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Evolution or Revolution? The Italian Competition Authority and the Pfizer Decision: A Reply to Thomas Graf

Stefano Grassani (Pavia e Ansaldo Law Firm) · Tuesday, February 7th, 2012

In his last blog, Thomas Graf pointed out, as brilliantly and persuasively as he customarily does, the key features and implications of the Jan. 11, 2012decision of the Italian Antitrust Authority ("IAA") in the *Pfizer* case, coming to the conclusion that

"The intervention of the Italian Authority therefore expands the application of Article 102 TFEU to patent related conduct in a manner that deprives Article 102 TFEU of meaningful limiting principles. It does not identify improper conduct that is distinct from and goes beyond the lawful use of patent instruments provided by the patent system. If the decision were to stand this would therefore considerably increase legal uncertainty and potentially deter the use of legal instruments that EU law has introduced to stimulate innovation. If aspects of the patent system are considered unsatisfactory, the better way to address this is through legislative change, rather than antitrust intervention".

While abuses of dominance and the very same concept that 'certain' companies are held to a higher standard than others invariably raises some discomfort, I humbly do not fully agree on his reading of the above holding, nor I share the idea that the IAA unduly crossed the outer boundaries of article 102.

Preliminarily, let me at the outset disclose that, while all I will say relies on publicly available information, I did represent the generic company who lodged the complaint in the *Pfizer* case, actively pursuing conviction throughout the antitrust proceeding before the IAA. I trust those of you who believe in the sacred essence of our legal profession will defer to the paradigm of intellectual honesty we're all commanded to; I likewise anticipate that those who instead credit the fallacy of the human nature will certainly weight my ensuing remarks against such an original vice. I can only add that this learned forum seems to me a perfect venue for an unbiased exchange of views on a decision which comes at a crucial time and touches again upon the much debated issue of the interplay between IP and antitrust law.

That said, let me briefly explain why I respectfully disagree with Thomas. Unless otherwise stated, his summary recollection of the underlying facts is herein wholly referred to.

First of all, it is well clear from the evidence on file that Pfizer did not seek for a divisional patent as a reward to any new invention, application or innovative therapeutic use of its patented latanoprost molecule. The divisional patent applied for and obtained by Pfizer with the European

Patent Office in 2009 had no other purpose than that of enabling Pfizer to immediately request, in Italy, an SPC which, as Thomas rightly states, Pfizer was however time-barred from seeking in the first place. In other words, since Pfizer had 'forgotten' to ask for an SPC in Italy when it had the power to do so, the creation of a divisional patent was a remedial scheme merely aimed at allowing for the release of an SPC which, under the EU regulatory rules, Pfizer was no longer entitled to in Italy.

Secondly, no product was meant to be released by Pfizer based upon the divisional patent. Likewise, the divisional patent was validated by Pfizer only inItaly, where – as a result of its own inaction – there was a gap in the Pfizer's IP rights.

If that is the underlying scenario (something Pfizer did not dispute before the IAA), we're not far away from those situations where, as the EU Courts in *Astra Zeneca* and in a number of other cases clearly held, competition is not made on the merits. The type of competition which is to be promoted and protected under EU antitrust rules is competition "*on the merits*". Interestingly enough, if one bothers to run a word check on the 2010 judgment in *Astra Zeneca*, the expression "*competition on the merits*" will turn out to emerge 33 times !

Competition on the merits implies that IP rights, and the monopoly associated therewith, is warranted when the dominant company has engaged in a truly rewarding activity: a new product has been launched; a new drug has been discovered; a new process has been deployed; or, at the very least, the IP right is somewhat linked to consumers' welfare.

The lesson drawn by the EU case law on 102, but I would say more in general by the effects-based approach which we all think contributed to the improvement of antitrust enforcement in the recent years, is that conduct must be efficiency-driven if a dominant company shall safely comply with competition law.

In respect hereof, the fact that Pfizer's conduct merely tried to recoup the same protection that it would have had if it had not 'forgotten' to demand for an SPC in Italy does not seem to work as a valid justification. EU rules on SPCs make the granting of supplementary certificates contingent, inter alia, upon certain procedural time limits. If a company fails to comply with such limits and misses the deadline, the SPC cannot be granted and the company loses patent protection at the expiry of the basic patent life.

Competition on the merits holds that a dominant company cannot be allowed to indirectly and subtly seek for such additional patent protection by resorting to tactics which, ultimately, have a purely foreclosing object; regardless of whether such tactics are formally lawful under IP law.

Here too, the fact that a given conduct may be technically sound from an IP law perspective is not, in and by itself, a shield from the application of 102. From an antitrust perspective, the legitimate nature of the specific conduct at stake is irrelevant in ruling out the application of article 102. Exclusive agreements, discounts, refusal to deal, just to name few, are all conducts which, from a contractual point of view, are almost invariably legal. Yet, under certain circumstances, they may run afoul antitrust law.

In sum, it is true that, unlike *Astra Zeneca*, the *Pfizer* case does not fully rely on alleged misrepresentations by Pfizer before the patent agencies. Nevertheless, this does not mean that misrepresentation is the pivotal and necessary element for a 102 violation under *AstraZeneca* and that, short of that, antitrust authorities shall refrain from acting. Suffice to say that the second limb

of the Astra Zeneca's judgment related to the 'use' of the patent in certain countries (whereby AZ deregistered the Losec's capsules), rather than a mere misrepresentation at the patent release stage. Contrary to the generally accepted line of thought, *Astra Zeneca* sanctions misrepresentations not because they're ethically or legally despicable; but rather because, as in the case at stake, they are not servants of competition on the merits.

The IAA did not go further than that. As much as I would have loved to have been part of a revolution, I fear the *Pfizer* case is a simple evolution of well settled antitrust principles.

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