

Alexander Italianer interview (2)

DG Comp's director general talks about standard-essential patents, international co-operation and why he didn't become a singer

Standard-essential patents

Q: What role do you see for international standard-setting organisations such as the European Telecommunications Standards Institute (ETSI) in cases involving standard-essential patents and the recent proposal by ETSI and the telecommunication standardisation sector of the International Telecommunications Union (ITU) for a safe harbour process? Alternatively, does DG Comp intend to play a role in determining compliance with FRAND terms, on a case-by-case basis or globally?

A: Over recent months we have seen a succession of legal disputes, some involving standard essential patents, with different interpretations by member states' courts of FRAND and of the availability of injunctive relief where a commitment to license on FRAND terms has been given.

These disputes are very costly for those involved, and may ultimately harm consumers in terms of higher prices and less choice. Also, the uncertainty for businesses that may arise from unclear or ambiguous rules on intellectual property in a standard-setting context risks having a chilling effect on innovation and competition.

We therefore very much welcome the efforts by standard setting bodies (in particular by ETSI and the ITU) to clarify their policy with respect to standard essential patents (SEPs).

The fact that we have received many complaints related to standard-essential patents also shows that there is a potential need for more guidance. As Vice President Almunia has put it, if necessary, we are willing to provide clarity to the market through our enforcement.

In 2012, we opened three in-depth antitrust investigations into the potentially anticompetitive use of SEPs by their holders: the Samsung and the Motorola cases. These investigations focused on a case-by-case assessment of a potential abuse by SEP holders through the use of injunction procedures.

Efforts by industry members to establish an industry-wide common understanding of FRAND, and the antitrust investigations by the European Commission, should be seen as complementary means of ensuring convergence of views in EU member states with regard to the actual interpretation of FRAND principles. Such a common understanding is necessary in order to reap fully the benefits of standardisation and the internal market.

Cartels

Q: What practical impact will recent judgments in the field of fundamental rights have on cartel investigations and the adoption of decisions in the area of cartels? Do you see this development as leading to delays in the adoption of Commission decisions and a more criminal-like process for conducting investigations?

A: The European Courts in Luxembourg and the Court of Human Rights in Strasbourg have all firmly confirmed that our cartel investigations fully comply with fundamental rights



and due process. Thus, I fail to see why there should be any need to change our current practice and working methods.

The Commission makes sure that the parties' procedural rights and interests are fully safeguarded throughout our investigations and we have set many checks and balances at every step in our procedures. Does that lead to delays in proceedings? Possibly, but that is the price that we are willing to pay to continue to be one of the world's highest rated competition enforcers.

Article 102

Q: Does the Commission have any plans to review/update the guidance on article 102, notably by adding safe harbours? The current guidance is viewed by some as perhaps more rigid towards dominant companies than current thinking and safe harbours could provide more concrete elements for dominant companies to rely on.

A: There are currently no plans to review or update the guidance on the Commission's enforcement priorities in applying article 82 (now 102) to abusive exclusionary conduct (the article 102 guidance paper).

We are talking about dominant firms and it is difficult to provide safe harbours for the exclusionary conduct of such firms. Once a firm is dominant, it will have such a degree of market power that it is very challenging to design simple form-based safe harbours for (potentially) exclusionary conduct.

The suggestion in your question that the guidance paper is viewed by some as perhaps more rigid towards dominant companies than current thinking, is surprising. The article 102 guidance paper sets out a consistent effects-based approach for the Commission to follow in setting priorities for its abuse of dominance cases.

The fact that we have set out in a relatively detailed way our policy for setting priorities in the area of abusive exclusionary conduct by dominant firms is unique. I don't think other competition authorities have engaged in this level of detail. The guidance paper is generally considered to be at the forefront of policy development. The effects-based approach explained in it is certainly not rigid compared to the more form-based approach that is found in the older EU case law.

International co-operation

Q: Is there scope for a co-operation agreement dealing with enormous transglobal disputes of the kind typified by the Apple / Samsung battles which seem to be beyond the reach of a single regulatory authority?

A: If you want to treat that kind of issue in a worldwide fashion, the only way to do that would be to give competence to a worldwide organisation such as the WTO. However, that option doesn't exist in the competition world. So what happens in reality is that, through the bilateral co-operation agreements, the agencies keep each other informed about the cases that are going on and in as much detail as the parties involved allow them to pass on. The agencies then keep each other informed about how the case is progressing. Depending on which of the agencies is most advanced, the others will look at what the first mover agency is doing and then usually try to see if that fits with their own theories or their own approaches.

To give you an example. A couple of years ago, there was a proposed merger between the global mining giant BHB Billiton and Rio Tinto. From what I remember, we didn't actually get to the point of prohibiting it because the parties withdrew at the last minute. However, a couple of years later, the same parties wanted to do a joint venture for iron ore and we started looking at that joint venture. The German authorities were also looking at the deal under their merger rules, and some other jurisdictions too. What then happened was that everybody knew that we were looking at this joint venture and, in effect, they waited for the conclusion of our case. Once it turned out that we had difficulties with the joint venture, the main agencies involved arranged for communicating their concerns at the same time to the parties, and the parties finally abandoned the idea. So that's an example of comity where we're all keeping each other informed about what's going on and we can discuss the case with each other. There's a cross-fertilisation of ideas as well, so you could argue that it's a kind of substitute for a co-ordinated form of decision-taking.

Of course, with standard-essential patents, it's more complicated because the issues at hand are a mixture of patent law and competition law. In Europe, we are looking into the alleged abuse of standard-essential patents. If you have a patent and the patent protection hasn't expired, then you are plainly dominant. Owners of standard-essential patents should thus license these patents on fair, reasonable and non-discriminatory terms.

All these issues are complicated, of course, so this is not the easiest example perhaps of a case where you would like to have some sort of worldwide jurisdiction, even if that were possible in the first place.

Career high and low spot

Q: What has been the high spot of your career?

A: In spite of all the difficulties that we have right now, I still consider the euro to be the high point of my career. Of course, I'm not the only one that was responsible for creating it. There are many fathers and mothers. I wasn't involved right from the beginning – the process started back in the 1970s – but I was involved in many of the preparations and in the negotiations of the Maastricht treaty. Then I worked in the cabinet of President Jacques Santer and we had to do the actual preparation of the euro coins and notes and all that. So I was heavily involved in the coming into being of the euro.

Q: And the low spot?

A: When I was studying for my master's degree, I failed to pass one examination and I had to repeat it. That was a low point in my career. But then I wrote a PhD and the professor who failed me the first time was the chair of my PhD committee and he gave me a cum laude for the way I defended my PhD thesis. I was glad I could compensate for my earlier failure. I guess that was a combination of a high point and a low point.

Competition law philosophy

Q: Do you think that competition law has much of a philosophy underpinning it?

A: I'm not a lawyer and I'm even less of a philosopher. I tend to look at competition just as an economist. But I suppose that, if we're looking at first principles, I guess we have a competition regime for much the same reason that we have the Geneva Convention or (to quote a more pacific example) for the same reason as every sport has to have an impartial referee.

Fair play is essential and competition rules ensure that a level-playing field is maintained in the EU single market. In the struggle to excel and outperform competitors, the rules are important so that we can ensure that competition occurs on the merits and not through anticompetitive strategies that can harm consumers in the long run.

On a slightly more philosophical level, we must remember that the EU project and its crown jewel, the single market, were built on the idea of core freedoms: freedom of movement of goods, freedom of establishment and of providing services, free movement of capital and of course free movement of persons. Competition rules ensure that the economic freedoms can become reality. No private or state actor should be allowed to rebuild obstacles in the single market that we have all strived to tear down as part of the European construction.

In another life

Q: If you couldn't be a senior official at the Commission, what would you be instead?

A: I suppose there is a difference between what you would like to do and what you can actually do, yes? I would have loved to have had the talent to sing but I don't. I'm a very bad singer. I was even excluded at primary school from collective singing. Nevertheless, I like vocal music enormously so, if I could have been a singer, I would have chosen that path – or perhaps become a poet for that matter. It would have been wonderful.