

Bird & Bird

"Reverse payments" under scrutiny

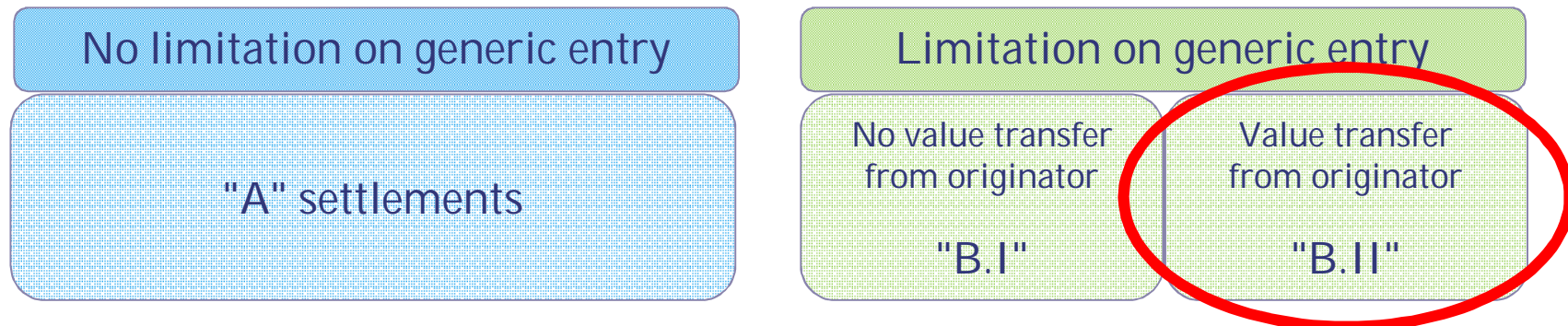
Patent Settlements and EU Competition Policy

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"Reverse payment" settlements

- European Commission classification of settlements:



- EU Commission: B-II settlements => highest degree of antitrust scrutiny
- FTC: reverse payments => presumptively unlawful restraints of trade
- Raises a number of questions
 - What is a reverse payment?
 - Can a reverse payment be legitimate?

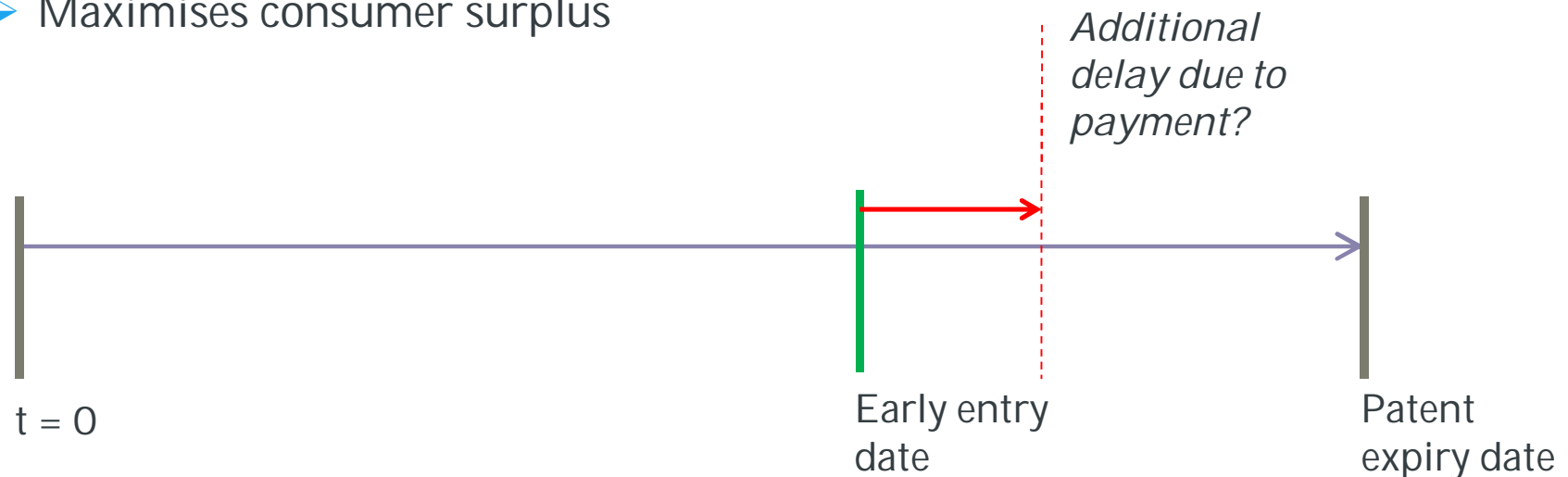
What constitutes a payment?

Any settlement involves some form of consideration to the generic manufacturer

- Straightforward payment case: cash payment from the originator
- What about :
 - Agreeing not to release an authorised generic (exclusive licence)?
 - Granting a free/cheap licence?
 - Renouncing a damages claim?
 - Agreeing on an early entry date?

The case for early entry agreements

- Favoured by FTC, 3rd Circuit
- Position of EU Commission unknown
- Main benefit: settling parties do not attain more than they can expect from litigation
 - Maximises consumer surplus



Are all reverse payments problematic?

Some reverse payments can be traced to purposes other than extra delay

- Originator pays his avoided cost of litigation to generic company
- Originator purchases services, goods, IP rights from generic company
- Payments that reflect risk aversion
- Payments that are necessary for the settlement to occur (*e.g.* information asymmetry)

Conclusions

- Reverse payments - are we asking the right question?
 - Pro-competitive "payments"
 - *e.g.*: early entry
 - Payments unrelated to delays
 - *e.g.*: avoided litigation costs
- Focus should be on distinguishing pro- from anticompetitive settlements
 - Evolution in EU Commission language
 - From Sector Inquiry: focus on value transfers
 - ... to draft TTBER Guidelines: focus on inducements, financial or otherwise, to accept more restrictive settlement terms