

- In a pool constituted of complement technologies, instead, independent licensing is not a problem under normal circumstances, thus non-compete clauses are rarely included in such kinds of pools. Here, the key can also be found in the nature of the technologies involved: complements have necessarily to be employed together in order to obtain the desired contract-product. For this reason, should a patentee market his own individual technology by way of independent licensing to third parties, which would not constitute direct competition for the pool, as its field of activity is not limited to the pool members' isolated technologies. Besides, as outlined above, such independent licensing practices offer the benefit of enhancing the incentives for the pool contributors to innovate in pool-unrelated areas. However, these kinds of pools are much more concerned with the hold-up problem, should a new implementation of one of the technologies involved turn out to be indispensable for the production of the contract-product at issue, which could freeze the whole pool's functioning mechanism in the absence of grant-back provisions. This policy is implemented at the cost of a reduced incentive for pool members to invest into the development of pool-related innovations.

In fact, pools composed of perfect substitute or complement technologies mostly represent a mere abstraction of the reality and can rarely be found in their "pure" form. Besides, apart from "grey areas" where clear-cut distinctions based on the nature of the technologies involved are not easily discernable, in the real world pools do not come "labelled" as consisting of complementary or substitute patents.

Indeed, in order to resist a stereotypical assessment of the nature of patent pools that often tends to be confined to merely formal grounds, such as the declared intents of the parties entering into the agreements, a deeper consideration of empirical evidences should be enhanced. The former, more rigid approach is in fact based on a tradition of mistrust towards pooling arrangements,<sup>390</sup> which were historically associated with horizontal, price-fixing, anti-competitive "cartels", and thus deemed to comprise substitute technologies, unless proven to be "innocent". On the contrary, nowadays we should advocate a more flexible and pragmatic evaluation of such business practices, taking into consideration the overall context in which they arise, also when examining the individual clauses that contribute to their overall appearance.

#### **IV. Institutional Framework Governing the Pool**

Finally, a last point to be dealt with concerns the institutional framework governing the pool, which covers the way in which such consortia are created and orga-

<sup>390</sup> See in this respect the report traced by Gilbert R., "Antitrust for Patent Pools: A Century of Policy Evolution", Stanford Technology Law Review, April 2004, available at: [http://www.law.berkeley.edu/institutes/belt/stemcell/articles/gilbert\\_patent\\_pools.pdf](http://www.law.berkeley.edu/institutes/belt/stemcell/articles/gilbert_patent_pools.pdf)

nised. Indeed, the importance of a good patent pool management should not be underestimated as the way in which those entities are run may consistently reduce the incidence of antitrust allegations.<sup>391</sup> The most important points may be summarized as follows.<sup>392</sup>

## 1. Independent Experts

Where independent experts are in charge of the assessment and administration of essential technologies to be included in a pool, it is more likely that competition authorities will be more indulgent in their legal assessment, since non-aligned administrators are better guarantors of impartiality, because the selection of the pooled technologies is likely to be based on price and quality considerations, rather than on personal convenience of association, as it may occur if the pool is administrated by the strongest patent holders themselves.<sup>393</sup>

## 2. Open and Indiscriminate Participation

When the participation process is open to all interested parties, ideally also representing different interests, it is more likely that the pooled technologies will be selected on the basis of price or quality considerations, as compared to if the pool is set up by a limited group of technology owners, where individual interests may eventually prevail over objective factors.<sup>394</sup> Accordingly, when persons representing different interests are managing the pool, it is more likely that licensing terms and conditions will be open and non-discriminatory, thus reflecting the real market value of the licensed technologies.

391 Specifically in: Guidelines, *supra*, fn. 299, Sect. 4 “Technology pools”, para. 230, it is stated that the way a patent pool is structured can very well reduce the risk of restricting competition and provide assurances to the effect that the arrangement is more favorably seen as pro-competitive.

392 For an outline on the point, see i.a.: Van Bael I., “Pool Management and Institutional Arrangements “, In: “Competition Law of the European Community”, Kluwer Law International, 2005, p. 704 *et seq.*

393 Besides, see also Guidelines, *supra*, fn. 299, Sect. 4 “Technology pools”, para. 233, stating that: “The Commission will take into account how experts are selected and what are the exact functions that they are to perform. Experts should be independent from the undertakings that have formed the pool. If experts are connected to the licensors or otherwise depend on them, the involvement of the expert will be given less weight. Experts must also have the necessary technical expertise to perform the various functions with which they have been entrusted. The functions of independent experts may include, in particular, an assessment of whether or not technologies put forward for inclusion into the pool are valid and whether or not they are essential”.

394 *Id.*, para. 231.

### 3. Overseen Exchange of Sensitive Information

Another determinant factor is that in oligopolistic markets, as eventually reflected within a patent pool, exchanges of sensitive information, such as pricing and output data, may facilitate collusion. In such cases the extent to which safeguards have been put in place in order to preserve the exchange of confidential data may be closely investigated.<sup>395</sup> Also in this respect, an independent expert may play an important role by ensuring that such information, still necessary for the purposes of calculating and verifying royalties, is not unduly disclosed to undertakings that compete on affected markets.

### 4. Neutral Dispute Resolution Mechanism

Finally, it is important to take into account the dispute resolution mechanism envisaged when setting up the pool. Specifically, when this is entrusted to independent bodies, it is more likely that contentious processes will also be dealt with in a neutral, unbiased way.<sup>396</sup>

In conclusion, the observance of a few, basic sensible principles, as hereby outlined, may go a long way in ensuring “green light” for patent pools, establishing a record of good practices.

### D. Selected EC Case Law on Patent Pools

As compared to the long history of intersection between antitrust and patent pools in the US, raising a broad range of competition issues with regard to the licensing of technologies, the jurisprudence of such cases in the EU is relatively small, although similarly instructive.<sup>397</sup> In the following, we will attempt to summarize some of the most significant proceedings before the European Commission’s Competition Directorate General involving the legal assessment of technology pooling licensing agreements:

395 *Id.*, para. 234.

396 *Id.*, para. 235.

397 Charles River Associates, “Multiparty Licensing”- Report prepared for the European Commission’s DG for Competition, April 2003, “History of Patent Pools and Competition Policy”, p. 21 *et seq.* available at: [http://www.europa.eu.int/comm/competition/antitrust/legislation/multiparty\\_licensing.pdf](http://www.europa.eu.int/comm/competition/antitrust/legislation/multiparty_licensing.pdf)