documents that are not necessarily merger specific are often the subject of these requests. There have been cases in which documents submitted pursuant to a request issued in the context of a merger investigation have triggered competition law concerns unrelated to the merger.

For example, when various franchise agreements were requested as part of a merger investigation, the Competition Commission expressed concerns with exclusivity provisions contained in the agreements, claiming that they would have a restrictive effect on competition. The Competition Tribunal, the adjudicative body deliberating upon the merger, noted that non-merger specific antitrust issues cannot be investigated through the "back door of merger control" but invited the Competition Commission to investigate its concerns separately.

In a case involving a merger investigation of property funds, lease exclusivity provisions were raised by the Competition Commission as a concerning feature of the way in which business is done. Similarly, the Competition Tribunal remarked that while the impugned clauses in the lease agreements existed pre-merger and the implementation of the merger would not alter that situation, *"enforcement through the prohibited practices regime is the more effective tool."* Following this, the Competition Commission initiated a market inquiry with a specific focus on lease exclusivity provisions in contracts.

What is clear from these examples is that documents submitted within the context of a merger investigation run the risk of unearthing unrelated antitrust issues. These issues carry administrative, civil and criminal consequences if the respondent firm is ultimately found to be liable.

Key lessons

Merger review does not exist in a vacuum. Documents always tell a story, and attorneys need to be sure that the documents that have to be submitted as part of the merger review process tell a story that supports the proposed deal and do not result in other investigations being launched. Once documents are submitted to a competition enforcer or regulator, parties can expect that they will be closely reviewed, not only with respect to the transaction at hand, but also with an eye toward both civil and criminal actions.

The US example highlights the collaboration between the DOJ's civil and criminal sections. The fines in the European cases serve to remind companies that the exchange of commercially sensitive information may be forbidden by competition rules. Similarly, the examples from the rest of the world emphasise the growing risks and implications following the submission of documents to antitrust authorities.

Companies need to be increasingly aware of the risks ordinary course documents present, and implement proper document management procedures, as well as compliance programmes to ensure compliance with the relevant competition laws. Whilst easy to state, ongoing compliance with competition law is the most straightforward way to ensure that documents submitted for a merger review tell the story the merging parties want to be told.

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Endnotes

1. China's MOFCOM handled 395 notifications in 2016. In the Philippines, a new competition regime came into force in 2015, with more than 70 mergers reviewed as of 31 December 2016. Singapore, Japan, Australia, Korea and Taiwan all have well-established merger control regimes. New regimes are in the process of being implemented in Thailand and Myanmar, which include merger control provisions.
2. The Administrative Council for Economic Defence (CADE).
3. It should be noted that CADE only has jurisdiction over investigations of anti-competitive conducts, but can work alongside the Public Prosecutor's Office if the investigation relates to certain anti-competitive practices (essentially cartels) that could also be considered criminal offences. In fact, these authorities currently hold a series of co-operation agreements, through which both offices can work together sharing documents and evidence to support each other's investigation, increasing the exposure of those involved in the investigations.

Boundary issues

Recent developments at the interface of IP and competition law

by **Pat Treacy, Edwin Bond** and **Sivaloganathan Kumaran**

There are often tensions at the crossover between intellectual property (IP) and competition law. This article explores some recent developments at this interface, focusing on two main areas: (i) recent cases examining factors that need to be taken into account when assessing whether royalties charged by copyright collecting societies are excessive or discriminatory under Article 102 TFEU; and (ii) recent debates on what constitutes fair reasonable and non-discriminatory ("FRAND") behaviour in the context of standard essential patent ("SEP") licensing.[1]

Charging appropriate royalties

AKKA (excessive royalties)

In September 2017 the CJEU handed down a relatively rare judgment on the criteria applicable when assessing excessive or unfair pricing by a dominant firm in the context of copyright licensing.[2] The Latvian Competition Council had found that AKKA, a collecting society with the exclusive right to issue licences for the playing of music in commercial premises in Latvia, had abused its dominant position by charging excessively high licence fees. Following a series of appeals, the Latvian Supreme Court referred several questions to the CJEU.

The first three questions related to the issue of how to make appropriate comparisons when assessing whether a price is excessive under Article 102. Endorsing the two-stage test in *United Brands*,[3] the CJEU acknowledged that a number of different methodologies can be used to determine the "benchmark price". The Court confirmed that (at least) in the context of copyright licensing, one appropriate method is to compare the prices charged by the collecting society in its home country with those charged in other Member States, provided that the reference Member States are selected using "objective, appropriate and verifiable criteria". The CJEU also held that when making cross-country comparisons, the purchasing power parity (PPP) index must be used to take into account differences in economic conditions between countries.

The CJEU then considered what standard should be required for a dominant firm's price to be deemed excessive. In its view, whilst there is "no minimum threshold", a difference between the dominant firm's price and the benchmark price should give rise to concerns only if it is both "significant and persistent on the facts". The Court emphasised that even if there appears to be a significant and persistent price difference, it is still open to the dominant firm to justify the difference on the basis of "objective factors" (in AKKA's case by reference to factors having an impact *on* "management expenses or the remuneration of rights holders"*)*. In the authors' view, the CJEU's call for caution reduces the significant risks of false positives under Article 102.

MEO (discriminatory royalties)

In another collecting society case, *MEO v Autoridade da Concorrência*,[4] the CJEU gave a preliminary ruling in April 2018 on the circumstances in which discriminatory pricing may constitute abuse of dominance. Article 102(c) TFEU says it is abusive to apply "dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage". The CJEU's ruling sheds important light on the meaning of "competitive disadvantage", holding that:

- All relevant circumstances must be examined to determine whether the discrimination produces, or is capable of producing, a competitive disadvantage;
- Proof of actual, quantifiable deterioration of a particular customer's competitive position is not required for a finding of competitive disadvantage; and
- The mere presence of an immediate disadvantage affecting operators who are charged more does not mean that competition is distorted or capable of being distorted.

More generally, in emphasising that discriminatory pricing is abusive only where it "tends to distort competition", the CJEU's ruling is the latest in a line of recent cases taking an effects-based approach to applying Article 102. The ruling also has potential implications for disputes in the FRAND arena. Price discrimination between licensees has received relatively little judicial or regulator attention to date (although the comments of Mr Justice Birss in *Unwired Planet v Huawei* (English High Court) are discussed below). This issue is likely to become increasingly significant as the Internet of Things results in new market entrants requiring SEP licences.

FRAND developments

EU Commission Communication on SEPs

In November 2017 the European Commission published an eagerly anticipated Communication, "Setting out the EU approach to Standard Essential Patents".[5] Although not legally binding, the Communication is intended to address some of remaining uncertainties in SEP licensing after the CJEU's 2015 ruling in *Huawei v ZTE*, and to drive progress towards EU-wide adoption of 5G. It sets out several key principles, including:

- FRAND is not a "one size fits all" concept, and may differ from sector to sector and over time;
- The current SEP declaration system needs modernising to ensure greater transparency about ownership and essentiality of SEPs;
- "In principle", a FRAND royalty should not include any value attributable to the inclusion of the technology in the standard; and it should also take into account a reasonable aggregate royalty rate (to prevent royalty-stacking); and
- Global licensing is capable of being FRAND where the SEP holder has a portfolio of global scope and the implementer operates globally.

Perhaps disappointingly, the Communication does not provide much further guidance on each of the steps in the framework for licence negotiations established in *Huawei v ZTE*. It also avoids some of the more controversial issues in the world of SEP licensing. For instance, one of the main current areas of dispute is whether the FRAND obligation requires SEP holders to license all comers, including component manufacturers, or whether they can decide to license end-manufacturers to the exclusion of those higher up the value chain. Apart from stating that business models may vary from sector to sector and that SEP holders should not discriminate between similarly situated licensees, the Communication stays silent on this issue. Future cases will therefore have to grapple with it from first principles, which is likely to become increasingly important with the advent of 5G and the Internet of Things.

Determining global FRAND rates: *Unwired Planet v Huawei* and *TCL v Ericson*

Following Mr Justice Birss's ground-breaking first instance FRAND judgment of April 2017,[6] an air of expectation surrounded the recent Court of Appeal hearing in *Unwired Planet v Huawei*.

Huawei appealed on three main grounds:

i. ***Global licensing*** – that the High Court was wrong to hold that there should only be one set of FRAND terms and that those terms should be global. Huawei claims it should have been able to enter into a national licence set by the Court.
ii. ***Non-discrimination (ND)*** – that the High Court was mistaken in deciding that the ND limb of FRAND allows a SEP holder to charge similarly situated licensees such as Huawei and Samsung substantially different royalty rates for the same SEPs, provided that the difference in rates does not result in a distortion of competition (the *MEO* case discussed above may be of interest in this context).
iii. ***Huawei v ZTE*** – that the High Court should have found that Huawei had a defence to UP's injunction claim under Article 102 TFEU, as UP had failed to comply with the steps set out by the CJEU in *Huawei v ZTE*.

The Court of Appeal's judgment is expected this summer, and will be pored over by all those interested in the FRAND debate.

Meanwhile, on the other side of the Atlantic, in December 2017, Judge Selna of the US District Court for the Central District of California released perhaps the most significant US FRAND decision to date in *TCL v Ericsson*.[7] Judge Selna's approach has similarities to *Unwired Planet*, making use of a "top-down" methodology and comparable licences to determine royalty rates for a global licence. But there are also several differences which, if adopted in future judgments, could significantly affect how FRAND rates are calculated. For instance, Judge Selna held that a range of rates could be FRAND; and he dismissed the relevance of competition law in determining whether Ericsson had breached its non-discrimination obligation. Judge Selna's decision is significantly more licensee-friendly than *Unwired Planet*: unsurprisingly, Ericsson has appealed to the Federal Circuit.

FRAND jurisdiction battles: *Conversant v Huawei and ZTE* and *Apple v Qualcomm*

Luxembourg-based Conversant brought proceedings against Huawei and ZTE in the English High Court in July 2017, alleging infringement of its UK SEPs and seeking a determination of global FRAND licence terms.[8] Both defendants challenged the Court's jurisdiction to hear Conversant's claims, arguing that its claim to a global FRAND determination was not justiciable by the English courts and that those courts were not the convenient forum for the determination of the claims. In April 2018, Mr Justice Carr rejected the defendants' arguments on jurisdiction, holding that Conversant's claims were "claims for infringement of four UK patents" rather than "foreign portfolio infringement claims or worldwide royalty claims".[9] Whilst both defendants have appealed, Carr J's decision suggests that the UK remains – for the moment at least – a favourable forum for SEP holders seeking to resolve global licensing disputes.

FRAND developments in the UK took a further jurisdictional twist in May 2018, when the High Court in *Apple v Qualcomm*[10] declined to allow Apple to advance its claim that Qualcomm had violated its FRAND licensing obligations. Mr Justice Morgan was troubled by Apple's attempt to use the UK Qualcomm subsidiary – which does not own relevant patents, and did not give FRAND undertakings to ETSI – as an anchor defendant for a claim based on FRAND undertakings given by its ultimate parent company, Qualcomm Inc. He therefore granted Qualcomm "reverse summary judgment" against Apple's claim. Apple's damages case, which includes a competition claim that Qualcomm charged "supra-FRAND" royalties, hangs in the balance – the judge expressed doubts about whether the claimants suffered loss in the jurisdiction, and has permitted Qualcomm to adduce evidence on this point.

Conflicting future international approaches to FRAND enforcement?

In recent years, the EU and US competition authorities have been relatively consistent in their approach to non-FRAND behaviour by holders of SEPs. However, things may be about to change. The US Department of Justice (DOJ) has signalled, in a series of public comments by officials, that it is considering rolling back the role of antitrust in FRAND, leaving it to the courts to resolve cases on the basis of contract law principles. For example, speaking in Brussels in February 2018, Makan Delrahim, assistant attorney general in the DOJ's Antitrust Division, argued:

> "The duelling interests of innovators and implementers always are in tension, but the tension is best resolved through free market competition and bargaining. And that bargaining process works best when standard setting bodies respect the intellectual property rights of technology innovators, including the very

> important right to exclude. To the extent a patent holder violates its commitments to a standard setting organization, remedies under contract law, rather than antitrust remedies, are more appropriate to address licensees' concerns."

By contrast, the European Commission appears committed to looking at FRAND and SEP licensing issues in their competition law context. Speaking in Washington DC in April 2018, Nicholas Banasevic, head of unit (Antitrust – IT, Internet and Consumer Electronics) in DG Competition, suggested: "What our jurisprudence has confirmed is that you cannot look at some of these issues exclusively through the IP prism [...]." He added: "Intellectual property and competition law have common aims – it's an overstatement to say that they are in tension."

These comments by EU and US officials suggest that, as we enter the second half of 2018, debates over the appropriate balance between IP and competition laws will continue to rumble on.

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Endnotes

1. Space precludes discussion of recent cases in the pharmaceutical sector which involve issues at the IP/competition interface. For a detailed analysis of the CJEU's January 2018 ruling in Case C-179/16 *F. Hoffmann-La Roche*, see the article, "Restriction by object: Analysing off-label use of pharmaceuticals", in the February 2018 edition of *CLI*.
2. Case C-177/16 *AKKA/LAA*.
3. Case C-27/76 *United Brands v Commission*.
4. Case C-525/16 *MEO v Autoridade da Concorrencia*.
5. The Commission also published companion papers giving guidance on certain aspects of the IP Enforcement Directive and on 'A balanced IP enforcement system'.
6. *Unwired Planet International v Huawei Technologies* [2017] EWHC 711 (Pat).
7. *TCL Communications v Ericsson* (C.D. Cal., 21 December 2017, SACV 14-341 JVS(DFMx) and CV 15-2370 JVS (DFMx))
8. *Conversant Wireless Licensing S.a.r.l v Huawei Technologies Co. Ltd & Others*. Bristows LLP acts for ZTE in these proceedings.
9. [2018] EWHC 808 (Pat).
10. [2018] EWHC 1188 (Pat).

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