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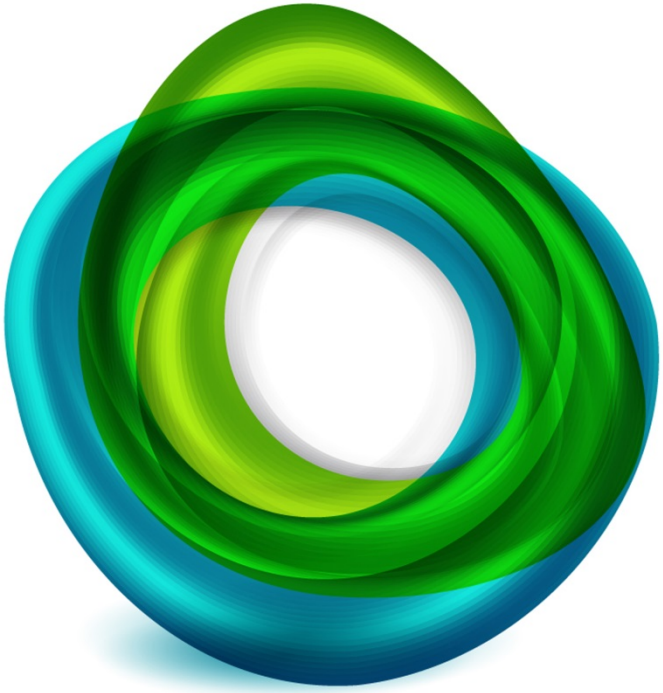


IP and competition law in the EU

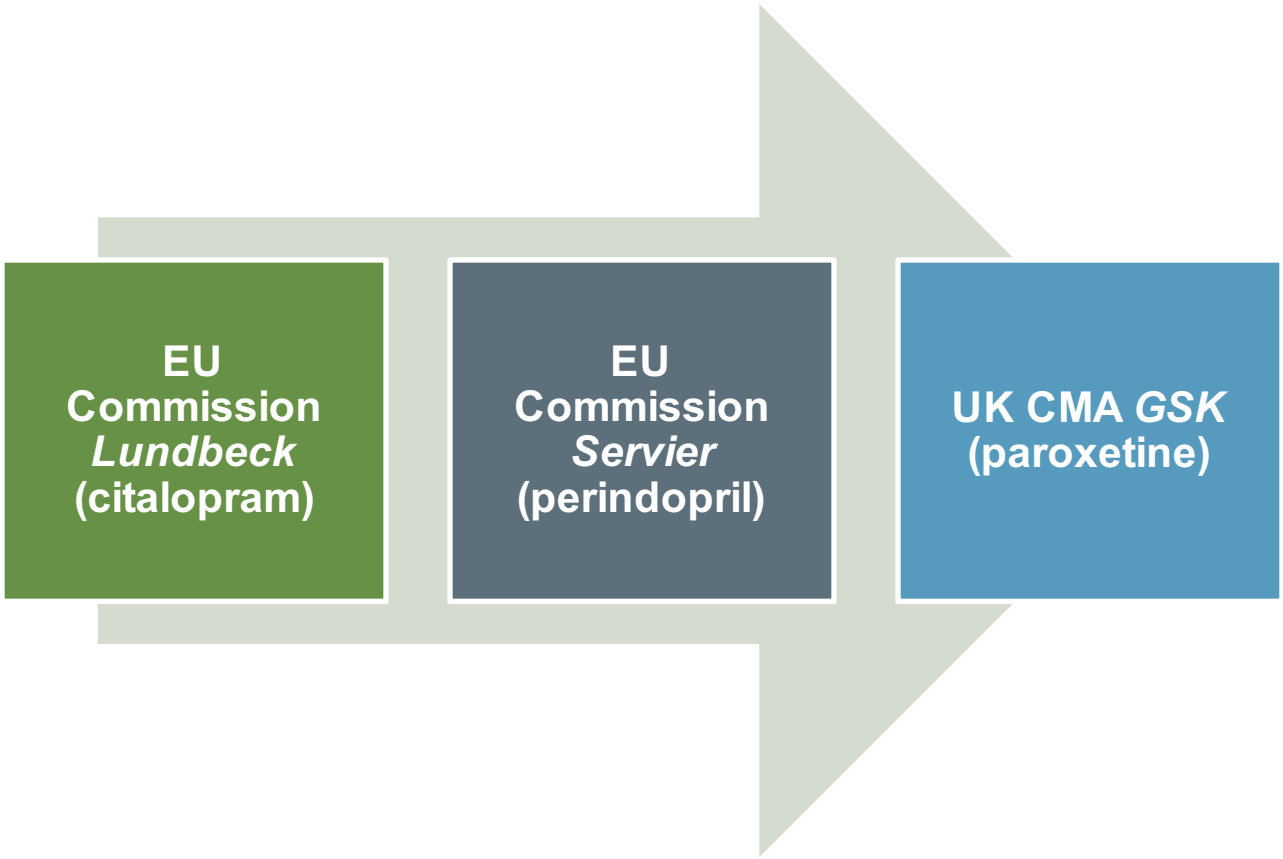
David Por – Partner – Allen & Overy LLP (Paris)

Agenda

- Continued focus on pay-for-delay agreements
- Competition authorities' message to patentees: "Do not be too smart!"

Continued focus on pay-for-delay agreements

Continued enforcement



Genentech v. Hoechst – The facts

Genentech licensed under two US patents and one EP concerning the manufacture of proteins

Running royalty of 0.5%

EP revoked in opposition; US patents ruled to be valid but not infringed

Arbitration proceedings: Genentech must pay €100m as running royalties

Action for cancellation of the award before the Paris Court of Appeals, notably based on alleged breach of Article 101

Referral of a preliminary question to the CJEU

Genentech v. Hoechst – AG Wathelet's opinion

1 2

1	Parties can agree that royalties are payable even in the absence of patent protection, provided that: − the agreement is open to termination; − it does not impose restrictions beyond termination.
2	Value for the licensee: avoiding uncertainty and litigation

How will that be reconciled with the pay-for-delay doctrine?

A rationale opening additional questions

- "*From [expiry of the compound patent] the market is in principle open for entry of generic versions*" (Lundbeck §68) => revival of the criticism on "secondary patents" of the sector enquiry?

- Category B.I settlements are generally unproblematic except e.g. where "*the patent holder know that it does not meet the patentability criteria, e.g. where the patent was granted following the provision of incorrect, misleading or incomplete information*" (6th Report on the Monitoring of Patent Settlements)

==> A modification of patent law?

“Do not be too smart!”

Perindopril

Compound patent expired – process patents still existant

Servier acquired third party technology circumventing the patents

==> Abuse of dominant position

Parallels with previous cases

- AstraZeneca: deregistration of MAs for Losec
- Pfizer (IT): a “complex exclusionary strategy”: an SPC based on a divisional application
- Nespresso: product redesign and follow-on IP filings

==> Abuse of dominant position

A new limit to IP rights?

- Is any use of patents for purposes other than protecting novel innovation illegal?

- How can the existence of exclusionary intent be assessed?

Questions?

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