

RISK MANAGEMENT OF ANTITRUST IMMUNITIES REMOVAL IN THE AREA OF INTELLECTUAL PROPERTY RIGHTS RELATIONS

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Competition is good for innovations?

2

- Competition between firms **elaborating** one and the same process or product, is good for innovations
- Competition between firms producing already existing (known) goods, is good for cost decrease and quality increase

BUT...

- Firms expecting more intensive competition on market just **after** innovation possess **less** incentives to invest in R&D
- Firms have more incentives to invest in innovations if they can prevent investments in their own R&D [Baker, 2007].

AND...

Is competition always good for innovation? (results of research)

3

- **Process innovations are profitable for big firms due to benefits of scale of production**
- **Product innovations are supported mainly by active market competition [Gilbert, 2006].**

Probable consequences of immunities removal (I)

4

- Refusal probability of effective forms of relations on IPR
 - Hybrid arrangements, including some vertical restraints
 - *“Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements 2014/C 89/03”* :
 - “The TTBER also exempts agreements between the licensor and the licensee where the agreement imposes obligations on the licensee as to the way in which it must sell the products incorporating the licensed technology”
 - Russia?:
 - Safe harbor of Commercial Concession (Franchising)
 - Safe harbor for companies according rule of de minimus 20% on each market
 - Correlation between safe harbors and real cases on licensing in Russia?
Franchising as a way for insurance from antitrust risks (the problem of adverse selection and/or moral hazard)
- As a result: sub-optimal form of interaction (transaction cost are higher than under available alternative)

Probable consequences of immunities removal (II)

5

- Patent disputes
 - ▣ Disputes over patent limits (or other exclusive rights for IPR) and the limitations they might de-facto impose on market participants
 - ▣ Disputes over patent or other exclusive rights in this case cannot be dismissed by the FAS Russia on the basis of exemptions in articles 10 and 11 of the law “On the Protection of Competition”
 - ▣ Substantially the issue transcends the authority of the FAS Russia (is it justifiable to introduce into production the new technical solution of a competitor – or does it infringe the patent?), but how and on what grounds will the FAS Russia dismiss such complaints, if the actions indeed suppress competition?

Probable consequences of immunities removal (III)

6

- Overcoming the risk of unwarranted application of the “safe haven for IPR”
 - ▣ The general character of the provisions of the law “On the Protection of Competition” allows a wide range of practices to be interpreted as “actions on implementation of exclusive rights” or “agreements about providing and (or) alienating the right of using the results of intellectual activity”, a fact which is taken advantage of by unscrupulous firms
 - ▣ The removal of immunities lifts the burden of proving the opposite from the FAS Russia, although in some cases FAS has been known to solve the far from trivial problem
- Can the problem be solved in general without immunities?
 - ▣ Via methodical approach or guidelines

Probable consequences of immunities removal (IV)

7

The context (coherence) of implementation of norms matters for the appraisal of potential effects (see commentary by judge of the Constitutional Court of the Russian Federation G.A. Gadzhiev)

- Effects of implementing contiguous norms
 - ▣ Collective dominance
 - ▣ Permissible pricing practices
- Establishing the existence of a product market
 - ▣ What is for sale and what isn't?
 - ▣ What is an object of civil law?

Bifurcation points for overcoming risks of immunities removal

8

- ❑ Removing antimonopoly immunities or preserving them (for a length of time or conditionally)
- ❑ Developing antitrust guidelines on issues of IPR or accumulating knowledge necessary for market participants through studying enforcement practices
- ❑ Differentiating antitrust regimes for different types of IPR (author's rights, industrial property) or "one size fits all"
- ❑ Changing the Civil Code for fixating special types of relations in IPR
- ❑ New requirements for rule of reason
- ❑ Special rules for socially significant spheres

Roadmap?

- The issue cannot be solved at once (if we want everything immediately we will get nothing and gradually)
- The sequence of actions matters
- Aligning long-term expectations of interest groups
- A chance for a high-quality institutional project

Thank you!

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