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ABSTRACT

- 1. Considering *Ex Ante* Disincentives in Compulsory Licensing: How to Solve the Tradeoff between Obligations to Deal and the Scope of Intellectual Property Protection**
- 2. *Wanadoo*: Between ‘Old’ Antitrust and Enforcement Priorities**
- 3. Dal dovere alla logica premiale: una misura della pressione dinamica e altre forme di tutela degli incentivi ad investire in R&S**

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1. *Considering Ex Ante Disincentives in Compulsory Licensing: How to Solve the Tradeoff between Obligations to Deal and the Scope of Intellectual Property Protection*

By definition, exclusive rights, such as intellectual property rights (“IPRs”), imply a certain degree of exclusion and restriction of competition. Even if EU Courts have accepted that a dominant company owning IPRs is not obliged to share such rights with competitors for the sole reason of being dominant, they have repeatedly taken the position that a refusal to license may constitute an anticompetitive abuse under certain circumstances.

This paper is intended to provide a critical overview of EU case law and examine the effects of compulsory licensing on economic welfare. First, it shows that the European approach is based on imperfect economic assumptions: on the one hand, it only focuses on short term allocative efficiencies (*i.e.*, the immediate negative impact of the monopoly on consumers), on the other, it takes the facility for granted (it assumes that the facility being contended would have been created even if the inventor knew since the beginning that he would not have recouped the R&D investment).

More broadly, it shows that mandatory access generally lowers the inventor’s incentives to invest in R&D for the intuitive reason that companies invest only when they expect large returns in terms of monopoly profits. A preferable approach would be to analyse cases involving compulsory licensing of IPRs from the perspective of long-term efficiencies, balancing consumers’ short-term gains against the inventor’s *ex ante* disincentives to invest, especially when significant R&D expenditure is involved.

2. *Wanadoo: Between ‘Old’ Antitrust and Enforcement Priorities*

In *Wanadoo*, the Court of Justice of the European Union (“CJEU”) held that a predatory strategy would always reinforce the predator’s dominant position even when the latter has no possibility of recuperating losses.

This paper is intended to provide a critical overview of the economic literature on predation and examine the significance of the recoupment test in predatory pricing analysis. It then describes the requirement of recoupment in the U.S. and EU jurisprudence and focuses on the *Wanadoo* case by illustrating the arguments raised by the parties and the rationale put forward by the CJEU to exclude a requirement of recoupment.

While the European Commission and Courts continue to put emphasis on the intention to cause harm to competitors, it is argued that the introduction of a recoupment analysis would have helped drawing the dividing line between what is anticompetitive predation and what is rather pro-competitive pricing behavior.

3. *Dal dovere alla logica premiale: una misura della pressione dinamica e altre forme di tutela degli incentivi ad investire in R&S*

This paper illustrates how patterns of R&D investment by firms in “new-economy” industries could be used to estimate the strength of dynamic competition in the short term. It argues that, while Schumpeter’s replacement effect is only observable in the long term, dynamic competition also materialises in the short term in the form of

pressure to invest insisting upon market players, thereby reducing their market power and margin of maneuver.

At the same time, it shows that traditional antitrust principles should be applied with caution in order not to discourage investments in R&D, and that market power analysis should become central to the practice of antitrust economics.