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Ericsson v. Micromax – A Kick-Start to SEP-FRAND Antitrust Jurisprudence in India

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In its decision passed on 30 March 2016, the Delhi High Court upheld the order passed by the Competition Commission of India (CCI) directing an investigation into the allegations of abuse of dominance against Telefonaktiebolaget LM Ericsson (Ericsson) with respect to its actions as a Standard Essential Patent (SEP) holder. The present decision sets the stage for the jurisdiction of the CCI with respect to anti-competitive actions of essential patent holders *vis-a-vis* implementers of the standard.

SEPs are those patents that must be used in order to comply with the standard set for achieving interoperability between devices, such that, the use of the standard requires infringement of the SEP. Thus, to draw a balance between the rights of SEP holders and implementers many standard setting organisations require members to agree to license SEPs to implementers on Fair, Reasonable and Non-Discriminatory (FRAND) terms.

Background

Ericsson as a member of European Telecommunications Standards Institute (ETSI), a standard setting organisation had committed to grant irrevocable licenses regarding its SEPs in 2G, 3G and EDGE technology on FRAND terms. The informant Micromax Informatics Ltd. (Micromax) alleged that Ericsson had abused its dominant position in the market for GSM technology by:

1. Demanding excessive royalty based on the sale value of the entire phone instead of the value of the patented technology used in the phone
2. Filing of injunction and threatening to report Micromax's failure to pay royalty to Securities Exchange Board of India, prior to its listing

The foremost objection raised by Ericsson was the lack of jurisdiction of CCI because the issue of abuse of patent rights must be resolved under the Patents Act.

Decision of the CCI

The commission firstly noted the importance of FRAND terms as a mechanism to prevent the issue patent hold up and royalty stacking. It also dismissed the jurisdictional challenge simplistically by highlighting that this dispute consisted of questions regarding competition law which CCI had jurisdiction to adjudicate.

The commission defined the relevant market as the ‘SEP in GSM compliant mobile communication devices in India.’ Ericsson was found to be *prima facie* dominant in the relevant market because it held almost 400 patents in India in GSM technology and no substitutable alternative was available for the implementers of the standard. A *prima facie* case for abuse of dominance was satisfied because the royalty charged by Ericsson was on the sale price of the product and not on the value of the technology contributed by the SEP. On this basis the Director General was asked to investigate the complaint.

Challenge of the CCI Order Before the Delhi High Court

Meanwhile, Ericsson challenged this order by filing a writ petition contending that the Patent Act provided the remedy of compulsory licensing in such cases and would override the Competition Act, 2002 (‘the Act’). Thus, the court dealt in detail with the question of whether there was any irreconcilable inconsistency between the Patent Act and the Act.

It may appear that IPR and competition law are contradictory because while former furthers monopoly, the latter seeks to prevent anti-competitive practices arising from the same. However according to the court the remedies for abuse of patent rights provided by both laws are quite different. The Patent Act provides the remedy of compulsory licensing for abuse of patents i.e. a remedy *in personam*, while Section 27 of the Act provides various remedies that include levying penalties, cease and desist order i.e. remedies *in rem*. Based on this analysis the court concluded that there was no irreconcilable inconsistency between both regimes and the CCI could exercise jurisdiction even though there was an impending civil suit for infringement.

The second major objection raised was that there was no prima facie abuse of dominance as Ericsson was merely exercising its right as a legitimate patent holder. The court extensively referred to US cases like *Rambus Inc.* (FTC 2006) and EU cases such as *Motorola v. Apple*, *Huawei Ltd. v. ZTE*. These decisions extensively dealt with the question of abuse of dominance by SEP holders by their failure to disclose patents during standard setting process or seeking of injunctions in court.

Based on these decisions court concluded that there was a possibility that filing injunction or demanding excessive royalty by Ericsson could give rise to abuse of dominance. This is because the pressure of legal proceedings could force the implementer to enter into a one-sided licensing agreement which would adversely affect the consumers by increasing the likelihood of hike in prices in the downstream market. The court also held that a prospective licensee like Micromax could also enter into FRAND negotiations/file an antitrust suit while reserving its right to challenge the patent rights of the licensor before a civil court.

Thus, the Delhi High court dismissed all jurisdictional challenges upholding the jurisdiction of CCI to assess abuse of dominance by SEP holder i.e. Ericsson.

Analysis

Through this decision the court has clarified that the regime of IPR and Competition law are both important for promoting innovation as they provide different remedies and are thus complementary in nature. But, the order also suffers from viewing the issue too simplistically because the question of whether CCI can also grant compulsory license as a remedy is still left open. This is because Section 27 of the Act provides a wide residuary power of granting remedy ‘for passing any other orders as CCI deems fit.’ This question becomes significant because mere penalty/cease and desist order by CCI may not be the most effective remedy for implementers. Contrarily, it could also be argued that CCI should refrain from taking the helm as a royalty setter leaving FRAND negotiations to market participants, but deterring abusive practices through cease/desist order.

Another significant contribution by this decision is that through its analysis of global antitrust decisions it has delineated growing concerns in the SEP-FRAND jurisprudence. These issues will become increasingly relevant in India where the major players are implementers and not SEP holders. These include abuse of dominance:

- Due to refusal to license on FRAND Terms or charging excessive license fee, after SEP holder gives such commitment to the Standard Setting Organisation.
- Due to initiation/threat of initiation of injunction/other proceedings by SEP holder seeking to force implementer to conclude licensing agreement.
- Due to failure to disclose by SEP holder with respect to the patents held *vis-à-vis* the standard during the process of standard development and standard adoption.
- Ability of implementer to bring abuse of dominance claims parallel to contesting the validity of the patents before the civil court.

Many implementers/SEP holders are waiting with bated breath for the CCI's decision on the merits and the remedy it awards. But, this case is only the tip of the ice-berg on antitrust issues in SEP-FRAND paradigm in India and CCI has a huge role to play in clarifying the specific issues enlisted above, but this jurisdictional go ahead by Delhi high court is a good start.

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