

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.³⁹⁵ 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.³⁹⁶

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.³⁹⁷ 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

I. Videocassette Recorders (VCR)

Although the number of multiparty licensing cases has been quite limited, it is clear that the European Commission has been quite cautious about the potentially anti-competitive aspects of certain restrictions in multiparty licensing for a very long time. In 1987, an agreement involving cross-licensing of patents was found to negatively affect competition within the European Community.³⁹⁸ Specifically, Philips and Sony had entered into an agreement with other videocassette recorders (VCR) producers on a uniform application of technical standards for the system at issue. The cross-license covered royalty-free patents to ensure the compatibility of cassettes with recorders from different vendors.

However, the agreement provided that only the Philips complete system would be allowed, so that, consequently, any modification to the Philips system required the consent of all parties. Despite the improved interoperability of the cassettes with video machines of different producers, the Commission refused to grant exemption arguing that: “compliance with VCR standards led to the exclusion of other, perhaps better, systems. Such an exclusion was particularly serious given the market position enjoyed by Philips [...] Restrictions were imposed upon the parties which were not indispensable to the attainment of these improvements. The compatibility of VCR video cassettes with the VCR video machines made by other manufacturers would have been ensured even if the latter had to accept no more than an obligation to observe the VCR standards when manufacturing VCR equipment”³⁹⁹.

II. Advanced Photographic System (APS)

Taking a new approach, from the early 1990s on the Commission has unequivocally demonstrated that it also recognises and prizes the potentially pro-competitive effects brought about by technology sharing, such as the establishment of standards setting. As in most of the cases, no formal decisions were made on the notified agreement reported below, for instance, but the Commission sent the parties a so called “comfort letter”, i.e. an administrative letter, thoroughly expressing its opinion.

Specifically, in July 1993 Canon, Kodak, Minolta, Fuji and Nikon notified the European Commission about their accord for the still under way development and further exploitation, under the terms of a cross-license, of the Advanced Photographic System (APS), a new industry standard, which involved the production of new types of cameras, films and photo-finish equipment.⁴⁰⁰ The Commission has twice formally invited third parties to submit their observations on the proposed coopera-

398 Philips VCR, OJ No L 47, 18.1.1978, p.42 *et seq.*

399 Philips VCR, OJ No L47, 18.1.1978.

400 Notice in OJ C 68/3 of 5 March 1994.