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European Legal Studies  
Etudes Européennes Juridiques

## RESEARCH PAPERS IN LAW

2/2007

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### **Exploitative Abuses: Which Competition Policy, Which Public Policy?**

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## Exploitative Abuses: Which Competition Policy, Which Public Policy?

### DRAFT PAPER

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As the final session of the day, my aim in this paper is to briefly outline the nature of exploitative abuses before turning to the question of the relationship between competition law and intellectual property law in the context of what Teubner calls the regulatory trilemma and from that draw a two-fold conclusion. First, the demands on law from the social phenomenon of markets are more acute when those demands raise issues across the different law domains of IP and competition. Second, where IP law and competition meet, the aim should be for both domains to internalise the values of the other. This however can only happen to the extent but only to the extent that there can be what Collins<sup>1</sup> calls productive disintegration. Finally, in the specific context of exploitative abuses the overlap between IP law and competition law arises primarily in relation to claims of excessive pricing in licensing arrangements. Such claims could form the basis of a private action<sup>2</sup> or can be made in the context of compulsory dealing decisions such as Microsoft.<sup>3</sup> The involvement of competition agencies in pricing decisions goes to the heart of concerns about the nature of competition law and the role of competition agencies and highlights the need for the law to indirectly control rather than inappropriately attempt to directly control markets.

### **Exploitative Abuses**

Instances of exploitative abuses - those abuses which result in direct loss of consumer welfare – are often compared to exclusionary abuses which exclude competitors from the market.<sup>4</sup> Exclusionary abuses are the primary focus of A82 with exploitative abuses uncommon.<sup>5</sup> The primary example of such an abuse is excessive pricing defined by the ECJ as a price that has no reasonable relation to the economic value of the product supplied.<sup>6</sup> Where such prices have the effect of curbing parallel trade or unfairly exploiting customers then it falls within A82.<sup>7</sup> Excessive pricing is caught under A82(a) which prohibits the charging of unfair prices thus prices that are unfairly high are prohibited.<sup>8</sup> The failure of the Commission in *United Brands*<sup>9</sup> to prove excessive pricing before the ECJ meant that it was more inclined to invoke discriminatory pricing than excessive pricing when alleging abuse under A82.<sup>10</sup> In fact, excessive pricing has only been found by the ECJ in two cases: British Leyland<sup>11</sup> and Hilti<sup>12</sup>. In both cases, as Temple Lang notes, the prices found to be excessive were four to six times the prices charged by the same company for the same service at the

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<sup>1</sup> Hugh Collins, *Regulating Contracts* OUP Oxford 1999 at 46. Collins uses the term to describe the impact of public law regulation on modern contract law under English law. Contract law in his view has proved doctrinally robust so the reconfiguration of legal reasoning has been productive.

<sup>2</sup> *Attheraces Ltd v. The British Horse Racing Board* [2007] EWCA Civ. 38 (2 Feb 2007) although the pre-race data which was the essential facility in this case was not governed by IP law.

<sup>3</sup> EC Commission, IP/07/269 1 March 2007, Microsoft warned of further penalties over unreasonable pricing available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/269&format=HTML&aged=0&language=EN&quiLanguage=en> See also Qualcomm \*

<sup>4</sup> On exploitative abuses under A82 see generally \*\*\*

<sup>5</sup> Thus exclusionary abuses are the focus of the DG Competition discussion paper on reform of A82 see EC Commission, *Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* (Dec. 2005) in particular p. 4 para. 3 and p. 17 para 53.

<sup>6</sup> 27/76 *United Brands* [1978] ECR 207; [1978] 1 CMLR 429 para. 250-252.

<sup>7</sup> 26/75 *General Motors v. Commission* [1975] ECR 1367.

<sup>8</sup> The imposition of unfair terms is also included under A82(a) and can also be exploitative and (rarely) tying under A82(d) could lead to excessive prices.

<sup>9</sup> 27/76 *United Brands* [1978] ECR 207; [1978] 1 CMLR 429

<sup>10</sup> EC Commission, *Twenty Fourth Report on Competition* 1994 at 207 \*.

<sup>11</sup> 226/84 *British Leyland*, [1986] ECR 3263.

<sup>12</sup> T-30/89 *Hilti* [1991] ECR II 1439 on appeal C-53/92P [1994] ECR I-667.

same time in the same geographic market.<sup>13</sup> More recently, excessive pricing has been raised by the Commission in *Deutsche Post II*,<sup>14</sup> and the *Port of Helsingborg*<sup>15</sup> decisions and by the UK CAT in *NAPP*<sup>16</sup> and in the English Court of Appeal.<sup>17</sup> Excessive pricing is addressed also ex ante through regulatory frameworks in relation to those sectors where entry barriers are particularly high and state monopolies were previously the norm i.e. utilities and communications.

Outside of this specific regulatory environment, competition law rightly shies away from alleging excessive pricing for three reasons. First, substantively there is no satisfactory legal test that will allow effective benchmarking of prices to determine when prices are excessively high especially in innovative markets.<sup>18</sup> The two step test is whether the difference between the costs actually incurred and the price actually charged is excessive and if so, whether a price has been imposed which is either unfair in itself or when compared to competing products.<sup>19</sup> Evans and Padilla point out that not only is the test highly ambiguous but also entirely subjective. The EC Commission in the *Port of Helsingborg* decision rightly rejected a 'costs + reasonable profit' approach to determining excessive pricing.<sup>20</sup> A positive difference between price and production cost did not automatically imply prices were unfair. In that particular decision, it noted the high sunk costs for the ferry and no-cost factors like the intangible value of the location of the port had to be considered. A similar approach can be seen in the English Court of Appeal decision in *Attheraces* where the first instance finding of excessive pricing was overturned because the appellate court was of the view that a costs+ test takes too narrow a view of what constitutes economic value. In particular it does not have regard to the value to the purchaser of the product of service.<sup>21</sup>

Second, under both US and EC competition law monopolisation and dominance are not prohibited. Given the economic view of dominance as that of the ability to charge prices significantly higher than the competitive level it is problematic if not paradoxical to view excessive pricing as abusive given it goes to the definition of dominance.<sup>22</sup> Finally, institutionally, if there is a finding of excessive pricing a competition agency may look like it is imposing price controls which runs counter to the *raison d'être* of competition law facilitating competitive markets where prices are allowed to find their own level to the benefit of consumer welfare. In fact, excessive pricing can be unproblematic – if a dominant undertaking charges monopoly rents, provided there is no market foreclosure then the competitive forces of the market will ensure that new entrants or existing incumbents will intervene and compete on price. Even less efficient competitors may act as a constraint on dominant firms.<sup>23</sup> Excessive pricing can even promote consumer welfare where the ability to charge high prices encourage innovation.

Given the difficulties of evaluation, remedy and the conceptual integration of dominance and pricing, Evans and Padilla warn of the high risk of errors with excessive pricing either wrongly condemned (type I error) or wrongly acquitted (type II error).<sup>24</sup> The difficulty is that of devising a sufficiently realistic legal test that will allow dominant undertakings to make pricing decisions that will be predictably legal.<sup>25</sup> Evans and Padilla for this reason suggest that excessive pricing should only be alleged in obvious, serious and indefensible cases.<sup>26</sup> This of

<sup>13</sup> John Temple Lang, 'Fundamental Issues Concerning Abuse under Article 82 EC', Regulatory Policy Institute Oxford, July 2005.

<sup>14</sup> [2001] OJ L 331/40. para. 155 et seqe.

<sup>15</sup> COMP/A.36.570/D3 24 July 2004.

<sup>16</sup> CA98/2/2001. NAPP 15 January 2002 Competition Commission Appeal Tribunal <http://www.catribunal.org.uk/documents/JdgNapp150102.pdf>

<sup>17</sup> *Attheraces Ltd. V. British Racing Board* [2007] EWCA Civ. 38 (2 Feb 2007).

<sup>18</sup> David S. Evans and A. Jorge Padilla, 'Excessive Prices: Using Economics to define Administrable Legal Rules' CEMFI Working Paper No. 0416 September 2004 <ftp://ftp.cemfi.es/wp/04/0416.pdf> at 3.

<sup>19</sup> *United Brands* at 252.

<sup>20</sup> Comp/A.36.568/D3 23 July 2004 [http://ec.europa.eu/comm/competition/antitrust/cases/decisions/36568/reject\\_en.pdf](http://ec.europa.eu/comm/competition/antitrust/cases/decisions/36568/reject_en.pdf)

<sup>21</sup> *Attheraces Ltd. V. British Racing Board* [2007] EWCA Civ. 38 (2 Feb 2007) from para 148.

<sup>22</sup> Yannis Katsoulacos, 'Exploitative Practices in Article 82' (2006) *European Enterprise Journal* \*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.* at 4. See generally K. Schrader-Frechette, *Risk and Rationality* University of California Press, Berkeley and Los Angeles 1991 espec. Ch. 9.

<sup>25</sup> Richard Whish, *Competition Law* 5<sup>th</sup> ed. Butterworth London 2003 p. 689

<sup>26</sup> David S. Evans and A. Jorge Padilla, 'Excessive Prices: Using Economics to define Administrable Legal Rules' CEMFI Working Paper No. 0416 September 2004 <ftp://ftp.cemfi.es/wp/04/0416.pdf> (\*) at 22.

course begs the question to some extent: when are cases obvious, serious and indefensible? The NAPP case I suggest comes close to meeting the test. NAPP was fined for excessive pricing of its sustained release morphine drug in the community (general practitioner) market. On appeal NAPP had argued that account had to be taken of the need to recoup for investment in R&D in a dynamic market with pricing evaluated on a portfolio basis for a range of products. While the Tribunal seemed to accept the principle of the argument, it was rejected in this case. The drug in issue had been put on the market in 1980. There was no evidence put forward as to the costs that had to be recouped and, given the time frame; it was taken as given that recoupment had taken place long before the decision. The pricing in the case was evaluated under both price-costs margin and price benchmarking tests (a preponderance of the evidence standard). NAPP was found to have earned 80% profit under the price-costs margin test with its nearest competitor earning less than 70% and under price benchmarking its prices were 33-67% higher than those of its competitors in 2000 – the year before the initial decision. In the community market prices were over 10 times those in hospitals and 4-7 times higher than NAPP's own export prices. But NAPP is and should remain the exceptional case leaving excessive pricing as a possible basis for an A82 action but only one to be invoked rarely.

Evans and Padilla suggest a modified per se test as a means of limiting the risk of error. Excessive prices would be per se legal save in exceptional circumstances defined as: (a) firms have a near monopoly position in the market which is not the result of past investments or innovations, and which is protected by insurmountable legal barriers to entry; (b) the prices charged by the firm widely exceed its average total costs; and (c) there is a risk that those prices may prevent the emergence of new goods and services in adjacent markets. The test is cumulative and the final requirement is explicitly reminiscent of the Magill and IMS tests<sup>27</sup> where refusal to licence can constitute an abuse if it prevents the sale of a new product for which there is potential consumer demand. The requirements are cumulative under the proposed test and the new product rule as well as tying it to the compulsory licensing cases also ties it firmly to exclusion – market entry to adjacent markets is restricted through the excessive pricing. Thus excessive pricing is redefined as exclusionary rather than merely exploitative underlining once again the difficulty of alleging excessive pricing under A82EC.

### ***IPR and Competition***

From a sociological perspective markets require three legal tools in order to function: property, contract and good governance.<sup>28</sup> These tools are necessarily complimentary but, insofar as they are normatively distinct or closed to each other, tension can exist between them. Competition law is one aspect of the governance of markets and, like IP law shares the overlapping but not exclusive objective of promoting innovation in the market. As subsystems of law, they are normatively closed but also linked (or structurally coupled to use the language of autopoiesis)<sup>29</sup> through the social phenomena of markets and innovation. It is this combination of linkage and closure that is a source of tension. This tension is compounded by the demands that are made on law in general and on both these domains of law in particular by the social phenomenon that they are called on to address. This is not just a matter of what is often called 'regulatory drag' although in dynamic high tech markets regulatory drag may be an inevitable feature of the law. Other factors such as the extent to which laws adopted are a response to intense lobbying – which is a hallmark of intellectual property laws generally including those adopted within the field of competition law – are also relevant.<sup>30</sup> Irrespective of the institutional or public choice features of the domain, regard is

<sup>27</sup> Case C-241/ & 242/91P *RTE and Others v Commission* [1995] ECR I-743; Case C-418/01 *IMS Health v NDC Health* [2004] 4 CMLR 28.

<sup>28</sup> N Fligstein and I Mara-Drita, 'How To Make a Market: Reflections on the Attempt to Create a Single Market in the European Union' (1996) 102 *American Journal of Sociology* 1, 14. See also I Maher, 'The Interface of EC Competition Law and Intellectual Property Rights: The Essential and the creative' (2005) CYEL \*

<sup>29</sup> Gunther Teubner, (1988) (ed) *Autopoietic Law: A New Approach to Law and Society* 1998 Berlin, De Gruyter; Gunther Teubner, 'Autopoiesis and Steering: How Politics Profit From the Normative Surplus of Capital' in In T'Veld, Schaap, Termeer & van Twist 1991 at 133-134.

<sup>30</sup> See e.g. the discussion of the Directive on Protection of Databases Directive 96/9/EC OJ [1996] L 77/20 in Ioannis Lianos, 'Competition Law and Intellectual Property Rights: Is the Property Rights' Approach Right?' (2006) CYEL at 173; and the reference to frenzied lobbying by I. Saltzman, in his discussion of the adoption of a block exemption regulation in 'The New Technology Transfer Block Exemption Regulation' (1996) 9 EIPR 506.

had to the theoretical underpinnings of law and its role and nature of the modern state. By adopting this perspective, it is hoped to shed some light on the question posed in the title.

### The Regulatory Trilemma

Juridification is –as Teubner suggests – an ugly word and one that is difficult to define.<sup>31</sup> The context of juridification is the changing and increasing demands on law in the modern regulatory state with law used as a means of control to constitutionalise the economy.<sup>32</sup> Juridification is not defined by a proliferation of laws but as a process in which the interventionist state produces a new type of law, regulatory law which specifies conduct in order to achieve particular substantive ends.<sup>33</sup> Given juridification is different from the mere proliferation of law, the ambition should not be to attempt to stop ‘legalisation’ instead the aim should be to channel law so as to avoid or minimise any negative side-effects. This in essence defines the review processes that has been ongoing in relation to EC competition law generally and A82 specifically.

Formal rationality which is a hallmark of law is being changed by the process of juridification such that material rationality is to the fore and is defined by reference to function, legitimation and norm structure.<sup>34</sup> In relation to function, law is no longer exclusively concerned with conflict resolution but increasingly with political intervention. The political sphere has taken on responsibility for many social processes and in turn requires the definition of goals, the choice of normative means and their implementation. Competition law has not been entirely instrumentalised by this process – thanks in part to its influential episteme of legal practitioners<sup>35</sup> and the high level of technical expertise and discourse that operates in the field – although within the specific context of the EC the fact that competition decisions are taken by the full College of Commissioners allows some scope for instrumentalisation and substantively, the emphasis on market integration has also proved a powerful driver in the first 50 years of the EC rules.

The basis of legitimation is no longer exclusively traditional values and goals encapsulated within the rule of law. There is an increasing emphasis on result orientation institutionally and substantively. Agencies who implement these laws are required to justify their role through reference e.g. to value for money, performance indicators and benchmarking under better regulation initiatives. The success of a policy field is defined by reference to what political scientists refer to as output legitimacy<sup>36</sup> and this can be seen in the form of self-evaluation contained in competition agency annual reports. This emphasis on outputs can also lead to general questions being raised in the context of specific cases. Thus the question ‘who wins?’ is raised not just in relation to the parties of the action but more widely in relation to (economics-defined) consumer welfare. In IP competition cases this can be particularly pertinent and difficult to answer given the tensions that can arise in relation to concerns about market foreclosure, freedom of contract, and innovation.

For example in Microsoft the requirement to deal was not limited to any particular customer creating an unusually wide obligation to deal, and the issue of whether innovation was adversely affected was argued from two radically different perspectives with Microsoft arguing that the incentive to innovate would be removed by the obligation to deal while the Commission argued that any negative effect on Microsoft’s incentive to innovate was offset against by the positive effect of innovation for the whole industry.<sup>37</sup> Finally the structure of regulatory law is characterised by a weakening of the idea of generality and methods of interpretation with increasing discretion and particularisation of the law. The law is

<sup>31</sup> Juridification: Concepts, Aspects, Limits, Solutions in Robert Baldwin, Colin Scott and Christopher Hood (eds.), *A Reader on Regulation* OUP Oxford 1998 at 389.

<sup>32</sup> Habermas \*

<sup>33</sup> G. Teubner, *Juridification: Concepts, Aspects, Limits, Solutions* in Robert Baldwin, Colin Scott and Christopher Hood (eds.), *A Reader on Regulation* OUP Oxford 1998 at 405.

<sup>34</sup> *Ibid.* 401.

<sup>35</sup> F. van Waarden and M. Drahos, ‘Courts and (Epistemic) Communities in the Convergence of Competition Politics’ (2002) 9(6) *Journal of European Public Policy* 913-934.

<sup>36</sup> Christopher Lord, \*

<sup>37</sup> EC Commission, *Decision Microsoft/W2000 (COMP/C-3.37.792)* 24 March 2004 at para. 783.

increasingly purpose orientated (in keeping with the result orientation legitimisation) and dependent on social science thinking that can measure outputs and define legal function.<sup>38</sup> Drawing on Weber, Teubner suggests that law is on the one hand increasingly formalised to the extent that it is self-referential and professionalized. On the other hand, it is becoming increasingly instrumentalised and is more and more exposed to the demands of politics and of regulated areas of life.<sup>39</sup> This paradox of increasing autonomy of law and its increasing interdependence creates a tension wherein regulatory law can only trigger self-regulatory processes rather than seek to control social processes directly. The self-referential nature of social systems makes anything more direct impossible. If law tries to intervene over and beyond the extent it is possible within the autopoietic social system then this gives rise to the regulatory trilemma<sup>40</sup> i.e. one of three things can happen:

- The law is ignored as irrelevant and has no impact;
- It produces disintegrating effects on the social system; or
- It produces disintegrating effects for law itself.

The solutions to this trilemma are many including a focus on implementation, deregulation (in particular reliance on cost-benefit analysis – which Teubner criticises for the fact that economic costs are more readily calculable than social costs<sup>41</sup>), and, the approach favoured by Teubner, proceduralisation, which is the control of self-regulation.<sup>42</sup> The strength of this fairly pessimistic but ultimately realistic approach is that it acknowledges the limits of law and hence advocates indirect control through a focus on the regulation of organisation, procedures and the redistribution of competences.<sup>43</sup> He specifically refers to the negotiated outcomes in merger law as an example of such negotiated regulation. The aim is to replace direct state control with effective internal control through incentives and legal strategies. Thus by recognising the limits of the law, it can be put to best effect in the social world and thereby avoid the risk of either social or legal disintegration.

Regulatory law in this context is not understood in the narrow sense of state intervention to prevent market failure<sup>44</sup> but in the wider sense of law having a role beyond conflict resolution where function, legitimisation and structure have been re-defined. Black's definition: the intentional activity of attempting to control, order or influence the behaviour of others<sup>45</sup> is more useful for our purposes as it can encapsulate competition law provided control is construed as indirect control. In other words, the analysis is not predicated on the conventional dichotomy between competition and regulation but seeks to distinguish the modern phenomenon of the simultaneously increasing formal law and the instrumentalised law. The challenge is to locate competition law and IP law within that framework.

### ***Competition and IP Law: Subsystems of law***

Teubner's analysis is at a high level of abstraction. While he draws examples from labour law, consumer law, competition law, he does not address the regulatory trilemma that can arise in relation to the not just to the social subsystems of politics, markets but also between legal subsystems such as competition law and IP law. While IP and competition law may share overlapping objectives they remain autonomous but overlapping normative subsystems of law. This view is one re-enforced in the current debate which seeks to remove the distinction between intellectual property rights and other property rights.<sup>46</sup> Lianos questions this trend, which for antitrust purposes at least, is accepted in US law.<sup>47</sup> He notes that IP

<sup>38</sup> G. Teubner, *Juridification: Concepts, Aspects, Limits, Solutions* in Robert Baldwin, Colin Scott and Christopher Hood (eds.), *A Reader on Regulation* OUP Oxford 1998 at 402.

<sup>39</sup> *Ibid.* p. 407.

<sup>40</sup> *Ibid.* at 408.

<sup>41</sup> *Ibid.* at 417.

<sup>42</sup> *Ibid.* at 420.

<sup>43</sup> *Ibid.* at 421.

<sup>44</sup> See e.g. Anthony Ogus, *Regulation: Legal Form and Economic Theory* Hart, Oxford 2004 pp. 1-3.

<sup>45</sup> Julia Black, *Decentering Regulation: Understanding the Role of Regulation and Self-regulation in a Post-regulating World* (2001) 54 *Current Legal Problems* 103.

<sup>46</sup> See Ioannis Lianos, 'Competition Law and Intellectual Property Rights: Is the Property Rights' Approach Right?' (2006) *CYEL* at 155.

<sup>47</sup> US Department of Justice and Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property* 1995 <http://www.usdoj.gov/atr/public/guidelines/0558.htm>. See A. Katz, 'Intellectual Property, Antitrust and the Presumption of Market Power: Making Sense of Alleged nonsense' University of Toronto Legal Studies Series Research paper No. 02/05.

rights are for a defined period, there are conditions for validity of patents which has no parallel in tangible property law and, critically in his view, the creation of IP is contingent on the intervention of a regulatory agency. In other words, intellectual property rights have a public dimension that is almost entirely absent from ownership of tangible property. The Fundamental Rights Charter of the EU extends the right to property to intellectual property.<sup>48</sup> The Charter is of course not binding – yet – and the ECJ does not seem to have formed a firm view as the conflation or distinction between IP and other property rights.<sup>49</sup> For example there is a ready cross-referencing between the compulsory licensing of IPRs and essential facility-type cases.<sup>50</sup> Thus *Magill* (compulsory licensing of IPRS)<sup>51</sup>, was much cited in *Bronner* (essential facility-type case)<sup>52</sup>. Nonetheless, a clear distinction is drawn between the cases in that there is an extra element to the exceptional circumstances test in IPRs cases viz. that the refusal to licence must prevent the emergence of a new product. While it is important not to overstate the differences between the two, a number of writers refer to the tensions between IP law and competition law due to the expansion of IPRs.<sup>53</sup> Whether IP law is equated with tangible property rights or not, the potential for friction between the two legal domains exists and the dilemma is how the two systems can best seek to indirectly control markets where IP plays a role. This risk is that both domains will be irrelevant e.g. the early experience with cyber space. Alternatively and more pertinently, the risks are either that there will be productive disintegration as between the two systems or their attempt to control the market will produce disintegrative effects on the market. Under this analysis there is no hierarchy between the domains. Neither can control the other, influence is indirect. Nonetheless, because of the linkages between the two domains – e.g. litigation, a common commitment to promote innovation – the two domains are forced (or should be), to process at the same time and repeatedly their reaction to externalities such as events in the market. Lianos suggests that the discourse of regulation (I would suggest regulatory law) is better suited to constructive dialectic relation between competition law and IP law.<sup>54</sup> This is because such a conception allows for the internalisation of competition concerns within IP law. I would suggest that this cannot be a one-way street and that the internalisation of IP concerns within competition law is also necessary. This can be done at the statutory level e.g. through the Software Directive as Lianos suggests and on the competition side through block exemptions. This is not sufficient however as the iterative processes of reflexive law require that the internalisation of IP law and competition law concerns become part of ex poste conflict resolution also. The suggestion that each domain should seek to indirectly influence the other so it can self-regulate to take account of competition/IP concerns has a policy dimension and a practical legal dimension but also on a more fundamental level is important to ensure that the two legal domains can develop in a manner that is both legally coherent, consistent and relevant for the market so that the two domains do not undermine their respective internal coherence and structure.

### ***Exploitative Abuses and Regulatory Law***

In the specific context of exploitative abuses, what evidence is there of the regulatory trilemma and its resolution? In general, A82 is not a general provision for the regulation of prices.<sup>55</sup> And while A82(a) does refer to unfair prices, the Commission has wisely steered clear of basing decisions on excessive pricing and where it has been alleged has rejected a test based on costs+ or applied it in the context of a recently liberalised sector where the

<sup>48</sup> Article 17(2) see [http://ec.europa.eu/justice\\_home/unit/charte/en/charter-freedoms.html](http://ec.europa.eu/justice_home/unit/charte/en/charter-freedoms.html)

<sup>49</sup> of the position of the European Court of Human Rights see Laurence R. Helfer, 'The New Innovation Frontier? Intellectual Property and the European Court of Human Rights' (2008) 49(Winter) Harvard International LJ forthcoming

<sup>50</sup> See I. Maher, 'The Interface of EC Competition Law and Intellectual Property Rights: The Essential and the creative' (2005) CYEL at \*

<sup>51</sup> Case C-241/ & 242/91P *RTE and Others v Commission* [1995] ECR I-743.

<sup>52</sup> C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co KG and Other* [1998] ECR I-7817.

<sup>53</sup> See Lianos supra. \* at 154; W Cornish, *Intellectual Property: Omnipresent, Distracting, Irrelevant?* (Oxford, OUP, 2004); in relation to copyright H Laddie, 'Copyright: Over-strength, Over-regulated, Over-rated?' in *Innovation, Incentive and Rewards: Intellectual Property Law and Policy* (1997) 5(3) Hume Papers on Public Policy pp. 1-17. A similar point is made by Helfer supra n. \* at 159.

<sup>54</sup> Lianos, supra n. \* at 179.

<sup>55</sup> Attheraces supra n. \* at para. 217.



dominant undertaking retained a monopoly position. In doing so, the internal coherence of A82 is retained. And excessive pricing allegations or findings are even rarer in relation to IPRs. Where the competition agency ends up as a price regulator most notably in the context of findings of exclusionary abuse (refusal to supply) the remedy involves licensing on reasonable terms. If subsequently there is a suggestion that the licence fees are not reasonable (i.e. excessive) then not only does the agency (or their agent) end up as a price regulator but also has to apply a test that is generally seen as ambiguous and vague and one to be invoked only in obvious, indefensible and serious cases. The difficulty here is that the role of competition law and the competition agency is corroded by the remedy offered with the need to monitor prices at odds with the emphasis in competition law of price being determined by competitive markets. This is why compulsory licensing can only be imposed in exceptional circumstances – not just to protect the freedom of contract but also to ensure the integrity of the competition law and of the IP law regimes.

### ***Tentative Conclusion***

The key question is how to ensure productive disintegration for competition law and IPR in those marginal but important cases where they interact. There are two suggestions that can be made. First, in the context of conflict resolution one way forward is to examine procedural issues such as the burden of proof and rules relating to standing. It would be useful to address questions such as: who should decide a dispute? How? At what level (national/supra-national/international)? Using which legal tools? For what sort of remedy? Also, by limiting analysis to IPR and competition issues the analysis is arguably too simplistic especially in the EU context where in particular regard should be had to the market integration imperative and trade law especially in the context of Article 30EC.





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