

Fantastic Beasts And How to Deal With Them Under the Competition Rules

Dr Hedvig Schmidt
Associate Professor in EU Law
Southampton Law School



Types of 'Beasts': Trolls /Patent Assertion Enterprises



Patent trolls exploit the patent via IP licence fees rather than innovation

Different companies will assert patents for different reasons and with different effect



Why more trolls in the US?



Symptom of systematic flaws in the US patent system

- too many patents interpreted too broadly, a remedy system that routinely rewards excessive damages

EU has higher barriers to patenting software than the US

- Art 52(2)(c) EPC excludes 'schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers' as patentable subject matter.

Studies show that fee awards might be the main incentive...

What's the problem?

Do the trolls promote or stifle innovation?

Grants opportunities for universities and research-intensive companies as well as start-ups to monetize their innovation.

Trolls do not innovate!

Increases cost to manufacturers/ tax on consumers

Can be deployed as an anti-competitive strategy



Can we use the competition rules to hunt the trolls?



IPRs are not immune to the Competition rules

“...the free exercise of an exclusive right, being a right which rewards investment or innovation, may be limited in the interest of undistorted competition on the common market.” (T-321/05 *AstraZeneca*, para. 679).

See EU case law: *Magill*, *IMS*, *Microsoft*, *Huawei*

Three routes of challenge:

Coordination (Article 101 TFEU, TTBER and in the US Sherman Act Section 1)

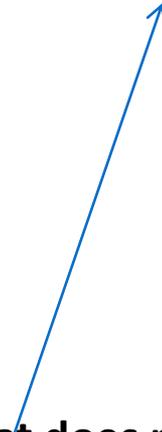
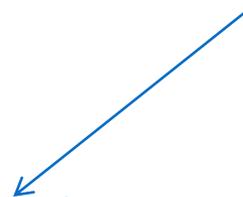
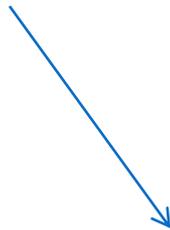
Assertion (Article 102 TFEU and Sherman Act Section 2)

Acquisition (controlled through EUMR or US S7 of the Clayton Act)

Rockstar – an example of a hybrid PAE privateer



Promised to uphold FRAND Commitments



Separate entity with no promise of upholding FRAND commitments

Rockstar



"We are separate," John Veschi (then CEO of Rockstar) says. "That does not apply to us."



Microsoft/ Nokia merger



In December 2013 the European Commission cleared Microsoft purchase of Nokia's mobile device business without conditions.

- 'overlap of activities too minimal and several strong rivals'.
- Any concerns arising from Nokia's post-merger licensing practices falls outside the scope of the EU Merger Regulation and can only be dealt with ex-post via Art. 101 and 102 TFEU

US DOJ also cleared the merger without conditions,

But MOFCOM, China did not!

- It found that Nokia had controlling power over the smart phone market, but as it was leaving the downstream market it had no incentive to stick to low royalty fees. It therefore required both Microsoft and Nokia to commit to FRAND Commitments of their SEPs (but only within the Chinese market).

Did the European Commission and US DoJ miss a trick?
Facebook/WhatsApp...

Conclusion



**BEWARE
OF
TROLLS**



Undoubtedly more litigations by trolls in the EU to come

Not all PAE are 'evil trolls', some do support innovation. Some PAE's activities are purely for IP law to resolve, but some such as the hybrid-PAE who engage in privateering are likely to be a competition law concern.

The competition rules already work effectively to tackle most of these. However, perhaps there is some room for improvement when it comes to merger control ?