



FAROS

Where competition law and IP meet....

AIPPI

Menu

- 1) General framework of analysis
- 2) Touch points between competition law and IP



The image features a central teal rectangular box with white text. This box is superimposed on a background collage of roller coaster tracks. The tracks are shown in various angles, including steep drops and curves, against a clear blue sky. The tracks are dark grey or black, and the overall composition is dynamic and geometric.

General framework of analysis

General framework of analysis

- **Concerted activities involving at least 2 separate undertakings:**
Art. 101 TFEU and Art. IV.1 CEL
- **Abuse of Dominance:** Art. 102 TFEU and Art. IV.2 CEL
- **Abuse of Economic Dependence:** Art. IV.2/1 CEL
- **Merger control / State aid**

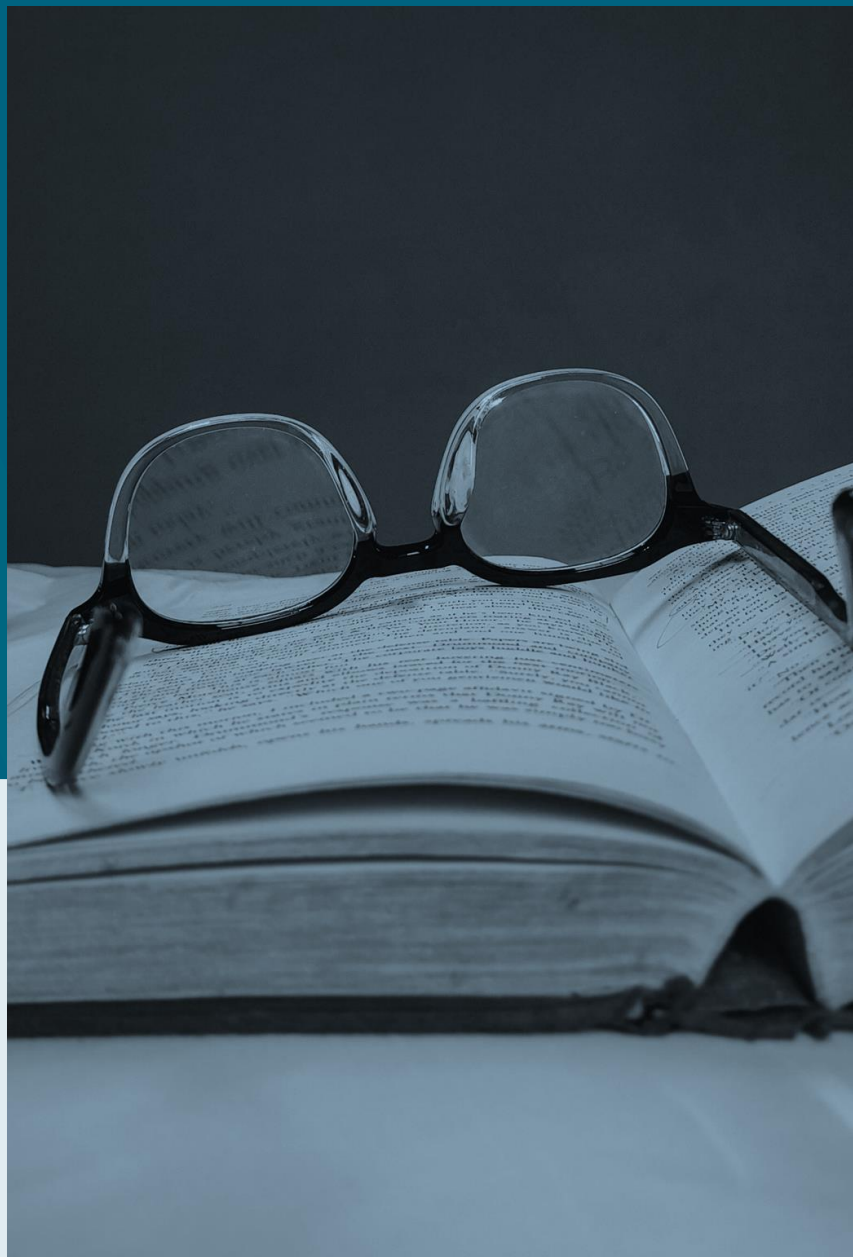


Art. 101 TFEU

Art. IV.1 CEL

Art. 101 TFEU / Art. IV.1 CEL

- **First para:** Basic prohibition (object or effect / appreciability standard / effect on trade between Member States)
- **Third para:** Exemption (individual based on self-assessment / block exemption)
- **Second para:** Absolute nullity (but also: administrative fines / private damages)
- **Important:** Convergence theory



Art. 102 TFEU

Art. IV.2 CEL

Art. 102 TFEU/Art. IV.2 CEL

- **Dominance:** Linked to definition relevant market / market shares / additional factors
- **Abuse:** Exclusionary / exploitative

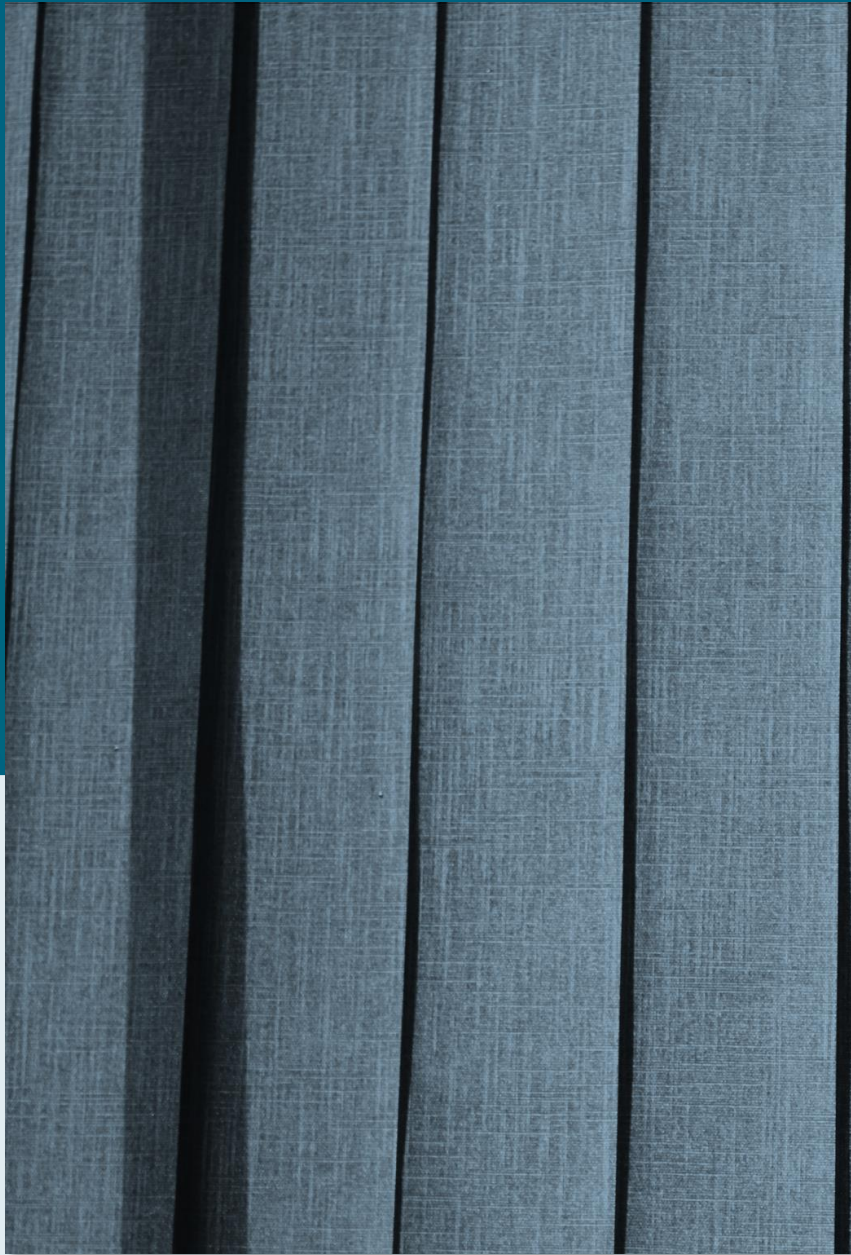




**Touch points between
competition law and IP**

Touch points between competition law and IP

- **First touch point:** Vertical agreements
- **Second touch point:** Technology licensing agreements
- **Third touch point:** Vertical subcontracting scenarios
- **Fourth touch point:** Research and development
- **Fifth touch point:** Information exchange
- **Sixth touch point:** Pay for delay (see pharma sector)
- **Seventh touch point:** Refusal to supply (linked to IP)



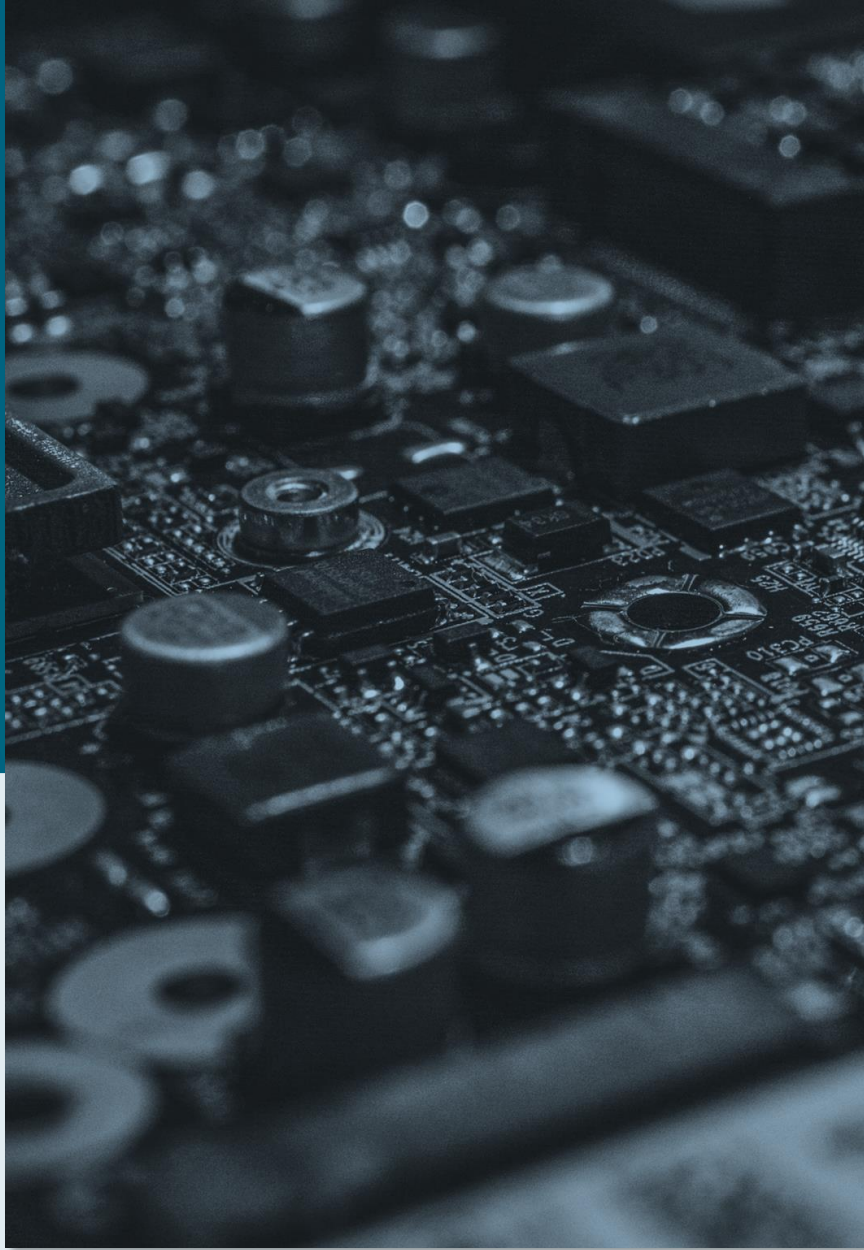
First touch point Vertical agreements

First touch point: Vertical agreements

- **Relevant sources:** Regulation 2022/720 and Vertical Guidelines
- **Check:** Art. 2(3) Reg 2022/720 re: scope of application (specifically re: IP)
 - Not the primary object
 - From supplier to buyer (and not vice versa)
 - Related to sale or resale
 - Not same object as hardcore

First touch point: Vertical agreements

- **Trademark license agreement not covered** (due to Art. 2(3))
- **Thus: self-assessment** (Vertical Guidelines by analogy)



Second touch point
Technology
licensing agreements

Second touch point: Technology licensing agreements

- **Relevant sources:** Regulation 316/2004 and TTBER Guidelines
- **Technology rights** = Patents, utility models, design rights, topographs of semiconductor products, supplementary protection certificates for medicinal products, plant breeders' certificates and software copyrights

Second touch point: Technology licensing agreements

- **Fundamental distinction** between competitors and non-competitors
- **Check:** Both technology market and product market
- **Non-competitors:** Market share of each party may not exceed 30%
- **Competitors market share** of parties combined may not exceed 20%

Second touch point: Technology licensing agreements

- **Hardcore restrictions:**

- Pricing restrictions when selling products to third parties (how much?)
- Output limitations (how many?)
- Customer restrictions (to whom?)
- Territorial restrictions (where?)

Second touch point: Technology licensing agreements

- **Excluded restrictions:**

- Exclusive grant back clauses imposed on licensee (re: own improvements or applications)
- No challenge clauses re: validity of IP rights
- Limitations to exploitation rights



Third touch point Vertical subcontracting scenarios

Third touch point: Vertical subcontracting scenarios

- **Relevant source:** Subcontracting notice (1978)
- **Exclusive supply-back** = justified in case of indispensable IP transfer



Fourth touch point Research and development

Fourth touch point: Research and development

- **Source:** Regulation 2023/1066
- **Market share limit:** 25%

Fourth touch point: Research and development

- **Necessary conditions regarding:**
 - Access to final results
 - Access to pre-existing know-how
 - Joint exploitation

Fourth touch point: Research and development

- **Hardcore restrictions:**

- Restriction of freedom to engage in own R&D
- Limitations of output or sales
- Price fixing
- Territorial and customer restrictions
- Refusals to meet demand
- Creation of difficulties re access to products



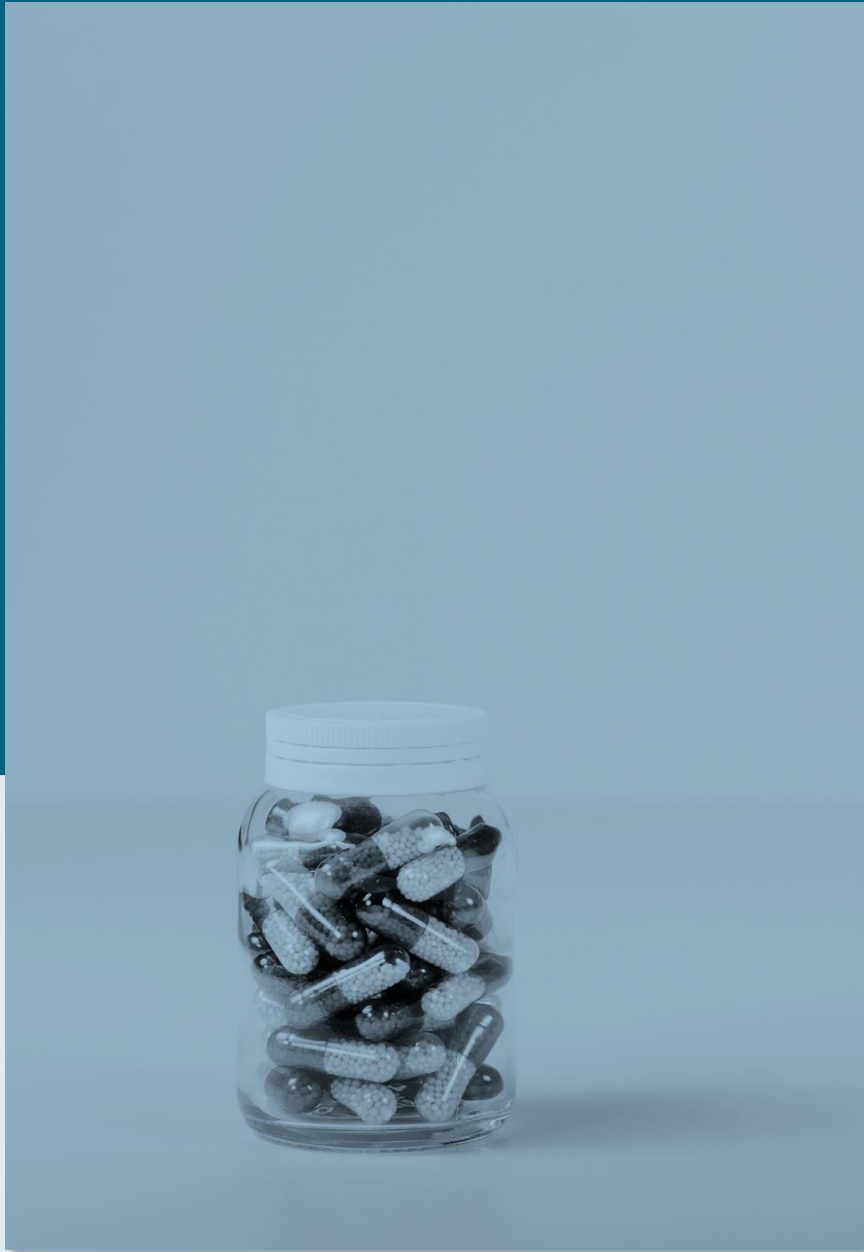
Fifth touch point Information exchange

Fifth touch point: information exchange

- **Source:** 2023 Horizontal Guidelines (chapter 6)
- **No block exemption** (unless ancillary) – self-assessment

Fifth touch point: information exchange

- **Central concept** = Commercially sensitive information (“CSI”)
- **IP will typically qualify as CSI**
- **Non-CSI** = Non-confidential technical issues relevant to the industry in general (such as standards or health issues) - general non-proprietary technology (such as general characteristics of certain equipment)



Sixth touch point
Pay for delay

Sixth touch point: pay for delay (see pharma sector)

- **Source:** Decisional practice Commission & case-law CJEU
- **Issue:** Arrangements regarding delayed market entry regarding expiry of IP protection
- **Recent development:** Lundbeck



Seventh touch point

Refusal to supply

Seventh touch point: refusal to supply (linked to IP)

- **Source:**

- Decisional practice Commission & case-law CJEU
- Draft Art. 102 Guidelines re: exclusionary conduct

- **Issue:** (i) Necessary to compete on downstream market & (ii) ability to exclude all competition by the other party & (iii) prevents other party from offering new products for which there is potential demand (hence, no pure copy of what dominant player is doing)

- **Classic example:** Magill

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02 580 18 14



Grensstraat 7, 1831 Machelen