THE
NATIONAL LAW REVIEW

Standards and Injunctions Under EU Competition Law

Friday, May 30, 2014

In two decisions issued in April 2014, the European Commission (the Commission) provided further clarification as regards the circumstances in which patentees can seek injunctions to protect their standard-essential patents (SEPs) pursuant to European competition law.

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Intellectual Property
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The Samsung Case

In 2012, the Commission raised objections in relation to injunctions that Samsung sought against one of its competitors on the basis of its patents essential to the 3G mobile technology. Although it is legitimate for a patent holder to protect its SEPs through injunctions, the Commission considered the use of such injunctions abusive in this case because Samsung had previously committed to license its SEPs on fair, reasonable and non-discriminatory (FRAND) terms.

In order to remedy these concerns, Samsung offered voluntary commitments, which, in its April 2014 ruling, the Commission rendered legally binding. Specifically, Samsung has committed, for a period of five years, not to seek any injunctions in the European Economic Area (EEA) on the basis of its SEPs for smartphones and tablets against any 'willing licensee' who agrees to a specified licensing framework, under which the parties have up to 12 months to reach an agreement, and in case no agreement is reached, any dispute over the determination of the FRAND terms should be decided by a court or by an arbitrator.

The Motorola Mobility Case

The Commission issued a prohibition decision against Motorola, holding that Motorola's seeking and enforcement of a SEP-based injunction against Apple in Germany constituted an infringement of Article 102 of the Treaty on the Functioning of the EU. The SEPs in this case related to the GPRS standard, an important industry standard for mobile and wireless communications.

The Commission found that, despite Motorola's prior commitment to license the SEPs on FRAND terms, and the fact that Apple was "willing" to enter into the licence on such terms, the company sought and enforced an injunction against Apple and requested that Apple give up its rights to challenge the validity, essentiality or infringement of Motorola's patents. The Commission held that such conduct was abusive and that implementers of a standard should be able to challenge the validity of a patent and still be considered willing licensees.

The "Safe Harbor"

The Commission reiterates that "*recourse to injunctive relief is generally a legitimate remedy for patent holders in case of patent infringements. (…) The two cases are therefore not about eliminating the use of injunctions by patent holders*." However, the Commission adds that a patentee may be abusing its position of dominance under EU competition law if the SEP holder has given a voluntary commitment to license its SEPs on FRAND terms and the company against whom an injunction is sought is "willing" to enter into a licence agreement on such FRAND terms.

Practice Note: The *Samsung* and *Motorola Mobility* cases have created a pro-licensee "safe harbor" from SEP

injunctions, under which a licensee can show that it is “willing” by agreeing that a court or an arbitrator shall determine the FRAND terms in case the parties fail to do so bilaterally. The rationale behind such an approach is that it protects the licensee in cases where the SEP holder may be abusing its position of dominance by preventing other companies from entering the market.

Whilst, at first sight, it may seem that the Commission has solved the issue of FRAND-encumbered SEPs and injunctions, in practice these two cases may (in hindsight) have served only to create further questions and uncertainty. In particular, the Commission does not define what constitutes a “willing licensee.” Instead, the regulator argues that this should be determined on a case-by-case basis either by a court or an arbitral tribunal, taking into account the specific circumstances of each case. Whilst it is reasonable to leave this task to a competent judicial body, the Commission has not given any guidance to adjudicators as to how they ought to identify and define willing licensees. Indeed, in the *Huawei v. ZTE* case that is currently pending before the Court of Justice of the European Union (CJEU), the regional court of Düsseldorf submitted a series of questions relating to the concept of a willing licensee, in particular asking whether abuse of a dominant market position in the SEP licensing context is to be presumed merely as a consequence of the licensee’s willingness to negotiate.

Similarly, the Commission has not provided any explanations as to what constitutes a FRAND royalty rate or, more importantly, how these rates ought to be calculated. Again, the authority believes that such determination should be left to the courts and arbitration tribunals, without however providing them with any guidance to fulfill this task. Such an approach is not only associated with the risk of having divergent judgments and interpretations across the different Member State courts, but also fails to consider the practical implications that will ultimately affect the way businesses plan and structure licensing deals. More specifically, because the Commission is indicating that adjudicators are best placed to determine FRAND royalties, this creates legal uncertainty as companies can no longer rely on themselves to self-assess the potential risks and implications of a technology transaction.

It thus appears that technology companies may confront something of a legal vacuum. Whilst they might look to the courts for further guidance, the courts themselves seem to be waiting for clarifications from the Commission. This begs the question whether antitrust intervention against (similarly sized) innovators that are active in one of the most competitive industries was necessary in the first place.

It seems that the Commission, the domestic courts and national antitrust authorities will likely struggle with these issues for years to come.

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