

Introduction

The interface between antitrust law and intellectual property rights has been in the spotlight for decades. Following the *IMS Health*¹ and *Microsoft*² decisions, discussions about, whether and under which circumstances the exploitation and enforcement of intellectual property rights may amount to abuse of dominant position under Article 102 TFEU (former Article 82 EC)³ have been more lively than ever within the academic community as well as among legal practitioners.

More recently, the challenge of reconciling an increasing amount of conflicts between patents rights and standards has dominated the debate. Frequently used words such as “*fair, reasonable, and non-discriminatory*” have become even more emotionally charged when applied in the context of technology standardization.

So-called FRAND commitments obligate undertakings who participate in the standard setting process of Standard Setting Organizations (“SSO”s) to offer their intellectual property rights to third parties on “*Fair, Reasonable, And Non-Discriminatory*” (“FRAND”) terms.⁴ Today, many patent holders have already committed themselves to license on FRAND terms. However, especially the handling of standard-essential patent rights has proved difficult and led to controversies and collisions with competition law.

Most recently, the European Commission has also started to take an interest in the level of royalties charged by licensors, when their patents are essential to technology standards.⁵ Once a proprietary technology has become part of a standard, right-owners are likely to extract higher royalties than before.⁶ This phe-

1 Case C-418/01 *IMS Health v. NDC Health* [2004] ECR I-5039.

2 Case T-201/04, *Microsoft Corp. v. Commission* [2007] ECR II-3601.

3 All references to Art 82 EC should be understood as references to the current Article 102 of the Treaty on the Functioning of the European Union (as renamed by the Treaty of Lisbon, which entered into force on 1 December 2009).

4 E.g., the standardization organisation ETSI requires IPR owners to submit a written declaration stating that they are prepared to grant licenses on *fair, reasonable and non-discriminatory terms and conditions* (Clause 6.1 of the ETSI IPR Policy).

5 See MEMO/07/389 of 1 October 2007 from the European Commission, “*Antitrust: Commission Initiates Formal Proceedings against Qualcomm*”.

6 The so-called “*hold up*” theory. See Mark Lemley and Carl Shapiro, “*Patent Hold Up and Royalty Stacking In High Tech Industries: Separating Myth from Reality*”, Stan-

nomenon, some times referred to as *ex post* opportunism, in turn calls for mechanisms to control the level of royalties charged by standard-essential patent holders in order to avoid excessive pricing.

As a starting point, it is widely acknowledged that licensing agreements as such are pro-competitive.⁷ Licensing agreements typically benefit the licensee as well the licensor and in the majority of cases, the parties are able to reach a mutually satisfactory agreement. Through the licensing agreement the licensee, on the one hand, gains access to new technologies, whereas the licensor, on the other hand, recoups money spent on initial research and development enabling him to reinvest and to develop new technologies.⁸ This generates a virtuous cycle of innovation, which at the outset benefits the society as a whole.

However, tensions may arise when license agreements have significant financial value and their terms and conditions limit competition within a certain market. Given the divergence of the stakeholders and the financial implications often at hand it is not surprising that this has led to the institution of a number of legal actions in several jurisdictions.

Before engaging in litigation in the defence of patent rights deemed essential to a technical standard, it is, however, advisable to carefully consider possible anti-trust implications. Antitrust rules and SSOs rules on the licensing of standard-

ford Law and Economics Olin Work Paper No.324, July 2006. 6 Case C-418/01 *IMS Health v. NDC Health* [2004] ECR I-5039.

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7 See *e.g.* the European Commission’s Guidelines regarding the application of Article 81 EC on technology transfer agreements, O.J. 2004, C 101/2 at § 9, stating as follows: “*Most licence agreements do not restrict competition and create pro-competitive efficiencies. Indeed, licensing as such is pro-competitive as it leads to dissemination of technology and promotes innovation.*”

8 Erik Stasik, *Patent or Perish, A Guide for Gaining and Maintaining Competitive Advantage in the Knowledge Economy*, Althos Publishing, 2003, p.35.

essential patents may thus provide the opposing party with additional arguments, against the patentee's claim of infringement and/or claim for injunction. In fact, in several recent cases exactly this type of defence has been in focus.

In 2008 for instance, six telecommunication companies have alleged that Qualcomm's patent licensing policies violate Article 102 TFEU.⁹ In January 2009, Nokia has further lodged a formal complaint with the European Commission against the patent holding company IPRCom, alleging that IPRCom by failing to license a portfolio of patents acquired from Robert Bosch to Nokia has violated commitments undertaken by it under the FRAND regime.¹⁰

In this paper, I will seek to address some of the legal implications of applying EC competition law to FRAND commitments. In particular, I will address the apparent increased tendency to enforce FRAND commitments by invoking Article 102 TFEU.¹¹

Particular emphasis will be put on the Qualcomm case, which is still pending before the European Commission and on recent patent infringement court proceedings, where essential patent holders have attempted to enforce their patent rights through injunctions, without first considering their obligations under anti-trust laws.

I have chosen to focus on this type of cases due to their particular importance for companies' possibility to fund their research and development through technology licensing. The impact of these cases is likely to go beyond the EU, not only because of the crucial economic significance of patented industry standards in general, but also due to the fact that a considerable number of the presently pending patent suits around the world in fact all relates to GSM standards.

9 See MEMO/07/1567, "*Antitrust: Commission initiates formal proceedings against Qualcomm*", 1 October 2007. Within the US, Broadcom has alleged that Qualcomm's patent licensing policies violate its commitment to ETSI with regard to the mobile telephone 3G standards, and the Sherman Act, respectively.

10 The complain stems from proceedings initially filed by Nokia against Robert Bosch in December 2006 in Germany seeking a declaration from German courts to the effect that Robert Bosch is obligated to honour its agreement to grant a certain license to Nokia on FRAND terms. See LG Mannheim docket number: 2 O 1/07.

11 Both the European Commission's Technology Transfer Block Exemption Regulation and its supporting Technology Transfer Guidelines address the applicability of Article 81 EC to technology licenses, without prejudice to the possible parallel application of Article 82 EC. See the European Commission's Guidelines on the application of Article 81(3) EC [2004] O.J. L101/97.

The paper consists of five parts. In Part I, I address the importance of standardization and the FRAND regime of the European Telecommunications Standards Institute (“ETSI”). I will also highlight how standard-essential patents can be used as a powerful tool to gain market power or as a potential barrier for market entry, *e.g.* through the (mis-)use of patents included in the GSM standard.

In Part II, I address the rationale behind EC competition law and methods used to enforce it. In particular, I will discuss the application of Article 102 TFEU to dominant IPR holders.

In Part III, I will analyse the applicability of Article 102 TFEU to the FRAND regime. The various licensing practices that may amount to abuse of dominant position, such as excessive pricing and price discrimination under Article 102 (a) and (c) TFEU raise a number of complex issues in relation to technology licensing, which I find it important to discuss and assess. In connection hereto, I will also consider the doctrine of patent misuse under the recent *AstraZeneca* case.¹²

In Part IV, emphasis is put on recent high profile competition disputes concerning the apparent increased enforcement of FRAND commitments under Article 102 TFEU. The aim is to see if any general guidance can be drawn from the European Commission’s handling of cases such as the *Qualcomm* case.

Finally, in Part V, I will discuss a number of decisions made by German courts regarding the admissibility and preconditions for invoking antitrust arguments as a defence in patent infringement proceedings in Germany.

12 Case COMP/A.37.507.F3, *Generic/AstraZeneca*, 15 June 2005, IP/05/737, on appeal Case T-321/05, *AstraZeneca v Commission*, pending judgment.