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Tool: An EU Antitrust
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I. INTRODUCTION

The *Apple/Samsung* mobile device war has been raging for quite some time. In the European Union, Samsung sought injunctive relief before several Member States' courts to prevent Apple from selling certain versions of its iPhone on the grounds that Apple was violating Samsung's standard essential patents ("SEPs") pertaining to the 3G mobile telephony standard. Early last year, the European Commission ("EC") initiated a formal inquiry² to assess whether Samsung had abused its dominant position by breaching its prior commitment to license its SEPs under FRAND³ terms. The EC has apparently focused its inquiry on the potential (ab)use of injunctive relief rather than on the alleged breach of Samsung's FRAND commitment. In December, it sent formal charges against Samsung.⁴ This case, which is not the only one in the pipeline,⁵ re-opens the debate on injunctive relief as a source of antitrust concern.

On the other side of the intellectual property/competition fence, over the past decade the EU antitrust watchdog has not used the interim measures mechanism provided for in Article 8 of Regulation 1/2003 even once. The provision empowers the EC to adopt interim measures in order to maintain the *status quo* pending the final outcome of antitrust infringement proceedings.

This article explores both aspects of injunctive relief, namely the use of injunctions by SEP owners and by the EC. Based on a review of existing case law, it first takes a critical look at the possible theories of harm that the EC may put forward in the context of injunctive relief viewed as a violation of the antitrust rules. It then examines why interim measures have remained an unexploited enforcement tool and whether the EC has alternative tools to enforce the antitrust laws in the context of threats of imminent and irreparable harm to competition.

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² On January 31, 2012, the EC issued a press release announcing it has opened a formal investigation against Samsung, available at http://europa.eu/rapid/press-release_IP-12-89_en.htm.

³ FRAND stands for Fair, Reasonable and Non-Discriminatory.

⁴ On December 21, 2012, the EC issued a press release announcing the adoption of a Statement of Objections against Samsung, available at http://europa.eu/rapid/press-release_IP-12-1448_en.htm as well as a "Questions and Answers" on Samsung – Enforcement of ETSI standards essential patents (SEPs), available at http://europa.eu/rapid/press-release_MEMO-12-1021_en.htm.

⁵ The European Commission is understood to be investigating patent disputes involving Google, Microsoft, Huawei, wireless technology patent holder InterDigital, and patent enforcement company MOSAID.

II. INJUNCTIVE RELIEF AS POSSIBLE VIOLATION OF EU COMPETITION LAW

Despite Samsung's last minute decision to terminate the injunctive relief proceedings that it has filed against Apple in several Member States' courts, the EC nevertheless adopted on December 21, 2012 a Statement of Objections ("SO") against Samsung alleging potential misuse of its SEPs relating to the 3G mobile telephony standards. Similar to other pending patent disputes, the EC is apparently taking the view that seeking court injunctions to stop commercialization by a competitor of products infringing SEPs may amount to an abuse of a dominant position, in particular when the SEPs' owner has made a prior commitment to license the SEPs to willing licensees under FRAND terms. Thus, similar to the U.S. Federal Trade Commission's ("FTC's") position in the *Motorola/Google* case adopted in January this year,⁶ the EC perceives the use of injunctive reliefs by SEPs holders as potentially problematic under Article 102 of the Treaty on the Functioning of the European Union ("TFEU").

The ongoing patent wars raise the question whether, and if so under what circumstances, a company with significant market power may violate the antitrust laws through preliminary court injunctions, which are purported to prevent a competitor from selling or entering the market. The case law on this issue is thin—only two court cases come to mind—*ITT Promedia* and *AstraZeneca*.

More than fifteen years ago, the EC had to deal with an allegation that Belgacom, the Belgian incumbent telecom operator, had abused its dominant position through, among other things, initiating vexatious litigation against ITT Promedia, a supplier of telephone directories. In that case, it was held that, in exceptional circumstances, seeking judicial relief could well be found abusive if engaged by a dominant company. However, such a finding would only arise when: (i) it appears that the legal action does not objectively constitute an attempt to establish a right (i.e. it is manifestly unfounded) and, thus, it is only meant to harass a competitor; and (ii) it is conceived as part of a strategy to eliminate competition.⁷ It is worth noting that, in applying the two-pronged test, the Court of First Instance (now General Court) found that Belgacom had not abused its dominant position.

Another case of relevance to today's debate is *AstraZeneca*.⁸ In that case, the EC found that AstraZeneca had committed two abuses of its dominant position that pursued the same objective of preventing or delaying entry of the generic version of omeprazole-based medicines. First, it was held that AstraZeneca had misled the patent offices and courts in order to obtain or maintain supplementary protection certificates ("SPCs"). In certain countries, this had the effect of extending the protection of AstraZeneca's patented drug Losec. Second, AstraZeneca had

⁶ *In the Matter of Motorola Mobility LLC, a limited liability company, and Google Inc., a corporation*, FTC File No. 121 0120, decision and order adopted on January 3, 2013, available at: <http://www.ftc.gov/os/caselist/1210120/index.shtm>.

⁷ Case T-111/96, *ITT Promedia v. Commission*, ¶30. This two-pronged approach was not called into question by ITT Promedia before the Court of First Instance (now the General Court). As a result, the Court did not examine the appropriateness of that approach under Article 102 of the TFEU (ex-Article 86 of the EC Treaty). This approach has, however, been examined and used by the General Court in its judgment on September 13, 2012 in case T-119/09, *Protégé International v. Commission*, not yet reported.

⁸ Case C-457/10, *AstraZeneca v. Commission*, judgment of the Court of Justice on December 6, 2012, not yet reported.

selectively deregistered the marketing authorizations for the capsule version of Losec and, in parallel, had launched a tablet version.⁹

According to the European Court of Justice's ("ECJ") ruling on December 6, 2012 in that case, the recourse to administrative procedures (and by extension legal actions), even in pursuance of a strategy to restrict competition, is legitimate if it qualifies as practices falling within the scope of "competition on the merits."¹⁰ Recourse to administrative processes or judicial actions may be unlawful only where they are used "in such a way as to prevent or make more difficult the entry of competitors on the market, in the absence of grounds relating to the defense of the legitimate interest of an undertaking engaged in competition on the merits or in the absence of objective justification."¹¹

Unfortunately, the ECJ does not provide much guidance as to how "competition on the merits" ought to be understood in particular cases. This catch-all expression tends to embrace more scenarios than the conventional theories of harm under Article 102 TFEU, including tying, bundling, predatory pricing, and refusal to deal. However, the reference to "the protection of legitimate interests" and "objective justifications" as possible defenses (although, admittedly, fairly hard to prove) might play as a counterweight or safety valve for dominant companies using—in good faith—legal procedures and remedies to protect their legitimate commercial interests.

In the ongoing injunctive relief debate, *ITT Promedia* does not appear to be authoritative, in the sense that it requires a showing that the injunctive relief is objectively and manifestly unfounded. This condition may not be fulfilled in cases where the patent holder is seeking injunctions to protect legally acquired SEPs. In addition, as *ITT Promedia* and subsequent cases illustrate,¹² the test has been applied or invoked, yet never met, to support a finding of abuse.

What about *AstraZeneca*? Under *AstraZeneca*, it would be necessary to determine whether a dominant company applying for injunctive relief against willing licensees (despite the fact that it had committed to licensing its SEPs under FRAND terms) qualifies as "competition on the merits." The answer to that question would arguably require a case-by-case analysis of the dominant company's conduct and practices, including the circumstances in which such practices were implemented, as well as the presence of any legitimate interest or objective justification. Presumably, based on the German *Orange Book* case, which analyzed defenses against injunctions under Article 102 TFEU, for an abuse of dominance case to proceed, it would be necessary for the EC to satisfy itself that the licensee has made a binding, unconditional, and reasonable offer to obtain the license under FRAND terms, which the licensor has rejected.¹³

Furthermore, relevant factors for the assessment of the conduct might include: (i) the efforts of the licensor to arrive at mutually satisfactory terms with the infringing licensees before

⁹ Commission Decision of 15 June 2005 in Case COMP/A.37.507/F3 available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_37507

¹⁰ Case C-457/10, at ¶129.

¹¹ *Id.*, at ¶134.

¹² See, in particular, judgment of the General Court of September 13, 2012, Case T-119/09, *Protégé International Ltd v European Commission*, not yet reported.

¹³ Bundesgerichtshof, KZR 39/06, decision of May 6, 2009.

seeking preliminary injunctions; (ii) the extent to which the licensor's refusal is discriminatory; (iii) the amount of compensation that the licensor seeks to obtain in the main proceedings; and (iv) the implications that an injunctive order may have on the licensees, including the risk of undermining the very purpose and essence of any FRAND commitments offered at the time of adopting the standard. Under the effect-based approach of the Guidance on Article 102 TFEU, in order to be considered abusive, the practices under review should also lead to anticompetitive foreclosure, namely denying an "equally efficient competitor"¹⁴ access to SEPs, which would likely result in higher prices or less choice to consumers.

The future will tell us what the EC's approach will ultimately be. Faced with limited case law and guidance from the European courts, would the EC find inspiration from the more process-oriented approach—involving compulsory arbitration—that the FTC devised in the *Google/Motorola* case?

III. INTERIM RELIEF: A CUMBERSOME TOOL FOR ANTITRUST ENFORCEMENT

The EC has made limited use of interim measures in antitrust proceedings. To understand why it is so, a bit of antitrust history may be a good place to start.

As early as 1980, the ECJ held in the *Camera Care* case¹⁵ that the EC had the power to impose interim measures in competition proceedings. *Camera Care* involved a refusal to supply photographic equipment and spare parts to a customer. The complainant, Camera Care, requested the EC to issue an interim decision ordering its supplier, Hasselblad, to restore supplies at the usual price and conditions. The EC refused on the grounds that it lacked a legal basis to do so, and the complainant lodged an action before the ECJ.

The ECJ ruled that the EC may adopt interim measures by decision where it appears that such measures would be: (i) indispensable to ensuring the effectiveness of any subsequent infringement decision and (ii) necessary as a matter of urgency to avoid serious and irreparable harm to a competitor or the public interest.¹⁶ The power was not unfettered, though. Interim measures had to be of "a temporary and conservatory nature and restricted to what is required in the given situation."¹⁷

As we shall see below, the imposition of any measure, even of a temporary and conservatory nature, will, in most situations, require a change in behavior on the part of the dominant company, which is very often at the root of the antitrust probe. It will be either an obligation to act (e.g. duty to provide interoperability information or compulsory license of Intellectual Property) or to refrain from committing an act (e.g. tying, bundling, or pricing below cost). That is to say, the measure will cause or induce a change in the market, the effects of which will often practically be impossible to reverse if the main proceedings reveal that the targeted company did not commit any abuse under Article 102 TFEU.

IMS Health is illustrative of this problem. In *IMS Health*, the General Court questioned the EC's use of interim measures, which took the form of compulsory licensing of copyright

¹⁴ See, e.g. Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, [2011] ECR I-527, at ¶63 et seq.

¹⁵ Order of the Court of 17 January 1980 in Case 792/79R, *Camera Care v Commission*, [1980] ECR 119.

¹⁶ *Id.*, at ¶¶18 and 19.

¹⁷ *Id.*, at ¶ 19.

under transparent, objective, and non-discriminatory terms. In a first order, the President of the General Court pointed out that the EC's decision was based on the *prima facie* finding that the IMS data reporting structure protected by copyright was an industry standard akin to an essential facility, a finding that IMS did not have an adequate opportunity to counter-argue, and that the EC's interim measure was not intended to preserve the *status quo ante*.¹⁸ It concluded that it needed additional time to assess the validity of the interim measure imposed by the EC and, in the meantime, suspended the EC's interim measure decision.

In its second order, adopted two months later, the President of the Court called into question the appropriateness of interim measures in the context of relatively novel (at the time) antitrust theories of harm, in particular the "exceptional circumstances" which would be capable of justifying compulsory licensing.¹⁹ The Court also put into the balance the risk of serious and irreparable harm to IMS's business should it be compelled to license its copyrighted data reporting structure to a competitor.²⁰ As a result, the President of the Court confirmed the suspension of the EC's decision ordering compulsory licensing.

At the time of *IMS Health*, the debate on the modernization of EU competition rules was reaching its final stage. On December 16, 2002, Regulation 1/2003 was adopted and empowered the EC to adopt interim measures:

[i]n cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a *prima facie* finding of infringement, order interim measures.

Post-*IMS Health* and Regulation 1/2003, the EC's ability to adopt interim measures has been further constrained. Not only must the EC reach a finding of a *prima facie* infringement but, more importantly, it must conduct an assessment of the irreparable damage to *competition* (as opposed to a damage to a single competitor) should no immediate relief be granted. To what extent the imminent threat of "irreparable damage to competition" connects with the financial and commercial damage suffered by the complainant is a difficult question to answer. Generally speaking, interim relief is seldom concerned about financial losses, which are not considered to be irreparable (since they may be recouped later in follow-on civil damage proceedings).

While the financial distress of the complainant may be a factor to consider, it is not a decisive one. Furthermore, as *IMS Health* reminded us, the primary purpose of Article 102 TFEU is to prevent the distortion of competition more generally, and especially to safeguard the interest of the consumers, rather than to protect the position of particular competitors.²¹ Therefore, the EC's inquiry must involve an analysis of whether there is an imminent and serious threat to the competition process as a result of the unilateral conduct of the dominant undertaking. At the same time, the harm to competition (and ultimately consumers) needs be balanced against the harm that the projected measure may cause to the dominant company.

¹⁸ Order of 10 August 2001, Case T-184/01 R, *IMS Health v. Commission*, [2001] ECR II-2349, ¶¶25 and 26.

¹⁹ Order of 26 October 2001, Case T-184/01 R, *IMS Health v Commission*, [2001] ECR II-3193, ¶106.

²⁰ *Id.*, at ¶127.

²¹ *Id.*, at ¶145.

As *IMS Health* suggests, interim relief should be reserved for clear-cut violations based on well-established case law (e.g. a refusal to supply a downstream user or refusal to provide access to an essential infrastructure, as illustrated by the *Port of Roscoff* case²²) and on a relatively straightforward fact pattern. In the context of Article 102 TFEU, though, such cases are not legion. Conversely, in situations where the conduct and the facts at issue arise in the context of commercial disputes and claims involving intellectual property rights, building a *prima facie* case may prove not only difficult but also hazardous, especially in view of the more effect-based approach adopted by the Commission in the Guidance on Article 102 TFEU.

These procedural and substantive burdens are actually at the heart of the problem. While interim measures have been devised to address emergency situations, in antitrust cases the EC simply cannot examine and draw conclusions from complex fact patterns under heavy time pressure. Under Regulation 1/2003, the EC has to go through a long drawn-out and resource intensive process prior to taking any action to freeze a rapidly deteriorating market situation.²³ The EC has to first adopt an SO based on a finding of a *prima facie* violation, keeping in mind that the threshold is *harm to competition*. It then has to give the parties an opportunity to rebut the allegations both in writing and at an oral hearing, after having given them access to file. Finally, the EC must adopt a decision that has to be, even in a shortened version, sufficiently reasoned.

On top of this long and cumbersome process, interim measures may prove counter-productive to the main proceedings. Once adopted, interim measures may be subject to an appeal and the applicant may seek its immediate suspension (as in *IMS Health*). The General Court may not be swayed by the arguments put forward by the EC and suspend the measure. This, in turn, may be detrimental to the substance of the main proceedings.

As an interim conclusion, the system appears simply impractical. Because it has to prove an additional element, i.e. threat of imminent and irreparable harm to competition, which is not required in the context of the main proceedings, the EC may find it more attractive to use another route, which could be sufficiently speedy and less prone to appeal. Specifically, the EC may prefer exploring, at a fairly early stage, whether commitments may resolve the antitrust concern more efficiently as opposed to embarking on the risky and costly interim measures path.²⁴

Under the commitment procedure, the EC benefits from a number of procedural economies: no SO is required,²⁵ no access to the file is foreseen, and no oral hearing has to be organized. The EC has to make a “preliminary assessment,” which merely requires an overview of the competition concerns that would support a decision rendering voluntary commitments binding. As commitments are not adopted to resolve an imminent threat of irreparable harm to

²² See http://europa.eu/rapid/press-release_IP-95-492_fr.htm#PR_metaPressRelease_bottom.

²³ The shortened time limits defined at article 17(2) of regulation 773/2004 bring only a small acceleration of the procedure. Commission Regulation (EC) No 773/2004 of April 7, 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123, 27.4.2004, p. 18).

²⁴ This appears to be what the EC has been trying to do with Google/Motorola, Samsung, and others in the context of disputes arising out of the use of SEPs.

²⁵ Although commitments may be offered after the issuance of a statement of objections.

competition, and the curative measures offered voluntarily by the dominant company are less intrusive than an infringement decision, deciding on commitments presumably requires a less cumbersome exercise than a showing of a *prima facie* violation. While it is true that the preliminary assessment has to be of such a level as to allow a review of the appropriateness of the commitments offered, the standard and burden of proof are probably less demanding than in the context of an interim relief, which may have dramatic effects on the commercial interests of the dominant company.

Finally, the EC does not have to initiate two proceedings in parallel (the interim proceeding and the main proceeding on the substance of the case) but can address all of the issues all at once with the undertakings concerned, including the complainant.

The flexibility of this instrument may explain why the commitment approach has become the enforcement tool of choice of the EC lately,²⁶ whereas no interim measures have been adopted since the entry into force of the Regulation 1/2003.

²⁶ To date, 17 commitment decisions concerning alleged abusive conducts by dominant undertakings have been adopted since the entry into force of Regulation 1/2003.