FRAND Litigations

AN ANTITRUST POINT OF VIEW

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Antitrust and FRAND: What are the legal theories?

- Competition rules used in FRAND litigation are mainly those concerning the abuse of a dominant position (article 102 TFUE; Section 2 Sherman Act)
- In both Europe and the United States, the texts on which this prohibition is based are broadly formulated.
- Case law based on these texts all consider that, in principle, the SEP holder can abuse his dominant position (US: monopolize the market).
- European Union Law: few guidelines
  - *Huawei* Case (ECJ, 2015)
  - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023) [About FRAND: mainly a synthesis of… Huawei] [cooperation among SSO and firms isn't anticompetitive under article 101]
  - No definition of what a FRAND is.

Antitrust and FRAND: What are the legal theories?

- The Dominant position
- **Consensus on the idea that the SEP holder is not *automatically* in a dominant position**
  - AG Whatelet, Opinion in *Huawei* (2014)

57. However, it should be noted that the referring court did not state in the order for reference that it had arrived at its finding that the SEP-holder in the present case unquestionably holds a dominant position after it had examined all the circumstances and the specific context of the case. I share the view expressed by the Netherlands Government that the fact that an undertaking owns an SEP does not necessarily mean that it holds a dominant position within the meaning of Article 102 TFEU, (27) and that it is for the national court to determine, on a case-by-case basis, whether that is indeed the situation. (28)

  - The starting point is to delineate the relevant market
    - (very) factual issue
    - One theoretical methodoloy but **different** results

What is the relevant market in FRAND antitrust cases?

- *Rambus Case* (European Commission, 2009): market for the technology

> (16) The relevant market is a technology market for DRAM interface technology. DRAM chips are a type of electronic memory primarily used in computer

Motorola (EC, 2014): market for the **licensing** of technologies

> (186) Therefore, this Decision focusses on the market for the licensing of the technology, as specified in the GPRS standard technical specifications, on which Motorola's Cudak GPRS SEP reads.

> (190) The definition of technology markets follows the same methodology as that for general product market definition[176]. Technology markets consist of the technology and the IP protecting that technology and its close substitutes, i.e. other technologies and related IP rights which customers could use as alternatives[177].

What is the relevant market in FRAND antitrust cases?

- *Broadcom v. Qualcomm* (US, 2007): market for the SEP holder technology

[19] First, the Complaint adequately alleged that Qualcomm possessed monopoly power in the relevant market. The Complaint defined the relevant market as the market for Qualcomm's proprietary WCDMA technology, a technology essential to the implementation of the UMTS standard. (¶¶ 2, 3; *see also* ¶ 58.)[10] This technology was not interchangeable with or substitutable for other technologies (¶¶ 7, 48, 58–59), and adherents to the UMTS standard have become locked in (¶ 53). With respect to

- *FTC v. Qualcomm* (US, 2020)

[30] Here, the district court correctly defined the relevant markets as "the market for CDMA modem chips and the market for premium LTE modem chips." *Qualcomm*, 411 F. Supp. 3d at 683. Nevertheless, its analysis of Qualcomm's business practices and their anticompetitive impact looked beyond these markets to the much larger market of cellular services generally. Thus, a

Dominant Position/Relevant market: conclusion

- **Size of the market matters**
- UK High Court, *Unwired Planet* (2017)

> 631. The starting point therefore is to define the relevant market. It was common ground that the relevant market for the purpose of assessing dominance in the present case is a distinct market for licensing each SEP individually. Defining the relevant market in this way is in line with the European Commission's decision in ***Motorola***. With the market defined in that way a patentee obviously has a 100% market share and Huawei submitted that therefore there was a presumption that such a party was dominant,

- **Despite this:**
- FRAND committment could be a constraint for the SEP holder
- Power of the SEP holder depends also of the strengh of the standard and the SSO (ex. Blue-Ray Disc Association)
- Situation where they are competing SSO and overlapping standards
- **The Key Question is: Can you find a suitable substitute for the FRAND-encumbered patent in question, readily and at low cost? Is there a credible alternative for the product?**

Antitrust and FRAND: What are the legal theories?

- **Abuse**
- *Motorola* (EC, 2014)

(496) This Decision therefore concludes that in the exceptional circumstances of this case and in the absence of an objective justification, Motorola abused its dominant position by seeking and enforcing an injunction against Apple on the basis of its Cudak GPRS SEP in Germany as from Apple's Second Orange Book Offer.

- *Huawei* (ECJ, 2015)

53 In those circumstances, and having regard to the fact that an undertaking to grant licences on FRAND terms creates legitimate expectations on the part of third parties that the proprietor of the SEP will in fact grant licences on such terms, a refusal by the proprietor of the SEP to grant a licence on those terms may, in principle, constitute an abuse within the meaning of Article 102 TFEU.

- **European Competition Law is probably more willing to find an abuse because of**:

- the concept of *special responsability* (does'nt exist in US law)

(279) As Motorola holds a dominant position on the EEA market for the licensing of the technology, as specified in the GPRS standard technical specifications, on which Motorola's Cudak GPRS SEP reads, Motorola has a special responsibility to ensure that its conduct in relation to the Cudak GPRS SEP does not impair genuine undistorted competition in the internal market.

- EU Law more concerned by the structure of the market (some other laws focuse *primarily* on consumer welfare)

Antitrust and FRAND: What are the legal theories?

- But…

In Europe, there are several important decisions in which dominance has been upheld, but courts are often reluctant to recognize abuse.

- Hard to prove **excessive prices** and **discriminations** under article 102 (very few cases)

- Hard to characterize the harmful effect on the consumers (because antitrust protects competition, not competitors)

Points of comparison (**US Law**) (very few cases of « Monopolization »)

FTC v. Qualcomm (2020)

First, Qualcomm's practice of licensing its SEPs exclusively at the OEM level does not amount to anticompetitive conduct in violation of § 2, as Qualcomm is under no antitrust duty to license rival chip suppliers. To the extent Qualcomm has breached any of its FRAND commitments, a conclusion we need not and do not reach, the remedy for such a breach lies in contract and patent law. *Second*, Qualcomm's patent-licensing royalties and "no license, no chips" policy do not impose an anticompetitive surcharge on rivals' modem chip sales. Instead, these aspects of Qualcomm's business model are "chip-supplier neutral" and do not undermine competition in the relevant antitrust markets. *Third*, Qualcomm's 2011 and 2013 agreements with Apple have

Antitrust and FRAND: What are the legal theories?

- **Conclusion: two « legal theories »** (or two different approaches)
- European competition Law: SEP holder may engage in abusive conduct. Antitrust can be a usefull tool.
  - *Rambus Case*, *Motorola Case* (European Commission)

- In contrast: Some authors, judges and commentators (especially in the US) believe that antitrust is the wrong tool.
- *FTC v. Qualcomm*

Finally, we note the persuasive policy arguments of several academics and practitioners with significant experience in SSOs, FRAND, and antitrust enforcement, who have expressed caution about using the antitrust laws to remedy what are essentially contractual disputes between private parties engaged in the pursuit of technological innovation. The Honorable Paul R. Michel, retired Chief Judge of the Court of Appeals for the Federal Circuit, argues that it would be a mistake to use "the hammer of antitrust law ... to resolve FRAND disputes when more precise scalpels of contract and patent law are effective." Amicus Curiae Br. of The Honorable Paul R. Michel (Ret.) at 23. Judge Michel notes that "[w]hile antitrust policy has its place as a policy lever to enhance market competition, the rules of contract and patent law are better equipped to handle commercial disputes between the world's most sophisticated companies about FRAND agreements." *Id.* at 24. Echoing this sentiment, a former FTC Commissioner, Joshua Wright, argues that "the antitrust laws are not well suited to govern contract disputes between private parties in light of remedies available under contract or patent law," and that "imposing antitrust remedies in pure contract disputes can have harmful effects in terms of dampening incentives to participate in standard-setting bodies and to commercialize innovation." Wright, *supra* note 1, at 808–09.

Which remedies are available?

- **Courts**
  - **US Law:** Treble damages + court injunctions to order changes in antitrust defendant's conduct.
  - **Europe:** Damages + Agreements or clauses imposed by a dominant firm shall be void + injunctions/interim measures (depending of the national court : principle of procedural autonomy *i.e.* EU Member States are free to establish their own national procedural rules to govern the exercise of EU law).

- **Competition Authorities**
  - Fines (limited to 10% of the overall annual turnover of the company. The 10% limit may be based on the turnover of the group to which the company belongs)
  - Commitments
  - Injunctions (and also interim measures: measures must justified by the risk of serious, irreparable harm)
  - No "contractual powers".

Remedies: an interesting french case (*the French neighbouring rights case, 2020*)

[1] Google is ordered to negotiate in good faith with any news publishers and news agencies or collective management organisations so requesting the remuneration owed by Google to the latter for any reuse of protected content on its services in accordance with the terms established in Article L. 218-4 of the IPC and based on transparent, objective and non-discriminatory criteria. This negotiation will have to cover the period of content reuse since 24 October 2019.

305. In order to guarantee the effectiveness of the first Injunction, Google should be ordered to communicate to publishers and news agencies entering into negotiations the information require (i) any calculation allowing for the evaluation of the remuneration proposal made provisi by Google to news publishers and news agencies;

g) Monitoring compliance with Injunctions

312. In order to monitor implementation of the Injunctions, which is dependent in particular on Google's good faith in the conduct of the negotiations, it appears necessary to provide for a mechanism to monitor compliance with the Injunctions.

313. Firstly, Google shall provide the *Autorité* with periodic reports on its compliance with this Decision. These reports shall include, in particular, the following:

(i) any calculation allowing for the evaluation of the remuneration proposal made by Google to news publishers and news agencies;

National courts or Competition Authorities?

- The courts are probably the *natural* judges for FRAND litigations, even though the parties invoke antitrust arguments.
  - But: the plaintiffs are confronted to difficulties to prove antirust wrondoings: complex economics and controversial issues. Expensive.
- Authorities: highly qualified staff, with economics skills, and various investigative powers.
  - But: **limited resources** (are competition authorities well suited to hear all the FRAND litigations?).
  - Since Directive *ECN+* (2019), national competition authorities shall have **the power to set their priorities** (*i.e.* they are obliged to consider formal complaints, but have the power to reject such complaints on the grounds that they do not consider such complaints to be an enforcement priority).

Conclusion

- A last question is is whether the non-discrimination rules of antitrust law can be used to interpret FRAND contractual disputes?
- The "ND" of FRAND *vs* the article 102 (c)

> Such abuse may, in particular, consist in:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

- Few cases involving discriminations between a dominant company and non rival companies (*i.e.* second line discrimination). Difficult to assess anticompetitive effects (no eviction/foreclosure effect).
- Interpretation of non-discrimination in antitrust law is very **restrictive**: competition law only concerned with discrimination that distorts competition on the market (and affect the structure and/or consumer welfare).

Thank you!

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