

Call for Evidence in the Gowers Review of Intellectual Property: Response of the Competition Commission

1. The call for evidence from the Gowers Review of Intellectual Property (the Review) indicates that responses are welcomed that only cover one or a few of the areas described in the scope of the Review. The Competition Commission (CC) does not have any relevant experience of the Review's general questions. The CC does, however, have a limited amount of experience with one of the Review's specific issues: the coherence between competition policy and intellectual property (IP) policy. This response outlines that experience, which sets out changes to the IP framework that alter the incidence and/or cost of litigation that may affect the merger control process.
2. The CC is an independent public body that investigates competition policy issues under the Enterprise Act in mergers, markets and major regulated utilities in the UK in response to references made to it by the Office of Fair Trading (OFT), the Secretary of State or the sector-specific regulators (for more details see competition-commission.org.uk/our_role). As such, the CC does not:
 - obtain or award IP rights;
 - use proprietary IP;
 - license/exchange IP; nor
 - challenge/enforce IP.
3. Consequently, the CC is not able to address the Review's 4 general questions. Nor does the CC wish to highlight IP-related issues other than those detailed in the call for evidence.
4. Nonetheless, as a result of conducting its inquiries, the CC has some experience of the coherence between competition policy and IP policy. Given IP rights may be thought of as statutory but temporary monopolies, the most obvious issues of coherence between competition policy and IP policy may therefore be:
 - whether holders of IP rights may somehow abuse this dominant, monopoly position (this will depend in part on whether the IP monopoly confers power in the product market); and
 - whether the transfer of such a monopoly through licensing of IP may somehow amount to an anti-competitive agreement (this will depend in part on whether the agreement is covered by the technology transfer block exemption regulation).
5. These issues are likely to come under the scope of the Competition Act or Articles 81 or 82 of the European Commission Treaty, not the Enterprise Act. In the UK, the OFT investigates competition policy issues under the Competition Act and European Commission competition law. Partly for this reason, the CC's investigations under the Enterprise Act of competition policy issues in markets and the regulated utilities have tended not to involve IP rights.
6. That is not to say that issues of market power of this sort that the CC might encounter in market investigations and utility inquiries could not rest in part on IP rights. Merely that those IP-rights issues have not tended to be central or, where they were, have not been problematic. For example:

- in its *Chlordiazepoxide and Diazepam* (1973) market study the (then) Monopolies & Mergers Commission (MMC) found that prices were too high towards the end of the patent term;
 - in the MMC's *Photocopiers* (1977) market study, it considered that blanket patenting may well be either a waste of resources or unfairly exclusionary, or both; and
 - in its *Video Games* (1995) market study, the MMC recommended that the then market leaders grant copyright licences to their competitors.
7. The CC's more relevant recent experience of the coherence between competition policy and IP policy arises in the context of merger control. It can be illustrated with the following hypothetical example, which is motivated by a recent CC merger inquiry (*Carl Zeiss Jena GmbH/Bio-Rad Laboratories Inc*, 2004).
 8. Suppose Party A and Party B produce competing products. Party A claims that Party B's product infringes an enforceable patent that A holds and sues B. The case proceeds through litigation until A decides to settle with B, a settlement that involves A acquiring B. No court has judged that B infringed A's patent. Combined, A and B have a large share in the product market in which they compete, a market that already is concentrated. This combined market share and concentration is sufficient to warrant the OFT referring the acquisition to the CC.
 9. In evaluating the merger, the CC would need to consider the impact of the abandoned IP suit on competition in the market and specifically, as part of the assessment of the relevant counterfactual, what would have happened if that suit had been settled through litigation rather than through acquisition. As a practical matter, the CC may therefore be forced to assess:
 - how the IP dispute was likely to have been resolved;
 - if it is clear that B infringed A's patent, whether any interim competition between A and B is relevant to the CC's analysis of the merger, given such competition would have been unlawful; and
 - whether the resolution of the IP dispute was likely to have resulted in B's exit from the market, or whether B was likely to have "worked around" A's patent.
 10. In doing so, the CC may have to conduct an in-depth analysis of a patent dispute that the parties to that dispute
 11. determined was too difficult to litigate in the court system. The CC may also have to consider whether any amassing of IP rights by A as a consequence of its acquisition of B could in itself be an anti-competitive effect (e.g. whether blanket patenting could be exclusionary).
 12. Any changes to the IP framework considered by the Review that alter the incidence and/or cost of IP litigation may therefore have a beneficial effect on the merger control process to the extent that they reduce the risk of such issues having to be determined in the context of merger control procedure.