EU Competition Law
Current Issues in a Global Context

Brussels - 20 May 2016
Session 1
Merger Control - Recent remedies Experiences

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EU COMPETITION LAW: CURRENT ISSUES IN A GLOBAL CONTEXT

Merger Control – Recent Remedies Experiences
20 May 2016

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The views expressed in this presentation are personal and do not necessarily reflect the views of the European Commission
Overview

• Current trends in merger remedies
  • Preference for structural solutions
  • Upfront buyer and fix-it-first

• Remedies in 4 to 3 mobile mergers
  • Case-by-case assessment
  • The Three/O2 case in the UK
Current trends in merger remedies

- Preference for structural solutions
  - 70% of merger decisions (2011-2015) involved divestiture remedies
  - Entail lasting structural change in the market
  - No need for long-term monitoring

- Upfront buyer and fix-it-first
  - GE/Alstom (hybrid upfront buyer/fix-it first solution)
  - Liberty Global/base (fix-it-first)
Remedies in 4 to 3 mobile mergers

- Case-by-case assessment
  - Market structure
  - Competitive role of merging parties
  - Country-specific issues (e.g., network sharing)
  - Learn from implementation of previous remedies

- Three/O2 UK
  - First prohibition decision in recent consolidation wave
  - Strong competition concerns (including UK specific issue of network sharing)
  - Remedies insufficient to address these concerns
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Merger Control - Recent remedies Experiences

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Why coordinate?

Merging parties’ perspective

Proliferation of merger control means many more jurisdictions are “priority” than in the past

Agencies’ failure to coordinate may lead to:

→ Inconsistent remedies
→ Uncertainty about outcome, timing, and ability to preserve synergies

Coordination is essential to minimize risk and avoid delay

But even successful coordination does not guarantee that agencies reach the same conclusions
What to coordinate?

Where can a divergence of views negatively impact parties?

Type of remedy
- Structural or behavioral?

Divestiture package
- Scope of assets to be included?
- Full business line divestiture rather than “grab bag of assets”?
What to coordinate (cont’d)?

**Buyer**
- Upfront buyer needed?
- Is the buyer “acceptable”?

**Terms of divestiture agreement**
- Conveys all necessary assets?
- Transitional services?

**Remedy order**
- Timing and process to implement remedy
- Hold separate requirements
- Monitoring/divestiture trustee
How to coordinate?

*What can merging parties do to facilitate coordination?*

Establish a coherent global merger strategy from the outset; reviews should be conducted in parallel.

Provide waivers to encourage the exchange of confidential information.

Participate in joint calls/presentations.

Provide consistent information to all agencies.

Take a proactive approach to remedies.
Where can we improve?

How to build better practices in the future?

More mature agencies should continue sharing best practices and “lessons learned” with newer agencies


Deferral to more mature agencies – when does it make sense rather than “piling on”? When one jurisdiction has a much smaller market than others?

Full participation by all relevant jurisdictions
Session 1

Merger Control - Recent remedies
Experiences

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Merger Control – Recent Remedies Experiences

Commissioner Terrell McSweeney*
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EU Competition Law: Current Issues in a Global Context

May 20, 2016
Brussels, Belgium

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International Cooperation

- FTC and DOJ frequently cooperate with non-U.S. competition authorities.
- Cooperation enables agencies to:
  - Identify/analyze issues of common interest; and
  - Promote consistent outcomes and convergence.
- Waivers typically allow more effective collaboration across multiple competition agencies.
  - [https://www.ftc.gov/policy/international/international-competition/international-waivers-confidentiality-ftc-antitrust](https://www.ftc.gov/policy/international/international-competition/international-waivers-confidentiality-ftc-antitrust)
ICN’s recently-issued Merger Remedies Guide highlights the overarching principles for remedies, as well as procedural considerations (e.g., timing, remedy design, and vetting of potential divestiture buyers).


Example: ZF/TRW

- FTC concluded proposed transaction likely to substantially reduce competition for manufacture and sale of heavy vehicle tie rods in North America.
- EC had competitive concerns regarding chassis components.
- To address U.S. and EC concerns, merging parties divested B-side’s linkage and suspension business in North America and Europe.
- No evidence that divestiture of these assets would eliminate efficiencies that otherwise resulted from the transaction.
- [https://www.ftc.gov/enforcement/cases-proceedings/141-0235/zf-friedrichshafen-trw-automotive-matter](https://www.ftc.gov/enforcement/cases-proceedings/141-0235/zf-friedrichshafen-trw-automotive-matter)
Structural vs. Conduct Remedies

- FTC has a preference for structural remedies over conduct/behavioral remedies.
  - Directly addresses competitive harm.
  - Tends to require less ongoing monitoring.
- FTC may also consider temporary non-structural remedies (e.g., supply agreements, technical assistance) to help divestiture buyer get up to speed in the market.
Up-Front Buyers (EC: “Fix it First”)

- Common practice in the United States.
- Respondent cannot close the proposed merger until an acceptable divestiture buyer is found.
  - Shifts costs of delaying the divestiture to respondent.
  - Prevents deterioration of assets pending divestiture (e.g., supermarkets).
Divested Assets – How Much Is Required?

- At times, FTC requires respondents to divest more than relevant assets of competitive concern in order to make the to-be-divested assets more attractive to potential buyers.

- Example: CHS/HMA – order required divestiture of all services and operations affiliated with hospital, even though competitive concerns limited to general acute care.

- Example: Zimmer/Biomet – competitive concerns regarding overlapping bone cement business, but order required divestiture of bone cement accessories as well because hospitals and GPOs frequently purchased together.
  - [https://www.ftc.gov/enforcement/cases-proceedings/141-0144/zimmer-holdings-inc-biomet-inc](https://www.ftc.gov/enforcement/cases-proceedings/141-0144/zimmer-holdings-inc-biomet-inc)
Example: *FTC v. Sysco*

- Merging parties proposed divestiture of 11 distribution centers (DCs) to largest regional broadline distributor, PFG.
- District court held assets must be sufficiently comprehensive that buyer will use them in relevant market.
- Even with divestiture, PFG would have had only one-third as many DCs as merged Sysco/US Foods.
- PFG would have lacked necessary nationwide geographic coverage and likely faced higher costs of goods sold.
- PFG internal documents were consistent with court’s conclusions. Documents suggested PFG needed more than 11 DCs to establish a national broadline network.

[https://www.ftc.gov/system/files/documents/cases/150623syscomemo.pdf](https://www.ftc.gov/system/files/documents/cases/150623syscomemo.pdf)
 FTC’s Remedy Study

- First study published in 1999.
  - [https://www.ftc.gov/sites/default/files/documents/reports/study-commissions-divestiture-process/divestiture_0.pdf](https://www.ftc.gov/sites/default/files/documents/reports/study-commissions-divestiture-process/divestiture_0.pdf)
- FTC staff currently engaged in new 6(b) study of the appx. 90 orders issued from 2006-2012.
  - Evaluating both structural and non-structural relief.
  - [https://www.ftc.gov/policy/studies/remedy-study](https://www.ftc.gov/policy/studies/remedy-study)
Session 2
Antitrust and IP - Standard Essential Patents and Patents Settlements

Brussels - 20 May 2016
REVERSE PAYMENT
SETTLEMENTS AS OBJECT
RESTRICTIONS

Professor Richard Whish
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20 May 2016
REVERSE PAYMENT SETTLEMENTS AS OBJECT RESTRICTIONS

RECENT COURT OF JUSTICE JUDGMENTS ON OBJECT RESTRICTIONS

- CASE C-32/11 ALLIANZ HUNGARIA
- CASE C-67/13 GROUPEMENT DES CARTES BANCAIRES V COMMISSION
- CASE C-373/14 TOSHIBA V COMMISSION
- CASE C-286/13 DOLE V COMMISSION
- CASE C-293 AND 294/13 DEL MONTE V COMMISSION
- CASE C-231/14 ING PENSII
- CASE C-345/14 MAXIMA LATVIYA
REVERSE PAYMENT SETTLEMENTS AS OBJECT RESTRICTIONS

SOME RELEVANT DATES

- **ALLIANZ HUNGARIA** - 14 MARCH 2013
- **CARTES BANCAIRES** - 11 SEPTEMBER 2014
- **TOSHIBA** - 20 JANUARY 2016
  - THE COURT DECLINED THE ADVOCATE GENERAL’S INVITATION TO RECONCILE ALLIANZ AND CB
- **LUNDBECK DECISION** - 19 JUNE 2013
- **SERVIER DECISION** - 9 JULY 2014
- BOTH DECISIONS AFTER ALLIANZ HUNGARIA AND BEFORE CARTES BANCAIRES
RECENT REVERSE PAYMENT DECISIONS

- **LUNDBECK** - RESTRICTION BY OBJECT. FINES ON LUNDBECK AND 4 GENERICS OF €146 MILLION EUROS

- **SERVIER** - RESTRICTION BY OBJECT AND EFFECT; ALSO AN INFRINGEMENT OF ARTICLE 102. FINES ON LUNDBECK AND 5 GENERICS OF €427 EURO

- **PAROXETINE** (UK CMA) - RESTRICTION BY OBJECT AND EFFECT; ALSO AN ABUSE. FINES ON GSK AND 2 GENERICS OF £43 MILLION
WHAT IS THE TEST TO ESTABLISH AN OBJECT RESTRICTION?

-CARTES BANCAIRES, PARAGRAPHS 50

‘CERTAIN FORMS OF COORDINATION BETWEEN UNDERTAKINGS CAN BE REGARDED, BY THEIR VERY NATURE, AS BEING HARMFUL TO THE PROPER FUNCTIONING OF NORMAL COMPETITION’

-CARTES BANCAIRES, PARAGRAPHS 53

‘REGARD MUST BE HAD TO [THE AGREEMENT’S] PROVISIONS, ITS OBJECTIVES AND THE ECONOMIC AND LEGAL CONTEXT OF WHICH IT FORMS A PART’
WHAT IS THE TEST TO ESTABLISH AN OBJECT RESTRICTION?

**CARTES BANCAIRES, PARAGRAPH 57**

‘THE ESSENTIAL LEGAL CRITERION ... IS THE FINDING THAT SUCH COORDINATION REVEALS IN ITSELF A SUFFICIENT DEGREE OF HARM TO COMPETITION’

**CARTES BANCAIRES, PARAGRAPH 58**

‘THE GENERAL COURT ERRED IN FINDING ... THAT THE CONCEPT OF RESTRICTION OF COMPETITION BY ‘OBJECT’ MUST NOT BE INTERPRETED ‘RESTRICTIVELY’

**NOTE THAT LUNDBECK AND SERVIER PRECEDE THIS FINDING**
WHAT IS THE TEST TO ESTABLISH AN OBJECT RESTRICTION?

- CAN THE ‘OBJECT BOX’ GET BIGGER? - CAN NEW OBJECT RESTRICTIONS BE DISCOVERED?
  - YES, IN PRINCIPLE: SEE EG ALLIANZ HUNGARIA

- BUT REMEMBER THE PRINCIPLE OF ‘RESTRICTIVE’ INTERPRETATION

- NOTE THAT MATRIX ARGUED IN SERVIER (FN 1596) THAT THE AGREEMENT COULD NOT RESTRICT BY OBJECT AS THERE WAS NO PRECEDENT ... (!!!)
THE FINDING OF AN OBJECT RESTRICTION IN SERVIER

SECTION 5.1.1 - RESTRICTIONS OF COMPETITION BY OBJECT: PARAS 1104-1124

- HOW CONSISTENT IS THIS SECTION WITH THE COURT OF JUSTICE’S SUBSEQUENT JUDGMENT IN CARTES BANCAIRES?
  - FOR EXAMPLE PARA 1111 - IT IS SUFFICIENT TO BE AN OBJECT RESTRICTION IF THE AGREEMENT HAS THE POTENTIAL TO HAVE A NEGATIVE IMPACT ON COMPETITION
  - PARA 1116 - IT IS NOT NECESSARY FOR THE RESTRICTION TO BE ‘OBVIOUS’
  - WHAT ABOUT THE REQUIREMENT TO INTERPRET RESTRICTIVELY?
THE FINDING OF AN OBJECT RESTRICTION IN SERVIER

- THE COMMISSION SETS OUT ITS TEST IN PARAGRAPH 1154 OF SERVIER FOR A RESTRICTION BY OBJECT
  - AGREEMENT BETWEEN ACTUAL OR POTENTIAL COMPETITORS
  - THE GENERIC AGREES TO LIMIT ITS INDEPENDENT EFFORTS TO ENTER THE MARKET(S)
  - THERE IS A TRANSFER OF VALUE FROM THE ORIGINATOR WHICH ACTS AS A SIGNIFICANT INDUCEMENT TO LIMIT ENTRY
CONCLUDING THOUGHTS

- **THE ALLIANZ HUNGARIA PROBLEM:** THERE IS NO ‘THIRD’ BOX MIDWAY BETWEEN OBJECT AND EFFECTS RESTRICTIONS

- **DO NOT FORCE RESTRICTIONS INTO THE OBJECT BOX FOR ADMINISTRATIVE CONVENIENCE (EG THE UK OFT IN TOBACCO?)**

- **FORCING CASES INTO THE OBJECT BOX UNDERMINES THE CONCEPT OF OBJECT INFRINGEMENTS AND MAKES IT MORE DIFFICULT TO JUSTIFY**
REVERSE PAYMENT SETTLEMENTS AS OBJECT RESTRICTIONS

THANK YOU FOR YOUR ATTENTION!
Session 2
Antitrust and IP - Standard Essential Patents and Patents Settlements

Brussels - 20 May 2016
The Continuing Search of US Antitrust for a Role in Standard Setting

Mathew Heim, Vice President & Counsel

Speaking in a Personal Capacity
US Enforcement Agencies Remain Focused On Risks of SEP Hold Up

- Continued commentary that antitrust has a role in connection with assertion of standard essential patents:
  - “Patent holders may seek to take advantage of that market power [created when patented technology is incorporated in a standard where high switching may exist] by engaging in patent hold-up, excluding a competitor from a market or obtaining an unjustifiably higher price for its invention than would have been possible before the standard was set.” DOJ Acting AAG Joseph F. Wayland (New York, September 21, 2012)
  - “A holder of patented technology essential to implementing a standard . . . may be able to take advantage of . . . lock-in by demanding extra rents.” DOJ AAG Bill Baer (Florence, Sept. 11, 2015)
US Enforcement Agencies Remain Focused On Risks of SEP Hold Up

• Actual instances of **objectively established competitive harm** from assertion of SEPs at best rare:
  – Market trends continue to point to highlight dynamic ecosystem
  – Few if any US injunctions or exclusion orders related to SEPs granted since eBay
  – Instances of hard enforcement actions?

• But much ‘soft’ law:
  – Concerns that soft law will create “*greater uncertainty for patent holders about their contractual obligations, intellectual property protections, and Constitutional rights, as well as conflict between the Commission and other institutions with authority in these matters.*” FTC Comm Maureen Ohlhausen, Dissenting Statement, *In the Matter of Motorola Mobility LLC and Google Inc.* January 3, 2013
  – Theoretical risks of hold-up from assertion of SEPs must be acknowledged, but unlike similar risks arising in other circumstances where transaction specific commitments are made and opportunistic conduct occurs, the courts can, and do, interpose themselves into the assessment of alleged anticompetitive behaviour
Antitrust’s Role in Addressing SEP Hold Up Must be Consistent with Antitrust Principles

- Antitrust is unsuited to address claims of “excessive” royalties absent showing of objectively established exclusionary conduct, even assuming a SEP holder has market power lawfully acquired by inclusion of the patented technology in a standard and effective implementation.
  - “[C]harging of monopoly prices . . . is . . . what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth.” 

- Increased prices or increased barriers to entry for a single market participant - *i.e.*, a standards implementer - does not establish antitrust harm - antitrust laws do not protect competitors, but rather competition.

- Alternative avenues exist for resolving SEP disputes
  - Courts are resolving FRAND royalty disputes under contract and patent laws - see, *e.g.*, Microsoft v. Motorola; Innovatio; Ericsson v. D-Link; CSIRO v. Cisco
  - Clarity regarding ability to obtain injunctive relief for infringement of SEPs has emerged - see, *e.g.*, Apple v. Motorola; Huawei v. ZTE
  - Antitrust agencies address specific conduct on case-by-case basis through tailored remedies - see, *e.g.*, FTC Bosch and Google/Motorola Mobility Consent Decrees
Antitrust Advocacy and Intervention in SEP Disputes Must be Cautiously Pursued

- Continued reliance on preconceived notions of theoretical competitive harm and suggested theoretical solutions has created risks to innovation
  - This focus has led to the growing adoption of laws and enforcement guidelines that impose “increasingly onerous limits on SEP owners’ ability to assert their rights.” FTC Commissioner Ohlhausen, *Antitrust Oversight of Standards - Essential patents: The Role of Injunctions*, (Beijing Sept. 12, 2015)
  - Advocating on competition grounds in favor of specific rules-based IPR policies - e.g., the IEEE Patent Policy - ignores inefficiencies resulting from such rules - e.g., decreased contribution of technology for inclusion in standards; delay in adoption of standards or development of proprietary technology

- Agency advocacy should promote limiting principles for the role of antitrust in SEP matters. Such a discourse may be developing:
  - “It is hard to justify antitrust intervention in a basic commercial dispute. If there is not bad conduct by the patent holder, no improper use of enhanced market power, but an assertion of lawful patent rights, competition enforcers need to stand down.” US DOJ AAG Baer (Florence Sept. 11, 2015).
  - “The fundamental question comes down to how much the government should intervene on either side - where we should draw the line. How strong should our intellectual property protections be? Ultimately, this is a choice for Congress.” FTC Comm. McSweeney (Washington DC April 20, 2016).
Six Proposals for Competition Agencies

1. Competition law should not regulate the traditional scope of patent rights, the balance struck in the *social contract*, or the role of the courts

2. Competition law should not seek to (re)define ‘legitimate’ use and the purpose of the patent system

3. The well-established limitations of antitrust intervention in the patent and its enforcement system should be applied consistently, for the sake legal certainty

4. Competition policy should not let theory overcome observable facts

5. Limiting principles and safeguards to antitrust action are needed, lest antitrust enforcement:
   - adversely impact the incentives to invest in risky R&D and the dynamic efficiency created by patent systems
   - perversely incentivises patent infringement or increases incidence of disputes and litigation

6. Policy evolution should not take place through soft law, nor can rights be abrogated on the *ipse dixit* of the regulator, without the opportunity of rigorous judicial review
Session 2
Antitrust and IP - Standard Essential Patents and Patents Settlements

Brussels - 20 May 2016
SEPs and FRAND: The U.S. Approach

John Gibson
20 May 2016
Overview

A. Origins of FRAND commitment in SEP licensing

B. What does FRAND mean in practice? (New frontier at intersection of Antitrust & IP)
   1. Competition law plays unsettled role in US FRAND litigation
   2. FRAND is a range
   3. Hypothetical Bilateral Negotiation Test
   4. SEP Injunctions v. infringing implementers
A. Origins of FRAND commitment
1. Why FRAND Commitments?

- First: Why standardization? (Promote interoperability of technology.)
- Success of standardization depends on (a) access to IPR essential to practice standards and (b) incentives for SEP holders to innovate.
- Patent confers right to exclude others from practicing invention, but does not necessarily confer monopoly power.
- Mutually binding FRAND commitment facilitates commercial success (adoption) of standards.
  - Implementers are assured access to SEPs on Fair, Reasonable, And Non-Discriminatory (FRAND) basis
  - Standards contributors (SEP holders) are assured reasonable return on their substantial R&D investments and FRAND cross-licensing
B. What does FRAND mean in practice?
1. Competition law plays unsettled role in US FRAND litigation

- **Broadcom v. Qualcomm** (3d Cir. 2007) (Based on Sherman Act, Section 2).
  - *Intentionally* false FRAND commitment during standards-adoption = Monopolization
  - Left open proof requirements to link pre-standardization *intent* to post-standardization licensing *practices*

- Most FRAND cases since *Broadcom* have focused on breach of contract claims in light of unsettled proof issues with antitrust/competition claims.

- **Microsoft v. InterDigital** (ongoing in D. Del.; jury demand).
  - *Broadcom*-style antitrust claim – Section 2 of Sherman Act (monopolization):
    - InterDigital made intentionally false promises to license its SEPs on FRAND terms
    - “After deceiving the SSO . . . InterDigital has exploited its unlawfully acquired power against Microsoft[,] including refusing to honor FRAND obligations and demanding excessive and discriminatory royalties”
  - Motion to Dismiss: Denied on 13 April, 2016.
    - Pledged *Broadcom* claim; but what proof of *intentionally false* FRAND commitment to win?
2. FRAND is a range

- Does *not* require a licensor to offer the exact same terms and conditions to every licensee.
  - Members rejected draft 1993 ETSI IPR Policy and Undertaking—which contained a “most favored licensee” provision
  - “[D]oes not require uniform treatment across licensees, nor does it require the same terms for every manufacturer or competitor.” *In the Matter of Certain Wireless Devices With 3G Capabilities And Components Thereof* (ITC 2013).

- “[A]llows for the parties to negotiate an appropriate agreement that addresses their specific circumstances and needs.” *ANSI Resp. to FTC Patents and Standards Workshop, Project No. P11-1204*, June 21, 2011.

- Range can be wide. Judge Robart in *Microsoft v. Motorola* found 0.555 to 16.389 cents per unit for H.264 video-codec patents; 0.8 to 19.5 cents per unit for 802.11 WiFi patents.
3. Hypothetical Bilateral Negotiation Test

  - Factor out subsequent increase in IPR value from standardization
  - Value should mitigate risk of patent hold-up while ensuring SEP holders reasonable royalties to incentivize creation of valuable standards
  - “[F]actors an SEP owner and implementer would consider” in an actual licensing negotiation:
    - Objective value contributed to standard
    - Quality of the technology and available alternatives
    - Importance of those technologies to the business
4. Injunctions v. infringing implementers

- **Immunity in U.S. courts:**
  - SEP Holder seeking injunction is *immune* from *antitrust liability* under *Noerr-Pennington* doctrine as long as underlying lawsuit is not “objectively baseless.” *Apple v. Motorola* (W.D. Wis. 2012) [Based on First Amendment right of free speech.]
  - No distinction between “willing licensee” and “unwilling licensee” as infringer
  - Potentially *no* such *immunity* where seeking injunctions is part of an overall anticompetitive scheme. *Microsoft v. InterDigital* (D. Del. 2016)
  - *No* such *immunity* under *breach* theory. *Id.*; *Microsoft v. Motorola* (9th Cir. 2015)
  - Sherman Act, Section 2 requires harm to competition—*never* just single competitor
4. Injunctions (cont’d)

- **Liability under FTC Act, Section 5:**
  - *Bosch* (focusing on competitive harm in the downstream product market)
  - *Google/Motorola* (focusing on competitor harm and exploitative abuse)
  - FTC alleged infringers in *Bosch* and *Google/Motorola* were “willing licensees”
  - *Recent FTC policy statement:* constrains use of Section 5 to matters that harm *consumer* welfare and “cause, or [are] likely to cause, harm to competition or the competitive process”
  - Will policy statement eliminate focus on competitor harm and exploitative abuse going forward?
4. Injunctions (cont’d)

• **Availability of Injunction**: Entitlement to injunction is another matter.
  
  – SEP holder “may have difficulty establishing irreparable harm” required to obtain injunction. *Apple v. Motorola* (Fed. Cir. 2014) (affirming district court’s denial of Motorola’s request for injunction)
  
  – “[I]njunction may be justified where an infringer unilaterally refuses a FRAND royalty or unreasonably delays negotiations to the same effect.” *Id.* [Unwilling licensee.]
Thank you!

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A.2. What is a FRAND Declaration?

Example: ETSI (European Telecommunications Standards Institute)

Clause 6.1

6.1 When an ESSENTIAL IPR relating to a particular STANDARD or TECHNICAL SPECIFICATION is brought to the attention of ETSI, the Director-General of ETSI shall immediately request the owner to give within three months an irrevocable undertaking in writing that it is prepared to grant irrevocable licences on fair, reasonable and non-discriminatory ("FRAND") terms and conditions under such IPR to at least the following extent:

- MANUFACTURE, including the right to make or have made customized components and sub-systems to the licensee's own design for use in MANUFACTURE;
- sell, lease, or otherwise dispose of EQUIPMENT so MANUFACTURED;
- repair, use, or operate EQUIPMENT; and
- use METHODS.

The above undertaking may be made subject to the condition that those who seek licences agree to reciprocate.
B.5. Prevailing basis for determining FRAND royalties is end unit, rather than smallest saleable unit.

- End-user product is prevailing basis for SEP royalties.
  - *Ericsson, Inc. v. D-Link Sys. Inc.* (Fed. Cir. 2014) – Licensing at the end-user product is consistent with RAND
  - 3G & 4G licenses based on end-user product (cell phones and other smart devices)

- Some courts have used “smallest saleable patent practicing unit” (SSPPU) as the damages base in assessing patent infringement damages.
  - Difference between damages base in patent infringement and royalty base in patent licenses
  - *Commonwealth Scientific and Industrial Research Organization (CSIRO) v. Cisco Systems, Inc.* (Fed. Cir. 2015) affirmed end unit as a damages base per parties’ negotiations, which were based on comparable licenses tied to end unit
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SEPS AND FRAND: THE EU APPROACH

EU COMPETITION LAW: CURRENT ISSUES IN A GLOBAL CONTEXT
KING’S COLLEGE LONDON / CROWELL & MORING LLP

DAVID BAILEY

20 May 2016
OVERVIEW OF PRESENTATION

- **WHY** IS FRAND RELEVANT TO THE APPLICATION OF EU COMPETITION LAW?

- **WHAT** DOES FRAND ACTUALLY MEAN?

- **HOW** DOES A SEP OWNER GET AN INJUNCTION WITHOUT INFRINGING ARTICLE 102 TFEU?

- **WHAT** ARE THE OPEN QUESTIONS?
THE ESSENTIAL PROBLEM:
- If and when a patent has become essential for using a standard, it confers market power.
- The owner of a SEP is then able to use that market power to “hold up” licensees by, for example, demanding excessive royalties.
- The ability to hold up arises only because the patent has become a SEP; it did not exist ex ante.

NOTE THAT CONCERNS OVER SEP OWNERS HOLDING-UP LICENSEES HAVE ARisen IN A NUMBER OF CASES: MOTOROLA, SAMSUNG, HUAWEI, UNWIRED PLANET AND MANY MORE!
THE POSSIBLE SOLUTIONS TO THE PROBLEM:
- CROSS-LICENSING
- PATENT POOLS
- FRAND COMMITMENTS

FRAND COMMITMENTS ARE A COMMON SOLUTION:
- E.G. ETSI IPR POLICY
- E.G. PARAS 287-291 OF THE COMMISSION’S GUIDELINES ON HORIZONTAL COOPERATION AGREEMENTS

BUT WHAT IS FAIR AND REASONABLE?!
WHAT DOES FRAND MEAN?

- DUAL PURPOSE OF FRAND COMMITMENTS:
  - WIDESPREAD USE OF STANDARDS
  - TO PREVENT THE MISUSE OF THE MARKET POWER THAT OFTEN ARISES FROM INCORPORATION OF A PATENTED TECHNOLOGY IN A STANDARD

- LICENSING TERMS SHOULD, SO FAR AS POSSIBLE, REFLECT THE ECONOMIC VALUE OF THE PATENT: PARA 289 OF THE GUIDELINES ON HORIZONTAL COOPERATION AGREEMENTS

- THERE WILL UNAVOIDABLY BE A RANGE OF TERMS THAT ARE CAPABLE OF BEING FRAND
WHAT DOES FRAND MEAN?

- **FAIRNESS** ARGUABLY REQUIRES SEP OWNERS TO:
  - NEGOTIATE IN GOOD FAITH WITH POTENTIAL LICENSEES
  - BE TRANSPARENT AS TO THE BASIS ON WHICH THE SEP HOLDER WILL LICENSE ITS SEPS
  - NOT SEEK AN INJUNCTION AGAINST A PERSON WHO IS WILLING TO TAKE A FRAND LICENCE
  - ? NOT BUNDLE SEPS WITH NON-SEPS ?
MEANING OF FRAND (CONT’D)

- **REASONABLE** ROYALTIES SHOULD REFLECT THE ECONOMIC VALUE OF THE PATENT, AS MEASURED BY:

1. THE INCREMENTAL CONTRIBUTION OF A SEP
2. APPORTIONING THE TOTAL ROYALTY BURDEN THAT MAY BE CHARGED FOR ALL SEPS
3. REFERENCE TO COMPARABLE LICENCES
4. ‘NUMERIC PROPORTIONALITY’
MEANING OF FRAND (CONT’D)

- **NON-DISCRIMINATION** REQUIRES THAT THE TERMS AND CONDITIONS OF A LICENCE BE MATERIALLY SIMILAR AS BETWEEN MATERIALLY SIMILAR LICENSEES

- **N.B. MATERIAL DIFFERENCES BETWEEN POTENTIAL LICENSEES, INCLUDING THE CONTEXT IN WHICH A LICENCE IS GRANTED**
FRAND AND THE USE OF INJUNCTIONS: THE EU EXPERIENCE

- **ORANGE BOOK**: GERMAN FEDERAL COURT OF JUSTICE (2009)

- **MOTOROLA MOBILITY**: COMMISSION INFRINGEMENT DECISION (2014)

- **SAMSUNG**: COMMISSION COMMITMENT DECISION (2014)

- **CASE C-170/13 HUAWEI v ZTE** (2015): CJEU

- **UNWIRED PLANET v SAMSUNG** (2015): ENGLISH HIGH COURT
FRAND AND THE USE OF INJUNCTIONS: PRELIMINARY RULING IN HUAWEI

WHAT MUST A SEP HOLDER DO TO GET AN INJUNCTION WITHOUT VIOLATING ART. 102?

- Tell the defendant about the alleged infringement of the claims of the SEPs
- Find out whether the defendant is willing to take a FRAND licence?
- If yes, make a specific, written offer for such a licence
- Then wait and see how the defendant reacts
- Can seek an injunction if the defendant fails to respond in a reasonable time, or if there is a counter-offer on non-FRAND terms

CASE C-170/13 HUAWEI v ZTE (2015), PARA 71
**FRAND & SEPS: THE OPEN QUESTIONS**

- CAN A SEP HOLDER GET AN INJUNCTION IF IT HAS MADE A FRAND OFFER FOR ITS PORTFOLIO OF PATENTS AROUND THE WORLD?

- IS A SEP HOLDER ENTITLED TO BUNDLE SEPS AND NON-SEPS?

- WHAT HAPPENS IF THE SEP HOLDER MAKES AN OFFER AT THE TOP END OF THE FRAND RANGE AND THE ALLEGED INFRINGER MAKES A COUNTER-OFFER AT THE BOTTOM END OF FRAND?

- SHOULD A REASONABLE ROYALTY BE BASED ON THE VALUE OF THE FINAL PRODUCT OR ON THE VALUE OF THE COMPONENT INCORPORATING THE TECHNOLOGY?
Session 2
Antitrust and IP - Standard Essential Patents and Patents Settlements

Brussels - 20 May 2016
Session 3
Cartel Damages Litigation - An EU-wide Overview
Brussels - 20 May 2016
The EU Directive on Antitrust Damages Actions

Thomas De Meese
Crowell & Moring, LLP
EU Directive on Antitrust Damages Actions – Legislative Procedure (Timeline)

- **11 Jun 2013** Adoption Commission
  Proposal for Directive
- **April 2014** Agreement European Parliament & Council
- **21 Oct 2014** Corrigendum of text agreed by Parliament
- **10 Nov 2014** Adopted by Parliament
- **26 Nov 2014** Adopted by Council
- **5 Dec 2014** Publication in Official Journal
- **Implementation by Member States due 27 Dec 2016**

- **Directive EEA-relevant:**
  - to be implemented in EEA/EFTA states
- **Implementation ongoing:**
  - Several countries have launched / completed consultations

2005 / 2008
Green Paper & White Paper proposing policy measures for Damages Actions
Key Content

• **Covered:**
  – Disclosure of evidence
  – Effect of national infringement decisions
  – Limitation periods
  – Joint and several liability
  – The passing-on of overcharges
  – Quantification of harm
  – Consensual dispute resolution
  – Temporal application

• **Not covered:**
  – Jurisdictional questions
  – Collective redress
  – Costs
  – Litigation funding
  – Infringements not affecting trade between MS
  – Imputability, culpability
Who to sue?

• **Rule:** Joint & several liability of joint infringers
  – Possibility to claim full compensation from any of the joint infringers

• **Exception:**
  – Immunity recipient:
    • Only liable towards own direct and indirect purchasers
    • Unless full compensation cannot be obtained from other participants
  – SME with market share <5% whose economic viability is at stake
    • Only liable towards own direct and indirect purchasers
    • Unless ring leader or repeat offender

• **Questions:**
  – Timing of the assessment of the impossibility to obtain full compensation?
  – Interaction with limitation periods?
Who can sue?

- Direct and indirect purchasers
  - *Actions by direct purchasers*:
    - Defendant has burden of proof of passing-on
  - *Actions by indirect purchasers*:
    - Rebuttable presumption of pass-on if:
      - Defendant committed infringement
      - Which lead to overcharge for direct purchaser, and
      - Indirect purchaser purchased the goods concerned

- Courts can estimate % of overcharge passed-on
- No overcompensation
When to file a claim?

• **Limitation periods:**
  - *Duration*: at least 5 years
  - *Starting point*: not before infringement has ceased and claimant knows or should know:
    • The facts and their qualification
    • The existence of harm
    • The identity of the infringer
  - *Suspension*: during investigation until one year after final decision

• **Questions:**
  - Quid appeals against fine only?
  - Quid appeals by only some of the defendants?
  - Temporal application and revival of claims?
Disclosure of evidence

• **Rule**: disclosure of specific documents or categories of documents from parties and/or third parties

• **Conditions**:
  – reasoned justification of plausible claim
  – proportionality
  – protection of confidential information and LPP

• **Questions & issues**:
  – Cultural change?
  – Timing of disclosure?
  – Temporal application: litigation started after 26 December 2014?
Disclosure of evidence

• Exceptions:

  – *Leniency statements & settlement statements*: no disclosure
  
  – *Statement of objections, response to SOs and RFIs, witness statements, withdrawn settlement statements, etc.*: only after CA proceedings are closed + balancing exercise
  
  – No “trading” of information obtained through access to file
What to claim?

- Rebuttable presumption that cartel infringements cause harm
- Possibility to estimate harm
- Full compensation: actual loss, loss of profits and interests
- No over- or under-compensation, no punitive or multiple damages
- Assistance by NCA
Session 3
Cartel Damages Litigation - An EU-wide Overview

Brussels - 20 May 2016
CARTEL DAMAGES LITIGATION –
AN EU-WIDE OVERVIEW

EU Competition Law: Current issues in a global context

20 May 2016 - Hilton Brussels Grand Place, Dr. Ulrich Denzel, LLM (Chicago)
Who to sue?

- **Subsidiary or parent company?**
  - “Deep pockets” of the parent company
  - Jurisdiction / Forum shopping ("where to sue")
  - Headquarter attention on defendant side --> better chances for settlement (?)
  - Torpedo

- **Challenging if subsidiary of parent company is not an addressee of the cartel decision**
  - Notion of "undertaking" / economic entity
  - "Piercing the corporate veil"?
  - Damage Directive, Art. 11 and national transposition plans (e.g. Germany)
Who to sue?

- All / many cartelists or just one?
  - Joint and several liability
  - Damage Directive, Art. 11
  - Cost risks
- CDC / German cement manufacturers I (all cartelists) vs. CDC / German cement manufacturers II (just one)
Pass on

- **Damage Directive, Chapter IV**
  - Direct and indirect purchasers can claim damages
  - Member States to lay down procedural rules to “avoid overcompensation”
  - Defendant can invoke passing-on defence

- **Interplay between Art. 17 (2) and Art. 14 (2)**

- **Who should sue?**

- **Who to sue?**
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Session 3
Cartel Damages Litigation - An EU-wide Overview
Brussels - 20 May 2016
Access to data following the cartel damages directive

Martijn van Maanen
20 May 2016
Purpose directive to overcome information asymmetry to support injured parties in private enforcement

- Preamble 16: Disclosure should be allowed, provided that:
  - Claimant shows that damages were suffered by conduct defendants
  - Data demand meets proportionality and necessity test
  - Demand sufficiently described by subject, period, category, etc.

Similar disclosure offered to defendants regarding plaintiff data
Access to data cartel members

- All information absent leniency statements and settlement statements are disclosable (preamble 27)
- National court should have access to documents that are asserted to be exempted from disclosure
- Pergan
- Confidential information disclosable, with safeguards implemented by national court to protect interests (preamble 18)
- Interest of cartel members to reduce exposure to private enforcement does not merit protection
- Variety of safeguards
Effect on disclosure of implementation directive in civil law jurisdictions

- Greater access to data generally
- Different treatment of confidentiality interests than before
- Protection of interests will not prevent disclosure
- Introduction confidentiality rings and other safeguards
- Comparative edge UK on disclosure expected to diminish
- Plaintiffs may need to be more diligent in keeping data for disclosure purposes
Access to file?

- Directive departs from Donau Chemie
- No leniency/settlement statements, (almost) no material in pending investigations
- Proportionality test
- Need for such access may be overrated: data not focused on causation and damages
- Directive prefers demands for data from defendants
Session 3
Cartel Damages Litigation - An EU-wide Overview

Brussels - 20 May 2016
Court approaches to quantifying harm from cartels: UK issues

Jon Turner QC
Monckton Chambers
Guidance from Europe

• Damages Directive, Art. 17(1), recital (46): estimating harm, not measuring it

• Recital (45) – enter, the “complex economic models”

• The Commission Staff’s Practical Guide (2013)
The UK Courts

• The tradition / judicial pre-disposition:
  • Witness-based approach to evidence
  • Focus disclosure on contemporaneous pricing and strategy documents
  • Draw inferences from what the witnesses said they were aiming for, and what they perceived they were achieving
  • Accord less weight to experts giving ex post facto analyses: cf. Napp (2002) in the CAT.
The Air Cargo cartel litigation

• Biggest cartel damages case ever in the UK Courts: Emerald claimants alone seek >£1.2bn.

• Claim follows Commission infringement decision concerning collusion on surcharges

• Issue of extent to which air freight prices were raised by the cartel
Judge’s resistance to econometrics

“It seems to me that the experts are just taking over the evidence in this case. Is it not expected that there will be witnesses from the purchasing departments or from people who will say what they generally did? Why does it all have to be this complicated econometric analysis? Why can't these things be proven in the ordinary way that issues are proven in court?”
Perceived incompatible approaches

“If you are going to trawl through the million emails looking for the one where some airline executive says to his or her chum "Oh, we have really got to make sure that these fuel charges get through to the shippers and I'm pleased to see that everyone is making efforts that that is done and it seems to be hitting them hard" or something, some kind of smoking gun type email, well, it doesn't seem to me that there is a role for that kind of evidence, if we are going down the route of looking for the econometric analysis of price increases.”
The expert process in the UK courts (1)

• Before the Courtroom –
  • Without prejudice meetings
  • Presumption against lawyers attending
  • Joint statement of agreement and disagreements, and the reasons for disagreeing

• In Court
  • Written reports stand as evidence
  • “Hostile” cross examination
The expert process in the UK: hot tubs and the Google abuse trial (2015)

• Agenda for discussion
• Experts give evidence “concurrently” and are questioned together
• Judge-led – move to an inquisitorial model
• Advantages:
  • More illuminating; time-saving
• Disadvantages
  • Loss of party control; burden on Judge
Session 3
Cartel Damages Litigation - An EU-wide Overview

Brussels - 20 May 2016
Session 4

Antitrust and the Internet - Platforms, Data and the Sector Inquiry

Brussels - 20 May 2016
Geo-blocking and EU competition law

Thomas Kramler
DG Competition, European Commission

(The views expressed are not necessarily those of the European Commission)
e-Commerce in the EU

Online consumers who purchased tangible goods and offline services abroad (%)

30  38  47  52  56  63  71  80  88  94
Domestic and cross-border online shopping, EU 28, 2008-2014
(% of population who ordered goods or services over the Internet, domestically and cross-border, in the last 12 months)

Source: Eurostat Community Survey on ICT usage in households and by individuals 2014: From whom did you buy or order goods or services for private purpose over the Internet in the last 12 months? (isoc_ec_ibuy).
Context: Digital Single Market Strategy

- Political priority of the Commission, adopted on 6 May 2015

- Aim: Better access for consumers and businesses to online goods and services across Europe - Remove unjustified barriers

- Actions:
  - Legislative actions → regulatory barriers
  - Complemented by Sector Inquiry → company erected barriers
The Single Market Objective

- ECJ, Joined Cases C-403/08 and C-429/08, Murphy, paragraph 139:

  "An agreement which might tend to restore the divisions between national markets is liable to frustrate the Treaty’s objective of achieving the integration of those markets through the establishment of a single market. Thus, agreements which are aimed at partitioning national markets according to national borders or make the interpenetration of national markets more difficult must be regarded, in principle, as agreements whose object is to restrict competition within the meaning of Article 101(1)."
Legal framework on vertical restraints

- Vertical Agreements Block Exemption Regulation (2010)
  - Safe harbour subject to a 30% market share threshold
  - List of hardcore restrictions (Art 4)
    - Obligations to set a fixed or minimum sales price
    - Restrictions of passive sales into a certain territory ("where")/or customer group ("who")
    - Restrictions of active or passive sales to end-users by members of a selective distribution system

  - BER does not cover copyright licensing (para 33 (e))
  - Provides explanations and examples regarding on-line sales restrictions
Geo-blocking

- Geo-blocking prevents users from accessing/purchasing consumer goods/digital content services online based on location/place of residence

- Geo-filtering refers to different terms (in particular prices) depending on the location/place of residence
Delivery refusal most common geo-blocking measure

Retailers who gather location information for geo-blocking purposes, EU-28
Geo-blocking (Goods)

Respondents that have a contractual restriction to sell cross-border for each product category – EU 28 (Issues paper on geo-blocking)

- Clothing and Shoes: 13%
- Consumer Electronics: 9%
- Sports and Outdoor: 9%
- Cosmetic and Healthcare: 8%
- Household Appliances: 8%
- Toys and Childcare: 6%
- House and Garden: 6%
- Computer Games: 4%
- Media: 4%
- Others: 4%
Larger companies geo-block more

Respondents that gather location information for geo-blocking purposes for each 2014 turnover category
More than two thirds of digital content providers geo-block

Proportion of respondents implementing at least one type of geo-blocking measure, EU-28
Proportion of respondents implementing at least one type of geo-blocking in Italy

Proportion of respondents implementing at least one type of geo-blocking measure, EU-28
Geo-blocking (Content)

Proportion of agreements requiring providers to geo-block by category – Average for all respondents – EU 28 (Issues paper on geo-blocking)

- Fiction TV: 74%
- Films: 66%
- Sports: 63%
- Children TV: 55%
- Non-fiction TV: 50%
- Music: 44%
- News: 23%
Geo-blocking (Content)

Proportion of agreements requiring providers to geo-block by category – Spain (Issues paper on geo-blocking)

- Children TV: 93%
- Fiction TV: 65%
- Films: 32%
- Sports: 28%
- Non-fiction TV: 28%
- News: 17%
- Music: 0%
Absolute territorial protection and IP

- Trade Marks: ECJ, Cases 56 and 58/64, Consten & Grundig

- Plant breeders rights: ECJ, Case 258/78, Nungesser

- Patents: Article 4(2)(b) TTBER

- Copyright: ECJ, Joined Cases C-403/08 and C-429/08, Murphy
Sector Inquiry (Timing)

- First round of requests for information in June 2015
- Issues Paper on geo-blocking in March 2016
- Preliminary Report followed by Public Consultation mid-2016
- Final Report in the 1Q 2017
Goals of the Sector Inquiry

- Gain a more comprehensive understanding of competition issues, market dynamics and business challenges in cross-border e-commerce
- If appropriate, provide guidance to businesses through subsequent enforcement
- Look at the legal framework on online vertical restraints in the light of current market realities
- Complement legislative initiatives
Session 4

Antitrust and the Internet - Platforms, Data and the Sector Inquiry

Brussels - 20 May 2016
Online Platforms And Antitrust
Analyzing Access Restrictions

Thomas Graf, Brussels May 20, 2016

The speaker represents companies with an interest in the covered topics. All views expressed in this presentation are the speaker's own and not attributable to any clients.

clearygottlieb.com
Overview

- Vertical access restrictions: A manufacturer limits its dealers’ access to online platforms (the German debate)

- Horizontal access restrictions: A competitor limits rivals’ access to online platforms

- Not sharing access: A platform limits access to itself
Vertical restrictions on access to online platforms

[Diagram showing the relationship between Manufacturer, Merchants, and Merchant Platforms & Comparison Shopping Services]
## Confusion in Germany

### Concerns

| Who is on which side? | Bundeskartellamt (*Asics, Adidas, and Sennheiser*) | OLG Munich (*Adidas*)  
| KG Berlin (*Scout school bags*) | OLG Frankfurt (*Backpacks*)  
| OLG Schleswig (*digital cameras*) | OLG Karlsruhe (*Scout school bags*) |

| Is there a restriction of competition? | By object / hard core restriction | Access restriction does not foreclose competition for any customer group |

| Do quality concerns justify restrictions? | Dismissed – eBay is not a flea market | Recognize quality / brand image issues |

| What about para. 54 Vertical Guidelines? | Not binding, mistaken, overtaken by developments |  |

OLG Frankfurt referred the issue for preliminary ruling to the ECJ in April 2016
Some considerations

- *Cartes Bancaires* and *Maxima Latvija*: Concept of object restrictions must be applied “restrictively”

- Context and actual circumstances must be taken into account

- Not a resale prohibition – more akin to promotion rule

- Is it not legitimate for manufacturer to define promotion strategy?

- If there is inter-brand competition should we worry in any event?

- Merchants have other promotion options
Horizontal restrictions on access to online platforms
Same basic considerations

- *Cartes Bancaires* and *Maxima Latvija* principles apply for both vertical and horizontal restrictions and across Articles 101 and 102 TFEU

- *Maxima Latvia*: Exclusion from platform (shopping center) cannot be equated with restriction of competition

- *Microsoft (Tying)*: “good reasons not to assume” restrictive effects

- *Microsoft* involved detailed assessment of alternatives (paras 858-876)

- Factual question that must be assessed against technologies at issue

- Online restrictions do not necessarily foreclose any portion of demand – all users remain contestable
Platform limits access to itself
Refusal to deal standard applies

- Objection against access limitations of a platform postulates a positive duty to assist others

- For such a duty to exist, the platform must be “indispensable” (Microsoft, Bronner)

- Favoring / “self-preferencing” claims are disguised claims for supply

- Any claim for supply / access can be re-characterized as a “favoring” claim

- German BGH excludes “self-preferencing” as abuse
  - BGH KZR 7/10 Grossistenkündigung, BGH KZR 65/10 Telefon- und Branchenverzeichnisse
  - Otherwise there is a conflict with the principle that a company has no duty to generate competition against itself
Conclusions

- No expansion of by object / by nature concept – online is not a “sacred cow”

- If function of platform is mainly promotional, competitive problems less plausible

- Need to distinguish between restrictions that hinder access to third-party platforms and access limitations implemented by platform itself
Session 4

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Current Issues in a Global Context
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