D. Patent Pools and the Interface between Intellectual Property Rights and Antitrust Law

The legal treatment of patent pools lies at the crossroads between intellectual property rights, as conferred upon the different patent holders who contribute their technologies to the pool for a consideration, and antitrust law,[72] as these kinds of license agreements may fall under the scrutiny of competition authorities, to the extent that they may represent a significant obstacle to competitors seeking access to the relevant contract product or technology market,[73] where concerns arise due to the collective pricing of pooled patents and to the regrouping of a large number of parties, which may entail greater possibilities for collusion.[74]

72 For a comprehensive study focusing on the wider and complex interface between IP and competition law, in the current global context, see i.a.: Drexl J., "Research Handbook on Competition and Intellectual Property Law", Edward Elgar Publishing, 2008; Ullrich H., "The Interaction between Competition Law and Intellectual Property Law - An Overview", In: Patent Pools: Approaching an Intellectual Property Problem via Competition Policy, 2007, p. 305 *et seq.*; Anderman S., "The Interface Between Intellectual Property Rights and Competition Policy", Cambridge University Press, 2007; Ghidini G., "On the 'Intersection' of IP and Competition Law", "Intellectual Property and Competition Law: The Innovation Nexus", Edward Elgar Publishing, 2006, p. 99 *et seq.*

73 The former defined in the Commission Regulation (EC) No. 772/2004 of 27 April 2004 on the application of Art. 81 (3) of the Treaty to categories of technology transfer agreements, OJ 2004 L 123/11 (hereinafter TTBER), available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&model=guicheti&numdoc=32004R0772; Art. 1, para. 1, lett. F "contract product", as products produced with the licensed technology. Besides, the relevant technology and product market are defined, with regard to competing undertakings, in the same article 1, respectively under lett. J (i) "competing undertakings on the relevant technology market, being undertakings which license out competing technologies without infringing each other' intellectual property rights (actual competitors on the technology market); the relevant technology market includes technologies which are regarded by the licensees as interchangeable with or substitutable for the licensed technology, by reason of the technologies' characteristics, their royalties and their intended use" and lett. J (ii) "competing undertakings on the relevant product market, being undertakings which, in the absence of the technology transfer agreement, are both active on the relevant product and geographic market(s) on which the contract products are sold without infringing each other' intellectual property rights (actual competitors on the product market) or would, on realistic grounds, undertake the necessary additional investments or other necessary switching costs so that they could timely enter, without infringing each other' intellectual property rights, the(se) relevant product and geographic market(s) in response to a small and permanent increase in relative prices (potential competitors on the product market); the relevant product market comprises products which are regarded by the buyers as interchangeable with or substitutable for the contract products, by reason of the products' characteristics, their prices and their intended use".

74 For a broader overview, see *i.a.*: Hovenkamp H., *et al.*, "IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law", 2002, para. 34, p. 34 *et seq.*

I. Confuting the Traditionally Perceived Antagonism between Patent and Antitrust Law: Introducing the Concept of "Competition of First Level" and Refuting the Idea of "Patent Monopolies"

Traditionally, it was believed that there is an inherent conflict between intellectual property, which grants exclusive rights, and antitrust law, that prohibits monopolies, with these two disciplines also pictured as "antagonists". However, said assumption is based on the misleading association and confusion of "monopolies", on the one hand, which are actually situations of fact where there are no alternatives on the relevant market, and "exclusive rights", on the other hand, which are conversely situations where the law confers a certain exclusivity of exploitation, both temporarily and territorially defined, on the right holder, as a consideration of the undertaken endeavours, without this being necessarily followed by a situation of market monopoly,[75] with foreclosure of actual "alternatives", as previously considered.

Indeed, the view is taken that where patent protection is provided and in the interplay between offer and demand, substitute technologies are generally available as valid alternatives, since "competition of first level" - i.e. at the stage where research and development take place - may be in its turn rather enhanced by the perspective of a return of investment, provided by the niche of exclusivity which intellectual property confers upon the right holder in the marketplace - i.e. where "competition of second level" finally occurs.

Hence, IP protection provides a valuable incentive for distinctive players to breed their ideas and step in, eventually challenging already established contenders, thereby supplying the market with alternative choices. Thus, patent exclusivity typically does not coincide with market monopoly.[76] This important distinction, which has been duly endorsed by a qualified doctrine, addresses a fundamental legal issue lying at the very heart of patent protection. Putting it in quite simple terms: "patent rights are not legal monopolies in the antitrust sense of the word. Not every patent is a monopoly and not every patent confers market power".[77]

Whereas IP rights "as such" do not create privileged realms of "economic monopolies", as legal oasis detached by the surrounding harshness of competition - since

75 For a critical, analytic approach on the issue, see i.a.: Drexl J., "The Relationship Between the Legal Exclusivity and Economic Market Power: Links and Limits", In: Ullrich H. and Govaere I., "Intellectual Property, Market Power and the Public Interest. Brussels, 2008, p. 13 *et seq.*

76 In this sense, see i.a.: Clifford A., "Patent Power and Market Power: Rethinking the Relationship Between IP Rights and Market Power in Antitrust Analysis", In: Drexl J. ed.: Research Handbook on Intellectual Property and Competition Law, Cheltenham, UK, Northampton, MA, USA, Edward Elgar, 2008, p. 239 *et seq.*; Ullrich H. and Govaere I., "Intellectual Property, Market Power and the Public Interest. Brussels", 2008.

77 Harmon R., "Patents and the Federal Circuit", Sect. 1.4 (b), 5 ed. 2001, p. 21. Also sharing the same fundamental perspective, see *i.a.*: Pitofsky R., "Challenges of the New Economy: Issues at the Intersection of Antitrust and Intellectual Property", Antitrust Law Journal, 2001, p. 913 *et seq.*

patent protection, as considered, typically allows the entrance of independent and innovative substitute products into the market - in some particular circumstances, it may occur that the market power enjoyed by IP holders reaches unintended dimensions, resulting in an actual foreclosure of third party competition, thus leading to a "de facto" monopoly. In other words, depending on the availability of substitute technologies on the relevant market, exclusive rights may ultimately lead to market power and even monopoly as defined under competition law. In such a scenario, expected business dynamics is endangered[78] and the delicate balance between competition and IP law shall be accordingly re-adjusted, eventually by carefully delineating the specific circumstances in which antitrust remedies should intervene to correct the unwanted impasse that occurs when, for the concurrence of encountered factual and economic circumstances, patent protection grows beyond its foreseen conventional scope.[79]

II. Matured View of Complementarity between IP Protection and Competition

Here, the question to be dealt with is whether an intervention of antitrust law to correct a patent misuse may be pertinent and, eventually, desirable.[80] Concerns stem from the debated "intersection" between intellectual property and competition law, with their deriving conflicts, traditionally rooted in the seeming antinomy of the respective direct goals of the named disciplines: promoting innovation through the attribution of exclusive rights, on the one hand, and preserving open access to the market, on the other hand.[81] However, we may be merely confronted with an apparent source of conflict, because at the highest level of analysis, IP and competition law may well serve "complementary" scopes,[82] as they both ultimately aim at promoting consumer welfare and, in different ways, innovation.

78 For a broader, critical approach on the issue, see i.a.: Ghidini G., "Patent Protection of Innovations: A Monopoly with a Wealth of Antibodies", In: "Intellectual Property and Competition Law: The Innovation Nexus", Edward Elgar Publishing, 2006, p. 13 *et seq.*

79 Along the same line: Ghidini G., "Exclusive Protection and Competitive Dynamics of Innovation: Striking a Balance", *supra*, fn. 78, p. 23 *et seq.*

80 For a thorough review on the matter, see: Ullrich H., "The Interaction between Competition Law and Intellectual Property Law: an Overview", European University Institute - Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop, 2005, Introduction, p. 1 *et seq.*, available at: http://www.iue.it/RSCAS/Research/Competition/2005/200612-CompUllrichOVERVIEW.pdf

81 Ghidini G., "On the Intersection of IPRs and Competition Law with Regard to Information Technology Markets", European University Institute - Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop, 2005, Introduction, p. 1, available at: http://www.iue.it/RSCAS/Research/Competition/2005/200510-CompGhidini.pdf

82 Lowe P., "Intellectual Property: How Special Is It for the Purposes of Competition Law Enforcement?", European University Institute - Robert Schuman Centre for Advanced Studies,