2. Competition Law and Intellectual Property Rights

The goals of intellectual property and competition law are most often convergent. They share in the common purpose of promoting innovation and enhancing consumer welfare - also both areas of law are based on principles of efficiency.[57] As identified by *Fine* under the heading *"EC Competition Law on Technology Licensing",* as a starting point competition and innovation are therefore complementary rather than exclusive.[58] However, the two statutory frames also contain opposing elements. While the very objective of patents is to foster innovation by creating competitive advantage through exclusive rights, competition law, on the contrary, seek to eliminate any behaviour and practices that may restrict trade, something that in turn may discourage companies from investing in innovation. It is out of the friction between these two opposing and different goals that conflicts may arise.

Under the classical theory, a market[59] is defined as a self-regulating structure that balances demand and supply. Individual buyers and sellers have no power over the market and therefore they cannot directly influence the market price. This is important, as a competitive market allows for the enhancement of efficiency through maximizing consumer welfare and achieving the optimal allocation of resources and truly works at the equilibrium point where demand and supply are met.[60] Under this theory, a market is subject to a perfect competition; efficiency is automatically maximized and therefore cannot be improved through the application of competition rules.[61]

However, in reality, markets do not possess all the characteristics required for perfect competition. A truly competitive market only exists in theory not in reality, where several external factors influence the market. In reality, there is always a risk of the market transforming into a closed and monopolistic market[62] that

57 Frank L. Fine, *The EC Competition Law on Technology Licensing*, Sweet&Maxwell Ltd., London, 2006, p.14.
58 Ibid.
59 "*Market*"in the present context shall mean any market or markets irrespective of their nature and form.
60 Alison Jones & Brenda Sufrin, *EC Competition Law Text, Cases, and Materials,* Oxford University Press, third edition, 2008, p.3-10.
61 Ibid, p.7.
62 *E.g.* markets with high entry barriers.

works ineffectively. The underlying strategy of a monopolistic undertaking is to increase prices in order to maximize profits and thus decrease the overall size of the market instead of increasing supply, without having to take the interests of competitors and consumers into account.[63] This arguably may lead to excessive prices in the market place, which is the most obvious way in which a dominant undertaking usually will try to exploit its position.

Conversely, as analysed by *Jones* and *Sufrin,* even if economic theories demonstrate that dominant companies' pricing is likely to be higher than those operating in competitive markets, it is often argued that free market economy needs the lure of monopolistic pricing and price regulation is therefore seen rather as the antithesis of the underlying principles of a free market.[64] Furthermore, as argued by same authors, "*excessive pricing may be pro - rather than anti-competitive because high prices and profits may act as a signal to attract new competitors on to the market."*[65] Where this is not occurring, because of high entry barriers, the spectre of competition authorities and courts acting as price regulators looms.[66]

Accordingly, under European antitrust principles, it is normally left to the markets to regulate the prices, as long as the market itself is functioning. In the context of technology licensing this means that, if a potential licensee considers that the offered royalty rate is excessive, he eventually has to withdraw from using the patented technology in question. In turn, if the licensee does not accept the royalty rates offered to him by the patentee, the patentee must reconsider his pricing strategy. However, as stated above, if the market is not able to handle excessive pricing by itself, competition authorities and courts have to intervene and correct the situation.

Competition law has played an important role in the creation of the common market within the European Union. Accordingly, EC competition law serves two masters: on the one hand, the maintenance of effective competition and, on the other hand, the imperative of increased single market integration.[67] The Treaty of Lisbon has repealed Article 3(1) (g) EC, which listed one of the EU's objectives as the implementation of "*a system ensuring that competition in the internal market is not distorted*" and the new Article 3(3) TFEU states: *"The Union shall establish an internal market. It shall work for the sustainable development of*

63 Supra note Alison Jones & Brenda,. p.8-10.
64 Ibid, p.586.
65 Ibid.
66 Ibid.
67 Ibid, p.42.

Europe, based on balanced economic growth, price stability, high competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance". Some commentators have expressed concern that this change in wording will undermine the Commission's ability to enforce competition law and that it will alter the European courts' interpretation of the relevant Treaty provisions relating to competition law. However, there is still mention of "*ensuring that competition is not distorted*" in a new legally binding Protocol on Internal Market Competition which powers the Union to take competition actions under Article 352 TFEU if necessary. The real effect of this change may be limited therefore.

It is sometimes argued that the objectives of EC competition law have never been precisely articulated in any formal document or decision by relevant organs of the European Union. Therefore, the question of what the true aims of EC competition law are, is actually widely debated.[68]

This controversial aspect of antitrust law and IPR`s have particularly been discussed by *Etro* in his book *"Competition, Innovation, and Antitrust, A Theory of Market Leaders and Its Policy Implications*". In essence, *Etro* argues that while antitrust legislation was written with the purpose of benefiting consumers, when applied in practice it has sometimes been biased towards market leaders and been applied more in defence of their competitors rather than in the interests of consumers.[69] Thus, as argued by *Etro,* even if one accepts that the goal of competition law is to achieve efficiency and maximize consumer's welfare, there is an increasing tendency within a number of different jurisdictions towards using competition rules to protect competitors. This in turn, naturally causes a lot of uncertainty, in particular, within innovative markets. As stated by *Etro* "*the competition in high-tech markets is dynamic in the sense that it takes place in a so-called winner-takes-all race*."[70] In such a setting, companies compete mainly through innovation, and therefore due to this particularity a deeper evaluation of the true effects of competition cannot be assessed merely on the basis of a static concept of competition, but must be submitted to a deeper evaluation.[71] *Etro* further reminds that the credibility of the chosen competition policy, especially in innovative markets, is crucial in order for companies to have incentives to

68 Federico Etro, *Competition, Innovation, and Antitrust, A Theory of Market Leaders and Its Policy Implications,* Pringer-Verlag, Berlin Heidelberg, 2007, p.172-173.
69 Ibid.
70 Ibid, p.186.
71 Ibid.

innovate, since companies' investment in R&D mainly depends on their expectations as regards the level of protection of their innovations.

A similar tension arises in the relationship between competition law and standard-setting processes. As noted by *Hovemkamp* in an article titled *"Standards Ownership and Competition Policy":*

"While standard setting can enable firms to innovate along all…avenues of business progress, it can also facilitate both of antitrust twin evils: collusion and exclusion. When standards are created and enforced by competing producers, collusion is possible. When they are used to keep some producers out of the market anticompetitive, exclusion is possible."[72]

Therefore, also the European Commission has been closely scrutinising IP policies of SSOs with a view to prevent the adoption of rules that might infringe EC competition law, but at the same time the Commission has tried to maintain incentives for companies to invest.[73] As *Anderman* and *Kallaugher* suggest, standardization agreements can *"promote economic interpenetration in the common market or encourage the development of new markets and improved supply conditions."*[74] Accordingly, it is essential that standardization outweigh its anticompetitive effects. In general, standards are considered acceptable under competition law if they lead to efficiencies and ensure that fair parts of the benefits are passed on to consumers.

2.1 The Objectives of Article 102 TFEU

In the past, courts have had a tendency to limit the application of competition law within the field of IP. This did not mean that competition law is not applicable at all.[75] Many of the most controversial IP related decisions made by the European Commission have been decided under former Article 82 EC (new

72 Herbert Hovenkamp, ***"Standards Ownership and Competition Policy",*** available at: http://ssrn.com/abstract =889335.

73 See letter form Angel Tradacete, DG Competition, to Karl Heinz Rosenbrock, ETSI's Director General, dated 26 April 2005, as referred to in ETSI Directives, Version 20, July 2006, available at: htrp://etsi.org.

74 Steven D. Anderman & John Kallaugher, *Technology Transfer and the New EU Competition Rules, Intellectual Property Licensing after Modernisation,* Oxford University Press, 2006, p. 95.

75 Earlier Article 295 EC was interpreted so as to prohibite the application of EC competition rules to prejudice intellectual property ownership conferred by Member States.

Article 102 TFEU). The largest fine ever imposed in a single decision - EUR 497 million - was an Article 82 EC case, where Microsoft was considered to have abused its dominant position in the market for operating systems for personal computers. Also for the purposes of this paper, Article 102 TFEU, and in particular how it has been applied on intellectual property rights, will play a very important role.[76]

Article 102 TFEU prohibits the abuse of dominant position. It is irrelevant how the dominant position was obtained, including whether it is based on the grant of an intellectual property right. This was particularly addressed by the former European Competition Commissioner Mr. Mario Monti in the *Microsoft* case as follows: "*Dominant companies have a special responsibility to ensure that the way they do business does not prevent competition on the merits and does not harm consumers and innovation."*[77]

An analysis of abuse under Article 102 TFEU involves three stages. First, the relevant market in which the alleged abuse has occurred must be defined. Second, it must be determined whether the undertaking suspected of abuse has a dominant position within the relevant market (as defined). Third, it must be analyzed whether or not the undertaking has in fact abused its dominant position.

Under Article 102 TFEU, the possession of a dominant position on a relevant market is not illegal *per se.* Even if a company creates an economic monopoly, *e.g.* through the establishment of an industrial standard, this does not automatically mean that this amounts to abusive conduct. Companies are encouraged to compete and at the end of the day, the most efficient players should be allowed to be successful within the market place. Thus, those companies who have been more efficient and attained a certain market power, *e.g.* through R&D resulting in superior innovations, should not be penalized for being dominant. As correctly pointed out by the European Commission: *"to maintain incentives to invest and innovate, the dominant firm must not be unduly restricted in the exploitation of valuable results of the investment*".[78]

76 Also, Article 81 EC plays an important role, since the collaboration of several undertakings can lead to application of Article 81(1) and 81(3) EC, respectively. This aspect falls, however, outside the scope of this paper.

77 See Press Release IP/04/382 by the European Commission: **"*Commission concludes on Microsoft investigation, imposes conduct remedies and a fine*"** of 24 March 2004.

78 Proposal by the European Commission 2005, see Federico Etro, "*Competition, Innovation, and Antitrust, A Theory of Market Leaders and Its Policy Implications,"* Pringer-Verlag, Berlin Heidelberg 2007, p.203.

However, as recent developments have shown, the standardized technology market raised several antitrust concerns and the competent competition authorities are called to monitor the enforcement of FRAND commitments. This was particularly addressed by the former Competition Commissioner *Mrs. Neelie Kroes* in the following way: "*standards are clearly more important than ever*" and where a technology owner is able to exploits its market power gained during the development of standards, "*then a competition authority or regulator may need to intervene*".[79]

79 The European Commissioner for Competition Neelie Kroes, "*Being Open About the Standards,*" Speech/08/317, 10 June 2008.