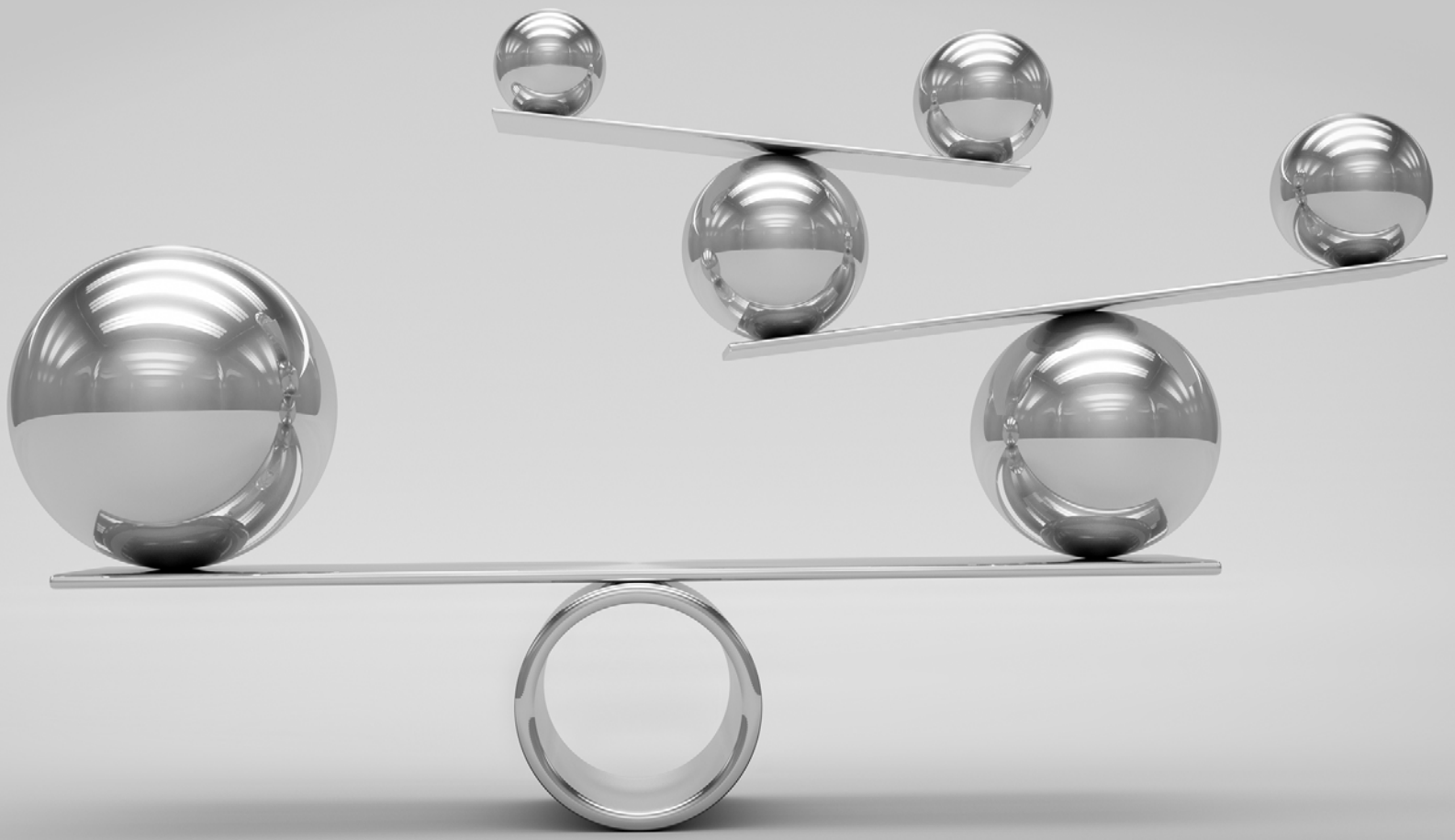
COMPETITION, INNOVATION AND INTELLECTUAL PROPERTY…THE ELUSIVE BALANCE



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I. INTRODUCTION

There is usually general agreement in international fora on the need to promote innovation and to guarantee an adequate level of reward for innovators through protection of their intellectual property rights ("IPR"). It is also widely accepted that promoting competition provides incentives for innovation and that innovation disrupts markets and creates benefits for consumers and for society as a whole. But there is significantly less consensus on the level of protection that can be extended to IP rights holders. If their rights give them substantial market power, they have the potential to cut out competition and frustrate follow-on innovation.

This is only one of the areas of disagreement and controversy within and between the various antitrust jurisdictions across the world. Because this and other antitrust issues create considerable uncertainty on how competition law will be enforced, there are constant calls from the business community for more international convergence in antitrust and a better balance between competition and IP law enforcement.

This article reviews the international landscape of antitrust enforcement, assesses the progress on international convergence and the prospects for further improvements, especially in relation to the interaction between antitrust and property rights.

II. ACHIEVING INTERNATIONAL CONVERGENCE: THE CHALLENGES

The outreach of many firms in today's world may be global but the challenge for them of dealing with the divergences between jurisdictions on antitrust law as well as protection of intellectual property remains considerable. Although most countries in the world now have competition and IP laws on their statute books, a significant minority do not. And even where these laws exist, the prescriptions and policies which stem from them are often very different, with some aiming to ensure that intellectual property rights are not undermined by antitrust action and others taking the view that sometimes the possession of IP rights gives the holders market power which they can abuse.

The institutions set up to enforce competition law, and the processes which they follow, are also very diverse. In most countries, competition agencies themselves are empowered to take direct action against anticompetitive transactions and conducts, even if their decisions are subject to review by courts. In others, a competition agency must prosecute any deal or practice before a court that takes the final decision itself.

The same diversity of approaches applies in respect of protection of intellectual property rights. In some jurisdictions, the protection available is quickly and easily obtained, and strong. In others, it is a long and complex process and enforcement is weak.

Beyond the differences between national regimes, efforts to ensure a balanced approach in the international enforcement of antitrust law on the one hand and IP law on the other, also depend for their success on the awareness of international standard-setting agencies of the implications of their decisions for competition. That is not always their first concern.

III. ACHIEVING INTERNATIONAL CONVERGENCE: THE PROGRESS SO FAR

Despite these obstacles, a lot of progress has been made over the last twenty years in international convergence of antitrust regimes. In this respect credit is due in large measure to the efforts of the OECD's Competition Committee as well as to the International Competition Network, which brings together heads of all the competition authorities in the world, together with representatives of the legal community and of business itself. The major achievements relate to the establishment of best practice standards in areas such as ***institutional design*** (in particular how to guarantee the objectivity and independence of an antitrust authority), ***due process*** (how to ensure that the rights and obligations of all parties to a competition law investigation are fully respected), the focus on ***facts-based investigations with increased use of economics and econometrics***, and ***techniques and tests of merger control*** and antitrust enforcement, especially ***action against cartels.***

These positive developments in terms of international convergence in antitrust have not always related directly to the interaction between intellectual property rights, innovation and competition. But they have had an impact in enabling antitrust agencies, patent authorities and courts throughout the world to learn from each other and develop more convergent approaches to transactions and conducts which have an impact in several jurisdictions. At the same time, there has been growing recognition of the impact that IP rights can have on the dynamic of competition (or lack of it) in the increasing number of markets in which data, information and knowledge are key parameters in determining how firms compete.

Yet even if there has been some progress, the substantive policy and procedural differences between antitrust jurisdictions still present firms with considerable obstacles when they are trading and investing in different countries.

There has been growing international acceptance of the U.S.-conceived notion of the so-called "effects" doctrine. Each national authority limits its concerns to the impacts of a transaction or conduct in its own jurisdiction. But frequently it does not make sense either for a firm or for an antitrust authority to tailor the remedies to fit the situation in each individual country. If the markets are global, or nearly global, an effective remedy must make sense for the whole market.

IV. THE IMPACT OF POLICIES AND REGULATION BEYOND ANTITRUST

If the challenges of promoting sufficient convergence among antitrust authorities were not enough, national regulation around intellectual property, as well as regulation in other policy areas such as data protection, data privacy, and national security make the picture even more complicated. In some countries, price regulation (however frowned on by market-oriented economists) has also been the chosen solution to perceived problems of excessive pricing, including fees and royalties linked to property rights.

V. PROMOTING POLICY CONVERGENCE WITHIN JURISDICTIONS

Even with any jurisdiction, it may be difficult to get more convergence, either between different policy fields or over time. The ongoing debate on the interaction between antitrust and IPR in the area of standard essential patents ("SEPs") illustrates some of the difficulties. In the U.S., some have regarded "hold-up" as the major infringement issue. More recently "hold-out" has been of more concern. In India, the Competition Commission has tended to impose some restrictions on injunctive relief for holders of SEPs but Indian courts have been more concerned to protect the rights of patent-holders.

In Europe, there are frequent differences of view within the European Competition Network (composed of National Competition Authorities and the European Commission). The most recent relate not so much to IPR issues but to how to handle possession of big data and whether to treat data privacy as a factor in an antitrust assessment given its impact on consumer welfare and choice. Perhaps these intra-jurisdictional debates and divergences simply underline the fact that many problems of international convergence reflect genuine policy choices of different authorities over time. In addition, decisions taken by antitrust authorities or courts may be decisive in their own jurisdictions but often relate to specific cases and facts which may or may not be replicated elsewhere.

VI. GUIDELINES AS A PATH TOWARDS CONVERGENCE?

In striving to promote convergence, all major antitrust jurisdictions have made attempts to produce guidelines on how antitrust laws will be applied in specific areas.

Markets are increasingly global, with complex digital systems and subsystems at the basis of many products and services, especially in the IT sector itself but also cross-cutting in all sectors. This emphasizes the importance of providing business with some ground rules as to how antitrust and IP law can positively interact for the benefit of both business and consumers. Telling business where it can innovate, expand or merge without infringing the law is arguably essential for a vibrant digital economy.

Over time, one can say that the U.S.[2] and EU Merger[3,4] Guidelines, subject to various revisions, have withstood the test of time. One could say the same thing for the EU's Guidelines on horizontal cooperation agreements.[5] The European Commission's Guidance on enforcement priorities[6] in control of abuse of dominance under article 102 TFEU has had a rougher ride although it has the merit of having narrowed down the

2 U.S. DOJ/FTC Horizontal Merger Guidelines of 19/08/10.

3 EU Guidelines on Horizontal Mergers, OJ C 31 of 05/02/04.

4 EU Guidelines on Vertical and Conglomerate mergers, OJ C265 of 18/10/08.

5 EU Guidelines on Horizontal Cooperation Agreements, OJ C11 of 14/01/11.

6 European Commission Guidelines on enforcement priorities under article 102 TFEU, OJ C 45 of 24/02/08.

definition of anticompetitive foreclosure of competitors.

The European Commission's Recent Communication on SEPs[7] covers issues such as disclosure of patents and the conditions necessary for successful injunctive relief. To that extent, it clarifies the areas where U.S. and EU antitrust authorities may reach divergent conclusions. In addition, the EU's 2004 IP Rights Enforcement Directive[8] is designed to ensure that remedies for violation of IPR remain equitable and proportionate, both from the point of view of innovators and investors and from that of implementers.

Court decisions bring some but not total clarity, for example the ECJ's Decisions on *ZTE/Huawei*,[9] and the European Commission's settlement of the *Motorola*[10] and *Samsung*[11] cases. In any event, international convergence in court decisions depends crucially on more convergence between legislators, and on more cooperation between agencies across jurisdictions. In Europe, we have regrettably too few antitrust decisions to build a coherent policy. This puts even more responsibility on the shoulders of the antitrust agencies and other agencies of government to get the policy messages right.

In India, in contrast, there is now considerable case law for example on SEP–related injunctions, including recourse to interim arrangements.

Yet there is a continuing global debate on the confrontation between antitrust and IPR. And there is a focus on whether the FRAND or non-FRAND royalties charged by patent holders are genuinely justified by the link between the patented technology and the business subsystem or system on which the royalty calculations are based. With respect to international convergence, the U.S. authorities have at least clarified many issues of process through the recently adopted International Guidelines.[12]

VII. DEVISING CROSS-JURISDICTIONAL REMEDIES IN GLOBALIZED MARKETS: SUBSTANCE AND PROCESS

More immediate progress can be made through further cooperation in devising remedies which are consistent between each other and make sense in different jurisdictions. There are still obstacles: due process, time-lines, cooperation of the parties, consent of intervening parties, incentives for forum shopping, regulatory gaming and capture, big vs small, big vs big...But progress needs to be made.

One of the key challenges today is how to intervene effectively in IT markets. On the one hand, as Jorge Padilla has emphasized at the LeadershIP conference, we need to research problems more deeply, take a holistic approach, analyze the potential problems at each layer of the value chain, look at the overall vertical impacts as well as network effects and economies of scale and scope. On the other hand, if an antitrust agency is to intervene effectively in a market, it needs to do it in a timeframe which allows it to help solve the problem as originally identified, and not impose a remedy when the market has already moved on. At the same time, it should not intervene too quickly if this risks damaging competition rather than helping it. This is a challenge shared by all agencies but it is an important one. And frequently younger agencies rush in where angels fear to tread.

VIII. THE CHANGING NATURE OF INTERNATIONAL CONVERGENCE

There has been another important development in the antitrust landscape. Twenty years ago, the debate on the potential for international convergence in antitrust, as well as in IP law, was a transatlantic one, dominated by the U.S. agencies (FTC and DOJ) on the one hand and European agencies on the other (European Commission and national European agencies such as the Bundeskartellamt). Today the debate involves a

7 European Commission Communication on Standard Essential Patents, COM (2017) final of 29/11/17.

8 EU IP Rights Enforcement Directive, 2004/48/EC, of 29/04/2004.

9 ECJ Decision, *Huawei v. ZTE*, C-170-13, of July 16, 2015.

10 Commission Decision in Case AT.39985, *Motorola*, of 29/04/14.

11 Commission Decision in Case AT.39939, *Samsung*, of 29/04/14.

12 U.S. DOJ/FTC Guidelines for International Enforcement and Cooperation, of 13/01/17.

number of agencies from other prominent countries, in particular China, India, Brazil, Korea, Japan. The UK will also soon have a separate voice from the EU. New ground (in terms of policy and case law) is being opened up in many jurisdictions. India is an obvious example. But as a result, the "comity challenge" is even more difficult than in the past. In addition, the debate twenty years ago was about international convergence in antitrust alone whereas today, as was emphasized earlier, we need to look out of the antitrust silo at the wider scope for convergence in antitrust, wider economic and social legislation, as well as intellectual property law. This requires a lot more interagency cooperation within jurisdictions even before we get started in international convergence.

Ideally there should be much more progress in convergence of law and policy. That is a long-term process with work to be done at the OECD and at the ICN as well as by standard-setting organizations. Moreover, if the effort is to have value-added, the result cannot simply be a lowest common denominator of general objectives and common processes.

IX. TOWARDS A "RIGHT" BALANCE BETWEEN IPR PROTECTION AND COMPETITION LAW ENFORCEMENT

As I emphasized at the beginning of this article, everyone seems to be in favor of competition, of innovation and of guaranteeing innovators' adequate rewards for their efforts. However, to be credible, we need to make every effort to create the right balance between protecting IP rights on the one hand and stimulating follow-on innovation, competition and consumer welfare on the other hand. Standardization can help incentivize and propagate innovation, including licensing of standard-essential patents on FRAND terms. But the challenge of finding the elusive "right balance" between IPR and competition is by no means confined to SEPs. It applies to patent protection as a whole.