Kluwer Competition Law Blog

The Tussle over Jurisdiction: The Controller General of Patents v. Competition Commission of India

Debanjan Mandal, Mahima Cholera, Dipak Varma (Fox & Mandal) · Wednesday, November 29th, 2023

The Honorable Delhi High Court has recently in the case of *Telefonaktiebolaget LM Ericsson (PUBL) v. Competition Commission of India* held that when a patent is issued in India, the Competition Commission of India **(CCI)** cannot inquire into the actions of a patentee in the exercise of its power under the Competition Act, 2002. The Division Bench has, therefore, overruled the decision of the first instance court. The Court observed that both the Competition and Patent Acts are specific legislations with regard to their respective fields. However, based on the analysis of the provisions and remedies provided, it posited that the Patent Act provides powers to the Controller General of Patents **(Controller),** the principal officer responsible for administering the patent system in India to deal with anti-competitive concerns and due to its character of *lex specialis,* its own criteria should prevail over considerations surrounding the Competition Act.

Following this recent development, Part II discusses the scheme of the Patent and the Competition Acts in dealing with antitrust concerns with respect to patents. Part III provides an analysis of this recent judgment of the Delhi High Court.

Scheme of the patent act and the competition act

The patent framework under the Patent Act sets an equilibrium between two objectives. It not only provides an incentive to the inventors to showcase their technologically advanced innovations to the public, but also provides an incentive to invest in research and development. Therefore, to balance the equilibrium, a patent provides a limited monopoly to the patentee. This protection provided under the Patent Act creates an incentive for further innovation and is not *per se* abusive. However, when patent holders indulge in anti-competitive practices such as refusal to license, restricting or delaying the entry of competitors, excessive pricing etc., they not only undermine the basic fundamentals of competition law but also the spirit of intellectual property protection. Therefore, intervention of competition law is often needed where the granting of a patent is used to limit consumer welfare by restricting or regulating unfair trade practices.

The Patent Act of 1970 provides certain safeguards to offset the plausible anti-competitive effect by providing a framework for compulsory license **(CL)**, exhaustion of rights Bolar provisions, etc. Section 83 of the Patent Act provides for certain general considerations that have to be met in exercising the powers conferred by Chapter XVI of the Patent Act. Section 83(f) of the Act states

that patent right is not to be abused by the patentee and that the patentee may not indulge in practices that unreasonably restrain trade. However, it is interesting to note that the term "*unreasonably restrain trade*" has not been defined in the Patent Act. Further, while considering the CL application, the Controller as per Section 84(6)(iv) shall check if the licensee has made efforts to obtain the license from the patentee on reasonable terms and conditions. However, the proviso to this section states that the clause shall not be applicable in case of the establishment of grounds for anti-competitive practices adopted by the patentee.

On the other hand, Section 3 of the Competition Act prohibits agreements that relate to the control of goods or services that have an appreciable adverse effect on competition or are likely to do so. Section 3(5) of the Competition Act allows the patentee to impose reasonable conditions as may be necessary for protecting the rights that have been conferred under the Patent Act. However, Section 60 of the Competition Act prohibits raising contentions of anti-competitive agreements and abuse of a dominant position before any other statutory authority/court. Therefore, the CCI argued that the Competition Act is a special legislation dealing with the prohibitions of anti-competitive agreements and abuse of dominant position so that its jurisdiction cannot be ousted in the present case.

The Delhi High Court held that the CCI does not reserve the jurisdiction to check whether an agreement under which a patent is licensed will cause an appreciable adverse effect on competition within India or if the same will amount to abuse of dominant position. The Court held that Chapter XVI is a complete code in itself with respect to anti-competitive concerns as mentioned therein. Further, on account of Chapter XVI being added subsequent to the enactment of the Competition Act, and applying the principle of *lex posterior derogat priori*, the Court held that the CCI cannot inquire into these aspects. Although Section 60 of the Competition Act provides that the Act shall have an overriding effect with respect to any other law, the Court interpreted that the same should be applied in addition to, and not in derogation, of the other laws for the time it is in force.

Analysis

The appellants in the present case argued that the CCI should have no jurisdiction to enquire into the business of licensing a patent since CCI vide Section 2(f)(ii) of the Competition Act can only look into the complaints of a consumer who hires or avails any services or if the matter relates to the performance of any services. They also argued that licensing of the patent is neither a sale nor purchase of goods and/or services, therefore, CCI would have no jurisdiction. Like Article 101 TFEU, Section 3 of the Competition Act also prohibits anti-competitive agreements. Since patent licensing arrangements require the conclusion of an *agreement* between the parties, therefore, the CCI's right to adjudicate cannot be ousted.

It is interesting to note the powers of the Controller of Patents in such cases. As per Section 84(1)(b) of the Patent Act, any person interested may make an application for the grant of a CL in case the patent is not available at a reasonably affordable price. However, the Act does not define "*reasonably affordable price*" or bestows any powers of investigation in this regard. Therefore, the Controller must rely on the evidence presented by the parties and its subsequent impeachment from the counterparty to determine such a price. The Controller often looks at the price of similar goods in the market to determine the affordability of the goods. As a result, the Controller of Patents in the case of *Lee Pharma v. AstraZeneca* could not decide the affordable price because of an absence

of an "*exact quantum*" of the medicine required by the patients and the dearth of data provided by the applicant to prove the need for compulsory license. Although this method bears resemblance to the competition law method of ascertaining the relevant market, the lack of investigative powers in the hands of the Controller makes it burdensome for the applicant to prove the need for a CL.

The remedies provided under the Competition Act are wide as opposed to the specific remedy of seeking a CL under the Patent Act. The Controller is only empowered to grant a CL against those patents which meet the "*reasonable requirements of the public*" test, and three years later to the granting of the patent. Further, with reference to the *locus standi*, any person can approach the CCI alleging an abuse of dominant position or restraint of conditions under the Competition Act. However, in considering CL applications, made by any such person under the Patent Act, the Controller also looks at the ability of the applicant to work with the invention to the public advantage and its capacity to undertake risks in providing capital via that same work. Further, the CCI is not only empowered to impose monetary penalties but also allows parties to file for compensation to recover damages. Therefore, the remedies under the Competition Act are more holistic and provide flexibility to the CCI to counteract the antitrust concerns with respect to the granting of patents.

The Supreme Court was faced with a similar issue in the case of *CCI v. Bharti Airtel* wherein the Apex Court had to adjudicate the jurisdictional conflict between the Telecom Regulatory Authority of India (TRAI) and the CCI. The Court observed that the CCI is armed to the teeth to adjudicate if an agreement can have an adverse effect on competition. Further, based on the analysis of the provisions of the governing legislation, the Supreme Court did not oust the jurisdiction of the CCI and held that the jurisdiction of the CCI should be subsequent to the TRAI's fact-finding exercise.

Interestingly, the Delhi High Court in the present case did not provide any reasons to differ from the decision of the Apex Court, although arguments were advanced by both parties with respect to its applicability. Therefore, this judgment has created a vacuum as it prevents the competition law-based remedies from being applied in cases of abuse of a patent in the market.

Conclusion

In an attempt to provide a solution to the dispute, the Delhi High Court has erred in the harmonious construction of the two legislations. Although both the legislations seem to be in conflict, these are complimentary bodies of law which aim to encourage innovation and industry competitiveness.

This post shows how the exclusive granting of jurisdiction to the Controller of Patent is not the best interpretation of the legislation and secondly, how the power and remedies provided under the Competition Act were perhaps ignored by the Court. Furthermore, the Apex Court decision in *Bharti Airtel* was not considered to adjudicate the jurisdictional dispute and, therefore, has created an impending problem with regard to the tussle for jurisdiction between both legislations.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe here.

Kluwer Competition Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

Learn how **Kluwer Competition Law** can support you.

This entry was posted on Wednesday, November 29th, 2023 at 9:00 am and is filed under Ex ante regulation, Ex ante regulatory assessment, Ex post regulatory assessment, India, Intellectual property (IP), National competition authorities (NCAs), Patent settlements
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.