

Rights and wrongs

Last year *Legal Business* teamed up with Bristows for a research project on client attitudes to IP. This summer we followed up with a debate to address the charged issue of Brussels' attitude to innovation

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With corporates protecting intellectual property (IP) rights with greater intensity than ever and IP specialists becoming increasingly in demand among in-house legal teams, it was fitting that some of the world's most IP-driven companies came together as a follow-up to last year's *Legal Business Insight* report into client attitudes to IP. Bristows was the host for a panel discussion that included representatives from Google, AstraZeneca, Coca-Cola and Vodafone, as well as leading IP silk Simon Thorley QC and former Court of Justice of the European Union (CJEU) judge Fidelma Macken, tackling the theme: 'Is the treatment of IP rights in European Commission competition cases harming innovation?'

The approach of the Directorate-General for Competition of the European Commission (DG Comp) has been to encourage innovation as part of the overall driving policy of the Commission to create an 'innovative Europe' for

the 21st century. Joaquín Almunia, the European Union Competition Commissioner, has been quoted saying that European competition policy recognises the need for innovation and that competition and IP policy are in harmony.

However, the reality based on the experience of some of those around the table, either as private practice or in-house counsel, is somewhat different to this utopian vision. Feedback from the panel was that recent case law involving the Commission suggests a much more interventionist mood in DG Comp, which appears to believe the IP system is not functioning as it should to promote innovation.

CHILLING EFFECT

The most significant factor of all is DG Comp frequently finding companies looking to exercise their rights as incompatible with competition policy, despite many in business and legal circles believing that it has a fundamental lack of understanding about how IP really works.

'There are a lot of things that could and perhaps should be done with the litigation system and the patent system, but I am not sure that it is necessarily a good reason for DG Comp taking the view that it is the proper arbiter of these things,' says Pat Treacy, competition partner at Bristows. 'There are very competent and very capable people in DG Comp, but I am not sure the nuances of the IP system and the incentives for companies to innovate are things that they necessarily focus on, on a regular basis.'

Julia Holtz, director of competition at Google, refers to a case she has been involved in for the last two years where Motorola Mobility, which Google acquired in 2012, was criticised by Almunia for 'unfairly' trying to enforce its patents through an injunction. 'The Commission basically attacked Motorola for having gone to court,' she says. 'DG Comp maybe would have had a place to tell the court what it thinks the right balance is, but to then attack the



**Julia Holtz, director
of competition, Google:
The system is not working**



Wayne Spillett, Vodafone: Smartphone wars directly affect carriers



Rosemary Choueka, Bristows: DG Comp's view that 'big equals bad' threatens innovation

► company for having gone to court to ask for an injunction – that really was going too far in terms of the division of executive and judicial powers. It also does not sufficiently respect the fundamental right of access to courts as set out in the IIT Promedia case.'

This is a striking view coming from a company, Google, that believes that the patent system is in urgent need of reform. 'In the software world, we really believe that patents have a chilling effect. The system is not working as it was intended – we wanted Motorola patents really for defensive purposes because Google at the time did not have enough patents to defend itself. That shows that the system is broken: companies' best defence is to amass patents because otherwise you're exposed.'

As a network provider, Vodafone is frequently caught up in the crossfire according to Wayne Spillett, its senior legal counsel, who says he welcomed the Commission's decision from a legal certainty viewpoint.

'We watch the handset manufacturers have these fights and their licensing costs already represent a hidden cost for Vodafone. However, for us, an injunction would quite literally mean

shutting down our network, which would be catastrophic. Clarity on when we might be considered a willing licensee and so avoid an injunction is quite welcome.'

Holtz adds that since the Motorola decision will not be appealed, the decision will apply to the entire industry and not just Motorola.

Largely there is resistance from most around the table for DG Comp getting involved in patent disputes, which some contributors felt amounted to the Commission over-reaching its remit. Rosemary Choueka, a Bristows competition partner, argues the Commission has a quasi-legal, quasi-political remit, with commercial drivers coming in third place.

'In some cases, its exposure to the commercial realities of investment, or indeed many of the other things are limited to what it hears when people are making representations to it,' she says.

Choueka's colleague, partner and head of Bristows regulatory department, Maria Isabel Manley, reinforces the point: 'I am for competition rules to apply where appropriate and I am a big fan of IP rules. However, both sets of rules must co-habit in harmony,' she says. 'If you have a granted patent, you have a right

and you should be entitled to enforce that right. It is for the courts to determine whether, at the end of the day, the patent is valid or not, not the competition authorities.'

ZERO-SUM GAME

The lack of a commercial mindset is one that chimes with a number of the in-house lawyers attending, noting that from a company perspective, pursuing rights in Europe can be a frustrating gamble because they feel the Commission is the wrong body for exploring IP, including talking about which patents are 'good' and 'bad'.

'They are just not qualified to do the work that they are doing in this area,' says Catherine Higgs, senior legal counsel at AstraZeneca.

'What is quite frightening is the apparent reluctance of anyone in DG Comp to want fully to understand what patents are and why they are necessary,' observes Simon Thorley QC of 3 New Square.

This is a point echoed by Romano Subiotto QC, a competition partner at Cleary Gottlieb Steen & Hamilton, who is lead counsel for Lundbeck in *Lundbeck v Commission*, a key case

dealing with the cross-over of IP rights and EU competition law. He says DG Comp's approach is to determine what objectives it wants to achieve and then find the means to achieve them. 'The problem here is we have non-experts questioning the value of IP rights. They do not have the necessary tools or expertise to undertake this assessment and are largely driven by the objectives they want to achieve.'

One common view is that the Commission uses unfair methods in the way it handles its cases, using as a starting point that there is some kind of wrongdoing that is bad for consumers, then working backwards to find dominance or breach of competition rules in order to prove its point, trying to prove intent and disregarding the value of IP rights.

But Fidelma Macken of Brick Court Chambers argues that one of the reasons why IP has fallen foul of DG Comp is that nobody is standing up for it – not the lawyers, not the companies going to the court, not the judges, and not the Commission itself. Commercially, it makes less sense for business to fight against the Commission. 'It may well simply be cheaper, involve less manpower, and be less time-

'DG Comp seems to look on any settlement as an admission of wrongdoing.'

Fidelma Macken, Brick Court Chambers

consuming and less serious for your business to settle than actually fight. This seems to be something that DG Comp either does not recognise or does not want to recognise, but instead it seems to look on any settlement as an admission of wrongdoing,' she says.

This is picked up on by Jacob Westin, assistant general counsel at GlaxoSmithKline, who says: 'In the current environment it is very tempting for a business person, who we advise, to say: "Look, we have all these issues; the Commission is not very easy to deal with. The courts are not very predictable. We can settle and we can move on." That is what they want. They want to get on with their business.'

Many companies have neither the appetite nor the stamina to litigate through the European courts and the innovators within those companies

want to bring new products to the market rather than defend patents in court. Settling is often an attractive option, even if it means taking a risk from a competition perspective.

In the pharmaceutical sector, Higgs says there is a danger of having to encourage internal clients to pursue a case if there is a good prospect of winning, even if litigating is costing significant sums of money. 'On a business level, a case can cost £100,000 a month to litigate, so that may seem like a good reason to settle but the Commission's position seems to be: if we think we're going to win, why would we settle? If we settle we obviously think we're going to lose, therefore, the patent is invalid.'

One of the key concerns raised in the discussion is that the Commission appears to be very focused on short-term price



David Harrigan, The Walt Disney Company



Harry Robinson, Telefónica



Romano Subiotto, Cleary Gottlieb Steen & Hamilton: DG Comp not in a position to be making judgements about IP rights



Simon Thorley QC, 3 New Square: Seeking change in Brussels is like 'hitting your head against a brick wall'

► competition, despite another school of thought that says longer-term incentives need to be preserved, which will lead to competition in a more dynamic sense and is likely ultimately to be more beneficial to consumers.

'The problem that we have all skirted around, is that the Commission thinks "big equals bad", which has got to be a problem,' says Choueka. 'What then is the basis for innovating if big equals bad? Why innovate, why grow and why be successful? It is just a zero-sum game.'

EDUCATION NOT REVOLUTION

The solution? Some suggest a refreshing of DG Comp personnel might bring about new policy, in addition to encouraging different member

states' competition authorities to properly monitor what that Commission is doing as regards the treatment of IP in Commission cases. Nonetheless, Subiotto feels that exerting pressure through lobbying to make the Commission more accountable is perhaps a more productive approach than replacing senior competition officials.

Thorley, who is due to retire from practice as an advocate shortly, provides the rather depressing reality that comes with 25 years' experience as a QC handling these kind of cases at a European level. 'How does one actually get things implemented? Obviously this is not the first time I have heard people saying "there must be a better way". The problem is, one always gets the impression when seeking to implement

change in Brussels that you are hitting your head against a brick wall.'

A futile quest perhaps, but it seems avoiding conflict with the Commission over exercising IP rights is an unrealistic prospect. A week after this round table, the Commission announced that it would be fining Servier €331m after ruling the pharma company had used a series of patent settlements with generic rivals to protect its blood pressure medication perindopril from generic competition. This prompted a stern response from Servier spokesperson Lucy Vincent, chiming with the opinions expressed here: 'The European Commission's decision against our intellectual property rights sends a very bad signal to companies of all sizes, which make the choice to innovate in Europe. This kind of sanction jeopardises the pharmaceutical companies' commitment to research and this is thus detrimental to patients.'

Servier has announced its intention, 'considering the novelty of the unfounded theory put forward', to appeal to the CJEU. But clearly many feel it's high time the wider issues of competency are tackled head on. **LB**

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THE PANELLISTS

- **Rosemary Choueka** Partner, Bristows
- **Elizabeth Gutteridge** Partner, Deloitte
- **David Harrigan** Director, The Walt Disney Company
- **Catherine Higgs** Senior legal counsel, AstraZeneca
- **Julia Holtz** Director of competition, Google
- **Sarah Jackson** Senior legal counsel, Roche
- **Cameron Johnston** Legal counsel, Telefónica UK
- **Judge Fidelma Macken SC** Brick Court Chambers
- **Maria Isabel Manley** Partner and head of regulation, Bristows
- **Mark McAteer** Managing editor, *Legal Business*
- **Harry Robinson** Legal counsel, Telefónica UK
- **Tara Sherbrooke** Senior intellectual property lawyer, Element Six
- **Wayne Spillett** Senior legal counsel, Vodafone Group
- **Romano Subiotto QC** Partner, Cleary Gottlieb Steen & Hamilton
- **Simon Thorley QC** 3 New Square
- **Pat Treacy** Partner, Bristows
- **Fern Wakely** Senior legal counsel, Coca-Cola Enterprises
- **Jacob Westin** Assistant general counsel, GlaxoSmithKline

