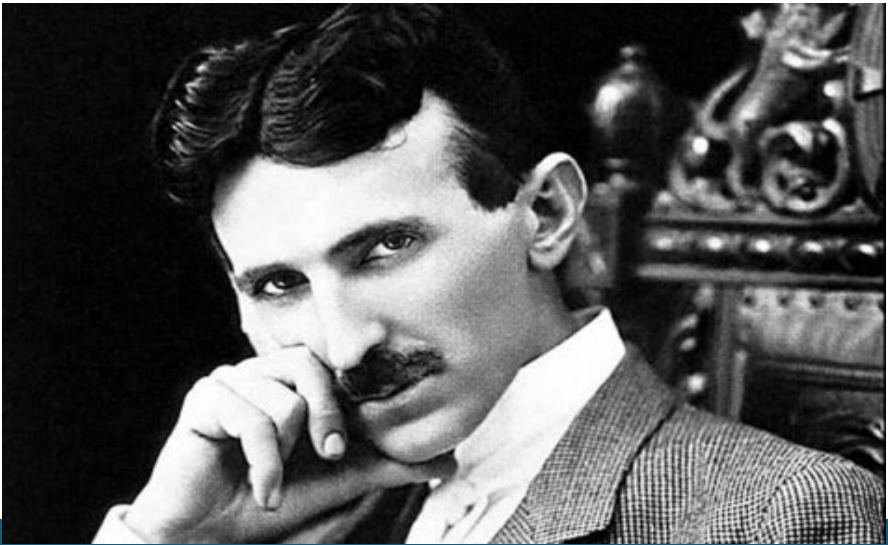
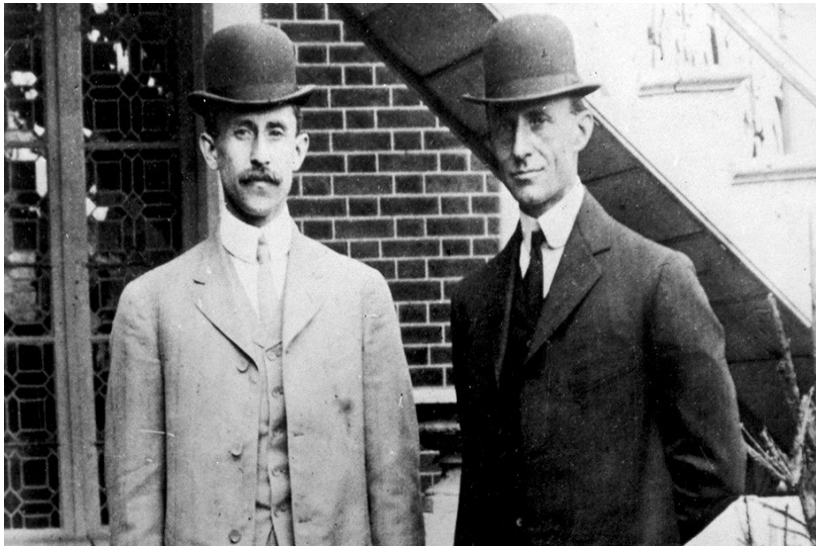


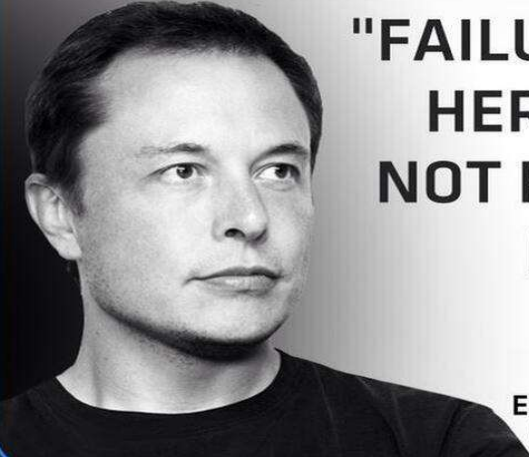


Liege
Competition
and
Innovation Institute

EUROPEAN LAW AND TECHNOLOGICAL INNOVATION

Prof. Dr. Pieter Van Cleynenbreugel





**"FAILURE IS AN OPTION
HERE. IF THINGS ARE
NOT FAILING, YOU ARE
NOT INNOVATING
ENOUGH."**

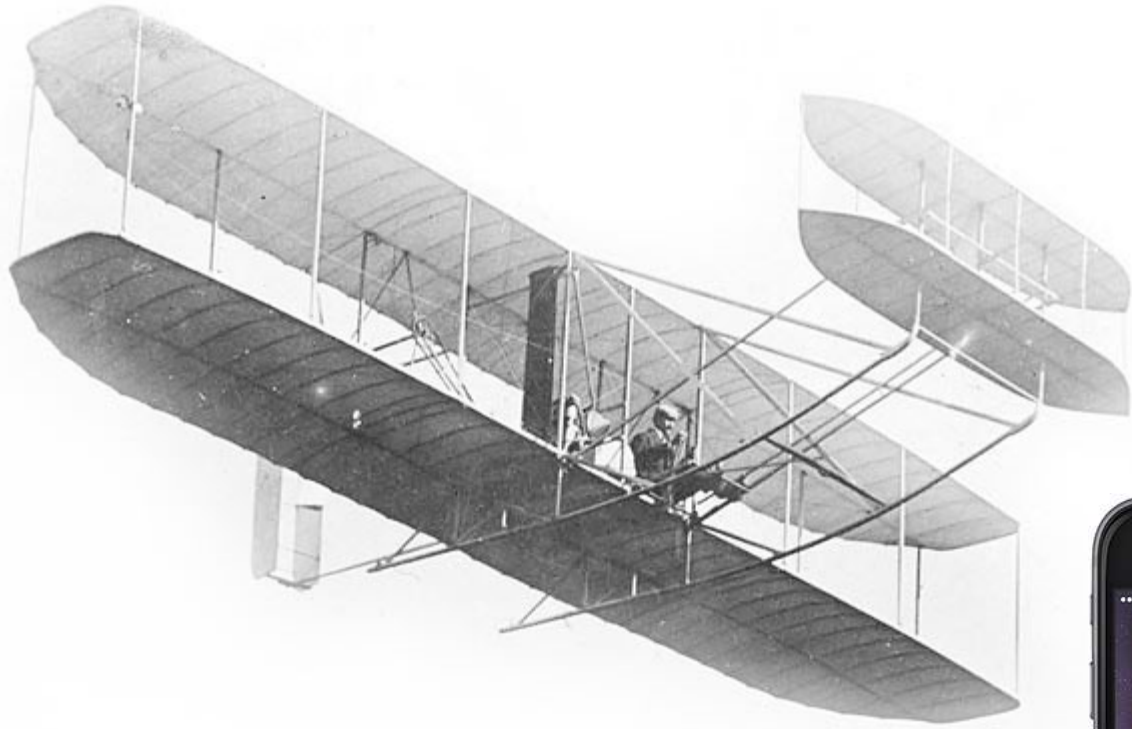
ELON MUSK
IN INTERVIEW WITH FAST COMPANY
FEBRUARY 2005

A graphic featuring a black and white portrait of Elon Musk on the left. To the right of the portrait is a quote in large, bold, black capital letters. Below the quote, the name 'ELON MUSK' is written in bold, followed by 'IN INTERVIEW WITH FAST COMPANY' and 'FEBRUARY 2005' in smaller text.

European law and technological innovation

- ▶ Why this course?
- ▶ Everyone talks about innovation, but it remains undefined...
 - ▶ Innovation v. design v. invention
 - ▶ Product v. process innovation
 - ▶ Technological innovation?
 - Industrial changes
 - Particular focus on « new technologies »
 - Hardware
 - Software



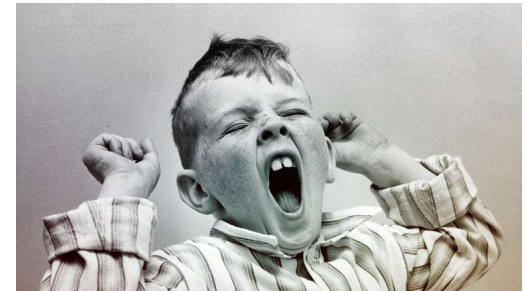




Google



Wake-up slide



- ▶ **Main aim of this course: where and how does EU law (not) deal with technological innovation?**
 - ▶ From a policy perspective, EU wants to move ahead
 - ▶ Innovation Union – product and process innovation in new technologies
 - ▶ Europe 2020
 - ▶ Two policy approaches
 - ▶ Supporting a market – passive attitude
 - ▶ Direct EU intervention – more active attitude, either EU itself or Member States
 - ▶ Legal reality contains a variety of mixed strategies aimed at
 - ▶ Enabling innovation – internal market + State aid
 - ▶ Protecting innovation – common intellectual property standards and competition law provisions
 - ▶ Protecting individuals against the excesses of innovation – privacy and data protection

Course plan

- ▶ **Introductory part: innovation and European Union law – anything goes?**
 - ▶ Session 1 (23/09 or 29/09)
- ▶ **Part II: stimulating innovation? – the internal market**
 - ▶ Session 2 (today): free movement of goods
 - ▶ Session 3 (next week): market access for new technology services
- ▶ **Part III: stimulating innovation – towards EU intellectual property rights?**
 - ▶ Session 4 (14/10): towards a unitary patent and its limits

Course plan

- ▶ **Part IV: stimulating innovation – direct State support**
 - ▶ Session 5 (21/10): R&D&I State aid
- ▶ **Part V: leveling innovation? – EU competition law and technological innovation**
 - ▶ Session 6 (28/10): can cartels be innovative?
 - ▶ Session 7 (4/11): Standard Essential Patents and EU competition law
 - ▶ NO CLASS ON 11/11 PUBLIC HOLIDAY
 - ▶ Session 8 (18/11): Applying EU competition law to technology giants: from Microsoft to Google (lecture by Mr. Simon Troch, Brussels Bar competition lawyer)

Course plan

- ▶ **Part VI: protecting against the excesses of innovation**
 - ▶ Session 9 (25/11): Privacy and EU data protection in a digital context
 - ▶ Session 10 (2/12): Data retention

- ▶ **Reflections on the relationship between EU law and technological innovation**
 - ▶ Session 11 (9/12): looking back and forward...

Course approach

- ▶ Ex cathedra with room for questions
- ▶ Invitations to reflect on the matter
- ▶ Use of Powerpoints

- ▶ Do not hesitate to interrupt with questions or if things are unclear – course is meant to be interactive

- ▶ Remember – it is a reflection course so some elements discussed during are meant to trigger your autonomous reflection, not just providing you with all the answers at this stage – the aim of a university's master level course

Course reader

- ▶ Contains legislative and case law materials that constitute background to this course
- ▶ Meant to support you in your study process
- ▶ Use it in your paper process as well
- ▶ Can be annotated and brought to the exam

Slides

- ▶ Accompany each class
- ▶ Add structure (hopefully...)
- ▶ Steer autonomous study activities
- ▶ **CAN BE BROUGHT TO THE EXAM AS WELL!!**

Exam

- ▶ **Oral exam – 30 minutes preparation time, 25 minutes presentation**
 - ▶ In January, dates will be communicated by faculty administration
 - ▶ 3 questions, each one counting for 5 points
 - ▶ Materials covered in class
 - ▶ You can bring your annotated reader to the exam

- ▶ **Course paper**
 - ▶ Proposed subjects attached
 - ▶ 2500 – 3500 words (7-9 pages) – reflection paper on course materials
 - ▶ First draft or structure to be submitted by 18/11
 - ▶ Feedback session week of 28/11

Stimulating innovation – the EU internal market

1. The classical perspective on free movement and innovation

EU internal market

▶ Article 26 TFEU:

The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties

- ▶ Market access rights/negative integration: Treaty free movement rights having direct effect
- ▶ Market access regulation: harmonisation / positive integration
- ▶ Complementary regulation: including innovation-focused regulation

EU internal market

- ▶ Today: negative integration and its relationship to (technological) innovation

- ▶ Next week: positive integration and technological innovation

Innovation union

- ▶ **Diagnosis: « we lack an internal market for innovation »**
 - ▶ Lack of common regulation
 - Multiple initiatives, see next week
 - ▶ Lack of common access to finance criteria
 - Towards a common regulatory framework
 - ▶ *Lack of attention granted to innovation as a condition necessary to scale up the EU's internal market*
 - Flows directly from consistent case law by the Court of Justice on matters that go above and beyond technological innovation

EU internal market

- ▶ **First limb: negative integration / market access**
 - ▶ Originally above all: goods (Coal and Steel Community, industrial origins of the European Union)
 - ▶ Free movement of goods
 - ▶ Art. 34-35 TFEU: all quantitative restrictions and measures having an equivalent effect on imports and exports are prohibited...
 - ▶ *Restriction*: (CJEU, Dassonville): any measure directly or indirectly, actually or potentially restricting inter-state trade
 - ▶ Against all Member State regulation?? – in principle, except selling arrangements (*Keck and Mithouard*)

EU internal market

- ▶ **First limb: negative integration / market access**
 - ▶ ...unless they can be justified by proportionate public interest criteria in Article 36 TFEU or by overriding reasons in the general interest
 - ▶ One of the Article 36 TFEU reasons: *the protection of industrial and commercial property*
 - ▶ Member States have to justify particular regulatory interventions in the light of EU internal market law
 - ▶ Non-economic justifications?
 - ▶ Innovation as public interest or overriding reason?

EU internal market

- ▶ Contrary to the industrial property justification, a more general innovation-justification question has not been dealt with as such – at least so far...
 - ▶ Future development? See next week for the *Uber* cases...

Negative integration and innovation

- ▶ **CJEU internal market case law on goods**
 - ▶ Goods need to circulate freely above all
 - ▶ That means that the necessities of free circulation/movement may trump other concerns

Negative integration and innovation

Underlying policy rationale:

Removing barriers between Member States will indirectly stimulate innovation

Internal market as a means 'naturally' to promote innovation

laws of demand and supply trigger natural kind of innovation, more than centrally-planned division of scarce resources

BUT

this also means that innovation is not a key feature in policymaking and in the interpretation of laws shaping such policymaking

If you reflect a bit more, however,...

▶ At least two concerns

- ▶ If all national rules are potentially EU-restrictive, then national rules that *finance* or *protect* innovations are also potentially to be removed?
 - ▶ Rules giving subsidies to authorities established in a particular region?
 - ▶ National IPR: patents, copyright, trademark protection...
- ▶ To the extent that those innovation-protective rules apply within one territory, can they be extended extraterritorially in order to safeguard innovation in the internal market?

If you reflect a bit more, however,...

▶ At least two concerns

- ▶ All the more relevant given that no common EU-wide patents and copyright regimes were in place
- ▶ Trademarks, designs and plant variety protection have been the subject of EU regulatory intervention and EU-wide protection later on
- ▶ To the extent that EU law prohibits national innovation-protective rules and does not offer an alternative, what consequences for innovation imaginable?
 - ▶ Very market-oriented vision on innovation, not maintained in mainstream economic literature
 - ▶ Innovation not taken seriously?

If you reflect a bit more, however,...

- ▶ At least two concerns
 - ▶ Exacerbated in the context of *technological* innovation
 - ▶ E-technologies are by nature border-transcending
 - ▶ What if someone commercialises an application / some kind of software that is subsequently copied by a competitor established in another Member State, yet offering it in the same Member State as the original inventor?
 - ▶ To what extent can the inventor rely on EU internal market law to get the invention commercialised and protected across Member States' borders?

CJEU and innovation: classical approach

- ▶ A good brought into free movement, i.e. having been exported to another Member State « benefits » from the exhaustion of national intellectual property rights attached to that good!
- ▶ That means that one good produced lawfully in a Member State and exported to another Member State (with a different price regulation system) can subsequently be re-imported in the original Member State, where it can be sold at a lower price and in competition with the same product not having been exported first.

CJEU and innovation: classical approach

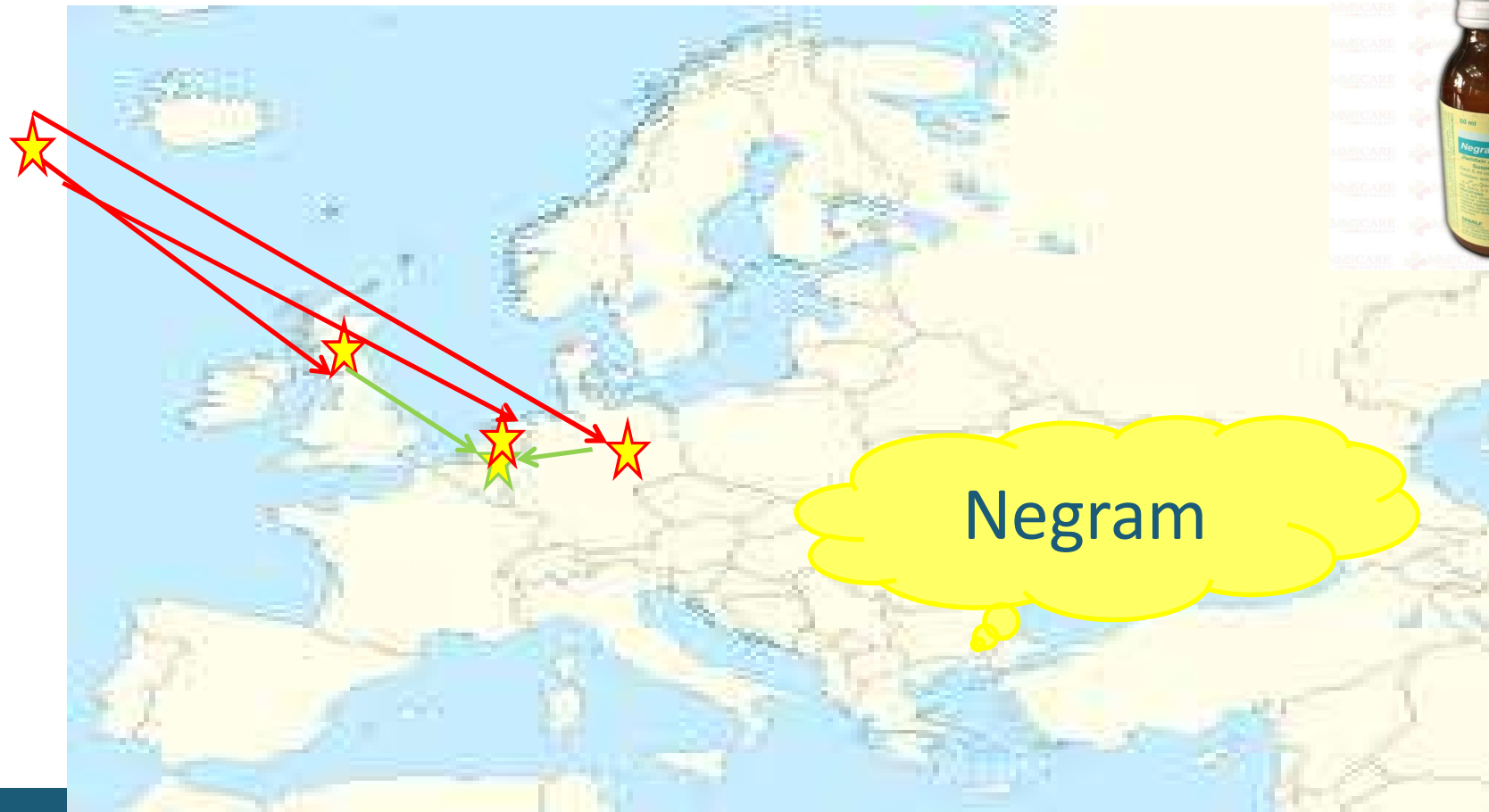
▶ CJEU

- ▶ *Case 15/74, Centrafarm I*
- ▶ *Case 16/74, Centrafarm II*
- ▶ *Case C-348/04, Boehringer*

▶ Logic also transposed in e-context?

Centrafarm

- ▶ Parallel importations of medicinal products protected by patents/trademarks in different Member States



Centrafarm I

- ▶ a patentee holds parallel patents in several of the States belonging to the EEC,
- ▶ the products protected by those patents are lawfully marketed in one or more of those Member States by undertakings to which the patentee has granted licences to manufacture and/or sell,
- ▶ those products are subsequently exported by third parties and are marketed and further dealt in in one of those other Member States,
- ▶ the patent legislation in the last mentioned State gives the patentee the right to take legal action to prevent products thus protected by patents from being there marketed by others, even where these products were previously lawfully marketed

Centrafarm I

- ▶ It is clear from this Article 36 TFEU, in particular its second sentence, as well as from the context, that whilst the Treaty does not affect the existence of rights recognized by the legislation of a Member State in matters of industrial and commercial property, yet the exercise of these rights may nevertheless, depending on the circumstances, be affected by the prohibitions in the Treaty.

Centrafarm I

- ▶ In relation to patents, the specific subject matter of the industrial property is the guarantee that the patentee, to reward the creative effort of the inventor, has the *exclusive right*
 - ▶ *1. to use an invention with a view to manufacturing industrial products and*
 - ▶ *2. to use an invention with a view to putting it into circulation for the first time, either directly or by the grant of licences to third parties*
 - ▶ *3. the right to oppose infringements.*
- ▶ If, however, a patentee could prevent the import of protected products marketed by him or with his consent in another Member State, he would be able to partition off national markets and thereby restrict trade between Member States, in a situation where no such restriction was necessary to guarantee the essence of the exclusive rights flowing from the parallel patents.

Centrafarm I

- ▶ An obstacle to the free movement of goods may arise out of the existence, within a national legislation concerning industrial and commercial property, of provisions laying down that a patentee's right is *not exhausted* when the product protected by the patent is marketed in another Member State, with the result that the patentee can prevent importation of the product into his own Member State when it has been marketed in another State!
- ▶ Patent holder can still take legal action when good produced by third parties coming from Member State where it was not patented or patentable...

Centrafarm I

- ▶ Existence of patent rights is not as such incompatible with Article 34 TFEU
- ▶ Exercise may be if patent is already « exhausted »....
 - ▶ Product legally commercialised in one Member State, subsequently re-imported in another Member State in parallel with commercialised products put there directly by patent holder

Centrafarm II

- ▶ several undertakings forming part of the same concern are entitled to use the same trade mark for a certain product in various States belonging to the EEC,
- ▶ products bearing that trade mark, after being lawfully marketed in one of the Member States by the trade mark owner, are subsequently acquired and exported by third parties to one of the other States, where they are marketed and further dealt in,
- ▶ the trade mark legislation in the last-mentioned State gives the trade mark owner the right to take legal action to prevent goods from being marketed there under the relevant trade mark by other persons, even if such goods had previously been marketed lawfully in another country by an undertaking there entitled to use that trade mark and forming part of the same concern.

Centrafarm II

- ▶ An obstacle to the free movement of goods may arise out of the existence, within a national legislation concerning industrial and commercial property, of provisions laying down that a trade mark owner's right is not exhausted when the product protected by the trade mark is marketed in another Member State, with the result that the trade mark owner can prevent importation of the product into his own Member State when it has been marketed in another Member State.

Centrafarm II

- ▶ Existence of trademark rights is not as such incompatible with Article 34 TFEU

- ▶ Exercise may be if trademark is already « exhausted »....
 - ▶ Product legally commercialised in one Member State, subsequently re-imported in another Member State in parallel with commercialised products put there directly by trademark holder

Exhaustion in practice

- ▶ Exhaustion principle enshrined in harmonising EU legislation on the matter
 - National IPR protection mechanisms, the exercise of which needs to be compatible with EU free movement law
- ▶ What does it mean for a patent, trademark or other IPR to be exhausted?
 - Re-importing same product in parallel : YES
 - What if you start modifying a *trademarked* or copyrighted product before commercialising it after parallel imports?
 - Changing seal?
 - Changing bearer of image (*C-419/13, Art & Allposters*)?
 - Adding stamp on trademarked product?

Boehringer

- ▶ the trade mark owner may legitimately oppose further commercialisation of a pharmaceutical product imported from another Member State in its original internal and external packaging with an additional external label applied by the importer, unless
 - ▶ – it is established that reliance on trade mark rights by the proprietor in order to oppose the marketing of the overstickered product under that trade mark *would contribute to the artificial partitioning of the markets between Member States*;
 - ▶ – it is shown that the *new label cannot affect the original condition of the product inside the packaging*;
 - ▶ – the packaging *clearly states who overstickered the product and the name of the manufacturer*;
 - ▶ – the presentation of the overstickered product is *not such as to be liable to damage the reputation of the trade mark* and of its proprietor; thus, the label must not be defective, of poor quality, or untidy; and
 - ▶ – the importer *gives notice* to the trade mark proprietor before the overstickered product is put on sale, and, on demand, supplies him with a specimen of that product.

Boehringer

- ▶ it is for the parallel importers to prove the existence of the conditions that
 - ▶ reliance on trade mark rights by the proprietor in order to oppose the marketing of repackaged products under that trade mark would contribute to the artificial partitioning of the markets between Member States;
 - ▶ the repackaging cannot affect the original condition of the product inside the packaging;
 - ▶ the new packaging clearly states who repackaged the product and the name of the manufacturer;
 - ▶ the presentation of the repackaged product is not such as to be liable to damage the reputation of the trade mark and of its proprietor; thus, the repackaging must not be defective, of poor quality, or untidy; and
 - ▶ the importer must give notice to the trade mark proprietor before the repackaged product is put on sale and, on demand, supply him with a specimen of the repackaged product, and which, if fulfilled, would prevent the proprietor from lawfully opposing the further commercialisation of a repackaged pharmaceutical product.

Logic extended to e-situations?

- ▶ This case law has been developed in relation to tangible products
 - ▶ Mostly in pharmaceutical industry – triggered by R&D innovation
 - ▶ At the same time, it can be questioned to what extent the same logic would apply to digital content and technological improvements available at different times/rates in different Member States
 - ▶ Art. 5(2) Directive 2009/24/EC on legal protection of computer programs (Case C-128/11, *UsedSoft*)

Implications for technological innovation

- ▶ At heart and at its origin,
 - ▶ EU internal market law is not pre-occupied with technological innovation
 - ▶ Diagnosis 'no internal market for innovation' seems correct
 - ▶ Court of Justice did not necessarily decide in favour of innovation or the protection of its fruits, but rather ruled in favour of movement

Implications for technological innovation

- ▶ In the EU free movement law constellation
 - ▶ Member States may protect the fruits of innovation
 - ▶ Balance between the exercise of those protective rights and the EU free movement requirements
 - ▶ Cross-border activities need to be promoted, more so than the protection of innovative inventions
 - ▶ Pro-entrepreneur rather than pro-innovation



Implications for technological innovation

- ▶ Implications of this constellation
 - ▶ Limited room for innovation protective measures at national level
 - ▶ Gaps in the absence of EU-wide intellectual property rights protection: need for applications in different MS territories
 - ▶ Limited incentives for a pro-innovation-based economic policy, both in the minds of businesses and Member States...

Implication for technological innovation

- ▶ **Recalibrating free movement and technological innovation**
 - ▶ An innovation justification mandatory requirement/overriding reason in the general interest?
 - ▶ More EU-wide intellectual property harmonisation?
 - ▶ Modified EU rules on extraterritorial effects of IPR protection?



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Liege
Competition
and
Innovation Institute

EUROPEAN LAW AND TECHNOLOGICAL INNOVATION

Prof. Dr. Pieter Van Cleynenbreugel

Questions?



Recap



- ▶ **How does EU law structure/regulate/affect technological innovation processes and results?**
 - ▶ From a policy perspective, EU wants to move ahead
 - ▶ Innovation Union – Europe 2020
 - ▶ Two policy approaches
 - ▶ Supporting a market – passive attitude towards innovation
 - ▶ Direct EU intervention in relation to entrepreneurship and to technological innovation, the latter constituting the subject of this course
 - ▶ Legal reality contains a variety of mixed strategies aimed at
 - ▶ Enabling technological innovation *to flourish cross-border* – internal market + State aid
 - ▶ Protecting innovation – *common intellectual property standards* and competition law provisions
 - ▶ Protecting individuals against the excesses of technological innovation – privacy and data protection

LAST TIME



Stimulating innovation – the EU internal market

1. The classical perspective on free movement and *innovation in general*
2. Conclusion :
3. A. innovation may be – or may not be a side-effect of the existence of an internal market
4. B. protection of innovative products is limited by the need to ensure free flow of goods – « exhaustion » doctrine
5. C. implications in e-context?

Enabling innovation – the EU internal market

2. Completing the internal market in a pro-technological innovation sense

EU internal market

▶ Article 26 TFEU:

The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties

- ▶ Market access rights/negative integration: Treaty free movement rights having direct effect
- ▶ Market access regulation: harmonisation / positive integration
- ▶ Complementary regulation: including innovation-focused regulation

EU internal market

- ▶ Last time: negative integration and its relationship to (technological) innovation
- ▶ Today: positive integration and *technological* innovation
 - ▶ [General EU law measures aimed at stimulating innovation, start-ups and entrepreneurship]
 - ▶ Enabling e-commerce: digital single market
 - ▶ Gradual development of EU-wide protection of innovation: unitary patent + copyright proposals

Enabling e-commerce

Andrus Ansip Commission
Vice-President
Digital Single Market



Enabling e-commerce



- ▶ 9 June 2016:
 - ▶ “The [Digital Single Market] will remove the barriers that prevent Europeans from meeting the challenges of the growing digital economy - and from making the most of its opportunities...
 - ▶ ...It will give people more access to online goods and services. It will allow businesses and governments to make better use of digital tools like public e-services.”

Enabling e-commerce



▶ 11 October 2016:

- ▶ “Nobody should be left behind in the digital age. It is a key part of the thinking behind the Digital Single Market. It underpins everything we are trying to achieve. This project to turn Europe digital will benefit everyone, in all corners of Europe. That applies to connectivity and online access. It applies to European rules to guarantee fair and open competition; It applies to data flows, consumer protection and online public services;”

Enabling e-commerce

- ▶ Digital single market complementing existing EU internal market
 - ▶ Facilitating cross-border e-commerce transactions
 - ▶ Enhancing access to online services and content
 - ▶ Enhancing access for individuals
 - ▶ Ensuring cross-border intellectual property rights protection is in place

Facilitating e-commerce

- ▶ **E-commerce legal framework in place: Directive 2000/31**
 - ▶ The development of information society services within the Community is hampered by a number of legal obstacles to the proper functioning of the internal market which make less attractive the exercise of the freedom of establishment and the freedom to provide services; these obstacles arise from divergences in legislation and from the legal uncertainty as to which national rules apply to such services; in the absence of coordination and adjustment of legislation in the relevant areas, obstacles might be justified in the light of the case-law of the Court of Justice of the European Communities; legal uncertainty exists with regard to the extent to which Member States may control services originating from another Member State.

Facilitating e-commerce

- ▶ Regulating information society services in B2B and B2C contexts
- ▶ Art. 2(a): (see Directive 98/48/EC)
- ▶ any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.
- ▶ For the purposes of this definition:
 - ▶ at a distance means that the service is provided without the parties being simultaneously present, (e.g. Case C-108/09, *Ker-Optika*)
 - ▶ by electronic means means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,
 - ▶ at the individual request of a recipient of services means that the service is provided through the transmission of data on individual request.
 - ▶ C-291/13, *Papasavvas*, notion also covers the provision of online information services for which the service provider is remunerated, not by the recipient, but by income generated by advertisements posted on a website

Facilitating e-commerce

- ▶ Home-country principle + free movement
 - ▶ Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.
 - ▶ Member States may not [...] restrict the freedom to provide information society services from another Member State.

Facilitating e-commerce

- ▶ **Guaranteeing e-commerce providers to establish themselves in the territory of a Member State**
 - ▶ No specific e-commerce authorisation permitted (art. 4)
 - ▶ Yet authorisation for underlying activity can remain in place, in accordance with the EU Services Directive (2006/123)
 - ▶ E.g. optician wishing to offer on-line contact lense sales
 - ▶ Yet, obligation to make information available to customers (art. 5)
 - ▶ Name (+ trade register)
 - ▶ Geographical address
 - ▶ E-mail address
 - ▶ Supervisory authority and/or professional association
 - ▶ VAT-number
 - ▶ Customer template complaint form or telephone number? – Case C-298/07, *Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband*

Facilitating e-commerce

- ▶ **Transparency and communication of information**
 - ▶ Unsolicited commercial communications permitted in principle (art. 7)
 - ▶ If permitted by Member State law...
 - ▶ Opt-out registers
 - ▶ Cross-border context? (*Alpine Investments*)
 - ▶ Mandatory information accompanying commercial communications (art. 6)
 - ▶ Mandatory information to be provided in contracts with e-services providers and consumers (art. 10)
 - ▶ Optional if no consumers involved
 - ▶ art. 11: e-service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means + ability to access information about order

Facilitating e-commerce

- ▶ Liability of e-commerce service providers
 - ▶ No general obligation to install filtering system – Case C-70/10, *Scarlet*; Case C-360/10, *Sabam*
 - ▶ art. 12 – « mere conduit »
 - ▶ Case C-484/14, *McFadden*, 15/09/2016 – providing free access to network which is used to infringe rights of others, unless being formally notified and not taking action...
 - ▶ art. 13 – « caching »
 - ▶ art. 14 – « hosting » and removal of illegal content
 - ▶ Duty to remove when becoming aware of content – Joined Cases C-236/08 to 238/08, *Google*
 - ▶ If not done, damages can be imposed – Case C-324/09, *L'Oréal*
 - ▶ art. 15 – no general obligation to monitor

Relationship e-commerce Directive to technological innovation?



We'll be
back
soon...

Facilitating e-commerce 2.0.

- ▶ DSM proposals May 2016: Upgrading the framework of Directive 2000/31
 - ▶ = further facilitating e-commerce transactions
 - ▶ = prohibiting certain persistent commercial practices
 - ▶ Geo-blocking
 - ▶ Parcel delivery costs
 - ▶ = enhancing coordinated enforcement of EU law
 - ▶ New minimum powers for national consumer protection law enforcement authorities, agencies and departments



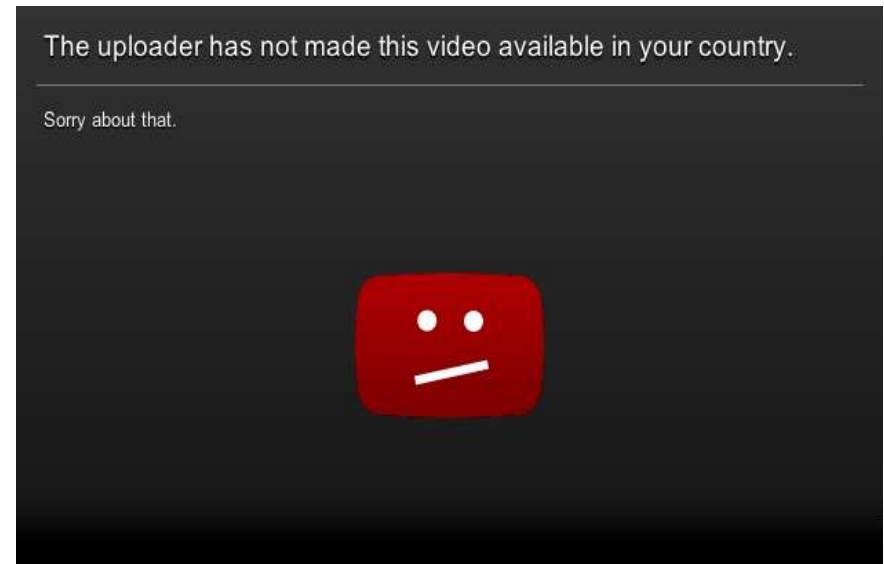
At this stage, only legislative proposals...

Facilitating e-commerce 2.0.

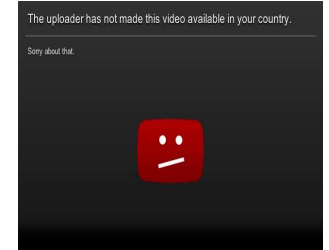
► Geo-blocking

Access Denied

You don't have permission to access "http://www.southwest.com/" on this server.



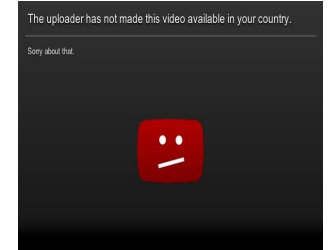
Facilitating e-commerce 2.0.



▶ Geo-blocking

- ▶ = traders operating in one Member State block or limit the access to their online interfaces, such as websites and apps, of customers from other Member States wishing to engage in cross-border commercial transactions
- ▶ Commission inquiry
 - ▶ Competition law: existence of agreements and unilateral practices – limits of EU competition law?
 - ▶ More general stakeholders inquiry: goods and services most affected by geo-blocking are clothing, footwear and accessories, physical media (books), computer hardware and electronics, airplane tickets, car rental, digital content such as streaming services, computer games and software, e-books and MP3s

Facilitating e-commerce 2.0.

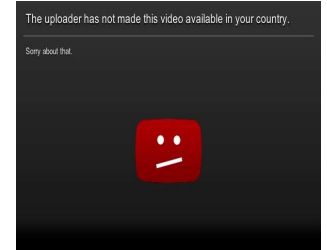


▶ Geo-blocking proposed Regulation

▶ Art. 3(1) and (2):

- ▶ Traders shall not, through the use of technological measures or otherwise, block or limit customers' access to their online interface for reasons related to the nationality, place of residence or place of establishment of the customer.
- ▶ Traders shall not, for reasons related to the nationality, place of residence or place of establishment of the customer, redirect customers to a version of their online interface that is different from the online interface which the customer originally sought to access, by virtue of its layout, use of language or other characteristics that make it specific to customers with a particular nationality, place of residence or place establishment, unless the customer gives his or her explicit consent prior to such redirection. In the event of such redirection with the customer's explicit consent, the original version of the online interface shall remain easily accessible for that customer

Facilitating e-commerce 2.0.

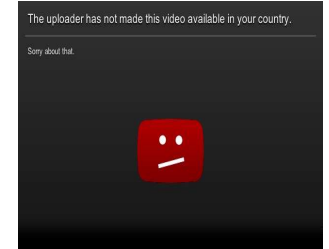


▶ Geo-blocking

▶ Art. 3(2) and (3)

- ▶ The prohibitions set out in paragraphs 1 and 2 shall not apply where the blocking, limitation of access or redirection with respect to certain customers or to customers in certain territories is necessary in order to ensure compliance with a legal requirement in Union law or in the laws of Member States in accordance with Union law.
- ▶ Obligation to offer clear justification for doing so in the language of the online interface that the customer originally sought to access

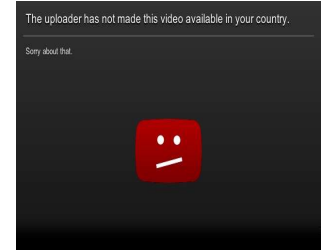
Facilitating e-commerce 2.0.



▶ Geo-blocking

- ▶ Article 4(1) – non-justifiable prohibitions
- ▶ Traders shall not apply different general conditions of access to their goods or services, for reasons related to the nationality, place of residence or place of establishment of the customer, in the following situations:
 - ▶ (a) where the trader sells goods and those goods are not delivered cross-border to the Member State of the customer by the trader or on his or her behalf;
 - ▶ (b) where the trader provides electronically supplied services, other than services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter;
 - ▶ (c) where the trader provides services, other than those covered by point (b), and those services are supplied to the customer in the premises of the trader or in a physical location where the trader operates, in a Member State other than that of which the customer is a national or in which the customer has the place of residence or the place of establishment.

Facilitating e-commerce 2.0.



▶ Geo-blocking

▶ Article 6

- ▶ Agreements imposing on traders obligations, in respect of passive sales, to act in violation of this Regulation shall be automatically void.

Market access focus...

Audiovisual media

EXCLUDED!!

Facilitating e-commerce 2.0



▶ Parcel delivery

- ▶ Complements « universal service » postal Directive 97/67 ...
- ▶ Article 2(2)(a) proposed Regulation:
 - ▶ "parcel delivery services" means services involving the clearance, sorting, transport or distribution of postal items other than items of correspondence; transport alone shall not be considered a parcel delivery service; delivery of such items exceeding 31,5 kg shall not be considered a parcel delivery service
- ▶ Article 3 proposed Regulation:
 - ▶ Mandatory information to be provided
- ▶ Articles 4/5
 - ▶ Communication of tariff information to national regulatory authorities

Facilitating e-commerce 2.0



▶ Parcel delivery

▶ Article 6:

- ▶ Mandatory access to universal service national parcel delivery system upon reasonable reference offer
- ▶ National regulatory authority can intervene and impose modified price offer

Market access focus!!

▶ Link to e-commerce?

- European Parliament: *accessible, affordable, efficient and high-quality delivery services are an essential pre-requisite for cross-border e-commerce to thrive*

Facilitating e-commerce 2.0.



▶ Enforcement

- ▶ Enhancing consumers' trust in cross-border e-commerce by upgrading existing consumer protection enforcement framework
- ▶ National authorities and courts are responsible for enforcement of EU consumer protection law, including e-commerce Directive
- ▶ Assembled in informal *Consumer Protection Coordination* (CPC) network (Reg. 2006/2004)
 - ▶ Basically Commission back-office
 - ▶ Coordinates mutual assistance for intra-Union infringements

Facilitating e-commerce 2.0.



- ▶ Enforcement: proposed Regulation
 - ▶ Upgrade to intra-Union infringements and widespread infringements
 - ▶ Minimum powers for national enforcement authorities, tailored to e-commerce (art. 8 proposed Regulation)
 - ▶ b) require the supply by any natural or legal person, including banks, internet service providers, domain registries and registrars and hosting service providers of any relevant information, data or document in any format or form and irrespective of the medium on which or the place where they are stored, for the purpose of among others identifying and following financial and data flows, or of ascertaining the identity of persons involved in financial and data flows, bank account information and ownership of websites
 - ▶ l) close down a website, domain or similar digital site, service or account or a part of it, including by requesting a third party or other public authority to implement such measures
 - ▶ Upgraded mutual assistance framework

Facilitating e-commerce 2.0.

- ▶ Future – fascinating – case study: Uber



EU internal market

- ▶ Last time: negative integration and its relationship to (technological) innovation
- ▶ Today: positive integration and *technological* innovation
 - ▶ [General EU law measures aimed at stimulating innovation, start-ups and entrepreneurship]
 - ▶ Enabling e-commerce: digital single market
 - ▶ Gradual development of EU-wide protection of innovation: unitary patent + copyright proposals

Enabling e-commerce

- ▶ Digital single market complementing existing EU internal market
 - ▶ Facilitating cross-border e-commerce transactions
 - ▶ Enhancing access to online services and content
 - ▶ **Enhancing unfettered e-access for individuals**
 - ▶ Ensuring cross-border intellectual property rights protection is in place

Enhancing access to e-services

► Net neutrality



Enhancing access to e-services



► Net neutrality

▸ Regulation 2015/2120

- This Regulation aims to establish common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users' rights. It aims to protect end-users and simultaneously to guarantee the *continued functioning of the internet ecosystem as an engine of innovation*.
- Art. 3(1) - End-users shall have the right to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice, irrespective of the end-user's or provider's location or the location, origin or destination of the information, content, application or service, via their internet access service

Enhancing access to e-services

▶ Net neutrality

- ▶ Article 3(3) – Providers of internet access services shall not engage in traffic management measures going beyond those set out in the second subparagraph, and in particular shall not block, slow down, alter, restrict, interfere with, degrade or discriminate between specific content, applications or services, or specific categories thereof, except as necessary, and only for as long as necessary, in order to:
 - ▶ comply with Union legislative acts, or national legislation that complies with Union law, to which the provider of internet access services is subject, or with measures that comply with Union law giving effect to such Union legislative acts or national legislation, including with orders by courts or public authorities vested with relevant powers;
 - ▶ preserve the integrity and security of the network, of services provided via that network, and of the terminal equipment of end-users
 - ▶ prevent impending network congestion and mitigate the effects of exceptional or temporary network congestion, provided that equivalent categories of traffic are treated equally

Enhancing access to e-services



► Net neutrality

► Yet, article 3(5)

- Providers of electronic communications to the public, including providers of internet access services, and providers of content, applications and services shall be free to offer services other than internet access services which are optimised for specific content, applications or services, or a combination thereof, where the optimisation is necessary in order to meet requirements of the content, applications or services for a specific level of quality.
- Providers of electronic communications to the public, including providers of internet access services, may offer or facilitate such services only if the network capacity is sufficient to provide them in addition to any internet access services provided. Such services shall not be usable or offered as a replacement for internet access services, and shall not be to the detriment of the availability or general quality of internet access services for end-users.

Enhancing access to e-services

- ▶ **Networks' access for service providers**
 - ▶ EU electronic communications regulatory framework (2009 update)
 - ▶ Audiovisual Media Services Directive 2010/13
 - ▶ Article 3: Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of audiovisual media services from other Member States for reasons which fall within the fields coordinated by this Directive
 - ▶ Multiple exceptions, however
 - ▶ + protection of public interests in relation to offering of media services coming from other Member States

Enhancing access to e-services

▶ Roaming Regulation

▶ Roaming

- ▶ = surcharges that telecoms operators impose on their customers each time they crossed a border while using their mobile device on holiday or during business trips
- ▶ = costs charged for using the network of a related mobile telecom operator in another Member State

▶ Regulation 717/2007 – maximum prices – Eurotariff

- ▶ 26/09/2016 proposed Regulation– abolishing roaming in its entirety by June 2017

Enhancing access to e-services

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ROAMING WHEN TRAVELLING IN THE EU

As of 15 June 2017: no extra charges
As of 30 April 2016, you will pay domestic prices + a maximum of

€ 0.05	€ 0.02	€ 0.05
		
Voice-calls made (per minute)	SMS sent	Data (per MB)

(prices in Euro cents, excl. VAT)

 #roaming

Digital Single Market

Enhancing access to e-services

- ▶ Other (future) regulatory initiatives or proposals seeking to promote or enhance EU-wide e-commerce
 - ▶ Radiospectrum – Wireless Europe
 - ▶ Update Audiovisual media services
 - ▶ Broadband Europe vision
 - ▶ Data protection and VAT updates in the e-context

EU law and technological innovation – where are we now?



Summary

- ▶ Regulating what is already there
- ▶ Not stimulating technological innovation, rather stimulating the use of existing technologies and acknowledging e-developments as something external to EU internal market law
- ▶ Riding on the e-wave, aligning the internal market with what exists in terms of technological developments

Extending e-commerce regulation to IPR protection

Cross-border IPR protection

- ▶ Cf. first class: intellectual property rights protection remains the province of Member States
 - ▶ In practice,
 - ▶ National law
 - ▶ International agreements on cross-border IPR extensions and enforcement
 - ▶ Increasing EU intervention tailored to e-commerce
 - ▶ Copyright : 2001/2004 Directives => 2016 Proposals
 - ▶ Patents: unitary patent (enhanced EU cooperation), relating more generally to the protection of all kinds of patentable innovations...

Next class:

- a. A. Better protection cross-border IPR
- b. B. Stimulating innovation more directly through EU State aid law



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Liege
Competition
and
Innovation Institute

EUROPEAN LAW AND TECHNOLOGICAL INNOVATION

Prof. Dr. Pieter Van Cleynenbreugel

Questions?



Facilitating e-commerce 2.0.

► Future – fascinating – case study: Uber

C-526/15, Uber
Belgium, pending

2 June 2016,
Commission sharing
economy
communication



C-320/16, Uber
France, pending

C-434/15, Elite Taxi,
pending

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Copyright

- ▶ Directive 2001/29/EC:
- ▶ Article 2: Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:
 - ▶ (a) for authors, of their works;
 - ▶ (b) for performers, of fixations of their performances;
 - ▶ (c) for phonogram producers, of their phonograms;
 - ▶ (d) for the producers of the first fixations of films, in respect of the original and copies of their films;
 - ▶ (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

Copyright

- ▶ Directive 2001/69/EC:
- ▶ Article 6(3): the expression ‘technological measures’ means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the *sui generis* right provided for in Chapter III of Directive 96/9/EC.
- ▶ Technological measures shall be deemed ‘effective’ where the use of a protected work or other subject matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

Copyright

- ▶ Directive 2001/29/EC:
- ▶ Article 6 « voluntary » measures : Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.
- ▶ 2. Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which:
 - ▶ (a) are promoted, advertised or marketed for the purpose of circumvention of, or
 - ▶ (b) have only a limited commercially significant purpose or use other than to circumvent, or
 - ▶ (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of,
- ▶ any effective technological measures.

Copyright

- ▶ **Directive 2004/48/EC: enforcement coordination?**
 - ▶ Article 3(1): Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive. Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

Copyright

- ▶ 2009 software Directive 2009/24:
 - ▶ See also Article 1, the Community's legal framework on the protection of computer programs can accordingly in the first instance be limited to establishing that Member States should accord protection to computer programs under copyright law as literary works and, further, to establishing who and what should be protected, the exclusive rights on which protected persons should be able to rely in order to authorise or prohibit certain acts and for how long the protection should apply
 - ▶ Art. 4 and 5: restricted acts + exceptions to it
 - ▶ Responsibility remains with national level!!

Copyright

- ▶ **Towards more effective cross-border protection**
 - ▶ December 2015 Commission Communication
 - ▶ 2015 portability Regulation proposal
- ▶ **2016 proposals**
 - ▶ Two Directives
 - ▶ Copyright
 - ▶ Disability
 - ▶ Two Regulations
 - ▶ Copyright issues related to broadcasting
 - ▶ Disability

Copyright

- ▶ Portability Regulation:
- ▶ Concerns exercise of harmonised features of copyright across borders as concerns cross-border portability of online content services
- ▶ Article 3:
 - ▶ The provider of an online content service shall enable a subscriber who is *temporarily present* in a Member State to access and use the online content service.
 - ▶ The obligation shall not extend to any quality requirements applicable to the delivery of an online content service that the provider is subject to when providing this service in the Member State of residence, unless otherwise expressly agreed by the provider.
 - ▶ The provider of an online content service shall inform the subscriber of the quality of delivery of the online content service provided.

Copyright

- ▶ **2016 proposal I: Directive on copyright**
 - ▶ Upgrading already harmonised framework in light of technical developments and new Internet-focused business models
 - ▶ Article 10: video-on-demand agreements – impartial assistance
 - ▶ Article 11: copyright protection on digital press publications
 - ▶ Article 13: adequate protection measures and technology to be offered by information society service providers

Copyright

- ▶ **2016 proposal I: Directive on copyright**
 - ▶ Articles 3 and 4: text and data-mining in teaching and research activities
 - ▶ Cross-border exception envisaged

Copyright

- ▶ 2016 proposal II: Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes
 - ▶ Ancillary online services – country of origin of broadcasting service – Article 2
 - ▶ Retransmission by broadcasting organisation
 - ▶ Article 3: collective management organisation

Copyright

- ▶ 2016 proposals

- ▶ Print disabilities exception and copyright

- ▶ Implementing *Marrakesh Treaty*

- ▶ Proposed Directive – within EU

- ▶ Proposed Regulation – in relation to third countries

Related developments: unitary patent

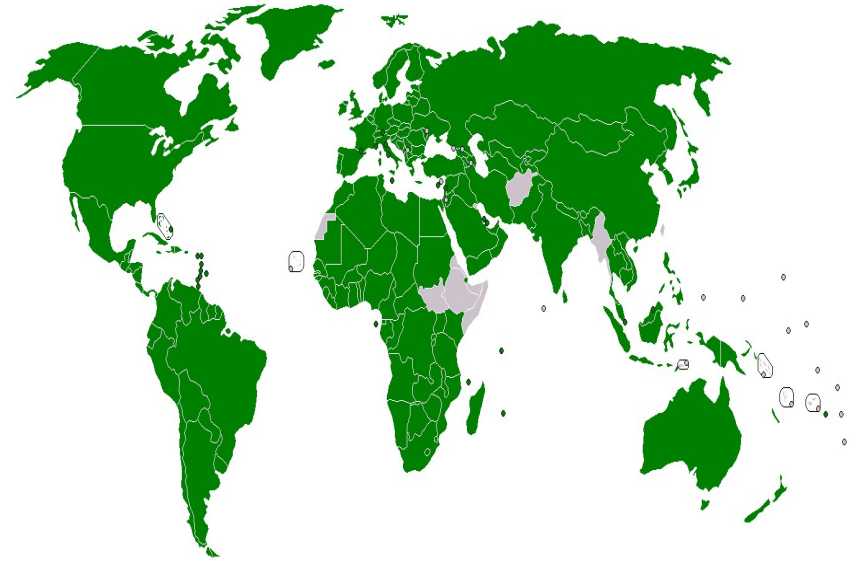
- ▶ Patent law

- ▶ National law

- ▶ 1883 Paris Convention

- ▶ 1973 European Patent Convention

- ▶ TRIPS agreement



Only indirect impact
on technological
innovation !!

Unitary patent

- ▶ European patent – European Patent Office (EPO)
- ▶ Complementary EU initiatives
 - ▶ Regulation 1257/2012: unitary patent – unitary effect among participating Member States
 - ▶ Enhanced cooperation between Belgium, Bulgaria, the Czech Republic, Denmark, Germany, Estonia, Ireland, Greece, France, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Malta, the Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland, Sweden and the United Kingdom
 - ▶ Not joining: Spain, Italy and Croatia

Unitary patent

▶ Unitary effect

- ▶ Article 3(1): A European patent granted with the same set of claims in respect of all the participating Member States shall benefit from unitary effect in the participating Member States provided that its unitary effect has been registered in the Register for unitary patent protection.
- ▶ Article 3(2): it shall provide uniform protection and shall have equal effect in all the participating Member States
 - ▶ Article 5: uniform protection – exhaustion doctrine
 - ▶ Article 7: treatment as a national patent
 - ▶ Article 4 Regulation 1260/2012: translation of patent in language of Member State where infringement took place or where claimant is domiciled.

Unitary patent

- ▶ **Unified Patent Court (UPC)**
 - ▶ Agreement between participating Member States
 - ▶ Central division – local/regional divisions
 - ▶ Competences of UPC
 - ▶ « National/Member State jurisdiction » for EU law purposes
 - ▶ Opt-out possibility but not for unitary effect patents
 - ▶ Important for entry into force of Unitary Patent legal regime
- ▶ **Next logical step for copyright and other e-attuned IPR as well ?**

EU law and technological innovation – where are we now?



EU law and technological innovation – where are we now?

- ▶ Technology defies attempts at regulation
- ▶ Regulatory developments at EU level only after technology is made available
- ▶ Regulating – rather than stimulating – technological innovation
- ▶ Too little, too late?? – or potential openings towards more technological innovation-focused market regulation

EU law and technological innovation – where are we now?

- ▶ **EU internal market law and technological innovation**
 - ▶ Market access and cross-border e-commerce remain primordial policy goals
 - ▶ Regulation takes technological innovation for granted
 - ▶ Marginal adaptations to existing legal frameworks
 - ▶ Not necessarily a trigger for legislative/regulatory innovation
 - ▶ Room for Member State initiatives to stimulate technological innovation on EU territory??

EU law and technological innovation – where are we now?

- ▶ EU internal market law and technological innovation
- ▶ Regulating innovation rather than regulating for innovation... (*Butenko and Larouche*)
 - ▶ Making innovative technologies accessible for SMEs, individual traders

= *entrepreneurial* law and regulation rather than regulating innovation or regulating for innovation

Up next...

**Enabling technological innovation more directly through
the EU State aid mechanism?**

State aid and technological innovation

- ▶ **Margarethe Vestager, 14 October 2016**
 - ▶ *“Consumers need fast broadband connections at affordable prices, to get the most from what the Internet has to offer. And the EU Digital Single Market strategy aims to get ultrafast broadband to at least half of all Europeans within the next four years. We may well need public money to make that investment happen. And the state aid rules can help make sure that money is used in a way that doesn't undermine competition”.*



State aid and technological innovation

▶ State aid in EU law

- ▶ Ranked among the EU competition law rules
- ▶ Applicable when a public authority grants an advantage to an undertaking or when the advantage can be attributed to it
 - ▶ Undertaking = any entity engaged in economic activity (*Höfner*)
 - ▶ When advantage is granted to non-economic activity, one falls outside the realm of the State aid rules
 - ▶ No EU law limits on non-economic activity-focused advantages

State aid and technological innovation

▶ State aid in EU law

▶ Article 107 TFEU

- ▶ (1) general incompatibility of advantages – prohibition
- ▶ (2) per se exceptions
- ▶ (3) possible exceptions

▶ Article 108 TFEU

- ▶ Existing aid – new aid
- ▶ Notification obligation to European Commission
 - Regulation 2015/1589
- ▶ Unlawful – incompatible aid
- ▶ Recovery

State aid and technological innovation

▶ Notification obligation

- ▶ Block exemption mechanism – General Block Exemption Regulation 651/2014
- ▶ Recital 46: SMEs may experience difficulties in gaining access to new technological developments, knowledge transfer or highly qualified personnel. Aid for research and development projects, aid for feasibility studies and innovation aid for SMEs, including aid to cover the costs of industrial property rights, may remedy those problems and should therefore be exempted from the notification requirement under certain conditions

State aid and technological innovation

▶ Exempted from notification

- ▶ Aim = permitting public authorities to correct market failures in the interest of R&D&I
- ▶ Legal consequence = some advantages will be deemed compatible with the internal market
- ▶ Classification (case-by-case) and threshold system
 - ▶ Project innovation- or R&D-related?
 - ▶ If so, exemption if certain thresholds met
 - ▶ Above those thresholds – notification obligation, yet still assessment on a case-by-case basis – Commission guidelines

State aid and innovation – funding non-economic activities

▶ **Principle:** funding of non-economic activities does not constitute State aid (Art. 107 TFEU and 2014 Commission guidelines)

▶ What are non-economic activities? (Commission guidelines)

- ▶ Education projects
- ▶ Independent R&D for more knowledge and/or better understanding
- ▶ wide dissemination of research results on a non-exclusive and non-discriminatory basis, for example through teaching, open-access databases, open publications or open software
- ▶ Non profit knowledge transfer projects

Could you envisage an e-innovation project captured by those exceptions?

De minimis

- ▶ *De minimis non curat praetor*

- ▶ Regulation 1407/2013

- ▶ Article 3: *The total amount of de minimis aid granted per Member State to a single undertaking shall not exceed EUR 200 000 over any period of three fiscal years*

- ▶ *Services of general economic interest: EUR 500 000*
(Regulation 360/2012)

- Relevance for e-technologies?

Regulation 651/2014

- ▶ **Economic activities related to R&D&I**
 - ▶ Fundamental research
 - ▶ Industrial research
 - ▶ Experimental development
 - ▶ Feasibility studies
 - ▶ Development of research infrastructures
- ▶ Innovation clusters
- ▶ Innovation by SMEs
- ▶ Process and organisational innovation support

Regulation 651/2014

- ▶ **Thresholds per undertaking per project**
 - ▶ Fundamental research – EUR 40 million
 - ▶ Industrial research – EUR 20 million
 - ▶ Experimental development – EUR 15 million
 - ▶ Feasibility studies – EUR 7,5 million
 - ▶ Development of research infrastructures – EUR 20 million

- ▶ Innovation clusters – EUR 7,5 million per cluster
- ▶ Innovation by SMEs – EUR 5 million per undertaking
- ▶ Process and organisational innovation support – EUR 7,5 million

Regulation 651/2014

- ▶ **Thresholds per undertaking per project**
 - ▶ Renewable energy – EUR 15 million
 - ▶ Broadband infrastructures – EUR 70 million total costs
- ▶ **Aid intensity**
 - ▶ Fundamental research – 100% of costs
 - ▶ Industrial research – 50% of costs
 - ▶ Experimental development – 25% of costs
 - ▶ Feasibility studies – 50% of costs
 - ▶ Development of research infrastructures – 50% of costs

 - ▶ Innovation clusters – 50% of costs
 - ▶ Innovation by SMEs – 50%; 100% advisory services
 - ▶ Process and organisational innovation support – 15% large undertakings or 50% SMEs

Regulation 651/2014

- ▶ **Only specific costs to be covered by public authority intervention**
 - ▶ Articles 25-29 GBER
 - ▶ E.g. process and organisational innovation aid
 - ▶ Personnel costs
 - ▶ Costs of instruments and buildings
 - ▶ Costs of patents bought or licensed and contract research
 - ▶ Operational costs
 - ▶ E.g. innovation aid SMEs
 - ▶ Costs obtaining and defending patents
 - ▶ Advisory and support services

Commission guidelines

- ▶ **Additional clarifications**
 - ▶ Market failure approach
 - ▶ Public procurement
 - ▶ Collaboration projects
 - ▶ What and when to notify?
- ▶ **Legal effects and consequences of guidelines**

In practice

- ▶ Legal loopholes
 - ▶ SME-circumvention
 - ▶ Collaboration circumvention



Case law on the
matter?

Complementary EU initiatives

- ▶ **Horizon 2020**
- ▶ **European Structural and Investment Funds**
- ▶ **European Fund for Strategic Investments**
- ▶ **Access to finance plan for SMEs**

State aid and technological innovation

- ▶ **Conclusions to draw from EU State aid rules and their application**
 - ▶ No specific e-technology focus, despite rhetoric to that extent – exception: broadband access
 - ▶ Funding possibilities granted to Member States, complemented by EU tools
 - ▶ Market failure focus?
 - ▶ ⇔ market design focus in e-commerce regulation and cross-border IP protection



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Liege
Competition
and
Innovation Institute

EUROPEAN LAW AND TECHNOLOGICAL INNOVATION

Prof. Dr. Pieter Van Cleynenbreugel

Questions?



State aid and technological innovation

- ▶ **Margarethe Vestager, 14 October 2016**
 - ▶ *“Consumers need fast broadband connections at affordable prices, to get the most from what the Internet has to offer. And the EU Digital Single Market strategy aims to get ultrafast broadband to at least half of all Europeans within the next four years. We may well need public money to make that investment happen. And the state aid rules can help make sure that money is used in a way that doesn't undermine competition”.*



State aid and technological innovation

▶ State aid in EU law

- ▶ Ranked among the EU competition law rules
- ▶ Applicable when a public authority grants an advantage to an undertaking or when the advantage can be attributed to it
 - ▶ Undertaking = any entity engaged in economic activity (*Höfner*)
 - ▶ When advantage is granted to non-economic activity, one falls outside the realm of the State aid rules
 - ▶ No EU law limits on non-economic activity-focused advantages

State aid and technological innovation

▶ State aid in EU law

▶ Article 107 TFEU

- ▶ (1) general incompatibility of advantages – prohibition
- ▶ (2) per se exceptions
- ▶ (3) possible exceptions

▶ Article 108 TFEU

- ▶ Existing aid – new aid
- ▶ Notification obligation to European Commission
 - Regulation 2015/1589
- ▶ Unlawful – incompatible aid
- ▶ Recovery

State aid and technological innovation

▶ Notification obligation

- ▶ Block exemption mechanism – General Block Exemption Regulation 651/2014
- ▶ Recital 46: SMEs may experience difficulties in gaining access to new technological developments, knowledge transfer or highly qualified personnel. Aid for research and development projects, aid for feasibility studies and innovation aid for SMEs, including aid to cover the costs of industrial property rights, may remedy those problems and should therefore be exempted from the notification requirement under certain conditions

State aid and technological innovation

▶ Exempted from notification

- ▶ Aim = permitting public authorities to correct market failures in the interest of R&D&I
- ▶ Legal consequence = some advantages will be deemed compatible with the internal market
- ▶ Classification (case-by-case) and threshold system
 - ▶ Project innovation- or R&D-related?
 - ▶ If so, exemption if certain thresholds met
 - ▶ Above those thresholds – notification obligation, yet still assessment on a case-by-case basis – Commission guidelines

State aid and innovation – funding non-economic activities

▶ **Principle:** funding of non-economic activities does not constitute State aid (Art. 107 TFEU and 2014 Commission guidelines)

▶ What are non-economic activities? (Commission guidelines)

- ▶ Education projects
- ▶ Independent R&D for more knowledge and/or better understanding
- ▶ wide dissemination of research results on a non-exclusive and non-discriminatory basis, for example through teaching, open-access databases, open publications or open software
- ▶ Non profit knowledge transfer projects

Could you envisage an e-innovation project captured by those exceptions?

De minimis

- ▶ *De minimis non curat praetor*

- ▶ Regulation 1407/2013

- ▶ Article 3: *The total amount of de minimis aid granted per Member State to a single undertaking shall not exceed EUR 200 000 over any period of three fiscal years*

- ▶ *Services of general economic interest: EUR 500 000 (Regulation 360/2012)*

- Relevance for e-technologies?

Regulation 651/2014

- ▶ **Economic activities related to R&D&I**
 - ▶ Fundamental research
 - ▶ Industrial research
 - ▶ Experimental development
 - ▶ Feasibility studies
 - ▶ Development of research infrastructures
- ▶ Innovation clusters
- ▶ Innovation by SMEs
- ▶ Process and organisational innovation support

Regulation 651/2014

- ▶ **Thresholds per undertaking per project**
 - ▶ Fundamental research – EUR 40 million
 - ▶ Industrial research – EUR 20 million
 - ▶ Experimental development – EUR 15 million
 - ▶ Feasibility studies – EUR 7,5 million
 - ▶ Development of research infrastructures – EUR 20 million

- ▶ Innovation clusters – EUR 7,5 million per cluster
- ▶ Innovation by SMEs – EUR 5 million per undertaking
- ▶ Process and organisational innovation support – EUR 7,5 million

Regulation 651/2014

- ▶ **Thresholds per undertaking per project**
 - ▶ Renewable energy – EUR 15 million
 - ▶ Broadband infrastructures – EUR 70 million total costs
- ▶ **Aid intensity**
 - ▶ Fundamental research – 100% of costs
 - ▶ Industrial research – 50% of costs
 - ▶ Experimental development – 25% of costs
 - ▶ Feasibility studies – 50% of costs
 - ▶ Development of research infrastructures – 50% of costs

 - ▶ Innovation clusters – 50% of costs
 - ▶ Innovation by SMEs – 50%; 100% advisory services
 - ▶ Process and organisational innovation support – 15% large undertakings or 50% SMEs

Regulation 651/2014

- ▶ **Only specific costs to be covered by public authority intervention**
 - ▶ Articles 25-29 GBER
 - ▶ E.g. process and organisational innovation aid
 - ▶ Personnel costs
 - ▶ Costs of instruments and buildings
 - ▶ Costs of patents bought or licensed and contract research
 - ▶ Operational costs
 - ▶ E.g. innovation aid SMEs
 - ▶ Costs obtaining and defending patents
 - ▶ Advisory and support services

Regulation 651/2014

▶ Start-up aid

- ▶ Aid for start-ups
 - ▶ Loans with interest rates
 - ▶ Guarantees
 - ▶ (Small) grants
 - ▶ Doubled for small and innovative enterprises!
- ▶ unlisted small enterprises up to five years following their registration, which have not yet distributed profits and have not been formed through a merger.
 - ▶ If not subject to registration the five years eligibility period may be considered to start from the moment when the enterprise either starts its economic activity or is liable to tax for its economic activity

Commission guidelines

- ▶ **Additional clarifications**
 - ▶ Market failure approach
 - ▶ Public procurement
 - ▶ Collaboration projects
 - ▶ What and when to notify?
- ▶ **Legal effects and consequences of guidelines**

In practice

- ▶ Legal loopholes
 - ▶ SME-circumvention
 - ▶ Collaboration circumvention



Case law on the
matter?

Complementary EU initiatives

- ▶ **Horizon 2020**
- ▶ **European Structural and Investment Funds**
- ▶ **European Fund for Strategic Investments**
- ▶ **Access to finance plan for SMEs**

State aid and technological innovation

- ▶ **Conclusions to draw from EU State aid rules and their application**
 - ▶ No specific e-technology focus, despite rhetoric to that extent – exception: broadband access
 - ▶ Funding possibilities granted to Member States, complemented by EU tools
 - ▶ Market failure focus?
 - ▶ ⇔ market design focus in e-commerce regulation and cross-border IP protection

Innovation and Article 101 TFEU

What role for EU competition law in ensuring innovation?

- ▶ **EU competition law**
 - ▶ Antitrust + Mergers: Articles 101-106 TFEU + Regulation 139/2004
 - ▶ State aid as ugly duckling: Articles 107-109 TFEU

- ▶ **What role for competition law in ensuring innovation?**
 - ▶ Goals of competition
 - ▶ Goals of competition law
 - ▶ Objectives of EU competition law

- ▶ **Question on top is a most difficult question for a lawyer to answer...**
 - ▶ Relates to perennial discussions on the objectives of competition law
 - ▶ Rather the inverse question is being asked in order to find a tentative answer to the above one...

The role of innovation in EU competition analysis

- ▶ Pablo Ibañez Colomo (London School of Economics / Chillin'Competition)
 - ▶ Indirect role
 - ▶ Supplementary argument, in addition to market structure /competitive foreclosure arguments
 - ▶ More direct role
 - ▶ Measuring to what extent innovation is affected by anticompetitive behaviour

Which role is most preferable?

Ibañez Colomo, 'Restrictions on Innovation in EU competition law', Working Paper (adapted version also published in *ELRev.*), [https://papers.ssrn.com/sol3/papers.cfm?abs](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2699395)

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In practice

- ▶ **Mostly indirect role for innovation in EU competition law analysis**
 - ▶ Especially in Article 101 TFEU cases
 - ▶ Aligning to the aims of intellectual property law – reductionist view on innovation
 - ▶ Main elements in *Microsoft* and *Google* cases (18/11 lecture)

- ▶ **Direct innovation concerns seep through**
 - ▶ See next week – Mergers + SEP and Article 102 TFEU cases
 - ▶ Albeit rather implicitly/hidden...

Article 101 TFEU

- ▶ 1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as *their object or effect* the prevention, restriction or distortion of competition within the internal market, and in particular those which:
 - ▶ (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
 - ▶ (b) limit or control production, markets, technical development, or investment;
 - ▶ (c) share markets or sources of supply;
 - ▶ (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - ▶ (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
- ▶ 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

Article 101 TFEU

- ▶ 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
 - ▶ - any agreement or category of agreements between undertakings,
 - ▶ - any decision or category of decisions by associations of undertakings,
 - ▶ - any concerted practice or category of concerted practices,which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
 - ▶ (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
 - ▶ (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 101 TFEU

- ▶ Cartel agreements and similar types of collusive behaviour that cannot be justified (on what grounds??) are in principle prohibited
- ▶ Link with technological innovation?
 - ▶ Above all in the realm of *licensing agreements* of IPR
 - ▶ *Maintaining workable licensing agreements in a competitive transnational market*
 - ▶ Court of Justice
 - ▶ *Nungesser – Case 258/78*
 - ▶ *[Ottung – Case 320/87]*
 - ▶ *Genentech – C-567/14*

Article 101 TFEU

- ▶ Case 258/78, Nungesser



Article 101 TFEU



▶ Case 258/78, Nungesser

- ▶ Para 61: *absolute territorial protection granted to a licensee in order to enable parallel imports to be controlled and prevented results in the artificial maintenance of separate national markets, contrary to the Treaty* - see also para 29 and references to patents and trade-marks
- ▶ Para 58: *the grant of an open exclusive licence, that is to say a licence which does not affect the position of third parties such as parallel importers and licensees for other territories, is not in itself incompatible with article 85 (1) of the Treaty*
- ▶ In casu, however, para 60: *parallel importers or exporters, such as Louis David KG in Germany and Robert Bomberault in France who offered INRA seed for sale to German buyers, had found themselves subjected to pressure and legal proceedings by INRA, Frasema and the applicants, the purpose of which was to maintain the exclusive position of the applicants on the German market*

Article 101 (3)
TFEU?

Article 101 TFEU

follows an IPR
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▶ Case 258/78, Nungesser

- ▶ para 56: *the exclusive licence which forms the subject-matter of the contested decision concerns the cultivation and marketing of hybrid maize seeds which were developed by INRA after years of research and experimentation and were unknown to German farmers at the time when the cooperation between INRA and the applicants was taking shape . For that reason the concern shown by the interveners as regards the protection of new technology is justified .*
- ▶ *para 57: in fact , in the case of a licence of breeders ' rights over hybrid maize seeds newly developed in one Member State , an undertaking established in another member state which was not certain that it would not encounter competition from other licensees for the territory granted to it , or from the owner of the right himself , might be deterred from accepting the risk of cultivating and marketing that product ; such a result would be damaging to the dissemination of a new technology and would prejudice competition in the Community between the new product and similar existing products*

Article 101 TFEU

▶ Case 320/87, Ottung

- ▶ Para 15: *A contractual obligation under which the grantee of a licence for a patented invention is required to pay royalty for an indeterminate period, and thus after the expiry of the patent, does not in itself constitute a restriction of competition within the meaning of Article 85(1) of the Treaty where the agreement was entered into after the patent application was submitted and immediately before the grant of the patent.*
- ▶ Para 13: *An obligation to continue to pay royalty after the expiry of a patent can result only from a licensing agreement which either does not grant the licensee the right to terminate the agreement by giving reasonable notice or seeks to restrict the licensee's freedom of action after termination. If that were the case, the agreement might, having regard to its economic and legal context, restrict competition within the meaning of Article 85(1). Where, however, the licensee may freely terminate the agreement by giving reasonable notice, an obligation to pay royalty throughout the validity of the agreement cannot come within the scope of the prohibition contained in Article 85(1).*

Article 101 TFEU

- ▶ Genentech, C-567/14
 - ▶ Non-exclusive licence of a subsequently revoked patent
 - ▶ Anticompetitive agreement – placing licensee at competitive disadvantage?
 - ▶ *Article 101(1) TFEU does not prohibit the imposition of a contractual requirement providing for payment of a royalty for the exclusive use of a technology that is no longer covered by a patent, on condition that the licensee is free to terminate the contract.*

Article 101 TFEU

- ▶ Cartel agreements and similar types of collusive behaviour that cannot be justified (on what grounds??) are in principle prohibited
- ▶ Link with technological innovation?
- ▶ Case law? Licensing agreements
- ▶ EU regulatory responses tailored to IPR protection and competition
 - Most notably in the realm of horizontal agreements
 - Block exemption Regulation on Technology Transfer
 - Block exemption R&D
 - Block exemption specialisation agreements

TTBER

- ▶ **Technology transfer agreements**
 - ▶ Horizontal: total market share less than 20%
 - ▶ Vertical: each less than 30%

- ▶ **Hard-core restriction**
 - ▶ Price fixing
 - ▶ Output limitations
 - ▶ Market segmenting, yet licensing exceptions

- ▶ **Excluded restrictions**

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Article 101 TFEU

- ▶ §2: Horizontal co-operation can be a means to share risk, save costs, increase investments, pool know-how, enhance product quality and variety, and launch innovation faster
- ▶ §3: Horizontal co-operation agreements may [also] lead to competition problems. This is, for example, the case if the parties agree to fix prices or output or to share markets, or if the co-operation enables the parties to maintain, gain or increase market power and thereby is likely to give rise to negative market effects with respect to prices, output, product quality, product variety or innovation

Article 101 TFEU

- ▶ §28: Restrictive effects on competition within the relevant market are likely to occur where it can be expected with a reasonable degree of probability that, due to the agreement, the parties would be able to profitably raise prices or reduce output, product quality, product variety or innovation. This will depend on several factors such as the nature and content of the agreement, the extent to which the parties individually or jointly have or obtain some degree of market power, and the extent to which the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power.
- ▶ §41: the creation, maintenance or strengthening of market power can result from superior skill, foresight or innovation. + §81: market characteristics of innovative markets

Article 101 TFEU

- ▶ Competition in innovation (R&D)
- ▶ §130: restrictive *effects* of R&D agreements: The competitive relationship between the parties has to be analysed in the context of affected existing markets and/or innovation. If, on the basis of objective factors, the parties are not able to carry out the necessary R&D independently, for instance, due to the limited technical capabilities of the parties, the R&D agreement will normally not have any restrictive effects on competition. This can apply, for example, to companies bringing together complementary skills, technologies and other resources. The issue of potential competition has to be assessed on a realistic basis. For instance, parties cannot be defined as potential competitors simply because the co-operation enables them to carry out the R&D activities. The decisive question is whether each party independently has the necessary means as regards assets, know-how and other resources
- ▶ §133: R&D agreements are only likely to give rise to restrictive effects on competition where the parties to the co-operation have market power on the existing markets and/or competition with respect to innovation is appreciably reduced.

Article 101 TFEU and technological innovation

- ▶ Innovation is not a main analytical proxy of Article 101 TFEU analysis

Questions have arisen above all in merger and Article 102 TFEU context

- ▶ Innovation appears, from time to time in analysis
 - Mainly linked to IPR
 - Protecting the system of IPR, rather than countering it...
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 - What kind of innovation do we want to attain?
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Schedule

- ▶ 4/11: Competition law and innovation: from indirect to direct roles + examples
- ▶ 11/11: no class (Armistice holiday)
- ▶ 18/11: Case-studies on Microsoft and Google + essential facilities (Simon Troch)
- ▶ 20/11: submission of paper structure deadline
- ▶ 25/11: Case study on « two-sided markets » (15h45-17h00)
- ▶ Week of 28/11: appointment for paper topic discussion
- ▶ 2/12 +9/12: privacy, data protection and concluding remarks
- ▶ 18/12: paper submission via email in Word or PDF doc

EU competition law and technological innovation

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- ▶ **Direct innovation concerns seep through**
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 - ▶ « Two-sided markets »

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 - ▶ Main elements in *Microsoft* and *Google* cases (18/11 lecture)

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 - ▶ Mergers + SEP and Article 102 TFEU cases?
 - ▶ Albeit rather implicitly/hidden...
 - ▶ « Two-sided markets »

Article 102 TFEU and innovation

- ▶ **Starting point: same indirect role for innovation**
 - ▶ Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
 - ▶ Such abuse may, in particular, consist in:
 - ▶ (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
 - ▶ (b) limiting production, markets or technical development to the prejudice of consumers;
 - ▶ (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - ▶ (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 102 TFEU and innovation

- ▶ Starting point: same indirect role for innovation

- ▶ Case 238/87, *Volvo v. Veng*



- ▶ Aligning IPR protection and competition law concerns

- ▶ Using IPR can amount to abusive behaviour in exceptional circumstances

More direct roles for innovation?

Case-by-case reflections engaged in by Commission

- ▶ See Commission Competition Policy Briefs
 - ▶ Innovation in merger control
 - ▶ Standardisation / standard-essential-patents

Overall feeling: no clear line in what innovation is to be protected

- All kinds of innovation can play a role
 - Case-by-case analysis

Defining innovation in EU competition law

- ▶ Product innovation
- ▶ Process innovation

- ▶ Incremental innovation
- ▶ Breakthrough innovation

- ▶ Sustaining innovation
- ▶ Disruptive innovation



Linking innovation and EU competition law



Illustrations and case-studies

1. Mergers
2. Standard essential patents cases

Horizontal mergers

- ▶ **Concentration control – Regulation 139/2004**
 - ▶ Notification – strict time limits – ex ante assessment

 - ▶ Para 10, horizontal merger guidelines cf. art. 101 horizontal agreement guidelines
 - ▶ One of the criteria to be taken into account, seemingly on equal footing with output, price and structural concerns

 - ▶ General approach: elimination of actual or potential competitor impacts innovation in some industries
 - ▶ Pharmaceuticals – breakthrough product innovation
 - GSM/Novartis
 - ▶ Energy – incremental product and process innovation
 - GE/Alstom
 - ▶ Financial services– incremental process innovation
 - Deutsche Börse/Euronext



Non-horizontal mergers

- ▶ **Intel/McAfee**
 - ▶ Foreclosure by more dominant venture
 - ▶ Disruptive/breakthrough innovation + market access concerns
- ▶ **TomTom/TeleAtlas**
 - ▶ Sustaining innovation
 - ▶ Bigger = better: Innovation as efficiency?

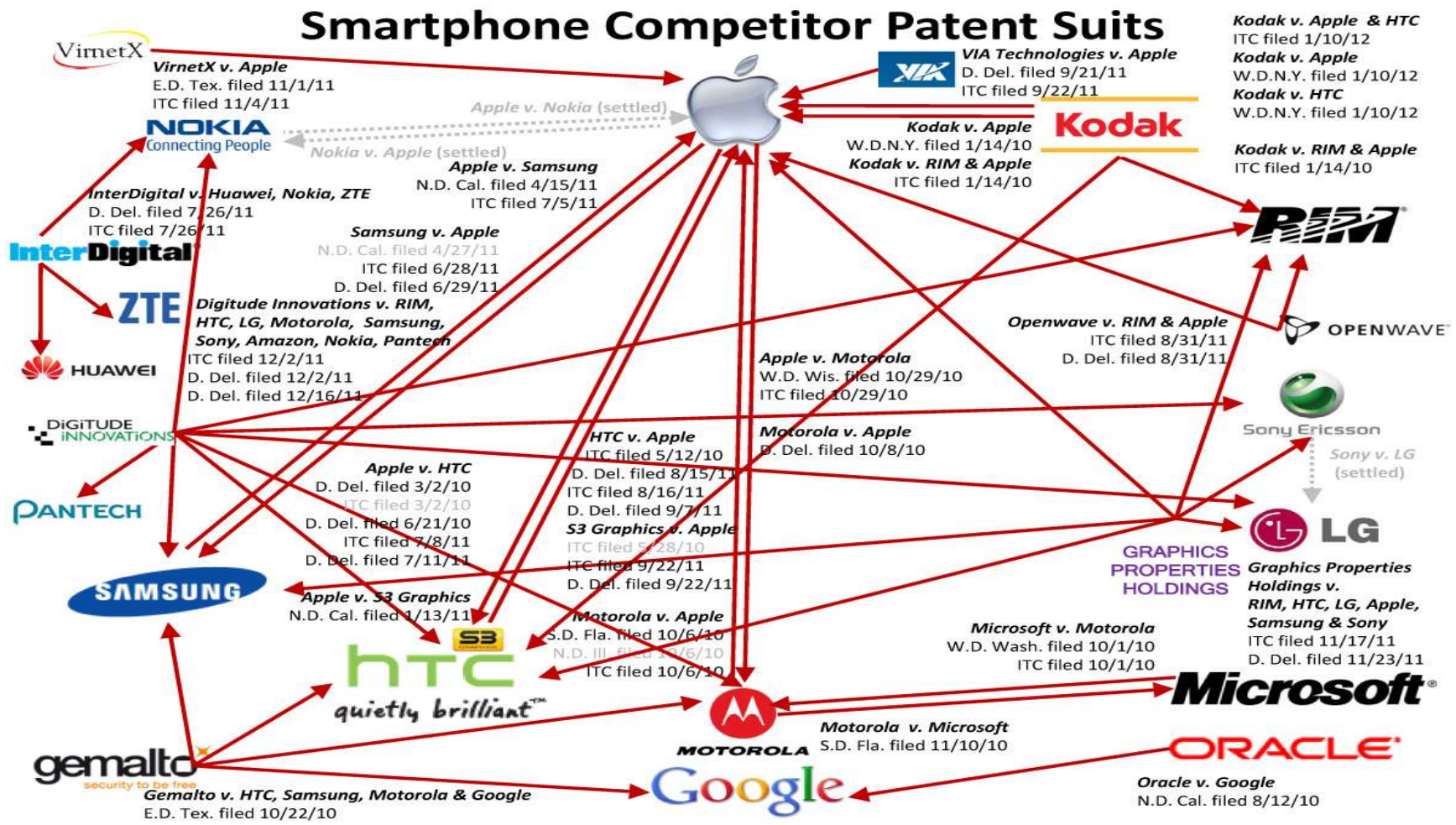


The SEP disputes

- ▶ What is a Standard-Essential Patent?
- ▶ Are SEPs important for innovation? If so, for what kind of innovation?
- ▶ How do SEPs relate to competition law?
- ▶ What would the impact of anticompetitive SEP action be on incremental innovation?

The SEP disputes

- ▶ The « smartphone » wars visualisation in 2012 © Kevin Tofel



The SEP disputes

- ▶ Samsung and Motorola Commission proceedings
Commitment v. infringement proceedings
- ▶ Huawei judgment
 - ▶ AG Opinion
 - ▶ Court's approach
- ▶ Innovation considerations
 - ▶ Protection of IPR is necessary
 - ▶ IPR may have to be licensed under FRAND conditions
 - ▶ Litigation may impede new entrants or new products – indirect affectation of innovation
 - ▶ Implicit recognition that major innovators can be dominant



Linking innovation and EU competition law

- ▶ In practice,
 - Schumpeter, Arrow or Shapiro?
 - Link with market structure (as already highlighted by *Ibañez Colomo*)
 - Primary concern = well-functioning competitively structured market (Arrow?)
 - However, market structure can directly impact on innovation (SEPs – merger situations)
 - In that case, innovation should be a direct concern for competition enforcement agencies

Linking innovation and EU competition law

- ▶ In practice,
 - Exceptionally, market structure can directly impact on innovation (SEPs – Merger situations)
 - E-tech markets are particularly prone to this *direct impact* relationship
 - In that case, innovation should be a direct concern for competition enforcement agencies
 - BUT, EU competition law remains agnostic about the type of innovation to be protected
 - Only addresses innovation elements embedded in market structure
 - Schumpeter – Arrow mix – Shapiro position

Questions?





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Liege
Competition
and
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EUROPEAN LAW AND TECHNOLOGICAL INNOVATION

Prof. Dr. Pieter Van Cleynenbreugel

Schedule

- ▶ 20/11: submission of paper structure deadline – thank you!!
- ▶ 25/11: EU competition law and innovation + case study on « two-sided markets » (15h45-17h00)
- ▶ Either 25/11 or week of 28/11: appointment for paper topic discussion
- ▶ 2/12 +9/12: privacy, data protection and concluding remarks
- ▶ 23/12: paper submission via email in Word or PDF doc

Reflections on more direct roles of innovation in
EU competition law analysis

Case-by-case reflections engaged in by Commission

- ▶ See Commission Competition Policy Briefs
 - ▶ Innovation in merger control
 - ▶ Standardisation / standard-essential-patents

Overall feeling: no clear line in what
innovation is to be protected

- All kinds of innovation can play a
role
 - Case-by-case analysis

Defining innovation in EU competition law

- ▶ Product innovation
- ▶ Process innovation

- ▶ Incremental innovation
- ▶ Breakthrough innovation

- ▶ Sustaining innovation
- ▶ Disruptive innovation



Linking innovation and EU competition law



Illustrations and case-studies

1. Mergers

Horizontal mergers

- ▶ **Concentration control – Regulation 139/2004**
 - ▶ Notification – strict time limits – ex ante assessment

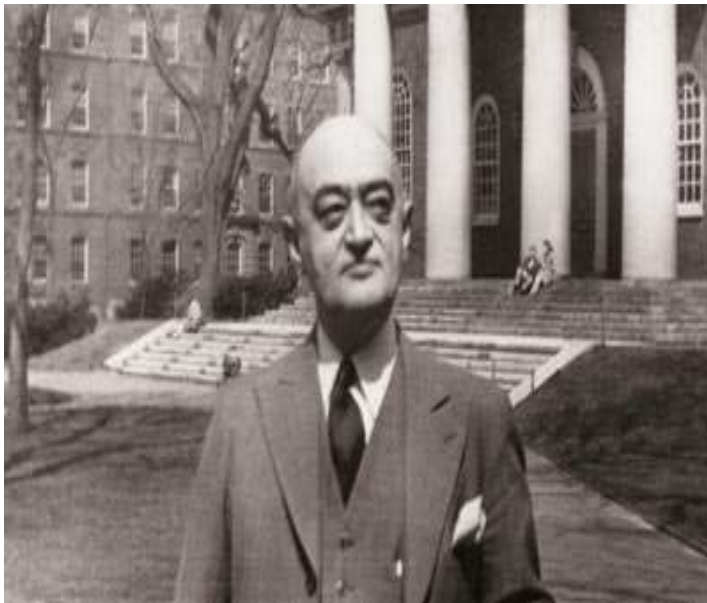
 - ▶ Para 10, horizontal merger guidelines cf. art. 101 horizontal agreement guidelines
 - ▶ One of the criteria to be taken into account, seemingly on equal footing with output, price and structural concerns

 - ▶ General approach: elimination of actual or potential competitor impacts innovation in some industries
 - ▶ Pharmaceuticals – breakthrough product innovation
 - GSK/Novartis
 - ▶ Energy – incremental product and process innovation
 - GE/Alstom
 - ▶ Financial services– incremental process innovation
 - Deutsche Börse/Euronext



Non-horizontal mergers

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 - ▶ Foreclosure by more dominant venture
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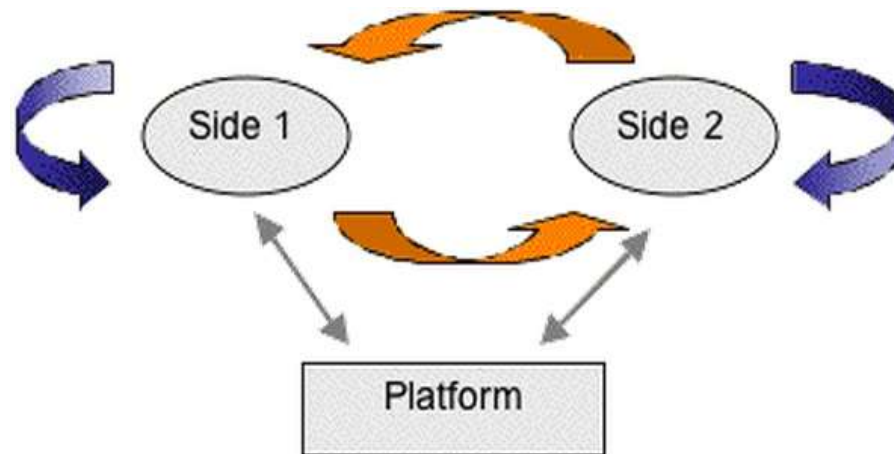
Two-sided markets

- ▶ Multi-sided markets – online platforms

- ▶ Rochet and Tirole: *A market is two-sided if the platform can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount; in other words, the price structure matters, and platforms must design it so as to bring both sides on board.*

- ▶ Online platforms as two-sided markets:

- ▶ Opentable
- ▶ Playstation
- ▶ Facebook
- ▶ Google?



Two-sided markets

- ▶ Two-sided markets, competition law and technological innovation?
 - ▶ How to deal with two-sided markets?
 - ▶ Taking two sides into account when defining dominant position – how?
 - ▶ Innovation generated directly or indirectly by two-sided markets?
 - ▶ Use of two-sided market model as motor for technological innovation?

Two-sided markets



Questions?





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Where are we now?

- ▶ **Enabling innovation? Internal market and competition law**
 - ▶ Free movement does not directly relate to innovation
 - ▶ E-commerce regulation takes innovation for granted
 - ▶ Competition law and innovation
 - ▶ State aid tolerates innovation-focused framework
 - ▶ Articles 101 and 102 have to engage with innovation claims
 - SEP cases as specific examples
 - ▶ Merger control and innovation: depending on the case, a Schumpeterian or an Arrowian perspective; Shapiro-focus
- ▶ **Today: protection against the excesses of technological innovation?**
 - ▶ What role for EU law to take in this respect?

Legal protection against the excesses of innovation



Protecting the fundamental right to privacy in a digital context

Overview

- ▶ **The fundamental right to privacy**
- ▶ Privacy in the digital age
- ▶ Privacy in EU regulation
 - ▶ Data protection regulation prior to 2018
 - ▶ Directive 95/46/EC
 - ▶ Data protection regulation from 2018 onwards
 - ▶ General Data Protection Regulation
 - ▶ Data retention regulation (next week)

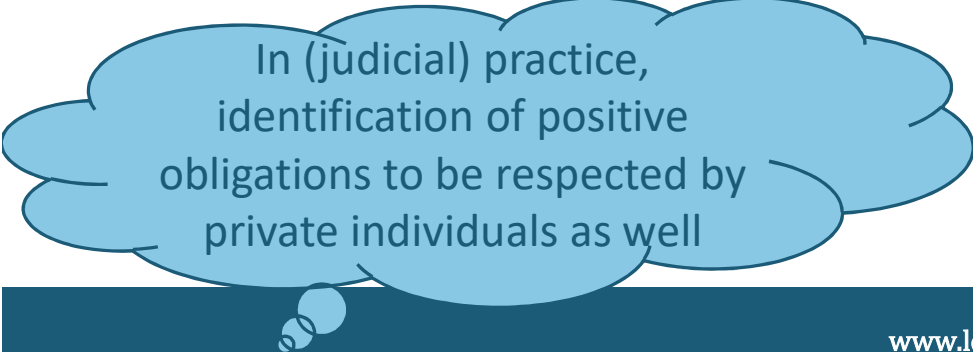
Privacy

- ▶ Rise as a fundamental right governing private and public relationships towards the end of the 19th Century in U.S. legal thought
- ▶ *Warren and Brandeis, 1890*: numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops."



Privacy

- ▶ In the context of fundamental rights instruments, above all a right vis-à-vis public authorities
 - ▶ Article 17 International Covenant on Civil and Political Rights
 - ▶ Article 8 European Convention for the Protection of Human Rights and Fundamental Freedoms
 - ▶ Article 7 Charter of Fundamental Rights of the European Union
 - ▶ Article 22 Belgian Constitution



In (judicial) practice, identification of positive obligations to be respected by private individuals as well



Above all negative obligations imposed on public authorities

Privacy

- ▶ Privacy extended in the private sphere, particularly in digital contexts: the right to protection of one's own data
 - ▶ Article 8 Charter of Fundamental Rights of the European Union:
 - ▶ 1. Everyone has the right to the protection of personal data concerning him or her.
 - ▶ 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
 - ▶ 3. Compliance with these rules shall be subject to control by an independent authority.



Negative and positive obligations!!

Overview

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Privacy in the digital age

- ▶ Same concerns have remained ever since the advent of technological innovation at the end of the 19th century...
 - ▶ More and more businesses assemble data, often with commercial purposes.
 - ▶ Result: personal information traditionally remaining within the private sphere is at risk of being 'traded'
 - ▶ Online platforms and traders facilitate data-trading
 - ▶ Recital 2, Directive 95/46: data-processing systems are designed to serve man
 - ▶ Recital 4 2016 Data Protection Regulation: protect « mankind », yet no absolute right

Privacy in the digital age

- ▶ **Primary solution = regulatory interventions in the marketplace (cf. approaches to e-commerce)**
 - ▶ Taking innovation for granted – something external to EU regulation
 - ▶ Addressing *externalities* of such external influences by subjecting them to specific rules
 - ▶ At Member State level
 - ▶ At European Union level
 - ▶ Harmonised data protection framework since 1995
 - ▶ Obligation for MS to establish independent authorities safeguarding a « right » to data-protection
 - ▶ Upgrade of regulatory framework necessary as new technologies develop as well
 - ▶ Attempt in EU by 2016 renewed data protection framework
- ▶ **Secondary solution = regulating government authorities in their dealings with data**
 - ▶ In EU, modelled after market regulation

Overview

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EU data protection regulation

- ▶ **Framework text in force = Directive 95/46**
 - ▶ Complemented by e-privacy Directive 2002 in relation to electronic communications, most notably telecommunications - enhancing security in public telecommunications networks (FYI)
 - ▶ Applicable to search engines and online platforms? *Google Spain* and *Schrems*
- ▶ **Renewed framework adopted April 2016, entry into force May 2018**
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Directive 95/46

- ▶ Article 1 – a paradox?
 - ▶ 1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.
 - ▶ 2. Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1.
 - ▶ Privacy never a justification for free movement restriction?

Directive 95/46

- ▶ **Article 4: obligation for Member States to apply their (EU-transposed) national data protection laws where:**
 - ▶ (a) the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State; when the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable;
 - ▶ (b) the controller is not established on the Member State's territory, but in a place where its national law applies by virtue of international public law;
 - ▶ (c) the controller is not established on Community territory and, for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the territory of the said Member State, unless such equipment is used only for purposes of transit through the territory of the Community.

Directive 95/46

- ▶ What is processing data?
 - ▶ Article 2(a): 'personal data' shall mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity
 - ▶ Article 2(b): 'processing of personal data' ('processing') shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction

Directive 95/46

- ▶ When is one controlling or processing data?
 - ▶ Article 2 (d): 'controller' shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law.
 - ▶ Processor = the one processing data for the controller

Directive 95/46

▶ Article 6: Personal data must be:

- ▶ (a) processed fairly and lawfully;
- ▶ (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards;
- ▶ (c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;
- ▶ (d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;
- ▶ (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use.

Directive 95/46

- ▶ **Article 7: processing can take place only if**
 - ▶ (a) the data subject has unambiguously given his consent; or
 - ▶ (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; or
 - ▶ (c) processing is necessary for compliance with a legal obligation to which the controller is subject; or
 - ▶ (d) processing is necessary in order to protect the vital interests of the data subject; or
 - ▶ (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or
 - ▶ (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1 (1).

Directive 95/46

- ▶ Guarantees available to 'data subjects'
 - ▶ Information obligations – Art. 11
 - ▶ Establishment of independent national authority – Art. 28
 - ▶ Liability of processors – Art. 23
 - ▶ Limits on transferring data to third countries when no adequate level of protection can be ensured there – Art. 25

Directive 95/46

- ▶ Specific rights available to ‘data subjects’
 - ▶ Art. 12: every data subject can obtain from the controller:
 - ▶ (a) without constraint at reasonable intervals and without excessive delay or expense:
 - Confirmation, communication and knowledge of the logic involved in any automatic processing of data concerning him;
 - ▶ (b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data;
 - ▶ (c) notification to third parties to whom the data have been disclosed of any rectification, erasure or blocking carried out in compliance with (b), unless this proves impossible or involves a disproportionate effort.

Directive 95/46

- ▶ Specific rights available to 'data subjects'
 - ▶ Art. 14(b):
 - ▶ to object, on request and free of charge, to the processing of personal data relating to him which the controller anticipates being processed for the purposes of direct marketing
 - ▶ to be informed before personal data are disclosed for the first time to third parties or used on their behalf for the purposes of direct marketing
 - ▶ to be expressly offered the right to object free of charge to such disclosures or uses.

EU data protection regulation

- ▶ Framework text in force = **Directive 95/46**
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 - ▶ **Applicable to search engines and online platforms? *Google Spain and Schrems***
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Google Spain

- ▶ Case C-131/12 – the right to be forgotten



Google Spain

- ▶ The Directive applies to
 - ▶ the activity of a search engine consisting in finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference
 - ▶ This must be classified as ‘processing of personal data’ within the meaning of Article 2(b) when that information contains personal data
 - ▶ the operator of the search engine must be regarded as the ‘controller’ in respect of that processing, within the meaning of Article 2(d)

Google Spain

- ▶ **As a result,**
 - ▶ the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful.
 - ▶ however, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question.

Schrems

- ▶ Case C-362/14 – does the U.S. offer adequate protection of personal data?



Schrems

- ▶ Facebook is to be considered as a processor of personal data,
 - ▶ Established a subsidiary in Ireland
 - ▶ Its servers are located in the United States
 - ▶ Data are processed in the United States

- ▶ Data processed and/or available in the United States
- ▶ U.S. public authorities, including its National Security Agency (NSA) engage in surveillance activities (e.g. the PRISM programme)
- ▶ International safe harbor principles

Schrems

- ▶ Mr. Schrems, a lawyer, realised that the transfer of his data to such authorities could take place in contravention of Directive 95/46, as the EU had adopted Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46 on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce, by which the European Commission found that the U.S. ensured an adequate level of protection
 - ▶ Complaint in Ireland to contest this
 - ▶ Complaint rejected
 - ▶ High Court nevertheless raised question of compatibility of Decision with Article 8 Charter and Directive 95/46/EC

Schrems

Article 25(6) of Directive 95/46/EC [...], read in the light of Articles 7, 8 and 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that a decision adopted pursuant to that provision, such as Commission Decision 2000/520/EC does not prevent a supervisory authority of a Member State, within the meaning of Article 28 of that directive as amended, *from examining the claim of a person concerning the protection of his rights and freedoms in regard to the processing of personal data relating to him which has been transferred from a Member State to that third country when that person contends that the law and practices in force in the third country do not ensure an adequate level of protection.*

Schrems

After the judgment:

- *Important role for national supervisory authorities...*
- *Redesigning EU-U.S. data exchange relationships*
- Development of a « Privacy Shield »
- Impact on technological advances?

Questions?



Next week

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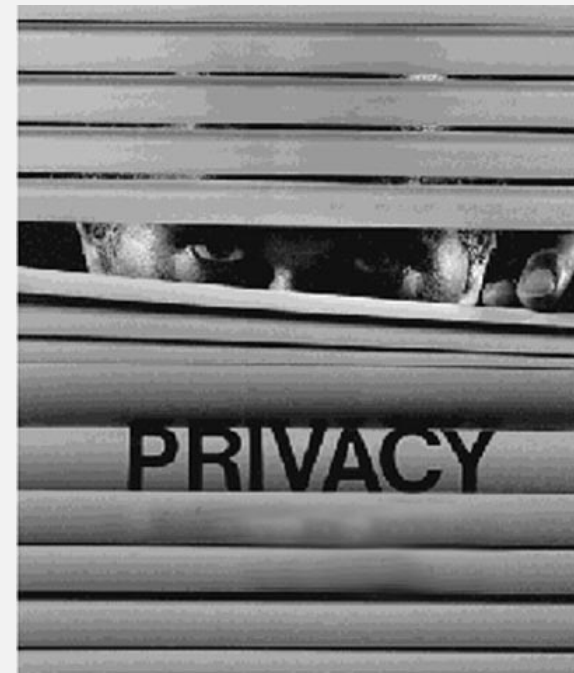
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Legal protection against the excesses of innovation



ePrivacy

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Data protection Regulation

- ▶ Regulation 2016/579: art. 99 §2, only applicable from 25 May 2018
 - Why?
 - Recitals 6-7:
 - Rapid technological developments and globalisation have brought new challenges for the protection of personal data. The scale of the collection and sharing of personal data has increased significantly. [...]
 - These developments require a strong and more coherent data protection framework in the Union, backed by strong enforcement, given the importance of creating the trust that will allow the digital economy to develop across the internal market.
 - Natural persons should have control of their own personal data. Legal and practical certainty for natural persons, economic operators and public authorities should be enhanced.

Data protection Regulation

- ▶ Regime and structure similar to the one established by Directive 95/46
 - ▶ Consent-based regime
 - ▶ Extraterritorial reach
 - ▶ More direct obligations on data controllers
 - ▶ Clear rights granted to data subjects
- ▶ Stronger enforcement powers to national data protection supervisors
- ▶ Establishment of a European Data Protection Board

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Data protection Regulation

- ▶ Principally consent-based regime
 - ▶ Same definitions of data, processing, controller
 - ▶ Article 5: data processing for specified, explicit and legitimate purposes...
 - ▶ Article 6: consent, which can be withdrawn (Art. 7)
 - ▶ No consent when necessary for the purposes of the *legitimate interest pursued by a private controller or by a third party*
 - ▶ Consent: any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her

Data protection Regulation

- ▶ Article 9: some data cannot be processed unless *explicit* consent has been given or vital interests need to be protected...
 - ▶ Processing of personal data shall be prohibited when they reveal
 - ▶ racial or ethnic origin
 - ▶ political opinions
 - ▶ religious or philosophical beliefs
 - ▶ trade union membership
 - ▶ the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person
 - ▶ data concerning health
 - ▶ data concerning a natural person's sex life
 - ▶ sexual orientation.

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Data protection Regulation

- ▶ Extraterritorial reach
 - ▶ Article 3, §1 and 3:
 - ▶ controller or processor established in the European Union, regardless of whether the processing takes place in the Union or not
 - ▶ MS law applies by virtue of public international law
 - ▶ NEW: processing of personal data of *data subjects who are in the Union*
 - ▶ By a controller or processor not established in the Union
 - ▶ Where processing relates to offering of goods or services to such data subjects
 - ▶ Monitoring of behaviour taking place in the Union

Data protection Regulation

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Data protection Regulation

- Article 7: data controller has to prove consent
- Article 24: implementation of measures facilitating compliance with Regulation
- Article 25: data protection by design and by default
- Article 27: obligation to designate a representative in the European Union
- Article 30: obligation to keep records
- Article 32: security obligation
- Article 35: impact assessment obligation
- Article 37: designation of a data protection officer

Data protection Regulation

- Disclosure obligations
 - Article 33: notification of data breach to supervisory authority
 - Article 34: notification to data subject *without undue delay* in case of hgi risk for the rights and freedoms of individuals
- Article 28: processors need to provide sufficient guarantees to implement appropriate technical and organisational measures
- Article 40 et seq.: encouragement of drafting of codes of conduct

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Data protection Regulation

- Article 12: transparency obligation
- Article 13: information to be provided
- Article 14: information to be provided when data obtained from a third party – not the data subject
- Article 15: right of access
- Article 16: right to rectification
- Article 17: right to be forgotten
- Article 18: right to restriction of processing

Data protection Regulation

- ▶ Article 21: right to object against data processing in the legitimate interest of a private controller; controller would then have to demonstrate compelling legitimate grounds for the processing, which override the interests, rights and freedoms of the data subject
- ▶ Article 22: the right not to be subject to a decision based solely on automated processing, unless authorised and surrounded by sufficient safeguards
- ▶ Article 23: in relation to public and criminal law investigations, rights outlined in the Regulation may be limited

Data protection Regulation

- Article 20: data portability
 - Right to receive data concerning yourself
 - Right to have data transferred directly to other controller where technically feasible
 - Right to erasure/be forgotten remains in place
 - May not adversely affect freedom of others

Data protection Regulation

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Data protection Regulation

- ▶ Article 58 : minimum enforcement powers
- ▶ Cooperation and consistency mechanisms



Data protection Regulation

- ▶ Regime and structure similar to the one established by Directive 95/46
 - ▶ Consent-based regime
 - ▶ Extraterritorial reach
 - ▶ More direct obligations on data controllers (and processors)
 - ▶ Clear rights granted to data subjects
- ▶ Stronger enforcement powers to national data protection supervisors
- ▶ **Establishment of a European Data Protection Board**

Data protection Regulation

- ▶ Cf. other sectors
 - ▶ Body of the European Union with legal personality
 - ▶ One representative of each MS supervisory authority, one from EDPS
 - ▶ Commission participates without voting rights

- ▶ Role in dispute resolution between national supervisory authorities

Data retention

- ▶ Data processed also often are stored somewhere
 - ▶ Useful for law enforcement purposes, not necessarily marketing
 - ▶ How long can they be stored? For how much time?
- ▶ EU law initiative: Directive 2006/24/EC
- ▶ In relation to publicly available electronic communications services or public communications networks

Does the EU have competence to regulate this matter?
How does it relate to the internal market/technological
innovation and competences in this field?

Data retention

- ▶ The Directive obliges retention of and access by public authorities to
 - ▶ Data necessary to identify the source of a communication
 - ▶ Data necessary to identify the destination of a communication
 - ▶ Data necessary to identify the date, time, duration and type of communication
- ▶ Data necessary to identify the location of mobile communication equipment
- ▶ Obligation to maintain data at least six months, up to two years...

Compatible with EU fundamental rights to privacy and data protection?

Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland*

Data retention

▶ *Digital Rights Ireland*

- ▶ Interference with fundamental rights, needs to be justified
- ▶ Para 51: an objective of general interest, however fundamental – such as the fight against serious crime – does not in itself suffice to make any data retention measure justifiable
- ▶ Para 58: the Directive *applies even to persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious crime. Furthermore, it does not provide for any exception, with the result that it applies even to persons whose communications are subject, according to rules of national law, to the obligation of professional secrecy*
- ▶ No criteria on access, no limitation on persons having access...

Data retention

▶ *Digital Rights Ireland*

- ▶ In relation to the fundamental right to data protection in particular,
 - ▶ Para 66:
 - no sufficient safeguards effectively to protect the data and risk unlawful use or access
 - attention to sufficient level of security and protection appears lacking
 - control by independent data protection authority is lacking...



Directive = invalid

Data retention

- ▶ Implications of the judgment
 - ▶ Impact of the right to data protection?
 - ▶ Impact outside the public enforcement context?
 - ▶ Impact on Member States' data retention laws?

Data retention

- ▶ In practice...
 - ▶ What can national legal orders still do in relation to data retention?
 - ▶ How extraterritorial can data retention legislation go?
 - ▶ What safeguards are necessary?
 - ▶ Joined Cases C-203/15 and C-698/15, *Tele2Sverige* and *Watson*
 - ▶ AG Saugmandsgaard Opinion of 19 July 2016: Swedish and UK legislation considered compatible

European law and technological innovation

Concluding reflections

European law and technological innovation

Exam and Q&A



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