Crossroad Between Intellectual Property Right and Competition Law in Emerging Economy Countries

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- Many countries, especially Asian countries adopted free market based or market economic reforms after the economic crisis in 1998;

- Some countries began to be referred as "emerging economies" instead of developing countries, where it suggests that these countries no longer have backward economies characterized with low economic growth rates, inadequate infrastructure etc, rather these economies are in transition to competitive market;

- Foreign investment into these countries becoming increasingly attractive both to the host country as well as the investors;

- To ease the entry of the foreign investors, many of these countries enacted investment law which allow investments in the area used to be prohibited under former regimes;

- Through joint venture agreement (JVA) it is mandatory to adopt a clause to implement transfer of technology to the host country;

- During the era of economic transition, many laws have been introduced to emerging economies countries as sign to participate in global market competition;

- Intellectual Property Right (covers patent, copyrights and trademarks) and Competition Law among many other laws have been introduced and practiced;

- Some countries adopted the specific two laws in different regimes due to different causes or intentions. But when the laws have conflicting ideas in enforcement, it is essential to know the relevance of adopting Competition and IPR law to understand the consequences;

- When we look at objectives of Competition and the IPR Law, both laws have different approaches: IPR provide rights to exclusivity while the others encourage competition and instead discourage exclusivity. Thus in some aspects limit the exclusive rights to avoid abusing its market power derived from the exclusivity rights;

- IPR provides or granted (limited) monopoly (to certain length of time) to encourage protection to the invention/ innovation;

- Common goal shared by the two laws is that both aim at providing consumer welfare;

- Then, how do we see that the shared goal can be harmonized by these two laws?

- Economic justifications for IP rights (i.e.: patents):
- Natural rights theory: inventions provide one's own property;
- Reward theory: inventors should receive compensation for the benefits they have given to the society or consumers;
- Exchange for secrets theory: patents and copyrights discourage persons from keeping new ideas secret, therefore its increasing ideas that later on becoming public domain (after certain years);
- Profit-incentive theory: protection of new ideas/invention is the clue/incentive to develop or to invent more or further;

- Invention is a non common economic product. Ideas need to be protected or inventors need to be compensated, otherwise free riding will take place;

- Prevention of such rights can be measured by way of:
- provide direct governmental grants to inventors of ideas (through regulation or laws);
- provide an inventor legal right to secure their invention, free to sell, rent or use the invention/rights for his/her exclusive benefits;

- IPR adopted the second choice because simply it treats the invention or rights like an ownership which can be measured by market demand, while the first choice would be difficult to measure or evaluate;

- Generally, the use of licensing, or acquisition of IPR does not necessarily violate Competition Law but may later turn out to be a problem, if not well regulated.

- Possible violation may be done through:

- If a pattern of acquiring all IPR in specific field, this conduct may lead (attempt) to monopolization;

- Licensing of patent practices may injured competition if they are unnecessarily restrictive or practice in discriminating conduct;

- Competing firms can improperly or intentionally “pool” their IPR/patents;

- Therefore, despite incentives, limitation is needed o regulate the conduct;

- IP rights may limited through:

- Power granted:
  IPR laws do not provide owner/inventor with complete control over the invention but only granted with certain rights, i.e.: patent owner can prevent others from making, using or selling;

- Scope:
  IPR rights protect only certain, defined aspects of invention, i.e.: patent laws aspects are legally defined only by claims of the patent;

- Duration:
  IPR rights are of limited durations and will be expired after certain length of time (patent and copyrights laws) or upon occurrence of particular event (trademark and trade secret laws);

- How IPR and Competition Law may be crossroad and in what issues?

- Monopolization: IP rights are legal monopolies granted by the law. Therefore, legal IP rights may be used a defense for monopolization if the monopolized market is covered by IP rights;

- Limitation of legal monopoly: is the right absolute or or not? In some cases, depend on the intent, legal monopoly may not be allowed;

- Monopolization by patent acquisition: if a firm follows a pattern of acquiring all available patents in a particular field, that conduct may be fall under “monopolization”

- Acquiring patent may be deemed as “acquisition of an asset” which may cause lessening competition:

- What will be the possible solution?

- Compulsory licensing as a remedy or an alternative for present or future patents rights at reasonable royalty fees;

- Exclusive licensing: IP rights holder has licensed the rights to certain party, this will be equivalent to a sale of IP rights;

- What problems may occurred from such conducts are vary, such as:
- Legal monopoly created by the patent grant only as far as the patentee's own use or reasonable exploitation of the invention, does not mean that it permits to "extend" monopoly through anticompetitive conduct in the licensing distribution of the patented product;

- Licensing is encouraged because it permits IPR owner to sell their rights efficiently;

- However if we are not careful, licensing or cross licensing plus the agreements may be deemed as anticompetitive conduct since agreement will give patent grant or patentee economic profits;

- In this case, the limit to ownership should be upheld because this conduct may use to abuse the patent grant and violate Competition Law principles;

- Restriction on licensee: once the patent or license has been sold, purchaser is free of patent monopoly and may use or re-sell the product without infringing patent rights – patentee has extracted all the monopoly profits;

- Resale price restriction in the agreement (on pricing) between the patentee and the licensee should be limited (although there is rationale that patentee may also wants to limit competition with the licensee);

- Limitations should be applied forward to the rights to sell or re-sell and to whom;

- Owners of two patents should not cross license the patents and fix the prices to be charged by themselves and their licensees, nor allowed to divide territories nor allowed to boycott;

- If patented inventions has several separate use of applications, patentee may properly limit a licensee to one of more such uses and grant such rights exclusively or non exclusively. This include restriction on the territorial basis;

- Other issues relate to Competition Law are:

- Grant back clauses or patent accumulation, deemed to be violating Competition Law because it attempts to "extend" patent monopoly;

- Exclusive dealing: patentee who requires that distributors agree not to sell products that compete with the patented product may be guilty of "abusing" the paten;

- Tying agreements: patentee cannot extend monopoly right by forcing customers to buy non patented good if they wish to obtain the opposite;

- Block booking: its prohibited to force licensee to purchase group of patents when licensee need to only obtain one;

- Patent pools – settlement of patent disputes: where parties to a patent infringement settled by establishing patent pool where patents are cross licensing and royalties are fairly divided among the patent owners;

- The question on patent pools whether it is still considered to be a fair solution or not (refer to monopoly power on the relevant market conflicting with granted monopoly power through patent's rights)

- In different outlook from Competition Law, we must look at: market definition: IPR define as non market goods but treated as goods as determine in Competition Law or in another words, IPR is technology market and R & D treated as innovation market;

- In most cases, because of its peculiarity, IPR mostly treated in rule of reason approach;

- Another issue relates to Competition Law is about the exemption:

- Competition Law usually regulates that certain business, industries or practices are commonly exempted;

- Basic types of exemptions are determined by each Country's constitutions, stated or implied by law/regulations;

- Under some countries Competition Law regimes, IPRs are being exempted with different purposes and incentives;

- The exemption purpose is to provide incentive to do more research and innovation, i.e.: patent laws encourage investment in R & D;

- The crossroad may be seen in patent laws where it is inherently in conflict with Competition Law because they reward innovation by conferring a legal monopoly to patent holder;

- Legal granted monopoly rights through the IP rights are in line and supported with the exemption clauses in Competition Law;

- If a strict competition policy limits the monopoly power of the patent holder, incentives to invest in R & D may be significantly reduced or vice versa;

- Now, what would be the emerging economies countries response to theses issues?

- Emerging economies countries incentive is increased economic growth and the key to long term economic growth is increasing numbers of foreign direct investment;

- Another goal is to increase access to and development of new technologies in order to create and sustain economic growth plus developing more industries which in turn expected to provide more jobs opportunity;

- There is strong need from host country with developing economy to increase capacity, to learn from imported technology and then expand or build upon the initial innovation. In these respected countries, large percentage of the technology are still imported from abroad in the form of licensing agreements with foreign firms;

- Competition Law that may limit the market power of the patent holder may cause less incentive to import technology through licensing agreement;

- In this context, Competition Law should be able to balance between: to encourage or create incentives for emerging economies to import technology and simultaneously promote incentives for domestic firms to engage in research and development;

- This issues crossroad with different purposes or different choices which is a challenge for many emerging economies countries on which choice will be adopted;

- In some instances, the condition worsened where the law have been enacted but weak and poor in enforcement, especially in protecting the enforcement of IP rights;

- Take a look at the Indonesian portrait where Indonesia has adopted many modern regulations regarding competition, investment and IP rights;
- Competition Law (Law No.5/1999). Law No.5 under Article 50 (b) granted exemption to IPR with the purpose to encourage innovations etc;

- Indonesia's IPR laws covered:
- Copy Rights: Law No.6/1982 superseded by Law No.7/1987 and Law No.12/1997 and lastly superseded by Law No.19/2002;
- Patent: Law No.6/1989 superseded By Law No.13/1997 and superseded again by Law No.14/2001;
- Trademark: Law No.19/1992 superseded by Law No.14/1997 and superseded by Law No.15/2001;

- Investment under Law No.25/2007 and Presidential Regulation No.111/2007 which give opportunities for foreign investors to do investment in Indonesia;

- Where do things stand now?

- IP rights remain to be one of the more complex areas of competition law and policy, no matter whether it is emerging economies or developed countries

- Developing credible and consistent regulations to balance between the two conflicting objectives remains a challenge for many emerging economies countries and guidelines is the best direction on which conduct or type of IPRs may be exempted;

- When it comes to exemptions, provisions need to be in place for withdrawing or limiting the exemptions. In another words, exemptions should be granted on limited basis and need to be review periodically;

- The review should include analysis on their impact on economic efficiency and consumer welfare;

- Competition Law can be use to bolster IP system by carefully applying consistent regulation, it will be able to secure foreign licensing agreements and thus should be able to increase the flow of patented technology to the host countries:

“terima kasih”

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