

DAY 2: FRIDAY, NOVEMBER 10, 2017

Plenary I: Finding the Right Balance between IPR and Competition

The key speakers were: Allan Asher, Chairman, Foundation for Effective Markets and Governance; Keith Maskus, Professor, University of Colorado; Shamnad Basheer, Honorary Research Chair Professor of IP Law, Nirma University; Daryl Lim, Associate Professor, The John Marshall Law School; and Geeta Gouri, Former Member, Competition Commission of India. Thomas Cheng, Associate Professor, University of Hong Kong, and Uros Cemalovic, Associate Professor, John Naisbitt University, presented their papers.

The session highlighted the importance of finding the right balance between competition and Intellectual Property (IP) protection for innovation, which is often contingent upon level of economic development in the country. It was opined that IP protection may not be priority for certain industries, such as heavy machinery, while it may be important for others, such as pharmaceutical and chemicals. Thus, a differential approach may be adopted to strike a balance. The development priorities of economies may influence the balance between IP protection and competition.

It was also pointed out that better coordination between patent and competition authorities is necessary. Consumer welfare should be at the core of competition law, for which competition authorities need to protect competition and not competitors. It was also stressed that populism needs to be avoided in order to prevent market distortion.

Plenary II: A Comparative perspective to IPR and Competition: Lessons and experiences from across the globe

The key speakers were: Eduardo Perez Motta, Former President, Federal Competition Commission, Mexico; Derek Ritzmann, Senior Vice President, Compass Lexecon; Sujitha Subramanian, Senior Lecturer, University of Liverpool; Ayman Shafei, Independent Consultant; and Kiran Meeterbhan, Former Executive Director, Competition Commission of Mauritius. Avinash Sharma, Panel Counsel, Competition Commission of India and Itumeleng Lesofe, Senior Legal Analyst, Competition Commission of South Africa, presented their research papers.

The plenary commenced with a key question of the extent with which invention needs to be rewarded to promote innovation. It was highlighted that there is no conflict between IP and competition regime in India and that both can exist simultaneously. The issue of forum shopping along with weak IP regime in South Africa was discussed. Experience from Middle East, Egypt and Mauritius were also quoted while discussing the application of competition law in areas of anti-competitive agreements and mergers.

Questions from the floor related to consumer welfare, collaborative standards setting and innovative approaches for coordination between IP and competition agencies. It was emphasised that in light of social and economic conditions of developing countries, the need to transfer technology to promote domestic invention which benefits society and consumers needs to be taken in to account, while tailoring the approaches for aligning IP and competition policies.

Parallel Session 1.1: Information and Communication Technology (ICT): Licensing of Patents and Standard Essential Patents (SEPs)

The key speakers were: Shyam Khemani, Special Advisor Competition Policy, SKP Group, Mahesh Uppal, Director, Com First (India) Private Limited; Keith Mascus, Professor, University of Colorado; Rajan S Mathews, Director General, Cellular Operators Association of India; Santanu Mukherjee, Advocate and Head of Chambers, Ex Lege Chambers; Cihan Dogan, PhD Candidate, Istanbul Bilgi University; A Damodaran, Professor, Indian Institute of Management-Bangalore; Derek Ritzmann, Senior Vice President, Compass Lexecon; and Vikas Kathuria, Assistant Professor, Bennett University.

The session started with discussing the prevalent theories of harm to competition vis-à-vis licensing of SEPs and whether there was sufficient economic evidence to prove the same. The consensus was that collaborative standardisation brings several efficiencies in the market and promotes consumer welfare.

There is little or no quantifiable evidence which proves that SEPs restrain innovation and competition in the market. Consequently, the regulators and adjudicatory bodies should not start with the assumption that there is anti-competitive harm through SEP licensing. Patents are essential for industries which rely on standards. Standard setting procedures are integral for interoperability and regulators should ideally see how market plays out before intervening. There might be scope for intervention where public interest is being harmed.

Interestingly, a case for widening the powers and capacities of the regulators was also made and it was stated that there ought to be clear guidelines for ex-ante and ex-post regulatory intervention. The Fair, Reasonable and Discriminatory aspects of SEP licensing were also discussed. Speakers also pointed out towards the research vacuum vis-a-vis innovative mechanisms to deal with such issues and the need for building ecosystems for good-faith negotiations.

Parallel Session 1.2: IP Competition Interface in Pharmaceutical and Agriculture

The session was chaired by David Ong'olo, Chairman, Competition Authority of Kenya.

Pharmaceuticals

The key speakers included: D G Shah, Secretary General, Indian Pharmaceutical Alliance; Sothi Rachagan, Vice Chancellor, Nilai University; Sujitha Subramanian, Senior Lecturer, University of Liverpool; Nripi Jolly, Associate, DMD Advocates; and Priyanka Choudhary, Research Fellow, National Law University-Delhi.

The session highlighted that Competition and IP can co-exist, despite apparent tensions between the two. IPR alone is not the driver for innovation and that inventions may also sustain without IPR protection. In addition, competition may not only be among generic developers and IPR holders, but may be associated with other dimensions as well.

For competition authorities, determination of relevant product market in pharmaceutical cases is a complex task. It was further stressed that in order to deal with the instances like

pay for delay, ever-greening etc., patent regime alone seems insufficient. Thus, competition authorities also need to play an advocacy role.

Agriculture

The key speakers include: Suman Sahai, President, Gene Campaign; Shivendra Bajaj, Executive Director, Association for the Biotech Led Enterprises Agriculture Group; Serdar Dalkir, President, Competition & Regulation Economics Testimony and Consulting; and K K Sharma, Chairman, K K Sharma Law Offices

As a pro-competition measure, India used TRIPS flexibilities to the fullest, when it chose sui generis legislation over patent protection for new plant varieties. It also included a separate chapter for farmers rights to save, use or even sell (in non-branded form) the protected seed. The concept of FRAND in Genetically Modified (GM) seed, is a result of unwarranted dispute over royalty between technology provider and technology user, which in this case happened to be local Indian company. It was argued that if the role were to be reversed, where domestic company was a technology provider, would GM Licensing Guidelines still be required?

From the recent big mergers in agriculture input sector, one expectation is that it would engender more funds into R&D. From competition policy perspective, implementing TRIPS flexibilities would be a positive approach. Thus there may also be need for further competition reform of IP regimes.

Planery 3: Disruptive Technologies and Economic Regulations

The key speakers included: Isabelle Durant, Deputy Secretary General, UNCTAD; Barak Orbach, Professor, University of Arizona, James E. Rogers College of Law; James Mancini, Analyst, Competition Division, OECD; Cassey Lee, Senior Fellow, ISEAS-Yusof Ishak Institute; Ajay Shah, Professor, National Institute of Public Finance and Policy; and Seema Gaur, Senior Economic Adviser, Ministry of Electronics & Information Technology, Government of India.

The session commenced with a broad discussion on importance of technology on least developed and developing countries. It was opined that digitisation has created a level playing field between countries. The discussions then moved to the rise of disruptive technologies and the regulatory challenges associated with them. More emphasis was given to two-sided markets (TSM), comprising consumers and service providers as users to a technology platform, which benefit mutually from any rise in demand. The session deliberated on the several regulatory connotations of TSM such as liability binding, classification of such platform, among others.

Other key points made included limited capacity of the regulators in understanding the disruptions and their constant evolution, predatory pricing, monopolies, homing (exclusive contract), privacy and data protection. The session also delved into the issue of algorithms being used for price holding and opening various avenues of collusion between competitors, which are difficult to identify.

The panel then discussed on the aspect of regulatory arbitrages that exist between the existing businesses and the disruptive businesses, which enable them to flout the existing regulations. The low capacity of states in framing optimal regulations was also underlined,

which may also be attributed to corruption, political influence and lack of will. Regulator may collect information on demand and supply to ascertain the possible outcomes, which may aid the policy making. Free riding on the doctrines from other regions such as the United States and Europe, was condemned and emphasis was laid on understanding the local scenario while drafting regulations.

Parallel Session 2.1: Digital Payments: Innovation in Regulation to Manage Disruption

The key speakers included: Atiur Rahman, Former Governor, Bangladesh Bank; Amol Kulkarni, Fellow, CUTS International; Ravinder S. Aurora, Executive Director, Mastercard; Kailas Karthikeyan, Policy Consultant, Gestalt Consulting; Sanjay Khan Nagra, Senior Associate, Khaitan & Co.; Sumita Kale, Research lead, Indicus Centre for Financial Inclusion; Srikanth Lakshmanan, Founder, Cashless Consumer; David Ong'olo, Chairman, Competition Authority of Kenya; Ashish Aggarwal, Consultant, National Institute of Public Finance and Policy; Enamul Haque, Professor, East West University and Mandar Kagade, Consultant, Indira Gandhi Institute of Development Research.

The session started with deliberations on prevalent regulatory challenges associated with digital payments. India is striving to transform itself into a cashless economy. However, it is facing several bottlenecks, in order to ensure last mile delivery of services to the consumers. These bottlenecks may be attributed to factors such as financial illiteracy, infrastructure unavailability, stringent regulations, etc.

The high cost of cash and benefits of digital payments was pointed out. Also, it was mentioned that implementation challenges faced by regulators could be resolved through good regulatory design and capacity building. Lack of efficient consumer grievance redress mechanism and demand side assessment of digital payments was also pointed out. Inability of small merchants to link with digital financial service providers, owing to unavailability of consumer data, was also stressed upon. The panelists agreed on the need for balanced regulation and collaboration between traditional and other entities in the sectors to ensure consumer welfare.

CUTS Research Report **Level the Playing Field to Leverage the Potential of Digital Payments** (available at <https://goo.gl/SSWmvi>) was released and disseminated during the session.

Parallel Session 2.2: Regulating Multi-Sided Platform Markets

The key speakers included: Bipul Chatterjee, Executive Director, CUTS International; Pornchai Wisuttisak, Assistant Professor, Chiang Mai University; Natalie Timan, Director of Economics, Competition and Markets Authority, United Kingdom; Hanne Melin, Director, Global Public Policy, eBay; Subhashish Gupta, Associate Professor, Indian Institute of Management-Bangalore; Smriti Parsheera, Consultant, National Institute of Public Finance and Policy; Duangthip Chomprang, Director, International Institute for Trade and Development; Puree Sirasontorn, Assistant Professor, Thammasat University; Cezley Sampson, Director, Privatisation and Regulatory Business Practice, London Economics Limited; Iravati Damle, Lead, Public Policy (West India), Uber.

The deliberations started with the role of government and regulatory agencies to promote competition in the market. It was conferred that there is a need to reform the existing legal framework, in order to regulate Multi-sided platforms (MSP). This may be done through endorsing regulation of competition rather than regulation for competition. Further, while competition should prevail in the market, it must not compromise on consumer welfare. However, to facilitate competition, barriers to expansion of markets must be lowered, which may be achieved through minimising regulatory requirements and red-tapism. Also, MSPs are often labelled as data aggregators; therefore, it was argued that data portability is needed to reduce information asymmetry.

While regulation should be made keeping consumers at the heart, however, inadequate economic-education of consumers might prove to be a barrier. In addition, there are multiple entities regulating a sector, which often results in jurisdictional conflicts. In the process, consumer grievance redress becomes more complex, which needs to be streamlined. It was also argued that some MSP connect remote and small, but independent enterprises, to the global value chain. There is need for further deliberations on whether such platforms are sharing a piece of pie with traditional and local enterprises or the size of pie has increased. Consequently, more research is required to determine if such MSPs should be differently treated from other market players.