

Abstract

This paper analyses the role of intellectual property rights in the shaping of the GSM industry. The acronym FRAND obliges undertakings participating in the standardization process within a Standard Setting Organization (“SSO”) to offer their intellectual property to third parties on fair, reasonable, and non-discriminatory terms.

Many patent holders have already committed themselves to FRAND licensing, but unfortunately, a number of controversies have arisen over licensing policy of standard-essential patents and placed the exploitation of these exclusive rights on a collision course with competition law. Given the divergences of stakeholders’ interests involved, especially within the telecommunication industry, it is not surprising that the controversies surrounding this issue are subject of many ongoing litigations within several jurisdictions. This is to a large part due to the lack of clear SSO rules to assess the implications of FRAND commitments and, in particular, the compliance of royalty pricing with such commitments. As long as the standardization community is not able to reach consensus within the SSO regime and agree to clarify relevant SSO IPR policies, one inevitable source of guidance in the next couple of years will be the European Commission. The increasing number of complaints seems to suggest that eventually the licensing practices of FRAND commitments will be assessed under Article 102 TFEU.

Throughout Mrs Neelie Kroes’ time as European Commissioner for Competition, the Microsoft saga has continued and the resulting workload may explain to some extent for the failure to open competition procedures in standard cases, despite their long-term importance for the European economy. Essential questions have been left without authoritative answers and it is not realistic to think that SSOs, which work by consensus, could solve all these problems without any guidance from the European Commission.

Against this background, the research and writing of this master thesis will be focused on analyzing the growing reliance to enforce FRAND commitments under Article 102 of the Treaty on the Functioning of the European Union (“TFEU”). The various licensing practices that may amount to abuse of dominant position under Article 102 (a) and (c) TFEU such as excessive pricing and price discrimination as well as deceptive behaviour within the SSO, raise a number of complex issues, which deserves to be critically discussed and properly assessed.

Particular emphasis will be put on the *Qualcomm* case, which currently is pending before the European Commission and on more recent patent infringement cases pending before the German courts, where standard-essential patent holders have attempted to enforce their patents through an injunction, without considering their obligations under antitrust laws. The perception is that where a standard-essential patent holder is committed to give an irrevocable license to third parties in the first place and they are prepared to pay FRAND terms, in principle, no injunction should be available, since the only issue to be resolved in the litigation is the amount of the royalties to be paid by the licensee. Patentees' (mis-)use of injunction raises the risk that manufacturers faced with such a threat will be willing to pay considerable more than FRAND and that patentees as a result will be able to withdraw more surplus than their technology entitle them to. However, no authoritative precedents comparable to the *eBay* case to overcome this problem exist at the EC level. If the European Commission were to open formal proceedings under Article 102 TFEU based on Nokia's complaint against the patent holding company ICom, it is expected that it will examine the use of injunctions by dominant undertakings and take also this aspect into account.

The importance of the currently pending cases is likely to reach beyond the EU, not only because of the huge economic importance of patented industry standards in general, but also because a significant number of ongoing patent suits related to the GSM standard is now pending before courts within various jurisdictions around the world. This paper will try to demonstrate that the FRAND debate is very controversial and that there are many unresolved issues and questions related to the enforcement of FRAND commitments under Article 102 TFEU. In essence, it is argued in this paper that even though the interface between IPRs and competition law within the standardized technology market is particularly complex and calls for extreme caution, this does not mean that EC competition law has no role at all to play in averting anti-competitive behaviour with regard to FRAND commitments within this area of business.

In the past, the European Commission has shown a tendency to be rather flexible when assessing the practical impact of FRAND commitments and therefore leaving this matter for will not necessarily lead to a drastic transformation of the entire licensing industry. The vague legal doctrines provided so far by the European Commission seem to indicate that the Commission wish to avoid the possible negative consequences, which could arise from too rigid price control. It is not likely that the Commission would change its current practice when dealing with FRAND commitments. Therefore, it can be assumed that the Commission will put particular focus on the procedure instead of the substance and approach

FRAND commitments in a pragmatic and flexible way in order to preserve appropriate licensing flexibility for the IPR holders.

