



**Competition policy and the TRIPS Agreement: more guidance needed? Where might we look? What insights from policy evolution at the national level?\***

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**\*This presentation is made in a personal capacity. The views expressed should not be attributed to the WTO, its Secretariat, or any of its Members.**



## **Contents of presentation**

- The role of competition policy in the TRIPS Agreement: what is clear from the Agreement**
- Questions left unanswered**
- Relevant economic principles**
- Lessons from policy developments in North America and Europe**
- Issues for reflection**



## Speaker's key premises/themes (1)

- ❑ **Competition policy is an important counter-balance to intellectual property rights.**
- ❑ **Yet, the application of competition law in this area should be approached with considerable caution, as the issues are complex.**
- ❑ **The TRIPS Agreement provides broad discretion to WTO Member governments in the policies that they adopt in this area – however, it also leaves unanswered some important questions. To answer these questions, we must look to: (i) economics; and (ii) the evolution of policies in the major jurisdictions with experience in this area.**



## Speaker's key premises/themes (2)

- Hence, there is a need for further study and reflection on appropriate public policies in this area. A question for reflection is whether some kind of international guideline may eventually also be needed/warranted.
- Important also to recognize that well-designed IP systems can address some competition concerns "internally", e.g. through strict application of patentability criteria. This highlights the importance of competition agencies' involvement in IP policy-making via their "advocacy" efforts.



# **I. Relevant provisions of the TRIPS Agreement**



## Historical recognition in the WTO of the role of competition policy in balancing the exercise of IP rights

- ❑ Concerns regarding the potential for anti-competitive abuse of rights protected under the TRIPS Agreement were voiced by many countries (especially developing countries) during the negotiation of the Agreement.
- ❑ Consequently, the TRIPS Agreement provides scope for the enforcement of competition law vis-à-vis anti-competitive licensing practices and conditions.
- ❑ The key operative provisions are Articles 40 and 31, especially 31(k). In addition, Article 8.2 provides general recognition that appropriate measures may be needed to prevent the abuse of intellectual property rights by rights holders.
- ❑ The provisions regarding anti-competitive practices (especially Article 40) generally are permissive rather than prescriptive in nature. Exception: right to consultations under Article 40.3.



## **Relevant provisions of the TRIPS Agreement: Article 40**

- ❑ Recognizes that licensing practices that restrain competition may have adverse effects on trade or may impede technology transfer/diffusion (Article 40.1).**
- ❑ Permits Members to specify anti-competitive practices constituting abuses of IPRs and to adopt measures to prevent or control such practices (Article 40.2). Such practices may include exclusive grantbacks, clauses preventing validity challenges and coercive package licensing.**
- ❑ Note: the list of anti-competitive practices that may be addressed in Article 40.2 is a non-exhaustive list.**
- ❑ Measures adopted to address such practices must be consistent with other provisions of the Agreement (also spelled out in Article 40.2).**



## **Relevant provisions of the TRIPS Agreement: Article 31**

- ❑ Sets out detailed conditions for the granting of compulsory licences aimed at protecting the legitimate interests of rights holders.**
- ❑ Provides for the non-application of two such conditions where a compulsory licence is granted to remedy “a practice determined after judicial or administrative process to be anti-competitive” (Article 31(k)).**
- ❑ The conditions which may thereby be rendered non-applicable include: (i) the requirement to first seek a voluntary licence from the right holder (Art. 31(b)); and (ii) the requirement that use pursuant to a compulsory license be predominantly for the supply of the domestic market (Art. 31(f)).**





## Relevant provisions of the TRIPS Agreement: questions left unanswered

- ❑ The set of other practices (beyond those referred to in article 40.2) which may constitute actionable abuses under Members' competition laws.
- ❑ The standards under which such practices should be reviewed (e.g. per se or “rule of reason”).
- ❑ What constitutes an adequate “judicial or administrative process” for purposes of Article 31(k)?
- ❑ The appropriate remedies to be employed (beyond the general requirement of consistency with other provisions of the Agreement).



## **II. The basic relationship between competition policy and IP: what economics tells us**



## **What economics tells us (1): the basic relationship between IP and competition law**

- ❑ The goals of IP law (broadly): promote innovation, creativity and the diffusion of new inventions/creative works.**
- ❑ Basic role of competition (antitrust) law: to prevent/remedy anti-competitive practices that harm economic efficiency/consumer welfare. NB: modern approaches to competition law recognize the importance of dynamic as well as static aspects of efficiency.**
- ❑ The old perception of the relationship between competition law and IP: intrinsic conflict, IP a “statutory monopoly”, hostile to the goals of competition law.**
- ❑ The modern perception: IP and competition law goals are consistent and compatible. Conflicts likely to arise only in a minority of cases – in which competition law intervention may indeed be needed to promote the underlying common goal of efficiency/consumer welfare.**



## What economics tells us (2): the competitive significance of IP and related practices

- ❑ For purposes of competition law, IP is “essentially comparable” to other forms of property rights – i.e. not intrinsically harmful or suspect. In fact, well-constituted IP systems generally serve to promote competition in the dynamic sense.
- ❑ In most (not all) cases, there are potential substitutes for individual IPRs. Hence, they do not create “market power” as recognized under competition law. Possible exceptions: blocking patents, patents reinforced by a standard, “killer portfolios” of potentially substitutable patents.
- ❑ Many of the IP licensing practices which we previously thought of as intrinsically restrictive (e.g. tying, field-of-use restrictions, even grantbacks) are not necessarily harmful in all cases.
- ❑ Hence: requirement for a “rule of reason” approach to carefully identify circumstances where competition is truly impeded.



### **III. The evolution of competition policy approaches to IP in major jurisdictions: basic issues of doctrine and policy, and possible insights for international deliberation**



## **Evolution of approaches in North America (1): historical perspective**

- Overall: far-reaching evolution of competition law standards and enforcement approaches based on improved understanding of the role of IP rights and licensing arrangements, over time.**
- 1960s and 70s: major efforts to constrain the exercise of IP rights and the use of “restrictive” licensing practices in the U.S. and Canada (era of the “Nine No-No’s”).**



## Evolution of approaches in North America (2): historical perspective (cont'd)

- ❑ 1980s: relaxation of enforcement policies based on improved understanding of the role of IPRs/insights of the “Chicago School”.
- ❑ 1990s/2000s: consolidation of modern enforcement approaches in relevant enforcement guidelines; broaching of new enforcement issues relating to network industries, “patent thickets” and the “new” economy.
- ❑ 2006 *Independent Ink* case (US Supreme Court): presumption of market power in IP tying cases over-ruled.
- ❑ 2009: Obama Administration signals a tougher approach (strengthened competition law enforcement) as compared to past (Bush administration); intellectual property a key concern. Yet, underlying principles of analysis not radically different.



## **Evolution of approaches in North America (3): current US enforcement developments**

- ❑ **FTC pharmaceutical patent settlement cases**: concern over agreements delaying entry by generic competitors (may be fine for the companies, but what about consumers?) Possible implications for international public health objectives?
- ❑ **Standard setting and abuse of dominance**: several cases involving failure to disclose relevant patents or applications to a standard-setting organization.
- ❑ **Early 2009: US Assistant-Attorney General Christine Varney repudiates past (Bush Administration) approaches to single-firm monopolization; signals tougher approach. Shares FTC concern re: patent settlements.**





## **Evolution of approaches in Europe: key policy and enforcement developments (1)**

- ❑ IP licensing practices a central concern of EC/EU competition policy since the early days of the Communities (much attention given to relevant guidelines).**
- ❑ Pathbreaking jurisprudence on exhaustion of IP rights.**
- ❑ Somewhat more interventionist approach than US to refusals to license (e.g. in *Magill TV* and *IMS Health*). Contrast with US Supreme Court decision in *Trinko* case.**
- ❑ Pro-active enforcement stance in Microsoft/other cases (sometimes engendering conflict with US).**



## **Evolution of approaches in Europe: key policy and enforcement developments (2)**

- Mid to late 2000s: re-vamping of enforcement policies in line with “more economic approach”.**
- 2009: major report on competition in pharmaceutical sector entailing many IP-competition issues.**
- Most recently: continued focus on IP evident in new guidelines on horizontal co-operation agreements.**



## **Evolution of policy approaches in major jurisdictions: some reflections (1)**

- ❑ IP a central focus of enforcement and policy advocacy efforts of competition authorities of established jurisdictions “from the beginning”.**
- ❑ Far-reaching evolution of enforcement policies over time, based on economic learning and policy experience.**
- ❑ Competition policy-IP interface possibly the most complicated aspect of competition law and policy. Both under and overly-aggressive enforcement stances entail costs.**



## **Evolution of policy approaches in major jurisdictions: some reflections (2)**

- ❑ Risk of conflicts of jurisdiction/remedies in some cases. Limited examples thus far but recall that more than 100 countries now have competition laws. Future may be different.**
- ❑ Important also to recognize that well-designed IP systems can address some competition concerns "internally", e.g. through strict application of patentability criteria. This highlights the importance of competition agencies' involvement in IP policy-making via their "advocacy" efforts.**



## **IV. Summary/questions for debate**



## Summary: questions for debate (1)

- Do the relevant provisions of the TRIPS Agreement provide sufficient guidance for Members with respect to the treatment of anti-competitive practices in this area, given the importance of technology licensing and IP in the context of the “knowledge-based economy”? In particular:
  - Is further guidance desirable with respect to the evaluation of licensing practices, given the risks involved in both overly lenient and overly strict approaches?
  - What about the “new generation” of competition policy issues in this area – e.g., issues concerning “patent thickets”, pooling, settlements and standards?
- What form might such guidance take?



## Summary: questions for debate (2)

- What to do about the potential for international conflicts of jurisdiction in major antitrust cases with an IP dimension? Will a “lead jurisdiction” or similar approach eventually be needed, or will international capacity building/voluntary guidelines suffice?**
- How to ensure needed input from competition agencies/advocates to IP policy formulation at the international as well as the national level?**



## **For further reading**

- Robert D. Anderson, “Competition Policy and Intellectual Property in the WTO: More Guidance Needed?” in Josef Drexler, ed. *Handbook on Intellectual Property and Competition Policy* (Edward Elgar: 2008).**