Changing Regulatory Anti-Trust Attitudes Towards High-Technology

Meghna Sharma, Prashant Singh*

Abstract

The last few years have witnessed a slew of regulatory changes in the Anti-trust space primarily instigated by the technological changes and the industry practices adopted in the technology sector. In this research paper, an attempt has been made to understand the anti-trust regulatory and judicial developments in the technology and the telecommunication sector. In the first part of the paper, it attempts to analyse the industry practices adopted by the Corporations such as Exclusive and sole licensing practices, the practice of sale restrictions and the sale of output restrictions. Each of these sub-divisions under the first part, will be examined across two levels: one, between the practice adopted by the corporations between competitors and two, the practice adopted by the corporations between non-competitors. In the second part of the paper, the focus will be to understand the anti-trust developments in the telecommunications sector. This section will analyse the following topical developments: abuses related to tariffs, predatory pricing, excessive pricing and abusive behaviour related to third party access. Finally, the paper will also briefly note the patent abuses that have arisen in the telecommunication sector and the implications for anti-trust on that matter. The primary focus in this paper is on the developments in the European Union with references to other jurisdictional practices.

*

* Ms.Sharma is a graduate research assistant at the Centre for Human Rights Studies at Jindal Global Law School. She has earlier served as a law researcher at Delhi State Legal Services Authority after graduating from Rajiv Gandhi National University of Law in 2018. She may be contacted at meghnasharma95@outlook.com.

Mr. Singh graduated in 2017 from Rajiv Gandhi National University of Law. He is currently serving as Associate Advocate, Chambers of Mr. P.S. Narsimha, Senior Advocate, Supreme Court of India. He has earlier worked as a Research Fellow at the Centre for Human Rights Studies, Jindal Global Law School. He may be contacted at prashantsingh93@live.com.

I. TECHNOLOGY SECTOR

A. Exclusive and Sole Licenses in the Technology Sector

A technology licence is deemed to be exclusive when the license is allocated an exclusive territory for the exploitation of the licensed technology, and the licensor undertakes not to produce with the licensed technology or to license others within the said territory. A sole license, on the other hand, involves a commitment by the licensor not to license third parties within a given territory, thereby reserving for itself the right to exploit the licensed technology in said territory.

i. Between Competitors

Pursuant to Article 4 (1) (c)[1], reciprocal exclusive licensing between competitors, which entails a commitment by the parties not to license their competing technologies to third parties, constitutes an allocation of markets or customers, or market sharing, which would be deemed a hard-core restriction of competition. By contrast, reciprocal sole licensing is not deemed a hard-core restriction because the parties expressly reserve for themselves the right to compete with their respective technologies in each other's territory. Nonetheless, such licensing may facilitate collusion where the parties have significant market power by ensuring that on the licensed territories, they are the only parties marketing products produced with the licensed technology. For this reason, reciprocal sole licenses are protected by the Technology Transfer Block Exemption Regulations (TTBER), but they are subject to individual assessment above the 20 per cent market share threshold.

A non-reciprocal exclusive license does not necessarily involve market sharing because the licensor would retain the right to exploit its competing technology in the territory assigned to the license for the exploitation of the licensed technology. However, such a license may produce anti-competitive effects which are subject to Article 81[2] because the licensor effectively undertakes to cease the exploitation of its competing technology in the licensed territory. Where the licensor has more than a nominal market presence, its non-exploitation

[1] Commission Regulation (EU) 316/2014, Technology Transfer Block Exemption Regulations, art. 4(1)(c), 2004 O.J. (L123) 11.

[2] Commission Regulation (EU) 316/2014, Technology Transfer Block Exemption Regulations, art. 81, 2004 O.J. (L123) 11.

of its competing technology in the licensed territory may result in a significant lessening of competition. For this reason, the TTBER covers non-reciprocal exclusive licenses up to the 20 per cent market share threshold, over which subjects such licenses to individual assessment under Article 81. On the other hand, the application of Article 81(1)[3] may be clearly excluded where the licensor has a limited position on the relevant produce market or lacks the capacity to exploit its competing technology.

ii. <u>Between Non- Competitors</u>

Exclusive licensing between non-competitors is viewed by the Commission as generally pro-competitive. Such licenses, which are the most common of two-party licensing arrangements, are considered necessary to induce the licensee to invest in the licensed technology and for the commercialisation of products embodying the technology. The historical view of the court and the commission is that such licenses are not likely to fall within the scope of Article 81 (1) provided that the license is "open". It must be open, in that it does not provide absolute territorial protection for the licensee[4], and the exclusivity does not extend beyond the period of validity of the licensed technology. To the extent that an exclusive license is caught by Article 81(1), the commission's view is that such a license is likely to fulfil the conditions of Article 81(3)[5]. The Commission would be unlikely to intervene, irrespective of the territorial scope of the license. However, intervention may be warranted in several circumstances. First, where a dominant licensee obtains an exclusive license to the licensor's competing technology, thereby foreclosing third party licenses and preserving the licensee's market power, and where entry barriers are high, the Commission's view is that Article 81(1) would be applicable and that the conditions of Article 81(3) would not normally be met. Secondly, where a licensor's restriction on passive sales into an exclusive territory or to an exclusive customer group allocated to another licensee has exceeded a two-year period, the restriction is no longer block exempted by the TTBER and becomes a hard-core restriction which is not likely to meet the conditions of Article 81(3). Thirdly, the Commission has seen no

---

[3] Commission Regulation (EU) 316/2014, Technology Transfer Block Exemption Regulations, art. 81(1), 2004 O.J. (L123) 11.

[4] Case 258/78, Nungesser v Comm'n, 1982 E.C.R. 2015 ¶¶ 57-58, 60.

[5] Commission Regulation (EU) 316/2014, Technology Transfer Block Exemption Regulations, art. 81(3), 2004 O.J. (L123) 11.

justification under Article 81(3) for exclusivity in a technology license when the underlying patents have expired.

B. Sale Restrictions

i. Between Competitors

Restrictions on active and passive sales by one or both parties to a reciprocal license between competitors, which prevent the affected party from selling into territories or to customer groups reserve for the other party, are considered hard-core restrictions pursuant to Article 4(1)(c) of the TTBER. Such restrictions are considered market sharing and are unlikely to qualify for exemption under Article 81(3).

Restrictions on active and passive sales by one or both parties to a non-reciprocal license between competitors, which prevent the licensor and/or the licensee from selling into territories or to customer groups reserved for the other party, are block exempt as an exception to Article 4(1)(c) of the TTBER up to the 20 per cent market share threshold. Likewise, the TTBER block exempts restrictions in such licenses of active sales by the licensee into the exclusive territory or to the exclusive customer group allocated by the licensor to another licensee, provided that the latter was not a competing undertaking of the licensor at the time of the conclusion of its own license. Above the 20 per cent market share threshold, such restrictions are caught by Article 8(2) where one or both parties have significant market power. However, according to the Technology Transfer Guidelines, such restrictions may be deemed indispensable, within the meaning of Article 81(3), for the dissemination of technology and to facilitate market penetration by third party licensees. The Commission specifically notes that restrictions on active sales by either party, for the purposes of Article 4(1)(c)(iv)[6] may be deemed indispensable to induce the other party to conclude the license, particularly when the latter party has a weak market position. However, it should be noted that restrictions on passive sales, within the meaning of Article 4(1)(c)(iv) and (v), may be problematic under Article 81(3). Whether restrictions on passive sales, within the meaning of Article 4(1)(c)(iv), are indispensable is not addressed by the Technology Transfer Guidelines the indispensability of such restrictions would be a question of fact in each case,

[6] Commission Regulation (EU) 316/2014, Technology Transfer Block Exemption Regulations, art. 4(1)(c)(iv), 2004 O.J. (L123) 11.

such restrictions would need to be objectively justified. The fact that restrictions on passive sales by licensees into a territory or to a customer group allocated to another licensee are hard- core restrictions under article 4(1)(c) should provide reason to proceed with caution.

ii. Between Non- Competitors

In the *Nungesser* judgment[7], the European Court held that "absolute territoriality" protection granted to a licensee in order to enable parallel imports to be controlled and prevented results in the artificial maintenance of separate national markets is contrary to the treaty.[8] This interdiction is now embodied in Article 4(2)(a)[9] of the TTBER, which states that the restriction of the territory into which, or of the customers to whom, the licensee may passively sell the contract products constitutes a hard-core restriction.[10] However, the TTBER indicates that the restriction of passive sales would be block-exempted up to the 30 per cent market share threshold were the licensor to restrict the licensee's passive sales into an exclusive territory or to an exclusive customer group reserve for the licensor. Above the 30 per cent market share threshold, the Commission's position is that the above restrictions are unlikely to fall within the scope of Article 81(1), unless the licensor has significant market power or there are network effects flowing from similar license agreements containing such restrictions. On the other hand, the Court has held that a technology license is caught by Article 81(1) where the licensor imposes a restriction on the licensee preventing it from manufacturing or using the licensed technology in a territory where there is no patent protection.[11]

Where the licensor and licensee are non-competitors, sales restrictions on the licensor do not constitute hard-core provisions within the meaning of Article 4(2)(b) of the TTBER. As in the case of exclusive licensing between non-competitors, the Commission considers that restrictions on active sales by the licensor may be indispensable to induce the licensee to conclude the license and to incur the necessary investments and commercial risks. Therefore,

---

[7] Case 258/78, LC Nungesser KG and Kurt Eisele v Commission of the European Communities, 1972 E.C.J. 2015.

[8] *Id.*, p. 61.

[9] Commission Regulation (EU) 316/2014, Technology Transfer Block Exemption Regulations, art. 4(2)(a), 2004 O.J. (L123) 11.

[10] Council Decision 73/238, Raymond & Co and Nagoya Rubber Co. Ltd., 1972 J.O. (L143) 39.

[11] Case C-193/83, Windsurfing International Commission v Comm'n, 1986 E.C.R. 11 ¶ 82.

Commission policy is that when such restrictions are caught by Article 81(1), they should nevertheless fulfil the conditions of Article 81(3).

Where the licensor and licensee are non-competitors, the licensor's restriction of the licensee's passive sales into an exclusive territory or to an exclusive customer group allocated by the licensor to another licensee during the first two years that this other licensee is selling the contract products in that territory or to that customer group is covered by the TTBER up to the 30 per cent market share threshold.[12] Above this market share threshold, the Commission considers that such restrictions, to the extent that they infringe Article 81(1), they would probably fulfil the conditions of Article 81(3). However, if the same restriction remains in force subsequent to this initial two-year period, the restriction becomes hard-core in nature within the meaning of Article 4(2)(b) and is not likely to satisfy the conditions of Art. 81(3).

C. Output Restrictions

i. Between Competitors

Pursuant to Article 1(1)(b)[13] of the TTBER, output restraints imposed on both parties to a reciprocal license between competitors constitute hard-core restrictions. However, where restraints on the output of the contract products are imposed on the licensee within the context of a non-reciprocal agreement or are imposed on only one of the licensees in the case of a reciprocal agreement, such restraints are block exempted up to the 20 per cent market share threshold. Above this threshold, Article 81(1) may be applicable where the parties have significant market power. The applicability of Article 81(3) in these situations, according to the Technology Transfer Guidelines, would depend upon whether the licensor's technology is significantly superior to that of the licensee and whether the output limitation substantially exceeds the output of the licensee prior to the conclusion of the licensee. When these circumstances are present, the effects of such output restraints, including site licenses, are viewed as minimal even when demand is growing. Such restraints may be deemed indispensable for the licensor's granting of a license to its competitors. On the other hand,

[12] Commission Regulation (EU) 316/2014, Technology Transfer Block Exemption Regulations, art. 4(2)(b)(ii), 2004 O.J. (L123) 11.

[13] Commission Regulation (EU) 316/2014, Technology Transfer Block Exemption Regulations, art. 1(1)(b), 2004 O.J. (L123) 11.

the presence of output in combination with other restrictions in a license between competitors, such as assignment of exclusive territories or customer groups, suggests that the license is intended to partition markets, and this would militate against the application of Article 81(3).

ii. Between Non- Competitors

Output restrictions imposed by the licensor upon the licensee, where the parties are non-competitors are block exempted up to the 30 per cent market share threshold, with the main anti-competitive risk being reduced to intra-technology competition between licensees. The likelihood of such effects would depend upon the market power of the licensor and licensees and the extent to which the output-restraint prevents the licensee from satisfying demand for products incorporating the licensed technologies. However, to the extent that such output restraints infringe Article 81(1), they are generally considered to promote the dissemination of technology within the meaning of Article 81(3). In the Commission's view, where the parties to the license are non-competitors, the licensor should be free to determine the output of contract products by its licensees. If this were not possible, the licensor could be discouraged from granting licences, and this would set back the dissemination of its technology.

D. Tying and Bundling

Tying and Bundling, in the sphere of technology licensing, are given different meanings in the Technology Transfer Guidelines. According to para. 191 of the Guidelines, tying occurs when the licensor makes the licensing of one technology (the "tying" product) conditional upon the licensee taking a license for another technology or purchasing a product from the licensor or someone designated by him (the "tied" product). Bundling occurs when two technologies or a technology and a product are sold together as a bundle (even though the commercial and legal result is effectively a tie). However, neither tying nor bundling can occur unless the relevant technologies and products are separate in terms of demand substitutability.

Tying and bundling are not identified in Article 4[14] of the TTBER as either hard-core restrictions or as stated exceptions to such restrictions. However, tying and bundling are subject to the 20 per cent and 30 per cent market share thresholds of Article 3[15], depending on whether the parties to the license are competitors or non-competitors. The affected relevant technology or product markets, for the purposes of the market share calculation, are those for both the tying and tied products.

Above the market share thresholds of Article 3, tying (and therefore, bundling) may be subject to Article 81(1). The main competition concern is the foreclosure of competing suppliers of the tied product. There are other potential restrictive effects of tying, such as the raising of barriers of entry where the licensor effectively forces new entrants to enter several markets at the same time, and the prevented switching by the licensee to alternative technologies where it is dependent on the tying product and the licensor may lock in the licensee with higher royalty costs. The above competition risks usually depend upon the licensor having market power in the market for the tying product, since in the absence of market power, the licensor cannot foreclose competition in the market for the tied product. Where the licensor does not have market power, the Commission's position appears to be that Article 81(1) is inapplicable to tying where this practice is necessary to ensure the intended technical exploitation of the licensed technology.[16]

According to the Technology Transfer Guidelines, tying the licensor may fulfil the conditions of Article 81(3) where the result is a "technically satisfactory exploitation" of the licensed technology or adherence to quality standards. The Commission has stated that the licensor has a "legitimate interest" in ensuring the quality of the products incorporating the licensed technology particularly where the licensee is using the licensor's trademarks. Moreover, licensees may feel compelled to accept the licensor's tie when the practice coincides with consumer's expectations. However, the conditions of Article 81(3) would not be met where the licensee is required to obtain certain unpatented goods from the licensor where such goods are not indispensable to a proper technical exploitation of the licensed technology. Even in those situations in which Article 81(3) is applicable, the parties to a license remain at

---

[14] Commission Regulation (EU) 316/2014, Technology Transfer Block Exemption Regulations, art. 4, 2004 O.J. (L123) 11.
[15] Commission Regulation (EU) 316/2014, Technology Transfer Block Exemption Regulations, art. 3, 2004 O.J. (L123) 11.
[16] Council Decision 88/143, Rich Products/Jus r01, 1988 O.J. (L69) 21.

risk under Article 82, the usual basis in EC Competition law for the interdiction of tying by dominant firms.[17]

II. TELECOMMUNICATION SECTOR

A. Abusive Behaviour Related to Third Party Access

The refusal of third-party access to essential infrastructure can constitute an abuse of dominance on the access market. The existing level of competition on the downstream market can be threatened or its development can be obstructed by an undertaking's refusal to grant access to key infrastructure. This may result in an obligation for dominant undertakings to grant competitors access to their networks and services, however subject to two restrictions. Third party access must be economically feasible and technically possible for the infrastructure owner and the access user to be willing to pay an appropriate price in exchange. Under those conditions, access seekers are entitled to request non-discriminatory treatment.[18] In the telecommunications sector, third party access is in principle granted by way of sector-specific regulation. Nevertheless, there is still scope for competition enforcement action under Article 82 EC, in so far as the regulation does not provide for a satisfactory solution to the competition problem in individual cases.

The commission examined a number of cases of possible access refusals in the telecommunications sector, mainly based on formal or informal complaints by competitors. Several cases of this type were dismissed following the rejection or withdrawal of the complaints, since the regulatory authorities managed to ensure the required third-party access for the competitors with the regulatory instruments at their disposal.

B. Predatory Pricing

In the event a dominant company sells a product or service on the retail market below its own production costs, in order to prevent its competitors from entering the market, this can amount to an infringement in the sense of Article 82(2). The same applies if a dominant company forces its competitors out of the market while strengthening its own market position with the possibility to raise the prices. In principle, such a price abuse can be found if the

[17] Case C-395/96, Compagnie Maritime Belge Transports v Comm'n, 2000 E.C.R. I-1365; Case T-51/89, Tetra Pak Rausing v Comm'n, 1990 E.C.R II-309.

[18] Case C-7/97, Oscar Bronner GmbH&Co. KG v Mediaprint Zeitungs-und Zeitschriftenverlag GmbH&Co. KG and Others, 1998 E.C.R. I-7791.

price is set below the average variable costs of the dominant company or below the average total costs, provided that the intention to pre-empt the market entry can be proven as well. The European Court of Justice considers as average variable costs those costs that vary according to the quantity produced, assuming that a dominant company only has an interest in charging such prices with a view to foreclosing the markets for its competitors so as to be able to increase the prices later on by abusing its dominance or even its monopoly position.[19] Under these circumstances, the sale of each unit produced represents for the company a loss of the value of its entire fixed costs and at least a proportion of the variable costs per produced unit.

For the telecommunications services, a price which corresponds to the variable costs can be substantially lower than the price which an operator must charge in order to cover its costs for providing the service on its network. For the application of these criteria on prices charged by a vertically integrated operator, which are basis for investment and market entry strategies of competitors, only the incremental costs for the provision of these services should be taken into account. The predatory pricing test is applicable also to emerging markets, since they cannot from the outset be excluded from the scope of article 82 of EC. The application of this test is in particular justified if a company bears practically no fixed costs, since the necessary investments are made by their parent company which gains substantial profits with its wholesale services.

C. Excessive Pricing

Competition problems usually occur in the form of high access prices to be paid by the competitors to the incumbent operators. Independent service providers need access to input products and services, because they often do not have or get equivalent alternatives to the infrastructure and service portfolio held by the incumbents. Therefore, the dominant operators are in a position to prevent market entry by fixing the level of the wholesale tariffs at an inadequately high level compared to the economic value of service provided.[20] Such excessive pricing can be demonstrated on the basis of a comparison between the actual price and the underlying costs, if this reveals the profit margin for the product or service in

[19] Case C-62/86, AKZO Chemie BV v Commission of the European Communities, 1991 E.C.R. I-2259 ¶ 71; Case C-333/94, P Tetra Pak International SA v Commission of the European Communities, 1996 E.C.R. I-5941.
[20] Case 26/75, General Motors Continental NV v Commission of the European Communities, 1975 E.C.R. 150 ¶ 12.

question.[21] Therefore, an adequate cost allocation is of fundamental importance. If a company carries out a number of different activities, the relevant costs as well as an appropriate share of the overhead costs are to be attributed to each of the different activities. The assessment of excessive pricing can alternatively be based on a comparison of the price in question with the prices charged in other geographical areas, serving as a reference prince. A comparison is also possible between the price of the dominant company in question and the price on other markets which are subject to potential competition.[22] Any relevant sources of Community law regarding the price setting in the sector concerned can support the comparison.[23]

The commission has applied these principles for the assessment of excessive pricing in a number of cases in the telecommunications sector. The sector-specific regulation can also, in this respect, contribute to the prevention of such infringements. However, if this is not achieved in an efficient manner, be it for legal or administrative reasons, competition law procedures and remedies are possible in order to ensure fair competition. Several procedures for excessive pricing that were launched already, before or immediately after the complete liberalization of the telecommunications markets, on the grounds that the sector-specific reregulation did not exist, was not applicable or sufficiently pro-competitive.

D. Patent Abuses

In the last years, several Article 82 investigations have had as their object the licensing of intellectual property rights. The CFI's endorsement of the Commission's decision in the *Microsoft Case*[24] seems to have encouraged the Commission to pursue further patent abuse cases in a number of different sectors. Besides launching a sector inquiry into the pharmaceuticals sector alleging, inter alia, a misuse of the patent system, in 2007 the Commission opened two patent abuse cases against companies operating in the telecommunications sector.

---

[21] Case 27/76, United Brands v Comm'n, 1978 E.C.R. 207.

[22] Case 30/87, Corinne Bodson v SA Pompes funebres des regions liberees, 1988 E.C.R. 2479; Cases 110/88, 241/88 and 242/88, Francois Lucazeau and others v Societe des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others, 1989 E.C.R. 2811 ¶ 25.

[23] Case 66/86, Ahmed Saeed Flugreisen and Silver Line Reiseburo GmbH v Zentrale zur Bekampfung unlauteren Wettbewerbs, 1989 E.C.R. 803 ¶ 43.

[24] Case T-201/04, Microsoft v Commission of the European Communities, 2007 E.C.R. 289.

A refusal to license intellectual property rights by a dominant undertaking does not constitute an abuse *per se*. In order to determine whether such refusal amounts to a break of Article 82 EC it is necessary to balance the incentive to innovate, protected by the intellectual property rights, against the promotion of competition in the market. With the view to encourage investments in innovative technologies, the ECJ has considered a refusal to license intellectual property rights as being abusive only under exceptional circumstances. The test to be applied was set out in the *Magill*[25] and *IMS Health*[26] cases and reaffirmed lately in the *Microsoft case*. According to the jurisprudence of the Community Courts, the refusal to license intellectual property rights is tantamount to a breach of Article 82 EC under the following conditions, if the intellectual property right is indispensable for carrying on a particular activity on a neighbouring market, if the refusal is such as to exclude any effective competition on that neighbouring market, and prevents the emergence of a new product for which where is potential consumer demand, and if it is not objectively justified.

Even if these circumstances have been qualified by the ECJ as 'exceptional', they are very likely to happen when intellectual property rights are included in a standard. On the one hand, standardization plays a pivotal role in promoting technological development especially in IT, telecom and other network industries, since it reduces problems of compatibility and interoperability. On the other, the creation of a single standard can lead to a restriction or even to the complete elimination of competition in a market, given that the choice of one technology for a standard, locks out alternatives. This is why standard setting organizations (SSOs) often impose constraints on those taking part in the standardization process to ensure that the advantages of standardization are passed on to consumers. Such constraints typically consist of obligatory ex-ante disclosure of essential patents and the commitment to license such patents on Fair, Reasonable and Non-Discriminatory Terms (FRAND commitment).

In a complaint against Qualcomm before the Commission, several phone and chipset manufacturers, alleged an infringement of the FRAND commitment as imposed by the European Telecommunications Standards Institute (ETSI). Qualcomm holds patents essential to UMTS standards, for the licensing of which it allegedly charged disproportionate and discriminatory royalties. Having considered the complaints since 2005, the Commission

---

[25] Case C-241/91, Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Comm'n, 1995 E.C.R. I-743.

[26] Case C-418/01, IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG, 2004 E.C.R. I-5039.

decided in August 2007 to initiate formal proceedings against Qualcomm. The commission is not competent to take a decision on an alleged breach of ETSI's contractual rules governing the conditions under which intellectual property rights may be licensed. However, given the existence of a clear link between Article 82 EC and Commission does have formal standing to investigate whether Qualcomm is dominant in the third-generation mobile phones market and whether the licensing terms and royalties imposed by Qualcomm are fair, reasonable and non-discriminatory.

The commission has also started proceedings against Rambus, a US company which develops memory chips for, inter alia, communication products. This is the first time that a 'patent ambush' is being investigated under EC antitrust law. A company incurs in 'patent ambush' whenever it withholds information about patents around a proposed standard. As abovementioned, before a standard is set, companies engaging in the creation of the standard should make clear whether a particular technology is covered by a patent. Moreover, patent holders have a duty to license their technology on a fair, reasonable and non-discriminatory terms to the companies wishing to implement the standard. Allegedly, Rambus took part in industry efforts to create a standard for DRAM (Dynamic Random Access Memory) chips without revealing that it held a blocking patent. Subsequently, it charged unreasonable royalties for the use of those patents. In the Commission's preliminary view, Rambus abused its dominant position by claiming unreasonable royalties, which it wouldn't have been able to charge without its patent ambush. It is noteworthy that similar charges were brought against Rambus in the United States. Here, the district court before which the case was pending cleared the company of abusing its patents in a standards-setting forum on the grounds that the company did not engage in deceptive disclosure of facts and that the obligations imposed by standard setting organization were not clearly defined at the time of the creation of the standard. Although the Commission's case is separate from the US case, this judgment could have an impact on the outcome of the proceedings out of EC level.

It has been argued that the fact that the Commission has been ascribing particular importance to patent-related abuses, especially in the IT and telecommunications sector, is due to public policy considerations. This is well illustrated by the Microsoft case.[27] In its decision, the Commission stated that the refusal to supply interoperability information assumed a special

[27] Microsoft, *supra* note 16.

character which set it apart from other refusal to supply decisions, because of the relevance of compatibility and connectivity in the software industry where network effects are pervasive. Also, the CFI recognized the importance of this issue when it noted that the '*the disclosure of information for interoperability purposes is beneficial for the society as a whole*'.[28] This is the reason why, when assessing whether the conditions under which intellectual property rights are licensed are compatible with the provision of Article 82 EC, the Community Courts have used a balancing test between incentives for inventors and the competitive situation in the market place, rather than ascertaining whether the IP right is no longer being used according to its essential function but instead to achieve an anti-competitive purpose. The Commission's approach could lead to the attachment of liability to the mere fact of refusing to grant access to intellectual property rights rather than a full inquiry into anti-competitive purposes and objective justifications.

CONCLUSION

Through the course of the research paper, the basic principle that dominant companies are under certain circumstances obliged to grant third party access to their networks and services is of great importance in the technology/telecommunications sector, since in many areas, the incumbent operators still have quasi-monopolies. Even if straight-forward access restrictions were eliminated, competition on the downstream markets would still depend on the prices and conditions of the upstream network access, which allows for a gradual marketed entry. A company which is dominant on a given product or service market and which commits an abuse in the sense of Article 82 EC can prevent the emergence of a new product service. In order to terminate the abuse, the company in question can then be required to grant to its competitors, access to its network and services. Is it important to note that, the Competition Act, 2002[29] or the concomitant provisions in the Intellectual Property Regulations do not regulate such complex technology transfer agreements. Therefore, the Indian courts have been forced to rely on the jurisprudence of EU. Apart from the aspect of granting access to the network and services, the research paper has dealt to a considerable extent with the regulations and the licensing practices involved during the technology transfer. While there have been few cases in this regard, it is hoped that the regulations and the practices adopted

[28] IMS Health, *supra* note 18, ¶ 305.
[29] The Competition Act, No. 12 of 2003, INDIA CODE (2010) 31.

by the companies bring in more consistency and clarity so that the jurisprudence of anti-trust violations on these emerging areas can be well developed.

**