



EUROPEAN COMMISSION

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Intellectual property and competition policy

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No inherent conflict between IP protection and competition policy

I thank the organisers of this 8th IP Summit for their kind invitation to come to Paris today.

Your conference gives me the opportunity to talk about the connection between intellectual property and competition policy.

This issue, grown in importance with the rise of the knowledge economy, is becoming even more crucial in the current juncture.

There are signs that Europe is rebounding from this long crisis. There are many views on how to sustain the upswing, but everyone agrees that we must invest more and better on research and innovation.

This means, among other things, designing public policies and legal systems to protect, promote and reward innovation.

How to do so?

From time to time I have heard opinions in the IP community expressing fears that competition policy enforcement and the protection of IP rights have mis-aligned objectives.

Of course, I don't share this view.

In their different ways, both the patent system and the system that enforces competition law in the EU pursue common goals.

A well-functioning IPR system can in fact promote competition by encouraging firms to invest in innovation.

And both competition policy and the intellectual-property protection system do contribute to create the right framework for innovators.

As a competition authority, we intervene only when the IP rights are abused or used as a cover-up for anti-competitive practices – which is clearly the exception, not the rule.

Competition policy, IPs, and standards

We sometimes see in our practice that such abuse takes the form of a refusal to license.

Refusing to licence a patent or other IP rights can lead to such negative impacts on competition that it is justified to oblige the holders to license out their IPs.

I will recall here the landmark cases involving Magill in the 1990's on TV listings, IMS Health in the pharmaceutical sector, and subsequently Microsoft.

In all these cases, the European Courts have upheld our decisions establishing that refusing to license an IPR by a dominant company may constitute an abuse of dominant position.

But the Courts have also made it clear that refusing to licence can be an infringement of competition law only in 'exceptional circumstances'; that is, when a company needs access to the IPR to enter the market and effective competition would be eliminated if the license were not granted. And this jurisprudence draws a clear boundary for our enforcement work.

Over the years, we have also seen another problematic area; the use of patents in standard-setting processes. Here, the Rambus case of 2009 is a good example.

The case revolved around a so-called "patent ambush". Rambus had failed to disclose that it had patent rights on certain kinds of memory chips before technical standards involving these same chips were adopted.

As a result, the industry was never given the choice to select another technology and Rambus obtained a standard-essential patent, which it could have used to extract higher royalties. In the end, a commitments decision allayed our competition concerns.

Horizontal Guidelines

In addition to our decisions, we have also given guidance on standardisation processes in our 2010 antitrust guidelines on co-operation agreements, which devote a whole section to them.

These Horizontal Guidelines set out the criteria under which the Commission will not take issue with standard-setting agreements. These criteria include clear rules on disclosure and FRAND commitments.

The underlying principle of these rules is that prevention is better than cure. To the extent possible, industries should avoid creating opportunities for abuse by individual companies. And the best way to do it is building good safeguards when establishing standard-setting organisations and deciding on their procedures.

Technology Transfer Agreements

More guidance is given in the antitrust rules on licensing agreements for the transfer of technology –which will be renewed next year.

These rules are designed to give incentives to innovation but also to prevent that these agreements are misused to partition markets or foreclose new technologies.

For example, while the rules give a safe harbour to exclusive licensing, they do not allow restrictions on the use of the licensee's own competing technology or research.

The system has worked quite well since its introduction in 2004 and stakeholders have only asked for incremental changes – which is what we have done in the new draft rules submitted for consultation this spring.

Let me tell you about one proposed change regarding patent pools.

Patent pools can give companies easier access to necessary inputs, such as standard essential patents, and ideally provide them with a one-stop-shop at a cheaper price.

However, there are still too few of them out there. To encourage their creation, we are planning to introduce more guidance on our future assessment of patent pools.

In short, the new rules will set out the "safe harbour" principles under which such pools will raise no competition concerns. This will give a push to pro-competitive pools and help companies navigate through "patent thickets" which – as you know – can grow very dense in some sectors these days.

SEPs and the smartphone wars

Ladies and Gentlemen:

I will now turn to our recent and on-going enforcement action involving intellectual property rights and begin with the so-called smartphone wars.

In my view, the proper starting point for analysing the strategic use of standard-essential patents is the standard-setting context.

We all agree that standardisation can bring enormous benefits because it allows companies to focus on innovation, safe in the knowledge that their products will work together.

However, there are inherent competition risks when a group of companies, many of them competitors, come together to agree on a common technology to the exclusion of other technologies.

That is why standard-setting organisations generally ask members to commit to license on FRAND terms the patents that are essential to the standard.

And, as I've just mentioned, this would allow companies to benefit from our safe harbour for standardisation agreements in our Horizontal Guidelines.

The requirement explains our concerns in the on-going Samsung and Motorola cases. Patent holders should not seek injunctions based on SEPs against companies that are willing to enter a licence on FRAND terms.

As many of you will know, Samsung has offered commitments to address our competition concerns in relation to its use of injunctions.

Samsung essentially proposes not to enjoin companies which are willing to have the dispute settled by a court or arbitrator.

We have market-tested these commitments and will take account of the feedback when we discuss with Samsung possible improvements to their commitments in the coming weeks.

In the Motorola case, the Commission has recently received questions from the Mannheim District Court, which is currently one of the first courts in Europe conducting a "FRAND setting trial".

The questions regard the compatibility with EU competition law of Motorola's seeking and enforcing injunctions in Germany. The Commission will try to give the court a useful answer as quickly as possible.

To repeat and to put it very simply, I believe that injunctions should not be available when there is a willing licensee.

Ideally, this principle should be implemented by the standard-setting organisations themselves. But since that is not happening, I am willing to provide clarity to the market through competition enforcement.

SEP issues in mergers

Apart from these well-known cases, we have also encountered SEP-related issues in two merger cases that we have cleared recently; Google's acquisition of Motorola and Microsoft's acquisition of the mobile-phone unit of Nokia.

As to the first deal, we concluded that Google's acquisition of Motorola's large portfolio of standard-essential patents for mobile devices would not lead the merged entity to foreclose other suppliers, also thanks to existing FRAND commitments.

The story is different in the Microsoft/Nokia case. Since Nokia will retain its patent portfolio, some have claimed that the sale of the unit would give the company the incentive to extract higher returns from this portfolio.

These claims fall outside the scope of our review. When we assess a merger, we look into the possible anti-competitive impact of the company resulting from it. We cannot consider what the seller will do.

If Nokia were to take illegal advantage of its patents in the future, we will open an antitrust case – but I sincerely hope we will not have to.

Patent assertion entities

In other words, the claims we dismissed were that Nokia would be tempted to behave like a patent troll or – to use a more polite phrase – a patent assertion entity.

Whatever the name, these are organisations whose only commercial activity consists in licensing and enforcing patents – and I understand that they are a growing concern.

According to some studies, 40% to 60% of all patent lawsuits in the US are initiated by patent trolls – including prominent ones targeting retailers and small businesses.

This has prompted our colleagues at the Federal Trade Commission to look more closely into the issue and better understand the impact of these organisations on innovation and competition.

For a variety of reasons, patent trolls have been less active in Europe than in the US. However, this could change in the future.

You can rest assured that we are watching this space very carefully. DG competition will hold patent trolls to the same standards as any other patent holder.

Scraping issue in the Google investigation

To round up the discussion of the IP issues we encounter in the IT sectors, let me briefly mention our on-going investigation of Google's business practices.

One of the four competition concerns I set out in that case has a connection with IP.

As you may know, Google creates a link between getting the right to use material from other sites on its specialised search services and the appearance that these sites have on Google's general search results – a practice that allows Google to benefit from investments made by other firms.

I have asked Google to sever this link to restore competitive incentives. This competition issue is irrespective of the IP situation because it is about the link that Google creates between general searches and specialised ones – such as when you look for news, items to buy online, and restaurants in your area.

Recently several European publishers have asked us to go further and put in place mechanisms that would allow them to tell Google exactly how it can use their content – which they claim to be IP protected.

The reasons for their demands are not difficult to understand, but it is important to realise that competition-law tools have their limits. They cannot be a panacea for issues that relate solely to the nature of IP protection.

Patent settlements in the pharmaceutical sector

Ladies and Gentlemen:

I will now move out of the communication industries to look at the pharmaceutical sector, which is another area of our work where we sometimes have to deal with intellectual property rights.

Patent settlements have played a role in the case we decided last June against the Danish company Lundbeck. Other companies involved in our on-going investigations are – among others – Servier, Cephalon and Teva.

A concern that we have in these cases is that the settlement of a patent dispute can be used as a cover-up for agreements that delay the sale of a generic medicine in return for a payment by the originator to the generic company.

However, not all pay-for-delay agreements involve patents. In a case that will be decided very soon, we have been investigating whether the Dutch subsidiaries of Johnson & Johnson and Novartis used a commercial agreement to avoid competing against each other.

Our concern has been that these agreements may have allowed the producers of generic medicines to share the monopoly rent of the originator company.

These cases follow an inquiry in the pharmaceutical sector the Commission conducted in 2008-2009. The study found that over 20% of all patent settlements concluded between 2000 and 2008 were potentially problematic.

We have since monitored the industry every year and the potentially problematic settlements have stabilised to around 10% of the total.

The latest monitoring report, covering the settlements concluded in 2012, is published today. Its findings confirm the trend. Although the total number of settlements has increased, around 7% of these are potentially problematic.

These results show that our scrutiny is not forcing companies to "litigate each patent dispute to death" –as is sometimes suggested by the industry. On the contrary, companies can often solve their disputes in a manner that stays on the right side of EU competition law.

Unitary Patent & Unified Patent Court (UPC)

Before I conclude my presentation, I would like to say a few words on the nascent common patent system in Europe.

From the perspective of competition policy, there is no doubt that the introduction of a unitary patent and the creation of a Unified Patent Court will cut costs for innovative firms and reinforce the internal market.

I am looking forward for the new Court to start its operations, which – as we have seen in the cases I have presented to you today – will have some connection with Europe's competition authorities and their action.

Looking ahead

Let me conclude with a look ahead.

The role of intellectual property in our economies has grown significantly over the last decades, and the trend will likely continue in the future. One only needs to look at the IPR policies of major economies –such as the US, China and the EU – and, maybe more tellingly, at the way how many companies in innovative industries see competition unfold.

In many commercial transactions, IP is among the most valuable assets. As is evident from the smartphone wars I referred to earlier, for many companies IP is crucial to gain an edge over their competitors and avoid falling into what some people call "commodity hell".

For EU competition enforcement and policy, this means that cases involving IP are also likely to remain on our radar.

Although the intersection of competition and IP can be a very challenging spot, I believe that we have been up to the challenge so far.

Our laws have proved to be sufficiently flexible to take into account a range of different market characteristics.

Overall, our enforcement record shows that IP cases are rare and that we tread very carefully. However, our record also shows that IP is not immune from competition law scrutiny and that we will continue to intervene if necessary.

Thank you.