YEARBOOK of ANTITRUST and REGULATORY STUDIES
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Peer-reviewed scientific periodical, focusing on legal and economic issues of antitrust and regulation.

CARS Centre for Antitrust and Regulatory Studies
Centrum Studiów Antymonopolowych i Regulacyjnych
Centre for Antitrust and Regulatory Studies, University of Warsaw, Faculty of Management
www.cars.wz.uw.edu.pl

Dawid Miąsik, *Stosunek prawa ochrony konkurencji do prawa własności intelektualnej* [*The relationship between competition law and intellectual property law*], Warszawa 2012, 586 p.

The relationship between intellectual property law and competition law is certainly a fascinating one. It is therefore not surprising that it has attracted the attention of many scholars. Leading Polish jurisprudence on the relationship between intellectual property rights (IPRs) and competition law has also, and unsurprisingly, attracted the attention of numerous academics and commentators. However, there has never been a comprehensive analysis of this relationship. Dawid Miąsik's excellent book certainly fills this important gap.

The author properly points out that the exercise of such exclusive rights as IPRs can potentially have negative effects on the market. This is particularly so, as the author rightly notices, when an IP holder is capable of excluding others from the market by exercising his/ her exclusive right. Indeed, the way in which the IPR is exercised might not be the most desired one from the perspective of satisfying the public interest in the proper functioning of the market[1].

As the author correctly states, the key issue at the intersection of IPRs and competition law is the importance that should be attached to the fact that a given activity, which is considered potentially anticompetitive, is in fact a form of the exercise of an IPR[2]. One should not forget that exclusive IPRs are granted as a reward for investments already incurred and as an incentive for further innovation. This suggests that a dynamic competition perspective must be taken into account when an intervention by way of competition law is being considered. Having studied Dawid Miąsik's book, I believe that this is the view taken by its author. The question remains, however, whether dynamic competition concerns are the only valid ones here or whether, and if so in what circumstances, should static competition issues also be addressed.

The author provides the readers with a comprehensive analysis of the relationship between IP and competition law in US, EU and Polish law. The thorough analysis of this relationship in the above jurisdictions is preceded by the presentation of leading theories that explain the relationship between these two legal fields. Although some of these doctrines are no longer in use, their presentation remains useful as it helps to

[1] D. Miąsik, *Stosunek prawa*, p. 67.
[2] D. Miąsik, *Stosunek prawa*, p. 75.

understand the evolution of the relationship between IP and competition law. In this part of the book, the author also analyzes the meaning of the concept of 'competition' as well as the aims pursued by competition laws. Thus, chapters II and III provide useful tools for the following in-depth analysis of the three chosen jurisdictions.

It needs to be stressed that the selection of Polish, US and EU laws as the basis for this analysis is by no means coincidental. The reason for choosing Polish law is obvious. The selection of the US and the EU is also not just a choice of two leading legal systems; it is also justified by the realization that EU competition law evolves under a strong US influence. Indeed, developments in the US antitrust field are sooner or later taken into account in EU law both by the European Commission as well as the Court of Justice. Understanding US law certainly helps to grasp the developments in the EU.

This critical review shall concentrate on selected issues discussed in chapter V of Dawid Miąsik's book where the author analyzes the relationship between IP and competition in EU law. The assessment starts from the assumption of the supremacy of EU competition law over IPRs, which makes it possible to control the exercise of IPRs by the TFEU provisions on competition. As such, EU competition law sets limits on the exercise of IPRs in the public interest and, indirectly, also in the interests of competitors. The author presents the evolution of the relationship between IPRs and EU competition law. While the Treaty is silent on this issue, the relationship is shaped by the jurisprudence and case law of the CJEU and the Commission.

Initially, many authors advocated the immunity of IPRs from competition law interference. The exclusivity theory seemed to be the basis for such thinking[3]. This approach was however rejected in cases such as *Grundig* or *Sirena Eda*[4]. What followed were the 'existence/exercise' and the 'specific subject matter' doctrines. In this context, the author accepts the criticism of the existence/exercise doctrine and admits that its application makes it very difficult to predict the outcome of CJEU rulings in particular cases[5].

The author also rightly observes that competition law enforcement in the area of IPRs was largely influenced by the specific aims of EU competition law, that is, its primary aim to eradicate obstacles to European integration raised by private parties[6]. This resulted in a very strict approach to exclusivity and sales restrictions. Indeed, it was primarily the Commission that advocated a strictly integrationist perspective towards the exercise of IPRs. This approach was not always correct and it was the Court of Justice who gradually modified it. As the author points out, this approach is certainly no longer dominant.

The author analyzes the relationship between IP and competition primarily in the context of such exclusionary practices as refusals to deal. He refers to a number of cases in this context including: *Magill*, *Volvo/Renault*, *Ladbroke, IMS Health* and *Microsoft*. Less attention is paid to exploitative practices such as demanding excessive

[3] D. Miąsik, *Stosunek prawa*, p. 361.
[4] D. Miąsik, *Stosunek prawa*, p. 362–363.
[5] D. Miąsik, *Stosunek prawa*, p. 367.
[6] D. Miąsik, *Stosunek prawa*, p. 396 and the following.

royalties for granting access to immaterial goods protected by IPRs. Such practices might also lead to the exclusion of competitors, who are either incapable or unwilling to get a license in such circumstances. In this context, reference is made to the *Syfait II* judgment where the CJEU declined to treat high prices as an indicator of a negative effect on competition.

However, these types of practices seem to attract an increasing amount of attention from the European Commission[7]. This is shown, among other things, in its *Rambus* and *Qualcomm*[8] cases. Both came up in a standard-setting context and concerned alleged exploitative practices by the above companies, which were believed to be holding a dominant position on their respective technology markets. The Commission alleged that the royalties charged were in breach of competition law mandated obligations to license their standard essential patents on FRAND terms (fair, reasonable and non-discriminatory). In a similar and recent case, the Commission initiated at the end of 2012 proceedings relating to the abuse of a dominant position against Samsung[9].

The use of FRAND obligation relates, *inter alia*, to royalties that may be charged by IP holders. It covers exclusionary practices such as discriminatory treatment of licensees, but it also addresses exploitative behavior. The perspective of obtaining high royalties is seen both as a reward and an incentive to innovators. Adopting such a perspective calls for a cautious competition law intervention in this area. The European Commission, unlike its US counterparts, seems to be eager to intervene in such cases. The fair and reasonable component of the Article 102 TFUE mandated FRAND obligation of IP holders would require more attention.

Chapter III contains an analysis of what seems to be the key issue in this field – when is the refusal to grant an IPR an abuse of a dominant position. This is particularly vital when many of the refusal cases relate to access to IPRs which are essential in order to employ widely used technical standards in the area of telecommunications and electronics. It seems that the author follows the jurisprudence of the Court of Justice here and accepts that a refusal to license may be regarded as an abuse of dominance within the meaning of Article 102 TFEU only if it hinders the appearance of a new product.

This approach follows the CJEU jurisprudence in *Magill* and *IMS Health* as well as, to a certain degree, its approach in the *Microsoft* judgment. It is true that in *Magill* the refusal to license weekly TV program information made it impossible for a new product to appear on the market. In the *IMS Health* case, however, the purpose of the request to license a copyright protected sales data presentation structure was not to bring a new product on the market, but to provide the same product as the IP holder. Consumers (large pharmaceutical companies) did not want a new product – in this case,

[7] Both the Technology Transfer and the Horizontal Guidelines explicitly mention the obligation to license on FRAND terms in the context of patent pools and standard setting.

[8] European Commission – MEMO/07/389 of 01/10/2007 Antitrust: Commission initiates formal proceedings against Qualcomm European Commission.

[9] European Commission – IP/12/1448 of 21/12/2012 Antitrust: Commission sends Statement of Objections to Samsung on potential misuse of mobile phone standard-essential patents.

a new format of presenting pharmaceuticals sales data – they were accustomed to the existing model developed by IMS Health. Its format became a widely accepted industry standard and the market did not need an alternative model. In such cases, there is no room for dynamic competition. Still, while competition by substitution is not what the market wants, what can be improved is price competition. Consumers would ultimately be better off if they had a chance to buy the same product, but at a lower price.

This is the case with IP protected standards. Access to IPRs relating to a standard technology are not required by competitors to offer a new product to consumers (as in, a product which could not be offered by the IP holder). Dawid Miąsik, seemingly motivated by dynamic competition concerns, seems to accept this strict approach to the 'new product requirement'. This is where I have a problem with the analysis. It seems that the author would not be ready to accept competition by imitation in this case. Instead, he would rather stay with the idea that what is required here is a new product. This would mean that the author accepts competition only if it is competition by substitution.

The obvious problem here is that the concept of a 'new product' is vague. There would certainly not be a new product in the circumstances of *IMS Health*. In truth, a new product could be offered in this case, but no one would be likely to buy it because nobody wanted their sales data to be presented in a manner different to what they were used to. However, if access to an established sales data presentation model is not granted, a long period of time of possible price competition might be lost, and consumer welfare is likely to be reduced as a result. There is no evidence that losses in dynamic competition resulting from granting a compulsory license would be higher than losses in static efficiency. It is doubtful that consumers would be better off if competitors are refused a license.

Electronic or telecommunication markets show that granting access to IP that protects technologies, which are considered to be standards, results in hardly any losses in dynamic efficiency. Access to standards opens up new markets and leads to vibrant dynamic and price competition within that IP protected standard. This realization is best illustrated by smart phones and tablets. Would consumers be better off if Nokia, Samsung or Motorola refused to license their standard essential patent technologies to Apple and *vice versa*? Certainly not. Though the products are the same and they satisfy similar consumer needs, dynamic competition is hardly reduced – it is just that it is now conducted within a set standard. Additionally consumers benefit from fierce price competition. This leads me to the conclusion that refusal to grant access to IP protected standards would be damaging both to static and to dynamic competition. Ultimately, it would be damaging to consumers.

I would also like to make a comment on the author's treatment of the ordoliberal school. Ordoliberal ideals provided a solid ground for European Community competition law and its enforcement. It is true that ordoliberals equated restrictions of competition with restrictions of competitors' freedom to act on the market, that is, in fact, rivalry between competitors. It is also true that they intended to protect a certain structure of the market because they believed that a concentrated market results in some market players gaining too much power. They feared that economic power would turn into political power, which could be abused.

It seems that the author's approach to the ordoliberalism is rather critical, in particular with respect to the manner in which ordoliberals approached the concept of competition restrictions and, as a result, the importance they attached to rivalry between competitors. This criticism is indeed widely accepted today. Protecting rivalry, which results in a certain market structure, might in the long run be positive for competition, also if competition is understood in terms of economic efficiency. *Microsoft* seems to prove ordoliberal concerns about market players gaining too much economic power. Lack of rivalry affected competition in a negative manner by depriving consumers of products, in this case software, capable of satisfying their needs to a much greater extent.

Concerns over structure should not be abandoned. Indeed, EU competition law makes reference to market structure. It must be stressed that Article 101(3) TFEU not only refers to 'promoting technical progress' and 'allowing consumers fair share of the benefits' but also stresses that competition should not be eliminated with 'respect of a substantial part of the products concerned'. By making a reference to technical progress, the TFUE indicates that dynamic competition concerns must be taken into account. By underlining at the same time that competition should not be eliminated, it points to market structure as well.

I would also like to address comments made by the author when referring to the *Masterfoods* case. The CJEU states therein that it is possible to place restrictions on the exercise of an IPR if these restrictions are proportional and do not affect the specific subject matter of that right[10]. The author then adds that forcing IP holders to make their immaterial property available without compensation could be regarded as overly excessive interference with the exercise of their right. Generally, this is correct but there are circumstances where this will not be an accurate assumption. An IP holder who additionally holds a dominant position is required to license on FRAND terms. In the context of standardization, as well as patent pools, an obligation to license on FRAND terms dictates non-discriminatory treatment with respect to setting conditions for access to technologies controlled by dominant undertakings. If an IP holder decides to license royalty free, which is by no means uncommon, subsequent licenses must also be granted on royalty free terms. A different approach would result in discrimination and the conditions of competition on the downstream product markets would not be the same for all market participants.

Finally let me say that Dawid Miąsik's book is both a must have and a must read for all those who deal with IP law. It is now no longer possible to operate in many markets without properly understanding how competition law affects the exercise of IPRs. Dawid Miąsik's book helps the reader to understand this complicated relationship. It is not easy to read, but getting through it certainly gives a lot of satisfaction.

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[10] D. Miąsik, *Stosunek prawa*, p. 354–355.