

ABA Comments on EC Evaluation Report on TTBE

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* Speaking as member of Comments working group, not on behalf of ABA or any of its Sections

Comments on TTBE Report

- Jointly by ABA Sections of Antitrust Law, International Law & Practice, Intellectual Property Law
- Compare EU & U.S. approaches
- Endorse basic thrusts of TTBE Report
- Urge additional flexibility & broader scope in future block exemptions

Joint Comments

- Of ABA Sections only, not ABA policy
- Comments working group
 - J. Anthony Chavez, ExxonMobil Chemical Corp.
 - Yee Wah Chin, Mintz Levin
 - H. Stephen Harris, Jr., Alston & Bird
 - David W. Hull, Covington & Burling
 - Fernando Laguarda, Mintz Levin
 - Abbott B. Lipsky, Jr., Latham & Watkins
 - M. Howard Morse, Drinker, Biddle & Reath

EU – U.S. Comparison

- Role of competition law w.r.t. IPRs
- Market power of IPRs
- Abuse of dominant position v. monopolization
- Horizontal-vertical characterizations
- Vertical restraints
- Procedural context

Role of Competition Law

- “intervene & try to improve the balance provided by IPR law”
 - IPR holder might not obtain maximum royalties
 - Dominant IPR holder may be subject to compulsory license
- Grant/existence of IPR not affected by competition law
- Exercise of IPR subject to competition law
- Balance of incentives to innovate determined by Congress
 - Antitrust doesn’t “improve the balance” of IPR law in particular cases
- IPR holder gets what royalties market will bear
- Patent rights used as sword may violate antitrust laws
- Walker Process

Market Power of IPR

- EU apparent inference of “legal monopoly” from IPR
- U.S. IPR is property right only
- IPR is exclusive rights over technology
- Same general antitrust principles apply to IPR as to other property rights
- IPR has no presumption of market power

Illegal Monopoly

- EU prohibits exploitation of market power by dominant firm
- U.S. prohibits monopoly obtained or maintained by improper means

Characterizations of Licenses

- EU focus on competitive relationship of parties
- U.S. consider nature of competition absent the license
- Consider relationship of parties relative to subject of license
- Focus on “vertical” or “horizontal” nature of license
- Less focus on competitive relationship of parties

Vertical Restraints

- EU concern on intra-brand competition
- Coordination among licensees
- Territorial restrictions & market integration objective
- U.S. focus on inter-brand competition
- Foreclosure of access to input
- Raise rivals' costs
- Coordination among competitors

Procedural Context

- EU block exemption, restrictions questionable unless exempted
 - White-listed, black-listed & grey clauses
 - Exclusions
 - Covers only patent & patent w/ know-how licenses
- Consistency across exemptions
- Devolution
- Notification, opposition, withdrawal
- U.S. permitted unless specifically prohibited
- Guidelines safety zones, outside of which rule of reason applies
 - Covers patents, copyrights & know-how

Endorse

- Shift to more economics & effects-based analysis
- Consistency with newer block exemptions on vertical restraints, specialization agreements & R&D agreements
- Expansion of TTBE beyond some exclusive bilateral licenses
- Basic thrust of proposed block exemptions
- Issuance of guidelines

Expansion of Scope

- Non-exclusive licenses
- Additional types of exclusive licenses
 - Territorial
 - Field-of-use
 - Customer group
- Additional types of bilateral licenses
 - Comparable treatment to cross-licenses & pools
 - No singling out of territorial restrictions
- Multiparty licenses, consistent with approach toward bilateral licenses
 - Competitive impact independent of # of parties
- Additional types of license restrictions

License Restrictions

- Tying arrangements – consistent with vertical restraints block exemption
- Grant-back clauses
- Output restrictions
- Site licenses
- Non-competes
- No-challenge clauses
- Customer, field-of-use, territorial restrictions

Territorial Restrictions

- Equivalent to customer & field-of-use restrictions
- No basis to impose harsher treatment, should not be in hard-core list
- Should not be brought in line with vertical restraints block exemption

New Block Exemptions

- Support limited prescriptive character
- Support limited hard-core list
 - Based on vertical restraints block exemption
 - Removal of certain customer restrictions & price conditions from list for “vertical” licenses
- Support exemption for licenses of complementary/blocking IPRs
 - Up to 25% market share
 - Hardcore list of restrictions that fix prices/limit output/sales
- Support narrowing of definition of “competitor”
- Support retention of withdrawal mechanism

Guidelines

- Treatment of multi-party licenses
- Conditions that would exclude restraints from coverage
- Treatment of arrangements with market shares above thresholds
- Treatment of restraints that are no longer per se illegal
- Classification & treatment of restraints that directly relate to exploitation of licensed IPR
- Clarification of “abuse” of dominant position
- Clear procedural rules & transparent substantive guidelines

Additional Flexibility

- Role of market shares & market definitions
- Treatment of market power
- Characterization of licenses
- Focus on impact on competition absent license

Markets

- Oppose any presumption of illegality based solely on market share thresholds
- Support consistency of thresholds with other block exemptions
- Concerns on definitions markets & dominance
 - Market definitions speculative involving R&D
 - “Innovation market” concept prone to misuse

Market Power

- Prohibition of exploitation of market power, along with presumption of monopoly power, results in excessive condemnation of licenses
- Market shares of breakthrough technologies not indicative of anticompetitive intent or effect

Characterization

- “Horizontal/vertical” v. “competitor/non-competitor”
- Definition of “competitor”
 - “Sweeping breakthrough”
 - “Mutual blocking position”
- Restraints that “relate directly to exploitation of the IPR”

Competitive Effects Focus

- Licenses typically pro-competitive
 - Enable integration with complementary factors
- Restrictions may allow efficient & effective exploitation of IPR
 - Prevent free-riding
 - Provide incentive to invest & develop
- Impact on competition absent license
 - Relationship among IPRs involved

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