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Another CJEU ruling on standard-essential patents and FRAND looks inevitable

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Cars and other motor vehicles operate such sophisticated communication technologies that today they operate almost like "smartphones on wheels". This dependency on electronic communication means auto-manufacturers require access to the latest 4G and 5G standards essential to navigation and communications. Of course, these essential technologies are often patented and thus there are a range of standard-essential patents that require licensing. When the companies that hold the patents and the manufacturers who seek to make use of the tech cannot agree on the terms (in line with commitments to FRAND licensing) patent disputes are inevitable.

In Europe high profile battles often involve Nokia, the Finnish telecoms giant and major 4G and 5G developer, over licences for patented technologies that are essential to standards for navigation, vehicle communications and self-driving cars. Nokia's patent enforcement strategy could be described as assertive or even aggressive, depending on your point of view. In late 2019, a group of 27 companies, including Daimler, Ford, BMW, Dell, Cisco, Continental, Lenovo and Sky complained to the European Commission about alleged abuses of the patent system that they claimed could jeopardise the development of self-driving vehicles and relevant connected devices.

Although the complaint did not mention Nokia by name, it clearly pointed the finger at the Finnish multinational and its refusal to license its standard essential patents to car companies and component suppliers on terms viewed as FRAND by the potential licensees. In particular, the companies believe the licensing fees demanded by Nokia are too high, even to the extent of amounting to an illegal abuse of a dominant position under Article 102 of the Treaty on the Functioning of the European Union (TFEU) (thereby violating EU competition rules). In the seminal 2015 case Huawei v ZTE, the EU's top court found that every player is entitled to obtain a patent licence for standard technology on fair and reasonable terms.

As is well known, SEP holders are required to give an irrevocable undertaking that they are prepared to grant competitors licences on terms that are fair, reasonable, and non-discriminatory. Daimler and its suppliers argue that Nokia's licensing behaviour doesn't comply with these obligations, which is why they have filed the antitrust complaint with the European Commission. The Commission has yet to take action.

In the meantime, in 2019 Nokia began several legal actions against Daimler, including in Germany, claiming patent infringement. For our purposes the key German dispute is Nokia v

Daimler before the District Court of Mannheim (case ID 2 O 34/19). The dispute concerns Nokia's patent EP 29 81 103 B1 which is key to the UMTS and LTE standards. Nokia has asked the court to issue an injunction against Daimler. The case is ongoing.

Inevitably in such a dispute, both sides claim the other has not made a proper FRAND offer in line with the CJEU's crucial *Huawei* guidance. But the CJEU's guidelines were arguably unclear in a range of specific areas, especially regarding the particular duties of the patent holder and the potential licensees/infringers in FRAND negotiations. Specifically, does the SEP owner have to license every entity in the supply chain (and on what terms)?

This issue has recently provoked the involvement of Germany's Bundeskartellamt (Federal Cartel Office). On the 18th of June 2020, the Federal Cartel Office filed an *amicus curiae* brief in which it calls on the Mannheim District Court and other courts dealing with related cases between the parties to stay proceedings pursuant to an analogous application of Section 148 of the German Code of Civil Procedure and refer the case to the Court of Justice of the EU (CJEU) for a preliminary ruling on a series of questions relevant to competition law and standard-essential patents:

- does a SEP owner's refusal to license a supplier while pursuing litigation against the end-user manufacturer (within the same supply chain for the patent technology) amount to abuse of a dominant position under Article 102 of the Treaty on the Functioning of the European Union (TFEU)?
- What is the criteria for suit? Can a SEP owner decide which entity within a supply chain to sue for infringement, or does each entity's overall value within the chain need to be taken into account in light of competition law?
- In what circumstances can certain entities within a supply chain be excluded from an offer to license?
- Can SEP owners decide entirely of their own accord which entities they will license to and which ones they refuse to license to, depending on what stage of the supply chain the potential licensee operates at?

Conclusion

The Federal Cartel Office can participate in German court proceedings in form of "amicus curiae" pursuant to Section 90 of the German Act against Restraints of Competition *ex offico* though they usually are submitted in proceedings before the highest German courts. The courts are of course not obliged to follow the Office's proposed action but the Mannheim court notably postponed the envisaged delivery of the judgment from June 23, 2020 to August 04th 2020 following the Office's statement. This could be seen as an indication that the Court is seriously considering calling the CJEU to decide in the hope that it gives clarity to this complex area.

The 2015 Huawei ruling, while praised for its balanced approach, was also criticised for being too vague in some respects (e.g. the requirement for parties to negotiate in 'good faith'), in particular in the present scenarios where many companies are involved in a supply chain for a complex product. Any new ruling on the above questions would undoubtedly be less 'balanced' as the CJEU would need to make the hard decisions on supply chains, components and end-users – the very decisions it avoided skilfully in the 2015 ruling.

Another complexity is the complaint at the EC level. Some commentators have argued that a

European Commission investigation into Nokia's licensing scheme could have a negative impact on Europe's strategic autonomy when it comes to 5G, as Nokia is one of Europe's major 5G players (along with Ericsson). Could a formal competition procedure aimed at shedding light on Nokia's practices take place simultaneously with a new CJEU case? Could the EC seek to provide guidance on key issues before the CJEU has a chance to make a ruling? Time will tell.

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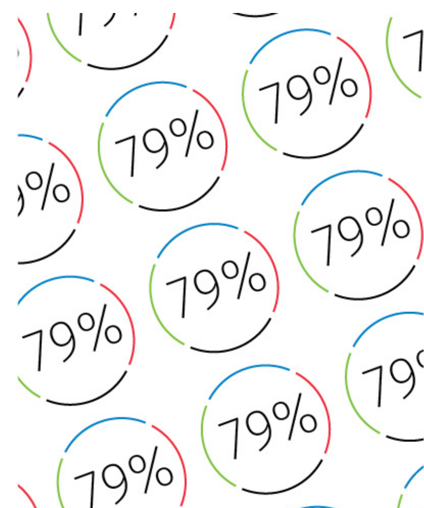

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