technology. Most importantly, it was ascertained that the agreement did not contain unnecessary or excessive restrictions on competition. Finally, the Commission approved the pool, considering its overall beneficial effects on the consumers, thus granting a "comfort letter" under Art. 81(3) of the EC Treaty and thereby clearing the underlying agreement.[404]

IV. Moving Picture Experts Group (MPEG)

Other relatively recent notifications include the previously mentioned MPEG-2 pool, eventually cleared in 1998,[405] and the subsequent MPEG LA +5 pool, cleared in 2001.[406] As previously mentioned,[407] the MPEG-2 (Moving Pictures Experts Group) is an open standard for transmitting and storing video signals, providing a technique for eliminating redundant information and, consequently, saving transmission resources and space in storage media, such as optical discs. Both above-mentioned pooling agreements offered a single non-exclusive licence program and were unitarily administered by an independent entity, MPEG LA, based in the US city of Denver, Colorado. Furthermore, patent holders could offer licences for their patents outside the pool.

By clearing these agreements, the European Commission maintained that the pool had overall beneficial effects for the consumers and did not impose excessive or unnecessary restrictions on competition, therefore ultimately complying with the exemption criteria of Art. 81(3) of the EC Treaty.

V. Third Generation Patent Platform Partnership (3G3P)

Relatively recently, in November 2002, the European Commission's competition services, following the same balanced approach, eventually cleared the agreement among the so called Third Generation (3G) mobile equipment manufacturers (who refer to themselves as the "3G Patent Platform Partnership" or "3G3P"), involving a world-wide mechanism for evaluating, certifying and licensing essential patents for 3G mobile communications systems.[408] A positive administrative "comfort letter" was then issued in favour of the newly established 3G3P consortium, covering the creation of five 3G technology-specific platforms, fundamentally intended to determine and attest the essentiality of 3G patents, streamline licensing administration

404 Further details of the notification of the DVD Licensing Program were published in the Official Journal of the European Communities, 27 August 1999, vol. 242, p. 5 *et seq.*

405 Press release IP/98/1155 of 18 December 1998; Notice in OJ No 98/C 229/6 of 22 July 1998.

406 Notice in OJ 174/6 of 19 June 2001.

407 See Part I / B / 2 of this contribution, dedicated to The "MPEG LA" Case.

408 Press release IP/02/1651 of 12 November 2002.

and applying a price cap mechanism aimed at moderating the effects of high cumulative royalties.

The initiated antitrust proceedings go back to July 2000, when the newly established 3G3P and its eighteen members, consisting of both big manufacturers and major mobile operators,[409] notified the Commission about their agreements to pool their technologies together in order to create a consortium operating world-wide and designed to provide an open, voluntary and cost-effective framework for 3G mobile communication licensing services, ultimately intended to facilitate market entry and access to 3G technologies, thereby reducing the delays, costs and uncertainties invariably associated with the licensing of multiple patents.

In order to obtain antitrust clearance, pools should merely include essential patents, i.e. those that are indispensable for complying with a given technological specification. Consequently, as is implied by the very same concept of "essentiality", there should not be any substitute patents related to a given standard, hence all technologies should be reciprocally complementary, and the respective patent holders should not be competitors in the relevant market.

However, in the context of 3G standard setting, which took place under the guidance of the International Telecommunications Union (ITU), a certain degree of competitive concerns could not be avoided: in fact, the five families of standards that were eventually included under the 3G3P umbrella - encompassing separate air interface technologies[410] regrouped under the name of IMT-2000 (IMT standing for International Mobile Telecommunications and 2000 being the year when concerted acceptance of the main specifications to be incorporated into the 3G systems was eventually reached) - all represent alternative, i.e. substitute, technical solutions, thus potentially competing with each other, since consensus on a single global air interface standard could not be reached, and finally a compromise was opted for, the ultimate goal being attaining interoperability among the five separate air interface technologies and thereby allowing for global roaming and compatible 3G services.

Nevertheless, the alleged competition among the five substitute technologies encompassed by the IMT-2000 was in practice less compelling than in theory: in fact, it was undeniable that within certain regions one of the five technologies was widely prevailing, either due to consumers' dependencies on the already existing 2G legacy systems or to regulatory choice.[411] Anyway, given the potential or actual competition, among the five 3G technologies at issue, the 3G3P in its initial pattern seemed at least to some extent to form a prohibited, restrictive arrangement among market

409 Namely Alcatel, Cegetel, Electronics and Telecommunications Research Institute Korea, France Telecom, Fujitsi, Royal KPNN.V., LG Information and Communications, Matsushita, Mitsubishi Electric, NEC, NTTDoCoMo, Robert Bosch GmbH, Samsung Electronics, Siemens AG, SK Telecom, Sonera Corporation, Sony and Telecom Italia Mobile.

410 Respectively known as W-CDMA, CDMA2000, TD-CDMA, TDMA-EDGE and DECT.

411 On the point, see: Choumelova D., "Competition Law Analysis of Patent Licensing Arrangements - The Particular Case of 3G3P", Competition Policy Newsletter, Spring 2003, no. 1, p. 42, also available at: http://ec.europa.eu/comm/competition/publications/cpn/cpn2003_1.pdf

contenders, where their joint agreement on licensing conditions and royalty rates could have been marked as a price fixing attempt, as such caught by Art. 81 of the EC Treaty. This raised pressing concerns about the antitrust consequences of said practice, and in the course of 2001 and 2002 several amendments were introduced in the notified accord before the Commission. Indeed, the most crucial change was the establishment of five distinguished technology-specific platforms, each relating to the corresponding 3G interface, instead of one single platform for all selected interfaces, where the relevant patents were pooled together, as initially conceived.

Considerations related to the allegedly anti-competitive price setting mechanism in place were also overcome by the introduced amendments. In fact, the modified agreements eventually provided a default five percent maximum cumulative royalty rate, i.e. a "price cap", to be applied on each licensee and for each specific single 3G technology included under the IMT-2000. Besides, patent holders and third parties also left open the option between the standard pre-defined licensing conditions and the choice of entering into individual bilateral negotiations, according to their best convenience.

Now, taking into account its overall peculiarities and despite the quite significant resemblances, we should point out that interestingly there is a number of significant features distinguishing the 3G Patent Platform Partnership from a pure patent pool, which may be briefly highlighted as follows:

- The 3G3P patents are not exactly "bundled" together, because of the concurrent existence of the five separate technology platforms in place. Thus, there is no real comprehensive pooling of patents. Instead, licensees have the option, as we have just seen, to choose among the different technologies and, consequently, transactions can be concluded also on a bilateral basis, if the standard pre-defined licensing terms do not meet the parties' convenience within the particular setting determined on a case-to-case basis.
- Whereas in a patent pool a licensee typically enters into an agreement with the consortium itself, here there is no single licence between the platform, as such, and a given third party, since the 3G3P is technically divided into five distinguished units and, alternatively, bilateral arrangements can also be negotiated on an individual basis, according to the concrete circumstances in place.
- In the 3G3P the licensors do not assign their patents to the platform, as it is typically the case within a pool, which in this case rather has the function of an intermediary between patent holders and third parties, than of a truly representative entity acting on behalf of, and therefore substituting itself to, its associates; besides, here members always retain their rights to also conclude non-exclusive licensing agreements outside the 3G3P framework, an option which in a patent pool may or may not be inserted into an elective, additional clause, irrespective of its undeniable desirability for eventually overcoming competition concerns.

In conclusion, while assessing the compliance of 3G3P patent licensing arrangements with antitrust rules, the Commission finally had to ascertain that no unfair restriction of competition occurs among the different 3G technology-specific

platforms; that only essential patents are encompassed by each single platform in consideration; that no biased tying of patents occurs and that competition in related or downstream markets is not foreclosed; that further R&D is not discouraged by the arrangement under scrutiny.[412]

Nonetheless, the scope of the administrative comfort that has been conceded, and the ensuing clearance, is inherently limited to the notified agreements, as applying to the 3G3P membership at that time, and in no way it encompasses any other industry initiatives, such as decisions of 3G standard setting organisms and working groups, taking into particular account the novelty of 3G technologies at the time they were developed and introduced into the marketplace and the subsequent unpredictability of related 3G downstream product markets.

VI. Philips and Sony's CD Disc Licensing Program

In August 2003, after years of heated debates, the European Commission finally cleared a set of bilateral arrangements between Philips and Sony, establishing the worldwide CD Disc Licensing Program and regulating the firms' reciprocal rights and obligations.[413] Moreover, the related third parties' Standard License Agreement (the SLA 2003), covering essential patents to manufacture different specifications of pre-recorded CD discs, also eventually got antitrust clearance, pursuing from the recommended adoption of amendments to make it fully compliant with EU competition rules. This clearance marks the end of the Commission's rigorous inspection of the Philips and Sony CD Disc Licensing Program.[414]

In fact, the two companies had already been closely involved in cooperative research and development on the cutting edge of optical data storage technology since the 1970s, which resulted in joint patented inventions, eventually reaching a global dimension. At a time when magnetic tapes and vinyl discs were the dominating audio storage media on the marketplace, in the early 1980s, both firms commonly implemented the CD system standard specification, as part of an innovation program concerning digital audio recording, which was actually launched by the Electronic Industry Association of Japan.[415]

Actually, the close cooperation between Philips and Sony was first institutionalized in 1979, when the two undertakings concluded a cross-licence agreement to collaborate in the design and development of optical audio disc players and their

412 Choumelova D., *supra*, fn. 411, p. 43.

413 Press release IP/03/1152 of 7 August 2003.

414 Pena Castellot M., "Commission Settles Allegations of Abuse and Clears Patent Pools in the CD Market", Competition Policy Newsletter, Autumn 2003, no. 3, p. 56 *et seq.,* also available at: http://ec.europa.eu/comm/competition/publications/cpn/cpn2003_3.pdf

415 At that time the CD system was just one among several different alternative solutions advanced by other participants in the program, even if eventually the former prevailed over time. Pena Castellot M., *supra*, fn. 414, p. 58.