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Competition and Intellectual Property law – Requirements for Compliance by Enterprises

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A common thread runs through Competition policy and Intellectual Property Law as they intersect at the point of fostering innovation, efficiency, consumer welfare and economic growth.

The apparent tension between IPRs and anti-trust laws is subsumed under the modern approach of treating IPRs and competition policy as complementary to each. As the indisputable function of law is to strike an efficacious balance between the conflicting interests, States strive to achieve this with the aid of flexibilities in law, guidelines and through judicial interpretations. With the growing realization that competition which matters most is the competition on merits, the competition law authorities have begun to highlight the congruence between competition policy and intellectual property rights while endeavoring to promote a culture of Competition Compliance in Enterprises. The article discuses the various IP related issues which emerge when products enter the market with reference to recent case laws and the varied approach of major jurisdictions.

Introduction

With the proliferation of competition laws and the increased attention paid to its compliance programmes by regulatory authorities around the world, compliance with global competition laws should be a high priority for businesses everywhere. Over 100 countries across the globe now have competition legislation and the number is growing constantly.[1] National competition authorities are also becoming more established, better-resourced and increasingly proactive in enforcing their competition laws. It has become the prime responsibility of large, medium and small companies alike to comply with these regulations. Companies need to be aware of the risks of infringing competition rules and how to develop a compliance strategy that best suits their needs. An effective compliance strategy enables a company to minimize the risk of involvement in competition law infringements, and the costs resulting from anti-competitive behavior. Commitment of Business enterprises to emphasize their competition law

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1 http://www.cci.gov.in/images/media/speeches/ABA_speech_1.12.2012.pdf

compliance through, including it in their business's overall corporate responsibility or ethical trading statement has become pertinent with Competition authorities spreading their tentacles far and wide.

Competition law ensures that anti Competitive practices or transactions, either domestic or transnational do not undermine the efforts of Governments to promote economic growth, freedom of trade and consumer welfare

Competition Laws and a legal instrument for its enforcement

Competition – the process of rivalry between business enterprises for customers – is a fundamental characteristic of a flexible and dynamic market economy.[2] Evidence shows that trade liberalization, deregulation and privatization are necessary conditions for market competition and economic efficiency. In sectors not open to international competition, individually or collectively powerful domestic suppliers have an incentive to restrict competition among themselves, to abuse their market power, to create strategic barriers to entry or to expansion in limit potential competition, to swallow their competitors to diminish competitive pressure on the market.[3] The need for Competition Law arises as markets can suffer from failures and distortions of such players who can resort to anti- competitive activities[4] with the help of cartels,[5] abuse their dominant position, [6] moot irregularities in Mergers and Acquisitions[7] which adversely impact economic efficiency and consumer welfare.[8] As a contradictory measure Competition laws emerge as a cardinal principal both in the international and national arena additionally with a Competition Watchdog with the authority of ensuring Competition Compliance.

Competition law ensures that anti-competitive practices or transactions, either domestic or transnational do not undermine the efforts of governments to promote economic growth, freedom of trade and consumer welfare.[9] Competition policy is about applying rules to make sure businesses and companies compete fairly with each

2 Available at http://www.cci.gov.in/images/media/speeches/ABA_speech_1.12.2012.pdf

3 Available at http://www.oecd.org/mena/investment/38472009.pdf

4 Anti Competitive practices include Tie- ins, Patent pools, package Licensing, refusal to license, cross Licensing, R&D Agreements, Exclusive Licensing, Price Fixing, Restrictive Practices as a part of licensing, Restriction on Licensee to question validity of IP, Grant backs etc.,

5 Section 2 (c) "cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.

6 Abuse of a dominant position occurs when a dominant firm in a market, or a dominant group of firms, engages in conduct that is intended to eliminate or discipline a competitor or to deter future entry by new competitors, with the result that competition is prevented or lessened substantially available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00511.html

7 Combination under the Competition Act, 2002 means acquisition of control, shares, voting rights or assets, acquisition of control by a person over an enterprise where such person has direct or indirect control over another enterprise engaged in competing businesses, and mergers and amalgamations between or amongst enterprises when the combining parties exceed the thresholds set in the Act

8 Available at http://cci.gov.in/images/media/presentations/1vinod_dhall_16june04.pdf

9 Available at http://www.oecd.org/mena/investment/38472009.pdf

other. This encourages enterprise and efficiency, creates a wider choice for consumers and helps reduce prices and improve quality. Competition policy, which has become legally binding in India,[10] is one of the most developed areas of law in recent times. Realizing the growing significance, by 2008, 11 countries had enacted competition laws, which is more than 50 percent of countries with a population exceeding 80,000 people. 81 of the 111 countries had adopted their competition laws in the past 20 years, signaling the spread of competition law. Today the number is nearly 120 countries and still counting.[11]

Intersection of Competition and Intellectual Property law.

Many practitioners perceive an inherent tension between competition law and intellectual property law. Even though both schemes seek to promote innovation. Competition law attempts to achieve both short term competition and long term innovation, however, Intellectual property law, by contrast, generally involves the sacrifice of short term competition in an effort to promote innovation. This leads to questions of whether one legal scheme must yield to the other or, if not how one should accommodate the other. The question arises most concretely in the form of whether the exercise of Intellectual Property law and Competition law can be seen as complementary rather than antagonistic to each other. Competition law and IP laws are important, indeed essential, elements of the modern economy. [12] Both laws share the same fundamental goals of enhancing consumer welfare and promoting innovation. IP protection provides incentives for innovation and technological diffusion, which in itself is an important source of competition in the marketplace and therefore supports competition. Most of the countries have created a balance to include IP laws and competition laws as per the socio economic and political requirement of the country so as to foster innovation and enhancing consumer welfare. TRIPS (The Agreement on Trade Related Aspects of Intellectual Property Rights) Agreement the most important and comprehensive international agreement on intellectual rights provides scope for the enforcement of competition law vis-à-vis -competitive licensing practices and conditions. The key operative provisions are Articles 40[13] and 31,

10 The Competition Act was passed in 2002 and amended in 2007. The Competition Commission of India (CCI) was established on March 1, 2009 as an autonomous body comprising of a Chairperson and six members. An appellate body called Competition Appellate Tribunal was also set up in May 2009 with final appeal lying to the Supreme Court of India. It was substantially enforced from May 2009,

11 http://en.wikipedia.org/wiki/Competition_law

12 Available at www.fasken.com/files/Publication/.../OBA_Competition_and_IP.pdf

13 Article 40 of the TRIPS Agreement recognizes that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology. Paragraph 1). Member countries may adopt, consistently with the other provisions of the Agreement, appropriate measures to prevent or control practices in the licensing of intellectual property rights which are abusive and anti-competitive (paragraph 2). The Agreement provides for a mechanism whereby a country seeking to take action against such practices involving the companies of another Member country can enter into consultations with that other Member and exchange publicly available non-confidential information of relevance to the matter in question and of other information available to that Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality by the requesting Member (paragraph 3). Similarly, a country whose companies are subject to such action in another Member can enter into consultations with that Member

especially 31(k). In addition, Article 8.2[14] provides for general recognition that appropriate measures may be needed to prevent the abuse of intellectual property rights by rights holders. The provision regarding anti-competitive practices (especially Article 40) generally are permissive rather than prescriptive in nature.[15]

Rights to intellectual property such as patents, know-how, registered designs, trademarks and copyright can be highly valuable assets. Owners may seek to impose territorial or other restrictions on their licensees, and parties may well wish licenses to be on an exclusive basis. Any such limitation may be subject to the applicable competition rules. Three areas where tensions arise when competition law and Intellectual Property intersect each other are Anti-competitive licensing agreements (which include Package licensing, refusal to license, Cross licensing, Exclusive Licensing, Price fixing agreements, Pay for delay agreements, etc), Abuse of Dominant position, and foul play in mergers and acquisition. Most jurisdictions accept that, as a general principle, the holder of intellectual property has the right to refuse to license its IP if it wishes. However, a number of countries provide an obligation to license intellectual property under certain limited circumstances. In a landmark case [16] *the* United States Court of Appeals for the Federal Circuit held that it would "not inquire into the patent holder's subjective motivation for exerting his statutory rights, even though his refusal to sell or license his patented invention may have an anti-competitive effect, so long as that anticompetitive effect is not illegally extended beyond the statutory patent grant".[17] Thus the court endorsed the view that "in absence of any indication of illegal tying, fraud in the Patent and Trademark Office, or sham litigation," the patent holder should be immune from the anti-trust laws.[18] Conditional refusals to license have been treated differently than unconditional refusal to license by the courts. For example when Microsoft,[19] defended its policy of refusing to license its intellectual property except on specific terms that prevented customers from removing icons, altering the initial boot sequence, or otherwise altering the appearance of the Windows desktop. The District Court rejected Microsoft's argument that the owner of lawfully obtained intellectual property has an "absolute and unfettered right to use its intellectual property as it wishes," without giving rise to antitrust liability. The Court stated that such an argument "is no more correct than the proposition that use of one's personal property, such as a baseball bat, cannot give rise to tort

14 Article 8.2.-Appropriate measures, provided that they are consistent with the provisions of this Agreement,needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology

15 The Interface between Intellectual Property Law and Competition Law www.wipo.int/edocs/mdocs/...ip.../wipo_ip_nyc_11_ref_anderson.pptm - Cached

16 CSU v. Xerox Corporation (Xerox 203 F.3d 1322 (Fed. Cir. 2000

17 http://deepblue.lib.umich.edu/bitstream/handle/2027.42/50437/JMM%20Slippery%20Slope.pdf?sequence=1

18 http://www.rkmc.com/publications/articles/federal-circuit-closes-the-door-on-antitrust-refusal-to-deal-claim

19 United States v. Microsoft 253 F.3d 34 (DC Cir. 2001

liability".[20] FTC[21] opined in the Innovation and Competition Report that "there are circumstances in which imposing conditions for a license may be anti-competitive and that view is consistent with a long line of anti-trust cases.[22]

Another example of Court's treatment of a conditional refusal to deal arose in *Intergraph Corporation* v. *Intel Corporation*[23] and In re Intel Corporation[24] respectively. According to FTC's allegation, Intel supplied patent and copyrighted protected technical information and specifications regarding future products to customers in advance of the release date of microprocessors. However, according to FTC's complaint, Intel refused to provide advance technical information and specifications to three customers – Intergraph, Digital Equipment and Compaq – because those companies refused to grant Intel and Intel's licensees' royalty free licenses to their microprocessors related patents. Intergraph sued Intel vide a separate private suit. The Federal Circuit reversed a District Court's entry of preliminary injunctive relief against Intel, ruling that Intergraph and Intel were not direct competitors in any downstream product market and therefore Intel could not be held liable for monopolizing the market for workstations in which Intergraph competed. The FTC, in contrast, alleged that Intel's conduct had the effect of maintaining its monopoly power in the market for microprocessors by diminishing the incentives of other companies to develop new microprocessor related technologies that might erode Intel's monopoly position.[25]

In the European Union current law governing refusal to license developed through a series of three cases: *Radio Telefis Eireann and Independent Television Publications Ltd* v. *Commission (Magill)*[26],IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG [27], and Microsoft Corp. v. Commission.[28] The first case commonly known as *Magill* involved a British company, Magill TV Guide Ltd., which intended to produce a new product, namely a weekly TV guide that would have included the programming of all important broadcasting companies. At that time, each broadcasting company produced its own TV guide that included only its own programming. The broadcasting companies refused to grant Magill a license to include their TV programming within the Magill's proposed guide. Magill filed a complaint with the commission with respect to this behaviour, claiming that the other

20 http://www.nytimes.com/2000/04/04/business/us-vs-microsoft-overview-us-judge-says-microsoft-violated-antitrust-laws-with.html?pagewanted=all&src=pm

21 The Federal Trade Commission of America prevent business practices that are anticompetitive or deceptive or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish this without unduly burdening legitimate business activity.

22 US Dept. of Justice and Federal Trade Commission, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (2007)

23 195 F.3d 1346 (Fed. Circ. 1999)

24 128 FTC 213 (1999)

25 http://faculty.haas.berkeley.edu/shapiro/intel.pdf

26 Joined Cases C-241/91 P & C-242/91 P, 1995 ECR 743

27 Case C-418/01, 2004 ECR I-5039 http://www.stikeman.com/cps/rde/xchg/se-fr/hs.xsl/5812.ht

28 Case T-201/04, 2004 ECR II-446

broadcasting companies were infringing Article 102[29]. The Commission found that the action of the broadcasting company was indeed an infringement of Article 102 of the Charter of the United Nations, and instructed the companies to provide licensing rights to Magill. This decision was later confirmed by the General Court (GC) and the European Court of Justice (ECJ). The ECJ in *Magill* held that an IP holder could be liable for a refusal to license its IP if:

> (i) The refusal to license prevents the appearance of a new product which the Appellants (the dominant business) did not offer and for which there was a potential consumer demand;
>
> (ii) There is no objective justification; and (iii) The refusal puts the dominant business in a position to reserve a secondary market to itself by excluding all competition in the market.[30]

In other words, licensing arrangements likely to affect adversely the prices, quantities, quality or varieties of goods and services will fall within the contours of competition law as long as they are not in reasonable juxtaposition with the bundle of rights that go with IPRs.[31]

The Canadian Tribunal established that a unilateral refusal to license will rarely, if ever, violate the Competition Act. It has held that "the refusal to license trade-marks to competitors is nothing more than "the mere exercise of statutory rights" and thus cannot constitute an anti-competitive act under the Act's abuse of dominance provisions even if the refusal has exclusionary effects"[32]. The Tribunal will resort to the "general" provisions of the Act only if a party uses the protection afforded by IP rights to engage in conduct which goes beyond the "mere" exercise of such rights According to the IP Guidelines, the Commissioner will resort to the "general" provisions of the Act only if a party uses the protection afforded by IP rights to engage in conduct which goes beyond the "mere" exercise of such rights.[33] Most recently in *Eli Lilly* [34], the FCA (Financial Conduct Authority) applied the Competition Act to the relevant IP rights consistently with these

29 The text of Article 102 provides the following, 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 incompatible with the internal market in so far 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

30 scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1123&context...

31 The Interface between Competition and Intellectual Property Law:- A Canadian Perspective By D. Jefferey Brown. May 3 2011 available at http://www.cba.org/cba/cle/PDF/SPCOMP11_Brown_Slides.pdf

32 Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc. (1997), 73 C.P.R. (3d) 1 at 32-33 (Comp. Trib.) ("Tele-Direct"). The Tele-Direct case involved, among other things, an allegation that the dominant provider of telephone directory advertising services in Canada had abused its dominant position by refusing to license its "Yellow Pages" trade-mark to competing telephone directory advertising companies. In rejecting this allegation, the Tribunal relied upon subsection 79(5) of the Act, which is discussed below. See also Canada (Director of Investigation and Research) v. Warner Music Canada Ltd. (1997), 78 C.P.R. (3d) 321 (Comp. Trib.) ("Warner Music").

33 http://www.dwpv.com/images/The_Interface_Between_IP_Law_and_the_Competition_Act.pdf

34 Eli Lilly, [2005] F.C.A. 361.

prior decisions. To date, the Bureau has not significantly interfered with IP in policy discussions, in Federal Court cases, and at other times when it is important to bring a competition law perspective to the proceedings. However, it seems that the Bureau has exercised this mandate once only— recently in the patent case of *Eli Lilly* [35].

In the United States, both the FTC and private litigants challenged Intel's practice of refusing to supply certain copyrighted product information unless the recipient agreed to license certain patent rights both to Intel and to Intel's customers on favorable terms. No other jurisdiction challenged Intel's practices. But, the Japan Fair Trade Commission challenged similar practices of Microsoft and Qualcomm.[36]

The test for applicability of anti-trust law to a particular IP licensing arrangement will be whether it causes anti-competitive harm in a relevant market (except for the rare circumstance when an arrangement is considered to be a per se violation)

As more companies are licensing patents and copyrights in the international arena, and regulators in many countries focus greater attention to intellectual property licensing transactions, there is a rising need for regulators, practitioners and corporate counsel to understand the intersection of property and competition law in multiple countries. The test for applicability of anti-trust law to a particular IP licensing arrangement will be whether it causes anti-competitive harm in a relevant market (except for the rare circumstance when an arrangement is considered to be a per se violation).

Pay for Delay Agreements.

Yet another area of law where the two acts clash head-on is "Pay-for-delay" settlement agreements. "Pay for delay" agreements are a form of patent dispute settlement agreement in which a generic manufacturer acknowledges the patent of the originator pharmaceutical company and agrees to refrain from marketing its generic product for a specific period of time. In return, the generic company receives a consideration in the form of a payment from the originator. This practice of delaying market entry of generic drugs has been called into question both in Europe and in the US. On 19 June 2013, the European Commission announced its anti-trust decision against Lundbeck and four generic pharmaceutical companies. The Commission found that these companies had breached EU competition law rules prohibiting anti-competitive agreements[37] by agreeing to delay market entry of cheaper generic versions of Lundbeck's branded citalopram, an antidepressant, despite the patent on the citalopram molecule having expired. The Commission has imposed a fine of €93.8 million on Lundbeck and fined the generic producers a total of €52.2 million. This was the first time the Commission has penalised so-called 'pay-for-delay' settlements under the EU competition rules.[38]

35 The Competition Law and Intellectual Property Interface by Carolyn N. Naiman & Jennifer Manning Available at http://www.torys.com/Publications/Lawyers%20PDF%20Documents/AR2006-9T.pdf

36 http://www.jonesday.com/antitrust-alert—japan-challenges-essential-patent-licenses-under-anti-monopoly-act-11-05-2009/

37 Competition law developments on both sides of the Atlantic http://www.pinsentmasons.com/PDF/legal-update-pay-for-delay-agreements.pdf

38 Legality of Pay-For-Delay Settlement Agreements Available at http://thedemandingmistress.blogspot.in/2013/06/legality-of-pay-for-delay-settlement.html

In the US, the Supreme Court sought to settle the 'circuit-split'[39] regarding the legality of such agreements. While the Eleventh circuit preferred what is called the 'scope-of-the-patent' rule, the Third Circuit favored what it terms as the 'quick-look' approach. In this case[40] The Supreme Court by a 5-3 majority reversed the Eleventh Circuit, and held that the anti-competitive effects of a settlement agreement that fall *within* the scope of the patent's exclusionary potential are *neither* immune from antitrust attack, *nor* presumptively unlawful (as the FTC had argued). When determining the scope of patents' anti-trust immunity, the *settlement's potential anti-competitive effects* therefore need to be measured against *both patent law policy and anti-trust policy*, applying a *"rule-of-reason"* approach (e.g. the payment may compensate for saved litigation expenses and other services by the generic producer, such as marketing).[41] The Court's decision will probably end reverse payment settlement agreements, making generic competition less likely. Unable to settle, innovator patentees will litigate every case to conclusion, to avoid anti-trust scrutiny involving the same or similar infringement and validity questions better settled in litigation. Coupled with the FTC's position that transfer of "anything of value" from the branded drug maker to a generic competitor should also merit antitrust scrutiny, there is little advantage for either party in an ANDA **(Abbreviated New Drug Application)** lawsuit to settle and thus greater costs that should deter rather than incentive generic challenges. This is not the likely consequence that the majority envisioned.[42]

39 In the past decade, the Federal, Second, and Eleventh Circuits have upheld pay-for-delay agreements. They have emphasized the benefits of settlements, have claimed that payments fall within the "scope of the patent," and have highlighted patents' presumption of validity. In 2012, however, the Third Circuit created a circuit split by finding that pay-for-delay agreements were presumptively illegal any such payments made by a patentee to a generic manufacturer to delay the latter's entry into the market is per se unlawful as it amount to an unreasonable restraint of trade. Available at http://www.ipwatchdog.com/2013/06/18/supreme-courts-actavis-decision/id=41999/

40 Federal Trade Commission v. Actavis, 570 U.S. 2013

41 European Commission Fines Pharma Companies For Payments To Delay Generic Entry By Brittany Ngo for Intellectual Property Watch Available at http://www.ip-watch.org/2013/06/19/european-commission-fines-pharma-companies-for-payments-to-delay-generic-entry

42 Available at www.patentdocs.org/.../federal-trade-commission-v-actavis-inc-2013.html (2) There shall be an abuse of dominant position 4[under sub-section (1), if an enterprise or a group].

---(a) directly or indirectly, imposes unfair or discriminatory

—(i) condition in purchase or sale of goods or service; or (ii) price in purchase or sale (including predatory price) of goods or service. Or

(b) limits or restricts

— (i) production of goods or provision of services or market therefore;

or (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access

or

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

or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Abuse of a Dominant Position

When there is perfect competition in the market, the consumer is sovereign, as his welfare is maximized. However, monopoly is bad for the consumer and the economy. Competition law contains specific provisions against monopolistic behavior. The Sherman Act, 1890, to which the origin of competition law is traced, contains specific prohibition against monopolization. Article 82 [43] of the EU treaty prohibits abuse of dominance (AoD).

Similarly, Section 4 [44]of the Indian Competition Act, 2002, prohibits and punishes abuse of dominant position. It does not frown on dominance per se. A firm is free to grow as large as it pleases, or achieve as big a market share as it can. The problem arises only when there is Abuse of dominant position. Abuse of a dominant position occurs when a dominant firm in a market, or a dominant group of firms, engages in conduct that is intended to eliminate or discipline a competitor or to deter future entry by new competitors, with the result that competition is prevented or lessened substantially.[45] A finding of abuse of dominance-be it of an individual enterprise or that of a group-involves a three stage process. Firstly it is the determination of the relevant market which is assessed on the basis of relevant product/geographical market. Secondly it is the determination of "dominance" in that relevant market and thirdly is the determination of an "abuse" of that dominant position. Therefore, mere dominance is not a violation of the law.[46]

While correlating the approach of various countries it is seen that, US laws do not provide any safe harbor for IP licensing arrangements. The IP Guidelines state that, "absent extraordinary circumstances, the agencies will not challenge a restraint in an intellectual property licensing arrangement if:

- the restraint is not facially anticompetitive, and;
- the licensor and its licensee collectively account for no more than 20% of each
- Relevant market significantly affected by the restraint.[47]

A leading UK case[48] which dealt with the question whether refusal to license constituted an abuse of dominant position on the basis that, it was impossible for a competitor to enter or compete in the market decided that:-there

43 Article 82 is as follows: "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common 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 he 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."

44 Abuse of dominant position Sec 4. [(1)No enterprise or group] shall abuse its dominant position.]

45 http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00511.html

46 Assessment of Dominance : Issues and Challenges under the Indian Competition Act 2002 by Mr G.R. Bhatia http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=8de19f8a-5bbd-42b6-a96a-692a0f376625&txtsearch=Subject:%20Commercial

47 http://www.dwpv.com/images/he_Interface_Between_IP_Law_and_the_Competition_Act.pdf

48 Intel Corporation v. Via Technology Inc (2002) EWHC 1159

was no EU or English authority holding that a refusal to grant a license to intellectual property was an abuse in itself unless exceptional circumstances were present. It held that refusal of license would destroy *via* Technologies' chance of entry into chipset or CPU market in the UK unless it had access to Intel's patented technology, and anti-competitive in character.

The *Tele-Direct* case involved, among other things, an allegation that the dominant provider of telephone directory advertising services in Canada had abused its dominant position by refusing to license its "Yellow Pages" Trade Mark to competing telephone directory advertising companies. In rejecting this allegation, the Tribunal held that mere exercise of an IP right to refuse to license IP to a Complainant is not an anti-competitive act. Competitive harm must stem from the more than the mere refusal to license.[49] In the European Union a recent judgment of the Court of Justice of the EU ("CJEU") concerning the actions of pharmaceutical company AstraZeneca indicates that strategies involving the misuse of the patent system and pharmaceutical marketing procedures in order to exclude generic competitors and restrict parallel importations can constitute an abuse of a dominant position.[50]

Abuse of dominance is an objective concept and must be assessed on objective factors, and proof of the deliberate nature of the conduct and of the bad faith of the dominant undertaking is not required in order to identify an abuse of a dominant position. According to the CJEU, however, this does not imply that dominant companies must be infallible in their dealings with regulatory authorities and that each objectively wrong representation made will constitute an abuse. Rather, the assessment of whether representations made to public authorities for the purpose of improperly obtaining exclusive rights are misleading must be made taking into account the circumstances of each case and will vary according to those specific circumstances.

On 27 February 2008, the European Commission's anti-trust regulators fined Microsoft €899 million (about US$1.4 billion) for non-compliance with an earlier European Commission decision in 2004 ordering Microsoft to change its commercial practices which were breaching EU anti-trust rules. There were two aspects. First, Microsoft had refused to supply competitors of its work group servers with certain necessary interoperability information between Windows software and non-Microsoft group server operating systems, so preventing those competitors from developing rival products and foreclosing them from the market for work group server operating systems. Second, Microsoft had abused its position by "bundling" its Windows operating system with Windows Media Player software so that every consumer buying Windows had Window Media Player already installed on it, thereby making it harder for rivals of Windows Media Player (such as Real-Networks) to compete on-line intermediation services[51].The European Court's

49 Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc. (1997), 73 C.P.R. (3d) 1 at 32-33 (Comp. Trib.) ("Tele-Direct"). also Canada (Director of Investigation and Research) v. Warner Music Canada Ltd. (1997), 78 C.P.R. (3d) 321 (Comp. Trib.) ("Warner Music").

50 IP-rich Japanese companies may face new competition issues in Europe: CJEU's decision in AstraZeneca March 25 201 http://www.lexology.com/library/detail.aspx?g=cb7dbbef-98be-43e1-9624-90fa472fce

51 The Interface Between IP Law and the Competition Act by John Bodrug Davies Ward Phillips & Vineberg LLP (Toronto, Canada. available at http://www.dwpv.com/images/The_Interface_Between_IP_Law_and_the_Competition_Act.pdf

judgment in the *Microsoft* case will be viewed as an affirmation of the European Commission's strong stance towards Microsoft – and of its unwillingness to tolerate non-compliance with Commission rulings. In UK the OFT (Office of Fair Trading) in a landmark decision held that *Reckitt Benckiser* abused its dominant position by withdrawing NHS packs of its Gaviscon Original Liquid medicine, and was imposed a fine of £10.2m. The OFT found that Reckitt Benckiser withdrew NHS packs of its profitable Gaviscon Original Liquid from the NHS prescription channel after the product's patent had expired but before the publication of the generic name for it, so that more prescriptions would be issued for its alternative product, Gaviscon Advance Liquid. Pharmacies that receive prescriptions for Gaviscon Advance Liquid must dispense it, as it is patent protected and there are no generic equivalent medicines.[52]

Very often the licensing agreements may also be used to restrict competition between the licensor and the licensee or between a numbers of licensees. IPRs may give the right holder a market dominant position, either by virtue of the exclusive right, without more or because IPRs combined with other factors, such as, network externalities practices that satisfy to be essential facilities are deemed to be anti-competitive in nature. The indispensable requirement for invoking the doctrine is the unavailability of access to the 'essential facilities'. The only reason that the legislators have inserted the such provisions is to bring within the purview of the Acts agreements that 'may' circumvent its provisions, and permit the abuse of dominant position by the companies to the detriment of smaller firms. As such, business in dominant positions will need to take great care to ensure that their IP filing and enforcement strategies are not perceived as abusive by the regulatory authorities. In other words, licensing arrangements likely to affect adversely the prices, quantities, quality or varieties of goods and services will fall within the contours of competition law as long as they are not in reasonable juxtaposition with the bundle of rights that go with IPRs.

Any Merger & Acquisition activity (including joint ventures) which meets the turnover threshold determined by the national authorities will require prior approval from their national Competition authorities authority prior to completion, failure of which attract under the penalty of fines varying

Competition Compliance during Mergers and Acquisition

Any Merger & Acquisition activity (including joint ventures) which meets the turnover threshold determined by the national authorities will require prior approval from their national Competition authorities authority prior to completion, failure of which attract under the penalty of fines varying. This is the case if certain thresholds, set under the national merger control rules, are not met. Often, these thresholds are based upon sales, the monetary value of the transaction and/or the market share of the companies involved. The main criteria applied by the authorities in reviewing mergers, acquisitions and the formation of joint ventures is that their operation must not lead to the creation

52 Reckitt Benckiser agrees to pay £10.2 million penalty for abuse of dominance http://www.oft.gov.uk/news-and-updates/press/2010/106-10

or reinforcement of a dominant position or that the transaction under review should not have the potential to substantially lessen competition. In the event a dominant position is created or if competition is significantly reduced, the transaction may be prohibited. Alternatively, the authorities may clear it subject to certain conditions (also called commitments or remedies) being fulfilled, such as the divestment of certain assets. If the parties fail to report a qualifying transaction to the authorities, they run the risk of being fined and also of having the transaction declared null and void. In the United States merger regulation began under the Clayton Act, and in the European Union, under the Merger Regulation 139/2004 (known as the "ECMR").[53] In *SCM Corp.* v. *Xerox Corp*[54] the Court concluded that where a dominant competitor in a particular industry or market acquires a particular patent or group of patents which, in addition to those patents already owned, afford such a dominant competitor monopoly power in that industry will violate Anti-trust rules. In addition, if the intent of the purchase is to eliminate competition within the field, this will leave the dominant purchaser susceptible to antitrust violations. Similarly in the *Boeing/McDonnell Douglas* case. [55]the merger was cleared only on condition that other aeroplane manufacturers obtained non exclusive licenses to patents and underlying know-how held by Boeing. In the *Ciba-Sandoz merger* case, the European Commission's (EC.s) concerns to the parties' dominant position in the market for methoprene (an ingredient in animal flea control products) were satisfied by an undertaking to grant non-exclusive licenses on fair and reasonable terms for its production.[56]

Furthermore in cases relating to the market for gene therapy, were also resolved by a 10-year obligation to provide non-exclusive patent licenses to requesting third parties on commercially competitive terms.[57]. On 11 March 2008, the European Commission cleared Google's proposed acquisition of online advertising firm DoubleClick. The transaction, which was approved by US antitrust regulators on 20 December 2007, had been the subject of a second phase, in-depth merger investigation by the European Commission since the Commission's initial market investigation had indicated that the proposed merger would raise competition concerns in the markets for ad serving and intermediation in online advertising. The decision was based on the commission's in-depth investigation, where it was, found that Google and DoubleClick were not exercising major competitive constraints on each other's activities and the parties could, therefore, not currently be considered as actual competitors on-line intermediation services. [58]

53 Under EC law, a concentration is where a "change of control on a lasting basis results from (a) the merger of two or more previously independent undertakings... (b) the acquisition... if direct or indirect control of the whole or parts of one or more other undertakings." Art. 3(1), Regulation 139/2004, the European Community Merger Regulation

54 463 F. Supp. 983; 1978 U.S. Dist

55 For more details on this case, see, for example, Boeder T. & Dorman G.J, The Boeing/ McDonnell Douglas Merger: The Economics, Antitrust Law and Politics of the Aerospace Industry, NERA Economic Consulting, 2000 at www.wcl.american.edu/journal/lawrev/47/karpel.pdf - Cached

56 ibid Available at http://www.internationalmergerlaw.com/cases/boeing.html

57 Competition Law and Intellectual Property: Controlling Abuse or Abusing Control ? http://www.cuts-international.org/pdf/CompetitionLaw_IPR.pdf

58 Mergers: Commission clears proposed acquisition of DoubleClick by Google http://europa.eu/rapid/press-release_IP-08-426_en.htm

Recently the PRC Ministry of Commerce ("MOFCOM") approved the acquisition by Google Inc. of Motorola Mobility, Inc. under the Chinese Anti-Monopoly Law ("AML"), but imposed conditions[59] to require that Google continue to license the Android operating system and the patents acquired from Motorola in the same manner as Google currently does. MOFCOM's decision once again demonstrates China's increasing influence on merger review of global transactions. Indeed, other regulators around the world, notably in the U.S. and the EU, approved the transaction without imposing any condition. This is the third recent decision in the IT industry, after Western Digital/Hitachi[60] and Seagate/Samsung,[61] in which MOFCOM came to a different conclusion than other anti-trust authorities despite the global nature of the markets at issue.[62] As mergers of such scale is largely intended to suppress the growth of that particular sector to ensure that the incumbents enjoy abnormal profits the competition authorities around that world, including those in the developed world, monitor the market closely.

Significance of Competition Compliance Program for Enterprises

The above discussed legal battles demonstrates the need for a effective Competition Compliance Program. Compliance involves the active efforts on the part of an enterprise to comply with the provisions of the Competition/Anti-trust/Anti-monopoly Act. When an enterprise takes certain necessary and concrete steps to ensure that knowingly or unknowingly it does not infringe the provisions of the Act, it can be stated to maintain a 'Competition Compliance Programme'. A compliance programme provides a formal framework for ensuring

59 In order to alleviate such concerns, MOFCOM agreed to clear the transaction only under the followingconditions:1.Google will license Android free of charge and in open source, consistent with its current commercial practice. 2. Google will treat all original equipment manufacturers (i.e., mobile terminal manufacturers) in a non-discriminatory manner with respect to the provision of Android. 3. Google will continue to comply with the obligations Motorola currently undertakes with respect to its (presumably only essential) patents to license them on fair, reasonable and non-discriminatory (FRAND) terms. 4. Google will appoint an independent supervising trustee to supervise its performance of these conditions. The first two obligations are imposed for a period of 5 years, although Google may request MOFCOM to change or terminate them before the expiry of that period. After 5 years, MOFCOM may continue to evaluate the market conditions of China's smart mobile device and operating systems markets, and may make further decisions based on the result of its evaluation

60 MOFCOM's review of Western Digital/Viviti transaction took place,against the backdrop of the European Commission's earlier decision requiring that Western Digital divest production assets for the manufacture of 3.5 inch hard disk drives. After Toshiba had agreed to acquire those assets, the transaction was also cleared by the U.S. Federal Trade Commission.. Available at http://www.jonesday.com/antitrust-alert-lessons-from-chinas-merger-review-decisions-learned-in-recent-hard-drive-acquisitions-03-09-2012/

61 In Seagate/Samsung, MOFCOM came to the conclusion that the merger would have anticompetitive effects by reducing competitive pressure on remaining competitors and increasing the risk of their coordination. MOFCOM therefore required Seagate to maintain Samsung as an independent competitor by establishing an independent subsidiary to produce, price, and market Samsung products, and by building a wall to prevent information exchanges between Seagate and its Samsung subsidiary. MOFCOM indicated that Seagate could apply for a waiver of such conditions after one year, depending on competitive conditions then. MOFCOM's decision diverged significantly from the decisions taken in the U.S. and Europe, where the authorities cleared the transaction without any remedy.

62 http://www.mondaq.com/x/179768/Antitrust+Competition/China+Conditionally+Approves+Googles+Acquisition+Of+Motorola+Mobility.

that the business[63] as a whole, as well as individual employees and directors, comply with competition law. It can also help to identify actual or potential violations at an early stage, enabling to take appropriate remedial action.

The essential elements behind the Competition Compliance program could be summarised as the 5Cs of compliance -Commitment, Culture, Compliance know-how and organisation, Controls, and Constant monitoring and improvement

The essential elements behind the Competition Compliance program could be summarised as the 5Cs of compliance -Commitment, Culture, Compliance know-how and organisation, Controls, and Constant monitoring and improvement.[64] The conditions that ought to be concurrently met for a compliance program to be effective are:

- Real commitment to comply with competition law should be demonstrated,
- Current and potential risks facing the company should be identified,
- Internal structures, mechanisms and procedures in line with competition law should be formulated. [65]

A well formulated and adequate compliance programme should encourage good corporate citizenship.[66] Compliance Programmes will have to be custom-made for each enterprise and an "off the shelf' programme is very unlikely to serve the purpose. Practical guidelines should be made available to reflect the market position of the company It should ensure that it is of practical use on a day-to-day basis. A sophisticated legal treatise may not be the appropriate document for the employees who look after the work on a day to day basis and may not be legally trained.[67] This is to ensure that they do not knowingly or unwittingly cross the boundaries imposed by the Competition Act. Generally, it is recognized that compliance program differs according to size, sophistication and risk profile of the company. Competition Commission authorities across the world are aggressively advocating competition regulation compliance and many authorities have initiated innovative Competition Compliance Programs (CCP). Apart from leading competition enforcement jurisdictions such as

63 'business'. means any entity engaged in economic activity irrespective of their legal status, including companies, partnerships, individuals operating as sole traders. Availablebhttp://www.corporateaccountability2009.com/CAC09%20Amsterdam/Panel%20III/Hoehn%20-%20OFC%20-%20How%20Achieve%20Compliance.pdf

64 http://www.thestar.com.my/story.aspx?file=%2f2013%2f4%2f29%2fbusiness%2f13010340&sec=business

65 Availablehttp://www.theworldlawgroup.com/files/file/docs/CLIENT%20ALERT,%20NEW%20GUIDELINES%20ON%20COMPETITION% 20LAW%20COMPLIANCE%20PROGRAMS%20CHILE.pdf

66 Available at http://oft.gov.uk/shared_oft/ca-and-cartels/competition-awareness-compliance/oft1341.pdf

67 http://www.cci.gov.in/menu/ccp.pdf

Australia, USA, UK, many young and emerging competition jurisdictions have also initiated competition compliance programmes.[68] For example, Office of Fair Trading (OFT), UK has suggested a four step process for CCP comprising of risk identification, risk assessment, risk mitigation and review. Recently, International Chamber of Commerce has published "The ICC Antitrust Compliance Toolkit"[69] for providing practical guidance for larger companies and SMEs. Competition Commissions' of Unites States, Brazil, European Union, Japan among others, have published intellectual property guidelines facilitating businesses to identify acts which are anticompetitive.

Compliance Committee & Compliance Manual

To enable an effective Competition Compliance program all enterprises should constitute a Compliance Committee (headed by a senior management personal as compliance officer) comprising senior management, with ultimate responsibility of overseeing the compliance programme. The role of the Compliance Committee is to train and motivate the employees, to prepare Compliance Manual, and to conduct periodic review of the Compliance Programme. It should monitor procuring / selling activities of the enterprise from competition angle and should constantly sensitize their officials about abiding by the competition law.

A Compliance Manual should consist of a brief overview of the relevant competition rules, a statement endorsed by the Board/Management of the business, that the company aims to comply with the relevant competition rules, a bullet point list of 'dos' and 'don'ts', a clear statement that it will be a disciplinary matter if any employee breaches the compliance requirements; and details of the compliance officer or person to whom all queries on competition issues can be referred. Examples of likely violations should be incorporated in the compliance manual. It would be wise to integrate a competition compliant information management system into the overall document management system of the company. Ensure a proper recording system for all documents, minutes of meetings and other events which may provide useful evidence of non-participation in anti-competitive practices. Enterprises that have entered into agreements or are in the process of negotiating agreements, especially agreements with competitors should take precautions to ensure that they remain on the correct side of law.[70] Periodic evaluation of Compliance Program is should be conducted to keep it relevant and working

A dynamic environment necessitates active risk management. By building a culture of compliance based on ethics and performance, companies can reinforce their reputation with their customers, investors and wider public and become a source of pride and motivation for their employees. To achieve this, the enterprise should consider having an active training program that includes instruction by knowledgeable professionals having expertise and experience in corporate compliances. The training should be as practical as possible, including case studies drawn from the enterprise's actual experiences. It should also highlight the consequences of violations. Effectiveness of a Compliance Policy will be enhanced if it

68 www.cci.gov.in/Newsletter/Newsletter_jan.pdf ICC Antitrust Compliance Toolkit available at http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/competition/icc-antitrust-compliance-toolkit/

69 www.iccwbo.org/advocacy...of.../icc-antitrust-compliance-toolkit

70 http://www.cci.gov.in/menu/ccp.pdf

is linked to an enterprise's human resource (HR) and disciplinary policy. This would prompt employees to attach seriousness to the compliance issues. Besides, this would reflect the seriousness of the management to compliance, as far as the competition authority is concerned. Different levels of infringements can be dealt with by increasing levels of sanction, resulting ultimately in dismissal for the most serious infringement.

The benefits of Compliance and Costs of Non Compliance

While achieving a culture of competition law compliance, requires an investment by the business, including a real commitment of management time, the benefits of this investment far exceed the cost. Having an effective culture of compliance with competition law will help a business to avoid the many adverse potential consequences of competition law infringement including the following:

- financial penalties of up to 10 per cent of group turnover[71]
- adverse reputational impact (business and personal) associated with having committed a competition law infringement
- director disqualification orders for the directors of infringing companies[72]
- criminal convictions for those individuals involved in a cartel
- considerable diversion of management time and the incurring of legal costs in order to deal with investigations by competition authorities [73]
- unenforceability of restrictions in agreements that infringe the law, and
- lawsuits from those who have suffered harm as a result of the infringement.

The early detection and termination of any violations that have been committed by the business in appropriate cases, allows immunity or leniency applications to be made, potentially helping to reduce or eliminate financial penalties.[74] It helps employees recognize the potential signs of violating competition law. The employees mature into confident player of the game aware of 'the rules of the game' and are able to compete vigorously for business without fear of violating competition law, as well as recognizing when they should seek legal advice on potential competition law issues, as an effective culture of competition law compliance is an essential part of an ethical business culture, which can provide reputational advantages.[75]

The legal, economic and reputational risks of non-compliance to companies and their directors and officers outweigh any advantages. In addition to civil or criminal proceedings for non compliance, it can expose a business to significant fines or administrative monetary penalties and recovery of damages under the Competition Act. In addition, most countries have procedures in place to certify class action proceedings; it is common to see such actions filed when an offence has been committed under the Competition Act. Firms involved in anti-competitive behavior may find their agreements to be unenforceable.[76] *Non-compliance can also result in negative publicity, loss of management time, significant legal costs and a prohibition from*

71 http://www.cci.gov.in/images/media/presentations/RajinderKumarCompetitionCompliance.pdf

72 http://www.ipvancouverblog.com/canadiancompetitionlaw-competitionlawcomplianceprograms

73 http://www.ics-shipping.org/Competition_Law_Compliance_Policies.htm

74 http://oft.gov.uk/shared_oft/ca-and-cartels/competition-awareness-compliance/oft1341.pdf

75 ibid

76 http://www.cba.org/cba/newsletters/addendum04-07/PrintHtml.aspx?DocId=23873

participating in government bidding processes. In addition to, or in lieu of, fines, individuals convicted of criminal offences may be sentenced to a period of imprisonment. [77]

Conclusion

As the global economy races towards an information-based economy, the value of intellectual property continues to play an increasing role as the driving force behind future licensing, merger and acquisition activities. Indeed, it is anticipated that intellectual property will be the dominant force in future commercial transactions endeavors. Competition Law too is hugely significant as a building block for economic development. The competition authorities need to ensure the co-existence of competition policy and IP laws since a balance between both laws would result in an economic as well as consumer welfare. Success in building a competition culture has obvious benefits for enforcement: businesses will more readily comply voluntarily with the competition law; businesses and the public will more willingly co-operate with enforcement actions, by providing evidence and the like; and policy makers will more enthusiastically support the mission of the competition agency.

As it is evident that a culture of Compliance of the Competition Law is beneficial for enterprises in many aspects it needs to be part of a company's overall ethical business agenda. It is the prime responsibility of large, medium and small companies alike to comply with these rules. Companies need to be aware of the risks of infringing competition rules and how to develop a compliance strategy that best suits their needs. From a commercial point of view, it is a choice between adopting a CCP or facing the risks of ever increasing costs of legal proceedings, considerable time and resources to be wasted in defending such proceedings, imposition of heavy penalties and loss of reputation and business. Active and well managed compliance programmes can be beneficial in terms of knowledge sharing, risk assessment and as an outward demonstration of management commitment to the issues. Above all, they help to establish what the competition authorities want to see within businesses: "a culture of compliance". Beyond these benefits the best reward for a good compliance strategy is not infringing the law. However, law evolves, procedures and regulations are regularly streamlined and views and outlook on issues change. A static policy towards risk management through Compliance Program may not serve the purpose; it may even turn out to be counterproductive.

Last, but by no means least, the compliance program should receive not only the attention of employees but should also be put up for periodic review by the Board of Directors. Competition compliance programmes cannot succeed without the unambiguous commitment of top management of the company. To make it more effective the Competition Commission of India is contemplating of requesting SEBI (Securities and Exchange Board of India) to include effective competition compliance in their listing. Good corporate governance has far reaching leverage and valued by the markets. This is a new but critical component of governance and while assisting enterprises ward off the unfriendly eye of the Competition Authorities will indeed pay dividends in the long run.

77 http://www.out-law.com/page-5811www.theiacp.org/LinkClick.aspx?link=196&tabid=140