LATHAM & WATKINS

Studienvereinigung Kartellrecht
International Forum on EU Competition Law 2014

A few questions regarding the European Commission's antitrust enforcement with respect to standards-essential patents

Sven Völcker

All views expressed are personal

Latham & Watkins operates worldwide as a limited liability partnership organized under the laws of the State of Delaware (USA) with affiliated limited liability partnerships conducting the practice in the United Kingdom, France, Italy and Singapore and as affiliated partnerships conducting the practice in Hong Kong and Japan. The Law Office of Salman M. Al-Sudairi is Latham & Watkins' associated office in the Kingdom of Saudi Arabia. In Qatar, Latham & Watkins LLP is licensed by the Qatar Financial Centre Authority. © Copyright 2014 Latham & Watkins. All Rights Reserved.

Injunctions: what is an unwilling licensee?

„Willing“

*“The Commission's preliminary view is that the **acceptance of binding third party determination** for the terms of a FRAND licence in the event that bilateral negotiations do not come to a fruitful conclusion **is a clear indication that a potential licensee is willing to enter into a FRAND licence**.*

*This process allows for adequate remuneration of the SEP-holder so that **seeking or enforcing injunctions is no longer justified** once a potential licensee has accepted such a process.”*

Commission Q&A on Motorola SO, 6 May 2013

„Unwilling“

*“By contrast, a potential licensee which **remains passive** and **unresponsive** to a request to enter into licensing negotiations or is found to **employ clear delaying tactics** cannot be generally considered as "willing".*

How does the „unwilling licensee“ justification fit with Article 102 TFEU?

The court notes, as a preliminary point, that although the burden of proof of the existence of the circumstances that constitute an infringement of Article 82 EC is borne by the Commission, it is for ***the dominant undertaking concerned*** *and not for the Commission, before the end of the administrative procedure,* ***to raise any plea of objective justification and to support it with arguments and evidence****.*

Microsoft v. Commission [2007] ECR II-3601, ¶ 688

"It falls on the dominant undertaking to ***demonstrate any negative impact*** *which an obligation to supply is likely to have* ***on its own level of innovation****. If a dominant undertaking has previously supplied the input in question, this can be relevant for the assessment of any claim that the refusal to supply is justified on efficiency grounds"*

Commission's Enforcement Priorites, para. 90

How does the „unwilling licensee“ exception fit with Article 102 TFEU?

Court-ordered FRAND damages for valid and infringed patents as more proportionate means?

*“Member States **shall ensure that the competent judicial authorities**, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to **pay the rightholder damages appropriate to the actual prejudice suffered** by him/her as a result of the infringement.”*

Article 13 (1) of Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights

Hold-up

Reverse Hold-up?

Freedom from injunctions for submission to SEP portfolio adjudication: a fair trade?

“In my judgment, a defendant accused of patent infringement by a patentee who claims to have a standards essential patent is and must be entitled to say, "I wish to know if this patent is valid or infringed or not before I take a licence". Such a stance cannot fairly be described as unwillingness. (44)

*Although it is a truism that disputes of this kind often end up with a global licence, **one needs to be careful turning that truism into something like a right to compel a defendant to enter into such a licence** (63)*

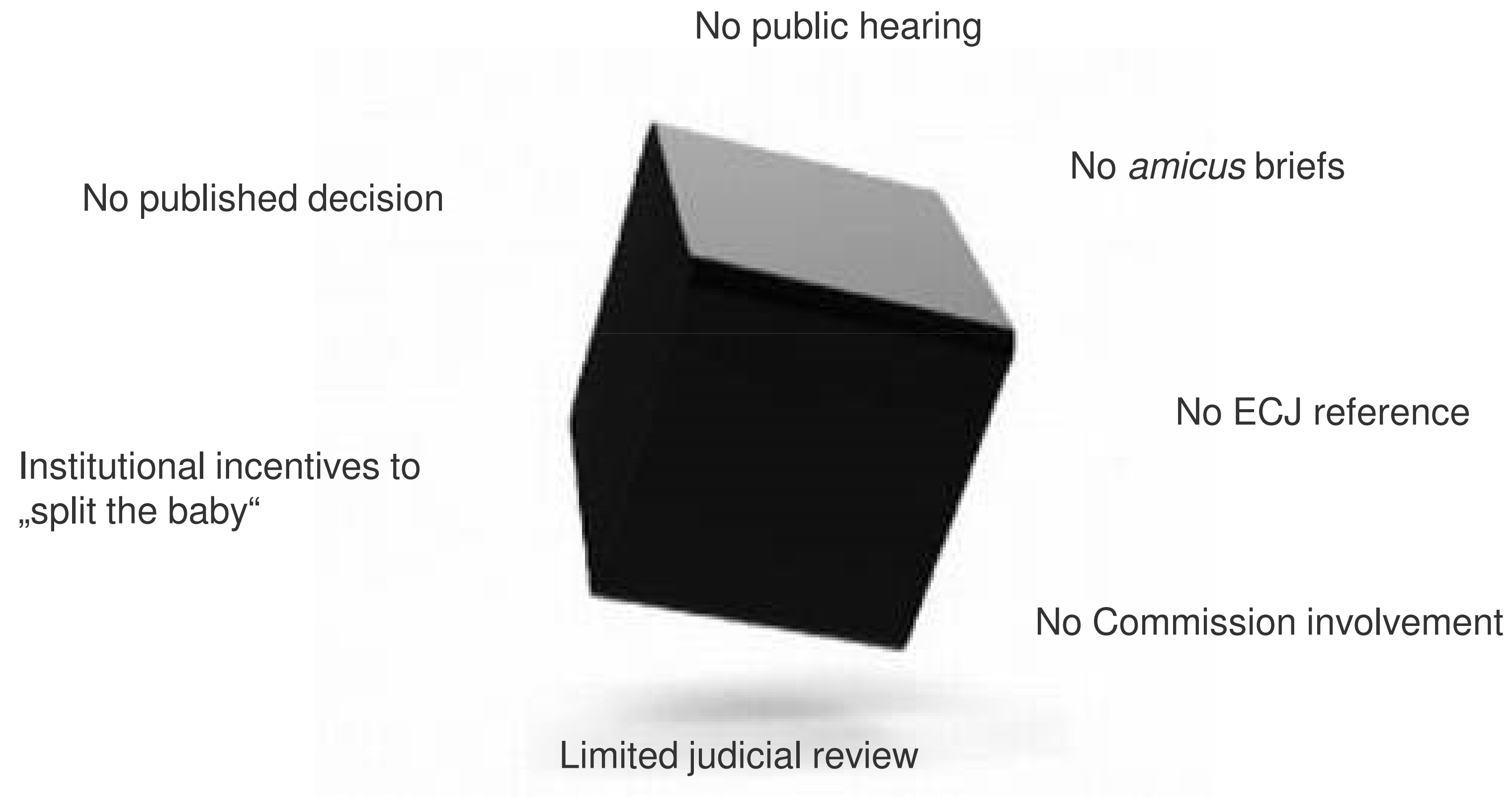
Birss, J, *Vringo Infrastructure v. ZTE (UK) Limited and ZTE Corporation*, 6 June 2013, [2013] EWHC 1591 (Pat)

*“It is important to highlight that the Order, including the arbitration provision, **does not negate or alter traditional burdens of proof**, or deprive implementers of their rights to seek judicial review, challenge infringement, or raise defenses such as validity, exhaustion, and essentiality.*

*Moreover, the Order does **not presume infringement** by the implementer, and leaves Google with the **same burdens of proof it would have in any court proceeding**.”*

FTC Letter to Commentators of July 23, 2013, In the Matter of Motorola Mobility LLC and Google Inc. File No. 121 0120, Docket No. C-4410, footnote 13

Should competition authorities broker removal of SEP cases to black-box arbitration?



Are commitment decisions the appropriate instrument for SEP cases?

Article 7

*"The Commission is also more likely to opt for a prohibition decision if it is important to **set a legal precedent**. Prohibition decisions are usually reasoned in greater detail and explain the Commission's theory of harm more exhaustively, which **gives more guidance to market players**.*

*Prohibition decisions are also frequently challenged before EU Courts, which gives **judges the opportunity to clarify the law,** whereas appeals of Article 9 decisions, including by third parties, are rare."*

Article 9

*"In a decision under Article 9, the Commission accepts commitments offered by a company that appropriately address the Commission's concerns as formally communicated to the company, offer **sound solutions and achieve real change** in the markets."*

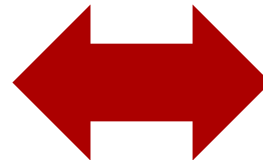
*"It is important to stress that the Commission **will not accept commitments that fall short of addressing its concerns**. The Commission does not enter into a "bargaining" process that would allow a company to get away with insufficient commitments. "*

Should the meaning of FRAND be left to the courts?

"Q: Does the Commission take a position on what a reasonable royalty rate is?

*A: No. **National courts or arbitrators** are generally well equipped to do this."*

Commission Q&A on Motorola SO,
6 May 2013



*"Does the **Commission have any knowledge** as to the criteria and the factors according to which, in the mobile telecommunication industry or in comparable industries, **the value of a (standard-essential) patent portfolio is generally assessed** and a license agreement is entered into that corresponds to the **FRAND standard** in the industry?"*

LG Mannheim, Ruling of 8 November 2013 in Apple v. Motorola, announced in open court

Should the meaning of FRAND be left to the courts?

"The Commission ***has not provided explicit guidance*** *on what constitutes a 'fair, reasonable, and non-discriminatory royalty,' giving rise to a competitive market environment.* ***This shortcoming leads to hold-up problems*** *where owners of patent rights test the limits of the FRAND framework."*

"*The Contribution of Competition Policy to Growth and the EU 2020 Strategy*", prepared by Copenhagen Economics upon request of the European Parliament's Committee on Economic and Monetary Affairs, July 2013

Does Article 102 TFEU have nothing to say about FRAND?

Example: Component level royalties

- Refusal to license component manufacturers as discrimination (Article 102 (d))
- Charging royalties for other's efforts as the imposition of unfair trading terms (Article 102 (a) (*Der Grüne Punkt*)
- Precedents
  - *Rambus*: Royalty cap in commitments to be calculated based on price of DRAM chip or functionality
  - *In re Innovatio IP Ventures Patent Litigation* (2013): royalties based on Wi-Fi chip as smallest saleable patent-practicing unit