SPEECH - 11 September 2015

Intellectual property and competition

19th IBA Competition Conference, Florence 11 September 2015 – version 01

Introduction

Good morning Ladies and Gentlemen,

I am very happy to be able to open the 19th IBA Competition Conference.

Competition enforcement and intellectual property is an area that keeps academics, lawyers and enforcers very busy these days and as I was preparing my address, I thought this would be the right place to explore the links between these two topics.

Because as far back as in 1421 the Florentine Republic issued one of the first statutes for the protection of intellectual creations.

However, it appears that only one patent was ever issued under the statute – to Brunelleschi, of all people, the very architect of the dome of Santa Maria del Fiore.

As Competition Commissioner the obvious question is why? Only one patent? The guilds must have been quite influential at the time.

***

Six centuries later, the story is quite different. The European Patent Office grants around 65,000 patents a year and intellectual property law has become an important tool to promote innovation.

In our knowledge economy, innovation is a leading factor to ensure competitiveness, economic growth, and job creation.

Protecting inventions and creative works is mainly the task of intellectual property law. Without intellectual property, there would be little incentive to invest in certain forms of innovation and creative works.

These investments are often substantial and risky and IP rights protect and encourage those who are willing to take the risk.

However, as the European Court of Justice has recognised, sometimes, intellectual property rights can be used to restrict competition. And this is bad news for competitiveness, growth and jobs.

It can also harm consumers, who should have access to a wide range of innovative and creative goods and services at reasonable prices.

Competition law can therefore complement intellectual property law in situations where the way that intellectual property law is exercised may fall short of promoting consumer welfare. Without effective competition rules, there would be higher risks that today's innovators might stifle those of tomorrow, or that consumers might not benefit from fair access to those innovations. Our task in this regard is to find the right balance between the interests of distributors, artists, inventors and creators and the interests of consumers.

However, competition law is not the answer to everything. We cannot solve issues in today's digital world that are for the IP rules – we cannot and we should not. If those rules need to be updated, that is a task for legislators. Competition policy should therefore work hand in hand with intellectual property policy to achieve common goals.

As competition enforcers, we should focus our resources on the most serious competition issues. We should also give priority to cases that can set useful precedents for our future practice, as well as for national competition authorities and courts.

So competition policy, intellectual property law, and other policy areas converge on a common goal. Together, we should promote an environment where innovators and creators have the right incentives and rewards and – at the same time – where consumers can benefit fairly from their work.

I will look at two topics to illustrate the interplay between competition law and intellectual property law: standard essential patents and barriers to cross-border online trade in Europe.

Standard Essential Patents

First, standard essential patents.

In general, standards are good for consumers and the economy because of the 'interoperability' they provide.

If I call a friend or send her a picture, I can be confident she will receive my message regardless of the firm that made her device or the network she uses.

This also means that a company can develop new devices and services safe in the knowledge that they will work with other devices thanks to the standards agreed beforehand with other companies.

To set a standard, competing firms must come together and choose one technology to the exclusion of others. In general, competition authorities do not like such gatherings, but we know the advantages of standards and we usually give the green light provided certain conditions are met.

One important condition involves standard essential patents.

If a member of a standard setting organisation owns a patent for a technology that will be included in the standard, that member must commit in advance to license it to all third parties on fair, reasonable and non-discriminatory terms.

The acronym is FRAND and it serves two main purposes: it guarantees that standards are open to all; and it makes sure that patent holders receive a fair reward for their inventions.

I want to stress the word ‘fair’, because we also want to make sure that the holder does not take advantage of the standard to impose unreasonable prices and terms on those who have to use the technology it owns, in other words, in a way that it would not be able to without the standard.

This is where things stand in principle. Now, let’s see what they look like on the ground.

There have been many court cases around the world in the last few years involving smartphone manufacturers. The press has dubbed them the ‘smartphone wars’.

A frequent issue in these cases is when a patent holder that pledged to license its standard essential technology on FRAND terms claims a patent infringement and asks a court to ban the sale of competitors’ products that use the technology.

Now, the main point is whether patent holders can seek injunctions in these situations.

In 2014 the Commission adopted two decisions in this context. The Motorola and Samsung decisions outlined that there should be some limits to this right precisely because of the competition context in which the standardisation process takes place. We were able to act quickly in both cases on a general issue which had broader market relevance, and both the US Federal Trade Commission and the US Department of Justice have taken similar positions.

This is how our reasoning went.

You commit to license your technology because you want it to be part of a standard. So far, so good. But if you do that, you should not be allowed to seek an injunction when there's a willing licensee on the other side.

In a nutshell: you can't have it both ways.

Injunctions of this sort could be used to extract conditions that would otherwise not be achievable, and which may hamper the standardisation process, restrict competition, and ultimately harm both consumers and innovation across the industry.

Our Motorola and Samsung cases triggered a number of interesting developments.

Most notably, a German judge asked the European Court of Justice to give a preliminary reference ruling on these issues. Two months ago, in the Huawei/ZTE ruling, the Court confirmed our position on two main points:

- First, that standard essential patents are different from other patents because of the commitments to license on FRAND terms;
- Second, that when there's a company willing to take a license on FRAND terms, injunctions should be off the table.

We were particularly happy about this confirmation given that our decisions were considered as novel by many. The judgment is important because it confirms that standardisation takes place in a competition context. And the judgment confirms that it is only natural that if, in order to have your technology accepted as part of a standard, you commit to license that technology - in return for reasonable remuneration of course - then you should not be able to seek an injunction to exclude products from the market if there is a willing licensee on the other side. In my view, this obligation applies to whoever exercises the patent right in question.

The judgment also confirms the important role of the EU Courts in giving guidance to the Commission and to national courts throughout Europe as well as to the Unified Patent Court currently in the making.

Neither our decisions nor the Huawei judgment mark the end of the story. We are already seeing attempts to circumvent the principle established in our decisions and confirmed by the Court. The most apparent example is when injunctions are being sought against companies active at other levels of the distribution chain, for example telecoms operators selling phones rather than the phone manufacturer.

Beyond that, there are new questions arising in patent enforcement that have a competition law dimension. At the same time, not all perceived shortcomings of the patent system can effectively be addressed by competition enforcement – the answer will often lie in the appropriate design of patent law and practice.

Cross-border online trade

I will now turn to my second topic: Online trade across national borders in the Single Market.

At first blush, the topic looks odd, particularly to someone who comes from outside Europe. Why should we even talk about national borders when the original promise of the digital revolution in the Single Market was precisely to tear them down?

If we take that promise at face value, there would be no better place for trade in the Single Market than the internet, where physical location is irrelevant.

In fact, as things turned out, we are far from that ideal.

There’s a whole series of barriers – linguistic, regulatory and contractual – that keep the online world fragmented along national boundaries in Europe.

With its Digital Single Market strategy, the Commission launched a co-ordinated drive to deal with those barriers.

To show how competition policy can contribute, I will outline the issues we are looking at in our pay-tv case.

In July, we sent a Statement of Objections to six major film studios from the U.S. and to the British broadcaster Sky UK. In that Statement, we preliminarily concluded that the agreements signed by the studios and Sky included clauses that prevent Sky UK from allowing EU consumers to access its pay-TV services available in the UK and Ireland, which is where Sky promotes and advertises its services.

In particular, the clauses constrain Sky UK from responding to unsolicited requests from outside the UK and Ireland, so called passive-sales restrictions. Without these restrictions, Sky UK would be free to decide on commercial grounds whether to sell pay-TV services to such consumers, taking into account the regulatory framework.

Some agreements also contain clauses requiring the studios to ensure that, in their licensing agreements with broadcasters other than Sky UK, these broadcasters are prevented from making their pay-TV services available in the UK and Ireland.

Our preliminary conclusion is that these clauses prevent cross-border passive sales in the Single Market and, unless justified, would be in breach of EU competition rules. As you know, a Statement of Objections only expresses preliminary views on which we are seeking the response of the parties concerned.

Just to clarify one point. We do not question the studios' ability to grant broadcasters the exclusive rights to broadcast content in a certain territory only – in other words, territorial exclusivity as such is not at issue in this case.

What we are questioning is absolute territorial protection consisting of the explicit contractual restrictions which prevent broadcasters from providing their services across a national border inside the EU to viewers who have wish to access such services and are willing to pay for them.

If such clauses did not exist, broadcasters would no longer be contractually prevented from responding to unsolicited requests coming from consumers from other countries. At the same time, broadcasters also have to take account of the applicable regulatory framework, such as, for online services, relevant national copyright laws. These aspects may need to be tackled by changes to copyright rules, for example as part of the copyright initiatives included in the Commission's Digital Single Market Strategy.

Our pay-TV cases point to a broader issue.

We know that online markets are far from integrated in Europe. However, we do not have a full picture of the restrictions in Europe that lead to such fragmentation, and whether they are company-erected or regulatory.

As you know, in May this year, I have therefore launched a sector inquiry into e-commerce in Europe.

We are casting our net wide. We are collecting information from companies of all sizes in every EU country.

I want to take this opportunity to thank the businesses that are answering our questions. I know it takes time and resources, but we are determined to make it worth the effort.

Competition policy – like all public policy – works best when it is based on facts. With the facts right, we can protect the interests of consumers and law-abiding firms and make Europe's digital markets a better place for doing business.

If it is agreements between companies that are restricting e-commerce across Europe's national borders, then you can expect competition enforcement to follow.

Where constraints are due to unjustified regulatory barriers, then it is a matter for other areas of policy, not least copyright.