Micromax Informatics Limited vs. Telefonaktiebolaget LM Ericsson (Publ)

Through this monthly publication, CUTS International intends to undertake independent examination of relevant competition cases in India (on-going as well as decided). The objective is to provide a brief factual background of the facts of relevant cases, followed by an analysis of the predominant issues, therein. This publication will expectantly help readers to better comprehend the evolving jurisprudence of competition law in India.

The issues have been dealt in a simplistic manner and important principles of competition law have been elucidated in box stories, keeping in mind the broad range of viewership cutting across sectors and domains. The purpose of this publication is to put forward a well-informed and unbiased perspective for the benefit consumers as well as other relevant stakeholders. Additionally, it seeks to encourage further discourse on the underlying pertinent competition issues in India.

Executive Summary

Presently, one of the most legally contested issues lies globally at the interface of Competition Law and Intellectual Property Rights (IPR). Specifically in the Information and Communications Technology (ICT) sector, this issue emerges around the possible anti-competitive effects which may arise during the standard setting process and subsequent licensing of patents which have become part of a standard (known as Standard Essential Patents or SEPs).[1]

Every industry relies on standards and they are one of the major sources of efficiency, innovation and public welfare in an economy.[2] Standards are basically requirements which necessitate technical, quality or safety benchmarks for achieving network effects in an industry. They also satisfy the function of laying down minimum criterion for manufacturing of products. Standards are particularly needed in industries, such as telecommunications, computing and other industries which affect the digital economy, and are generally set by Standard Setting Organisations (SSOs) or industry consortia in a collaborative manner and/or closed manner.[3]

However, the process of standard setting increasingly involves patented technologies and might widen the scope for anti-competitive behaviour.[4] When such standards necessitate the use of a particular patent, it renders the patented invention as essential to the industrial standard and seems to amplify the power in the hands of the patent owner. Post standardisation and after the inclusion of the patent, it becomes compulsory for a manufacturer to obtain a licence from the patent owner to use the SEP.

This may lead to confrontational negotiations and raise the probability of anti-competitive behaviour on the part of the SEP holder or IP-infringement behaviour on part of the implementer. Although the SSO IPR policies generally mandates that the SEPs are licensed on Fair, Reasonable and Non-Discriminatory (FRAND) terms, but the diverse interpretation of FRAND also leads to disagreement on patent royalty amounts.

These circumstances have led to several legal disputes in the global smartphone industry. Thus, this edition seeks to specifically anaylse one such major dispute in India where an SEP holder was accused of anti-competitive behaviour. In 2013, Micromax filed information with the Competition Commission of India (CCI) against Ericsson, under Section 19(1)(a) of the Competition Act alleging abuse of dominance *vis-à-vis* licensing of SEPs.[5] In the complaint, Micromax raised allegations against Ericsson based on the possible anti-competitive effects caused by its licensing practices with regard to Standard Essential Patents held by Ericsson in the ICT sector.

The Commission was of the opinion that considering the non-substitutability of the relevant product (SEPs), Ericsson is evidently dominant in the relevant market of '*SEP(s) in Global System for Mobile Communication (GSM) compliant mobile communication devices in India*'.

Furthermore, keeping in mind Ericsson's licensing practices (demanding royalties based on the Net Selling Price (NSP), thereby discriminating against different mobile handset manufacturers and charging royalties unrelated to the patented technology of the smartphones), the Commission thought this to be a case worth investigating into and accordingly ordered the Director General to investigate.

CCI's *Prima Facie* Opinion

Allegations by Micromax

The information filed by Micromax contained allegations of abuse of dominant position which is prohibited under Section 4 of the Indian Competition Act. Micromax, being a major mobile handset manufacturer and supplier in India contended that Ericsson (a telecommunications company), which owns several patents including a great number of Standard Essential Patents in this sector with regard to the GSM standard set by the European Telecommunications Standardisation Institute (ETSI), demanded excessive royalties from Micromax which was in fact a contravention of its FRAND commitment.

According to Micromax, this demand of unfair, discriminatory and excessive royalties was made through notices sent by Ericsson which alleged that Micromax was indulging in SEP infringement.[6] Micromax further alleged that in one of the notices, Ericsson threatened that it would inform the Securities Exchange Board of India (SEBI) which could possibly result in harm to Micromax considering its future plans to make the company public.[7] The royalties which were demanded by Ericsson were based on the Net Selling Price (NSP) of the end product i.e. the mobile handset, and Micromax considered that approach as arbitrary and abusive.[8]

CCI's Analysis

Relevant Market

The first and foremost analysis done by the CCI was with regard to identifying the relevant market in the present case. Considering the product in question, CCI held that the relevant product market as '*SEP(s) in GSM compliant mobile communication devices*'. As Micromax contended the dominance of Ericsson in India only, and the fact that Ericsson licensed its SEPs to Micromax in India, the relevant geographic market was held to be India.[9] Combining the two, the relevant market was held to be "*SEP(s) in GSM compliant mobile communication devices in India*".[10]

Dominant Position

The second important question which needed answers was whether Ericsson was dominant in the relevant market or not? *Prima facie*, the Competition Commission of India (CCI) considered Ericsson ownership over wide ranging SEPs and lack of substitutability for the relevant product and concluded that prima facie, it is apparent that Ericsson is dominant in the relevant market.[11]

FRAND Commitments

Thirdly, according to CCI, the royalties charged were unrelated to the patented product and thus, were against the Fair, Reasonable and Non-Discriminatory (FRAND) commitment. In other words, the order indicates that conceptually, CCI was against the methodology of determining royalties according to the final selling price of the product and was in favour of the fixing royalty based on the Smallest Saleable Patent Practicing Unit (SSPPU), i.e. the chipset. Based on this reasoning, an order was passed under Section 26(1) directing the Director General to investigate the matter and report back to the Commission with its findings.

Analysis by CUTS

Ericsson vs. Micromax and the Global Patent Wars

This Indian dispute between a cell phone manufacturer (Micromax) and a SEP holder (Ericsson) is a mere battle in the larger patent war being fought in the ICT sector between SEP implementers and SEP holders across the globe. The underlying dispute in such cases apparently lies at the unique interface of two laws i.e. Patent Law and Competition Law. Evidently, the inclusion of patents in standards leads to a unique situation where technological patents become essential to the manufacturing and production of a product, for example, a smartphone.

"*Technology standards* specify a common language for technologies to communicate and interact, ensuring compatibility and functionality of complex technology systems. Standards evolve in markets where returns increase when a large number of firms rely on the same technology. For example, computers, smartphones and tablets connect to the internet or other devices via standardised wireless technologies, such as Long-Term Evolution (LTE), Wi-Fi or Bluetooth. Standards enable products to communicate with each other and frequently give rise to substantial consumer benefits".

– *IPlytics EU Report on Landscaping SEPs (2016)*

To make the process of standard setting more efficient and amicable, the SSOs generally require all members to adhere to their IPR policies. This includes agreeing beforehand, to licence SEPs on FRAND terms as well as to make bona fide disclosure of any IPRs which may affect the subject matter of a standard.

Consequently, this entails that exercise of patent rights over SEPs does not remain exclusive, but is subject to conditions, generally identified as a FRAND commitment. The stipulation of FRAND governs the adequacy of the royalty amount incurred over a particular SEP and aims at balancing the interests of the SEP holder and the SEP implementer while they negotiate patent licenses.

The basic role of FRAND in standard setting is to curtail the actions of the licensors and licensees and therein protect competition and innovation in the market.[12] However, the fact that FRAND is subject to varied interpretations and the licensing process of SEPs is fraught with economic disagreements over royalty amounts has opened up the sector to numerous legal battles currently being fought in competition agencies and courts worldwide.[13]

A number of high profile disputes have arisen between major mobile phone manufacturers across various jurisdictions and the stakes involved in such smart phone disputes are massive.[14] Recently, developing nations, such as India are witnessing an increasing number of disputes which relate to SEPs and Competition Law and the present case is one such example.

CCI Jurisdiction and Possible Inconsistency between Patents Act and Competition Act

One of the most important legal interrogations which arose out of this dispute (and went on to be argued in details in the Delhi High Court) was with regard to the issue of apparent inconsistency between the Patents Act and the Competition Act. In the present case, Ericsson CCI's jurisdiction by contending that patent right abuse must be resolved under the Patents Act and also contended that the subject matter of the dispute was already being argued in front of the Delhi High Court. However, the Commission brushed aside this contention by stating:

"The issues raised before the High Court by OP (Ericsson) *are in respect of infringement of its IPR rights. The Informant* (Micromax) *has every right to raise issues before the Commission. Section 62 of the* (Competition) *Act makes it clear that provisions of Competition Act are in addition to and not in derogation of other existing laws..... Thus this Commission has obligation and jurisdiction to visit the issues of competition law. Pendency of a civil suit in High Court does not take away the jurisdiction of the Commission to proceed under the Competition Act".*[15]

Ericsson went on to challenge this order of the CCI by filing a writ petition with the Delhi High Court (DHC)[16] (the petition also challenged orders passed by the CCI in case of Intex Technologies Limited vs. Telefonaktiebolaget LM Ericsson[17]) based on the argument that the Patents Act being a special law, deals with matters relating to abuse of patent rights, and should override the Competition Act which is a general law.[18]

It was alleged that the grant of patent rights by the owner and any abuse during the process is covered specifically by the Patents Act and on the other hand, the Competition Act is a general statute for maintenance of freedom of trade and to ensure competition in the market.[19];l

The Court discussed both the Acts in detail in order to address whether there was an inherent inconsistency between the acts and whether the Patent's Act being a special act would prevail over the general Competition Act (in case inconsistency is proven). After a detailed analysis and comparison of the relevant provisions of the acts, the scope and remedies of both acts were held to be completely different and it was held that there was no inherent inconsistency between the same.

The Court put forward the principle of harmonious construction and upheld the jurisdiction of the Commission in the present case and established an important precedent in the evolution of Indian jurisprudence on SEP and Competition law matters.

FRAND Royalty Rates and Ericsson's Possible Abuse of Dominance

Considering Ericsson's portfolio of SEPs and Micromax's allegation against Ericsson of abuse of dominance in the Indian market, the Commission came to the conclusion that the relevant market in the present case would be "*SEP(s) in GSM compliant mobile communication devices*".[20] Furthermore, the Commission rightly analysed that owing to the non-substitutability of the large number of SEPs owned by Ericsson, the company was *prima facie* dominant in the relevant market.

Regarding abuse of dominant position, Micromax claimed that Ericsson demanded excessive royalties which were based on the Net Selling Price of the end product i.e. the smartphone. Moreover, it was contended that this demand was arbitrary and abusive and was allegedly in contravention of the FRAND commitment made by Ericsson to the ETSI. By demanding unfair, discriminatory and excessive royalties based on the NSP of the mobile handset, it was alleged that Ericsson abused its dominance in the relevant market.

The Commission upheld this argument and indicated the possibility that Ericsson had charged excessive royalties from implementers and by demanding royalties based on percentage of the handset price, Ericsson discriminated against different mobile handset manufacturers and charged royalties unrelated to the patented technology.[21] This was in contravention of its FRAND commitment and could possibly amount to abuse of dominance under Section 4 of the Act.

The Commission thus indicated that the NSP approach of royalty calculation is evidently inconsistent with competition principles and can lead to an investigation into abuse of dominance (provided dominance and other conditions are met). Interestingly, the varying methodologies of determination of FRAND royalties has transpired into several legal disputes across the globe in the form of anti-competitive claims made by the licensees and infringement claims forwarded by the SEP holders.[22] Hence, it becomes important to view the approaches objectively. The argument against the NSP approach generally forwarded by the licensees is that the

SEP holder charges different royalty rates for the same technology and discriminates amongst licensees depending upon the prices of manufactured handsets.

It is also argued that such a rate is anti-competitive as it is unrelated to the patented product and is in derogation of the FRAND commitment. Conversely, if the royalty is set keeping the 'smallest saleable patent practicing unit' (SSPPU) i.e. the chipset as the base, it is often criticised as being inappropriate as well. The rationale of this argument is that the actual value of the patent cannot be restricted to the unit and the value provided to the handset by the patented technology adds important functionalities which go beyond the physical aspects of a unit.

The fact that the Commission considered the NSP approach as anti-competitive raises several complications. Firstly, this approach went on to be in contradiction to the approach taken afterwards by the DHC in a SEP patent infringement case between filed by Ericsson against Intex[23], hence adding to the Indian jurisprudential uncertainty on the matter. In this case, the court affixed the royalty base of SEPs, according to the NSP of the end product i.e. the mobile handset. To decide the percentages of royalty rates, the court relied on the US case law of Commonwealth Scientific and Industrial Research Organisation (CSIRO) vs. CISCO (worldwide IT leader) which basically rejected the SSPPU model.

In addition to this, another concern is that if the Commission does in fact find that Ericsson abused its dominance by demanding royalties on NSP of the product (after the investigation by the Director General), can it also indulge into the process of royalty setting or possibly grant a compulsory licence?[24] Moreover, the fact that it is highly complicated and technical to calculate royalties based on the SSPPU model considering the number of patents inculcated into a particular unit, a technical analysis of abuse of dominance in the relevant market would not be easy.

Be that as it may, post investigation, the final order of the CCI will have significant impact on the mobile handset industry in India and will also help in bringing in much needed certainty for industry players *vis-à-vis* standardisation and SEP licensing procedures.

Conclusion

Jurisprudence in India regarding SEP and competition law issues is still at a relatively nascent stage, compared to other jurisdictions like the European Union (EU), the United States (US) and China. This places Indian courts and competition authorities in an advantageous position where they can learn from the experience of other jurisdictions.

However, the fact that CCI in the present case and the DHC in infringement orders have laid down different perspectives on FRAND royalties might lay the foundations for judicial ambiguity which might distort licensing procedures and negotiations.

Moreover, the final decision of the Commission will hold immense significance in promoting competition and innovation the ICT sector which notably consists more of SEP implementers than SEP holders.

In addition to this, several questions still remain unanswered (which might be clarified as and when specific disputes arise) with respect to SEP licensing and Competition Law, such as whether the threat of injunction made by the SEP holder would amount to abuse of dominance; whether patent holdout could be possibly addressed through application of competition law etc.

Besides the jurisprudential clarity which will come with time, the Competition Commission can also explore the possibility of framing guidelines for licensing of SEPs and clarify the Indian approach towards application of Competition Law *vis-à-vis* standardisation and licensing of standard essential patents.

---

[1] For details on possible anti-competitive conducts which may arise due to exercise of IP rights generally, see OECD, *Competition Policy and Intellectual Property Rights,* (1997), available at: http://www.oecd.org/competition/abuse/1920398.pdf and for specific conduct related to Standard Essential Patent licensing see literature available at: http://www.crai.ca/sites/default/files/publications/IP-Literature-Watch-September-2014.pdf

[2] U.S. DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION, 1 (2007) available at: www.usdoj.gov/atr/public/hearings/ip/222655.pdf.

[3] URŠKA PETROVČIČ, COMPETITION LAW AND STANDARD ESSENTIAL PATENTS: A TRANSATLANTIC PERSPECTIVE, INTERNATIONAL COMPETITION LAW SERIES, 3 (2014).

[4] Mark. A. Lemley, *Antitrust, Intellectual Property Rights and Standard Setting Organizations*, 90 California Law Review 6, 1889 (2002).

[5] Micromax Informatics Limited vs. Telefonaktiebolaget LM Ericsson (Publ), Case No. 50/2013.

[6] Ibid, at 2.

[7] Ibid.

[8] Royalty calculation of patents, especially SEPs is a highly technical and complex process. Furthermore, it is subject to negotiation between the parties and has various methods of determination. The Net Selling Price (NSP) method takes the NSP of the device (smartphone in this case) as the royalty base and calculates royalties on the percentage of the same. Alternatively, if the royalty base is the Smallest Saleable Patent Practicing Unit (i.e. the chipset) then the royalty amount would be different. However, what constitutes the SSPPU has also been highly contested in other jurisdictions. See https://www.ftc.gov/system/files/attachments/key-speeches-presentations/wong-ervin_-_methodologies_for_calculating_frand_damages.pdf

Royalties demanded were as under:

a) GSM - 1.25% of sale price of product,
b) GPRS - 1.75% of sale price of product
c) EDGE - 2% of sale price of product
d) WCDMA/HSPA: Phones, Tablets - 2% of sale price of product
e) Dongles - USD 2.50 per dongle.

[9] Supra note 5, at 7

[10] Ibid.

[11] Supra note 5.

[12] Although the licensing process is a mutually beneficial one for both the licensor and licensee, but their vested interests might hamper the negotiation process. Notably, in such a case, an SEP holder might want to collect supra-FRAND royalties or refuse to license at a certain FRAND rate (patent holdup) and the SEP implementer might want to stall the negotiation process in search for minimum or not royalty burden (patent holdout).

[13] Josh Lerner and Jean Tirole, *Standard-Essential Patents*, Journal of Political Economy, Vol. 123, No. 3, 548 (2015).

[14] *What is at stake in the Apple-Qualcomm dispute?*, Financial Times (28/04/2017), accessed on 14.07.2017, available at: https://www.ft.com/content/5d0c4ece-2bfb-11e7-9ec8-168383da43b7?mhq5j=e2

[15] Supra note 5, at 8

[16] Telefonaktiebolaget LM Ericsson v. Competition Commission of India and Another, Delhi High Court 30.03.2016, available at: http://lobis.nic.in/ddir/dhc/VIB/judgement/30-03-2016/VIB30032016CW4642014.pdf

[17] CCI Case No. 76/2013

[18] Supra note 15, at 83.

[19] Ibid, at 84.

[20] Supra note 5, at 7

[21] Commission gave the example that the same technology would accrue different royalty amounts depending on the price of the phone, which is essentially discriminatory.

[22] See Laser Dynamics, Inc. v. Quanta Computer, Inc., 694 F.3d 51, 67 (2012); CSIRO v. Cisco. 2014 WL 3805817, E.D. Tex. (2014) and NDRC Administrative Sanction Decision No. 1 [2015] (Mar. 2, 2015)

[23] Telefonaktiebolaget LM Ericsson vs. Intex Technologies (India) Limited I.A. No. 6735/2014 in CS(OS) No.1045/ 2014

[24] Muralidharan Sahithya, *Ericsson vs. Micromax – A Kick-Start to SEP-FRAND Antitrust Jurisprudence in India,* (2016), available at: http://kluwercompetitionlawblog.com/2016/07/13/ericsson-v-micromax-a-kick-start-to-the-sep-frand-antitrust-jurisprudence-in-india/

This edition was prepared by Parveer Singh Ghuman, Senior Research Associate, CUTS International (psg@cuts.org)