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**GLOBAL TRENDS IN CONVERGENCE AND DIVERGENCE
AT THE IP-COMPETITION INTERFACE**

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“There is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success, than to take the lead in the introduction of a new order of things. Because the innovator has for enemies all those who have done well under the old conditions, and lukewarm defenders in those who may do well under the new.”

- Niccolò Machiavelli

1. INTRODUCTION

We have witnessed a rapid diffusion of competition law across the globe. At the same time, as more countries depend on science and technology to drive their economies, intellectual property ("IP") has become a critical asset to be acquired and strategically exploited. There is some agreement that IP law and competition law can work synergistically to promote innovation and economic competitiveness. However beyond an acknowledgement of broad principles in a few areas of the IP-competition interface, deep differences remain between national competition laws, particular in the regulation of abusive conduct. As IP markets become increasingly complex due to market evolution and globalization, the challenge will be for states to establish and sustain a competition regime that inspires the confidence of its stakeholders.

2. WHERE WE ARE

The first step to understanding global trends is to take our bearings, reflect on how we got here and see how we measure up. Once we have a good idea of where we are, we are in a better position to understand the prospects and perils on the road ahead.

2.1 The Rise of Asia

2.1.1 Recent years have seen Asian countries converging toward having competition laws. In terms of the impact on the global economy, the most significant ones are China, India and Russia. Their laws are based broadly on European competition rules, and are similarly broadly drafted.

2.1.2 Multinationals are anxious to see where these laws and international best practices converge – and even more anxious to see where they diverge. They are concerned that the laws will target foreign investors. However, at least at the beginning, it will probably make more business sense to reassure foreign businesses and embrace internationally accepted norms. Eventually, local needs will cause creases and inconsistencies as new cases and concerns arise.

2.2 Europe and America

2.2.1 Divergent competition policies between Europe and America have led some American companies to turn to Europe to fight their antitrust battles.

2.2.2 EU law has taken the view that visible competition is the best way to ensure dynamic efficiency. It starts from the presumption that the dominant firm has a special responsibility not to distort competition by hampering its competitors' freedom of action. The strength of this approach is that more people will have access to the means to innovate. The risk is that people may not want to try in the first place, if they realised that when they succeeded, as Microsoft had, they would be subject to a heavy and unpredictable set of responsibilities, including an obligation to share what they had legitimately earned to featherbed their competitors. So there may be more innovation in terms of quantity, but not necessarily in terms of quality.

2.2.3 US law is generally less interventionist. It believes more in preserving the integrity of IP so that owners have the confidence that if they succeed, they can keep their expected rewards. It embodies a strong presumption that a firm's freedom to determine market conduct achieves a better result for the market. That gives a fair amount of certainty, but it places too much faith in an over-stretched IP system.

2.3 The key point is that familiar rules may lead to dramatically different results. The differences comes not from different formulations of the principles but from the principles themselves that give different meanings to words like "anticompetitive" and

"abuse", as well as different methods for defining markets and assessing market power.

3. U-TURNS, CROSSROADS AND SUPERHIGHWAYS

3.1 In the next few years, whether we can converge onto international best practices depends to a large extent on how we choose to adapt to changing market conditions.

3.2 Interface 2.0+

3.2.1 From about the 1900s till the 1980s, we lived in the world of Interface 1.0. We were beginning to understand how IP could dampen market competition. Economic theories were developed to provide guidelines and goals for intervention. The focus was on restrictive licensing practices, and cases mostly concerned non-digital subject matter.

3.2.2 From the 90s toward the turn of the twentieth-first century, we moved into Interface 2.0. In Interface 2.0, competition policy considered the economics of the information age. This included issues involving digitization, network effects, market tipping, and the global exploitation of IP.

3.2.3 Microsoft's bid for Yahoo in February 2008 signalled a dramatic market transition. This was not merely the largest technology acquisition ever. The world's largest software company had realised that the Internet has displaced the PC as the centre of the technology universe. The functions offered by Microsoft's operating system and office productivity suites would soon be duplicated and improved upon in a way that would appreciably erode Microsoft's market position and eventually displace it if it continued on its strategic trajectory. We are at the cusp of a new era - Interface 2.0+. The transition is not yet complete and how competition regulation should respond to the IP issues emerging from this era remains uncertain at present. However, regimes which are able to institutionalize regulatory excellence will be best placed to emerge as leaders in this next age.

3.2.4 This will fundamentally change the way innovation is regulated. We see a convergence of products and services through the Internet into a single global marketplace. With the digitisation of so many IP products, anyone can access the Internet and get songs, music, software – many for free. So many more people can choose not to be stuck at the bottom of a vertical distribution chain without access to alternatives because of segregated geographical markets. But this convergence has another important effect. Fewer players are needed to meet the exploding global market demand. It is very tempting, and therefore very easy, for these firms to be penalised for merely being so big. The EU approach to regulating abuse of dominance raises some concern. It's not just because of its economic heft. More importantly, it is because many countries with EU-type rules are looking to it for guidance. And as businesses continue to exploit innovation across the world, the rules of the road in one country may set the tone for an entire global industry.

3.2.5 The problem with the EU's approach that it is very difficult to identify exactly what duties attach to "special responsibility" by a "superdominant firm." It sets higher standards based on size, not on behaviour. It may be better to see it this way: either a firm is dominant or it is not. Further, structural analysis makes it more difficult to accept that competitors may self-destruct when they fail to come to grips with market changes. There will always be technologies that win and technologies that lose. The people who made horse carriages were not the ones who started car companies. Mainframe computers were not displaced by other mainframe computers, but by a new disruptive technology in the form of the PC. So innovation will not be driven by those who complain that competitors are not buying into their products

because they've been locked in. Instead, it's increasingly clear that innovation will be driven by those who see opportunity in adversity.

- 3.2.6 For example, Apple saw in Napster, Kazaa and Grokster consumer demand for online, unbundled music and offered iTunes. They bypassed OEM and PC channels which regulators were convinced had been tied up. Sergey Brin and Larry Page saw in a market dominated by Yahoo, Alta Vista and AOL, Internet surfers who wanted quick, unbiased, and comprehensive search results. They won the market and changed "Google" into a everyday verb. So while the antitrust regulation by regulators around the world may have hastened Microsoft's decision to open up, Microsoft itself has recognised that the old world is disappearing. And in this new world, Microsoft just like anybody else, has a business model that either works or it does not. By making its software more accessible, Microsoft is hoping to become a more integral part of those programs and services. Shutting its windows will mean irrelevance in an interconnected world.
- 3.2.7 And Microsoft is not alone. To win market share from BlackBerry, Apple unveiled it's iPhone software development kit earlier this month, together with a 100 million dollar 'iFund' to finance budding entrepreneurs who want to develop programs for it.
- 3.2.8 The point is this: what is unthinkable today may be tomorrow's convention, and it will be dangerous if the world converges onto the most restrictive norms. Because the corollary to helping competitors too readily may be that innovation in the market will be held back because vigorous innovation and competition becomes more risky.

3.3 Institutionalizing Excellence

3.2.1 Good Rules

- (i) An important starting point is not to be blinkered by theories of efficiency, but focus on effectiveness instead. This means clear goals, clear boundaries and clear evidence of consumer harm.
- (ii) **Clear goals:** First, we need to understand what kind of innovation we want to promote. Should competition by imitation be allowed? Should we require forced sharing of an improperly created monopoly? What are its limits? How innovative should a rival's product be to find that consumer welfare has been harmed? Does it have to be a whole new evolutionary product or merely an incrementally innovative product? How should the level of innovation in products be determined in the case of products integrated with different functions each protected by different layers of IP? Do we determine it by the inventiveness of a patent or originality of copyright? Or something in between?
- (iii) **Clear boundaries:** Second, as a matter of fairness, it's critical for firms to be able to understand how competition laws will affect their IP. Unfortunately, the tendency is for regulators to keep options flexible when issuing guidelines and rulings. Courts and regulators should follow precedent and carefully explain departure from significant points.
- (iv) **Clear evidence of consumer harm:** Third, it's a little simplistic to equate consumer choice with consumer welfare without showing convincing evidence why the status quo harms consumers. We should avoid re-engineering products under the guise of antitrust policy. Regulators are rarely more competent than the market in

choosing the "best" design for a product, particularly when the "best" design must evolve rapidly to meet changing consumer demands.

3.2.2 Good Players

- (i) Getting a working competition infrastructure in place is relatively easily. The challenge is to get the people to run that infrastructure, institutionalize the skills and maximize the infrastructure.
- (ii) This requires an indigenous core of top management that is capable of self-renewal. It also requires top talent who will add a world class cutting edge to the analysis. Top talent needs to be in both the private and public sectors, and should comprise of both locals and foreigners. This creates a dynamic environment where the status quo is continuously examined and justified so that the rules regulating innovation remain supple, relevant and far-sighted. It also creates synergistic links between interdependent global economics and promotes knowledge sharing and conflict resolution.

4. **CONCLUDING THOUGHTS**

- 4.1 The global economic play field is evolving. We are in the game, whether as regulators pushing national interests or lawyers pushing private interests. The question we all need to ask ourselves is: are we ready?
- 4.2 Many critical areas of the IP industry are complex and fast-changing. Regulators and legal advisors to IP owners increasingly need to make decisions in the absence of complete information. Many emerging challenges and issues cannot be resolved by existing policies and rules.
- 4.3 Today, many more Asian countries have embraced functioning competition laws, in form, if not also in substance. As Asian economies rise to the forefront of global markets, the challenges of regulating innovation through competition rules can only grow in significance. It would be helpful if Europe and America accepts a bigger role from Asia in developing the Interface and engage it constructively for mutual benefit.