WTO OMC

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# TRIPS PROVISIONS ON COMPETITION POLICY

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In 2004, the discussion on trade and competition policy in the WTO was formally placed on hold: the WTO General Council decided that Competition will not form part of the Work Programme set out in the Doha Declaration and therefore no work towards negotiations on this issue will take place within the WTO during the Doha Round" ([1]). Nonetheless, it would not be accurate to say that competition policy is excluded altogether from the WTO. Provisions on competition policy can be found in various existing WTO instruments. This is the case of the TRIPS Agreement, which is the WTO agreement on intellectual property. Two sets of provisions are of particular interest:

- Art. 8.2 and 40, which are more permissive than prescriptive since they provide that WTO Members "may" adopt appropriate measures to address abuse of intellectual property right; therefore, they are not obliged to adopt such measure;
- Art. 31k, which makes the life easier for competition agencies when they impose a compulsory licence as a remedy to an anti-competitive behaviour.

## I. Appropriate measures to prevent abuse of IPRs (TRIPS, Art. 8.2 and 40)

Art. 8.2 and 40 allow Members to adopt competition rules to address anti-competitive practices. This is a key element of this section of the meeting since competition policy is an important determinant of both innovation in the pharmaceutical sector and access to medicine at an affordable price.

Art. 8.2 provides for a general principle that "Appropriate measures, provided that they are consistent with the provisions of (the TRIPS Agreement), may be needed to prevent the abuse of intellectual property rights by right holders".

As already mentioned, this provision is not prescriptive. Admittedly, these measures, that could be adopted to prevent abuse of IPRs, must be consistent with the other provisions of the TRIPS Agreement; however, this mainly refers to non-discrimination which is an important principle of the multilateral trading system.

[1] WTO, WT/L/579 du 2 August 2004.

It is also worth mentioning that Art. 8.2 does not specifically mention competition law violations but these are clearly included in the general terms of "abuse of intellectual property rights".

Art. 40 focusses on the specific issue of anti-competitive licensing practices. It should be clear that licensing agreements are not a priori anti-competitive. On the contrary they are pro-competitive as they are liable to expand the number of competitors. However these agreements can contain anti-competitive clauses.

Art. 40.2 contains a short list of licensing practices that WTO Members may address as abuses of intellectual property rights: this list includes exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing. Obviously, these are not the most harmful practices that come to mind. However this list corresponds to the level of agreement reached by the negotiators of the TRIPS Agreement. A more daring list would have included price fixing and market sharing. However, it is important to stress that the Art. 40.2 list is only illustrative.

Finally, Art. 40.3 and 40.4 contain provisions on cooperation. For example, Art. 40.3 provides that "Each Member shall enter, upon request, into consultations with any other Member which has cause to believe that an intellectual property right owner that is a national or domiciliary of the Member to which the request for consultations has been addressed is undertaking practices in violation of the requesting Member's laws and regulations". This is an interesting example of mandatory cooperation in the implementation of competition policy.

**II. Compulsory licence as a remedy to an anti-competitive practice (TRIPS, Art. 31k)**

Under TRIPS, Art. 31, WTO Members may grant compulsory licences i.e. licences granted in spite of the opposition of the patent holder.

In this regard, in the Doha Declaration on the TRIPS Agreement and Public Health, that was adopted in 2001, the WTO Members formally recalled an important flexibility that results from the TRIPS Agreement: "Each Member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted".

It must also be recalled that TRIPS Art. 31 sets out certain conditions that have to be respected by any WTO Member that grants a compulsory licence.

Violation of competition law is one important ground upon which a compulsory licence can be granted. Indeed, a compulsory licence can be a remedy to an anti-competitive behaviour.

For example, a refusal to grant a voluntary licence, can, at least in some legal system, like in the European Union, be considered as an abuse of dominance. The remedies could include not only a fine but also an injunction to grant the licences that the dominant firm refused to grant in the first place. In other word, the competition agency will grant a compulsory licence.

In such a case, i.e. when a compulsory licence is a remedy to an anti-competitive practice, WTO Members are not obliged to apply some of the conditions set out in Art. 31.

This is the case in the first place of the requirements to show that the beneficiary of compulsory licence has made efforts to obtain voluntary authorization from the right holder on reasonable commercial terms and conditions, and that such efforts have not been successful within a reasonable period of time. In other words, the competition agency can impose a compulsory licence even without prior negotiation of a voluntary licence.

This, however does not mean that a negotiation has no place at all in a case of refusal to grant a voluntary licence. For example in the GSK and Boehringer Ingelheim cases addressed by the South African authorities in 2003, an amicable solution was achieved after a negotiation between the complainant and the two undertakings. These two firms had been accused of abusing their respective dominant position by refusing to licence their patents to generic drug manufacturers (and by charging excessively high prices). The cases were eventually closed after the two firms made a number of commitments, including the commitment to expand the number of licensees in South Africa.

Another condition that a competition agency is not obliged to apply is the requirement that the products produced under a compulsory licence be predominantly for the supply of the domestic market of the member which grants the compulsory licence. In other words when a compulsory licence is a remedy to an anti-competitive practice, the whole production can be exported.

Finally, Art. 31k provides that the competition agency may consider the need to correct anti-competitive practices while determining the amount of remuneration due to the patent holder. This means that when a compulsory licence is a remedy to an anti-competitive behaviour, the patent holder could be deprived of an "adequate remuneration": the remuneration could be lower than if an anti-competitive practice had not been established.