wipolex/en/text.jsp?file_id=461539.

[303] In its assessments, CADE applies a consumer welfare standard, with top priority given to gains to consumers. For more information see the WTO, Trade Policy review, Report by the Secretariat, 17 May 2013 (WT/TPR/S/283). Available at https://www.wto.org/english/tratop_e/tpr_e/s283_e.pdf.

[304] A dominant position is defined as having either the ability to unilaterally (including when acting as a group) alter market conditions or control over at least 20% of the relevant market. CADE may, however, apply different market control thresholds for specific sectors. In its assessments, CADE applies a consumer welfare standard, with top priority given to gains to consumers.

[305] José Alexandre Buaiz Neto, 'Brazil (Chapter 2)', in Vinje, above note 178. Available at https://thelawreviews.co.uk/edition/the-intellectual-property-and-antitrust-review-edition-2/1145330/brazil.

[306] *Ibid*.

certain IP right is conditioned upon the acquisition of another licence or other products; (d) exclusivity agreements; (e) cross-licensing and pools; (f) grant-backs; and (g) refusals to license. CADE's analysis with respect to such situations of abuse is based on the rule of reason.[307]

ii. Licensing Practices

As mentioned before, licensing agreements classified as concentration acts or associative agreements are subject to notification to CADE. Although there are no established guidelines for the competition agency's analysis of such agreements, CADE's stance towards the assessment of licensing agreements has been elaborated in relevant cases:[308]

a. antitrust authorities must analyse such acts to better understand how they work;

b. a *prima facie* refusal to analyse a case by CADE must be exceptional and must be clearly allowed by the law; and

c. an association of two or more companies, even without involving a merger and acquisition, can give rise to economic dominance, especially in high technology sectors.

When approving patent licensing agreements, CADE generally requires an exclusion of clauses that grant powers to the licensor to control decisions related to the business and the partnership structure of the licensee. Although this position tends to be followed by CADE in many cases, whether a general obligation to submit licensing agreements to CADE exists is doubtful and the issue requires further clarification.[309] Moreover, in some cases CADE considered patent pools as a means to improve competition in markets that use technology protected by SEPs, but has also recognised that the pools have the ability to harm competition when misused.[310]

iii. Refusals to License

In certain circumstances, CADE considers a refusal to license as an example of a possible abusive conduct. For example, a refusal to negotiate may be subject to abuse of dominant position provisions.[311]

In line with other jurisdictions, CADE may consider the application of the essential facility doctrine[312] based on four premises: (1) the existence of an essential input owned by a dominant firm; (2) economic or legal unfeasibility or the lack of alternative means of provision of the input; (3) the refusal of access to the input to a competitor; and (4) if the provision of the input to a new competitor affects the quality of access to companies that already have access to it.[313]

iv. Anti-competitive patent settlements

Patent settlements have not been reviewed under the current competition framework in Brazil.[314] Some scholars suggest that in particular circumstances, certain kinds of patent settlements if conducted may violate the Competition Law.[315] Specifically, Article 88 of the Competition Law establishes the prohibition of agreements between competitors which may substantially eliminate competition or strengthen a position of dominance on the relevant

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[307] *Ibid*.

[308] CADE's proceeding No. 08700.003898/2012-34, as cited in Anderson Ribeiro, João Luis Vianna and Gabriel Leonardos, *Pharmaceutical IP and competition law in Brazil: overview,* 1 June 2017. Available at https://uk.practicallaw.thomsonreuters.com/5-561-9409?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1.

[309] Ribeiro et al, *id.*

[310] Buaiz Neto, above note 305.

[311] *Ibid*.

[312] Essential facility theory reflects the idea that a good or service essential to the community cannot be subject to restrictions by those holding the right to explore it.

[313] Buaiz Neto, above note 305.

[314] The fact that in Brazil there is no exclusivity period for the first generic drug to enter the market makes it less likely to have pay-for-delay agreements. For further information see Martinez, above note 294, p. 374.

[315] Roberta Silva Melo and Fernandes Remédio Marques, *The Exclusion Payment Agreements between Reference and Generic Medicines Companies: Restrictive Practices of Competition?* (PIDCC, Aracaju, Year IV, Edition No. 08/2015, 2015), p. 417 (in Portuguese). Available at http://pidcc.com.br/artigos/082015/17082015.pdf.

market.[316] Firstly, a settlement between actual or potential competitors where there is no real dispute (the litigation is a 'sham') may be considered anti-competitive if it involves competitive variables.[317] Secondly, if a settlement includes a provision that is outside the scope of the dispute and has anti-competitive effects, it is also likely that the settlement will be considered anti-competitive.[318]

v. Standard Essential Patents (SEPs)

In the first and only case analysed by CADE involving potential abuses related to SEPs, which was brought by TCT against Ericsson,[319] the latter's actions were not considered as a sham litigation or abuse of dominant position, and thus the case resided outside of CADE's jurisdiction. Given that the case addresses the issue of a regular licence agreement, CADE decided that negotiations related to the price of royalties were a private commercial matter, and it is not CADE's prerogative to decide on this matter, even if these parties are to some extent competitors.[320]

vi. Patent Asserting Entities (PAEs)

Activities of PAEs in Brazil have been minimal, and CADE has not issued any guidelines or opinions regarding the matter. One of the reasons for the lack of PAEs' activities is the significant time it takes for PAEs to actually assert judicially its patent rights, and subsequently obtain a monetary retribution.[321]

Nevertheless, PAEs may find a favourable immediate battleground in Brazil as standards for obtaining injunctive relief are relatively low. In this sense, PAEs are capable of obtaining preliminary -*ex parte*- injunctive relief. Moreover, in cases where alleged PAEs were involved, few courts have taken into account the fact that the asserted patent covered only partially the infringing one. Thus, technical issues are generally not weighting in as such when deciding requests for preliminary injunctions.[322]

(4) Competition Advocacy regarding the IP system

CADE has issued a set of guidelines in relation to its competition policy, its institutional proceedings, and the interpretation of existing norms. In that sense, guidelines are available for acts related to horizontal concentrations, gun jumping, as well, compliance and leniency programmes.[323]

Although no specific guidelines on the competition policy and IPRs interface have been issued by CADE, some related infringing practices are mentioned in relevant publications by CADE. For example, the Guidelines for the Analysis of previous Consummation of Merger Transactions refer to licensing the exclusive use of IP to the counterparty, before and during the implementation of a merger, as a practice that can raise CADE's concerns.[324]

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[316] *Ibid.*

[317] In a related 'originator-generic' case, CADE fined the pharmaceuticals Eli Lilly do Brasil Ltda. and Eli Lilly & Co. for the practice of sham litigation, by which the companies obtained and held the undue monopoly of an active principle, and kept the competitors out of the market. Available at http://en.cade.gov.br/press-releases/eli-lilly-fined-in-brl-36-6-million-for-sham-litigation.

[318] Ademir Antonio Pereira Júnior and Jose Del Chiaro Ferreira da Rosa, IP & Antitrust 2016: Brazil. Available at https://globalcompetitionreview.com/jurisdiction/1000462/brazil.

[319] *TCT vs. Ericsson* (AP nº 08700.008409/2014-00) (in Portuguese). Available at http://www.migalhas.com.br/arquivos/2015/6/art20150609-08.pdf

[320] *Ibid*.

[321] Lisa L. Mueller, *Patent Trolls: A Global Perspective*, 16 February 2014. Available at https://bricwallblog.com/2014/02/16/patent-trolls-a-global-perspective/.

[322] Sterne Kessler Goldstein and Fox PLLC, *Enforcing Patents in Brazil: An Injunction Paradise?*, 13 November 2017. Available at https://www.lexology.com/library/detail.aspx?g=4f62efde-5cc1-4a4f-9fa7-587387497896.

[323] CADE, *Guidelines*. Available at http://en.cade.gov.br/topics/publications/guidelines.

[324] CADE, *Guidelines for the Analysis of Previous Consummation of Merger Transactions*, p. 8-9. Available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guideline-gun-jumping-september.pdf.

In 2015-2016, CADE was honourably mentioned in the ICN – WBG Competition Advocacy Contest with regard to the agency's competition advocacy in fast growing and innovative markets.[325]

Overall, Brazil's competition regime and the consideration of the interface between IP and competition can be described as emerging. While no formal guidelines on this subject have been issued to date, CADE has shown its ability to consider the complexities of the issues at hand in a nuanced way and applies the overall rule-of reason and effects based approach also witnessed in other jurisdictions.

2. China

(1) Introduction and context

Since initiating its wide-ranging economic and policy reforms in the late 1970s, China has experienced rapid economic and social development.[326] By progressively transforming the previously centrally-planned economy, the market reform process in China created favourable conditions for the introduction of competition policy.[327] The first regulation to protect market competition in China – the Interim Provisions on Developing and Protecting Socialist Competition (the Interim Provisions) - was established in 1980. The Interim Provisions recognized the role of technological innovation in China's economy.[328]

As the process of economic reform deepened, China enforced a series of laws related to anti-competitive practices: the Anti-Unfair Competition Law (1993) established a prohibition of tie-in sales; the Contract Law (1999) referred to technology contracts that illegally monopolize technologies, impede technical progress, or infringe the technological achievements of others as null and void; the Foreign Trade Law (2004) set a prohibition on certain types of IP-related anti-competitive conducts, such as preventing licensees from challenging the validity of IPRs covered by the contracts, imposing forced package licensing and specifying exclusive grant-backs.[329]

China's full-fledged competition law - the Anti-Monopoly Law ("AML") - entered into force in 2008.[330] In less than a decade, 'remarkable strides' have been made by China to enforce the 2008 Law, notwithstanding that, in the view of some observers, policy applications may be unduly influenced by industrial policy considerations.[331] The legislation, moreover, has important potential application to IP issues. While excluding its application to undertakings that exercise IPRs in accordance with the laws and administrative regulations on IPRs, the AML can be applied to undertakings that eliminate or restrict market competition by abusing their IPRs.[332] The Chinese Government has embraced the idea – initially promulgated in the US - that competition policy and IPR protection share the same goals, i.e. protecting competition, encouraging innovations, improving economic efficiency, and protecting consumers' interest and public interest.[333]

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[325] The WBG, above note 55.

[326] The Third Session of the 11th Central Committee of the Party initiated the call for reform of China's economic system. For a brief introduction of the official introduction of the outcome of the Third Plenary Session of the 11th Central Committee of the Communist Party of China see People Daily Online, *Third Plenary Session of 11th Central Committee of CPC held in 1978*, 9 October 2008. Available at http://en.people.cn/90002/95589/6512371.html.

[327] See Xiaoye Wang, *The Evolution of China's Anti-monopoly Law* (Edward Elgar Publishing, 2014).

[328] The Interim Provisions on Developing and Protecting Socialist Competition of 1980 (in Chinese), available at http://www.pkulaw.cn/fulltext_form.aspx?db=chl&gid=816.

[329] Anti-Unfair Competition Law of 1993, available at http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn011en.pdf. The Contract Law of 1999, available at http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn137en.pdf. The Foreign Trade Law of 2004, available at http://english.mofcom.gov.cn/aarticle/policyrelease/internationalpolicy/200705/20070504715845.html.

[330] The Anti-Monopoly Law of 2008 (AML), available at http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml.

[331] William E. Kovacic, 'Competition Policy and State-Owned Enterprises in China' (2017) 16.4 *World Trade Review* at 693-711. See also the related discussion of the recent *Qualcomm* case, below.

[332] Article 55 of the AML: 'This law is not applicable to undertakings which exercise their intellectual property rights in accordance with the laws and administrative regulations on intellectual property rights; however, this Law shall be applicable to the undertakings that eliminate or restrict market competition by abusing their intellectual property rights'. See above note 330.

[333] The Preamble of the Draft Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights (the Draft Guidelines), released for public consultations on 23 March 2017 (in Chinese). Available at http://fldj.mofcom.gov.cn/article/zcfb/201703/20170302539418.shtml.

In 2015, the State Administration for Industry and Commerce (SAIC), one of the three competition agencies in the jurisdiction with competence on non-price related anti-monopolistic issues including those related to IPRs, adopted its Provisions on the Prohibition of the Abuse of Intellectual Property Rights to Eliminate or Restrict Competition (the SAIC Provisions).[334] The SAIC Provisions, formulated on the basis of China's enforcement experience and policy trends in other major economies[335], are China's first set of dedicated rules on the application of the AML to IP.

Besides the SAIC, there are two other administrative agencies responsible for competition policy development and enforcement in China: the National Development and Reform Commission (NDRC) and the Ministry of Commerce (MOFCOM).[336] Their respective coverage of competition policy may also involve IPR issues. The SAIC Provisions, however, are only binding on the SAIC. This has raised the concern that the division of authority across three overlapping enforcement agencies may diminish coherence in law and policy.[337]

In 2015, all three agencies, together with the State Intellectual Property Office (SIPO), the IPR protection authority of China, were mandated by the Anti-Monopoly Commission of the State Council to draft Guidelines on the application of the AML to IPR issues within the scope of their respective competence. The involvement of SIPO in the process helps to ensure that the legitimate rights of IPR holders be appropriately reflected in competition policy enforcement. A consolidated version of the Draft Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights (the Draft Guidelines) was released for public consultations on 23 March 2017.[338] In addition to those developments in legislation, the enforcement of competition policy against abuses of IPRs has also witnessed dynamism in this jurisdiction.[339] The enforcement practices enriched the authorities' knowledge in this area and contributed to the subsequent issuance of relevant regulations or guidelines.

(2) Scope of the SAIC Provisions

The SAIC Provisions of 2015 govern anti-competitive agreements, abuses of dominant market position, patent pools, patent ambushes in standard setting, SEPs, etc. Price-related monopoly conducts in the IP area are explicitly excluded from the coverage of the SAIC Provisions as they fall outside the SAIC's enforcement authority.

(3) Doctrinal content of the relevant Chinese instruments

i. Overall Framework

To strike a delicate balance of IPRs and competition policy, the SAIC Provisions set out: 'competition policy and the protection of IPRs share the common goals, i.e. promoting competition and innovation, enhance economic efficiency, and protect consumers' interest and the community's interest'.[340] Generally, the Provisions explain that the AML only applies to abuses of IPRs with the effects of eliminating or restricting competition, specifically, the circumstances of monopolistic agreements and abuses of dominant market position.

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[334] Provisions on the Prohibition of the Abuse of Intellectual Property Rights to Eliminate or Restrict Competition (the SAIC Provisions) (in Chinese and English). Available at http://www.saic.gov.cn/zw/wjfb/zjl/201504/t20150413_213223.html.

[335] The SAIC stated in its Explanatory Notes on Drafting the Provisions (the Explanatory Notes on Drafting), published on 11 June 2014 together with the draft Provisions (version for public consultations) that it had learnt from guidelines, policy stances and enforcement practices of foreign competition agencies, identified their consensus and divergences on relevant issues, and given consideration to opinions of relevant academia, business representatives from home and abroad, and experts from the EC Directorate-General for Competition, the US Department of Justice and the Federal Trade Commission, and the Canadian Competition Bureau, etc. The Explanatory Notes on Drafting (in Chinese) is available at http://www.gov.cn/xinwen/2014-06/16/content_2701355.htm.

[336] The MOFCOM is in charge of merger control; the NDRC - of price-related monopolistic conducts; and the SAIC - of non-price-related monopoly conducts.

[337] Kovacic, above note 331.

[338] The Draft Guidelines, above note 333.

[339] Among several administrative/judicial cases, one of the significant ones was the NDRC's investigation over and imposition of penalties on Qualcomm's patent licensing practices in 2013-2015. See related discussion, below. Another noteworthy case is *Huawei v. IDC* in which the courts found IDC to have abused its dominant position by excessive pricing practice and tying non-SEPs to SEPs. See Lexology, Zhong Lun Law Firm, *Seeking Injunctions for Standard Essential Patents in China*, 3 March 2016. Available at https://www.lexology.com/library/detail.aspx?g=d2c6e034-3544-4b6e-bb29-55be99235ffe.

[340] Article 2 of the SAIC Provisions, above note 334.

Consistent with international practice, relevant market(s) are defined as including both a product and a geographic dimension. The product market can be a technology market or market for products embodying certain IPRs. The Guidelines on the Determination of Relevant Markets, adopted by the Competition Commission of the State Council in 2015, further clarify that in anti-monopoly enforcement that involves IPRs, IPRs and innovation might also be taken into account. The SAIC Provisions reaffirm that, while the ownership of IPRs may constitute one of the factors that confers dominant market position to the IPR owner, an undertaking should not be deemed to be in a dominant market position due to the ownership of IPRs.[341]

Similarly to the US, the EU and Japanese approaches, the SAIC Provisions create a safe harbour rule for monopoly agreements. Specifically, the Provisions provide that under the following circumstances, an agreement may not be deemed as a prohibited monopoly agreement unless evidence indicates that the agreement has the effect of eliminating or restricting competition:[342]

- for a vertical agreement, the combined market shares of concerned competing undertakings in a relevant market are no more than 20%, or there are at least four independently controlled substitutable technologies in the relevant market that can be obtained at reasonable costs; or

- for a horizontal agreement, neither the concerned undertaking nor relevant trading counterparts hold a market share of more than 30%, or there are at least two independently controlled substitutable technologies in the relevant market and can be obtained at reasonable costs.

For cases that do not meet the requirements of the safe harbour, the SAIC in its investigations applies a 'rule of reason' approach. To determine an abuse of IPRs, a five-step methodology is used:[343]

(1) Determination of the nature and the manner of the exercise of IPRs by the undertaking;

(2) Determination of the nature of the relationship between an undertaking and the exercise of IPRs;

(3) Definition of the relevant market(s) for the exercise of IPRs;

(4) Assessment of the market position of the undertaking exercising IPRs; and

(5) Analysis of the effect of an undertaking's exercise of IPRs on competition in the relevant market.

Factors that are taken into consideration when assessing the impacts of relevant conduct on competition include: (1) the market position of an undertaking and trading parties; (2) the degree of market concentration in the relevant market; (3) entry barriers in the relevant market; (4) relevant industry practice and stage of the industry development; (5) the duration and scope of the effects of the restrictions in relation to output, territories, consumers, etc.; (6) the effects on the promotion of innovation and technology; (7) the innovation capacity of undertakings concerned and speed of technological change; and (8) other factors relevant to determining the effects of exercising IPRs on competition.[344]

ii. Licensing practices

Under the above-mentioned overall stance and structure, the SAIC Provisions address licensing practices in the light of two aspects, i.e. entering monopolistic agreements by exercising IPRs and abusing dominant market position in exercising IPRs.

With regard to monopolistic agreements, the SAIC Provisions refer to Article 13 and 14 of the AML which identify prohibited agreements, such as price fixing, restricting production or sale, splitting markets, and restricting innovation. These hardcore cartels are prohibited in a 'per se' approach unless there is evidence showing that such agreements are for the purpose of

[341] *Ibid,* Article 6.
[342] *Ibid,* Article 5.
[343] *Ibid,* Article 15.
[344] *Ibid,* Article 16.

technological innovation, developing new products, enhancing efficiency of SMEs, energy saving, protecting environment, disaster relief, etc.[345]

Regarding the abuse of dominant market position, the SAIC Provisions highlighted several prohibited conducts that have already been identified by the AML. They include: (1) restricting transactions; (2) bundling; (3) exclusive grant-backs; (4) prohibiting challenging the validity of patents; (5) continuing collecting patent loyalties over expired patents; and (6) discriminating licensees of equal merit; etc.[346] The above suggests that the SAIC Provisions follow broadly similar approaches as the current Japanese and Korean Guidelines in dealing with licensing practices.

An important recent case relating to the treatment of licensing practices and related abuses of a dominant position in China that attracted international attention is the *Qualcomm* case. In this case, the investigation concluded that Qualcomm had abused its dominant position by charging excessive or unreasonably high royalties by refusing to provide the list of licensed patents and charging royalties for expired patents; requiring royalty-free grant backs of relevant patents; bundling SEPs with non-SEPs; and charging relatively high royalty rates based on the net wholesale selling price of devices. A fine of US$975 million, or 8% of Qualcomm's 2013 revenue in China, was imposed together with a corrective order.[347]

The *Qualcomm* case attracted worldwide attention and, in the view of some observers, put China on a par with other major competition jurisdictions for taking strong action against anti-competitive conduct by dominant companies.[348] At the same time, international business representatives and their advocates expressed concerns about a perceived linking of competition policy with industrial policy goals in China and an alleged lack of transparency in related enforcement procedures.[349] Critical views were also expressed regarding the NDRC's treatment of the excessive pricing issue.[350] In commenting on the latter, Koren W. Wong-Ervin, then Counsel for IP and International Antitrust in the Office of International Affairs at the US Federal Trade Commission, pointed out that, in contrast with the situation in China, in the US there is no 'excessive pricing' provision under the antitrust statutes and the relevant agencies generally aim to avoid price regulation.[351] Qualcomm, for its part, accepted the penalty and undertook the necessary remedial measures in response to the corrective order.[352]

The SAIC Provisions also prohibit the conclusion of anti-competitive agreements or abuses of dominant market position through patent pooling arrangements. The text of the SAIC Provisions provides a definition of a patent pooling arrangement and a list of prohibited arrangements for a patent pool management organisation with a dominant market position. They include: (1) restricting members of the patent pool from licensing patents as independent licensors outside the pool; (2) restricting the development of technologies that compete with the pooled patents; (3) imposing exclusive grant back requirements; (4) prohibiting licensees from challenging the validity of pooled patents; and (5) applying differential treatment to members of the patent pool or licensees of equal merit.[353]

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[345] Article 15 of the AML, above note 330.

[346] Article 8, 9, 10 and 11 of the SAIC Provisions, above note 334.

[347] NDRC (in Chinese). Available at: http://www.ndrc.gov.cn/zwfwzx/xzcf/201503/t20150302_754177.html.

[348] See, for background, Allen & Overy, Antitrust in China: *NDRC v. Qualcomm* – One All. Available at http://www.allenovery.com/publications/en-gb/Pages/Antitrust-in-China-NDRC-v--Qualcomm-%E2%80%93-One-All.aspx.

[349] The US Chamber of Commerce, *Competing Interests in China's Competition Law Enforcement: China's Anti-Monopoly Law Application and the Role of Industrial Policy*, 2014. Available at https://www.uschamber.com/sites/default/files/aml_final_090814_final_locked.pdf.

[350] The US Chamber of Commerce, above note 349.

[351] Koren W. Wong-Ervin, *Antitrust and IP in China: Quo Vadis?,* ABA Spring Meeting 2015, 16 April 2015. Available at: https://www.ftc.gov/system/files/attachments/key-speeches-presentations/wong-ervin_-_2015_aba_spring_meeting_4-16-15.pdf.

[352] Qualcomm Press Release, *Qualcomm and China's National Development and Reform Commission Reach Resolution - NDRC Accepts Qualcomm's Rectification Plan - Qualcomm Raises Midpoints of Fiscal 2015 Revenue and Non-GAAP EPS Guidance*, 9 February 2015. Available at http://files.shareholder.com/downloads/QCOM/3864235320x0x808060/382E59E5-B9AA-4D59-ABFF-BDFB9AB8F1E9/Qualcomm_and_China_NDRC_Resolution_final.pdf.

[353] The SAIC Provisions, above note 334.

iii. Refusals to license

As part of the rights granted to IPR holders, refusals to license are considered completely legal under normal conditions and are, therefore, not addressed by the SAIC Provisions. Nonetheless, under special circumstances, i.e. where the concerned IPs constitute 'essential facilities' and the refusal to license such IPRs would eliminate or restrict competition, the SAIC Provisions consider the refusal to constitute an abuse of a dominant market position, and therefore prohibit such refusals.[354] The SAIC Provisions spell out the following factors that should be taken into account when drawing such a conclusion: (1) the relevant IPR is essential for other undertakings to participate in the market and cannot be replaced by other technologies; (2) refusing licensing the relevant IPR would lead to negative impact on competition or innovation in the market and bring harms to consumers' and communities' interest; and (3) licensing of the relevant IPR would not bring unreasonable harms to the IPR holder.

iv. Anti-competitive Patent Settlements and PAEs

Anti-competitive patent settlements and PAEs are not specifically addressed in the SAIC Provisions. Anti-competitive patent settlements may, however, be potentially subject to scrutiny as monopolistic agreements between competing undertakings that restrict production, sale or development of new products, and thus prohibited under the general provisions on monopolistic agreements.[355]

v. Standard Essential Patents (SEPs)

The SAIC Provisions establish that undertakings shall not eliminate or restrict competition through standard settings and implementation.[356] First, a patent holder with a dominant market position, when participating in a standard–setting process, should not conceal relevant patents to the standards-setting organization or explicitly waive patent rights during the standard-setting process, and later assert those rights against implementers of the standard after the standard is released ('patent ambush'). Second, after the patent becomes a standard essential patent, the IP holder should not refuse to license it out on FRAND terms, engage in bundling or impose other unreasonable conditions in transactions.[357]

(4) Competition advocacy directed at the IP system/Draft Guidelines on the Competition-IP interface

The draft Guidelines which were published by the Anti-Monopoly Commission of the State Council for public consultations on 23 March 2017 are designed to establish a broader and more balanced approach to the IP and competition policy interface, including the consistent application of the rule of reason approach.[358] Importantly, the new Guidelines aim to be applicable to all three Chinese competition agencies and as a result regulate monopolistic conducts, price-related (competence of the NDRC) or non-price related (competence of the SAIC), and mergers (competence of the MOFCOM).

In addition to the principles that are already set out in the SAIC Provisions, the proposed Guidelines highlight two additional points: (i) in determining the abuse of IPRs for eliminating or restricting competition, the same regulation standards shall apply to IPRs as those applied to other property rights, and (ii) the impact of relevant conducts on efficiency and innovation shall be considered on a case-by-case basis.[359]

With regard to anti-competitive agreements, the proposed Guidelines intend to specify detailed elements that should be taken into consideration during investigation procedures.[360] Specifically, the proposed Guidelines address joint research, cross-licensing, exclusive grant-back, non-challenging provisions, and standard setting, in addition to restrictions on production and sale of relevant products. The threshold for the application of the safe harbour provisions is planned to

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[354] *Ibid*.
[355] Article 4 of the SAIC Provisions, above note 334; article 13 of the AML, above note 330.
[356] Article 13 of the SAIC Provisions, above note 334.
[357] *Ibid*.
[358] The Draft Guidelines, above note 333.
[359] *Ibid*.
[360] Investigations on joint research and development agreements, cross licensing, exclusive grant-backs, no challenge of the validity of IPRs, exclusive standard setting mechanism and restrictions on the use of IPRs and the sale of products containing IPRs.

be increased from two to four substitutable technologies for vertical agreements (similarly to the number already set for horizontal agreements).[361]

Concerning abuses of dominant market position, the proposed Guidelines suggest that while determining the dominant market position, special elements related to IPRs should be taken into account in addition to the general criteria set out in the AML: (1) the possibility and cost for the trading counterparts to switch to alternative technologies and or products; (2) the level of dependency of the downstream market on the products that contain relevant IPRs; and (3) the negotiation abilities of the licensees towards the licensors. Additional criteria are specified for determination of a dominant market position of standard-essential patent holders. The proposed Guidelines set out specific guidance for different scenarios, such as: imposing unfairly high licensing fees, refusal to license IPRs, bundling, imposing unreasonable trading conditions and differential treatment to licensees of equal merit.[362]

Regarding business concentrations, the proposed Guidelines highlight that transferring or exclusively licensing IPRs may result in the control, or the imposition of decisive influence, of one undertaking over another. Therefore, it should be subject to the obligation to obtain approval through merger review. Potentially applicable structural or behavioural remedies, including a combination of both are outlined in the proposed Guidelines.[363]

The proposed Guidelines also address other issues such as patent pooling, injunctive relief and copyright collective management organization. The Guidelines, while acknowledging the role of those mechanisms in reducing transaction costs, protecting IPRs, enhancing efficiency and promoting competition, prohibit potential abuses of IPRs related to those activities.[364]

Overall, China has put in place, in less than a decade, a relatively comprehensive legal and institutional framework for the application of competition policy that draws upon approaches implemented in more experienced jurisdictions in important respects, while also retaining features deemed by the Chinese authorities to be important to China's development and policy context. This has to be considered as a major achievement for the relevant authorities. The issues addressed in the relevant Chinese legislation/proposed guidelines include both conventional issues such as hardcore cartels, and cutting-edge issues such as SEPs and patent ambushes. At the same time, aspects of China's approaches remain unsettled and their application retains the potential to generate concerns for international businesses, as manifested in the recent *Qualcomm* case. Hence, China's approach to the competition-IP interface highlights the importance of continuing international dialogue in this area.[365]

3. India

(1) Introduction and context

India enacted its first competition law - the first Monopolies and Restrictive Trade Practices Act (MRTP Act) - in 1969. The primary objective of the Act was to prevent concentration of economic power and restrict monopolistic practices rather than promoting competition more broadly. In the light of multilateral trade liberalization in the 1990s, the Government of India recognized the complementary role of competition policy for its post-liberalization market economy. [366] Thus, in 1999, the Government set up a High Level Committee on Competition Policy and Law to advice on a modern competition law. As observed by the Finance Minister of India at the time:

> The MRTP Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from

[361] See above note 338.
[362] *Ibid*.
[363] *Ibid*.
[364] *Ibid*.
[365] It is interesting and relevant to note that, already, the new US Assistant Attorney-General for Antitrust, Makan Delrahim, has visited China where he delivered a speech emphasizing the importance of strong intellectual property standards and careful application of competition rules in this area to the promotion of innovation, economic growth and prosperity. See Delrahim, above note 37.
[366] See, for further discussion of the complementarity between market liberalization and competition policy see Robert D. Anderson, William E. Kovacic, Anna Caroline Müller and Nadezhda Sporysheva, *Competition Policy, Trade and the Global Economy: current developments, past debates and issues for reflection (*provisional title; forthcoming).

> curbing monopolies to promoting competition. The Government has decided to appoint a committee to examine this range of issues and propose a modern competition law suitable for our conditions.[367]

On the basis of the submitted recommendations, the Parliament passed the Competition Act in 2002, which was subsequently amended in 2007, 2009, and most recently in 2017. The Competition Commission of India (CCI) was established by the same Act in 2003 to 'eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India'.[368]

The introduction of the Competition Act in India was a key step towards promoting competition. The Act prohibits anti-competitive agreements, abuse of dominant position and regulates mergers and acquisitions. The Competition Act, however, does not include any express provision prohibiting IP-related business practices as anti-competitive. Although the general prohibition on abuse of dominant position applies equally to non-IP and IP related practices, the prohibition of anti-competitive agreements is limited by an immunity exception for IPR holders.

Beyond this, historically, India has had concerns with the overall impact of IP on competition and its market economy. Reflecting this, India had an important role in securing agreement on the inclusion, in the TRIPS Agreement, of provisions dealing with anti-competitive and other perceived abuses of IP.[369]

The beginning of the 21st century witnessed a significant increase in the number of competition enforcement cases on the exercise of IP. Although the CCI has not issued any official guidelines or regulations related to the IP-competition policy interface, these issues have been addressed in related enforcement initiatives, as well as in a non-binding instrument the Advocacy Booklet on Intellectual Property Rights under the Competition Act - published by the CCI in 2002 (Advocacy Booklet).[370]

(2) Scope of relevant statutory provisions

Section 3 of the Competition Act establishes a general prohibition of anti-competitive agreements 'in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India'. Nevertheless, this provision provides IP exceptions:

> Nothing contained in this section shall restrict— (i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under: (i) Copyright Act, 1957; (ii) Patents Act, 1970;(iii) Trade and Merchandise Marks Act, 1958 or Trade Marks Act, 1999; (iv) Geographical Indications of Goods (Registration and Protection) Act, 1999; (v) Designs Act, 2000; (vi) Semi-Conductor Integrated Circuits Layout-Design Act, 2000.[371]

While the reasonable use of IPRs is thus exempted from Section 3 covering anti-competitive agreements, no such derogation is available in cases of abuse by IPRs holders. Rather, Section 4 of the 2002 Competition Act establishes the prohibition of abuses of dominant position by providing an exhaustive list of prohibited practices, without expressing a similar 'defence clause' for IPR holders.[372] Beyond this, the Patent Act of 1970 contains provisions regarding compulsory licensing on broader public interest grounds. [373]

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[367] Pradeep S. Mehta, *A functional competition policy for India* (Academic Foundation, 2006).

[368] The Competition Act, 2002. Available at http://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf.

[369] See, for detailed related commentary and supporting references, Nuno Pires de Carvalho, *The TRIPS Regime of Antitrust and Undisclosed Information* (Kluwer Law International, 2008); A.V. Ganesan, 'Negotiating for India', in Watal and Taubman, above note 13; and Jayashree Watal, *Intellectual Property Rights in the WTO and Developing Countries* (Oxford University Press, 2001).

[370] The Competition Commission of India, *Advocacy Booklet, Intellectual Property Rights of 2002*. Available at http://competitioncommission.gov.in/advocacy/PP-CCI_IPR_7_12.pdf.

[371] The Competition Act, above note 368.

[372] Abuse of dominant position includes, 'any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including - (a) tie-in arrangement;

(3) Doctrinal content

i. Overall Framework

Although the importance of a 'rule of reason' approach has been recognized in some recent competition cases, India still generally follows a 'per se' approach, as evidenced in the limited jurisprudence on the competition policy-IP interface.[374]

The exception regarding the applicability of Section 3 of the Competition Act makes reference to 'reasonable conditions as may be necessary for protecting IPRs' as the main requisite to fall under the immunity set out therein. As those conditions are not further defined or explained in the Act, by implication, unreasonable conditions attached to IPRs will fall under the scope of Section 3.[375] As mentioned before, practices considered as abuses in terms of Section 4 are not exempted from competition scrutiny.

ii. Licensing Practices

On the subject of licensing agreements, the Advocacy Booklet provides a non-exhaustive illustrative list of licensing arrangements that are restrictive or likely to be anti-competitive. For example, an arrangement that effectively merges the Research and Development (R&D) activities of two or only a few entities that could plausibly engage in R&D in the relevant field might harm competition for development of new goods and services. Exclusive licensing arrangement, including cross-licensing, tie-in and patent pool arrangements, are another category of possible competition concern.

iii. Refusals to License

Refusals to license have been mainly addressed in case-law. The CCI, in its analysis of a related case on whether there was a 'refusal to deal' leading to a violation of the Competition Act, held that, since there is no 'IP defense' clause in section 4(2) of the Act against an alleged abuse of dominance, such act of the enterprise cannot be justified based on the fact that the exclusionary conduct is within the scope of their IPRs.[376] A refusal to deal can also be scrutinised as an anti-competitive vertical restraint. In this sense, the refusal to grant a licence or the imposition of unreasonable restrictive terms can be analysed as potentially anti-competitive.[377]

Moreover, while examining claims on the refusal to deal, the CCI's approach prioritised short-term effects over the longer term effects of IPRs, which are essential for innovation and competition. By opening the door for compulsory licensing of IP technology to third parties, this approach by the CCI has been criticized for restricting the rights of IP holders.[378]

(b) exclusive supply agreement; (c) exclusive distribution agreement; (d) refusal to deal; (e) resale price maintenance […] if such agreement causes or is likely to cause an appreciable adverse effect on competition in India' (Section 4(4) of the 2002 Competition Act). See above note 368.

[373] In 2012, the Controller General of Patents, Designs and Trade Marks issued a compulsory licence of Bayer's anti-cancer drug Nexavar to the Indian generic firm Natco Pharma Ltd. The decision was based on Article 84 (1) of the Patent Law, which establishes the grounds for compulsory licences, namely, if the patent does not satisfy the needs of the public, the invention is not available at an affordable price, and the failure to work or insufficient working of the invention in India 3 years after the patent grant. *Bayer Corporation v. Natco Pharma Ltd.*, Order No. 45/2013 (Intellectual Property Appellate Board, Chennai). Available at http://www.lawyerscollective.org/wp-content/uploads/2014/12/bombay-high-court-judgment.pdf.

[374] The decision of Competition Appellate Tribunal (COMPAT) in *Schott Glass India Pvt. Ltd., v Competition Commission of India* (Appeal No. 91 of 2012, 2 April 2014) gave a fillip for the place of economic evidence. A later ruling of COMPAT in *National Stock Exchange of India Limited v Competition Commission of India and Another* (Appeal No. 15 of 2011, August 2014) suggests that new frontiers of market economics is still to be fully appreciated and it falls on economics to communicate with lawyers and others. For additional analysis see Geeta Gouri, 'Economic Evidence in Competition Law Enforcement in India' in Jenny and Katsoulacos (eds.), above note 288.

[375] Advocacy Booklet, above note 370.

[376] *Shamsher Kataria v. Honda Siel Car India Limited,* Case No. 03/2011, Competition Commission of India, 25 August 2014 and 27 July 2015.

[377] Samir R Gandhi, Gaurav Bansal and Krithika Ramesh, 'India (Chapter 8)', in Vinje, above note 178, p. 93. Available at https://thelawreviews.co.uk//digital_assets/d8692bd5-442a-4470-ad8e-1aeac28d304d/TIPAR2-full-book-PDF.pdf.

[378] Divyanshu Agrawal, *India's First Spare Parts Case: The Intellectual Property Defence in Anti-Trust Law,* 14 November 2014. Available at http://jiplp.blogspot.ch/2014/11/indias-first-spare-parts-case.html.

iv. Anti-competitive patent settlements

While not being illegal per se, patent settlements might be scrutinized as anti-competitive agreements under Section 3 of the Competition Act when unreasonable conditions are attached to the IPRs, or as abuse of dominant position under Section 4 of the Act, when such agreements are entered by a dominant firm to foreclose effective competition in the market. Nevertheless, under Section 3, if the agreement is entered into during the life of the patent, the patentee may claim a limited right of defence under Section 3(5) of the Act, as long as the restriction is necessary to protect its IPRs.[379]

Furthermore, it is relevant to mention a study commissioned by the CCI on issues concerning competition in the Indian pharmaceutical industry.[380] Although observations about patent settlements were made, nonetheless, it failed to provide clear guidance regarding such practices.[381] In continuation with its work on the subject, as recent as 2017, the CCI has reportedly initiated investigations in relation to two drug patent settlements.[382]

v. Standard Essential Patents (SEPs)

Of relevance to the discussion on competition-IP interface – which are not addressed per se in the Competition Act – is the jurisprudence on FRAND licensing for SEPs, which has been emerging followed by some decisions of the CCI and the Delhi High Court.[383] The disputes were related to 'exorbitant' royalty rates for SEPs and non-disclosure of licensing terms - conducts which were found to amount to an abuse of dominant position in the telecommunications market.

Regarding the alleged abuse of dominance, the CCI concluded that the use of the downstream products' sale prices as a royalty base is excessive and has no link to the value of the SEP that was being licensed out. Hence, the royalty was discriminatory and contrary to FRAND terms, thus, leading to abuse of dominance. Moreover, in the appeal in *Telefonaktiebolaget LM Ericsson v. Competition Commission of India*, the Delhi High Court generally upheld the jurisdictional right of the CCI to investigate an alleged abuse of dominance based on the absence of irreconcilable conflict between the Competition Act and the Patent Act.[384]

Recently, the CCI has also paid more attention to non-SEPs. Specifically, it investigated the potentially anti-competitive effects that may arise out of voluntary non-SEPs standards. In a related case[385], the Competition Appellate Tribunal (COMPAT) viewed the process of private and voluntary standardisation as possibly creating entry barriers, which consequently may result in an abuse of dominance.[386]

vi. Patent Assertion Entities (PAEs)

The CCI has yet to express guidance or an official view regarding patent assertion entities. Nonetheless, it is relevant to mention that the Indian Patent Act establishes that patents are not granted merely to enable patentees to enjoy a monopoly,[387] and, thus, patents are not subject of

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[379] Legal News & Analysis – Asia Pacific - India - Competition & Antitrust*, India – Pay For Delay Agreements on The CCI Radar*, 12 September, 2014. Available at http://www.conventuslaw.com/archive/india-pay-for-delay-agreements-on-the-cci-radar/.

[380] Centre for Trade and Development (Centad), New Delhi, *Competition Law and Indian Pharmaceutical Industry*, 2010, para. 5.4.21. Available at http://www.cci.gov.in/sites/default/files/PharmInd230611_0.pdf..

[381] Centad, above note 380.

[382] Michael A. Carrier, 'Drug Patent Settlements', in Blair and Sokol (eds.), above note 223, p. 336.

[383] See, for instance, *Micromax Informatics Ltd v. Telefonaktiebolaget LM Ericsson*, Case No. 50 of 2013, Competition Commission of India, 12 November 2013; *Intex Techs (India) Ltd v. Telefonaktiebolaget LM Ericsson*, Case No. 76 of 2013, Competition Commission of India, 16 January 2014; *Best IT World (India) Private Ltd. V. Telefonaktiebolaget LM Ericsson*, Case No. 4 of 2015, Competition Commission of India, 12 May 2015.

[384] *Telefonaktiebolaget LM Ericsson v. Competition Commission of India*, W.P.(C) No. 464/2014 and 1006/2014, available at http://lobis.nic.in/ddir/dhc/VIB/judgement/30-03-2016/VIB30032016CW4642014.pdf.

[385] In *re K Sera Sera Digital Cinema Pvt. Ltd. v Digital Cinema Initiatives*, LLC & Ors. (Case No. 30 of 2015), where six Hollywood movie production houses, by way of a joint venture, required cinema owners and digital cinema service providers in India to comply with a certain type of technology, so as to protect their proprietary content from piracy.

[386] Gandhi, Bansal and Ramesh, above note 377, p. 96.

[387] The Indian Patent Act of 1970. Available at http://www.ipindia.nic.in/writereaddata/Portal/IPOAct/1_113_1_The_Patents_Act_1970_-_Updated_till_23_June_2017.pdf.

simply being 'hoarded'. In this sense, the existing policy, along with the practice of compulsory licences, serves as a possible deterrent for patent trolls in India.

(4) Competition advocacy / ongoing discussion on the competition-IP interface

The Competition Act refers to the need for advocacy, stating that 'the Commission shall take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues'.[388] Along these lines, the CCI has made a notable effort in publishing, as part of its advocacy programme, advocacy booklets which provide guidance about different anti-competitive practices.[389] Although the content shall not be considered to reflect the official view of the CCI, they do nevertheless provide illustrative examples.

As mentioned, in relation to the interface between IPRs and competition, the CCI in 2002 published a booklet addressing the applicability of Section 3 of the Competition Act to anti-competitive agreements involving IPRs.[390] Specifically, it illustrates examples of licensing agreements that fall within the scope of competition law, albeit the presence of IPRs.

Moreover, on 1 March 2016, the Department of Industrial Policy and Promotion of the Ministry of Commerce and Industry of India issued a discussion paper on 'Standard Essential Patents, and their availability on FRAND terms'.[391] The objective of the paper was to involve the concerned stakeholders and citizens into a discussion on the needed policy framework. The paper clarifies concepts like SEPs, patent hold-ups, FRAND licensing, cross-licensing and patent pooling. It also gives an overview of the licensing position across jurisdictions including the US, Germany, Netherlands, France, UK, China and Japan.

Overall, therefore, the Indian stance on the competition–IP interface can be described as less clearly defined than in other jurisdictions. The gap left by the lack of formal Guidelines has resulted in a more piecemeal approach to individual issues developed through case-law. Moreover, although IPRs are covered by competition laws, the exemption under Section 3 of the Competition Act provides some leeway in their assessment.

4. The Russian Federation

(1) Introduction and context

Competition policy in the Russian Federation emerged largely in the context of the country's transition to a market economy in the post-Soviet period. The first competition law No 948-1 'On competition and monopolistic activities in the markets of goods' (the First Anti-Monopoly Law) was adopted in March 1991, only several months prior to the collapse of the Soviet Union. The primary goal underlying the First Anti-Monopoly Law was the de-monopolization of the Russian economy.[392] The Law formulated general provisions regarding unfair competition; prohibitions to enter into anti-competitive agreements and to engage in entrepreneurial activity for state agencies and their officials; and a requirement for entities to obtain consent from antitrust authorities prior to structuring their businesses.[393] Activities related to inventions, industrial designs, trademarks and copyright were excluded from the scope of the First Anti-Monopoly Law, unless relevant rights were exercised in bad faith with the purpose of limiting competition.[394] By that time, Russia had also adopted some IP laws and had become a party to the main international treaties related to IP.[395]

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[388] The Competition Act, 2002, above note 367, s. 49 (3).
[389] Advocacy Booklet, above note 370.
[390] *Ibid*.
[391] Available at http://www.ipindia.nic.in/Whats_New/standardEssentialPaper_01March2016.pdf.
[392] The Economist Intelligence Unit, Report on Competition policy in Russia, 2012. Available at https://www.eiu.com/public/topical_report.aspx?campaignid=RussiaCP2012.
[393] The First Anti-Monopoly Law, Articles 9, 10, 17 (in Russian). Available at http://www.consultant.ru/document/cons_doc_LAW_51/.
[394] *Ibid*, Article 2.2.
[395] By 1991 Russia was Party to the Paris Convention, the Brussels Convention, the Budapest Treaty, the Locarno Convention, the Madrid Agreement, the Nairobi Treaty, the Nice Agreement, the Patent Cooperation Treaty, the Strasbourg Agreement and the WIPO Convention.

At the beginning of the 21st century, the establishment of a strong competition policy regime was embraced as one of the core components of Russia's development reforms.[396] The Federal Antimonopoly Service (Russian competition authority, the FAS) was established in 2004 and a new Competition Law No.135-FZ On the protection of competition (the Competition Law) entered into force in 2006.[397] Much of the law is modelled on the EU's competition legislation.[398] Another component of the reforms at that time was the introduction of the new fine system. By increasing incentives to appeal infringement decisions, the new system resulted in increased demands for higher standards of evidence in the decisions on competition law violations. Over the years, Russia has been developing legal standards of economic evidence under competition investigations, integrating components of economics-based approaches that had originated in jurisdictions with a long tradition of competition enforcement.[399]

The Competition Law integrated a number of provisions envisaged to address IP issues. In addition to the provisions on unfair competition, the Law provided immunity to IP holders in relation to abuses of dominance and anti-competitive agreements. The amendments to the Competition Law – the so-called Fourth Anti-Monopoly Package which came into effect in 2016 - expanded the regulations on the interface between IP and competition policy in the area of unfair competition and provided a range of legal mechanisms to companies adversely affected by unfair practices. The Competition Law now sets out a non-exhaustive list of instances which constitute unfair competition. These developments are consistent with current trends in the competition law enforcement and judicial practices, as well as the FAS's general intention to align with best global practices (e.g. EU practices).[400]

Since 2014, both competition policy and IP have been subject to regulation under the Eurasian Economic Union Treaty (the EAEU Treaty).[401] Competition in a cross-border market, i.e. a market whose geographical boundaries encompass the territories of two or more EAEU Member States[402], is a matter of common Union policy. In particular, the Competition Chapter to the EAEU Treaty establishes common competition rules in cross-border markets and confers on the Eurasian Economic Commission (EEC)[403] the power to supervise compliance with the rules.[404] The Competition Chapter of the Treaty, unlike the Competition Law, does not exclude IP matters from its application. The EAEU Treaty also provides for the harmonization of member States' national legislation in the area of competition policy.

In December 2017, the approved Executive Order of the President of the Russian Federation No. 618 'On State Competition Policy Guidelines' accompanied by the National Plan on Competition Policy Development in the Russian Federation for the period of 2018 – 2020 (the 2017 Presidential Executive Order) reaffirmed that competition policy is one of the priorities in the light of country's further development. Among other competition policy objectives, the Order refers to improving antimonopoly regulation in order to effectively address anti-competitive conduct on cross-border markets, in light of digitalization and globalization (see discussion below).[405]

The competition policy-IP interface has also been addressed in related policy statements and enforcement initiatives by the FAS as are set out in more detail below.

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[396] OECD. Country Studies: Competition Law and Policy in the Russian Federation, 2013, p. 14. Available at http://www.oecd.org/daf/competition/CompetitionLawandPolicyintheRussianFederation.pdf.

[397] The text of the Federal Law on Protection of Competition of 2006 as amended in 2016 (Competition Law) is available at http://en.fas.gov.ru/documents/documentdetails.html?id=14737.

[398] The Economist Intelligence Unit, above note 392.

[399] Svetlana Avdasheva, Yannis Katsoulacos, Svetlana Golovanova, Dina Tsytsulina 'Economic Analysis in Competition Law Enforcement in Russia: Empirical Evidence Based on Data of Judicial Reviews', in Jenny and Katsoulacos, above note 288.

[400] Maxim Boulba and Maria Ermolaeva, 'Russia (Chapter 13)', in Vinje, above note 178.

[401] The EAEU Treaty was signed in December 2014 and entered into force in January 2015. Apart from the Russian Federation, the Republic of Armenia, the Republic of Belarus, the Republic of Kazakhstan and the Republic of Kyrgyzstan are member states of the EAEU. An unofficial translation of the EAEU Treaty into English is available at the WTO RTA database: http://rtais.wto.org/UI/PublicAllRTAList.aspx.

[402] The detailed criteria to determine a market as 'transboundary' are established in the Decision of the Supreme Eurasian Economic Council of 19 December 2012 No 29 'On approval of the criteria for classifying a market as transboundary'.

[403] A permanent regulatory body of the EAEU, available at http://www.eurasiancommission.org/en/Pages/default.aspx.

[404] Annex 19 to the EAEU Treaty, see above note 401.

[405] Executive Order of the President of the Russian Federation 'On State Competition Policy Guidelines'(Order of 21 December 2017 No. 618). Available at http://en.fas.gov.ru/documents/documentdetails.html?id=15342; and (in Russian) at http://www.garant.ru/products/ipo/prime/doc/71739482/#1000.

(2) Scope of relevant statutory provisions

The Competition Law provides qualified immunity to IP holders, in the sense that explicit exemptions for activities related to the exercise of exclusive IPRs or rights related to trademarks and other legally protected means of identification are incorporated to the text.[406] By contrast, abuses of dominance and anti-competitive agreements may not fall under such exemption. Additionally, the Competition Law prohibits unfair competition related to (i) acquiring and using a trademark of a legal entity, goods, works or services; (ii) using the results of an intellectual activity; (iii) actions that may cause confusion, including an illegal use of notations identical to a trademark, a brand name, a commercial designation, a name of the place of origin of goods; and copying or imitating goods' appearance.[407]

(3) Methodological Approach/Enforcement Experience

i. Overall Framework

Since adopting the Competition Law in 2006, Russia has gradually shifted towards a more economics-based approach. The Competition Law of the Russian Federation provides for 'a rule of reason' approach to the analysis of most practices. A per se prohibition is applied in relation to cartels.[408]

While no particular sectors or entities are exempted from the application of the Competition Law, general (block) exemptions have been adopted for certain agreements between: credit and insurance organizations; buyers and sellers; business entities conducting joint scientific surveys; and insurers carrying out joint insurance or reinsurance activity.[409] As previously mentioned, an exemption also applies to the exercise of exclusive rights derived from intellectual activity and equivalent means of individualization.

ii. Licensing Practices

The provisions on the prohibition of abuse of dominance and of anti-competitive agreements under the Competition Law do not apply, in principle, to actions and agreements relating to the exercise of IPRs (including trademarks and patents). Therefore, the parties enjoy certain discretion when drafting licence agreements. Licence agreements that cover only IP issues will benefit from this exemption; nonetheless, in many situations it is rather challenging to establish whether the immunity is available and can be relied on by the companies involved. By way of illustration, agreements on the exercise of IP rights may contain extensive requirements for the products to be distributed in a particular manner and in this way give rise to competition concerns. The prevailing position supported by the FAS is that the IP exemption does not apply to the conduct and arrangements concerning the circulation of goods manufactured under the licence: Competition Law applies in this case.[410]

This approach is supported by the FAS's decisions in several cases. In *Israeli Teva vs Russian Biotech*, the Court established that Teva's supply of the drug to Biotech (i.e. the subject-matter of the refused contract) did not imply the transfer of the trademark rights (which would be the exercise of the IP right); therefore the exemption would not apply.[411]

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[406] The Competition Law, above note 397, Article 10 (4).

[407] Using results of intellectual activity means selling, exchanging or otherwise introducing goods into circulation by an economic entity if the results of intellectual activity were used unlawfully, except the means of individualization owned by a competitor (The Russian Competition Law, Article 14.5), above note 397.

[408] WTO, Trade Policy Review, Report by the Secretariat, WT/TPR/S/345/Rev.1, 6 December 2016. Available at https://docs.wto.org/dol2fe/Pages/FE_Search/ExportFile.aspx?id=233138&filename=q/WT/TPR/S345R1.pdf.

[409] *Ibid*.

[410] Boulba and Ermolaeva, above note 400. FAS specifies that IP-related exemption is only applicable to 'the exercise of IP rights' (the use of IP by a right holder in his/her own activities or sale/licensing of the rights to others), however, it does not apply to activities such as an introduction of IP protected goods into circulation, i.e. their sale (similarly to currently maintained approach by Australia). See OECD, above note 396.

[411] *Israeli Teva v. Russian Biotech* (2015) was the first case which provided interpretation to the FAS's approach to IP-exemption from the abuse of dominance prohibition. Being in a dominant position on the market of the pharmaceutical drug Copaxone, Teva refused to enter into the distribution agreement, originally conceived by the earlier signed Cooperation Agreement. The FAS concluded that Teva violated provision on abuse of dominant position. With regard to Teva's attempt to trigger IP exemption, the Court, pointed to the fact that the FAS did not assess Teva's actions on exercise of its exclusive IP rights, but actions of Teva

Notably, the intersection between IP and antitrust was addressed in the FAS's decision in the *Google* case. In 2015, the FAS concluded that Google had violated the Competition Law by reaching agreements with Android-based mobile manufacturers, which included provisions on exclusivity and priority placement of Google apps, as well as, limiting the installation of other developers' apps and services.[412] Google claimed that the IP exemption provided for in the Competition Law should apply to the conduct in question as it essentially related to IP licences. The FAS looked into the agreements entered into by Google and, similarly to the case of Teva, concluded that the restrictions imposed by Google went beyond the exercise of exclusive rights to separate applications by Google and, therefore, was out of the scope of a 'pure' licence agreement and thus not covered by the exemption.[413] The decision was upheld by the Appeal Court, which imposed a fine of Rub 438 million (about EUR 7.3 million) in 2017. By admitting non-compliance of Google's actions with the Competition Law, the company reached an amicable settlement with the FAS according to which Google intends to eliminate anti-competitive actions.[414]

iii. Refusals to License

Due to the existing exemption regarding abuse of dominance in relation to the exercise of IP rights, the FAS does not have the right to apply remedial compulsory licensing in cases associated with an unsubstantiated refusal to license.[415] Compulsory licensing is available under the Civil Code based on a court decision in relation to inventions, utility models, industrial designs and selection inventions.[416] These remedial actions are not, however, linked to the infringements of the Competition Law.

The FAS has initiated a development of the law on compulsory licensing of medicines in cases of epidemics or in situations when the patent-holder is the only owner of medicines from a 'serious illness'. It is expected that the draft law will be approved in 2018.[417]

iv. Patent Assertion Entities (PAEs)

PAEs are significantly active in the electronics sector in Russia. One of the reasons for active PAEs' activities is the existing patent system. Under the Russian Patent Law, it is possible to file and obtain a utility model patent (patents issued without any formal examination on a prior art device).[418] In this case, a utility model patent owner enjoys the same scope of exclusive rights not contrary to the law as the owner of a full (invention) patent, including assigning the patent and authorization or prohibition of third parties from using the utility model.[419]

With respect to the cases of patent infringement and invalidity, Russia has a binary system: during a patent infringement proceeding, a defendant cannot argue that the patent is invalid. This makes easier for a patent troll to enforce its patent since the proceeding is only focused on proving infringement, but not determining (in)validity of the patent.[420] PAEs currently are not subject to consideration by the FAS.

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refusing to enter into the distribution agreement. In particular, the court established that Teva's supply of the drug to Biotech (i.e. the subject-matter of the refused contract) did not imply the transfer of the trademark rights (which would be the exercise of the IP right) and therefore the exemption would not apply. For more details see, The FAS, *Ultimate truth: TEVA violated the antimonopoly law*, 3 December 2015. Available at http://en.fas.gov.ru/press-center/news/detail.html?id=44298.

[412] Bloomberg, *Google Settles Russian Antitrust Case on Android Phones,* 17 April 2017. Available at https://www.bloomberg.com/news/articles/2017-04-17/google-settles-russian-antitrust-case-on-android-phones.

[413] Boulba and Ermolaeva, above note 400.

[414] FAS, *FAS Russia Reaches Settlement with Google*, 17 April 2017. Available at http://en.fas.gov.ru/press-center/news/detail.html?id=49774.

[415] The Competition Law, above note 397.

[416] The Civil Code of the Russian Federation. Available at https://www.wto.org/english/thewto_e/acc_e/rus_e/WTACCRUS48A5_LEG_119.pdf.

[417] The FAS, *The FAS in the media: The Law on compulsory licensing of medicines will be submitted to the State Duma in a month – Artemiev,* 17 January 2018. Available at https://fas.gov.ru/publications/14288.

[418] Utility model patents are granted for devices only. Specifically, utility model patents are usually granted to electrical and mechanical devices, packs, bottles, furniture, etc. No other type of products (such as chemicals or biotechnological inventions) or processes qualify for utility model protection.

[419] Mueller, above note 321.

[420] *Ibid*.

v. Anti-competitive patent settlements and SEPs

The Russian competition legislation does not directly deal with anti-competitive patent settlements. The settlements, however, might be assessed in accordance to the general requirements of the Competition Law on anti-competitive agreements and, therefore, should not create anti-competitive restraints.[421] Issues concerning SEPs (including the concept of FRAND licensing) are not currently regulated under the competition framework in Russia.

(4) Competition advocacy/ Proposals under consideration directed at the IP system

Although no specific guidelines on the competition policy and IPRs interface has been issued by the FAS, some guidance is provided in the agency's enforcement experience and relevant policy statements. Moreover, the FAS on the regular basis publishes analytical reports on the state of competition on different markets.[422] In 2014, the FAS was honourably mentioned in the ICN-WBG Competition Advocacy Contest.[423]

Following the adoption of the Governmental 'Action Plan' aimed at reforming Russia's competition policy[424], the FAS set a new Strategy for 2013-2024, which envisaged two major competition policy reforms in relation to IP:[425] (1) the application of the Competition Law to agreements, which exercise IP rights in a manner that restricts, prevents or eliminates competition; and (2) the introduction of an international exhaustion of IP rights in order to stimulate competition and reduce consumer prices.[426] Since that time, the FAS has been active in competition advocacy work relating to IPRs. As an active proponent of more regulation in this sphere, the FAS refers to the experience of Japan and the United States and their comprehensive guidelines.

The FAS's initial proposal to repeal the IP exemption and extend the scope of compulsory licensing to infringements of the Competition Law was, however, initially opposed by the Russian Civic Chamber, the Russian Union of Industrialists and Entrepreneurs and other governmental agencies.[427] After several unsuccessful attempts to amend the Competition Law, the Head of the FAS, Igor Artemiev, announced in October 2017, that the FAS had received instructions from the Chairman of the Russian Government to amend the law in view of the need to regulate digital markets.[428] These reforms are in line with the competition agency's recent enforcement activities in the Google case (see above), the Bayer AG - Monsanto merger,[429] and as previously mentioned,

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[421] Boulba and Ermolaeva, above note 400.

[422] Available at https://fas.gov.ru/documents/type_of_documents/analytics?filter_materials%5Bdocument_types%5D%5B%5D=68&page=2.

[423] The WBG, *Winners Announced: 2014 Competition Advocacy Contest*. Available at http://www.worldbank.org/en/events/2014/11/26/2014-competition-advocacy-contest.

[424] Decree of the Government of the Russian Federation of 28 December 2012 № 2579-p 'On the Affirmation of the Action Plan ('Roadmap') The Development of Competition and improvement of Competition Policy'. Available at http://government.ru/docs/3386/.

[425] The FAS. Strategy for the improvement of competition and the regulation of anti-monopoly in the Russian Federation in the period between 2013 – 2024, approved by the FAS on 3 July 2013. Available at http://fas.gov.ru/netcat_files/File/Str_razv_konk_i_antimonop_reg_13-14.pdf.

[426] The exhaustion of trademark rights is a matter of the EAEU policy. The EAEU Treaty establishes the regional exhaustion of trademark rights on the territory of its members. The FAS proposed to introduce the international exhaustion principle as a possible anti-recessionary measure which will lead to the reduction of excessive prices for imported goods. In 2014, the EAEC established a working group to assess consequences of switching from regional to international principle of trademark exhaustion. For more information see for example EEC, *The EEC discussed approaches on further application of the principle of exhaustion of exclusive rights to intellectual property,* 13 March 2015. Available http://www.eurasiancommission.org/ky/nae/news/Pages/13-03-2015-3.aspx.

[427] The President Counsel on the Codification and Improvement of the Civil Legislation referred to 'a conceptual fallacy of the proposed regulation and its contradiction with the civil legislation'. The reasons for critics were: (1) limitations to the exercise of exclusive IP rights may only be set by the Civil Code; (2) the Civil Code provides for the exclusive (monopoly) right, but at the same time it introduces a control mechanism to ensure that the exercise of this right is in good faith – a mechanism embodied in the possibility of court enforcement under article 10 Civil Code - in contrast, the FAS simply claimed unrestricted application of anti-monopoly laws with respect to activities involving IP protected goods. For further information, see the President Counsel on Codification and Improvement of Civil Legislation Report of 21 October 2013 № 122-2/2013. Available at http://antitrust.livejournal.com/79270.html.

[428] FAS, Igor *Artemiev: the antimonopoly body shall play one of the most important roles in the future*, 3 October 2017. Available at http://en.fas.gov.ru/press-center/news/detail.html?id=51898.

[429] See the FAS, *FAS Russia applies access and behavioral remedies in the Bayer/Monsanto merger*, 8 November 2017. Available at http://en.fas.gov.ru/press-center/news/detail.html?id=52417. On

also recognized as a key sphere for further development of competition policy regulation in the 2017 Presidential Executive Order.[430]

Furthermore, in November 2017, the FAS suggested to discuss approaches to antimonopoly regulation and economic analysis tools in the digital economy, emphasizing the need for reconsideration and new approaches on the 5th BRICS Competition Conference.[431]

Overall, therefore, the approach with regard to the IP-competition interface followed in Russia can be described as an emerging field of policy making. While certain principles are set out in the law and follow established practices, a further balancing of the two fields is under consideration.

5. South Africa

(1) Introduction and context

Through the 20th century, the South African economy, similarly to other emerging economies, was characterized by policies of import substitution, price controls and state ownership. However, the country's economic policy was also characterized by strong property rights and well-developed market institutions.[432] Certain anti-competitive acts were addressed in specific laws from the beginning of the 20th century. Under legislation that was effective from 1923 to 1944, the Board of Trade and Industries could offer advice on competition policy problems. It was a report by that Board which led to the establishment of the first competition law in South Africa - the Regulation of Monopolistic Conditions Act of 1955.

Since 1955, competition policy in South Africa has undergone several reforms, including the creation of the Competition Board in 1979.[433] The modernization of South Africa's competition regime was one of the elements of these democratic reforms initiated in the 1990s. An extended consultation process on competition policy, launched in 1992 under the African National Congress Policy Guidelines for a Democratic South Africa, culminated in the promulgation of the Competition Act of 1998 (Competition Act).[434] While drawing heavily from developed-country practice, such as the EU, the US and Canada, the Competition Act includes features that reflect unique characteristics of the South African economic and political system, such as issues related to black empowerment and employment.[435]

Competition policy in South Africa, as reflected in the preamble to the Competition Act seeks to address, *inter alia*, inadequate restraints against anti-competitive trade practices and unjust restrictions on full and free participation in the economy by all South African citizens.[436] It, thus, aims to open up the economy to greater ownership by a larger number of South Africans in order to attain an efficient, competitive, economic environment, which balances the interests of workers, owners and consumers, and focuses on the development of all South Africans.

Although the Competition Act is based on the developed countries' experience, the interplay between competition and IP law has not yet been addressed specifically. The Competition Act, however, does make specific reference to an application for exemption from the provisions of the Competition Act for agreements or practices that relates to the exercise of IP rights, including a

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8 November 2017, the FAS concluded a review of of the proposed merger between Bayer AG (Germany) and Monsanto Company (USA) and imposed remedies that are likely to have consequences for competition, innovation and technology transfer in global markets for biotechnology seeds and genetic materials, crop protection solutions and digital solutions for agriculture. The remedies are both behavioral and, to a degree, structural in nature: they require the merging parties to agree on effective technology transfer mechanisms and the provision of data access to Russian market participants, and to provide non-discriminatory access for independent developers and service providers to digital platforms, in order to prevent potential foreclosure (forms of compulsory licensing). For more details see Anderson et al, above note 366.

[430] The 2017 Presidential Executive Order, above note 405.

[431] FAS, *Andrey Tsarikovskiy: the fourth industrial revolution leads us to the 5th 'antimonopoly package'*, 29 November 2017. http://en.fas.gov.ru/press-center/news/detail.html?id=52571.

[432] OECD, *Competition Law and Policy in South Africa, An OECD Peer Review*, May 2003, p. 9. Available at http://www.oecd.org/daf/competition/prosecutionandlawenforcement/34823812.pdf.

[433] Dennis Devis and Lara Granville, 'South Africa. The Competition Law System and the Country's norms', in Eleanor M. Fox and Michael J. Trebilcock (eds.) *The design of competition law institutions and the global convergence of process norms: The GAL competition project* (Oxford University Press, 2012), p. 268.

[434] The Competition Act, available at http://www.compcom.co.za/wp-content/uploads/2014/09/pocket-act-august-20141.pdf.

[435] OECD, above note 432, p. 21.

[436] The Competition Act, above note 434.

right acquired or protected under South Africa's IP laws.[437] Additionally, some guidance on the Competition Commission's stance towards these issues has been provided in enforcement decisions and other policy statements.

(2) Scope of the IP-related exemption in the Competition Act

Under provisions of the Competition Act, a party can be exempted from its own application. More specifically, in limited circumstances, section 10(4) of the Act exempts agreements or practices which relate to the exercise of specific IPRs such as patents, copyright and trademarks.[438]

Examples of agreements which may require an exemption from the application of the Competition Act include delayed entry agreements, no challenge clauses, market division and allocation, tying, rebates and discounts, exclusive licensing, refusal to license or supply, price fixing, information sharing and standard setting.[439]

Although the Competition Act exempts agreements and practices related to the exercise of IPRs, restrictions and prohibitions related to anti-competitive practices still apply to IPRs holders (see discussion below).

(3) Doctrinal content

i. Overall Framework

The Competition Commission regulates market conduct and intervenes in the exercise of IPRs where market distortions are created to the detriment of consumer welfare. The interventions are undertaken on a case-by-case basis,[440] informed by jurisprudence and principles developed over time, comparative analysis, and interaction with other regulators, to ensure that they lead to long-term competitive benefits.[441] In 2001, the Competition Commission published an article on Intellectual Property and Competition Law which elaborated on the intersection of IP and competition law in South Africa. Building upon the experience of the US and Canada, the Commission set out principles which are pertinent to its examination of cases involving IP rights and competition issues:[442]

- Basic rights granted under IP law and the protection of these rights are important for economic progress and development;
- IPRs do not necessarily create market power. If an exercise of IPRs does not adversely impact the competitive outcomes in the relevant market, they should not be prohibited;
- IPRs may yield long-term pro-competitive benefits which are to be weighed against short-term anti-competitive effects. The assessment of the competitive impact of IP does not differ from that used to assess other competition issues under the Competition Act; and
- Licensing agreements are in general very widely regarded as a pro-competitive practice.

Consistent with the above, and as an interesting specific example of cross-jurisdictional learning, South Africa's Competition Commission has recognized that in its competition analysis, it

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[437] Article 10 of the Competition Act, above note 434.

[438] The Competition Act, above note 434.

[439] The Department of Trade and Industry of South Africa, *Draft Intellectual Property Policy of the Republic of South Africa, Phase I,* 2017. Available at http://www.dti.gov.za/gazzettes/IP_Policy.pdf.

[440] Two anti-competitive practices related to abuse of dominance discussed above are *per se* prohibited, without considering net competitive effects. These practices include: (i) charging an 'excessive price' that harms consumers. (Sec. 8(a) of the Competition Act); and (ii) refusing a competitor access to an essential facility (Sec. 8(b) of the Competition Act), see above note 434.

[441] The Department of Trade and Industry of South Africa, above note 439.

[442] The Competition Commission of South Africa, *Intellectual Property and Competition Law*, Competition News, edition 4 June 2001. Available at http://www.compcom.co.za/wp-content/uploads/2014/09/June-01-Newsletter.pdf.

increasingly implements approaches derived from those of the Canadian Competition Bureau, to the extent relevant given South Africa's legislative and economic circumstances.[443]

ii. Licensing Practices

The exercise and licensing of IP is generally assessed under the vertical or abuse of dominance provisions of the Competition Act. However, if the exercise, transfer or licensing of IPRs amounts to an agreement or concerted practice by firms in a horizontal relationship to fix prices or trading conditions or divide markets by allocating customers, suppliers, territories or goods, it may amount to a prohibited restrictive horizontal practice under the Competition Act. These are *per se* illegal practices. Agreements or concerted practices between competitors involving IPRs that do not amount to a per se prohibition but that substantially prevent or diminish competition are also prohibited, unless the parties to the agreement or practice can prove that technological, efficiency or other pro-competitive gains outweigh its anti-competitive effect.[444]

iii. Refusals to license

Under South Africa's Patent Act, abusing patent rights by charging excessive prices may be a ground for compulsory licensing.[445] However, since the establishment of the provision on compulsory licensing under the first Patent Act 40 years ago, no licence has been issued. This is in part due to the burdensome nature of the provision in the Patent Act which requires an application of compulsory licensing to be subject to a judicial process. The requirement on the judicial process creates additional cost implications for parties that intend to file applications. In this context, increasingly, parties turn to the Competition Commission.[446] Importantly, however, most of the resulting cases have resulted in settlements rather than fully litigated competition law decisions.

In an important instance of this phenomenon which generated very significant international attention, in 2003, the Competition Commission of South Africa concluded settlements with two major pharmaceutical firms regarding allegations that the two firms had abused their dominant positions in their respective anti-retroviral markets by charging excessively high prices and by refusing to issue licences to generic manufacturers. The Commission agreed not to ask for the imposition of a fine and, in return, the firms undertook to: (i) expand the licensing of the drugs to a number of generic manufacturers; (ii) permit the licensees to export the relevant anti-retroviral drugs to other sub-Saharan countries; and (iii) charge royalties of no more than 5% of the net sales of the relevant drugs. In 2007, a third major pharmaceutical company agreed to grant licences to produce and sell anti-retrovirals (AVRs) following a refusal to license complaint, before the South African Competition Commission. The voluntary settlements in these cases imply that there is no definitive judicial ruling on the underlying practices.[447]

iv. Anti-competitive patent settlements

Currently, South Africa does not have a legislation dealing with anti-competitive patent settlements. Such arrangements might, however, in particular circumstances, constitute a horizontal restrictive practice to the extent that it constitutes an agreement between competitors to divide markets, a per se prohibition under the Competition Act.[448]

Some commentators have suggested that inefficiencies in the South African IP system may have contributed to creating incentives for IP holders to delay or completely prevent entry of

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[443] *Ibid*.

[444] Derek Lötter and Shakti Wood, *Intellectual Property & Antitrust: South Africa*, December 2017. Available at https://gettingthedealthrough.com/area/17/jurisdiction/2/intellectual-property-antitrust-south-africa/.

[445] Section 56(2) of the Patents Act. Available at https://www.gov.za/documents/patents-act-9-apr-2015-0827.

[446] See for example complaint filed by Hazel Tau and other HIV/AIDS activists in Itumeleng Lesofe, *Finding the right balance between the enforcement of Competition law and the protection of Intellectual Property Rights,* prepared for the 11th Competition Law, Economics and Policy Conference, 31 August 2017, p. 14-15. Available at http://www.compcom.co.za/wp-content/uploads/2017/09/Paper_Competition-and-IP-Law_Itumeleng-Lesofe_Final_24082017.pdf, p. 11.

[447] For detailed discussion see World Health Organization, World Intellectual Property Organization and World Trade Organization, *Promoting Access to Medical Technologies and Innovation: Intersections between public health, intellectual property and trade*, 2012, p. 200. Available at https://www.wto.org/english/res_e/booksp_e/pamtiwhowipowtoweb13_e.pdf.

[448] Lötter and Wood, above note 444.

competing brands in the South African market.[449] The Commission has investigated some cases related to such practices. In June 2017, the Competition Commission announced the initiation of a related investigation against cancer drug manufacturers. [450] The Competition Commission's statement indicates that the assessment of an alleged abuse is planned to be conducted in relation to relatively 'new' issues such as patent thickets and ever-greening.

v. SEPs and PAEs

South Africa has not established legislation or guidelines dealing with SEPs and PAEs. While industry standard settings are not illegal per se, the practice may be subject to competition scrutiny and in particular under the abuse of dominance provisions of the Competition Act, in particular where there is a refusal to license. While not expressly referred to, the principle of fair, reasonable and non-discriminatory licensing has been applied by the competition authorities in cases where compulsory licensing of IP rights has been ordered.[451]

(4) Competition advocacy directed at the IP system / ongoing discussion on the competition-IP interface

The Competition Commission of South Africa has been active in competition advocacy, both generally and with respect to the competition-IP interface. In 2014, the competition agency was honourably mentioned by the ICN-WBG Competition Advocacy Contest.[452] The legal basis for competition advocacy is contained in chapter 4A of the Competition Act which allows the Competition Commission to conduct a 'formal inquiry in respect of the general state of competition in a market for particular goods or services, without necessarily referring to the conduct or activities of any particular named firm'.[453] The Competition Commission has issued a set of guidelines in relation to its competition policy.[454] Although no specific guidelines on the competition policy and IPRs interface has been issued, the Competition Commission elaborated on the intersection of IP and competition law in South Africa in relevant reports and the agency's newsletters.[455]

In 2013, the Department of Trade and Industry of South Africa published a draft National Policy on Intellectual Property, which indicated an arising interest in relation to competition issues and from abuses of IP rights.[456] The further and updated draft National Policy on Intellectual Property (Phase 1) in the context of public health was released in 2017.[457] Therein, the Department of Trade and Industry recommends a joint effort along with the Competition Commission to clarify the remit and scope of the intersection between competition law and IP.

The draft National Policy explicitly refers to the flexibilities provided under the TRIPS Agreement which are intended to ensure that patents are not used as platforms for illegally extending market power. It notes that: [458]

- In addressing the interface between IP and competition, the TRIPS Agreement gives members the scope to use competition policy as an instrument to facilitate access to medicines. Article 8 on its own, and in particular, read through the interpretive lens of the Doha Declaration on TRIPS and Public Health, empowers WTO members to take measures aimed at restraining anti-competitive practices.

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[449] See, e.g., Lesofe, above note 446, p. 26.

[450] South African Government, *Competition Commission on investigation into cancer drugs manufacturers*, 13 June 2017. Available at https://www.gov.za/speeches/media-statement-commissioner-investigation-manufacturers-cancer-drugs-13-jun-2017-0000.

[451] See Case 113/CAC/Nov11 - *Pioneer Hi-Bred International Inc & Pannar Seed (Pty) Ltd vs The Competition Commission, African Centre for Biosafety & Biowatch SA,* available at https://www.comptrib.co.za/cases/appeal/retrieve_case/1412. See also Lötter and Wood, above note 444.

[452] The WBG, above note 423.

[453] The Competition Act, above note 434.

[454] The Competition Commission of South Africa, *Guidelines.* Available at http://www.compcom.co.za/guidelines-for-public-comment/.

[455] The Competition Commission of South Africa, *Newsletters.* Available at http://www.compcom.co.za/newsletters/.

[456] Government Gazette No. 36816, Notice 918 of 2013.

[457] Government Gazette No. 41064, Notice 636 of 2017. See also the Department of Trade and Industry of South Africa, above note 439.

[458] The Department of Trade and Industry of South Africa, above note 439.

- Both competition law and patent law together can be used to implement competition-related TRIPS flexibilities and advance consumer welfare. Chapter 2 of the Competition Act, which covers practices such as horizontal restrictions, vertical restrictions, and abuse of dominance, and various licensing provisions in the Patents Act are pertinent in this regard.

In the above context, the Department of Trade and Industry has suggested that, although South African jurisprudence in relation to the interplay between competition law and IPRs is still at an early stage, there is scope to develop guiding principles.[459]

Overall, the South African approach to the competition-IP interface is still under development, without elaboration of formal guidelines. Still, it has had some impressive results. A path-breaking focus on public health issues related to the competition-IP interface is noticeable, in line with the general approach of the South African Competition Commission to target its activities in areas relevant to the country's economic development.

6. Summary observations

Overall, the progressive elaboration and strengthening of the legislative and institutional framework for enforcing competition law in the BRICS economies especially during the past two decades is a remarkable achievement. Without doubt, it testifies to the centrality of competition law and policy to the reform processes that these countries have followed and which, on the whole and with variations, have generated an impressive degree of economic dynamism and increased prosperity for their citizens. Moreover, since the inception of competition policy regimes, there has been, to certain extent, a move from 'per se' towards 'rule of reason' approach in the BRICS countries which reflects the maturing of their competition regimes and enforcement approaches.[460] At the same time, the potential for tensions and/or outright conflicts remains present in occasional cases where the relevant authorities are perceived to subordinate competition policy to industrial policy objectives.

In establishing their competition policy regimes, the majority of the BRICS jurisdictions have exempted certain IP-related issues from application of their competition laws. Related experience has contributed to initiatives aimed at limiting or repealing IP-exemptions from competition law and at providing a greater competition law scrutiny of IP settlements. Even though the BRICS jurisdictions have generally not yet adopted relevant guidelines, increasingly, the responsible agencies are articulating relevant interpretation on the application of competition policy vis-à-vis IP. In addition to traditional areas of interest, the agencies' focus is expanding to new frontiers such as abuses of SEPs. Moreover, increasingly, use is being made of compulsory licensing as a tool to address anti-competitive behaviour and as a component of merger approvals.[461]

V. Summary Analysis of Jurisdictional Approaches and Trends

This section of the paper attempts to take stock of relevant trends and developments that have been noted across the full range of jurisdictions that have been considered. Appendix Table 1 (see pp. 67-68) provides a summary of highlights in tabular form. A first overall observation is that pervasive interest in the interface of competition policy and IP is evident across all of the jurisdictions surveyed. This is notwithstanding their different levels of development, constitutional systems and/or economic structures and industrial profiles. This, in itself, is an important finding that manifests both a potential need for and the ultimate viability and usefulness of international dialogue in this area. Moreover, the measures and initiatives implemented at the level of individual jurisdictions e.g., concerning specific issues such as anti-competitive patent settlements and/or the treatment of standard-essential patents reveal clear indications of an ongoing inter-jurisdictional learning process, even where variations in national approaches are evident.

Some related observations are as follows:

- All of the jurisdictions considered have at least rudimentary rules bearing on potential anti-competitive abuses of IPRs, including in the context of licensing agreements. While, in many contexts, licensing practices generally are either considered exempted from or in line with competition laws, ancillary provisions relating to e.g. resale price

[459] *Ibid*.
[460] Gouri, above note 374.
[461] Rafael Pinho de Morais, 'Antitrust and Compulsory Licensing in BRICS and Developing Countries', in Jenny and Katsoulacos, above note 288.

maintenance, distribution, grant-backs and other such practices are subject at least to potential scrutiny under the national competition laws.

- In virtually all jurisdictions, a (sometimes gradual and incomplete) move towards an effects-based or case-by-case ('rule of reason') approach is evident. Furthermore, gaps in or the outright lack of relevant guidelines increasingly is complemented by advocacy efforts by the competition agency. This is particularly the case for 'new' issues, to the extent that they are not addressed in existing guidelines.

- Clear differences in approach are evident with regard to the treatment of refusals to license, which in some jurisdictions can amount to an abuse of dominance and in others (particularly in the US) is considered to be generally within the rights of the IPR holder.[462]

- A topic that is receiving increasing attention among competition authorities around the world is that of anti-competitive patent settlements. While only a few jurisdictions cover this practice in formal guidelines, six out of the eleven jurisdictions considered address it at least through advocacy or enforcement efforts and/or related jurisprudence. Similarly, SEPs are increasingly being addressed in one form or the other (in ten out of the eleven jurisdictions).

- Another 'new topic' – PAEs - is covered at least by two jurisdictions (Canada and Korea) in their IP-related guidelines, and is the subject of ongoing reflection/policy advocacy in others.

Overall, the following picture emerges. Initially, the traditional developed ('forerunner') jurisdictions, especially the US, Canada and the EU, focused on licensing practices as the primary area of interest with respect to the interface between IP and competition. Also in those jurisdictions, over the years (and decades), antiquated 'per se' approaches to relevant practices generally gave way, as their competition systems matured, to 'rule of reason' or case-by-case approaches. Likewise, in Japan and Korea, the treatment of IPR licensing arrangements under their competition laws has undergone/is undergoing a gradual reorientation, from an emphasis on industrial policy objectives to a more consumer welfare-focused approach that increasingly resembles the US, Canadian and the EU approaches in its effects. Indeed, in the majority of these 'forerunner' jurisdictions, the treatment of licensing practices is now, to a striking degree, a settled issue. At the same time, these jurisdictions are increasingly grappling with and focused on a broader and newer set of issues including at a minimum the following: (i) anti-competitive patent settlements; (ii) standard-essential patents; and (iii) the conduct of patent assertion entities. Over time, these trends are impacting/seem likely to impact also on a broad range of emerging and/or developing economies.[463]

An obvious further observation that emerges from the analysis in this paper concerns the move towards clearer policy formulation and, in some cases, enforcement guidelines across new jurisdictions, particularly (though certainly not exclusively) the BRICS economies. In these jurisdictions, for the most part, there is relatively little pre-existing jurisprudence or enforcement experience to rely on in this area, and policies either emerge in an iterative process (such as in India), through the evolving practice of the competition authority (such as in Brazil, Russia, South Africa) and/or from a clear government mandate to formulate relevant guidelines (such as in China). In any case, the relevant jurisdictions increasingly deem the area to be an important one and clearly consider it useful and instructive to set out their views.[464]

At the time of the establishment of their competition laws, several of the BRICS jurisdictions initially exempted IP issues from their application. During the past decade, however, a need for more guidance on the competition policy treatment of IPRs increasingly appears to have been felt. Even though most of the BRICS jurisdictions have not yet issued relevant guidelines, the competition agencies, increasingly, articulate provisional interpretations on the application of competition policy in relation to IP. In addition to traditional areas of interest, the focus of competition agencies is expanding to encompass new frontiers such as abuses of SEPs.

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[462] To be sure, even in the US, mandatory licensing of relevant technology may be and has been imposed e.g. as part of negotiated settlements in broader monopolization or merger cases.

[463] But cf. the analysis in F.M. Scherer and Jayashree Watal, 'Competition Policy And Intellectual Property: Further Insights From Developed Country Experience,' in Anderson et al, above note 6.

[464] See, for related discussion, Kovacic and Lopez-Galdos, above note 18.

VI. Concluding remarks

This paper has analysed competition agency guidelines and policy initiatives in relation to the role of IPRs and related practices in a broad cross-section of jurisdictions, encompassing traditional Western developed economies; Japan and Korea; and the BRICS economies. As foreshadowed in the Introduction to this paper, key findings from the analysis are as follows. First, in contrast to the situation prevailing twenty or thirty years ago, interest in and concern with ensuring an appropriate balance between IP and competition law and policy certainly is no longer a preoccupation of only a few (mainly developed) jurisdictions. Rather, interest in this issue has migrated across (and, in fact, beyond) the BRICS economies which are an important focus of the analysis in this paper. Such interest is clearly manifested by the wide range of guidelines, exploratory policy statements, advocacy efforts and related case developments across a wide array of countries that is documented in this paper.[465]

In many respects, these developments are salutary: they reflect rapidly diffusing awareness of the roles of both IP and competition policy in promoting innovation and technological diffusion, and therefore of the importance of these policy instruments for economic growth, development and prosperity. Indeed, the importance attached to the relationship of competition policy and IP as an element of the policy framework for innovation and the diffusion of new technologies in each of the jurisdictions surveyed is, by itself, a key finding of our analysis which merits reflection in national, multilateral and other settings.

The proliferation of guidelines and policy initiatives which is documented herein nonetheless also carries the potential for coordination failures and even outright conflicts. As elaborated in the Introduction to this paper, both intellectual property and (at least arguably) competition policy are tools that demand a modicum of coordination across jurisdictions. This is because the application of both sets of tools can result in cross-jurisdictional spillovers. The need for minimum standards to ensure due protection for the rights of innovators while incentivizing disclosure of socially valuable information and preventing free riding is, of course, a core rationale underlying the WTO TRIPS Agreement. The need for international coordination in the subject area of competition policy is, perhaps, less universally acknowledged than it is for IP. Still, the possibility of spillovers in the domain of competition law and policy is widely acknowledged, for example in the case of varying stances across jurisdictions towards mergers or abuses of dominant position that impact across national markets.[466] Indeed, to an important degree, concern with such spillovers forms the rationale for the work of the International Competition Network (ICN), the OECD, UNCTAD and other international organizations active in the competition policy field (including also WIPO in the context of its Development Agenda and, in the past, the WTO[467]), which have already promoted a significant degree of convergence in national policies through their extensive and informative analytical, policy development and advocacy work.[468]

As also noted in the Introduction to this paper, the need for a modest degree of coordination with respect to the competition policy-IP interface (as compared to other aspects of competition policy) is arguably particularly compelling, given the fungible nature of the underlying assets that are affected (knowledge and creative adaptations/innovations). The point here is that, given this fungibility, remedies imposed by particular jurisdictions in relevant cases (providing, e.g., for compulsory licensing) may well have spillovers in other jurisdictions (by facilitating access to relevant technology). Minimally, they may affect the incentives for investment in what are, in an increasing number of cases, global industries and markets. Indeed, it bears repeating that, already, Article 40 of the TRIPS Agreement presumes the need for at least a degree of enforcement cooperation between jurisdictions regarding competition issues.[469] This reflects an

[465] To this extent, our analysis echoes themes that have emerged from both the discussion of competition policy in the context of WIPO's Development Agenda and the analysis of provisions and related discussion concerning IP in regional trade agreements. See, generally, Nuno Pires de Carvalho, 'Competition policy in WIPO's Development Agenda', forthcoming in Anderson et al, above note 6; and Raymundo Valdés and Maegan McCann, 'Intellectual property provisions in regional trade agreements: revision and update', in Rohini Acharya (ed.) *Regional Trade Agreements and the Multilateral Trading System* (WTO and Cambridge University Press, 2016).

[466] See Epstein and Greve, above note 14. In addition to negative spillovers (e.g. one jurisdiction or its enterprises being adversely affected by enforcement decisions taken in other jurisdictions), there can of course be important positive spillovers from competition law enforcement (e.g., anti-cartel enforcement in one jurisdiction also benefitting consumers in other jurisdictions in which the same cartels have been active).

[467] See, for the pertinent background, Carvalho, above note 465, and Anderson et al, above note 366.

[468] See, for relevant discussion, Hugh M. Hollman and William E. Kovacic, 'The International Competition Network: Its Past, Current and Future Role' (2011) 20 *Minnesota Journal of International Law*, pp. 274-323; and, for diverse examples of relevant inputs, the websites of the ICN, OECD and UNCTAD.

[469] Recall the text of Article 40:3 of the Agreement, as set out in note 15 above.

early recognition of the need for cooperation in this area. Recently, individual WTO Members have called for further discussion of relevant issues, in the framework of the ICN.[470]

An important question that emerges, then, from our analysis is whether there is a need for a further cross-jurisdictional learning process and/or, eventually, a greater degree of coordination (whether voluntary or otherwise) concerning the policy issues, applications and initiatives that are discussed in this paper. Our view is that, minimally, there is a need for further *discussion* of related issues, involving both competition and IP authorities, in relevant fora. Transnational discussions and learning processes are an essential vehicle for the dissemination of sound policies in this area. Certainly, in the absence of such discussion, there is a risk that relevant enforcement policies will develop in ways that are sub-optimal and that generate unnecessary inter-jurisdictional conflicts.[471] Arguably, as well, it is an anomaly that, currently, the role of IPRs in the global economy is protected and, to a degree, entrenched via the WTO TRIPS Agreement, whereas at the same time, no similar formal treaty arrangement exists to support the (arguably equally important) role of competition policy in the global economy, and to ensure that such policy is applied in a transparent and non-discriminatory fashion.[472]

To be sure, the issues and developments examined in this paper are complex, and any related initiatives doubtless would require careful reflection. Perhaps, the right approach is simply to encourage continuing dialogue on relevant issues in the international fora that are or have been already active in the subject-area. At least, we believe, the analysis in this paper has shown that the relationship between competition policy and the IP system is of interest and concern to a wide range of developed and emerging/developing economies, around the globe; that the issues are important ones that will have implications for innovation, the diffusion of new technologies, prosperity and development at both the national and global levels; that there is currently a risk of coordination failures if not outright policy conflicts in this area; and that there is a solid basis 'on the ground' for meaningful discussions among a broad cross-section of developed and emerging countries, if the interest is there. Beyond this, the appropriate scope and direction of such discussions, and the choice of relevant fora, are beyond the scope of this paper.

[470] For instance, in 2015, the Korean and U.S. competition agencies discussed measures for competition law enforcement and cooperation reinforcement between competition authorities for intellectual property rights at the ICN meeting. See the KFTC, Annual Report 2016. Available at http://www.ftc.go.kr/eng/cop/bbs/selectBoardList.do?key=517&bbsId=BBSMSTR_000000002404&bbsTyCode=BBST11.

[471] On a similar note, recently, Makan Delrahim, Assistant US Attorney General for Antitrust, referring to the prospects for achieving further global convergence based on discussions in the International Competition Network (ICN), the leading global forum for competition enforcers, observed as follows: 'One issue ripe for deeper discussion is the intersection of intellectual property and antitrust, and I would strongly support efforts in ICN to make progress in this area. We need to be sure that antitrust enforcement does not impede the incentives for innovation that intellectual property laws provide.' Makan Delrahim, Remarks at New York University School of Law, New York, NY, 27 October 2017, available at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-law.

[472] See, for related discussion, Fox, above note 15.

Appendix Table 1: Comparative aspects of competition agency guidelines, policy statements, enforcement experience and advocacy regarding intellectual property[a]

	Licensing Practices	Effects based (Rule of Reason)[b] Approach to Most Licensing Practices	Refusals to License	Anti-competitive Patent Settlements	SEPs	PAEs	Advocacy
Australia	Yes (the CCA)	Rule of Reason	Yes/No[c]	Yes (Enforcement experience) [d]	Yes (Enforcement experience)[e]	No	Yes
Brazil	Yes (the Competition Law)	Rule of Reason	Yes	Yes/No[f]	Yes (Enforcement experience)[g]	No	Yes
Canada	Yes (Guidelines)	Rule of Reason	Yes (Competition Act)	Yes (Guidelines)	Yes (Guidelines)	Yes (Guidelines)	Yes
China	Yes (SAIC Provisions)	Rule of Reason	Yes (SAIC Provisions)	No/Yes[h]	Yes (SAIC Provisions)	No	Yes
European Union	Yes (Guidelines)	Rule of Reason	Yes (Advocacy, Guidelines)[i]	Yes (Guidelines, in context of licensing only; advocacy)	Yes (Guidelines)	Yes (Advocacy)	Yes
India	Yes	Rule of Reason / Per se	Yes (Enforcement experience)	Yes/No (Competition Act; Advocacy)	Yes (Enforcement experience)	No	Yes
Japan	Yes (Guidelines)	Rule of Reason	Yes (Guidelines)	No	Yes (Guidelines)	No	Yes
Korea	Yes (Guidelines)	Rule of Reason	Yes (Guidelines)	Yes (Guidelines)	Yes (Guidelines)	Yes (Guidelines)	Yes
Russia	Yes (Competition Law)	Rule of Reason / Per se	No (Under discussion)	No	No	No	Yes
South Africa	Yes (Competition Act)	Rule of Reason / Per se	Yes/No (Enforcement experience)	Yes/No (Enforcement experience)	No/Yes (Enforcement experience)	No	Yes
United States	Yes (Guidelines)	Rule of Reason	Yes [j]	Yes (Enforcement experience; advocacy)	Yes (Advocacy)	Yes (Advocacy)	Yes

[a] This table provides a broad overview of relevant measures and initiatives. There are undoubtedly, however, complexities and nuances to the various agencies' enforcement approaches that are not captured here. For a more detailed description of the individual jurisdictions' approaches, see the preceding sections of the paper. *NB also: in the table, 'Yes' means only that the topic is addressed in one way or another; conversely, 'No' means that the topic is not addressed.*

[b] 'Rule of Reason' approaches as identified here include approaches mixing block/general exemptions with an effects-based assessment of agreements not falling within safe-harbour provisions, such as in the EU.

[c] The refusal to license IPRs is not, by itself, prohibited by the CCA and, in some circumstances, is considered as an exercise of the right under section 51(3) of the CCA. Nonetheless, agreements between competitors not to license IPRs to third parties may constitute prohibited exclusionary practices. See, for related discussion, part 4 above.

[d] Anti-competitive patent settlements have not been subject to the consideration by the Australian courts. The only decision which addresses anti-competitive effects of 'pay-for delay' launch of generic pharmaceuticals is the 2015 decision in the Pfizer case. See part 4 above.

[e] Although there have been a few examples involving SEPs, in both cases the parties reached a settlement before the Federal Court was able to hand down its decision. See part 4 above.

[f] Patent settlements have not been reviewed under the current competition framework in Brazil. It is, however, suggested that in certain circumstances, patent settlements might eventually violate Article 88 of the Competition Law establishing the prohibition of agreements between competitors which may substantially eliminate competition or strengthen a position of dominance on the relevant market. See the discussion below.

[g] To date, *TCT v. Ericsson* was the only case analysed by CADE involving potential abuses related to SEPs.

[h] While not specifically addressed in the SAIC Provisions, anti-competitive patent settlements might be potentially subject to scrutiny as monopolistic agreements between competing undertakings that restrict production, sale or development of new products, under the general provisions on monopolistic agreements.

[i] The Guidelines only address refusals to license linked to SEPs. Refusals to license not linked to SEPs continue to be assessed under the criteria established by relevant jurisprudence, which allows for compulsory licensing under certain, restrictive conditions pursuant to the essential facilities doctrine.

[j] As noted above, the 2017 US Antitrust Guidelines for Intellectual Property Licensing include language reiterating the long-standing US position that antitrust law does not impose liability for unilateral refusals to assist competitors.