

4. Case Studies Related to the Enforcement of FRAND Commitments under Article 102 TFEU

In Europe, the relationship between the actual pricing level and the level compliant with FRAND commitments under Article 102 TFEU lies at the heart of the tension between intellectual property rights and competition policy. At present three disputes are pending before the European Commission¹²⁹ in which the Commission has been asked to investigate whether certain technology owners unlawfully have exploited their market power by failing to license their technology on FRAND terms. In the following, the conflict between patents and standards shall be analyzed in the light of these recent cases and patent infringement cases pending before courts of law. For this purpose I will distinguish between the following different scenarios:

First, whether and under which circumstances a company is likely to be deemed to abuse its dominant position on a certain market under Article 102 TFEU by refusing to license its patents to third parties on FRAND terms,

Second, whether and under which circumstances a company using a patent incorporated into a standard can defend itself against an injunction based on anti-trust defences in patent infringement proceeding.

Under the first scenario, I will try to predict the position that the European Commission will take in cases such as the *Qualcomm* case concerning the application of Article 102 TFEU to FRAND commitments and possible general guidelines to be deducted here from. As discussed above, no clear SSO rules exist on how to assess the implications of FRAND commitments as regards pricing.

Under the second scenario, I will analyze recent legal developments in Germany regarding the admissibility and other preconditions for invoking antitrust law, as a defence is patent infringement proceedings. In this context, I will take into a consideration recent case law developed by German courts. Particular emphasis will be put on the *IPCom* case.¹³⁰

129 Namely: Qualcomm, Rambus and IPCom.

130 At this point in time, the Commission has not yet announced whether it will open formal proceedings in this case.

4.1 The *Qualcomm* Case

As a starting point, it should be noted the European Commission is still in the process of investigating the *Qualcomm* case and that the Commission, as of yet, has not given any indication as to when it can be expected to decide this case. Accordingly, the official sources available at this point in time are limited. Already for this reason, readers are invited to critically assess my below arguments and to feel free to drawn his or her own conclusions.

However, since the *Qualcomm* case is the first “real FRAND case” under Article 102 TFEU put before the European Commission, it can be expected that the Commission’s handling of this case will be of major importance for future developments within this area of law in Europe. It is for these reasons that I have chosen to focus on the *Qualcomm* case and to use this case as the basis for a concrete case study in this paper.

4.1.1 What is the Object of the European Commission’s Decision to Initiate Proceedings in the *Qualcomm* case?

In 2005, Ericsson, Nokia, Texas Instrument, Broadcom, Nec and Panasonic lodged a complaint against Qualcomm Incorporated,¹³¹ a US chipset manufacturer. On 1 October 2007, the European Commission announced that it had decided to open formal antitrust proceeding against Qualcomm under former Article 82 EC. All of the complainants are mobile phone and/or chipset manufactures. The alleged infringement concerns the terms under which Qualcomm licenses its patents essential to the so-called WCDMA standard, which forms part of the 3G standard.

The first relevant activities related to the establishment of the WCDMA standard began in 1990, *i.e.* prior to the launch of the GSM.¹³² The standardization process took place within ETSI and proved to be extremely troublesome as already back then many companies failed to provide the requested FRAND declaration.¹³³ In fact, already at that time many industry experts warned that, if forced

131 See MEMO/07/389 of 1 October 2007 by the European Commission: “*Antitrust: Commission Initiates Formal Proceedings Against Qualcomm*”,.

132 Rudi Bekkers and Joel West, “*Standards, Patents and Mobile Phones: Lesson from ETSI’s Handling of UMTS*”, International Journal of IT Standards and Standardization Research, Vol.7 Issue 1, 2009, p. 16.

133 Ibid, p.18.

to pay stiff royalties, companies such as Ericsson and Nokia might be unable to afford the costs of developing and manufacturing third-generation WCDMA systems.¹³⁴ Indeed, the key obstacle was an IPR struggle between European vendors and Qualcomm.

In all 41 companies took part in the WCDMA standardization process, but roughly only four companies' hold 75% of the patents involved.¹³⁵ According to an ETSI listing from 2005, Nokia then claimed to hold 248 essential patents, Ericsson 244, Qualcomm 228 and InterDigital Communications 168 and represented together the largest patent portfolios holders.¹³⁶ According to *Goldstein and Kearsey*, the cumulative royalty rate for a company without essential patents in the WCDMA technology is believed to be within the range of 10-20 percent.¹³⁷ Individual patent owners usually charge between 0.5 and 4 percent on essential patents owned, a range which can seem small when considered with regard to a particular product, but huge when assessed together.¹³⁸ In addition, it has been estimated that the high cumulative royalty rates applied in the WCDMA market have indeed increased prices for end consumers.¹³⁹

The European Commission's investigations are focused on two allegations. Firstly, the complainants' claim that Qualcomm is unfairly trying to exclude other mobile phone chip manufacturers from the market by refusing to license its standard-essential patents on fair terms and by offering lower prices to handset makers who buy chip sets exclusively from Qualcomm. Secondly, the complainants are alleging that Qualcomm is charging excessive royalties for its standard-essential patents. The complaints are based on the understanding that the economic principle underlying FRAND commitments is that essential patents holders are not allowed to abuse the extra power they have gained during the standardization process by claiming royalties that do not comply with FRAND terms.¹⁴⁰

134 Supra note Rudi Bekkers and Joel West.

135 Larry M. Goldstein & Brian N. Kearsey, "Technology Patent Licensing: An International Reference on 21st Century Patent Licensing, Patent Pools and Patent Platforms", Aspatore Inc., 2004, p.52.

136 Ibid, ETSI listing from 2005.

137 Supra note Larry M. Goldstein & Brian N. Kearsey, p.52.

138 Ibid, p.53.

139 Philippe Chappatte, "FRAND Commitments- The Case of Antitrust Intervention", European Competition Journal, Vol.5 Nr.2, August 2009, p.334.

140 See MEMO/07/389 of 1 October 2007 by the European Commission: "Antitrust: Commission Initiates Formal Proceedings Against Qualcomm".

As mentioned above the investigations are still pending before the European Commission, but Qualcomm has already in a public statement denied all allegations.¹⁴¹ In addition, already in the course of US litigation, Qualcomm has argued that “*charging what the market will bear...is not an anticompetitive or unreasonable act*”.¹⁴² In essence, Qualcomm’s reported responses to the claims in question can be summarized as follows: With regard to the alleged refusal to license on FRAND terms, Qualcomm asserts that this claim is disproved due to the availability and wide take-up of licenses for its essential patents. Also, most of the complainants are licensees and are therefore not excluded from the market. Further, Qualcomm claims that the complainants are seeking to use Article 102 TFEU in order to reduce their royalties and to strengthen their own position within the 3G market. In addition, Qualcomm claims that the complainants’ allegations concerning exclusionary rebates and excessive royalties are “*misleading*”, since Qualcomm’s pricing practices merely reflects legitimate price competition.

It should be noted that the object of the investigations in the *Qualcomm* case has been changed significantly during the course of the investigations since the European Commission launched its inquiry in 2007. In particular, it should be taken into account that Nokia on 23 July 2008 withdrew its complaint with reference to that it had fifteen years cross-licensing agreement with Qualcomm.¹⁴³ Unfortunately, albeit not surprising, the specific terms of this agreement have not been made public. Therefore, one can only speculate as what has made Nokia withdraw its complaint. One possibility is of course that Nokia has obtained some royalty reductions.

4.2 Possible Doctrinal Solutions based on the Meaning of FRAND Terms

In the following, I will not go into the specific and complex facts of the *Qualcomm* case, but assume that the FRAND commitments undertaken by Qualcomm

141 See Qualcomm’s Press Release, October 1st 2007, available at: http://www.qualcomm.de/news/releases/2007/071001_ec_initiate_proceedings.html

142 *Broadcom Corporation v Qualcomm Incorporated*, Civil Action 05-3350, District Court of New Jersey, Memorandum in Support of Defendants Motion to Dismiss, 9 December 2005, I.A.3.

143 See Press Release, “*Nokia and Qualcomm Enter into a New Agreement*”, 24 June 2008, available at: <http://nokia.com/A4136002newsid=1238093>.