The European Commission’s Closer Look on the Pharmaceutical Sector
-New Development on the Interface between IP and Antitrust Law-

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ABSTRACT

A recent investigation of the EU’s pharmaceutical market carried out by the European Commission has been shedding new light on the question of abuse of a dominant position pursuant to Article 102 TFEU\(^1\) by holding, acquisition or exploitation of IP rights. This so-called “sector inquiry” indentified practices and strategies which “originator companies” exert on a large in order to target competitors, and found that such behavior results in significantly higher costs for buyers and competitors, in delay in the entry of generic medicine as well as the access to innovative medicine, and in obstruction of innovation. This article investigates recent antitrust proceedings by the Commission and the decision practice of the European Courts – within and beyond the pharmaceutical sector – and argues that the practices revealed by the sector inquiry can be predominantly assumed to lack objective justification, lead to foreclosure of competitors and therefore constitute infringements of Article 102 TFEU. Towards the end, the article shows that the Commission’s proactive policy in IP-related antitrust matters and its sensitivity to issues of abusive acquisition of intellectual property and abuse of public procedures by misleading representations establish a new quality in the application of European antitrust law, and serve as a guideline how to draw the line between IP protection, lawful business strategies and anti-competitive behavior under EU law.


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\(^1\) Treaty on the Functioning of the European Union; before the Treaty of Lisbon took effect known as Article 82 ECT (EC Treaty).
I. INTRODUCTION

In January 2008 the European Commission launched an in-depth investigation of the European Union’s (EU) pharmaceutical market, having become concerned that “competition may not be functioning optimally” in that sector. This “sector inquiry” was concluded on 8 July 2009 when the Commission published its final report. The report’s main findings are that it takes too long for generic medicines to reach the market; that fewer innovative medicines are reaching the market; and that there is urgent need for an EU-patent and patent litigation system. The inquiry’s results were aimed to allow the Commission or national competition authorities to identify the most efficient remedies that can resolve the specific competition problems in individual cases.

The inquiry is also clear indication of the Commission’s increased scrutiny on pharmaceutical companies’ conduct when bringing novel medicines to market and on their effort to keep the level of their revenues as long as possible when faced with competition from the generic pharmaceutical manufacturers. It is at the same time a new step in the application of Article 102 of the TFEU to...