CIPA informals – Competition (antitrust) law – 21 June 2021

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What is competition/law?

Competition means *commercial rivalry*, which is relied upon together with the *self-interest of entrepreneurs* to balance supply and demand in a free market economy. Competition should ensure that resources are directed to where they are the most valuable (economically)

Competition *law* is a set of binding rules designed to keep competition free.

EU Commission’s view

As expressed at UNCTAD 2014 *Roundtable on The Benefit of Competition Policy for Consumers*

> “… competition is not an end in itself. It contributes to an efficient use of society's scarce resources, technological development and innovation, a better choice of products and services, lower prices, higher quality and greater productivity in the economy as a whole.”

https://unctad.org/system/files/non-official-document/CCPB_IGE2014_RTBenCom_EU_en.pdf

Continuing relevance of EU law

- UK competition law 1988 provisions on restrictive practices and abuses of dominance were modeled closely upon EU law, the idea being to minimise the burden of compliance
- Decisions of the CJEU up to end 2020 are part of ‘retained EU law’, later decisions will be of persuasive authority on interpretation
- Retention of block exemption Regulations for UK
- EU law has ‘extraterritorial’ effect

‘Extra-territorial’ reach of EU competition law

“Qualified effects tests” – does anticompetitive behaviour have immediate, substantial and foreseeable effect in the EU? If so, EU competition law applies to conduct outside EU.

Brexit will not prevent exposure to liability under EU law in these circumstances

Iiyama v Samsung [2018] EWCA Civ 220 discusses tests applied in EU cases including *Intel* C-413/14 P, *Woodpulp* C-89/85 (implementation of cartel)

How to improve your trading position - possible competitive tactics

- Design innovative products & launch onto market
- Use clear, honest & informative labelling, ads
- Acquire & exercise IP rights
- Form contractual alliances with other market players
- Pay potential competitors to delay entering your market
- Take over or merge with other firms
- Achieve dominant position, eg 70% market share
- Abuse dominant market position, eg by refusing to deal or supply except on onerous terms

Further tactics

- Poach competitors’ best employees
- Deceive or confuse consumers by misleading promotional material
- Engage in ‘dirty’ advertising campaign, denigrating competitors
- Murder or threaten to murder competitor’s managing director

Which should be the sphere of competition regulation? And/or other areas of the law?

Forms of enforcement

Administrative – competition authorities

Civil – litigation in the courts (including UK's Competition Appeal Tribunal, or 'CAT')

Criminal – prosecutions in the criminal courts

Forms of enforcement: 'Administrative'

fines, cease and desist, and other behavioural orders

- Competition and Markets Authority (UK)
- European Commission, DG comp (EU)
  - Eg €4.34 billion re 'tying' of Google Playstore, Search and Chrome, obstructing competing apps, etc to strengthen dominance of Google search engine (AT.40099—*Google Android*)
- Commission 'ECN+' directive 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (deadline for transposition 4 Feb 2021 so not UK)

Forms of enforcement: Civil

so-called ‘private enforcement’

- litigation through the civil courts of Member States (damages, injunctions, etc; also ‘Euro defences’ have long pedigree)
- Possibility of direct and collective CAT actions in UK under Consumer Rights Act 2015 (criteria for collective actions made easier to apply by decision in *Merricks v Mastercard* [2020] UKSC 51)
- Commission Directive 2014/104/EU, implemented in UK by Claims in Respect of Loss or Damage for Competition Infringement… Regs 2017 SI 2017/104

Forms of enforcement: Criminal

- prosecution of offenders in criminal courts (fines, imprisonment)
- “cartel offence” in UK
- not EU

Competition vs unfair competition laws (and IP)

‘Competition law’ (‘anti-trust’ in US) – ensures there is *enough* competition, so that market forces, Adam Smith’s ‘invisible hand’, can operate effectively

- Underpins competitive social market economy (Art 3 and protocol 27 TFEU)
- protects competition; underlying assumption that free market competition benefits society/consumer welfare

‘Unfair competition laws’ – whether competition is of the *right kind*

- protects competitors and (indirectly) consumers

BUT, increasing emphasis on fairness (procedural AND substantive, social context) in competition enforcement

Goals of competition law

- Consumer welfare
- Competitive structure of the market
- Efficiency
- Market integration (special to EU)

Competition law applies to 'undertakings'

- Economic and legal concept of 'undertaking'

- "The concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and way in which it is financed"

Hofner and Elser v Macrotron [1991] ECR I-1979

Competition operates in a market

Seen as having dimensions of

- product market (substitutability)
- geographical market (where conditions of comp homogeneous)
- temporal market (sometimes)

United Brands [1978] ECR 207; 1 CMLR 429 (bananas)

Re technology licensing, Commission distinguishes between *technology market* (ie where licensors compete) and *product market* (ie where licensees compete)

Contractual alliances

- Restrictive agreements are regulated, eg restrictive provisions in licenses, assignments of IP, R&D agreements
- Art 101 TFEU /Chapter I of UK Competition Act
- applies to IP transactions

Consten & Grundig v Commission [1966]

Art 101 (1) TFEU: the prohibition

“The following shall be *prohibited* as *incompatible with the internal market*: all *agreements between undertakings*, decisions by associations of undertakings and concerted practices which may *affect trade between Member States* and which have as their *object or effect* the *prevention, restriction or distortion of competition* within the internal market, and in particular those which:

(a) directly or indirectly *fix purchase or selling prices* or any other trading conditions;

(b) *limit or control production, markets, technical development, or investment*;

(c) *share* markets or sources of supply;

(d) apply *dissimilar conditions to equivalent transactions* with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of *supplementary obligations* which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Art 101 (1) TFEU: the prohibition and its equivalent Chapter I of UK Competition Act 1988 as amended)

- Prohibition; directly applicable
- Parties in breach may be investigated by Commission (EU) or UK CMA, and fined
- Restrictions ‘By object’ (no need to prove effect), interpreted restrictively since *Cartes Bancaires* C-67/13 P (2014)
- But, include pay-for-delay agreements/ settlements with generic pharma companies, at least where no other explanation: Paroxetine C-307/18 (2020, CJEU) and [2021] CAT 9; Citalopram C-586/16P (2021, CJEU)

small fry –‘*de minimis*’

Volk (Franz) v Vervaecke Case 5-69 [1969] ECR 295

- Very small exclusive dealing agreement may escape prohibition if *no appreciable effect* on interstate trade

Commission’s ‘Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union’ and ‘Guidance’ ditto

- Low market shares (10% combined if competitors, 15% each for non-competitors) and absence of anti-competitive object (eg price-fixing)

Art 101(2) TFEU: the consequence

"Any agreements or decisions prohibited pursuant to this article shall be automatically void."

- Inability to enforce the restriction, and possibly the whole agreement if restriction cannot be 'severed'.

Art 101(3) TFEU: the let-out clause

“The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

— any agreement or *category* of agreements between undertakings,

— any decision or category of decisions by associations of undertakings,

— any concerted practice or category of concerted practices,

which *contributes to improving the production or distribution* of goods or to *promoting technical or economic progress*, while *allowing consumers a fair share of the resulting benefit*, and which does *not*:

(a) impose on the undertakings concerned *restrictions which are not indispensable* to the attainment of these objectives;

(b) afford such undertakings the *possibility of eliminating competition* in respect of a substantial part of the products in question.”

‘Crisis cartels’

- In the past, if a sector of the economy was in a bad way, a ‘crisis cartel’ might be justified to prevent collapse *Synthetic Fibres* [1984]
- During the COVID 19 pandemic, many agreements and collaborations (as well as subsidies) have been deemed necessary and permissible
- https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf
- https://ec.europa.eu/info/system/files/management-plan-comp-2020_en.pdf (recovery and subsidies or ‘state aids’)

‘Block exemption’ Regulations ease impact of Art 101 on ‘categories’ of agreement

- Important ones for IP have been retained, as amended to apply within the UK
- Reg 63 and Schedule 3 of The Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93, as amended by SI 2020/1343)

‘Block exemption’ Regulations

Research & Development: Reg 1217/2010 (‘R&D’)

- Useful for government/university/industry projects – can have more than 2 contracting parties. Important condition: access to results

Technology licensing (for production): Reg 316/2014 (‘Tech transfer’)

- Useful when licensing patents, knowhow, designs, plant variety rights, copyright in software, not copyright generally or trade marks. Allows a surprising range of restrictions, especially when licensor and licensee are not in competition.

Block exemption Regulations

Distribution agreements (including franchising – see Guidelines) Reg 330/2010 ('Verticals')

- Most commercial production requires a means for distribution of goods and services.
- Covers trade mark aspects of distribution

Specialisation – to rationalise industry: Reg 1218/2010

- One or more parties agree to restrict production
- Will remain effective in UK until they expire

‘Monopolisation’ – acquisition of a dominant position; merger control

Acquisition of dominant position not prohibited as such under EU/UK law, cf US. But…

Relevant to blocking or clearing of mergers, acquisitions, etc, under EU ‘Merger Regulation’ Reg (EC) No 139/2004, N/A in UK after 2020

- Test is whether ‘concentration’ is likely to be a ‘significant impediment to effective competition’

Or under Enterprise Act 2002, UK merger rules

- Test is similar – substantial lessening of competition
- Certain public interest powers to block mergers
- Important to conduct IP audit as part of ‘due diligence’

Abuse of a dominant position: *Art 102 TFEU (ex Art 82EC, Art 86EEC)*

"Any *abuse* by one or more undertakings of a *dominant position within the internal market* or in a *substantial part* of it shall be *prohibited* as i*ncompatible* with the internal market insofar as it may *affect trade between member states*. Such abuse may, in particular, consist in:

(a) directly or indirectly imposing *unfair purchase or selling prices* or other unfair trading conditions

(b) *limiting production, markets or technical development* to the prejudice of consumers

(c) applying *dissimilar conditions to equivalent transactions* with other trading parties, thereby placing them at a competitive disadvantage

(d) making the conclusion of contracts subject to acceptance by the other parties of *supplementary obligations* which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

Ch II of UK Competition Act follows

Art102 / Ch II

Note: no let-out equivalent to Art 101(3). If conduct can be justified economically, especially as meeting competition rather than stifling it, that conduct may escape the prohibition.

- Commission Guidance paras 28-31 (necessity) para 30 (efficiency)

Forms of abuse of dominance

Exploitative, eg

- unfair pricing

Exclusionary, EU Commission mainly re about this, eg

- predatory pricing
- margin squeeze, rebates
- exclusive dealing
- refusal to license or supply
- subversion of standard-setting
- misuse of SPC registration system

Discriminatory

Some cases on Art 102

- *Euro-fix Bauco Hilti AG v Commission* C-53/92 P [1994] tying, refusal to supply/license, etc
- *Volvo v Veng* Case 238/87 [1988] (spares, *special* circumstances in which may be abuse)
- *Rambus* Case COMP/38.636 (2009), standards ambush
- *AstraZeneca AB v Commission* T-321/05 [2010] upheld by CJEU Case C-457/10 P [2012], SPCs
- *Re Google Search (Shopping)* AT 39740 [2018] Search engine privileging own comparison shopping service in general results pages

Another area of competition regulation: ‘State aids’ or subsidies

Articles 107-109 TFEU

- Prohibition on Member States distorting competition by subsidies or special privileges.
- Aid allowable for research, infrastructure projects, etc: ‘General Block Exemption Regulation’ Reg (EU) 651/2014 (applicable 1 July 2014; more generous than earlier Regs)
- Specific projects may be cleared
- EU worry about ‘level playing field’ post-Brexit includes subsidies

Uncertain area for UK IP– exhaustion of rights

- Rights are ‘exhausted’ by legitimate marketing, so that movement of IP-protected goods (and sometimes services) cannot thereafter be controlled by the IP owner
- EU operates ‘regional’ exhaustion (within EEA)
- Post-Brexit, UK has operated ‘asymmetric’ or ‘unilateral’ system; regional rule in the UK but not *vice versa*

UK Government has launched consultation; 4 options but most likely are

- Continuing with unilateral system
- Full international exhaustion

https://www.gov.uk/government/consultations/uks-future-exhaustion-of-intellectual-property-rights-regime/the-uks-future-regime-for-the-exhaustion-of-ip-rights

Final remarks

Any questions?

Thank you for listening!