Standard-Setting Abuse: The Case for Antitrust Control

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Standard-Setting

- Standard-Setting: going from competition to a (potential) monopoly

- Key benefits: interoperability, network benefits, lower costs…
- Anticompetitive risks: less diversification, collusion… hold-up…

- Protection against hold-up:
  **FRAND** (Fair, Reasonable, Non-Discriminatory ex-post rates)
Cases – no precedent!

- **Rambus**: alleged patent ambush on DRAM (JEDEC)
  - Settled

- **Qualcomm**: alleged excessive price for WCDMA (ETSI)
  - Dismissed

- **Nokia-IPCom**: alleged FRAND circumvention through transfer
  - ‘Moral suasion’

- **Google-Motorola & Samsung**: alleged abuse of injunction right
  - Ongoing
The ‘antitrust’ debate mostly takes FRAND as given:

- *how should FRAND be enforced by antitrust authorities?*
- *how can we know if a FRAND commitment has been violated?*

Tricky because:

- Comp. Authorities stepping in Courts’ territory (private law)
- FRAND does not protect against all potential sources of harm
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The exercise of monopoly power is not per se an issue. In Europe, it becomes an issue if it is ‘exploitative’ (art. 102 TFEU: dominant undertaking imposing unfair trading conditions)

So the antitrust debate should rather be:

- how can we identify exploitative abuse in standards?
- is FRAND the right tool to protect against exploitative abuse?
Competition Economists’ default: **don’t mess with “unfair” prices**

... unless you really have to, because *if you don’t* consumers are very likely to be worse-off

*(most popular) checklist:*

- very high, lasting barriers to entry
- super-dominance
- not effective/swift regulation
- dominance originates in past failure of competition control
The issue

- The issue is not the FRAND infringement
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- The issue is the restriction of competition that permanently empowers a player to reach a more favorable equilibrium than it would if there would still be competition in the technology market.

FRAND infringement – seems more an “excuse”

if a firm commits to be fair and then breaks its promise… that seems to justify intervention: pursuing an exploitative abuse case entails a lower risk of distortion if something ”wrong” was done in the past

... but in principle you don’t need FRAND to apply 102 TFEU!
Can a player that committed to FRAND be not significantly empowered by the standard? **YES!**

Example:

- 3 technologies X, Z, Y compete to become the standard
- Company A has core-essential IP in X, Z and Y
- *A had market power already before the adoption of the standard*

... analogy with the ex-ante/ex-post approach... **BUT...**
Can a player that did not commit to FRAND be significantly empowered by the standard? **YES!**

**Examples**

**Hold-up**

* patent ambush (Rambus)
* ex-post patent transfer (IPcom)

_Licensor technically didn’t commit to FRAND_
Can a player that did not commit to FRAND be significantly empowered by the standard? Yes!

Examples

Hold-up
- patent ambush (Rambus)
- ex-post patent transfer (IPcom)

Reverse Hold-Up
- FRAND as reverse weapon
- Process manipulation

Licensor technically didn’t commit to FRAND
Licensee not required to commit to FRAND
Can a player that did not commit to FRAND be significantly empowered by the standard? **YES!**

**Examples**

**Hold-up**
- patent ambush (Rambus)
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**Reverse Hold-Up**
- FRAND as reverse weapon
- Process manipulation

*The issue could be with the process – but 101 can be difficult to implement if the nature of the abuse is essentially unilateral*
Theory (eg Ganglmair et al 2012) and empirics (eg Lanjouw and Schankerman 2004):

If you’re a **small innovator**, you are likely **to get a lower price** than you should be entitled to – because **access to judicial system is imperfect**

iRunway: 20% of seminal patents in 4G-LTE held by small companies

Same applies to hold-up… the smaller, the lower bargaining power, the more vulnerable

Perhaps here antitrust authorities can **add most** compared to courts??
Beyond FRAND

- Needs of a holistic and symmetric approach
- Focus on the restriction of competition, not on FRAND
- How the standard alters the bargaining process? Who gains, who loses?

In practice...
- Within company ex-ante / ex-post correspondence, internal business plans, forecasts etc.
- Between companies ex-ante / ex-post correspondence
- Focus on the standardization process: inspect meetings’ minutes, public info analysis (media coverage, reports, rumors…)
- Investments’ actual pattern (when did real lock-in take place?)
- …

Competition authorities: best suited to reconstruct the competitive counterfactual i.e. identify the significant alteration in the distribution of bargaining power. Art 102 should apply irrespectively of FRAND.
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Back-up slides
Check-list: 4 necessary (not sufficient) conditions for a FRAND violation

1. Ex-ante, a credible alternative to the adopted technology exists.
2. Ex-ante, perspective licensees cannot reasonably anticipate the licensor’s ex-post requests.
3. Ex-post, the licensor does not charge better licensing conditions than ex-ante.
4. Ex-post, the licensee is locked into the technology.

[underlying assumption: value of technologies increases over time]
# ETSI voting rights

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