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Shaken, not stirred. Competition Law Enforcement and Standard Essential Patents.

Check Against Delivery
Seul le texte prononcé fait foi
Es gilt das gesprochene Wort

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Ladies and Gentlemen,

The discussion about Standard Essential Patents is a passionate one, to judge by the language alone.

"Patent ambush", "patent wars", "patent pirates," hold-up", "hold-out", "sharks" and "trolls": this sounds more like the language of a James Bond movie than the language of the court room.

The discussion is so passionate, because there are big interests at stake.

On the one hand the interests of the patent holders. They deserve proper payment for use of their standardised technologies and their innovative efforts.

On the other hand the interests of licensees of standard essential patents. They should get access to patented technology included in a standard at fair, reasonable and non-discriminatory rates.

This balance is very delicate.

Imbalance in favour of patent holders can distort competition and hold up an entire industry which relies on standards.

Imbalance in favour of licensees can decrease incentives for companies to spend time and money on participating in developing standards.

In short, the balance between patent holders and licensees should be just right. I like James Bond movies, so let's say: it should be shaken, not stirred.

In our antitrust enforcement, we aim to do justice to the interests of both patent holders and licensees.

Standard Essential Patents

Before I discuss this issue in more detail – what is a standard?

I have an example of a standard right in front of me. My notes are printed on A4 sheets of paper. A4 is a standard. It makes life easier for manufacturers of stationery, printers and copy machines.

An example more relevant to our recent cases can be found in your pocket or in your bag or, if you're already bored with this talk, you are looking at it right now: your mobile phone.

Standard essential patents protect technologies that – as the name implies, are essential to a standard.

Access to these patented technologies is necessary to be able to bring a working phone to market.

If your phone would not be compliant with communication standards, such as GSM, UMTS, or Wi-Fi, it would just be a very expensive piece of plastic.

The number of standard essential patents, SEPs for short, doubles every five years.

How many patents are relevant for smartphones? This is a good Trivial Pursuit question. More than 100? More than 1000? More than 10,000? More than 100,000?

According to a White House report, 100,000 patents are relevant to smartphones.

According to another report, 23,500 patents have been declared essential just for the GSM, 3G and UMTS standards developed by ETSI, the European Telecommunication Standards Institute.

The benefits of standards are obvious. One is interoperability. All phone brands use the same radio waves. Without such standards, you could only call people with the same brand of phone.

Another is certainty: thanks to DVD standards, you only have to worry about which film you are going to watch tonight, not about the type of disc you need.

You will remember also the competition between VHS and Betamax for video tapes.

A world without standards would be bad for consumers and manufacturers alike.

Standards form the basis of success of technology we take for granted: radio, cable-TV, wi-fi, computers, mobile telephones, railroads, internet.

Standards are important to industry and consumers, and therefore they are important to the Commission.

On 25 March the College of Commissioners discussed the Digital Single Market strategy, and argued that standards "are essential for Europe's competitiveness, and [...] must be developed faster".

Standards are one of the cornerstones of the Digital Single Market.

In fact, without standards, there probably would be no Digital Single Market.

But from the perspective of competition policy, there can also be potential problems with standard setting.

Standards and Article 101

Competing companies are normally banned from getting together and forming anti-competitive agreements.

When competitors set standards together, they often eliminate competition between technologies - until a revised standard is adopted 5 to 10 years down the road.

In most cases, only the technology incorporated in the standard survives.

Even so, because of the immense benefits to consumer welfare, provided certain conditions and processes are adhered to, standard setting is usually compatible with Article 101 of the Treaty, which bans anti-competitive agreements between companies.

Our guidelines for horizontal agreements describe in detail the conditions standardisation agreements have to live up to.

In particular, there should be: First, unrestricted participation in standard-setting.

Second, a transparent procedure for adopting the standard.

Third, no obligation to comply with the standard. And fourth, access to the standard should be on Fair, Reasonable and Non-Discriminatory terms, or FRAND for short.

Standards and Article 102

Standard setting may still pose a problem from the perspective of Article 102; the abuse of a dominant position. That is what I would like to focus on today.

When all manufacturers are forced to use a standard, this can convey enormous market power to the holder of the SEP. Power that he would not have had absent the standard.

There is therefore the potential for abuse.

When they are dominant, standard essential patent holders are able to abuse their position in several ways.

- by excluding competitors from the market,
- by charging excessive royalty fees that they would not have been able to impose absent the standard,
- and by forcing competitors to accept burdensome licencing terms.

This is why we take a keen interest in standard essential patents in our competition policy and enforcement.

In 2009, we suspected chip manufacturer Rambus of engaging in a so-called "patent ambush". Rambus did not tell industrial customers of its DRAM memory chips that the patents in its products were essential to a standard. It then surprised them with a sudden claim for royalties.

We closed the case when Rambus committed to cap its royalties on these patents.

To level the playing field, before a standard is agreed, SEP-holders must commit to license them on fair terms.

Depending on the standard setting organisation, they can include them in a patent pool, license them "royalty-free", or, more usually, license them on FRAND terms.

In 2009, the IPCom case made it clear that FRAND commitments do not expire when the patent is sold.

IPCom had bought patents from BOSCH, a company that produces household appliances.

BOSCH had licensed them on a FRAND basis.

We examined allegations that IPCOM refused to honour the FRAND commitments to which Bosch had committed.

As a result IPRCom made a public declaration in which it promised to abide by the original commitments given by BOSCH.

Injunctions

More recently, we have looked at the abusive use of injunctions based on standard essential patents. To stop alleged infringers from using the patent, SEP-holders can ask courts to issue injunctions.

In the case of standard essential patents, injunctions can have far-reaching effects.

If successful, they can remove a competing product from the market.

The technology covered by the patent is, after all, essential for the standard, and without access to that patented technology, the product will not work. An injunction does not even have to succeed to cause significant damage. The threat of an injunction in itself can be devastating.

When faced with an injunction, companies may surrender outright to the demands of the patent holder rather than risk being pushed out of the market.

This way, SEP-holders may force potential licensees, even those who are willing to take a licence on FRAND terms, to accept terms they normally never would agree to.

For instance, they may force them to pay higher royalty fees, which they could not obtain for the same technology absent the standard.

SEP-holders may also force defendants to cross-license their own non-essential patents in return for the standard essential patent. Or they may oblige them to take a licence to the SEP holder's non-essential patents - even if the defendant doesn't need them.

In the end, the consumer could lose out.

If the injunction succeeds and the product exits the market, consumers have less choice.

If the licensee caves in to pressure and accepts unreasonable demands, consumers may pay higher prices.

Here again, the key question is about balance. How can patent holders defend their patents, and licensees defend themselves against the abusive use of injunctions?

Ideally, standard setting organisations would provide a balanced solution, but due to fundamental differences in interests of their members, this has proved to be an uphill battle.

Similarly, in Europe, because there is no European patent law yet, different national courts have come to different conclusions.

In 2009, the German Supreme Court was the first to tackle the anti-competitive potential of injunctions in the so-called "Orange Book Standards" case.

In a nutshell, the court concluded that alleged infringers could only mount an antitrust defence under several conditions.

First, even before signing an agreement, patentees must behave as a licensee and pay royalties, at least into an escrow account.

Second, patentees must make a binding, unconditional offer for concluding a licence. This also must be a reasonable offer, so that that the patent holder could not refuse it in light of its obligations to license on FRAND terms.

This, however, left a question open.

What does "unconditional" mean?

The word "unconditional" could be taken to mean that a licensee has to give up its rights to challenge the validity or essential nature of a patent. We believe that such an interpretation could be anti-competitive.

In part because of the lack of legal clarity, we decided to investigate the use of injunctions ourselves.

In our first decision addressing the issue, the Google/Motorola merger clearance in 2012, we expressed our concern that injunctions based on SEPs could be used to exclude competing products from the market, or to impose burdensome licensing terms.

This time last year, we concluded two cases about the use of injunctions based on SEPs via formal Decisions: *Motorola and Samsung*. Let me discuss them one by one.

Motorola

Motorola owned patents related to GPRS, part of the GSM or 2G mobile telecoms standard.

When this standard was adopted in Europe, Motorola declared its patents essential, and said it was willing to license them on FRAND terms.

In 2011, Motorola sought injunctions against Apple in Germany, in part on the basis of these SEPs.

During the proceedings, Apple defended itself by raising the Orange book defence I just discussed.

Apple made an unconditional licensing offer and deposited funds into an escrow account.

Motorola rejected the offers.

In its second offer, Apple agreed to let Motorola determine the royalties for its SEPs, subject to judicial review by German courts.

Apple made a total of six offers in which it made further concessions.

First, it allowed Motorola to terminate the agreement should Apple challenge any of the patents.

Second, Apple explicitly acknowledged that all of its devices infringed the licensed SEPs, even though for one model, it believed this not to be true.

The Commission found Motorola's behaviour to be abusive.

First of all, Motorola had committed to license its standard essential patents on FRAND terms.

From the second offer onward, when Apple allowed Motorola to set royalties in line with FRAND principles, subject to court review, Apple was a willing licensee.

Second, backed up by the threat of the injunction, Motorola demanded that Apple give up its rights to challenge the validity and infringement of any of Motorola's German SEPs.

This was a significant concession by Apple, because such challenges generally speaking have a good chance of success.

Between 2011 and 2013, the German Federal Patent Court fully annulled 44 per cent of patents and partially annulled a further 35 per cent of patents following such challenges.

In brief, Motorola had demanded that Apple do something it would probably not have done without the injunction.

In *Motorola* we took a prohibition decision, under Article 7. This is an outright ban, usually accompanied by a fine.

But, we decided not to issue a fine, because there was no case law on the subject yet, and because of the differing views of national courts on injunctions.

A prohibition decision also sets a precedent. In this case it created a safe harbour for companies, where they can find shelter from injunctions. This safe harbour is the following:

Where the holder of an SEP has given a commitment to license on FRAND terms in the standard setting process, a potential licensee is safe from injunctions by the SEP holder as long as the potential licensee has shown its willingness to enter into a licence on FRAND terms.

What a willing licensee is depends on the facts of the case and must be examined on a case-by-case basis. A licensee can demonstrate willingness, for instance, as in *Motorola*, by allowing courts to settle disputes about fair and reasonable royalties.

Samsung

The same time as we took our decision on *Motorola*, we also accepted legally binding commitments from Samsung.

Samsung was a commitment decision under Article 9. In this type of decision, we don't make a final finding, but we accept commitments from the parties to swiftly resolve competition concerns.

Samsung owned various standard essential communication telecommunications patents (UMTS) which it had committed to license on FRAND terms.

In 2011, Samsung sought injunctions based on these SEPs. On the basis of the evidence at hand, we had preliminarily concluded in a Statement of Objections that Apple was a willing licensee, and we informed Samsung that their injunctions were likely an abuse of a dominant position.

Unlike *Motorola*, Samsung offered us commitments. Samsung proposed a specific licensing framework, and promised not to seek injunctions against licensees of its SEPs who agreed to abide by the framework's conditions.

The framework provides for a 12-month negotiation period. Any dispute about what is "fair, reasonable and non-discriminatory" will be resolved by a court or by an arbitrator.

This assures potential licensees of the Samsung patents that they are protected from SEP-based injunctions.

Basically, in *Motorola* we designed a safe harbour, which outlines the legal conditions for protection from injunctions.

The *Samsung* case offers one example of how a safe harbour can be built in practice.

These two cases taught us two basic lessons.

First, it is generally legitimate for holders of patents to seek injunctions if someone is infringing their patents.

Second, seeking an injunction can be abusive, however, if:

- the holder of a standard essential patent has given a commitment to license under FRAND terms during a standard-setting process, and
- the licensee is willing to enter into a licence under FRAND terms.

An important achievement of the *Motorola* and *Samsung* cases is that they have limited the abusive use of injunctions as a "weapon".

Thanks to these cases, we believe that the balance between patent holders and licensees in Europe is now close to optimal: *shaken, not stirred*.

We are looking forward to seeing whether the European Court of Justice will set out similar principles in its pending consideration of the preliminary reference currently before it in the *Huawei/ZTE* case.

In this case mobile phone producer ZTE claims it is a willing licensee and that its competitor Huawei is abusing its dominant position by seeking injunctions.

In his recent Opinion, Advocate General Wathelet argues in line with our *Motorola* and *Samsung* decisions.

In brief: if commitments on FRAND terms have been made during the standard setting process, it can be an abuse of a dominant position to seek an injunction against a willing licensee.

PAEs

But there are always new possible threats that can upset that balance. Which brings me to another fictional character – the *troll*.

"Patent trolls" is a term used to describe companies whose only business is

to make money through patents. They don't themselves manufacture anything, or engage in research and development.

Typically, they sue companies who are allegedly infringing their patents.

I much prefer the more neutral term "patent assertion entities" or PAEs.

I should stress that we have nothing against the business model as such. Enforcing and monetising intellectual property is a perfectly legitimate way of doing business.

Some patent assertion entities own tens of thousands of patents. They don't just sue manufacturers. In the US, one company demanded a payment of \$2,500 each from more than 8,000 coffee shops, hotels and retailers for allegedly infringing the patent in the Wi-Fi they provided for their customers.

In the US, Patent Assertion Entities have become one of the main sources of litigation. In 2012, they were responsible for 62 per cent of all infringement suits.

For the time being, they have been less active in Europe. This seems to be the case for various reasons:

First, in Europe, the loser pays for a court battle – which increases the risks for whoever brings the case.

Second, damage awards are generally much lower.

Third, the courts are specialist patent courts – which reduces uncertainty about the outcome.

But I think we can also thank our enforcement efforts. We hold patent assertion entities to the same standards as other companies.

First of all: It is legitimate to defend property rights – also for patent assertion entities.

Second, the lessons from our cases apply to PAEs, too. The Commission's position in the IPCom investigation made clear that FRAND commitments travel with standard essential patents if they are sold.

And standard setting organisations, such as ETSI, have amended their IPR policies in that regard.

Third, thanks to the *Samsung* and *Motorola* cases, it is much harder for the holders of standard essential patents to use injunctions abusively.

This is important, because patent assertion entities often litigate on standard essential patents.

Conclusion

In conclusion,

I hope you will remember three things from what I said.

First, our case work is essential to broader Commission goals, such as the Digital Single Market.

Second, by providing precedents, antitrust enforcement can help achieve legal clarity.

Third, we are committed to maintaining the balance between patent holders and licensees. To keep it *shaken, not stirred*.

We will remain on our guard in our antitrust enforcement.

Because holders of SEPs find new ways of challenging alleged patent infringements.

In a recent case before the Mannheim district court, the SEP-holder sued not the *producer* of the phone, but the *distributor* of the phone: Deutsche Telekom.

This is a new development and we are watching it closely.