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I. INTRODUCTION

Over the last years a significant number of high profile antitrust cases raising the issue of how to reconcile competition rules and Intellectual Property ("IP") rights have been investigated in parallel by the U.S. and the EU competition agencies. Most of these cases show an ever-increasing level of convergence, although conventional wisdom still suggests that the approach in accommodating antitrust rules and IP rights is fundamentally different on the two sides of the Atlantic.

In particular, the tough stance taken by the U.S. agencies towards judicial injunctions sought by FRAND-pledged SEPs holders in the smartphone war, and the Supreme Court's ruling in *Actavis,* show that the United States—like the European Union—is progressively departing from a traditional "symmetry" principle which entails that, when applying antitrust rules to IP rights, the latter rights have to be treated and given the same deference as other property rights. The intensity in the application of competition rules increasingly depends on the strength of the IP rights at stake, as well as on the sector involved. And while the EU Commission still shows more boldness in its enforcement actions, at a closer look, differences with the United States tend to be modest and mainly result from different enforcement models.

A significant source of inconsistency, though, may come from the enforcement actions of National Competition Agencies ("NCAs") across the European Union, for some of them—in an attempt to emulate the Commission's bold stance—sometimes take a very intrusive attitude towards IP rights, putting convergence at risk.

The purpose of this article is to concisely compare theories of harms and outcomes of some of the most important antitrust investigations of the last years run in parallel by the United States and the European Union where an intersection between antitrust and IP rules has occurred. It will show that, after all, there is much more convergence between the U.S. and the EU systems than what has been conventionally thought.

II. ANTITRUST VERSUS IP RIGHTS—THE CLASSIC VIEW

Conventional wisdom has it that the approach of the U.S. and EU antitrust agencies when dealing with IP rights is fundamentally different.

In the United States, antitrust enforcement agencies and courts have applied the same principle of symmetry to IP rights as with other property rights, i.e. IP rights do not deserve

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special attention any more than other property rights. Therefore, the same general antitrust principles should apply to conducts involving IP rights that apply to conduct involving any other form of tangible or intangible property.[2] This implies that there is no negative bias and no presumption that IP rights confer market power deserving special attention under antitrust rules.[3]

Instead, in the European Union, when enforcing antitrust rules the Commission and the EU Courts have traditionally shown less deference towards IP rights than the United States. The typical approach spelled out in ECJ case law consists of distinguishing between the existence and the exercise of IP rights. Conditions for granting an IP right as such cannot, in principle, be challenged under Community Law, while the way such rights are exercised can indeed give rise to abusive exploitation of market power or exclusionary forms of unilateral conducts contrary to article 102 TFEU. This has led the Commission to challenge even the most typical ways of exercising an IP right and, therefore, its very essence.

The relationship between antitrust rules and IP rights in the European Union has been historically influenced by two main factors: (1) IP rights have been traditionally tainted with a negative bias given their potential to cause market segmentation along national borders and frustrate the internal market; and (2) the traditional form-based approach in the assessment of unilateral conducts, combined with the special responsibility principle incumbent upon dominant firms, have resulted in the Commission aggressively enforcing competition rules under Article 102 TFUE, [4] including in those areas of intersection between competition rules and IP rights.

This is particularly visible in the area of refusal to deal with rivals, where the *Microsoft* case (*Microsoft* I) has come to epitomize the gap existing between the U.S. and EU systems.[5]

Microsoft (I)

Microsoft (*Microsoft I*) was the first leading antitrust investigation run in parallel by the European Union and the United States that raised the issue of how to reconcile competition rules and IP rights, and is also the case that has most significantly contributed to the perception of a big gap in this area between the two sides of the Atlantic.

In the EU investigation,[6] the Commission challenged Microsoft's refusal to make interoperability information for work group server Operating Systems ("OS") fully available to

2 See the 1995 guidelines on IP rights jointly issued by the FTC and the DOJ.

3 On the symmetry principle in the United States, *see* J. Wright & D. Ginsburg "*Whither symmetry? Antitrust analysis of intellectual property rights at the FTC and DOJ*", 9(2) COMPETITION POLICY INT'L. 41 (2013).

4 Over the last years, the Commission has increasingly departed from a formalistic assessment of unilateral conducts, moving towards an effect based analysis. See Commission's guidance paper on the application of Article 102 TFEU.

5 For a review of the substantive Law applicable in the US and the EU to the refusal to deal in the area of antitrust/IPR intersection, see A. Arena, B. Bergmann J. Himes "*Two bodies of Law separated by a Common Mission: Unilateral Conducst by Dominant firms at the IP/antitrust intersection in the EU and the US" European Competition Journal 9. (2013): 623..*

rivals,[7] and the tying of Windows Media Player ("WMP") with Windows OS.[8] However, the EU investigation mainly revolved around the first conduct, namely Microsoft's refusal to deal with its rivals, an antitrust issue where the distance between European Union and United States could not have been wider.[9]

Under U.S. antitrust law, as a general principle there is no duty to deal with rivals (see *inter alia* S. Ct. in *Trinko*), even less so when IP rights are involved. The argument is that anticompetitive effects stemming from a unilateral refusal to license a valid intellectual property right are a natural consequence of IP Laws themselves.[10]

Under EU antitrust law, the reverse is true. Because of its "special responsibility," a dominant firm has, in principle, a duty to give its rivals access to an input it controls if its refusal results in a significant elimination of competition in the market dependent upon that input. The same principle tends to apply in case the refusal is based on the exercise of a legitimate IP right,[11] although under more exceptional circumstances. The *Magill/IMS*[12] line of jurisprudence had established that a refusal to grant a license by a IPR holder may amount to an abuse of dominance when: (i) the IPR owner enjoys market power, (ii) access to the IPR/input is indispensable for competitors to operate in a market dependent upon such input, (iii) refusal to grant a license risks eliminating all competition from such a market, (iv) there is no objective justification, and (v) the refusal to deal prevents the appearance of a new product.

With respect to the latter requirement, in *Microsoft,* for the first time, the Commission argued that the test would be met not only in those cases where competitors were prevented from marketing products having specified innovative features relative to the existing ones, but also when the refusal to deal prevented rivals from generically innovating through the introduction of competing products.. The General Court upheld the Commission's view: "preventing the

[6] *See* Commission Decision of 24 March 2004, Case COMP/C-3/37.792, Microsoft, *available at* http://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_4177_1.pdf

[7] According to the Commission's theory of harm Microsoft had strategically refused to disclose relevant interface information needed by rivals active in the market for work group server OS to achieve full client-to-server as well as server-to-server interoperability, with a view to monopolizing the work group server market.

[8] According to the Commission, tying WMP with the dominant Windows would make WMP the platform of choice for complementary content and applications, which in turn would cause foreclosure in the market for media players. Foreclosure would result from content providers standardizing on WMP and forcing consumers to use WMP at some point in time (the "tipping" theory). For a comment on this topic, *see* M. Dolmans & T. Graf, *Analysis of Tying Under Article 82 EC: The European Commission's Microsoft Decision in perspective*, 27(2) WORLD COMPETITION 225-244 (2004) and D.S. Evans & J. Padilla, *Tying Under Article 82 EC and the Microsoft Decision. A Comment on Dolmans and Graf*, 27(4) WORLD COMPETITION 503-512 (2004).

[9] For a review of the substantive Law applicable in the United States and the European Union regarding the refusal to deal in the area of antitrust/IPR intersection, *see* A. Arena, B. Bergmann, & J. Himes, *Two bodies of Law separated by a Common Mission: Unilateral Conducts by Dominant firms at the IP/antitrust intersection in the EU and the US*, 9(3) EUR. COMPETITION J.,. 623 (2013).

[10] For an extensive review of the topic, *see* H. HOVENKAMP, M. JANIS, & M. LEMLEY, IP AND ANTITRUST (2004).

[11] For a review of the topic, *see* V. Korah*, The interface between intellectual property and antitrust: The European experience*, 69, ANTITRUST L.J. 801 (2001).

[12] *See* joined cases C-241/91 and C-242/91 P, *RTE and ITP v Commission*; case C-418/01, *IMS Health GmbH*.

appearance of a new product" is nothing else than limitation of technical development in the broad sense.[13]

The case, as we all know, ended up with a prohibition decision, a huge fine, and intrusive remedies: Microsoft was fined something in the range of EUR 500 million, it was required to disclose to competitors its specification of Windows APIs, and it had to offer a version of its Windows OS without WMP to PC manufacturers/end users.

In the United States, the Department of Justice Antitrust Division ("DOJ") instead challenged different practices, charging both that Microsoft's exclusive dealings with OEM were designed to force Netscape out of the market for internet browsers, and that there was tying between PC OS and Internet Explorer.[14]

The theories of harm were also different. The core of the DOJ's theory was that Microsoft attempted to monopolize the market for internet browsers and was tying its internet browser to its OS in order to protect its quasi-monopoly position in the market for PC OS. Hence, in the Unites States the case was mainly about a maintenance of monopoly claim pursued through commercial behavior typically scrutinized under antitrust rules (exclusive dealing and tying), while there was much more limited discussion about the relevance of IP rights and their possible clash with antitrust rules.

Finally, the outcome/remedies were different. The U.S case ended with a settlement,[15] under which Microsoft was essentially required to refrain from entering into restrictive licensing agreements with OEMs. The tying allegations were dropped after a District Court of Appeal[16] applied the rule of reason test and referred the case back to the competent District Court, which in turn handed down a judgment endorsing the settlement.[17]

The criticism voiced against the EU case still resonates in the antitrust community at large and is not completely groundless. The criticisms included: (i) an excessively lengthy and

[13] Case T-201/04, *Microsoft v Commission.* For a comment, *see* D. Geradin, *What can the EU learn from the US SC judgment in Trinko in the wake of Microsoft, IMS and Deutsche Telekom*, 41 (6)COMMON MARKET L. REV., 1519 (2004),..

[14] For a comment on the U.S. decision, *see* A. D. Melamed & D.L. Rubinfeld, *U.S. v. Microsoft: Lessons Learned and Issues Raised,* ANTITRUST STORIES, 287-310 (E.M. Fox & D.A. Crane, eds. 2007). Several years after the U.S. investigation was over, the EU Commission challenged the same practices and required Microsoft to take several commitments to put an end such practices (*see* Commission Decision of 16 December 2009, Case COMP/C-3/39.530, *Microsoft*, *available at* http://ec.europa.eu/competition/antitrust/cases/dec_docs/39530/39530_2671_3.pdf.)

[15] Settlement of 2 November 2001. In the settlement Microsoft was also required to provide license communication protocols implemented on Windows PC OS (client-to-server interface information), but there was no obligation to disclose server-to-server interface information.

[16] U.S. DS Court for the District of Columbia, Judgment of 28 June 2001, *US v Microsoft Corporation*, No. 005212. Interestingly, the original intentions of the DOJ were very extreme and would have been probably lethal to Microsoft business model had the Court not rejected the remedy, namely the structural unbundling between the OS business and the applications business.

[17] U.S. DS Court for the District of Columbia, Judgement of 1 November 2002, *US v Microsoft Corporation*, Civil Action n. 98-1233.

unfocused investigation;[18] (ii) a disproportionate fine for a case addressing relatively novel issues; (iii) a somehow speculative theory of harm (the tipping theory with respect to WMP); (iv) an ineffective remedy; and (v) above all, an ever-increasing intrusive approach over IP rights.

In this respect, there is no doubt that the EU decision lowered the thresholds for antitrust intervention in cases of clashes with IP rights. First, *Microsoft* confirms the *Magill/IMS* doctrine in that behind the prevalence of competition rules over IP rights there is also an implicit judgment over the intrinsic quality of the IP rights at stake (in this case finally judged unworthy of protection). Second, it also expands the *Magill/IMS* doctrine, for the legal test is now less demanding: it suffices to prove that a refusal to license an IP right prevents any competing product from entering the market in order for the "new product" test to be fulfilled and the sphere of legitimate IP rights be invaded.

III. THE AREAS OF CONVERGENCE

Although admittedly the duty to deal principle set forth by the *Microsoft* doctrine is still good law in the European Union, and may potentially still have far-reaching implications in future cases, the noise made by, and the visibility of, this case have largely contributed to divert the attention from other important areas of antitrust/IPR intersection where the U.S. and the EU systems appear to head towards convergence.

Interestingly, it is the U.S. System which is coming closer to the EU's as it is moving towards a more interventionist approach[19], possibly under the influence of some distinguished scholars who have started to challenge the idea of IP rights' untouchability and parity with other property rights. First, it has been argued, IP rights are probabilistic in nature: (i) they contain a strong element of uncertainty, (ii) many rest on shaky grounds, (iii) they're issued after a limited examination process, and (iv) they would not stand scrutiny if litigated.[20] Second, IP rights cannot be treated like other property rights since the former may, in some circumstances, confer market power, sometimes even extraordinary market power. Accordingly, strong antitrust enforcement is needed in the presence of strong IP rights.[21] These ideas may have created the favorable intellectual background for a more assertive antitrust intervention in areas such as standard essential patents ("SEPs") in the ICT sector and patent rights in the pharmaceutical sector.

A. Rambus

The first important area of convergence concerns the issue of the deceitful acquisition of Standard-Essential Patents ("SEPs") and the problem of patent hold-up.[22] A patent hold-up

[18] The investigation lasted more than six years and triggered an endless discussion on what type of IP rights were at stake and what type of interface information should be disclosed to Microsoft rivals.

[19] This is not to say that the US has followed the EU, quite the opposite, US has typically been at the forefront of the debate on the antitrust/IP intersection, with the EU Commission being quicker to put in practice the US principles, also because of the different enforcement models (administrative in the EU).

[20] On the topic, *see* M. Lemley & C. Shapiro, *Probabilistic patents*, (19) J. ECON. PERSP., 75 (2005).

[21] On the topic, *see* M. Lemley, *New balance between IP and antitrust*, SW. J. L. & TRADE AM. 237 (2007).

[22] For an extensive comment on the patent hold-up issues and the *Rambus* case, *see* J. M. Wallace, *Rambus v. F.T.C. in the Context of Standard-Setting Organizations, Antitrust, and the Patent Hold-Up Problem*, 24 BERKELEY

occurs when a patent holder takes part in a standard setting process conducted by a Standard Setting Organization ("SSO") to establish an industry standard and, after having had its patent included in the technology standard retained by the SSO and the standard is in place, threatens to enforce its patent rights to extract supra-competitive prices from firms producing goods which use the standard.[23] *Rambus* was the first prominent case investigated by both the United States and the European Union that dealt with the issue of the deceitful acquisition of SEPs.

In *Rambus* the facts investigated by the two agencies were exactly the same. Rambus was a patent troll (i.e. non practicing entity) that engaged in a so-called patent ambush strategy in the context of the US-based standard setting organization JEDEC. It intentionally concealed its SEPs relevant to technology used in the JEDEC standard for DRAMs, and subsequently claimed excessive royalties for those patents from JEDEC-compliant DRAM manufacturers.

The case started first in the United States, where the U.S. Federal Trade Commission ("FTC") challenged Rambus' deceptive behavior as a form of unfair competition (Section 5 of the FTC Act) and as an attempt of unlawful monopolization (Section 2 of the Sherman Act). However, the FTC decision was quashed by the D.C. Circuit Court on the ground that the FTC had not demonstrated that Rambus' deception of Jedec SSO had directly caused an unlawful acquisition of monopoly power.[24]

In the European Union, the case was investigated later and assessed on a different legal standard. Since Article 102 prohibition does not include conduct resulting in an unlawful acquisition of market power (only the abuse of dominant position can be challenged and not the creation of dominance as such), the Commission challenged Rambus' behavior as a form of exploitative abuse, i.e. a deceptive conduct aimed at extracting monopoly profits from royalties paid by SEPs licensees. However, finding evidence of an exploitative abuse is a very difficult exercise and this case proved to be no exception.[25] This is why at the end, in *dubio* as to having collected sufficient evidence to the requisite legal standard, the Commission opted for settlement

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TECH. L. J. 661-693 (2009); B.H. Kobayashi & J.D. Wright, *Federalism, Substantive Pre-Emption, and Limits on Antitrust: an Application to Patent Holdup*, 5(3) J. COMPETITION L. & ECON. 469-516 (2009); J. Farrell, J. Hayes, C. Shapiro, & T. Sullivan, *Standard setting, patents and hold-up*, 74 ANTITRUST L.J. 603 (2007).

[23] The hold-up problem typically occurs in two scenarios: the patent holder takes part in the SSP and fails to disclose to the SSO the existence of relevant IPR, and then, once the standard is set, attempts to extract large royalty payments under threat of an injunction (the so-called patent ambush). The patent holder first agrees to have its patent included in the standard retained by the SSO in exchange for a commitment to license its patent under FRAND terms, and then attempts to charge locked-in standard compliant manufacturers much higher rates than FRAND terms.

[24] Rambus Inc. v FTC 522 F 3d 456 (DC Cir 2008).

[25] A price can be deemed excessive under the EU case law when it has no reasonable relation to the economic value of the product supplied. This requires a two-stage analysis aimed at examining whether the difference between the costs actually incurred and the price actually charged (the profit margin) is excessive. Investigating a case of excessive prices requires the following analytical steps: collecting costs and revenues of the dominant firm in the relevant market; calculating profits of the dominant firm in the relevant market; comparing such profits to the profits generated either by a competitor in the same relevant market or by the dominant firm in a different (geographic) market acting as competitive benchmark; and demonstrating the disproportion between the dominant firm's profit margins in the relevant market and the fair benchmark profit margin.

with Rambus committing to license patents relating to DRAM technology under Fair, Reasonable, and Non-Discriminatory ("FRAND") conditions.[26]

The interest in this case lies in the fact that the patent hold-up theory of harm inspiring the investigations on both sides of the Atlantic was first developed in the United States and then imported and applied in the European Union—although under somehow different legal grounds. Despite the different outcomes, *Rambus* is the first case showing a similarity of approaches between EU and U.S. agencies in dealing with SEPs corrupted by an element of deception.

B. SEPs and Injunctions

Similar convergence is emerging in the way U.S. and EU agencies are dealing with the injunctions sought by SEPs' holders vis-à-vis willing licensees in the context of the smartphone wars. The facts investigated are the same; all these cases are about the recourse (and enforcement) to injunctions by the owners of SEPs towards potential licensees willing to enter into a license on FRAND terms.

The theory of harm behind the agencies' interventions on both sides of the Atlantic is also by and large the same: Since injunctions generally involve a prohibition of the product infringing the patent being sold, by seeking or enforcing injunctive relief in court against a willing licensee, a SEP holder can impose unfair or unreasonable licensing terms on the licensee and cause significant foreclosure by forcing competitors out of the market. Such a threat can therefore distort licensing negotiations and lead to anticompetitive licensing terms that the licensee of the SEP would not have accepted absent the seeking of the injunction.[27]

As in *Rambus*, however, the legal grounds on which these conducts are challenged are partly different. In the United States the agencies treat these conducts as either an act of unfair competition under Section 5 of the FTC Act, or as an attempt of willful monopolization under Section 2 of the Sherman Act. The EU Commission seems to oscillate between qualifying these behaviors as either a form of exploitative abuse (i.e. an attempt by a dominant firm to extract from its clients supra-competitive profits along the lines of *Rambus*) or as novel cases of exclusionary abuses causing foreclosure.[28]

The outcomes are by and large consistent, save for some nuances: while the U.S. investigations have been closed with settlements,[29] two EU investigations against Apple and

[26] Commission Commitment Decision of 9 December 2009, Case COMP/38.636, *Rambus*, *available at* http://ec.europa.eu/competition/antitrust/cases/dec_docs/38636/38636_1203_1.pd.

[27] As to the U.S. position on the topic, *see* Statement of The Federal Trade Commission Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights Concerning "Standard Essential Patent Disputes and Antitrust Law", Washington, D.C., July 30, 2013.

[28] *See* Commission Decision of 29 April 2014, Motorola. For an extensive comment on the legal test applicable to such conducts in the European Union, in particular whether the strict test laid down in the ITT *Promedia* jurisprudence (T-11/96) should apply, *see* N. Petit, *Injunctions for FRAND-pledges SEPs: the quest for an appropriate test of abuse under article 102 TFEU*, 9(3) EUR. COMPETITION J. 677 (2013). *See also* M. Rato & N. Petit, *Abuse of dominance in technology-enabled markets: established standards reconsidered*?, 9(1) EUR. COMPETITION J. (2013).

[29] In the United States, Google has committed to cease seeking injunctions against a willing licensee, either in U.S. federal courts or at the ITC, to block the use of any standard-essential patents that the company has previously committed to license on FRAND terms. *See* Motorola Mobility LLC and Google Inc., F.T.C. File No. 121-0120 (July 22, 2013) at 5, *available at* http://ftc.gov/os/caselist/1210120/130724googlemotorolacmpt.pdf.

Motorola have just ended, respectively, with a settlement (commitment decision)[30] and a prohibition decision without a fine. In the *Motorola* case, in particular, the Commission has ultimately taken a more radical approach than its U.S. counterparts. It held that not only should the threat of the enforcement of an injunction (vis-à-vis its Apple decision) be regarded as abusive, but so should Motorola's insistence that Apple gives up its rights to challenge the validity by Apple's mobile devices of Motorola SEPs.[31]

Besides confirming that the U.S. and EU agencies agree on how to treat patent holds-up, these cases show that the level of convergence has significantly escalated. First, unlike the most blatant forms of patent ambushes, in these cases the deceptive nature of the conduct taken by the allegedly FRAND-pledged SEP's holder is far from being straightforward.[32] Second, the interventionist approach validated by the agencies on both sides of the Atlantic ends up frustrating an essential feature of IP rights, that is protecting the property right vis-à-vis potential infringers by exerting the fundamental right of recourse to justice.

In sum, while the supposedly FRAND-pledged nature of the IP rights at stake should not be underestimated, these cases point to a common trend consisting of a more interventionist antitrust enforcement in those areas where IPRs confer to their holders significant market power, (like in the case of SEPS) and the foreclosure effects resulting from the exercise of such rights can be accentuated by the features of the ICT industry which are conducive to market concentration—namely, direct and indirect network effects, a two-sided market structure, high R&D and fixed costs, and need of interoperability relationships between market actors

[30] *See* Commission decision of 29 April 2014, Samsung. Samsung has committed not to seek any injunctions in the European Economic Area ("EEA") for a period of five years on the basis of any of its SEPs, present and future, that relate to technologies implemented in smartphones and tablets against any company that agrees to a particular framework for licensing the relevant SEPs. The licensing framework provides for: a negotiation period of up to 12 months; and, if no agreement is reached, a third party determination of FRAND terms by a court if either party chooses, or by an arbitrator if both parties agree. An independent monitoring trustee will advise the Commission in overseeing the proper implementation of the commitments.

[31] *See* Commission Decision case of 29 April 2014, Motorola. In the decision, the Commission has found that it was abusive for Motorola to both seek and enforce an injunction against Apple in Germany on the basis of an SEP which it had committed to license on FRAND terms and where Apple had agreed to take a license and be bound by a determination of the FRAND royalties by the relevant German court. The Commission has also found it anticompetitive that Motorola insisted, under the threat of the enforcement of an injunction, that Apple give up its rights to challenge the validity or infringement by Apple's mobile devices of Motorola SEPs. The Commission has decided not to impose a fine on Motorola in view of the novel issues addressed by its decision.

[32] In the current debate over the legality of injunctions sought by SEPs holders, a prominent role is arguably played by these rights' specific features, that is the FRAND commitments taken in the context of the SSO as a precondition for the patent owner to have its patent inserted in the technology selected as a standard. However, one of the issues hotly debated in the context of the SEPs encumbered technologies and products, is whether in the context of a SSO a precise agreement has been reached about the FRAND terms and conditions under which a SEP can be licensed, or whether only an agreement in principle has been reached, i.e. without defining the exact financial terms. Some commentators also note that the problem of reverse hold-up should not be underestimated, i.e. the possibility that SEP implementers may themselves delay to agree to FRAND to extract better licensing terms from SEP holders. Under all these circumstances, the enforcers' intervention aimed at inhibiting the recourse to an injunction may unduly tip the contractual negotiation in favor of the candidate licensee.

C. Reverse Settlements in the Pharmaceutical Sector

A striking convergence is also emerging in the treatment of reverse settlements in the pharmaceutical sector.[33]

In the European Union, the Commission has not hesitated to challenge—although indirectly—the soundness of the patent rights standing behind these settlements.[34] The Commission has indeed developed a test based on what appear to be "signs of weakness" of the patents involved. In particular, based on the Commission's recent practice, two requirements have to be met in order for such settlements to be deemed anticompetitive by object:

1. The settlement agreement must somehow limit the generic company's ability to enter the market (e.g., through a no-challenge clause, non-compete clause, or the originator licenses where the generic company appoints the originating company as distributor).
2. The agreements entail some value transfer from the originator to the generic company in the form of monetary transfer or in kind (e.g. distribution agreement or license). In this context the size of value transfer is an important factor to consider (i.e. the disproportion between the payment, in whatever form, and the litigation costs and risks) because it signals there may be a profit-sharing mechanism.

While there is ostensibly no inquiry on the validity of the patent, and this issue appears to be irrelevant for the EU assessment, nonetheless, the conclusion is that—present the conditions above—there is an implicit presumption that either (i) the settlement imposes on the generic manufacturer restrictions going well beyond the scope and duration of the patent, or (ii) the patent is weak; that is the patent holder fears its patent does not meet patentability criteria (e.g., granted based on provision of incorrect, misleading, or incomplete information) and, should its patent be challenged in court by the generic manufacturer, it would likely succumb.

Present these conditions, the Agreement will be deemed anticompetitive by object with no need to prove effects. The agreement can still be exempted under Article 101 (3) TFEU, although the burden of proof is on the parties to demonstrate that efficiencies and other redeeming virtues compensate for adverse impact on competition. In practice, this means that

[33] These are commercial agreements between originators and generic competitors to settle patent-related disputes (dispute/opposition procedure/litigation) concerning the manufacturing and/or marketing of a generic version of a drug which is claimed to be protected by a patent. The theory of harm pursued by the agencies on both sides of the Atlantic is the same: delay of generic entry in return for value transfer with a view to preventing direct competition is a horizontal anticompetitive agreement similar to a price-fixing or market partitioning. i.e. a sharing of monopoly profit.

[34] While in the United States these cases have attracted since some time a lot of scrutiny, in the European Union, these cases came for the first time to the attention of DG Comp in the context of the pharma sector enquiry. To date, there are two pending investigations and two cases recently decided by the Commission: *Lundbeck* (closed with prohibition decision and fine), concerning direct payments, purchases of generic stock, and a distribution agreement when the patent was expired in return for delayed generic entry; *Servier* (recently decided), which concerns alleged direct payment when patent was about to expire in return for delayed generic entry; Cephalon & *Teva* (pending), about alleged direct payment and side deals in return for delayed generic entry; *J&J & Novartis*, recently decided, which concerns a Co-promotion deal.

present these conditions (transfer value and delay of possible entry) illegality presumption is very difficult to rebut.

This approach is by and large equivalent to the U.S. (short form) rule of reason approach recently endorsed by the U.S. Supreme Court in its *Actavis* ruling.[35] The resemblances are strong: The test applied by the Court is whether the settlement of a patent infringement suit entails a large and unexplained payment to a generic infringer. Present this requirement, the settlement can be held unlawful under the rule of reason analysis, i.e. without inquiry as to whether the patent is invalid or not, and even if the settlement does not go beyond the scope of the patent's nominal coverage. Hence, the agencies—or a plaintiff in court—have to demonstrate: i) that the payment from a branded drug manufacturer to a prospective generic exceeds the cost of avoiding litigation, and ii) likelihood of market power and competitive harm.

With respect to the latter requirements, though, the Supreme Court made clear that there is no need to conduct a full scale rule of reason analysis, which traditionally requires definition of a relevant market, demonstration of market power, and anticompetitive effects. In this case, instead it would suffice to take the (large and unexplained) size of payment as a strong indicator of market power[36] and competitive harm.[37] Which is tantamount to say that, once there is evidence of a large and unexplained payment, anticompetitive effects are somehow inherent to the settlement as such. This, in turn, is very close to endorsing an analysis by object only—like in the European Union—in order to reverse the burden of proof upon the parties to the agreement.[38]

It is noteworthy that the analytical framework endorsed by the Supreme Court in *Actavis* is midway between the agencies' radical approaches, suggesting an illegality *per se* of any reverse settlement any time a large and unexplained payment is involved, and the more deferential test that had been devised by several U.S. courts, which revolved around the "scope of the patent." The latter test is based on a presumption of patent validity, i.e. any settlement staying within the scope of the patent (e.g. keeping the generic away from the market until the patent expires) is lawful because the patent standing alone, if valid, would have kept the generic out of the market any way. Under this test, a settlement can be anticompetitive only when the patent dispute is a sham, the patent has been fraudulently obtained, or restrictions clearly go beyond the exclusionary zone of the disputed patent.

Interestingly, although it is clear that in assessing the antitrust legality of reverse settlements there is no need to evaluate the validity of the patent at stake, it is equally clear that, like in the European Union, under the analytical framework endorsed by the Supreme Court in

[35] FTC v. Actavis, Inc., 133 S. Ct. 2223 (2013).

[36] The reasoning is that in a patent dispute a patent holder would pay no more than the anticipated monopoly rents generated by the branded drug over the remaining period. This is why a large payment is indicative of market power.

[37] The reason being that a large payment would be irrational unless the branded drug manufacturer believes the generic drug would significantly reduce its monopoly profits.

[38] Moreover, in pharma cases, existence of market power and effects tend to be easy to demonstrate given that it is very common that a branded drug manufacturer holds a significant share—if not monopoly of the relevant market—and the selling price of brand-name drug is significantly higher than a generic drug, hence the effects of preventing a generic producer from entering the market on prices are significant by definition.

Actavis, antitrust concerns prevail over those of patent law in those cases where the patent is (presumed to be) unworthy of protection—e.g. in those cases where the delay in entering the market agreed in the settlement does not extend beyond the patent coverage and yet the large payment made by branded drug producer to the generic manufacturer to stay away will be taken as indirect evidence of the weakness of the patent.[39]

D. Google

The relatively moderate approach the EU Commission is taking in handling the Google investigation, by and large consistent with the line taken in the United States,[40] is an additional confirmation of this common trend.

Although the antitrust/IPR intersection is admittedly not the main focus of the investigation, among the numerous allegations raised against Google included was Google's alleged attempt to downgrade rivals' interoperability with some of its services through a number of abusive tactics. Actions included in this attempt were: (i) Google's adopting technical measures to restrict competing search engines from properly indexing YouTube links (which Google has recently acquired) on search result pages; (ii) its refusal to allow mobile telephones running Microsoft new Windows phone OS to access YouTube metadata in the same way as Android telephones and IPhones do; and (iii) Google preventing advertisers from using their data in an interoperable way with other search advertising platforms.

Interestingly, like in the United States, the EU Commission also appears to have raised concerns only in connection with the last allegation on the grounds that Google could induce exclusivity and foreclose competing search engines. The other allegations instead are likely to be dismissed, despite the insistence of several complainants claiming much more invasive remedies in the name of the essential facility doctrine—as spelt out in the *Bronner* case law—as well as the *Microsoft* doctrine.

IV. THE NCAs' PRACTICE—*PFIZER*

In the meantime, some recent decisions taken by NCAs remind us that convergence is also an issue to consider within the European Union.

The most exemplary case in this respect is the recent decision for abuse of dominance taken in Italy by the Italian Competition Authority, where Pfizer was heavily fined for having misused administrative procedures and litigation in the context of a complex strategy designed to artificially delay the entry of new generic drug competing with Pfizer's product Xalatan.[41]

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[39] For a comment on Actavis, *see* H. Hovenkamp, *Anticompetitive patent settlements and the Supreme Court's Actavis decision,* 15 (1) Minnesota Journal of Law, 3 (2013).

[40] Although the investigations on both sides of the Atlantic are heading towards a similar settlement (while the EU decision has not yet formally been adopted, the statements issued by Commissioner Almuniapoint to an imminent decision), under the EU's imminent commitment decision, Google seems to have accepted more extensive concessions mainly to address the so called "search bias" charges. Moreover, under the EU's decision some limited remedies have also been offered in connection with the scraping. Conversely, the U.S. settlement is focused on a very limited number of pure antitrust claims (i.e. the issue of exclusivity).

[41] *See* ICA Decision of 11 January 2012, n. 23194. The case has been ultimately upheld by the Conseil d'etat, Judgement of 12 February 2014, *Autorità garante c. Pfizer*, n. 09181.

Although the ICA decision explicitly refers to the abuse of regulatory procedure theory followed by the EU Commission in *Astra Zeneca,* and endorsed by the European Court of Justice ("ECJ"),[42] the facts appear somewhat different. In particular, in *Astra Zeneca* the foundation of the Commission's theory of harm was the fact that Astra Zeneca had obtained patent protection by submitting misleading information to the competent patent agency. In the *Pfizer* case, conversely, it is undisputed that Pfizer employed legal tools provided by the patent system to extend the duration of the protection (a divisional patent). Nonetheless the ICA considered that Pfizer filing an application for a divisional patent—which was a perfectly lawful act under Italian Patent Law—in combination with other conducts (such as launching judicial proceedings against the generic suppliers in order to prevent the sale of the generic, and putting in place other strategies designed to block the entry), constituted an abusive strategy designed to artificially delay a generic competitor from entering the market.

The ICA reasoning was ultimately upheld by the Administrative Supreme Court. The Judge held that a dominant company could not engage in conducts that, although legitimate pursuant to patent laws, have the sole purpose of foreclosing rivals. In this case, according to the Judge, a divisional patent was requested not to obtain a protection for an additional therapeutic use, but rather with the sole aim of extending the duration of the original patent protection and thus hinder the entrance of competitors in the market. The problem with this reading is that it violates the very essence of a patent right. If an originator has obtained a valid patent right without filing inaccurate or misleading submissions with the patent agency, he is entitled to exclude competitors in order to reap the reward of exclusivity without violating antitrust rules.[43]

The novel and alarming development of this case is that it marks a further—and more substantial—invasion of antitrust rules over the sovereign sphere of IP rights. As a result of the *Pfizer* ruling, not only can antitrust rules prevail and nullify IP rights' typical features (i.e. *ius excludendi omnes alios*) in those limited cases where it can be presumed there is something wrong with the patent in the first place (e.g. an inaccurate representation to the Patent Office); but antitrust rules can also challenge perfectly lawful patent rights in those situations where such rights are exercised—possibly in combination with other conducts—with an exclusionary intent, i.e. with a view to preventing competitors' entry. This is tantamount to saying that the existence as such of a lawful patent right is now exposed to antitrust scrutiny, for attempting to protect exclusivity and keep competitors out of the market is the most typical way of exerting a patent right.

V. CONCLUSIONS

In reconciling antitrust rules and IPRs the United States and the European Union have been traditionally regarded as two worlds apart. Under the EU's *Microsoft* doctrine—the argument goes—an IPR holder has an exorbitant duty to deal with competitors as long as it can be demonstrated that the refusal results in significant elimination of competition from the market. The reality is that, despite *Microsoft*, U.S. and EU approaches are increasingly consistent.

[42] Case C-457/10 P, *Astra Zeneca v Commission*.

[43] For a comment of the decision, *see* D. Geradin, W*hen competition law analysis goes wrong, the Italian Pfizer/Pharmacia case* (2014).

In light of the recent developments in the area of judicial injunctions and SEPs, and following the Supreme Court ruling in *Actavis* with respect to reverse settlements, it is now clear that the United States is departing from the traditional symmetry principle under which antitrust rules are applied to IPR exactly the same way as other property rights. There is, in particular, an increasing recognition that IPR cannot be antitrust exempt in an wholesale fashion, as IPRs may deserve special attention due to their specific features (probabilistic nature) and depending also on the relevant economic sector.

Hence antitrust enforcement is becoming increasingly strong when IPRs are (implicitly) judged unworthy of protection (e.g. a weak patent protecting a branded drug which, but for the settlement, would have been otherwise successfully challenged by a generic manufacturer). And it is also strong when IPRs are strong—e.g. SEPs in sectors prone to monopolization due to the specific market features (network effects, two-sided markets, switching costs, etc.).

As to the European Union, although the duty-to-deal principle set forth by the *Microsoft* doctrine is still good law and may potentially have far-reaching implications, as a matter of fact, since *Microsoft*, no cases have been decided based on this doctrine. In the meantime, in other important areas of intersection of antitrust rules and IPR, such as SEPs in the ITC sector and patent rights in the pharma sector, the Commission's cases show a significant level of consistency relative to their U.S. twin investigations. Although, admittedly, in some of the latest investigations the Commission's attitude remains bolder than the United States, the difference is more with the EU administrative enforcement model enabling the Commission to be more assertive in its enforcement action.

What is left as a potential source of inconsistency is the practice of some NCAs across the European Union, which—in an attempt to emulate the Commission's bold stance—may sometimes take decisions having disruptive effects over the very essence of IP rights.