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— News —

Antitrust

Commission adopts Motorola Mobility and Samsung Electronics decisions on standard essential patents (SEPs)

The last episode of the so-called smartphone patent wars has resulted in the European Commission declaring that Motorola Mobility (Motorola) incurred in an abuse of a dominant position by means of seeking and enforcing an injunction against Apple before a German court on the basis of a standard essential patent (SEP).

In parallel, the Commission has reached a settlement in a separate investigation concerning Samsung, which had similarly sought to use its SEPs in prejudice of certain Apple products.

SEPs are technically essential to implement a specific industry standard, thus it is not possible to manufacture products that comply with a certain standard without having access to these patents. Standards bodies generally require their members to commit to license their SEPs on fair, reasonable and non-discriminatory (FRAND) terms to prevent abuses of market power.

However, disagreements regarding FRAND terms led to some SEP holders seeking and enforcing injunctions before national courts. These injunctions may constitute an abuse of a dominant position if the SEP holder has given a voluntary commitment to license its SEPs on FRAND terms and the company against which an injunction is sought is willing to enter into such licence agreement.

This was the case of certain Motorola's mobile and wireless communications SEP. Motorola agreed to license its SEP to third parties on FRAND terms and both Motorola and Apple agreed that in case of dispute, the German courts would fix the FRAND rate and Apple would pay royalties accordingly.

The Commission has also clarified that any potential licensee of a SEP should be free to challenge the validity, essentiality or infringement of SEPs as it is in the public interest that eventually invalid patents can be challenged in court. In this sense, the Commission also found anticompetitive that Motorola used the threat of an injunction to force Apple to desist from challenging the validity or infringement by its mobile devices of Motorola SEPs.

Implementers of standards and ultimately consumers should not have to pay for invalid or non-infringed patents. Implementers should therefore be able to ascertain the validity of patents and contest alleged infringements.

The Commission has decided to order Motorola to eliminate the negative effects resulting from this behaviour but not to impose a fine, based on the fact that there is no EU case-law dealing with the legality under Article 102 TFEU of SEP-based injunctions and that national courts have so far reached diverging conclusions on this issue.

As for the Samsung case, based on the settlement reached with the Commission, the company has undertaken not to seek SEP-based injunctions in the European Economic Area for companies that agree to license its smartphones and tablets patents under a specific licensing framework based

on FRAND terms. In the event of dispute, a court or arbitrator –if both parties agree- will intervene.

Commission sends Statement of Objections to Crédit Agricole, HSBC and JPMorgan for suspected participation in euro interest rate derivatives cartel

Interest rate derivatives are financial products used by banks to manage risks associated with interest rate fluctuations. Euribor is a benchmark interest rate used in the Eurozone.

In 2011 the Commission carried out unannounced dawn raids in several banks. The investigations led to a settlement procedure by which the Commission fined 1,04 billion EUR to four banks (Barclays, Deutsche Bank, RBS and Société Générale) in December 2013 for colluding to set the Euribor. These four banks benefited from a 10% reduction in their fines.

In March 2013, the Commission opened proceedings against Crédit Agricole, HSBC and JP Morgan for their alleged participation in the Euribor cartel. The Commission has now sent these banks a Statement of Objections containing its concerns concerning the collusive scheme which aimed at distorting the normal course of pricing components for euro interest rate derivatives. These three banks did not participate in the 2013 settlement procedure.

European Parliament adopts Directive on antitrust damages actions

The European Parliament has approved the Commission's proposal for a directive on private antitrust damages actions by an overwhelming majority.

The key aspects of the directive are the following:

- The limitation period for victims of an antitrust violation should be at least 5 years since they could reasonably have known of the violation, the identity of the offender and the harm caused.
- Members of a cartel shall be jointly and severally liable for the loss caused by their actions so that a victim may seek full compensation from any of them without being its direct contracting counterparty.
- A presumption is established that cartels cause harm, shifting the burden of proof to cartel participants.
- Access to evidence is made easier. National courts are entitled to order, under limited restrictions, the disclosure of evidence containing confidential information, when it considers it relevant to the proceedings.
- Final decisions of a national competition authority will be binding on the courts of that country for the purposes of an action for damages and will constitute *prima facie* proof of an antitrust violation before courts of other Member States.
- The passing-on defence is allowed to defendants as long as they can prove that the claimant has passed on the overcharge resulting from the antitrust infringement (as a whole or in part) to its customers.
- Out-of-court settlements are encouraged.

The directive will enter into force following the approval by the Council and its publication in the Official Journal of the EU. Member States will then have two years to implement its provisions into their national legislations.

— *Case-law & Analysis* —

The Court of Justice upholds a complaint against Google based on the "right to be forgotten" (Judgment of 13 May 2014 in Case C-131/12 *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González*)

The Court of Justice of EU has uphold the complaint lodged by a Spanish individual (Mr Costeja) against Google with the Spanish Data Protection Agency based on the fact that, following searches with his name in Google's search engine, the list of results displayed links to pages of a 1998 newspaper (La

Vanguardia) containing information about the auction of his home for unpaid debts.

Mr Costeja also lodged a complaint against the newspaper La Vanguardia, but the Spanish Data Protection Agency rejected this complaint arguing that it was lawful to publish this information. By contrast, the Spanish authority condemned Google Spain and Google Inc to withdraw the data from their index and to render access to the data impossible in the future. The two companies sought annulment of the decision before the Audiencia Nacional (Spanish National High Court). In this scenario, the Audiencia Nacional decided to refer a series of questions to the Court of Justice with regard to Directive 95/46/EC on the protection of individuals to the processing of personal data and on the free movement of such data.

The Court has first analyzed whether the activity of Google falls within the Data Protection Directive. In this sense, it has found that the activity of a search engine consisting in finding information published on the internet by third parties, indexing it automatically, storing it temporarily and making it available to internet users according to a particular order of preference must be classified as 'processing of personal data' within the meaning of the Directive.

In addition, the Court has stated that, even if the indexing activities of Google take place in the US, the case is subject to the Directive insofar as the operator of the search engine established a branch or subsidiary in a Member State that promotes and sells advertising space offered by that engine and addressed to the population of that Member State.

Therefore, Google is considered as a "controller" in the sense of the Data Protection Directive; i.e. a body which determines the purposes and means of the processing of personal data.

Furthermore, the Court has confirmed that, in order to comply with the rights recognized by the Directive, the operator of a search engine is, under certain circumstances, obliged to remove links to third parties' web pages containing information relating to a person from the list of results displayed by a search of such person's name. This obligation shall be respected regardless the fact that the publication in those web pages was lawful.

The Court has also highlighted the important role played by the internet and search engines in these days and the fact that this situation renders the information contained in search engines' lists ubiquitous. Thus, this interference in the private life of a person cannot be justified on the sole fact of the economic interest of the engine operator.

Finally, with regard to the so called "right to be forgotten" or whether the Directive enables to request that links are removed from a list of results on the grounds that the person wishes their personal information to be "forgotten" after a certain time, the Court has confirmed this right under certain conditions. If following a request by the data subject, the inclusion of those links in the list is, at this point in time, incompatible with the Directive, the links and information in the list must be deleted. The Court has stated that processing of data may, in the course of time, become incompatible with the Directive where the information appears to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed and in the light of the time that has elapsed.

However, that would not be the case if it appeared, for particular reasons such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in accessing the information in question.

In sum, data subjects may address requests directly to operators of a search engine (controllers) which must then duly examine its merits. If the request is not granted, the data subject may bring the matter before the supervisory authority or the judicial authority, so that it carries out the necessary checks and orders the controller to take specific measures accordingly.

This judgment, which reaches a complete different conclusion compared to Advocate General Jääskinnen's opinion delivered in June 2013, opens a whole new landscape for online data protection complaints as web companies are now

bound by a legal obligation to examine each request and make a balance between the individual's right to privacy and the right of the public to find such data.

Spanish court reduces the fine imposed to the association STANPA as facilitator of a cartel (Judgment of Audiencia Nacional of 7 May 2014, *STANPA v CNC*)

In 2011, the Spanish cosmetic, toiletry and perfumery association (STANPA) was fined 900,000 EUR for facilitating a cartel in the sector of professional hair care products. This cartel consisted in the regular exchange of very sensitive information, such as future prices and non solicitation agreements. The cartel was active between 1989 and 2008, although STANPA only intervened as from 2003.

Eight companies were considered members of the cartel and received fines ranging from 299.000 EUR to 23 million EUR. Among these companies, Henkel was granted immunity from any fine due to revealing the existence of the cartel within the framework of the leniency regime.

STANPA appealed the decision before the Spanish competent court, Audiencia Nacional, which rejected all of the arguments of the claimant but one.

Among the arguments put forward by STANPA, it invoked that its alleged participation as "necessary cooperator" or "facilitator" in the cartel was not as such provided by the Spanish Competition Act among the possible offenders of the Act. Therefore, any fine imposed on the basis of such a charge would be unconstitutional.

The Court pointed out that as from 2003, STANPA received from and send to each of the members of the cartel strategic individual information. In addition, STANPA convened and participated in the meetings of the cartel. Considering this, the Court considered that STANPA may be held responsible of the infringement.

The last argument can be put in relation with the landmark EU case *AC Treuhand*, a Swiss consultancy fined a symbolic 1.000 EUR in 2003 in relation to the organic peroxides cartel, based on the same type of organisational assistance provided to the members of the cartel. This sanction was later confirmed by the General Court. Since the 2003 symbolic fine, the General Court has dismissed further appeals brought by AC Treuhand against the Commission on the heat stabilisers cartels and fines imposed on the consultancy have reached 348,000 EUR. It seems therefore clear that facilitators are susceptible of being fined for competition infringements.

Finally, the Court upheld the argument by which STANPA argued that, while the cartel was operative for almost two decades, it is proven that its implication took place only from 2003 to 2008 and therefore, the corresponding fine should not be fixed using the same parameters as used for the rest of the members. Thus, the fine was considered as not proportionate and the Court reduced it from 900,000 EUR to 450,000 EUR.

The Court of Justice fines Spain 30 million EUR for failing to recover illegal State aid in the Basque Country (Judgment of 13 May 2014 in Case C-184/11 *Commission v Spain)*

In 2001, the European Commission declared three not notified tax regimes in the Basque Country as illegal under the EU State aid rules and required Spain to recover the aids.

Subsequently, the Commission filed an action for infringement before the Court of Justice based on the alleged inactivity of Spain. The Court confirmed in 2006 that Spain did not execute the necessary measures to recover the illegal aids and ordered it to proceed with the recovery.

Subsequently, the Commission brought a second action requesting the Court of Justice to: (i) declare that Spain had failed to comply with the previous judgment and; (ii) to impose a more than 64 million EUR fine.

Advocate General Sharpston concluded the Court should fix a lump sum fine to Spain of 50 million EUR *(see our Alert of February 2014)*. The Court agreed on fining Spain due to (i) the excessive time it has taken to recover the illegal aid (ii) the particularly harmful consequences to competition and (iii) the recidivist behaviour of the Member State. Nevertheless the lump sum is fixed at 30 million EUR considering the ability of Spain to pay.

— *Currently at GA&P Brussels* —

Miguel Troncoso Ferrer has participated as lecturer in the courses of CAPA (*Certificat d'Aptitude à la Profession d'Avocat*) at the Brussels Bar Association where he has given a lecture on the Procedure before the European Court of Justice on 8 May 2014.