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INDUSTRIAL PROPERTY VS. COMPETITION IN EUROPEAN UNION LAW

- doctoral thesis -
abstract

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1. The issue subject to research. Its novelty and scientific importance

This thesis analyses the enforcement of the competition law in the matter of the industrial property, especially on the rights arising from the invention patent. The interest in pursuing this approach comes from the fact that the competition authorities and the courts of law prohibited the behavior of the owners of industrial property on the grounds that the rules of the competition law are infringed.

Furthermore, it was argued that between the two branches of law, given the aims of each, at first glance there would be a total contradiction because, while intellectual property law is intended to confer exclusive rights to holders, that qualify as true operating monopolies, competition law excludes exclusivity and monopoly positions because they allow the restriction or even elimination of competition.

Thus, it is the exclusivity of the rights conferred by the invention patent that would create prerequisites abuse of dominance, a deeply illicit behavior within competition law, the challenge being that to determine when and how competition law rules may limit the exclusive nature of industrial property rights.

Despite the major concern for matters of interest in intellectual property rights and commercial competition, especially the competition by abuse of dominant position obtained by recognizing an exclusive right over new and original creations, the problem was rarely investigated with us and only in articles and studies of lesser extent.

Therefore, I tried to conduct research to cover in other proportions the issue of intellectual property rights and competition and to represent an endeavor to align the doctrinal and jurisprudential concerns from other countries and from other legal systems.

In this sense, the research identifies international levers that have guided and continue to influence national legislation, adding to the international dimension the one of European Union law as a distinct source of law at national level.

The interdisciplinary approach of this research, by way of detailed summary of the case law, tries to combine all these perspectives, to supplement them and to subsume them to an exhaustive presentation of the interference of the competition law with the intellectual property rights.

Therefore, the importance and timeliness approach of the theme emerge out of the influence of the intellectual property, especially the patent law, in the economic reality, but also

out of the problems occurred in practice by the capitalization of this right in relation to the competition law. The results of the research are of interest in academic area and have a significant practical impact, both in relation to the low level of awareness and also because its incidence in commercial reality. The proposals and solutions offered are new and original and, not infrequently, change the current perspective on a broad set of issues in various branches of law.

2. The scope and objectives of the research

The scope of the study was to identify the consequences of the application of a foreign norm, such as competition law, in cases concerning intellectual property rights and will establish the *judicious* application of competition rules to patent law. In order to identify the most reasonable way to reconcile the two policies, the research was based on combining historical analysis of the evolution over time of the regulations with that of comparative law, in order to identify the influences felt in regulatory developments, but also the differences and similarities between US and EU regulations and with the analysis of the judicial practice and the international and community doctrine, following the logic of articulation and replacing the logic of opposition.

The general objective was to identify the tools provided, legislatively, judicially and administratively, alternately available, the proposals for *law ferenda*, all with the aim of drawing income and to *conciliate* the intellectual property and competition.

The intent of this study was not to provide a definitive, perfect, reconciliation model, between legal regulatory systems or even a recommendation of "best practices", but to develop clearer idea of the application means of the competition law to the commercial exercise of the intellectual property rights and to produce research results deep enough so that existing experience can be understood and used as a reference by the competition authorities and the parties to the litigation. This is a research study which should be seen as a work of reference and a resource that should be adapted to the particular circumstances of the interface between competition law and intellectual property rights.

The study is research typed but also reference typed, the results of the research can be used as reference points by the competition authorities and the parties to litigations and can be adapted

to the particular circumstances of the interface between competition law and intellectual property rights.

Probably the most important challenge was to answer the question *what must be the most appropriate relationship between competition policy and intellectual property rights in a growing industrial economy?*

3. The methodology of the research

From a methodological perspective, we found that the various regulatory bodies must be analyzed in their correlation and not in opposition, because they are part of a system. The articulation between intellectual property and competition could lead to a new coherence between these rules. The balance between the principles governing each body of rules compel to knowing how to interpret them and apply them to each other because it is not reasonable to think that a principle fails or takes over another, the right cannot take the place of economy or vice versa, the fixation of balance falling under the politics` responsibility.

Interferences are new and we first had to determine the nature and difficulties, before addressing solutions which allow us to draw profit from such interferences. The method of study was chosen to lead us to the logic of articulation, replacing the logic of opposition.

The complexity and difficulty of the analysis effort result from the presented information, requiring to connect the economic and legal knowledge and not to confront them in discussions. This ambition was difficult because it assumed to be a common wide area between the two disciplines, borrowing vocabulary, detecting and removing false disputes and moreover, learning a common vocabulary.

In order to achieve the set objectives it was necessary to perform the historical analysis and the comparative law analysis of the development of the objectives pursued by the competition policy and intellectual property, the legal regimes as well as the judicial practice and the doctrine. The methodology chosen for the research was complex, since the two types of analysis were constantly combined throughout the thesis considering that their use alone would significantly reduce the quality and the rigor of the study.

The final convergence between the two branches of law can only be achieved through careful consideration of the points of dispute between them and observing their own legitimacy, and in case of dispute, identification of the rules to follow in order to achieve the final purpose.

4. Paper structure

The thesis has been elaborated around three essential topics organized into three main parts, which in their turn are composed of several chapters, sections and subsections, plus preliminary considerations and final considerations: (i) competition policy and industrial property (Title I), (ii) the specific instruments of competition law and industrial property law (Title II), (iii) the relationship between competition and industrial property (Title III), with special reference to the consequences of admission of the invention patent rights, the abuse of dominant position which the invention patent can make possible and existing remedies to eliminate, reduce or repress the abuse and the possible and desirable limits thereof.

In the paper`s introduction we presented the purpose of the research, we identified the issue subject to research, we indicated the arguments based on which we chose the research topic, we indicated the research objectives and the methodology.

The first part of the book ("*The competition policy and industrial property*") is divided into three chapters which explore *The policy objectives in competition field*, *The policy objectives in industrial property field* and *Considerations on the relationship between competition and industrial property.*

In this part of the paper we produced the history of competition rules in the US and European countries, we identified the context in which the laws on competition were first adopted, the need for the adoption thereof and the institutions created to implement and apply the competition rules.

Chapter I gives a brief overview of the most important aspects of the historical evolution of competition in the US and the EU, focusing on the modern concept of "innovation", currently considered the main engine of growth in the modern global economy. In an effort to identify the current objectives of the competition policy, the chapter finally makes a presentation of the evolution of the objectives of competition policy, by observing that the objectives are different depending on the interests pursued and noting that not all are compatible.

Further in the research we presented the guidelines of competition policy and how they interfere with industrial property rights, in particular with the exclusive rights conferred by patents.

We faced a number of questions which mainly concerned the means of achieving a balance between the interests of creators and those of consumers, between stimulating innovation by recognizing exclusive rights, and also to avoid illegal competitive behaviors, abuse of dominant position which may arise from the actual monopole recognized by law of the intellectual property right holder.

Moreover, we tried to identify whether legitimate competitive behaviors lead to the exclusion of innovation, or they can live together, can conciliate one another or, in the worst case, can tolerate one another or maybe they are in a continuous antagonism?

In case of inventions, the issue that required clarification was to know whether protecting them and recognizing an exclusive right of exploitation of the invention, the abuse of dominance is encouraged *de facto*.

The chapter finally presents the evolution of competition policy objectives, which were developed in phases, showing that although initially antitrust law provisions have served as a tool to promote market integration, antitrust policy is also currently oriented towards promoting other objectives of the Community, provided under art. 3 of the Treaty on European Union. Hence, the fact that its function, though clarified, is still questionable, given that through competition policy one can follow a number of different objectives, not all of which are compatible. Note that there is not a clear hierarchy of these objectives, the priorities being set by the case.

We observed a trend to move towards consumer welfare and economic efficiency. The increasing emphasis on economic efficiency is an important and positive trend since it leads to a greater appreciation of the long-term benefits of competition policy which promotes economic growth for the benefit of citizens and society.

Competition policy itself is a mechanism that allows reducing costs and hence a factor for innovation and technical progress. Favoring innovation in industry and services, as well as distributing it in economy and society, is as important as promoting the competition in the product market. Therefore, competition in the EU is a necessary condition, but not sufficient for the Union to regain the path of growth and competitiveness. In this context, one contemporary issue is the reconciliation mechanism of inciting to innovation, focused on intellectual protection, with the objectives of competition law, especially in certain industry areas where research and innovation are very strong. It is significant to observe that as regards the competition law, it has a

Community dimension particularly important, while research and innovation policies have a much smaller Community dimension.

We noticed an obvious imbalance between the European system, which as regards the competition it was inspired by the USA and the American system, which together with an element of competition has a considerable part in the mobilization of means to support industrial innovation, a side which is missing in the European system. The disproportion is justified, at least in theory, by the historical moment of the formation of the EU, from independent states which first had to form a[n] [internal] common market, and only then to implement an industrial policy for research and innovation.

In contrast, in Europe until now there is not a genuine policy to support innovation and research in completing the construction of the internal market. Therefore it was argued that the success can only be achieved through constant innovation and the preservation of the European model, of social market economy, cannot be ensured without economic growth and increase innovation.

Chapter II titled "The policy objectives in industrial property field" is devoted to a presentation of the sources of law whose knowledge is of significant importance in understanding and identifying the objectives of industrial property. In connection with the invention patent, the most important regulation in this field are mentioned: the Paris Convention of 1883 on the protection of industrial property rights, the Agreement on the Trade-Related Intellectual Property rights of 1994 - TRIPS, the Washington Patent Cooperation Treaty of 1970, the Treaty on the Functioning of the European Union, the Treaty of Rome, the 13 most relevant directives and 8 European regulations covering the regulation of the intellectual property.

The family of intellectual property rights has two branches: literary and artistic property, which includes copyright and related rights and industrial property, which includes the rights over patents, trademarks, designs and industrial models, all having in common the recognition of an exclusive right of exploitation for the benefit of an intangible asset holder as well as defending the interests of creators.

As regards the industrial property, it protects innovation in the broad sense: patents, designs, industrial models and markings (trademark and trade name), such rights having a special economic connotation due to their industrial and commercial application, which distinguishes them of copyrights which exist even outside the economic and independent circuit of any

industrial or commercial application. The logic of these rights makes that the economic aspect is more important than the holder's personal items because such rights are related to economic public interests, to the research and development, competition policy, consumer interest and others. However, let us not forget that the copyright is currently facing a real economic paradox which makes it to have an essential competitive advantage by creating intangible assets that determine an exponential economic growth, especially in developed countries that have achieved informational technologies as well as other concepts in the domain.

Intellectual property rights are essentially negative rights; they prevent the protected innovations to be copied. The rights themselves do not ensure profitability, but in case the intellectual property rights` subject is a successful product, the legal exclusivity provides a stimulus for innovation, by acting as a reward for the inventor/creator and as an incentive for innovation in general. In case of invention patents, without an exclusive protection, businesses can choose to keep the innovative ideas secret. This incentive for the spread of information is also an incentive for innovation, resulting in new products and processes which enter the existing markets and/or developing new markets. Hence, in this way, intellectual property rights may actually enhance competition forces.

We found that both intellectual property rights and competition law creates its own balance between protecting the inventor and the invention of today and the inventor and the invention of tomorrow. In other words, intellectual property and competition laws try to find a balance between providing sufficient incentives for continuous innovation and avoiding protection for a single innovation, which would lead to deterring or blocking the next invention.

In the end we concluded that there is a considerable overlap of objectives of the two branches of law because intellectual property law and competition law as well aim at promoting innovation and growth. However, we found that each of them uses different mechanisms to achieve these goals, which inevitable produces source of tension between them.

On one hand, competition law tends to favor traditional static targets such as the optimal allocation of resources, production efficiency enhancement and prevent of accumulation or inappropriate exercise of market power in relation to the existing goods or services while the intellectual property laws pursuing dynamic objectives, it promotes long-term effectiveness by providing incentives to encourage investment in innovation, by offering a solid protection of intellectual property rights, and even in some cases, it gives the holder power market.

In certain circumstances, achieving a dynamic efficiency necessarily excludes static targets on the optimal allocation of resources and/or production efficiency enhancement and vice versa. Therefore, the importance given to the optimum allocation of resources in the short term by the traditional competition law risks a negative impact on innovation incitement which causes long-term benefits for society and is protected by intellectual property laws.

However, the final convergence between the two branches of law can only be achieved through careful consideration of the points of dispute between them and observing their legitimacy, and in case of dispute, rules to be followed in order to achieve the ultimate goal must be found, a the task we undertook in this paper.

The paper continues in **Chapter III** with a review of current opinions expressed by theorists on the subject theme, the effort being directed to conducting a comprehensive analysis to identify various concepts on the relationship between competition and intellectual property in countries of different legal traditions, united by target innovation and economic growth. In this respect, American, German, French and English doctrine and case-law positions are described and analyzed on the issue of industrial property rights protection and the competition, the need for conciliation and the solutions adopted in the case-law of these countries.

For example, German doctrine was particularly interested in the analysis of interference of the competition with industrial property from the point of view of concluding a license contract forthe exclusive rights over an invention, considering that the conclusion of such a contract might hide in reality unlawful competition behaviors, for example if the licensee and the licensor's intents to conclude the contract converge to influence the market and gain a dominant position in the market segment they belong.

Legislation and American doctrine are largely discreet about the question of the relationship between competition and intellectual property rights. Consequently, there are institutions that implement antitrust laws and the courts that determine the interaction between competition law and intellectual property rights.

The solutions given by the United States Supreme Court were that, usually, the exercise of the industrial property rights does not vitiate the competition, but on the contrary, supports and encourages it, thus abandoning antagonistic approach of antitrust laws and intellectual property rights laws and thus recognizing their complementary characteristics.

Thus, even if American institutions empowered to apply antitrust law abandoned the antagonistic approach between antitrust laws and intellectual property rights laws, recognizing their complementary characteristics, the courts of law still have some difficulties in reconciling and implementing these two areas of law.

The Commission to modernize the antitrust laws has identified the balance between the intellectual property rights and competition promotion as one of the issues which will be solved by the "new economies".

Internationally, although there is no international treaty to deal with substantive issues concerning the relationship between competition law and intellectual property rights, many international organizations, including the World Trade Organization (WTO), Organization for Economic Co-operation and Development (OECD) and United Nations Conference on Trade and Development (UNCTAD), addressed this topic and found that there appears to be broad consensus among countries on intellectual property rights and competition law, namely that they are compatible and they should coexist. However, it seems that there are still discussions about how exactly the competition law together with intellectual property rights law should be implemented.

The TRIPS Agreement provides that the member states may take appropriate measures to limit the exercise of intellectual property rights when such measures are necessary to avoid resorting to practices that unduly hinder trade or negatively affect the international transfer of technology. In addition, WTO Members may provide in their legislation that licensing practices such as exclusive concession clause, conditions which prevent the challenge of validity and bundling, are anticompetitive. However, the TRIPS Agreement does not address the extent to which competition considerations should limit the exercise of intellectual property rights.

A special position in German legal literature is found at one of its reputed representatives, Professor Hanns Ullrich.

The author argues that the intellectual property protection system itself is neutral in relation to the choice of either of the competition policy by competition authorities, but on the other hand, it is not less obvious that a voluntarist policy of competition law can profoundly affect the conditions for implementing and finally the results of a competition for innovation carried out with instruments of protection which the intellectual property system makes available to market players.

The argument seems logical and we partly shared it, however we noticed that French doctrine followed an opposite point of view, not without a solid justification.

In the second part of the paper "*Specific instruments of competition law and industrial property law*", in its three chapters ("*Specific instruments of competition law*", "*Specific instruments of industrial property law*" and "*Interference by institutions of competition law with industrial property rights*") we described the tools that the two branches of law use, i.e. competition and intellectual property, in order to achieve their targets, bringing the particularities of the interference between these instruments particular to each branch to the forefront of attention.

In its essence, the competition law seeks the enterprises` behaviors which may affect the competition in a determined market and therefore the central core of this branch of law has two key concepts –the enterprise and the market - plus the notion of attempt on the market. To this end, we analyzed the fundamental concepts in the field of competition law, enterprise and market, with a strong economic content, in relation to which the patent law is far away, having a legal structure, although it is a major factor of economic progress, and involving the question of the application framework of competition law in the field of intellectual property law. The company is considered subject to competition law, while the subject of the intellectual property law is the author, the individual; therefore, we examined the possibility of qualifying their author as enterprise. As regards the market, it operates on the basis of substitutability, in the sense that we examined the possibility of interpreting this criterion in intellectual property and patent law fields where protection is granted for original works for copyright and not for patent law.

The examination of the institutions required the analysis of regulations, and where the legislature was incomplete, the analysis of case law, highlighting aspects particular to competition law opposite the patent law.

We noticed that as regards the exercise of intellectual property rights, the praetorian activity has guided the conduct of enterprises, particularly as regards competition in the internal market.

So, in light of European Union law the *enterprise* (which also includes the inventor), the *competitive market, the principles of operating the market, the principles governing the Community market, illegal ententes* and *abuse of dominant position* are analyzed.

The enterprises are the main subjects of the legal relationship of competition in national and European Union legislation.

Over time, the European Court of Justice through its decisions has broadened the concept of enterprise, holding that the notion of enterprise is determined by the nature of the work, not by the quality of the operator or the form in which it operates.

The new Romanian Civil Code does not define the enterprise itself, but an enterprise operation, meaning the systematic exercise of an economic activity, with or without the aim of gaining profit, regardless of who carries it out.

A special place is reserved to illegal ententes and abuse of dominant position, analyzed in terms of forms and manifestation conditions as well as exemption criteria.

In another chapter of this part, "*Specific instruments of industrial property law*" we presented the inventions patent legal regime in Romania, and the main provisions of the TRIPS Agreement on invention patents.

By analyzing in the last chapter of this part of the paper, "*The interference by institutions of competition law with industrial property rights*", we examined the vision of the European Union Court of Justice, the position of this court on how the competition law regulations might apply to the inventor - natural person - of an invention.

The term "enterprise" is not used in intellectual property law branch, such having a more economic than legal meaning, the intellectual property law being rather concerned for the protection of the creator and to enable the exploitation of works (patrimonial rights), as well as respect for its works related personality (moral rights). In case of patent law, it is directly linked to economic effects, following the application of innovative solutions. Economically, the term enterprise involves the patent law, which required the elucidation of enterprise identity problem in patent law field. Can enterprises coincide with the authors and/or holders of inventions patents?In this sense, it needed to delineate the authors and holders of patents and we stated that enterprises in competition law are among these rights holders, in this respect the law has established that legal persons in general, companies in particular, are holders of intellectual property rights and patent rights, although the originality in case of copyrights and the novelty in patent law is often questioned, with the consequence of an insecurity to legitimize the protection of their rights through intellectual property rights. Therefore, the classification as enterprise of a company does not involve difficulties of interpretation, but such difficulties occur in the case

where the author is the creator of the work and owner of the rights resulting thereof, case in which we determined the treatment provided by the competition law.

According to ECJ case law, an independent inventor is included in the term "enterprise" for the purposes of competition law, to the extent it capitalizes his right conferred by the patent by way of licensing (*Case A.I.O.P. v. Beyrard*). Later, in the 90s, with the resolution of the *case Klaus Hofner, Fritz Elser v. Macroton GmbH* by the European Court of Justice, the concept of *enterprise* in competition law received the meaning of any entity exercising an economic activity, regardless of economic status and way of financing.

The Court, through its way of defining the company and treating the inventor independent of the concept of enterprise in competition law, it made it possible to extend the obligations of the company to the independent inventor, as regards the means of exercising the rights by observing the rules of loyal and honest competition.

Next, we analyzed the specific features of the enterprise`s activity which conducts its business in the field of intellectual property and we found that the exercise of an intellectual property right involves the phase of a legal exploitation of the right by way of concluding either assignment or licensing exploitation contracts. The author obtains remunerations and activates in completion field only as of the conclusion of these contracts. *Per a contrario*, for the period before the conception of the invention and obtaining the patent, including pre-contractual negotiations, these activities are not in the competition field. The exception to this rule is the order contract, when the author is paid to invent, its work entering the economic trade and the competition law rules apply to the entire period of the creative activity independent of any rights exploitation. With regards to personal exploitation of its invention by the inventor and the collision with competition rules, such cases are rare, the individual author is just a theoretical problem. Even if it would happen, the effects on the market are minimal and thus it would not affect the competition game, being excluded from penalties as a result of block exemptions.

As regards the market, in connection with the subject of the thesis on the application of competition law to intellectual property law, we identified difficulties regarding the problem of market delimitation, particularly the material delimitation.

We then analyzed the specificity of intellectual property rights in the material determination of the market in terms of the distinction between geographic and product market

so that we continue by making references to the market related phenomena, especially applying the theory of essential infrastructure, refusal to license protected products.

The substitutability problem, essential in competition field, is difficult to integrate in intellectual property law since each work is the result of individual efforts and is either unique in terms of originality for intellectual creative works, either new to patent law as well as for industrial designs and trademarks. In this field each object is unique, being different from other previously existing intellectual property objects.

The concept of novelty is particular to patent law. In doctrine, one observed the incompatibility between intellectual property law and the substitutability criterion in determining the relevant market in competition law.

One also noted that the lack of interchangeability of works has the meaning of civil law that of lack of fungibility, and not the meaning of competition law, lack of substitutability.

Next, we analyzed the existence of intellectual property rights in general and patent law in particular in terms of three levels: in space, time and limits of the scope of the patented invention, mainly identifying that competition law is not interested in the ubiquity of the intellectual property rights nor the intellectual property rights but is interested in their supports on which they stand, incorporating them. The supports have a material nature, but in the evolution of technology it increasingly tends to dematerialization, in the context of which the spatial barriers are removed, it being accessible around the globe. Therefore, the doctrine expressed skepticism in applying geographic delimitation of the market for intellectual property rights.

The chapter finally carries out an analysis in order to answer the question whether the European Union law has jurisdiction to intervene in the field of intellectual property law in general and patent law in particular, given that laws protecting intellectual property rights reveals the sovereignty of member states.

We analyzed this issue firstly by addressing the existing distinction criterion – an exercise which is based on the doctrine theory of inherent rights or inherent restrictions imposed on industrial property rights.

The third part of the paper, "*The relationship between competition and industrial property*" is the most consistent and contains two chapters, *The anti-competitive ententes and patent law* and *Abuse of dominant position and patent law.*

The interest of the topic subject to analysis turned to how the invention patent rights operate from the economic law point of view, namely the impact on the market and especially on their competitive structure in legitimate exploitation; thus, restrictive practices and unfair competition have not been analyzed as competition law sanctions behaviors by prohibitions *per se,* irrespective of any attempt on the market, as well as merger control, restricting research on anti-competitive practices, but with reference to the economical mergers in case the merger of an enterprise holds rights over invention patents.

Competition law aims to ensure,in the matter of anticompetitive practices, free and unadulterated competition in the markets, by prohibiting those behaviors harmful to competition, more specifically anticompetitive ententes, prohibited by art. 101 of TEEU and art. 5 of Romanian competition law as well as the abuse of a dominant position prohibited by art. 102 of TEEU and art.6 of the Romanian competition law. These two types of practices may affect the rights arising from the invention patent, such having been analyzed in detail in **Chapter I** and **Chapter II**, in which we focused on the points of friction between the two branches, solutions released by the authorities to ensure the best balance between the need to protect competition and the need to protect industrial property rights.

Chapter I of the third Title of the paper ("*Competitive ententes and patent law*") is dedicated to the analysis of the ways in which competition may be distorted by the exercise of the right conferred by the patent (license contracts), respectively as abuse of dominant position or anticompetitive ententes.

In this regard, we examined the incidence of art. 101 of TEEU on license contracts covering an intellectual property right, emphasizing that art. 101 of TEEU tends not only to balance the economic risks and benefits of licensing contracts but also to watch over the effects of such contracts on the integration of member states in the common market.

The license contracts foster the exchange of information between the enterprises involved in the same field of research and have become a practice increasingly used by holders of intellectual property rights.

At first glance, a license contract allowing more people to use, produce or sell an asset protected by intellectual property law seems to favor competition, helping competitors in the market by reducing the monopole force granted by the intellectual property law.

However, through the clauses inserted in the license contract or practices used by holders of intellectual property rights, anti-competitive effects on the market can be reached in particular circumstances. They can become tools for enhancing monopole behavior, manifested by imposing prices, limiting imports and market sharing, practices that harm the consumer and can be used to eliminate competition in the market, eitherfor the products obtained by licensed technology, or for this technology.

Anti-competitive practices involving patent rights are variable and can take place either when individual exploitation by the holder, contrary to prohibition rules regarding anticompetitive ententes or abuse of dominant position or when working through third parties on a contractual basis, when the said rules can also be breached.

Through the exclusive nature of the licenses, which has the effect of excluding competitors, the patent law is in collision with the rules of competition law whereas the restriction of competition on the market. Exclusivity is the *sine qua non* condition for the protection of the holders of the patented invention and to enable them to prevent third parties to take advantage of their creation. Therefore, the exclusivity is legitimate, and how competition law interferes in matters of exclusive license on the patent right is not easy.

With its decisions, the ECJ has repeatedly held that a licensing agreement of the intellectual property rights as such is not a "restriction of competition" but may fall within art. 101 para. 1 of the TEEU whenever it is "subject, the means or the consequence of" or "serves to produce" a commercial practice that aims at or acts as restricting or distorting competition on the common market. Only to the extent that through exclusive licenses the holder causes restrictions that cannot be justified by the specific object of its right or essential function, one might appreciate that there was a restriction of competition to a level below the one which existed at the time the license was issued.

Thus, competition law tends to look at the intellectual property rights as any other form of private property rights and limit their use when it becomes a conduct prohibited under competition law rules.

In most legal systems, the starting point of regulation is the type of relationship established between grantor and licensed.

If these relationships are vertical, for example, the parties are operating on different markets and at different levels of economic activity, such as contracts between investors and

manufacturers or those between manufacturers of specialized components and finished goods manufacturers, the risk of limiting the competition is considered lower than the case of horizontal licenses, when both the grantor and the licensee operate in the same market in which they are potential competitors.

This factor is only an indicator and should be assessed depending on the circumstances of the case, starting from the premise that the purpose of concluding a licensing contract is the need to supplement the capabilities of each trader. Typically, however, a vertical relationship has, unlike the horizontal one, the consequence of introducing a new competitor on the market and supports the distribution of the licensed product or process. At the same time, it can increase productivity by encouraging the licensee to invest in new product or process and the effect that the absence of competition in the production and distribution network has on prices (for example, by intra-brand competition) can be reduced.

Vertical licenses may have a restrictive effect on competition only to the extent that both contractors have both production and distribution capacities, but a vertical agreement allows reinforcement of horizontal agreements, for example, where a vertical license is used for facilitating a monopolistic entente by sales pricing.

We believe, along with doctrinarians opinion, that one should take equally interest in the restrictions imposed on the licensor and it should be recognized that the so-called concession is a negotiated transaction in which the parties grant mutual restrictions depending on the said interests. Consequently, as in any other transaction, one should be evaluate in terms of competition law whether the parties to the license contract express their contractual autonomy for legitimate competitive reasons or on the contrary for forging or restricting competition. Therefore, the evaluation criteria are those of the competition common law: the horizontal or vertical nature of the agreement, the objectives or the effects, including the importance on market the type of existing competition etc.

Currently, one should note that the competition policy on technology transfer agreements, as formulated by the Commission in the guidelines, is revealing insofar as the Commission determines the competitive relationship between the licensor and licensee by reference not only to their restrictive position on the relevant market, but equally to their position on the protection plan through exclusive rights. From here, the view that the parties possessing technology, in which the patents are in the unilateral or bilateral blocking position, are no longer considered as

competing on the technology market and are subject to vertical agreements. This qualification is explained by the support which enables the parties to combine the results of their research efforts and avoid investments in vain and not lose opportunities for profit. This is only one side of the issue. The distinction between horizontal and vertical agreements is poor in the license field because by receiving a license, the licensee may become a potential competitor of the licensor.

This case is based on the dilemma that any exclusive rights holder will not license if he has the fear the licensee of today is his rival of tomorrow and hence natural question arises *whether we should give him the opportunity to keep a competitive distance and how much would that be?* The rule stated in art.101 para. 3 of the TEEU states that there are no restrictions of competition allowed other than those indispensable to encourage the owner of the exclusive right to give licenses to third parties who may be reasonably presumed that in the absence of the restriction in question they will become its competitors. It results that although such an assessment is difficult in itself, it exerts a direct influence for establishing the anticompetitive potential of a license agreement, the risk of a collision between competitors always being present for them.

Naturally, one can think that the possession of an intellectual property party covering the same technology is a clearer indication that the parties are competitors and that their conflict resolution as regards the patent require particular attention from the competition authority which must show tolerance. Consequently, it is necessary to allow the parties to break the deadlock and it is imperative to ensure that the agreement does not contain restrictive clauses. The European Commission, by its proactive conduct as regards the industrial policy, must enable more the interest of enterprises and competition orientation towards the preset target rather than competition counterfeiting game.

In this regard, through certain guidelines or official legislation, US and EU authorities have created a detailed framework of regulations on certain terms as regards bilateral licensing of intellectual property rights agreement.

In the US, competition rules were adopted for intellectual property licenses, specifically identifying the categories of license agreements, terms and types of market which can represent the premises of anticompetitive behavior and are subjected to a test of establishing the risks and benefits, the so-called "*rule of reason*". *Antitrust Guidelines* use the rule of reason, according to which a license should not be used unless it allows the licensor to benefit by way of *the most effective possible exploitation of intellectual property.*

The European system for regulating industrial property contracts evolved starting from art. 101 of TEEU and refers not only to balancing the risks and economic benefits of licensing agreements but also the effects of such contracts on the integration of Member States in the common market. In view of the Union, applying the rule of reason involves a global balance, in two stages: firstly, the anticompetitive effect of entente is evaluated, according to art. 101 para. 1 of the TEEU, establishing whether it is competition restrictive (competitive balance) and, secondly, restrictive ententes, which are not *per se* prohibited, are subject to economic balance, in relation to art. 101 para.3 of the Treaty.

Art. 101 par. 1 of the TEEU establishes a judicial test to determine the categories of agreements or concerted practices which may affect free competition in the market, applying to all agreements between enterprises, decisions of enterprises associations and concerted practices which may affect trade between member states and aimor have the effect to prevent, restrict or falsify the competition game. Industrial property licensing contracts, concerted practices on licensing contracts, assignment of industrial property rights of third parties fall under the scope of art. 101 para. 1, to the extent the requirements of this rule are met.

At the end of this chapter we concluded that effective regulatory framework objective is to establish the necessary balance between allowing freedom of movement for the technology licensing process so that the parties to outline agreements according to their needs and protecting the public interest by ensuring a competitive market, minimizing the risks of market closure and isolation. If the limits set by the regulation are too tight, the parties'stimulus to conclude an agreement will be significantly reduced and the benefits obtained from the transfer of technology will be reduced because companies will license in territories outside the EU and will export instead of locating production units in European countries. Competition policy has a cooling effect on investments in technology transfer. However, if the restrictions are too permissive, the risks of anticompetitive practices will be higher. But seeing many economic benefits and economic costs of the process, the responsibility falls on the shoulders of the legislature to carefully calibrate these restrictions.

We note that the exploitation of the trade mark related rights is not likely, in principle, to raise significant problems of competition policy, because the trademark is designed to protect the distinctiveness of the product, ensuring the holders of distinguishing their products or services from the competing products or services, meaning that it excludes any monopoly on them.

It was alleged that certain trademarks related practices have violated competition law, but rather due to the nature of the practice than to the brand that was involved. For example, in the case of *NutraSweet*, the Court stated that it is possible for a trademark to be subject to restrictive agreement, but nevertheless, in the said case it was not identified such an agreement. Moreover, even in the presence of a restrictive agreement for a trademark, the practice is illegal, not generated by the existence of rights resulting from the trademark, but because the restriction on certain conditions and whether or not it is about a trademark, it is prohibited by competition law.

In the case of *Tele-Direct*, the Tribunal found that the simple grant of licenses for the use of trademarks on a selective basis, without involving an abuse of a dominant position, is not anti-competitive act.

Thus, the trademarks are nothing but "a symbol of the relationship between the source of a product and the product itself", which, although they may acquire economic value and they may grant rights to its holders, "they are not able to protect itself", meaning they are not likely to raise competition concerns. Moreover, it can even be considered that the trademarks promote competition by allowing consumers to easily distinguish different products, to identify sources of goods, and thus to procure the goods they want.

With regard to designs and industrial models, since by definition they contain visual characteristics rather than a functional use, it is unlikely to conflict with competition law.

In Chapter II of the third Title of the paper ("*Abuse of dominant position and patent law"*), we analyzed the incidence of art. 102 of the Treaty on industrial property rights, establishing what ways of exploiting these rights may appear as abusive and, at the same time, leading up to what point the normal exercise of industrial property rights respects the principle of legitimate competitive practices of an enterprise in dominant position or is justified in relation to art. 102 of TEEU. We distinguished between the situation where there is some domination of the holder of intellectual property rights, but that does not hinder effective competition on the market and the special situation of domination, constituting a *de facto* monopoly in secondary markets where traders are in a position of dependency when competition law may limit the exercise of industrial property rights.

In this respect, in performing the analysis of art. 102 the following steps were considered: defining the relevant market, given that it is a precondition of the decision determining whether an enterprise is dominant; identifying whether the enterprise is dominant in that market;

determining whether the enterprise has abused its dominant position and if some defenses available are available.

There are complex issues at every stage of analysis, due to different opinions, for example, whether a certain conduct of the dominant enterprise should always be considered abusive, onthe purpose of art. 102, if it relates to the protection of consumers or competitors, given that in evaluating art. 102 the Commission has generated numerous comments on the aim of this article and to the extent that it should be based on economic effect or legal form.

Among the specific powers of the patent law, the right to forbid third parties any unauthorized use is the main attack on competition and in such a situation, the competition law can intervene to allow third parties to access the protected invention, under the theory of essential infrastructure, thus removing the abuse of dominant position as regards the exercise of patent right which is manifested as a refusal to license, excessive charges to conceal a refusal to license, imposition of clauses on access to invention and other unfair practices related to the exercise of patent law, reviewed in this chapter.

What may generate the abuse is *exercising the right* and does not result from the mere fact of holding a dominant position on the market, but it is required that the holder to exercise the privileges conferred by the patent with exceeding the limitations of the protected specific object of industrial property right.

In this regard, the starting point for any analysis lies in the fact that the exclusive right allows the holder to defend itself against the actions of others, but not to exclude or hinder competition by third parties made by substitute products. Therefore, the first part of art. 102 of TEEU, the existence of a dominant position cannot be stated with reference to the exclusivity conferred by the intellectual property to the rights holder, but by reference to the actual competitive situation in which the object protected on the relevant market is found.

This formula, now classic, means, firstly, that the relevant market and the dominant position a company holds are in principle determined in the same manner for technologies or products protected by intellectual property as for any other product or service which may be substituted economically. It also means that it is the economic strength which enables an independent conduct to the enterprise in relation to competitors and consumer reactions rather than exclusionary power resulting from intellectual property which characterizes market dominance. Therefore, as the text of art. 102 of TEEU states, never the exclusive right, but the

dominant position must be proven and eventually the abuse is found. The abuse of dominant position can be analyzed from a subjective perspective (abuse of result) or objective (abuse of structure).

Once an enterprise holds a dominant position on the relevant market, by holding an industrial property right, it is incumbent the responsibility *"not to behave in such a manner as to cause distortion of the competition on the common [domestic] market"*.

For example, both US and the EU legislations clearly provide that it complies with competition rules when a company makes internal investments in research and development and in intellectual property rights, thus gaining a dominant position on the market. Moreover, if the intellectual property rights holders want to practice high prices for their successful products protected by intellectual property rights, *ex ante* investment risks will be respected by the competition rules in each legal system, even though in different ways. The legal exercise of the intellectual property rights is regarded by the doctrine as lawful under the competition rules, but each system has its own line where the exercise of an intellectual property right is not regarded as normal in the light of competition rules.

In conclusion, the mere existence of industrial property rights and the monopoly they create do not attract automatic application of art. 102; whereas the aforementioned distinction, it is recognized that the *existence of* industrial property *right* itself does not constitute abuse of a dominant position as long as the right was obtained under the law. However, when the industrial property right is used to prevent the entry of new competitors or to exclude actual competitors it can be subject to a number of restrictions, such as: the prohibition to acquire other companies holding a competing technology, the obligation to license or distribute protected products on secondary markets, censoring the price policy or joinder of products.

We found that the industrial property rights are exercised in a manner considered individually, especially in terms of an economic credentials, directly or indirectly, by way of assignment and license and only patrimonial rights are susceptible to collide with competition law a manner that would affect the market game, including by refusal to license, refusal to sale accompanied by abusive behavior from the holder of a dominant position on the relevant market, even if the holders exercise their rights under the patent law rules, their freedom of contract can be questioned in terms of competition law. Limiting leads us to think about the theory of abuse of law, to the extent that a "*foreign*" rule of competition law does not intervene, by its European

origin and therefore extremely dangerous. Therefore, we investigated the acceptable limits of economic efficiency goals in the protection of the rights granted by the patent and we sought to subordinate our reasoning to the rule to exercise these rights so as not to weaken the protection given, which can become on medium and long term a brake on innovation.

And finally, the paper ends with the *conciliation* of the two branches of law, by seeking a ***balance*** *as far as possible*, by *accepting* the intervention of competition law under certain limitations, by *law ferenda* proposals based on the performed analysis.

The bibliography and references used to accomplish the scope of this research cover a wide range of treaties, courses, monographs of certain Romanian and foreign authors in equal measure, articles, case law and information analyzed using web sources.