Abuse of Dominant Position in IPR License Agreements: Ericsson-Intex Spat

Introduction

An Indian mobile handset maker, Intex Technologies (India) Limited (**"Intex"**) filed a complaint with the Competition Commission of India (**"CCI"**) against the Swedish company, Telefonaktiebolaget LM Ericsson (**"Ericsson"**) in 2013 alleging abuse of dominance by Ericsson while negotiating a licensing agreement. Intex complained that Ericsson offered to enter into a global patent license agreement with them and demanded exorbitant royalty rates and unfair terms for licensing its patents, which Intex finally did not agree. CCI made a prima facie determination of abuse of dominant position and ordered an investigation under section 26[1] of the Competition Act, 2002 (**"Act"**). However, before the investigation was completed, Ericsson filed a writ petition at the Delhi High Court (**"DHC"**) challenging this order of CCI.

In light of the above facts, this e-newsline will examine the two proceedings: **(i)** complaint with CCI; and **(ii)** the case before the DHC; and explain how a case of alleged abuse of dominant position was made out here when the issue is related to patent licensing agreement, which falls within the exception of the anti-competitive agreements.

1. Factual Matrix and the CCI Order

Ericsson had a sizeable business in handset manufacturing and manufacturing network; however, pursuant to a change in strategy its focus shifted on the business of patent licensing/monetization, which formed one of its prominent revenue streams. While licensing, Ericsson executed a global patent licensing agreement with the licensee and gained royalty. In parallel, it also executed Non-Disclosure Agreements (**"NDAs"**) asking the licensee to keep the terms of the licensing agreement and NDA confidential. Intex sourced custom-made mobile devices, among other products from various countries and marketed them in India under its brand name. In 2013, while executing the licensing agreement with Ericsson, Intex complained to CCI that:

(i) The terms of the licensing agreement were highly unfair and discriminatory;
(ii) The royalty rates were extremely high, excessive and discriminatory; and
(iii) Ericsson had refused to share with Intex the commercial terms and royalty payments it had with other companies on the grounds of NDA with them, which strongly suggested that different royalty rates/commercial terms were being offered to the potential licensees belonging to the same category.

In the complaint, Intex informed CCI that Ericsson had licensed the patents to different companies in the same market on different terms and conditions and charged different rates of royalty thereby forcing inequitable and discriminatory market pricing of same products. This practice and insistence of Ericsson was likely to render the business of Intex

[1] This section provides for the procedure for inquiry on receipt of a reference…..or on information received under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Direct General to cause an investigation to be made into the matter.

unviable, if its competitors were able to sell the same products at lower rates. Intex approached CCI to investigate the matter and determine the potential abuse of dominant position by Ericsson. Dominant position[2] has been defined under the Act to mean a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to **(i)** operate independently of competitive forces prevailing in the relevant market; or **(ii)** affect its competitors or consumers or the relevant market in its favour. Abusive conduct may include imposing discriminatory or unfair or excessive price or conditions of sale, restricting or even limiting production/technical development, exclusive deals or cross-subsidizing the costs in one market by leveraging a dominant position in some other market.

Ericsson claimed to be the patentee of a huge portfolio of Standard Essential Patents[3] required for mobile handsets and network stations. CCI noted that SEP holders are under an obligation "*to license the SEPs to every party under Fair, Reasonable and Non-Discriminatory (FRAND) terms, in terms of the irrevocable commitment made to standard setting organization, such as the European Telecommunications Standard Institute (ETSI)[4],*" FRAND licenses are primarily intended to prevent patent hold-up and royalty stacking. This means that when standard technologies are protected by patent rights, there is a possibility for "hold-up" by the patent owner to demand higher royalties or burdensome licensing terms before the standard was chosen. Hold-up can subvert the competitive process of choosing among technologies and undermine the integrity of standard-setting activities. Ultimately, the high costs of such patents get transferred to the final consumers. By standardization, which is a voluntary process, a number of companies reach a consensus for setting common technology standards under the support of a standard setting organization, which in the present case is ETSI. In simple terms, standardization is the process of developing and implementing technical standards. Such technological standards are termed as SEP, when they are patented and for which there are no non-infringing alternatives. Once a patent is declared as SEP, it faces no competition from other patents unless that patent becomes obsolete due to new technology/inventions.

Upon review of the information and documents filed by Intex, *prima facie* it became apparent to CCI that Ericsson was dominant in the relevant market of GSM and CDMA technologies in India and it held a large number of GSM and CDMA patents. CCI *prima facie* found that Ericsson was dominant in this particular market as:

(i) Ericsson had 33,000 patents to its credit, with 400 of which were granted in India. It was the largest holder of SEPs for mobile communications like 2G, 3G and 4G patents used for smart phones, tablets etc;

[2] See section 4(2) Explanation (a) of the Act.
[3] An SEP is a patent that claims that an invention must be used to comply with a technical standard. These essential standards are established by technical or industrial experts and these experts are usually the insiders of the industry because every company or industry involved has proprietary technology and they want to see their technology used in the standard.
[4] A non-profit organization with more than 700 member organizations from 62 countries, which is officially recognized by the European Union as a European Standards Organization. ETSI produces globally applicable standards for information and communication technologies i.e. fixed, mobile, radio, converged, broadcast and internet technologies, some of which are covered by patents held by ETSI or ETSI members like Ericsson.

(ii) Ericsson held SEPs and there were no other alternate technology in the Indian market, so, it enjoyed complete dominance over its present and prospective licensees in the relevant product market.

CCI considered the following facts in order to conclude *prima facie* abuse of dominance:

(i) The royalty rates charged by Ericsson were contrary to the FRAND terms as they had no linkage to the patented product;
(ii) Ericsson refused to share the terms of FRAND licenses given to licensees similarly placed to Intex, possibly because Ericsson was imposing discriminatory and non uniform terms;
(iii) Each user of Ericsson's SEP was made to sign NDA, which meant that users were not able to find out terms of royalty given to other users and this reduced transparency; and
(iv) A jurisdiction clause, in violation of FRAND principles, was imposed, which debarred Intex from having disputes adjudicated in India (*where both parties carry on business*).

Therefore, the CCI ordered detailed investigation of the matter and, also, clubbed this matter with the ongoing investigation in another case (*Micromax Informatics Limited and Ericsson*), wherein Micromax had similarly alleged that Ericsson was demanding unfair, discriminatory and exorbitant royalty for its patents regarding GSM technology. In that case, it was alleged that the royalty demanded by Ericsson was excessive when compared to royalties charged by other patentees for patents similar or comparable to the patents held by Ericsson and CCI had ordered an investigation.

2. The case before DHC

Miffed by the CCI orders of November 28, 2013 (Micromax) and January 16, 2014 (Intex), Ericsson moved the DHC challenging the jurisdiction of CCI to rule on these cases. It alleged that CCI has no jurisdiction to investigate Ericsson's action in as much as the Patent Act itself provides adequate mechanism to balance the rights of patentee and other stakeholders and took refuge of sections 3(5)(i) and 62 of the Act. Under section 3(5)(i), anti-competitive agreements does not restrict the right of a person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights conferred under the Patents Act, 1970. Section 62 provides that the application of other laws is not barred and the remedies of the Act shall be in addition to, and not in derogation of, the provisions of any other applicable law for the time being in force. In light of the aforesaid, Ericsson alleged that the matter was outside the jurisdiction of CCI since it was purely contractual and no final rate of royalty was concluded eventually.

Further, talking about its efforts during the negotiation of the global patent licensing agreement, Ericsson contended that it made whole hearted efforts to negotiate licensing agreement with Intex for more than four years. However, Intex adopted various delaying and mala fide tactics to hinder the process. Eventually, Intex had evinced interest in pursuing negotiations, yet it simultaneously went behind Ericsson's back and filed revocation petitions against five of Ericsson's SEPs with the patent office. Thereafter, it lodged the complaint with CCI. Ericsson alleged that during the inter-se communication, Intex had acknowledged use of Ericsson's SEPs and yet continued using SEPs without paying any royalty to Ericsson. During the negotiation period, Intex's revenues grew by 30%. Finally, Ericsson contended that the revocation applications filed by Intex and CCI investigations are coercive tactics adopted by Intex to pressurize Ericsson to grant low royalty rates.

The DHC expressed its displeasure at CCI entering into an "adjudicatory and determinative" process by recording detailed and substantial reasoning at section 26(1) stage itself, wherein it has the obligation to do so at section 26(7) stage. Citing a Supreme Court (**"SC"**) judgement in *CCI vs. Steel Authority of India Limited and Another*[5], wherein it was held that an order passed under section 26(1) of the Act is an administrative order and an aggrieved party has a right to challenge it at section 26(7) stage, the DHC observed that such orders prejudiced the remedy by rendering it illusory under section 26(7). Finally, the single judge directed the Director General of CCI to refrain from passing any final order/report pending the adjudication of this matter in the DHC and restricted CCI from summoning any person from Ericsson working abroad without the leave of the DHC. As this order restricted the investigative powers of the CCI, it appealed against this order before a Division Bench of the DHC, which decided to modify the single judge's order to the extent that the Director General could call foreign officers for purpose of the investigation. However, in such an event, Ericsson could approach the DHC if it felt that summon from CCI was unnecessary. Certainly, the above orders of DHC have limiting effect on the investigating powers of the CCI but since these matters are still at their preliminary stages, it would be too premature to comment on the overall effect of the orders. It seems that CCI could appeal against the order of the Division bench as well.

Conclusion

The Act certainly does not prohibit companies from maintaining a dominant position but what is prohibited is the abuse of such dominant position. Transparency is the hallmark of fairness and it applies to conduct of business as well. The larger question is whether CCI be allowed to investigate the conditions imposed by an owner of IP for the protection of its rights and to restrain any infringement. Patents Act provides statutory protection for commercial exploitation of patents to its holder. Section 3(5) of the Act provides an exception of anti-competitive agreements and clearly mentions that nothing contained in section 3 of the Act shall restrict "*the right of any person to restrain any infringement or to impose reasonable condition, as may be necessary for protecting any of his rights*…." But does that mean that holders of protected IPRs can impose any condition? The answer would be in the negative because if they do so, CCI can certainly investigate the "reasonableness" of the conditions imposed in their agreements. In the current spat, if the investigations lead to the finding that Ericsson's global patent licensing agreements with discriminatory non disclosure conditions and different royalty terms with each party could have an appreciable adverse effect on competition and is actually an abuse of dominant position in the relevant market in India, the DHC will certainly allow CCI to adjudicate on the matter and could remove all restrictions imposed on CCI so far.

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[5] *(2010) 10 SCC 744.*