



Patents – Competition Law – European Digital Single Market

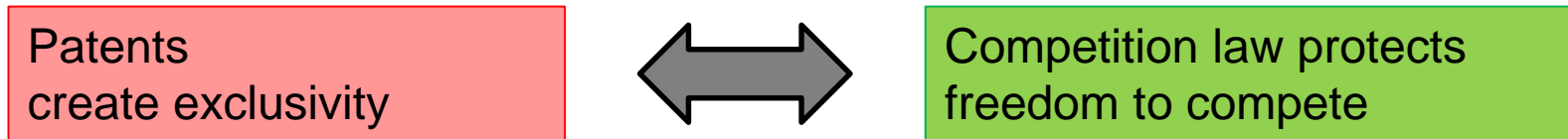
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Is There A Tension Between Patent And Competition Law?

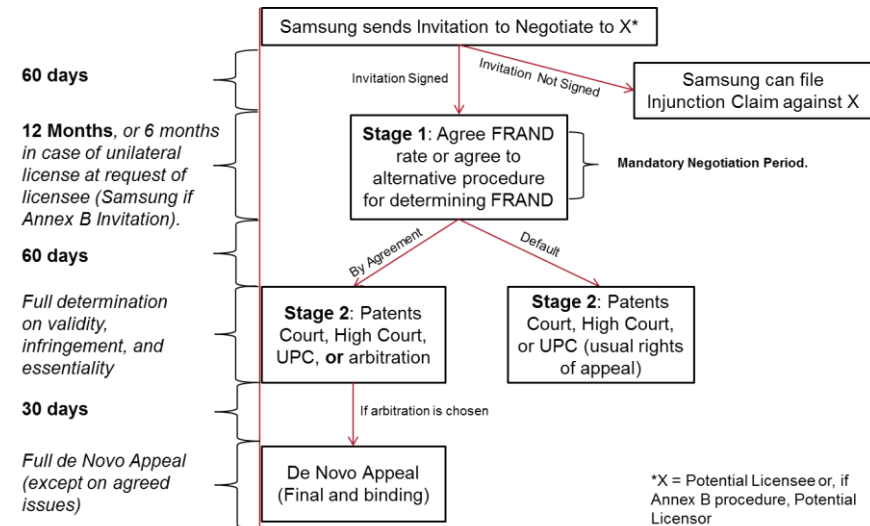


- But patent law's objective is to promote innovation by "*adding the fuel of self-interest to the fire of imagination*" (Abraham Lincoln)
- Promotion of innovation is a goal of competition law too
- Competition concerns only arise if patent owners use patents in ways that subvert the objectives of patent rights and are inconsistent with their essential function
- Similar considerations also under EU Treaty free movement rules on exhaustion of IP rights

Standard Essential Patents And Injunctions

■ EU Commission *Samsung* and *Motorola* cases:

- Raised antitrust concerns about seeking injunctions for standard essential patents
- Samsung commitments define complex mechanism for deciding when SEP owner may seek injunction
- Quasi-legislation through competition law enforcement?

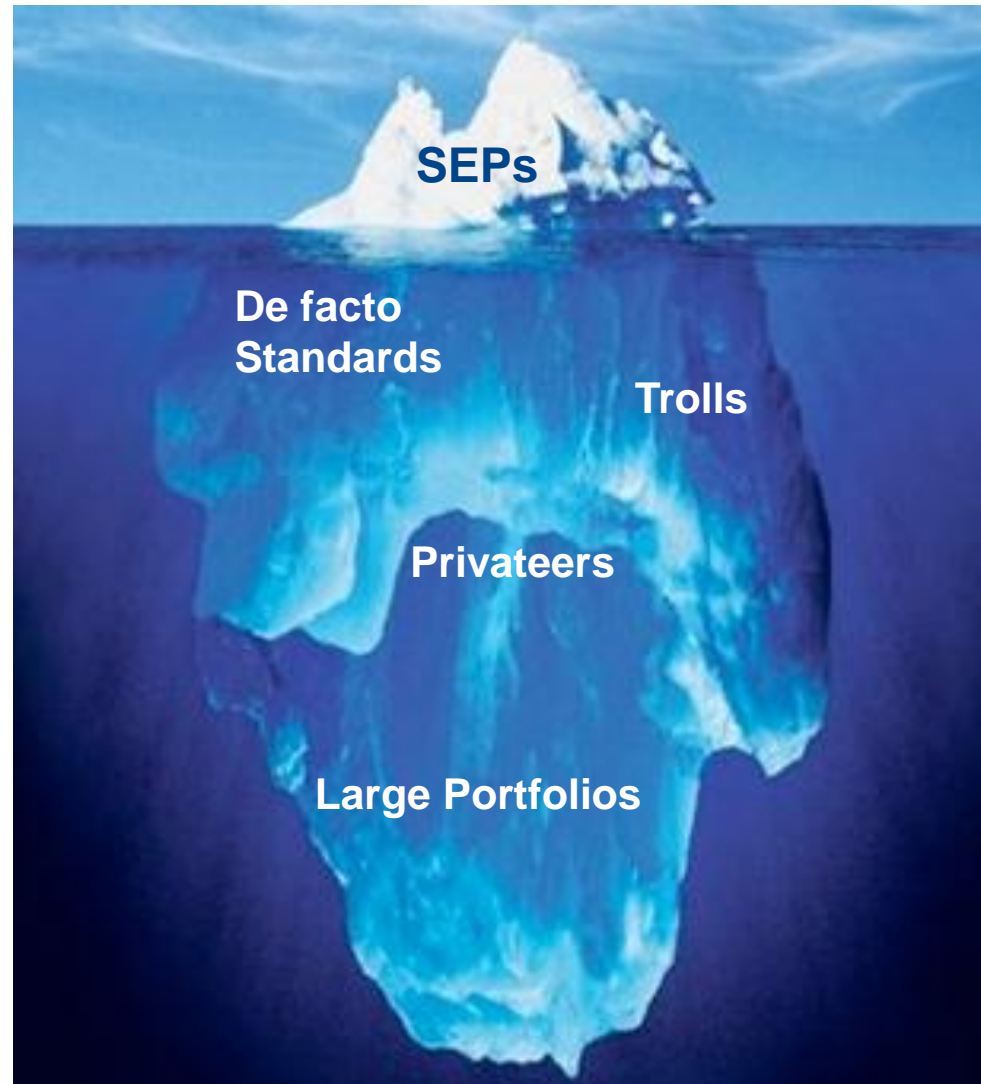


■ Is this a competition law issue all?

- Problem seems to have been more lack of harmonization of national judicial rules
 - Commission's concerns were directed against BGH Orange Book principles
 - Preliminary ruling in Huawei/TZE should create clarification

Beyond Standard Essential Patents


- De facto standards
 - Should they not be treated the same as SEPs?
 - See *Microsoft*
- Patent Assertion Entities
 - May help smaller innovators to monetize
 - But can use threat of injunctions to extract supra-competitive royalties
 - Shielded against counter-suits
 - Does reliance on injunctions by PAE subvert essential function of patents?



A Holistic Approach To Hold-Up Problems

- Antitrust has a role to play, but has its limits
 - Case specific, complex, long proceedings
- Free movement of goods
 - Treaty free movement rules as basis for US-style *eBay* balancing principles?
 - Seeking injunction where interest is purely financial (SEPs, PAEs) as a disproportionate restriction of trade?
- Procedural rules
 - Unified patent court: “Injunction gap” concern
 - Possibility for injunction to be issued before review of validity of patent
- Revision of merger control thresholds?
 - Introduce possibility to review acquisition of high-value patent portfolios irrespective of turnover





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