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Getting the Deal Through is delighted to publish the fully revised and updated sixth edition of *Intellectual Property & Antitrust*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 24 jurisdictions featured. New jurisdictions this year include Italy, Mexico, the Philippines, Russia and Spain.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. **Getting the Deal Through** publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.GettingTheDealThrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. **Getting the Deal Through** would also like to extend special thanks to contributing editor Susan M Hutton of Stikeman Elliott LLP for her continued assistance with this volume.

Getting the Deal Through

London

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Poland

Robert Małecki, Paweł Gutowski and Jan Karol Wiegner

Karniol, Małecki i Wspólnicy Spk

1 Intellectual property law

Under what legislation are intellectual property rights granted? Are there restrictions on how IP rights may be exercised, licensed or transferred? Do the rights exceed the minimum required by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)?

Intellectual property rights are granted by virtue of the Act on Copyright and Neighbouring Rights (the CNRA) and the Industrial Property Law Act (the IPLA). They exceed the minimum required by the WTO Agreement on TRIPs.

Copyrights and neighbouring rights are not subject to any kind of registration and an author enjoys their protection irrespective of complying with any formalities. A work (namely, any manifestation of creative activity of an individual nature established in any form) is in copyright from when it is established, even if its form is incomplete. In general, an author's economic rights expire after the lapse of 70 years from the author's death whereas moral rights are unlimited in time and independent of any waiver or transfer. Economic rights may be transferred to another person; a contract of transfer shall be made in writing otherwise it is null and void. Such a contract covers the fields of exploitation specified expressly therein. Even if a contract stipulates the transfer of all economic rights, the author retains an exclusive right to permit the exercise of its derivative copyright unless a contract stipulates otherwise. A contract may not provide provisions concerning all the works of an author to be produced in future and may provide only for fields of exploitation known at the time of its conclusion. A work may be subject to a licence, namely, a contract for its use. A licence covers the fields of exploitation specified expressly therein. An author may authorise the use of his or her work within the fields of exploitation specified in the contract and state a scope, territory and time of such use. As to the time of use, the CNRA provides that, unless the contract stipulates otherwise, a licence authorises the use of a work for five years in the territory of the state in which the licensee has its seat. Additionally, a licence granted for more than five years is always and definitely deemed, after the lapse of that period, as granted for an indefinite time. It is important to note that a licence for an indefinite time may, in general, unless the contract stipulates otherwise, be terminated with only one year's notice. An exclusive licence shall be made in writing, otherwise it is null and void. If there is no clear provision on transferring a right it is deemed that an author has granted a licence. An important provision limiting authors' economic rights is provided by article 116 of the IPLA, which states that products manufactured by means of an industrial design and put on the market after the lapse of the right in registration granted for such a design do not benefit from the protection of author's economic rights in a work under the provisions of the copyright law.

The IPLA deals with inventions, utility models, industrial designs, trademarks, geographical indications and topographies of integrated circuits as well as with obtaining patents, rights of protection, and rights in registration by entitled persons. The Patent Office of the Republic of Poland grants a patent when the statutory requirements are satisfied, in particular where an invention is new, involves an inventive step and is capable of industrial application. The term of a patent is 20 years counted from the date of filing of a patent application with the Patent Office.

A utility model, that is, any new and useful solution of a technical nature affecting shape, construction, or durable assembly of an object, may be protected by a right of protection granted by the Patent Office. The term of this right is 10 years counted from the date of filing of a utility model application with the Patent Office.

For an industrial design, that is, any new and unique character appearance of the whole or a part of a product resulting from the features of, in particular, the lines, colours, shape, texture, or materials of the product and its ornamentation, a right in registration may be granted. The term of this right is 25 years counted from the date of filing of an industrial design application with the Patent Office.

For a trademark, that is, any sign capable of being represented graphically and being capable of distinguishing the goods of one business entity from those of other business entities, a right of protection may be granted. The term of this right is 10 years counted from the date of filing of a trademark application with the Patent Office. The term of protection may, at the request of the right-holder, be extended for subsequent 10-year periods in respect of all or of a part of the goods. All these industrial property rights may be transferred and licensed in writing. The IPLA provides for restricted licences. Moreover, in certain cases, especially in the case of patent abuse, a compulsory licence may be granted. The impact of competition law on exercising or licensing IP rights is discussed in the following questions.

2 Responsible authorities

Which authorities are responsible for administering IP legislation?

Pursuant to the IPLA, the Patent Office is in charge of receiving and analysing of applications seeking protection for inventions, utility models, industrial designs, topographies of integrated circuits, trademarks, and geographical indications as well as keeping appropriate registers. The Patent Office is also empowered to decide in matters related to granting patents and supplementary protection rights.

There is no authority dealing with administration of copyright. Nevertheless, the CNRA provides a regulation of collective management societies as associations composed of authors, performers and producers. The collective management societies are in charge of granting licences and collecting and redistributing royalties to copyright holders in certain areas of copyright exploitation.

3 Proceedings to enforce IP rights

What types of legal or administrative proceedings are available for enforcing IP rights?

As regards enforcing IP rights granted by the CNRA and the IPLA, both civil and criminal proceedings before ordinary courts are available. Under the IPLA some of the cases concerning the criminal liability of a perpetrator will be decided according to the provisions governing the procedure applied in cases concerning petty offences. Moreover, the IPLA brings a litigation procedure before the Patent Office. This procedure is applicable especially in cases on the invalidation of a patent, a supplementary protection right, a right of protection or a right in registration as well as on the granting of a compulsory licence for exploiting an invention, a utility model or a topography. On conclusion of the litigation proceeding the Patent Office issues a decision. The provisions of the Code of Administrative Procedure apply accordingly to the litigation procedure before the Patent Office in cases not regulated by the IPLA. Lastly, the provisions of the Act on Suppression of Unfair Competition (the UCSA) regarding the civil and criminal liability for acts of unfair competition are enforced in civil and criminal proceedings as well as in the procedure applied in cases concerning petty offences.

4 Remedies

What remedies are available to a party whose IP rights have been infringed?

Provisions regarding IP rights provide for different types of remedies depending on which IP right has been violated.

In cases of an infringement of a rightholder's economic copyright, the right-holder may request compensation for damages resulting from the infringement according to the general rules of the civil code or pursuant to the provisions of the CNRA. According to the CNRA the right-holder may demand that the person who infringed its economic rights pays double or, where the infringement is deliberate, triple the amount of the appropriate remuneration. Moreover, the right-holder may demand that a perpetrator makes a statement of an appropriate content and in an appropriate form or that the perpetrator of the deliberate infringement committed within the framework of economic activity pays an appropriate sum to the Fund for the Promotion of Creative Activity. According to the special provisions of the CNRA regarding computer programs, the rightholder may demand that a user of a computer program destroys its technical means, including computer programs, used only to facilitate illegal removal or circumvention of the technical protection measures.

The right-holder whose moral rights have been violated may, for example, demand a cessation of breach of its exclusive rights, as well as demand that the perpetrator makes a public statement of the appropriate content and form. In cases of deliberate violation of moral rights, the court may award a certain amount of money to the rightholder to repair the suffered harm.

As far as the infringement of the IP rights mentioned in the IPLA is concerned, a patent holder, whose patent has been infringed, may demand that the infringing party ceases the infringement or surrenders the unlawfully obtained profits and redresses the damage, when the infringement was deliberate. The right-holder may demand stopping acts threatening infringement of the right. On request of the right-holder, the court may order unlawfully manufactured or marked goods to be withdrawn from the market or destroyed. It is also possible that the court hands the aforementioned products over to the right-holder on account of the sum of money to be adjudged to the right-holder.

5 Competition and abuse of IP rights

What consideration has been given in legislation or case law to competition in the context of IP rights, and in particular to any anti-competitive or similar abuse of IP rights?

Only the IPLA mentions competition and provides that suppression of unfair competition is governed by a separate legal act, namely, the UCSA. Furthermore, the IPLA declares that its provisions concerning the abuse of rights by the patent holder or licensee do not prejudice the provisions on counteracting monopolistic practices. The IPLA also provides that, in cases of an invention concerning semiconductor technology, a compulsory licence may only be granted to counteract unreasonable anti-competitive practices.

6 Remedies for deceptive practices

With respect to trademarks, do competition or consumer protection laws provide remedies for deceptive practices in addition to traditional 'passing off' or trademark infringement cases?

According to the UCSA, deceptive practices may be recognised as unlawful acts violating or threatening interests of another business entity indicated in article 3 of the UCSA. Moreover, deceptive marking of goods or services with a trademark may be recognised as misleading designation of products or services mentioned in article 10 of the UCSA. Under the UCSA the right-holder may request the business entity which committed the act of unfair competition to, inter alia, cease prohibited activities or remove its effects, as well as compensate a caused loss and release unlawfully gained profits.

Regardless of the above, according to the IPLA, marking goods with a counterfeit trademark or a registered trademark that a business entity is not entitled to use, for the purpose of placing them on the market or placing on the market goods bearing such trademark, is liable to a fine, limitation of freedom or even imprisonment for a period of up to two years.

7 Technological protection measures and digital rights management

With respect to copyright protection, is WIPO protection of technological protection measures and digital rights management enforced in your jurisdiction? Does legislation or case law limit the ability of manufacturers to incorporate TPM or DRM protection limiting the platforms on which content can be played? Could TPM or DRM protection be challenged under the competition laws?

Even before the WIPO Treaties entered into force in Poland, the CNRA in its wording as of 9 June 2000 actually met all requirements of the WIPO Treaties regarding TPMs and DRM. As a result of the WIPO Copyright Treaty's entry into force on 23 March 2004 as well as the WIPO Performances and Phonograms Treaties on 21 October 2003, the wording of relevant provisions of the CNRA has been amended and the aforementioned treaties' requirements are being met.

There is neither legislation nor case law limiting the ability of manufacturers to incorporate TPMs or DRM. However, TPM or DRM might be challenged under general competition law. Moreover, the lack of information on TPMs or DRM on the product or its packaging may be qualified under the UCSA as an act of unfair competition if it misleads consumers as to the usefulness or important features of the products.

8 Industry standards

What consideration has been given in legislation or case law to the impact of the adoption of proprietary technologies in industry standards?

There is neither legislation nor case law dealing directly with the impact of proprietary technologies in industry standards. However, due to article 82.1(2) of the IPLA, if a patentee abuses its patent,

a compulsory licence can be granted. Theoretically, patent ambush could be qualified as such an abuse and give the right to obtain such a compulsory licence. A compulsory licence is always non-exclusive, namely, it does not prevent other parties from being granted a licence, as well as the patent holder from concurrent exploiting of the invention. As regards compulsory licences, see also question 21.

Competition

9 Competition legislation

What legislation sets out competition law?

Polish competition law is set out in the Act on Competition and Consumer Protection of 2007 (the ACCP). The ACCP contains a catalogue of prohibited anti-competitive practices (including but not limited to direct or indirect price fixing, sharing markets of sale or purchase, limiting or controlling production or sale) and rules relating to abuse of a dominant market position. The ACCP provides for situations in which transactions between business entities, (for example, mergers and takeover of control) are subject to notification to the central government administration body competent in the protection of competition and consumers – the president of the Office of Competition and Consumer Protection (OCCP president), as well as remedies and sanctions which may be imposed for unlawful actions.

10 IP rights in competition legislation

Does the competition legislation make specific mention of IP rights?

The ACCP states that it is without prejudice to the rights arising under provisions on the protection of intellectual and industrial property. However, it applies to agreements entered into by business entities, in particular licence agreements, as well as to other practices of exercising the aforementioned rights.

The Council of Ministers, empowered by article 8.3 of the ACCP, has adopted two regulations mentioning IP rights. The first one is the Regulation of 30 July 2007 on the exemption of certain categories of technology transfer agreements from the prohibition of agreements restricting competition. Under this regulation, a transfer of technology agreement means an agreement by which one business entity grants another a licence to use an intellectual property right or know-how for the production of goods. The second is Regulation of 19 November 2007 on the exemption of certain specialisation and research-development agreements from the prohibition of agreements restricting competition. This regulation provides certain provisions on the usage and transfer of intellectual property rights within the scope of specialisation and research-development agreements.

11 Review and investigation of competitive effect

Which authorities may review or investigate the competitive effect of conduct related to IP rights?

The OCCP president is the competent authority dealing with the competitive effect of an agreement or conduct, including those related to IP rights. The key instruments used by the OCCP president are proceedings concerning competition-restricting practices – prohibited agreements (cartels) and abuses of a dominant position. Such a proceeding may end with a decision ordering the business entity to cease its questioned, restricted activities and pay a financial penalty. Furthermore, the OCCP president has the authority to permit or prohibit mergers and, when deciding on this issue, it investigates the competitive effect. The decisions of the OCCP president are appealable to the Court for Competition and Consumer Protection.

12 Competition-related remedies for private parties

Do private parties have competition-related remedies if they suffer harm from the exercise, licensing or transfer of IP rights?

A private party, understood as a consumer, has no specific competition-related remedies. It may obtain damages under the general rules of the Civil Code after bringing an action to ordinary courts. However, a private party may inform the OCCP president about violations of consumer rights and the OCCP president may then initiate proceedings and issue a decision recognising the given practice as infringing collective consumer rights and ban the practice. Such a decision will not result in awarding damages to the party, but it may be prejudicial in judicial civil proceedings.

13 Competition guidelines

Has the competition authority issued guidelines or other statements regarding the overlap of competition law and IP?

The competition authority has not yet issued any guidelines or statements concerning the overlap of competition law and IP.

14 Exemptions from competition law

Are there aspects or uses of IP rights that are specifically exempt from the application of competition law?

As stated in question 10, the ACCP is applicable only to agreements concerning IP rights entered into by business entities, in particular licence agreements, as well as to other practices of exercising IP rights. The two regulations adopted by the Council of Ministers indicated in question 10 provide for exemptions from competition law.

15 Copyright exhaustion

Does your jurisdiction have a doctrine of, or akin to, 'copyright exhaustion' (EU) or 'first sale' (US)? If so, how does that doctrine interact with competition laws, for example with regard to efforts to contract out of the doctrine, to control pricing of products sold downstream and to prevent 'grey marketing'?

The doctrine of 'copyright exhaustion' has applied in Poland since the CNRA came into force and concerns copyrights as well as neighbouring rights. In 2004, Directive No. 2001/29/EC of 22 May 2001 was implemented. Renting or lending an original or a copy of a piece of work for use is exempt from the doctrine, which means that it requires permission from the holder of the right. An effort to control pricing of products sold downstream is generally forbidden by competition law. Preventing 'grey marketing' or contracting out of the doctrine may be qualified as contrary to competition law.

16 Import control

To what extent can an IP rights holder prevent 'grey-market' or unauthorised importation or distribution of its products?

As to preventing 'grey marketing' with regard to copyrights, see question 15. As regards other IP rights holders, especially patent or trademark rights holders, their attempts to prevent 'grey marketing' of products first sold in EEA may be qualified as contrary to the competition law. The doctrine of exhaustion applies not only to copyrights, but also to other IP rights. However, if there are legitimate reasons, a holder of a trademark may oppose further commercialisation of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market. An authorisation for the distribution of products is necessary if the imported products were first sold outside the EEA.

17 Competent authority jurisdiction

Are there circumstances in which the competition authority may have its jurisdiction ousted by, or will defer to, an IP-related authority, or vice versa?

Such circumstances do not exist under Polish competition law. The proceedings before the OCCP president are conducted as explanatory, antimonopoly or proceedings on practices infringing collective consumer rights. The decisions of the OCCP president are only appealable to the Court for Competition and Consumer Protection.

Merger review**18 Powers of competition authority**

Does the competition authority have the same powers with respect to reviewing mergers involving IP rights as it does with respect to any other merger?

Pursuant to the ACCP, if the turnover of participants of the planned concentration in the financial year preceding the year of the notification exceeds the amount indicated in respective provisions of the ACCP, the participants are obliged to obtain prior clearance of the OCCP president before completion of the merger.

Under the ACCP the control of the OCCP president covers transactions that affect or are likely to affect competition in the market regardless of whether the merger involves IP rights or not. Hence, the OCCP president has the same powers with respect to reviewing the mergers involving IP rights as it does with respect to any other merger. As for the sanctions for implementing a merger without the prior clearance of the OCCP president, see question 27.

19 Analysis of the competitive impact of a merger involving IP rights

Does the competition authority's analysis of the competitive impact of a merger involving IP rights differ from a traditional analysis in which IP rights are not involved? If so, how?

The OCCP president's assessment of the competitive impact of a merger involving IP rights does not differ from traditional analysis of a merger. However, the OCCP president should take into consideration provisions of the Regulation of 19 November 2007 mentioned in question 10 above, as the competition rules referred to in article 6 of the ACCP prohibiting restrictive competition agreements do not apply to agreements that meet the requirements set forth in the said Regulation.

20 Challenge of a merger

In what circumstances might the competition authority challenge a merger involving the transfer or concentration of IP rights?

The OCCP president may challenge such a merger when it affects or may affect competition in the market, in particular by a creation or strengthening of a dominant position. However, the OCCP president shall issue by way of decision a consent for an implementation of such concentration in the event that waiving the concentration prohibition is justifiable, for example, the concentration brings economic development or technical progress and it may exert a positive impact on the national economy in Poland.

21 Remedies to alleviate anti-competitive effect

What remedies are available to alleviate the anti-competitive effect of a merger involving IP rights?

The IPLA provides for specific regulations that allow, in some circumstances, the granting of a compulsory licence. The Patent Office may grant the compulsory licence to exploit another person's patented invention when it has been established that the patent has been abused or it is necessary to prevent or eliminate a state of national emergency, for example, in the field of the protection of public order or human life and health.

Update and trends

Since the Regulation of 19 November 2007 on the exemption of certain specialising and research-development agreements from the prohibition of agreements restricting competition expires as of 1 January 2012, the Council of Ministers introduced a draft of a new regulation. Although the draft regulation concerns the Polish market, it follows Commission Regulations 1217/2010 and 1218/2010 to the effect of providing clear and uniform regulations. The draft provides a wider scope of application of the exemptions concerning the assignment of IP rights, obligation not to grant licences and fixing licence fees as compared with the Regulation of 19 November 2007.

Moreover, the compulsory licence may be granted in the situation of dependence of patents when the invention of another person cannot be used without violation of the rights of the earlier patent holder and the exploitation of the invention that is the subject matter of the dependent patent involves an important technical advance of considerable economic significance. However, as with inventions concerning semi-conductor technology, a compulsory licence may only be granted to counteract unreasonable anti-competitive practices.

Mandatory licences in the meaning of the IPLA cannot be granted on the grounds of the ACCP, however, the OCCP president's decision ordering the ceasing of the practice as it restricts competition may give some grounds for granting the mandatory licence according to the provisions of the IPLA. Moreover, the OCCP president may impose an obligation upon the parties of the merger or accept their obligation to grant the licence to their competitor and clear the concentration upon fulfilment of this condition. The licence is granted on the basis of relevant provisions.

Specific competition law violations**22 Conspiracy**

Describe how the exercise, licensing, or transfer of IP rights can relate to cartel or conspiracy conduct.

Agreements between competitors to transfer or licence intellectual property are subject to the OCCP president's analysis as to their conformity with the competition law. Such agreements may be recognised as restricting competition when they contain provisions that affect or may affect competition by fixing prices, determining terms and conditions of sales, etc. As discussed in question 14, agreements between competitors that meet the requirements set forth in the Regulation of 19 November 2007 mentioned in question 10 are excluded from application of the rules prohibiting competition-restricting agreements mentioned in article 6 of the ACCP.

Reverse payment patent settlements may be recognised as agreements whereby the parties limit production or share markets of sale and, as a result, are anti-competitive.

Moreover, the management of copyright by a collective management society is subject to evaluation as to its conformity with the provisions regarding competition-restricting practices (judgment of the Supreme Court, 6 December 2007, III SK 16/07). It means that agreements concluded by collective management societies that affect or may affect competition are challengeable under competition law. For example, see question 32.

23 (Resale) price maintenance

Describe how the exercise, licensing, or transfer of IP rights can relate to (resale) price maintenance.

Setting minimum resale prices for licensees shall be recognised as a competition-restricting agreement, since the ACCP forbids concluding contracts aimed at direct or indirect price fixing. However, in general, recommending resale prices for licensees is not considered to be illegal.

Acquisition and merger control – competition

24 Exclusive dealing, tying and leveraging

Describe how the exercise, licensing, or transfer of IP rights can relate to exclusive dealing, tying and leveraging.

Tying, that is, making the conclusion of an agreement subject to acceptance or fulfilment by the other party of other performances is not prohibited per se under the ACCP. It is illegal only if it constitutes a part of a competition-restricting agreement or an abuse of a dominant position, both requiring that there is neither a substantial nor a customary relation between the tying and tied goods. The limits on a business entity compelling or preventing the use of other products by using IP rights are set by provisions of the ACCP concerning the prohibition of competition-restricting practices, as well as by provisions of the IPLA concerning the abuse of a patent or other industrial property rights. Moreover, the Civil Code includes provisions (on ‘prohibited contractual clauses’) aimed at consumer protection, similar to those concerning tying under the ACCP. However, unlike the ACCP they concern making the conclusion, contents or performance of a contract contingent upon conclusion of another contract. As regards exclusive dealing it is, like tying, not prohibited per se. To be prohibited it has to constitute a competition-restricting agreement under the ACCP and cannot be one of the exemptions stated therein. The burden of evidence for the case of an exemption rests upon the concerned business entity.

25 Abuse of dominance

Describe how the exercise, licensing, or transfer of IP rights can relate to abuse of dominance.

In some situations the exercising of exclusive rights in specific circumstances may form an abuse prohibited by competition law. For example, a right-holder’s refusal to license may be recognised as an abuse of a dominant position when the refusal relates to the subject of an IP right that is indispensable to the exercise of a particular activity in a relevant market and there is no objective justification for the refusal, and the right-holder is a business entity that may act independently of competitors or contracting parties to a significant degree. According to the court’s judgements and decisions of the OCCP president, the following practices were recognised, inter alia, as an abuse of a dominant position with respect to IP rights:

- making the conclusion of a phonographic contract subject to bearing the costs of manufacturing a hologram by the licensee. The court stated that receiving the hologram charge by a collective management society was not necessary for a proper performance of reproduction rights to the records; and
- making the conclusion of a collective management agreement subject to empowering the collective management society to grant an exclusive joint public performance, mechanical and radio and TV licence.

26 Refusal to deal and essential facilities

Describe how the exercise, licensing, or transfer of IP rights can relate to refusal to deal and refusal to grant access to essential facilities.

Refusal to license IP rights may be recognised as an infringement of competition law when a dominant business entity has access to an essential facility (the subject of an IP right that is indispensable to the exercise of a particular activity in a relevant market) and exercises the right exclusively without objective justification for the refusal to grant access to the essential facility. If the right-holder refuses to grant access to the patented invention the IPLA provides for specific regulations that might lead to compulsory intervention in the right-holder’s exclusivity (see also question 21).

Remedies

27 Remedies for violations of competition law involving IP

What sanctions or remedies can the competition authority or courts impose for violations of competition law involving IP?

The OCCP president may issue a decision ordering a business entity that violated competition law to cease the restrictive or illegal conduct and pay a financial penalty of up to 10 per cent of its preceding year’s revenue. As for the mergers affecting competition, the OCCP president may undertake to restore the state of competition by, for example, ordering the business entity to sell a part of their shares or to dispose of the entirety or part of their assets of one or several business entities. The OCCP president may also impose a financial penalty of the aforementioned amount. In the case of delay in execution of the OCCP president’s decisions, the business entity may be liable to a financial penalty constituting an equivalent of up to €10,000 per each day of delay. Moreover, competition-restricting agreements or their respective parts are null and void.

Additionally, the business entity may request compensation or damages resulting from the infringement according to the general rules of the Civil Code.

28 Competition law remedies specific to IP

Do special remedies exist under your competition laws that are specific to IP matters?

There are no special remedies under the ACCP that are specific to IP matters.

29 Remedies and sanctions

What competition remedies or sanctions have been imposed in the IP context?

In his current decisions, the OCCP president imposes the remedies and sanctions mentioned in question 27. For example, in a case of 21 July 2009 (decision No. RWA-10/2009, available on the website of the OCCP) the OCCP president imposed a financial penalty of 407,256 zlotys on collective management society ZAiKS for abuse of a dominant position in the market of collective management of copyright to musical works and musical and lyrical works. In this case, ZAiKS’s practice restricted authors’ rights to choose a collective management society to manage their copyright, as well as restricting competition between collective management societies, since the agreement with ZAiKS provided a five-year binding period regardless of the date of renouncement of the agreement by a right-holder.

30 Scrutiny of settlement agreements

How will a settlement agreement terminating an IP infringement dispute be scrutinised from a competition perspective?

The ACCP provides a broad definition of an agreement which may be subject to the OCCP president’s analysis. As a result, there is no difference between analysing a settlement agreement terminating an IP dispute and any other agreement regarding IP rights from the perspective of competition law. An agreement whereby one party agrees not to compete with respect to the patented product may be recognised as infringing the provisions of the ACCP regarding competition-restricting agreements (limiting or controlling production or sale as well as technical development or investments), unless such agreement meets the requirements specified in the Regulation of 19 November 2007.

Economics and application of competition law**31 Economics**

What role has economics played in the application of competition law to cases involving IP rights?

Like in other countries of the European Union, economics plays an important role in the application of competition law. Recently, economic theories have been applied in cases decided by the OCCP president, such as in a case of 16 July 2010 (decision No. DOK 6/2010, available on the website of the OCCP) concerning a prohibition-restricting agreement entered into by PKN Orlen SA, the biggest Polish oil refiner and biggest petrol retailer. Another interesting decision where economic theory was applied is the decision of the OCCP president of 11 February 2004 (decision No. RWR 7/2004, available on the website of the OCCP) concerning Polskapresse sp zoo, one of the biggest publishers in Poland. Polskapresse sp zoo failed to notify the intention of concentration to the OCCP president, who as a result imposed a financial penalty of 235,850 zlotys. The position of the OCCP president on the application of economic analysis in cases of anti-competitive concentrations of business entities was presented during the meeting of the Competition Committee of the OECD in 2004. The importance of economics in competition law cases involving IP rights is difficult to indicate as there have only been minor cases where it has been considered. However, in a decision of the OCCP president of 21 July 2009 (decision No. RWA-10/2009), mentioned in question 29, economics played an important role in finding that the collective management society ZAiKS abused its dominant position.

32 Recent cases

Have there been any recent high-profile cases dealing with the intersection of competition law and IP rights?

In its decision of 29 August 2008 (decision No. 6/2008), the OCCP president found that the agreement between two collective management societies, ZAiKS and SFP, entered into on 29 December 2003 restricts competition and as such is prohibited under the ACCP. Due to the aforementioned decision the OCCP president obliged the parties to cease the competition-restricting practice resulting from the agreement and imposed financial penalties upon them. In its agreement ZAiKS and SFP, inter alia, fixed minimum fees collected from commercial users for the reproduction of audio-visual works on copies for individual use. The fixed minimum fees were applied, inter alia, when collecting fees from publishers who included DVDs of films with papers or magazines. An appeal to the Court for Competition and Consumer Protection filed by ZAiKS and SFP has been dismissed. Currently, the case is pending in the second instance court.

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