

## State of the Art

# FRANDly fire: are industry standards doing more harm than good?

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Industry standards are widely regarded as beneficial. Subject to appropriate rules, standards promote innovation by circumventing problems of product compatibility (particularly important for technologies reliant on interfaces and networks), they disseminate chosen technologies by allowing access to all comers, and they enhance technology durability. As the US Department of Justice has recently expressed it, open standards allow market participants to share knowledge and develop 'best-of-breed' products.<sup>1</sup> These benefits have the potential to be particularly significant for 'open' or 'planned' standards—where independent standards bodies have been involved from the outset—as compared with *de facto* standards developed by private companies.

However, over the last few years, industry standards have increasingly been in the news for the wrong reasons. For example, headlines have included 'Federal Court rules that Qualcomm abuse industry standard setting process';<sup>2</sup> 'IEEE802 committee on brink of collapse';<sup>3</sup> '100 Gb/s Ethernet talks break down';<sup>4</sup> and 'Rambus found guilty of monopoly and deception'.<sup>5</sup>

Private litigation involving IP rights embodied in standards has also become increasingly prevalent over the past few years. Standards involved in litigation or other regulatory disputes in the recent past range from the MP3 audio compression standard,<sup>6</sup> the JPEG photographic compression standard,<sup>7</sup> the GSM<sup>8</sup> and WCDMA

### Key issues

- The development and production of new high-tech products and services, particularly in the field of telecommunications, is increasingly governed by groups of IP owners—usually actual or potential competitors—who form themselves into standard-setting groups.
- One of the major benefits of standard-setting is that, once a key piece of innovation is developed, its proprietary does not exclude its use by others but allows its use by any third party willing to accept a licence on FRAND ('fair, reasonable, and non-discriminatory') terms.
- The authors examine the state of legal wisdom and experience regarding FRAND terms, particularly in the light of the need to comply with competition law requirements and the ease with which FRAND licensing obligations may be abused.

mobile telephony standards,<sup>9</sup> and the JEDEC memory standard.<sup>10</sup> A number of significant cases in the UK, US, and elsewhere have raised a range of difficult issues, such as whether holding a patent which has been declared essential to a standard deprives the patentee of its right to

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1 US DOJ Business Review Letter, VMEbus International Trade Association, 30 October 2006.

2 Broadcom press release, 22 March 2007.

3 *Tech News*, 28 March 2007.

4 *The Register*, 18 June 2007; this also relates to an IEEE standard.

5 *The Inquirer*, 2 August 2006.

6 The ongoing litigation in the US brought by Alcatel Lucent against Microsoft customer Gateway; *Lucent Technologies Inc. v Gateway Inc.*, 02cv2060, US District Court, Southern District of California (San Diego).

7 Litigation between Philips and LG in Holland in the Hague District Court; Case Number 261913.

8 A dispute (now settled) between Ericsson and Samsung Electronics in the UK, Holland, Germany, and the US related to this standard.

9 Disputes involving standards lodged or ongoing in 2005–2007 include: *Broadcom Corporation v Qualcomm Incorporated* in the US District Court of New Jersey and before the US International Trade Commission ('US ITC'); Nokia's complaint about Qualcomm in Delaware; *Nokia v InterDigital* in the English High Court; InterDigital complaint against Samsung Electronics before the US ITC; the complaint lodged with the European Commission by Broadcom, Ericsson, Nokia, NEC, Panasonic, and Texas Instruments in relation to Qualcomm. There are understood to be equivalent complaints (in some cases brought by other parties, or by unknown complainants) outstanding before the Korean, Japanese and Indian competition authorities.

10 *In the Matter of Rambus Incorporated*. Final Order and Opinion of the US Federal Trade Commission (FTC) on Remedy, 2 February 2007.

an injunction if it does not offer to licence the patent on the required terms,<sup>11</sup> the meaning of the word ‘essential’ and the right of a private litigant to seek a court declaration as to the essentiality of a particular patent,<sup>12</sup> the extent of the obligation on companies involved in standard setting to declare potentially essential patents,<sup>13</sup> whether (national) competition law can mandate the grant of a compulsory licence where a holder of an essential patent has discriminated against the proposed licensee,<sup>14</sup> and the meaning of the prevalent ‘RAND’ (reasonable and non-discriminatory) or ‘FRAND’ obligation found in the rules of many standards bodies.<sup>15</sup>

Although most standards bodies are governed by rules covering topics such as the process for declaring essential technologies and the basis on which third party access must be permitted to essential patents, there is typically insufficient guidance to answer the more detailed questions of the kind listed above. Despite the recent spate of litigation, the courts have yet to resolve many of the issues. Indeed, adversarial proceedings between private litigants are arguably not the best forum for answering these questions. The cases in this area—which mostly involve the IT or telecoms industries—raise questions of significant commercial concern. For example,

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*What might a FRAND royalty be following a breakdown in cross-licence negotiations, where the only real issue is the value of the licences to be granted?*

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Often, neither company is prepared to accept the risk of a formal judgment settling some of the open questions. Such cases are therefore ripe for pre-judgment settlement.

This article discusses difficulties that standards in the IT and telecoms sectors currently face and the link between them and the prevalence of a multitude of ‘declared essential’ IP rights. We ask whether standards bodies have in some senses brought the problems on themselves, before focusing on the particular question of the meaning of the (F)RAND obligation.

11 This question was considered by the US District Court of New Jersey in *Broadcom Corporation v Qualcomm Incorporated*, Civil Action No. 05-3350, judgment of 31 August 2006 (a preliminary judgment on a motion to dismiss). The Court held that such conduct would not deprive the patentee of an injunction. In the authors’ view, this conclusion is flawed (although the right to an injunction might be maintained in circumstances where, for example, the licensee itself withheld a licence of its essential patents). So far as the authors know, this issue has been raised in at least one other dispute, but no court has yet considered the issue other than in preliminary proceedings.

12 *Nokia Corporation v InterDigital Technology Corporation* [2007] FSR 23.

## Standard-setting myths

In at least the telecoms and IT fields, a number of myths about standard setting are in wide circulation. Many of these myths are perpetuated by the standards bodies themselves, with the aim of bolstering the credibility and value of standardization, for example:

- ‘It is possible to set a standard which avoids all patents or software copyright’ (in the IT hardware and telecoms sectors, the level of patenting is such that it is no longer possible to avoid patents except in the rarest of circumstances);
- ‘It is possible to set a standard with full knowledge of all patents contained in the standard’ (the level of patenting is such that participants in the standard setting process may not be aware even of all their own patents, let alone those belonging to third parties; this is exacerbated by patent-mining, a form of aggressive IP management designed to maximize royalty revenue from patent portfolios and by the time lag between the application for and grant of patents);
- ‘It is possible to withdraw or change a standard if a patent is subsequently discovered which the owner is not willing to license on (F)RAND terms’ (once the standard has been set, too much money and time has often been invested, both by the participants in standard setting and by those who have started to produce compatible products and infrastructure, to allow significant technology changes to be made);
- ‘The number of patents which cover technology contained in a standard remains constant or diminishes over the life of the standard’ (the time-lag between application and grant means that this is not so; in addition, many standards are regularly updated by incremental additions which also increase the patent burden);
- ‘Standards are set on an objective basis as a result of the working group choosing the best technology, and are immune from commercial lobbying’ (commercial lobbying is rife);
- ‘FRAND obligations deter companies from patenting with the sole aim of capturing patents over the

13 The Rambus proceedings in the US (see footnote 10 above).

14 *Standard Tight-head Drum (Standard-Spundfass)* Decision of the Bundesgerichtshof (Federal Supreme Court of Germany), 13 July 2004.

15 This was an issue in the litigation between Ericsson and Samsung referred to above, but was not decided before the case was settled. According to information contained in the press release issued by Broadcom and its co-complainants (see <http://www.broadcom.com/press/release.php?id=774809>), this issue is also central to the complaint to the European Commission about Qualcomm (see footnote 9 above).

standard' (FRAND obligations are so vague as to risk becoming toothless, and there is a widely-held view that the royalties receivable should be related solely to the number of patents declared).

Not all these myths have universal application. For example, the open source movement has seen some considerable success in the software field. However, in many cases, technologies have suffered from the desire of companies to convert participation in standards bodies to balance sheet credits. Other benefits—such as a detailed knowledge of the technical requirements of the standard leading to a reduced time to market—are now arguably perceived to have less value than in the past.

Many of these myths have been scotched in recent years. The utopian basis of the rules of many standards bodies is increasingly being acknowledged by participants in standardized industries (which have seen frequent litigation on such issues), by competition regulators and, to some extent, by the standards bodies themselves. However, while the problems are acknowledged, in many cases solutions have been harder to find.

## The meaning of FRAND

The question of how the FRAND obligation should be interpreted is a good example of the difficulties.

Standards bodies which make use of FRAND declarations—ie a promise that the licensor will make specified technologies available on fair, reasonable, and non-discriminatory terms—rarely, if ever, give any guidance as to what these terms mean. It is not even clear whether the use of the word 'fair' in the FRAND obligation, as typically included in the rules of European standards bodies such as the European Telecommunications Standards Institute ('ETSI'), adds anything to the obligation to offer 'reasonable and non-discriminatory' (RAND) licence terms, as is seen more commonly in the rules of US-based standards bodies.

Nor will most standards bodies intervene in bilateral disputes between members (or between members and non-members) to set a FRAND royalty, or even to give any guidance on the meaning of the commitment, not least because most standards bodies are little more than the sum of their members, with inevitably disparate commercial views.<sup>16</sup> As discussed above, there is a significant risk that either formulation can mean all things to all men. In consequence, the obligation risks becoming toothless.

Economists, lawyers, and industry representatives have proposed various theories as to how FRAND should be interpreted, for example:

- FRAND should be assessed on the basis of industry comparators (in the same or comparable markets);
- FRAND should be assessed by reference to the available share of profit (allocating some part of the overall profit to the technology owner, and some to the product manufacturer);
- FRAND should take into account the total royalty burden (ie the cumulative royalties) likely to be faced by someone wishing to bring a standard-compliant product to market;
- FRAND should be based on the number of patents held by the licensor, by comparison with the total number of patents in the standard (ie a share of a notional suitable maximum royalty level);
- FRAND should take into account the pre-standardization value of the technology (ie patentees should not receive a windfall because their technology has been included in the standard, but should be reimbursed on the basis of the technology's objective quality and centrality to the standard);
- FRAND should take into account the level of the licensor's R&D expenditure in developing the relevant technologies.

It is evident both that some of these theories conflict, and that many of the theories are extremely difficult to apply in the real world. However appropriate it may be in principle to take into account the costs of developing a given set of technologies, this information is often unavailable to licensees. Even the licensor may struggle to distinguish the costs attributable to a particular technology, developed over a number of years, from those which relate to the development of other technologies, and from costs which reflect the development of the licensor's own products which it would not be appropriate to recoup from others on the market. Much research may be expensive but fruitless, while some of best ideas may cost little to realise.

Given the multiplicity of theories, and the difficulties in putting the theories into practice, we consider below in overview whether there is any way of establishing a more objective basis for quantifying FRAND. We take the example of ETSI as the basis for this review.

<sup>16</sup> Patent pools formed 'beneath' some standards may provide more guidance. A good example is the 3G Licensing pool which licences out certain technologies included in the 3GPP mobile telephony standard.

## The example of ETSI

ETSI—the European Telecommunications Standards Institute—is a prominent example of a standards body which imposes a FRAND obligation. In this section, we consider briefly whether the history of ETSI and its IPR policy enables a more objective basis for the meaning of FRAND to be established.

ETSI was established in the late 1980s with responsibility for developing the 2G mobile telephony standard (GSM). It was created in part in response to the wishes of the European Community and the European Free Trade Association, each of which considered European standardization in telecommunications to be a key step in the development of the European single market.

Early in the standardization process, ETSI started to consider how to deal with IP rights held over aspects of the standard. The debate on the IPR issue within ETSI was significantly affected by the involvement of the public authorities, not only the PTs (the national Postal Telegraph and Telephone companies which formerly held state-granted monopolies in most European countries) but also, notably, the European Commission. As early as 1987, the Commission issued a detailed green paper on the development of the common market for telecommunications services and equipment,<sup>17</sup> emphasizing the important role that standardization had to play in providing European users with a greater variety and better quality of telecommunications services at a lower cost. This was followed in 1990 by a further green paper on the development of European standardization, which included some discussion of the role of ETSI.<sup>18</sup> In March 1991, the Commission wrote to ETSI to make clear its views that Community policies—including in particular in the areas of IP, competition and trade—had to be respected by ETSI during its work and enclosing an extract from its paper entitled ‘Standardisation in the European Economy’.<sup>19</sup>

In the following years, the Commission continued to engage closely with the standardization effort within ETSI and showed particular interest in its attempts to agree an IPR policy (ie a set of rules governing declaration of essential IPRs and access by third parties to such rights). The discussions between ETSI and the Commission during the early 1990s were based on an understanding by ETSI that any IPR policy adopted

would need to have regard to the Community policies identified to it by the Commission. Notable among the policies identified was competition policy, as well as IP and trade policies more generally. Attempts to finalize an ETSI IPR policy were, however, derailed in 1994 by the complaint to the Commission of the Computer and Business Equipment Manufacturers Association (‘CBEMA’) of the USA. The complaint alleged that the ETSI IPR policy amounted to a compulsory licensing scheme and violated Articles 85 and 86 (now 81 and 82) of the Treaty of Rome. Despite the Commission’s involvement in the earlier discussions about the IPR policy, it now indicated to ETSI that it was minded to share CBEMA’s concerns. In particular, the Commission noted:

Once an essential technology is included with the agreement of the IPR holder in the standard, particularly one which is made mandatory pursuant to Community legislation, the owner of the IPR relating to that technology occupies in most if not all situations a dominant position, if not to say *de facto* monopoly, *vis-à-vis* manufacturers requiring licences on that IPR in order to be able to participate in the market for the equipment in question.

The Commission’s intervention eventually led to the development of a modified IPR policy, which excluded the alleged licensing by default obligation.<sup>20</sup> This is essentially the policy—with a few modifications, including the change made in response to the Commission’s 2005 investigation designed to minimize the possibility of patent ambush—that still applies today.<sup>21</sup>

The Commission’s involvement and views remain relevant to interpretation of the current policy. While the exact interpretation of the ETSI rules—which are subject to French law—remain open to debate, the Commission clearly considered that numerous Community policies have a key role to play.

In the authors’ view, competition law and policy are particularly relevant to interpreting the FRAND obligation. This view is supported by the Commission’s own statement in the Horizontal Cooperation Guidelines, which provide guidance on how agreements between competitors should be structured so as to comply with the competition rules, that ‘to avoid elimination of competition in the relevant market(s), access to [standards] must be possible for third parties on fair, reasonable and non-discriminatory terms’.<sup>22</sup>

17 ‘Towards a dynamic European Economy’ Com (87) 290.

18 ‘Standardisation in the European Economy’ Com (91) 521.

19 Communication to ETSI 10th General Assembly, 6 March 1991.

20 The ETSI IPR Policy is available via the ETSI website: <http://www.etsi.org/legal/home.htm>

21 Commission Press Release IP/05/1565 of 12 December 2005 available on <http://europa.eu>

22 Commission Notice: Guidelines on the applicability of Art 81 of the EC Treaty to horizontal cooperation agreements [2001] C3/02, paragraph 174.

The concepts of fairness, reasonableness, and non-discrimination are well established in the case law relating to Article 82 EC (prohibition of abuse of dominance) in particular. For example, cases relating to excessive pricing, unfair trading terms, and discrimination are all directly relevant.

Given the Commission's comments on the likely dominance of the holder of an essential IP right, it seems appropriate to make use of these principles when considering obligations such as the FRAND obligation. Indeed, the Commission has recently opened proceedings into the complaint of a group of six players on the mobile telephony market over Qualcomm's failure to offer FRAND terms to its essential 3G patents.<sup>23</sup> Although the complaint relates primarily to Qualcomm's failure to comply with the terms of the ETSI IPR policy, the Commission has been asked to consider Qualcomm's conduct in the context of Article 82 (charging excessive and discriminatory royalties), rather than under the specific contractual rules governing the IPR policy (which the Commission would not have standing to do).

While the Commission's response remains unknown, a rigorous and reasoned application of the competition rules in this sector would provide assistance in fleshing out the meaning of the FRAND obligation. It would enable companies—and courts required to adjudicate on licensing disputes in this sector—to employ a set of well-established legal principles, and would introduce a more objective basis for determining the royalty payable in any given licensing situation. As ETSI is unlikely to provide further guidance on this issue in the short to medium term (the recent review of the IPR policy undertaken by members at a series of specially convened meetings having had limited practical effect), this development would be welcome to many prospective licensees.

## Recent US developments

It is evident from two recent Business Review Letters written by the US Department of Justice ('DOJ') that some US standards bodies now take more active steps to find new ways of combating the uncertainty surrounding FRAND.<sup>24</sup> (Business Review Letters are written in response to applicants' requests for a statement on the DOJ's antitrust enforcement intentions with respect to a particular agreement or course of conduct.)

The two Review Letters relate to two different standards bodies—the VMEbus International Trade Association ('VITA') and the Institute of Electrical and Electronic Engineers ('IEEE')—but raise very similar questions. In each case, the issue concerned the extent to which participants in standard setting should be permitted to consider the terms on which each technology would be licensed if it is included. The standards bodies in question both noted that they were concerned that the FRAND/RAND obligation was proving insufficient to ensure that standards remain open. They therefore wished to ensure that patentees holding candidate technologies give more specific commitments during the standard setting process as to the licensing terms that will be imposed once the standard has been set.

By way of example, the provisions proposed by VITA include

- an obligation on those submitting technologies to state the maximum royalty that will be sought in respect of any patents held;
- a sanction for failing to disclose patents and/or maximum royalties, in the form of a requirement to grant royalty-free licences;
- limits on the other terms which may be required, with a default position relating in particular to grant-backs, reciprocal licences, non-asserts, and covenants not to sue.

Previously, the competition authorities in both Europe and the US have considered that participants in standard setting should limit their deliberations to the technical suitability of the various proposed technologies, but should not address commercial questions. The European Commission is understood to have re-iterated this position to ETSI in the context of the review of the IPR policy which ETSI members undertook during 2006. The theoretical concern about such discussions is that any reference to commercial terms is tantamount to the standard setters agreeing the price at which the technology is made available—a form of price-fixing by a group of 'buyers' possessing the anti-competitive potential to drive down the price that a particular licensed technology can capture. Further, once a technology is chosen, the subsequent licensing out of that technology could be regarded as being subject to price fixing by a group of sellers.

The US DOJ did not take this view. Rather, it confirmed that—provided certain safeguards relating to the extent to which working group members can

<sup>23</sup> See footnote 9 above. The Commission issued a statement on 1 October 2007 saying that on 30th August it had opened formal proceedings against Qualcomm.

<sup>24</sup> See Department of Justice Business Review Letters to VITA and IEEE dated 30 October 2006 and 30 April 2007 respectively (available on [www.usdoj.gov](http://www.usdoj.gov))

actually discuss the licensing terms are in place—it should be acceptable for standards bodies to solicit provision of maximum royalty rates when a patented technology is submitted. The agency stated that it believed that this process would help to ensure that the conditions of competition which exist before a technology is chosen for a standard are preserved once the technology has been picked.

Will such measures be effective? The risk is that draconian *ex ante* obligations will deter technology developers from participating in open standards. Moreover, the principal basis for the DOJ's approach—that competition between technologies is preserved—is inapplicable where only one viable technology is available for a standard, or aspect of a standard. In this case, requiring the patentee to commit 'blind' to a maximum royalty rate could depress the value that could have been secured from the patent as compared with the open market position.

In contrast, there is also a risk that companies will notify such high maximum royalty rates—perhaps at a level which would lead to excessively high cumulative royalties when all of the technologies required to be licensed for a particular product are considered together—that the new obligation again becomes meaningless, and the actual royalty paid will again depend entirely on any given licensee's bargaining power.

### So how can 'unFRANDliness' be avoided?

The questions in this field are still far from being judicially determined. Faced with uncertainty, owners of essential patents must choose between two approaches.

The first approach is to seek to exploit the uncertainty by paying lip service to the (fairly clear) obligation to license declared essential patents, while seeking to obtain profit-maximizing royalties by approaching negotiations with third parties as pure commercial negotiations, from which the licensor is free to walk away after a respectable negotiating period if the prospective licensee will not pay the demanded licence fee. This approach is inappropriate where the prospective licensee also owns essential patents to which the licensor requires access. Even if there is a mismatch between the numbers and/or quality of the patents held by each party, each side in effect has the ability to block the other's access to market.

Another drawback may materialize if the putative licensor plans to sue the putative licensee for patent infringement. Such an outcome is likely if the licence in question is a renewal, so the licensee is already on

the market. Faced with a claim of patent infringement in relation to essential patents, the licensee is increasingly likely to fight back by claiming that the licensor's declaration of its willingness to licence essential patents deprives it of the right to claim an injunction, and limits its remedy to, at most, a right to damages, to be assessed on a FRAND basis. The risk of a court agreeing with this approach dampens the patentee's litigation firepower. Responding to such contractual and/or antitrust arguments is also liable to raise the costs and duration of such litigation considerably, which is why such cases usually result in pre-judgment settlement.

To reduce the risks of dispute about whether a given licence fee or royalty is FRAND, an essential patent holder can instead take an alternative approach. In this scenario, the licensor in effect concedes that the fairness requirement equates to some level of obligation on the patentee to conduct itself transparently (something which the application of EC competition law principles suggests may be appropriate). It requires the patentee to develop a licensing policy, which it is prepared to (or offers to) make available to prospective licensees. Such a policy would be likely to include some or all of the following points:

- An access fee (possibly payable in instalments) is intrinsically fairer than a royalty-based calculation, which arguably rewards the licensor for the licensee's own marketing and branding efforts, thus penalizing the licensee for competing on the very aspects of its product which allow it to stand out in the market.
- Equally, some regard should be had to the parties' relative exposure, ie the actual or likely volume of products sold by each incorporating the other's standardized technology.
- The starting point for the initial licence offer should take into account the number of other licences that the licensee will need in order to be able to access the market: in other words, it should factor in the need to ensure that cumulative fees do not make the end product commercially unviable.
- Licence fees for cross-licences should be quantified per licensor. Although one party will typically have a stronger portfolio than the other, leading to one paying only a balancing payment for the difference, the full royalties theoretically payable by each should be established and noted in the contract.
- Valuation should not be based solely on portfolio size. The intrinsic quality of the technologies involved (in this case, looking more at their centrality

to the standard rather than at the likely enforceability under the patent laws of any particular jurisdiction) is more important, being a fairer basis for payment.

- The stronger licensor should not seek asymmetric terms in its favour (eg one-way grant-backs); this should be taken to apply to all patents within the relevant portfolio, even if some patents/claims are not essential (eg it should not seek access to the licensee's non-essential patents if it is not prepared to grant access to its own such patents).
- Using a 'capture period' model is intrinsically fairer than limiting licences in time. The rules of many standards bodies (including ETSI) refer to the obligation to grant 'irrevocable' licences. While this may not, as a matter of contractual wording, prevent a time-limited licence from being granted, licence expiry and the corresponding need to renegotiate once the licensor is on the market is particularly liable to tempt the licensor to seek to capture more value than it is entitled to, and is particularly likely to lead to litigation (as the licensee is already on the market). The capture period model ensures that all patents granted as at a certain date, or within a certain date range, are licensed for life (contrast fixed term licences which grant access to all patents over a certain period, including patents newly granted in the term). Under the capture period model, a non-assert can be given over any patents which are newly granted within the term.

The policy is not failsafe. Cross-licences raise difficulties. Errors can be made in quantifying the relative value of each party's patent portfolio. Portfolio valuation is a dark art at the best of times, especially where the value of the transaction does not warrant the expense of engaging specialist valuation experts. Where the parties must weigh portfolios which may relate to different parts of the standard, where some technologies are core while others are peripheral, where there may be tens or hundreds of patents on each side, where the quality of the individual patents may vary both from the perspective of the value of the underlying technology and from that of the more technical questions of validity and essentiality, it is clear that no single value can be placed upon each portfolio. Rather, a fair and reasonable value of each individual licence is likely to lie within a range.

Some patentees may fear that these principles give away too much to potential licensees, who may also

hold essential patents and refuse to play by the same rules. However, the following benefits may arise:

- Licence agreements should be concluded much more rapidly, sparing valuable management time (transaction costs for negotiating cross-licences between major companies based in different parts of the world can be significant).
- The company's licensing policy can be made available to the licensee subject to a requirement for reciprocal treatment in cases where the prospective licensee also has standards essential technologies (standards bodies' rules often allow for this).
- The risks of facing an antitrust or breach of contract suit—with the attendant significant increase in legal costs and delay to the progress of the case—are reduced if patent enforcement becomes necessary.
- The risk of an actual adverse finding under either antitrust or competition law is significantly reduced.

Pending the further development of judicial precedent or the provision of further guidance by the standards bodies themselves, individual companies will take different approaches to complying with their FRAND obligations. Some may even find it in their interest to remain outside the standard-setting process to a greater extent than in the past, or may concentrate on developing 'commercially essential' technologies which are not subject to the rigour of the FRAND licensing regime.

## Continuing importance

Whatever the eventual outcome of the war of attrition between those who attempt to comply with FRAND obligations (and other standards body rules) and those who prefer to risk disregarding them, many skirmishes remain to be fought along the way.

One potential source of guidance in the next couple of years is the European Commission. Earlier this year the Commission announced that it has sent a statement of objections to US company Rambus<sup>25</sup> which relate to 'patent ambush' (ie a deliberately late declaration of a standard-essential patent). The remedies that the Commission proposes include an obligation on Rambus to licence its patents at a 'reasonable and non-discriminatory royalty rate, the precise amount of which should be determined having regard to all the circumstances of the case'. In previous cases involving IP rights, the Commission has used such obligations without giving any specific input as to the meaning of the obligation

25 See Commission press release MEMO/07/330 of 23 August 2007.

(rather in the manner of standards bodies themselves). However, in this case further guidance may be required. In the equivalent case brought in the USA by the Federal Trade Commission ('FTC'), the US regulator ordered that Rambus licence its patents at 'reasonable' royalty rates. The FTC has interpreted this to mean that Rambus should charge a maximum royalty rate of 0.5%, and that the technologies should be made available royalty-free after 3 years.<sup>26</sup> Rambus is appealing this decision, and it is likely that it will also contest vigorously any attempt by the European Commission to reduce the value that it can recover from its patents.

The Commission has also more recently<sup>27</sup> stated that it intends to pursue an investigation into the conduct of Qualcomm further to the complaint it received in 2005<sup>28</sup> about the terms on which Qualcomm licenses

its standard essential patents. It seems likely that this investigation will consider the standard against which Qualcomm's licensing practices should be assessed, which may involve a consideration of the meaning of FRAND and its relationship with Article 82.

In the meantime, more standards bodies may follow the lead of the IEEE and VITA in the US and reduce the damage that such in-fighting can do, by offering their own guidance on issues such as the meaning of FRAND. While this looks unlikely in the near future, the current level of litigation shows that standards continue to be of vital importance. This is one factor which is unlikely to change in the short term.

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<sup>26</sup> See reference at footnote 10. For further details of this case, please see Kostenko M and Treacy P. The FTC issues remedy order in the *Rambus* matter. *Journal of Intellectual Property Law & Practice*. 2007; 2: 430–432.

<sup>27</sup> See Commission press release MEMO/07/389 of 1 October 2007.

<sup>28</sup> See reference at footnote 9.