



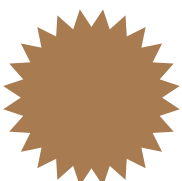
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Patent ambush: the commitment decision of the European Commission in the Rambus case

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Table of Contents

I. Introduction	2
II. <i>De Jure</i> Standardization and Its Relation to the EU Competition Law	4
III. Patent Ambush under the EU Competition Law	5
IV. Commitment Decision of the Commission in the Rambus Case	8
V. Analysis of the Commitment Decision.....	10
VI. Conclusion.....	16
Summary.....	18
List of Works Cited	19

I. Introduction

Technology standardization, if properly performed, results in benefits for today's knowledge-based economy by reducing the transaction costs of modularity, fostering the specialization and division of labour, promoting the competition of inventors and producers within standards¹. However, since patents protect inventions, a part of which are recognized as standards, standardization simultaneously is able to weaken competition and create entry barriers into the market for those companies that do not own standard-essential patents (SEPs). Such situation inevitably causes tension between intellectual property law and competition law that, in general, share the same objectives of promoting innovation and economic growth². One of the reasons of controversy between the specialists of the afore-specified fields of law is the process of standard-setting, which usually attracts high interest from both sides.

Generally, two ways of standard-setting are distinguished: a) *de jure* and b) *de facto* standardization. In the latter type, each company competes for the standard, and, thereby, for the market trying to convince all market participants to adopt a particular technology. In other words, *de facto* standards emerge if the technology of a specific company becomes predominant in the market.³ Once a specific technology has attracted a substantial number of customers, the benefits arising from the high number of persons already using this technology will be a decisive competition parameter for convincing all other customers to accept it. The other type of standard-setting, *de jure* standardization, is regarded as a procedure, which helps to elect the most superior technology as a standard and encourages the participation of all market players.⁴ However, the latter type of standardization may restrict consumers' choice or even lead to such situations as 'patent ambush', a situation, that occurs when a member of a standard-setting organisation (SSO) during the participation in the development and the setting of a standard withholds information about a patent

¹ Daniel F. Spulber, *Innovation Economics: The Interplay Among Technology, Standards, Competitive Conduct, and Economic Performance*, 9 J. COMPETITION L. & ECON. 777, 825 (2013).

² Steven D. Anderman, *The competition law/IP 'interface': an introductory note*, in THE INTERFACE BETWEEN INTELLECTUAL PROPERTY RIGHTS AND COMPETITION POLICY 1, 1 (Steven D. Anderman ed., 2009).

³ Sven Sattler, *Standardization under EU competition rules – the Commission's new horizontal guidelines*, 32 E.C.L.R., 343, 344 (2011).

⁴ Josef Drexler, *Intellectual Property in Competition: How to Promote Dynamic Competition as a Goal*, in MORE COMMON GROUND FOR INTERNATIONAL COMPETITION LAW? 210, 216 (J. Drexler, W. S. Grimes, C. A. Jones, R. J. Peritz, E. T. Swaine eds., 2011).

and/or a patent application, which is relevant to the standard, and subsequently after the standard is adopted, asserts, that the same patent is infringed by its competitors.⁵

The afore-specified cases not only restrain competition in a particular market, but also are able to have serious negative consequences on the technological development in a specific sector. The significance of patent ambush is demonstrated by the fact, that this issue has been highly debated on both sides of the Atlantic, where different approaches could be distinguished. One of the most famous cases, which occurred both in the European Union (EU) and in the United States of America (US), is the Rambus patent ambush case. Although EU and US authorities had to rule on the same set of facts, interestingly, different outcomes were produced in these jurisdictions. With regard to that, one could claim, that this case not only makes a good example of the different legal approaches on the same issue in these two jurisdictions, but also demonstrates that competition law is still in search for the right way of addressing the interface between intellectual property rights (IPRs) and competition law in standard-setting procedures.

This paper will focus on the Rambus case, which took place before the European Commission (Commission)⁶. The main objective of this work is to analyse the issues that have risen while assessing patent ambush under the Art. 102 of the Treaty on the Functioning of the European Union⁷ (TFEU) in the Rambus case. For the purposes of achieving the afore-specified objective, the main tasks of this paper are the following:

1. To analyse the concept of *de jure* standard-setting before the SSOs.
2. To discuss the notion of patent ambush in the process of standardization as an infringement of the EU competition law.
3. To discuss the outcome of the Rambus case before the Commission.

⁵ Knut Blind, Rudi Bekkers, Yann Dietrich, Eric Iverse, Florian Köhler, Benoît Müller, Tim Pohlmann, Stein Smeets, Jurgen Verweijen, STUDY ON THE INTERPLAY BETWEEN STANDARDS AND INTELLECTUAL PROPERTY RIGHTS 24 (2011), http://ec.europa.eu/enterprise/policies/european-standards/files/standards_policy/ipr-workshop/ipr_study_final_report_en.pdf.

⁶ Due to the length of this work, the legal proceedings regarding the patent ambush committed by Rambus, which took place in the US, will not be analysed here. However, if necessary, the author of this work is ready to discuss the outcome US Rambus case and make a comparison with EU Rambus case during the presentation in the class.

⁷ Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 (C 326).

4. To analyse legal difficulties, that arise while assessing patent ambush cases under the Art. 102 TFEU and to evaluate the Commission's arguments with regard to Rambus' conduct.

II. *De Jure* Standardization and Its Relation to the EU Competition Law

De jure standardization, which is regarded as highly dynamic and containing enormous complexity⁸, is performed with the help of SSOs. Nowadays there exists a variety of SSOs and nobody could argue that these organisations play a tremendous role in standard-setting, which has an impact on the competition, the development of particular industries and the entire economic system.⁹

The general goal of SSOs is to bring benefits to the society by creating widely adopted industry standards.¹⁰ The setting of a standard in SSOs helps to establish a single version of technology, thus, creating the interoperability of devices purchased from different producers, ease the product substitution, reduce consumer search costs and increase consumer confidence.¹¹ Additionally, standardization allows downstream producers to devote resources to research and development of more widely useable consumer goods.¹² When the standards are set correctly, the afore-specified objectives usually are met. However, the standardization procedures and SSOs themselves contain specific internal contradictions, which may lead to results that are less than ideal and make competition law authorities look at the process of standardization with a certain level of suspicion.

The *first* internal contradiction lying in SSOs is that standardization is both a competitive and a co-operative process. Standard-setting requires competitors to

⁸ Sattler, *supra* note 3, at 344.

⁹ Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CAL. L. REV. 1889, 1891 (2002).

¹⁰ Kraig A. Jakobsen, *Revisiting Standard-Setting Organizations' Patent Policies*, 3 NW. J. TECH. & INTELL. PROP. 43, 47 (2004), as cited in James De Vellis, *Patenting Industry Standards: Balancing the Rights of Patent Holders with the Need for Industry-Wide Standards*, 31 AIPLA Q.J. 301, 336 (2003).

¹¹ Robert Tallman, *U.S. AND E.U. ANTITRUST ENFORCEMENT EFFORTS IN THE RAMBUS MATTER: A PATENT LAW PERSPECTIVE*, 52 IDEA 31, 36 (2012).

¹² Joel M. Wallace, *Rambus v. F.T.C. in the Context of Standard-Setting Organizations, Antitrust, and the Patent Hold-Up Problem*, 24 BERKLEY TECH. L. J., 661, 663 (2009), as cited in Mark A. Lemley, *Ten Things to do About Patent Holdup of Standards (and One Not To)*, 48 B. C. L. REV. 149, 149 (2007).

collaborate and carries the risk of limiting competition: by setting detailed technical specifications for a product or service the scope for different and competing ways of technical development may be narrowed.¹³ This way the activities of SSOs' members may be regarded as agreements having as their object or effect the prevention, restriction or distortion of competition within the EU market and being prohibited under the Art. 101 (1) TFEU. However, the Art. 101 (3) TFEU states, that the former provision is inapplicable to agreements contributing to the improvement of production or distribution of goods or to the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit. Therefore, the Art. 101 TFEU does not preclude companies from participating in pro-competitive standard-setting processes.

Secondly, the goal of SSOs is to set and promulgate a standard, which would be applicable in a specific industry sector. Usually the technology selected by the SSOs is protected by IPRs. Thus, standardization procedure places the owner of a specific IPR in an exclusive market position, that can lead to a market dominance and, later, can be easily abused and result in the restraint of the competition. This way the process of standardization may also result in the infringement of the Art. 102 TFEU, which in the context of standard-setting is commonly referred to as 'patent ambush', and will be analysed in the subsequent part of this paper.

III. Patent Ambush under the EU Competition Law

As it has been stated before, standard-setting through the SSOs is regarded as having particular advantages, such as, *'offering a collective process of innovation, in which all the market participants are able to take part'*¹⁴. Such *de jure* standardization provides the interested market players with the opportunity to discuss technological problems that need to be solved, as well as the positive and negative aspects of every possible solution.¹⁵ However, at the same time such process may result in issues related to distortion of competition, in particular, patent ambush.

¹³ Sattler, *supra* note 3, at 344.

¹⁴ Drexler, *supra* note 4, at 216.

¹⁵ *Id.*

Generally, patent ambush is described as a situation when ‘a firm possessing IPR in the underlying technology threatens enforcement of its patent rights after the standard is in place to extract supracompetitive fees from firms producing goods that use or are compatible with the standard at issue.’¹⁶ In other words, patent ambush occurs when a company, which is a member of a SSO and is participating in the standardization process, hides the fact that it holds essential IPRs over specific aspects of the standard, which is being developed.¹⁷ In those situations, where the standard is covered by IPRs and no competing standards are available, the patent holder is able to acquire market dominant position and, after the standard is set, may assert its IPRs and demand excessive royalties in relation to its patent.¹⁸ According to the Commission, patent ambush represents a system failure of the whole standardization framework since it enables the undertaking to gain control over the standard and this way exclude competing technologies.¹⁹

It is claimed, that the patent ambush occurs in two scenarios. First scenario arises, when a company participating in a SSO agrees to RAND²⁰ licensing terms and later raises the licensing fees considering them as ‘reasonable’. Whereas the second occurs, when a firm does not disclose material patents until after the industry standard is set²¹, and then attempts to request high royalty payments from its competitors threatening them with an injunction or infringement damages. The latter type of patent ambush, which occurred in the Rambus case, is highly connected to the IPRs’ disclosure rules in the SSOs. In perfect circumstances, SSOs would mandate that all participants thoroughly investigate their patent portfolios and disclose all the patents as well as pending applications that cover the standard technologies.²² However, the enforceability of such obligations in reality is hardly possible. Therefore, some members of the SSOs may engage in a deceptive conduct

¹⁶ Wallace, *supra* note 12, at 663.

¹⁷ ALISON JONES & BRENDA SUFRIN, *EU COMPETITION LAW: TEXT, CASES, AND MATERIALS* 758 (2011).

¹⁸ Eliza G. Petrtsi, *The case of Unilateral Patent Ambush under EC Competition Rules*, 28/1 WORLD COMPETITION 25, 26 (2005).

¹⁹ JONES & SUFRIN, *supra* note 16, at 758, as cited in FAQ Press Release on the Rambus Commitment Decision, MEMO IP/09/554.

²⁰ ‘RAND’ means reasonable and non-discriminatory. In Europe this concept is regarded as ‘FRAND’ – fair, reasonable and non-discriminatory.

²¹ Justin (Gus) Hurwitz, *The Value of Patents in Industry Standards: Avoiding License Arbitrage with Voluntary Rules*, 36 AIPLA Q. J. 1, 3-4 (2008).

²² Joseph Farrel, John Hayes, Carl Shapiro & Theresa Sullivan, *Standard Setting, Patents, and Hold-Up: A Troublesome Mix*, 74 ANTITRUST L. J. 603, 603 (2007).

by non-disclosing SEPs that they own, which, later, may lead to a patent ambush and infringe the Art. 102 TFEU.

SSOs usually are not homogenous in terms of their membership and these organizations may consist of different types of members, whose interests are not necessarily the same. Generally, three different groups of SSOs' members can be distinguished: '*(i) vertically integrated firms that engage both in R&D for the development of standardised technology and the implementation of the said technology in tradable products; (ii) firms that engage only in manufacturing and selling in the downstream product market and are therefore only purchasers of technology; and (iii) firms that engage exclusively in the development of technology and then sell that technology to manufacturers by licensing their patents.*'²³ The latter group of the companies, the so-called pure technology developers, '*are characterised by a very specific incentive structure that may lead to a patent ambush*'²⁴. This type of firms usually are not keen on keeping the prices for licenses low and might be prone to act against *bona fide* requirements by acquiring patents on the future standards without informing other SSO's members and, later, charge excessive royalty fees for the use of a specific standard²⁵, i.e. engaging in a patent ambush.

Generally, patent ambush consists of two steps. First, a firm, which is participating in standardization process, works out the features of the standard, but does not disclose any patents or pending patent applications, which might be relevant for the upcoming standard. In other words, the company deliberately decides not to disclose its IPRs and this way not to reduce the possibility for its technology to become a standard. Once the standard is adopted, the company performs the second step: sues everybody who uses the afore-specified standard, unless the defendants agree to pay excessive royalty rates.²⁶

²³ Drexl, *supra* note 4, at 217.

²⁴ *Id.*

²⁵ Drexl, *supra* note 4, at 217-218.

²⁶ Andreas Fuchs, *Patent Ambush Strategies and Art. 102 TFEU*, MORE COMMON GROUND FOR INTERNATIONAL COMPETITION LAW? 177, 179 (J. Drexl, W. S. Grimes, C. A. Jones, R. J. Peritz, E. T. Swaine eds., 2011).

The competitors, who are using the standard, to which an entire industry has become economically committed, i.e. locked in²⁷, by the time when they get sued, have already made substantial investments in implementing this standard technology, and most likely will agree to pay excessive royalties to use it further. Such situation distorts competition and, according to the Art. 102 TFEU, may constitute an abuse of dominant position in the market, a situation, which occurred in Rambus case and was investigated by the Commission.

IV. Commitment Decision of the Commission in the Rambus Case

The patent ambush committed by Rambus, which was investigated by the competent US and EU institutions, could be regarded as a ground-breaking event that encouraged a deeper analysis of the interrelation between competition law, standardization, and IPRs. Before the afore-mentioned cases, these issues were better known only to a narrower group of legal specialists, whereas today it is one of the central topics of competition law and its policy, included into the agenda of many public authorities and organisations.²⁸

In the case at hand, which was investigated by the Commission between 2005 and 2009, Rambus, a technology company, based in the US, participated in a standard-setting process conducted by the Joint Electron Device Engineering Council (JEDEC) for computer chips and did not disclose relevant IPRs. At the time when JEDEC was adopting the standard for the Dynamic Random Access Memory (DRAM), Rambus was a member of this SSO. However, after this standard was adopted, the company left JEDEC. When DRAM standard became generally accepted by the industry in 1999, Rambus began enforcing its patents against companies using DRAM technology and claimed high royalty rates. This raised the question on whether such actions of Rambus are legitimate.

After conducting the investigation of the afore-specified circumstances, on 30 July 2007 the Commission sent Rambus a Statement of Objections indicating that the latter allegedly abused its dominant position, i.e. infringed the Art. 102 TFEU, by failing to disclose relevant IPRs during the standardization process and later claiming

²⁷ Tallman, *supra* note 11, at 36.

²⁸ Sattler, *supra* note 3, at 343.

unreasonable licensing royalties.²⁹ According to the preliminary view of the Commission, if Rambus had not disguised its relevant patents, JEDEC could have possibly used another technology and Rambus would have not been able to negotiate similar high licence fees.³⁰ In response to the afore-specified Statement of Objections, Rambus proposed commitments addressing the competition law issues raised by the Commission.³¹

After analysing the proposed commitments and investigating the circumstances, in its decision as of 9 December 2009 (Decision) the Commission considered that Rambus while being a member of JEDEC between 1991 and 1996 was well informed about the events taking place in the afore-specified SSO and the expectations of its other members.³² Thus, the Commission stated: *‘Rambus may have engaged in intentional deceptive conduct in the context of standard-setting process by not disclosing the existence of the patents and patent applications which it later claimed were relevant to the standard.’*³³ The Commission took the preliminary view that Rambus has been abusing its dominant position by claiming royalties for the use of its patents from JEDEC-compliant DRAM manufacturers at a level which, absent its allegedly intentional deceptive conduct, it would have not been able to charge. In addition, in the Decision it was also provisionally stated, that with regard to Rambus’ intentional breach of the JEDEC’s IPR policy and the duty of good faith, claiming the afore-specified royalties was incompatible with the Art. 102 TFEU.³⁴

Although the Commission preliminary found Rambus’ behaviour to be abusive, the case did not end with the Commission fining Rambus. Eventually the Commission adopted a so-called ‘Art. 9 settlement’ Decision whereby it held legally binding the commitments offered by Rambus, that, in particular, limited the licensing fees that Rambus could charge for certain patents that are essential to JEDEC’s standard.³⁵ After consultation with interested parties on the Rambus’ commitments, the

²⁹ Press Release, European Commission, Commission confirms sending a Statement of Objections to Rambus, MEMO/07/330 (Aug. 23, 2007).

³⁰ See *supra* note 29.

³¹ Proposed Commitment of Rambus Inc., Case C-3/38.636 (8 June 2009), http://ec.europa.eu/competition/antitrust/cases/dec_docs/38636/38636_1003_5.pdf.

³² Commission Decision, Case COMP/38.636 – Rambus of 9 December 2009, para. 41, http://ec.europa.eu/competition/antitrust/cases/dec_docs/38636/38636_1203_1.pdf.

³³ See *supra* note 32, para. 72.

³⁴ See *supra* note 32, para. 28.

³⁵ Sattler, *supra* note 3, at 347.

Commission concluded that the commitments in their final form were adequate to meet the competition concerns expressed in the Statement of Objections and, in the Decision declared the commitments legally binding on Rambus for a period of five years.³⁶

Due to the fact, that the case ended up with the afore-described settlement, the Commission was unable to develop a set of principles on the compatibility of certain licensing practices with EU competition law.³⁷ Furthermore, the afore-described ending of the case and, especially, the Commission's reliance on the fact that Rambus engaged in deceptive conduct during standard-setting while adjudicating on exploitative conduct, raised questions regarding the application of the Art. 102 TFEU and revealed issues relating to the evaluation of a patent ambush as an infringement of the EU competition law. These issues will be discussed in the subsequent part of this paper.

V. Analysis of the Commitment Decision

One of the peculiarities with the EU Rambus case is that it never has been solved, at least in terms of traditional legal understanding. This case ended neither with a formal finding of an infringement, nor with a clear dismissal of the charges against Rambus. In the view of this and the complexity of the necessary assessments, as in the Qualcomm matter, the Commission was probably not prepared to invest further resources to this case³⁸, thus, a commitment decision was adopted.

This type of decisions are quite often used by the Commission and are regarded as enhancing administrative efficiency and effectiveness in dealing with competition law issues.³⁹ On the other hand, it is claimed, that the increased use of commitment decisions results in a lack of precedent in an area of the law where companies must

³⁶ Fuchs, *supra* note 26, at 186, as cited in Summary of Commission Decision of 9 December 2009, Case COMP/38.636 – Rambus [2010] OJ C 30/717.

³⁷ Damien Geradin, *THE EUROPEAN COMMISSION POLICY TOWARDS THE LICENSING OF STANDARD-ESSENTIAL PATENTS: WHERE DO WE STAND?* 9 J. COMPETITION L. & ECON. 1125, 1131 (2013).

³⁸ Fuchs, *supra* note 26, at 186.

³⁹ Romano Subiotto, David R. Little, *The Application of Art. 102 TFEU by the European Commission and the European Courts*, J. 4 (3) EUR. COMP. L. & PRAC. 169, 169 (2013).

make difficult decisions and balance *ex ante* assessments of their conduct.⁴⁰ Thus, such decisions do not help the industry actors to understand whether they are playing on a safe ground or not.

One of the reasons why the commitment decision was used in this case, could be the difficult application of the Art. 102 TFEU to patent ambush situations. It could be claimed, that in the light of the current EU competition law it is not easy to qualify patent ambush as an abuse of a dominant position. From the first sight, this article does not seem directly suitable for tackling the manipulations that arise during the standardization process, at least while an IPR owner deliberately not disclosing its IPRs is not in a dominant position.⁴¹

Generally, the main idea underlying in the Art. 102 TFEU is that those companies, which are dominant in a specific market, should have a special responsibility and should adhere to specific standards of conduct while acting in that market. In other words, certain actions in the marketplace that could be legal if adopted by a company without significant market power may nevertheless be prohibited when they are committed by a dominant company.⁴² However, drawing a line between legitimate competitive acts and the undue impairing of undistorted competition is a difficult task and usually depends on the specific circumstances of each case.⁴³ Therefore, the application of the Art. 102 TFEU could not be regarded as clear and unambiguous. Even after many years of application of the afore-specified legal provision, a discussion over the objectives of the Art. 102 TFEU still takes place⁴⁴ and considerable uncertainty remains about the exact boundaries of this provision⁴⁵.

With regard to Rambus case, it could be claimed, that it is even less clear when patent ambush occurs, since it is a special situation in comparison to ordinary

⁴⁰ *Id.* at 170.

⁴¹ Fuchs, *supra* note 26, at 181.

⁴² Fuchs, *supra* note 26, at 189.

⁴³ Fuchs, *supra* note 26, at 189-190.

⁴⁴ Neelie Kroes, Tackling Exclusionary Practices to Avoid Exploitation of Market Power: Some Preliminary Thoughts on the Policy Review of Art. 82 (Sept. 14-15, 2005), in 29 FORDHAM INT'L L.J., 2005, at 593-600, as cited in Competition Law of the European Community § 3.02 (Valentine Korah ed., 2005) (noting that the precise role of Article 82, and its relationship with other objectives of the European Union and the policy underlying it, have not yet been settled definitely).

⁴⁵ Pablo Ibáñez Colomo, *The Law on Abuses of Dominance and the System of Judicial Remedies*, 13 LSE WORKING PAPERS 1, 1 (2013), http://www.lse.ac.uk/collections/law/wps/WPS2013-13_Ibanez.pdf.

abuse.⁴⁶ Generally, the prerequisites of applying the Art. 102 TFEU are the following: a) dominant position and b) abusive conduct⁴⁷. Both of these conditions in patent ambush cases require special attention and analysis.

a) Dominant position

According to the Court of Justice of the European Union (CJEU), a dominant position is a position of economic strength that enables a firm to hinder the maintenance of the effective competition in the relevant market by allowing it to behave, to an appreciable extent, independently of its competitors and ultimately of consumers.⁴⁸ The market power is established taking into consideration the following factors: a) definition of the relevant market, on which, as it is stated, is not easy to agree in standardization cases⁴⁹; b) showing that the defendant possesses a dominant share of that market; and c) demonstrating that there are significant barriers to entry, so that the threat of entry or greater competitive output does not constrain the seller's price.⁵⁰

With regard to the specified above, besides the issues arising due to other requirements, the most important one was that Rambus did not have a dominant position while non-disclosing the patents during the standardization proceedings. The company had market dominance only when it was claiming excessive royalties. Therefore, due to the exact moment when Rambus was in the dominant position, the alleged anticompetitive conduct was held to be the request of excessive royalty rates and not the deceptive conduct by not disclosing patents, although the latter was quite extensively discussed in the Decision.⁵¹

⁴⁶ Fuchs, *supra* note 26, at 179.

⁴⁷ These general remarks on the prerequisites for the application of Art. 102 TFEU were made on the basis of the following sources: CLAUDIA TAPIA, INDUSTRIAL PROPERTY RIGHTS, TECHNICAL STANDARDS AND LICENSING PRACTICES (FRAND) IN THE TELECOMMUNICATIONS INDUSTRY (2010); RICHARD WHISH & DAVID BAILEY, COMPETITION LAW (2012).

⁴⁸ See Case 85/76, Hoffmann-La Roche v Commission, 1979 E.C.R. 461, 3 C.M.L.R. 211, para. 4.

⁴⁹ Fuchs, *supra* note 26, at 187-188.

⁵⁰ E.g.: CLAUDIA TAPIA, INDUSTRIAL PROPERTY RIGHTS, TECHNICAL STANDARDS AND LICENSING PRACTICES (FRAND) IN THE TELECOMMUNICATIONS INDUSTRY 129 (2010), as cited in *Image Technical Servs. v Kodak* (9th Cir. 1997), 1202; *United States v. Microsoft Corp.* (D.C. Cir. 2001), 52 in: Biester/Dumas/Ensign 2007, 39; ABA SECTION OF ANTITRUST LAW, INTELLECTUAL PROPERTY AND ANTITRUST HANDBOOK 39 (2007), as cited in *Eastman Kodak*, 504 U.S. at 464; *Microsoft*, 253 F.3d at 52.

⁵¹ See *supra* note 33, para. 27-46.

Before shifting from the first requirement to the second one, it must be established, that the dominant position of the firm is held in the ‘*whole or substantial part of the common market*’⁵² and, if not, then the Art. 102 TFEU does not apply. In this case, it was clear, that at the time of requesting excessive royalties Rambus had a dominant position in the substantial part of the common market.

b) Abusive conduct

Being dominant, under the EU competition law, is not regarded as illegal *per se*. In order to fall under the Art. 102 TFEU, a certain abusive behaviour is required, e.g.: a) application of discriminatory licensing terms, and/or b) demanding excessive royalties, and/or c) refusal to license in order to monopolize downstream market.⁵³ In this case the Commission alleged that Rambus was involved in exploitative practices, i.e. was requesting excessively high royalty rates.⁵⁴ According to the CJEU case law, a price is considered to be excessive, when it is not related to the economic value of the product supplied.⁵⁵

Considering the fact, that price control is in itself a problem, because it is not clear how to determine the threshold of the price abuses, especially, in the context of IPRs⁵⁶, it could be claimed that in this case the Commission have chosen the more difficult way. However, due to the requirement of dominant position for the application of the Art. 102 TFEU, this was the only option trying to hold Rambus liable. Indeed, at the time of non-disclosing patents, Rambus did not have a market dominant position, thus, Rambus’ deceptive conduct during the standardization did not qualify as an abuse. For this reason, the Commission had to focus on the excessive royalty rates as an abuse of dominant position.⁵⁷ Nevertheless, the Commission mentioned that the deceptive conduct of Rambus during the standard-

⁵² RICHARD WHISH & DAVID BAILEY, COMPETITION LAW 191 (2012).

⁵³ Piotr Staniszewski, *The interplay between IP rights and competition law in the context of standardization*, 2 J. INTELL. PROP. L. PRAC. 666, 675 (2007).

⁵⁴ See *supra* note 32, para. 28.

⁵⁵ Case 27/76, *United Brands v. Commission*, 1978 E.C.R. 207, 1 C.M.L.R. 429, para. 250. The author of this work is aware, that the price control by the competition authorities is a complex issue, however, due to the length of this work, this problem will not be further elaborated.

⁵⁶ Fuchs, *supra* note 26, at 182.

⁵⁷ Thomas De Meese, *European Commission Accepts Commitments from Rambus in ‘Patent Ambush’ Case*, 1 (3) J. COMPETITION L. & PRAC. 215, 216 (2010).

setting, is the reason for such intervention to regulate royalty rates⁵⁸. Such arguments raise doubts on the appropriateness of the Art. 102 TFEU to address patent ambush cases.

Another important question that arises after the Rambus case, is whether EU law is in need of legislative reform, in order to be able to deal with cases involving competition in innovation⁵⁹, such as, patent ambush. The current competition law analysis relies on the effects of specific conduct only in the existing market, whereas in patent ambush cases the deceptive conduct occurs before the relevant market emerge and, when speaking about the application of the Art. 102 TFEU, prior the date when the undertaking will acquire market dominance.⁶⁰ This creates a major issue for recognising the non-disclosure of relevant IRPs during the standardization procedure as an exclusionary abuse under the Art. 102 TFEU. However, this problem requires separate debate and, meanwhile, as one is able to see from the Rambus case, the Commission was able to ‘circumvent’ this deficiency.

Due to the afore-specified situation, there are attempts to look for solutions beyond competition law.⁶¹ It is claimed, that patent ambush could be combated through breach of contract, breach of internal rules, fraud claims or unfair competition law⁶². However, many of the suggested alternatives do not seem to be suitable due to the fact that these fields of law are not harmonized on the EU level.⁶³

Since other legal remedies currently do not seem to be appropriate, one should reconsider the Art. 102 TFEU as a reasonable approach to prevent patent ambush strategies, diminish the incentives to engage in deceptive conduct in connection with standardization procedures and make the standard-setting more reliable. The fact that the Commission regarded Rambus’ conduct as an exploitative abuse, i.e. excessive pricing, by referring to the deceptive conduct, should be held as being in conformity

⁵⁸ See *supra* note 32, para. 28-29.

⁵⁹ Josef Drexler, *Anti-Competitive Stumbling Stones on the Way to a Cleaner World: Protecting Competition in Innovation without a Market*, 8 (3) J. COMPETITION L. ECON. 507, 542 (2012).

⁶⁰ Drexler, *supra* note 59, at 529.

⁶¹ For example, see Fuchs, *supra* note 26; Petritsi, *supra* note 18, at 26.

⁶² Petritsi, *supra* note 18, at 26.

⁶³ For further discussion on this aspect, please see: Drexler, *supra* note 60, at 510; Drexler, *supra* note 4, at 223; Fuchs, *supra* note 26, at 181; Petritsi, *supra* note 18, at 41.

with the importance of standard-setting procedure for maintaining undistorted competition and the basic principles of IPRs.

The reference to the deceptive conduct of Rambus during the standardization procedure in the case at hand is essential for two reasons. First, under the EU law, it is not accepted that royalty rates for patent licenses should be controlled by competition law.⁶⁴ This approach is in conformity with the basic principles of the patent law, which states, that inventor's right to claim any price should be an incentive for further research. Therefore, if competition law would be able to control the royalty rates, it might diminish innovation and development. In the light of the Rambus case, it is clear that controlling the license fees charged by the SEP owner would constitute depriving the latter person from its legitimate reward. Such approach would eventually suspend innovation, because, as it is stated, *'it is the ability to charge such prices that triggers the investment in new products as part of dynamic competition in first place'*⁶⁵. Thus, the interference with the IPR owner's right to establish prices, must be strongly substantiated by the objective of protecting competition. Indeed, a patent ambush situation where the owner has not been acting according to *bona fide* standards, in order to achieve a market dominant position, is the situation that could justify the control of patent licensing fees.⁶⁶

Secondly, at the same time, the task of competition law is to guarantee undistorted competition, which in the context of SEPs could be negatively affected by unfair actions during *de jure* standardization. Patent confers monopoly power on its owner with regard to specific technology, whereas, standardization, is able to turn this monopoly over a specific technology into a monopoly (dominant position) over the whole market, which could lead to restraints of undistorted competition. However, the main objective of the SSOs is not to create a market dominance for one company. Standard-setting, that may lead to dominance of one firm, is only a *mean* to promote competitiveness and innovation, which should be the real incentives of participation in the SSOs and cannot be achieved if any members are involved in deceptive conduct. With regard to great importance of standardization to competition and market players, the standard-setting procedures should be as transparent as possible

⁶⁴ Drexler, *supra* note 60, at 533.

⁶⁵ Drexler, *supra* note 4, at 220.

⁶⁶ Drexler, *supra* note 59, at 553.

and the conduct of its participants must be observed strictly. Thus, any deceptive form of conduct, which destroys trust among the SSO members⁶⁷, should be intolerable. Indeed, the pro-competitive and pro-innovative effects of the standard-setting, as well as the confidence in standardization proceedings, were indicated as the main justifications⁶⁸ for the intervention of the Commission in the Rambus case.

With regard to the afore-specified arguments, it should be concluded, that taking into account the nature of IPRs, particularly, patents, and the impact of standardization proceedings for obtaining market dominance, when deciding upon excessive pricing under the Art. 102 TFEU, the Commission correctly relied on deceptive conduct of Rambus as part of the patent ambush strategy. In the light of the current legal framework, including the Art. 102 TFEU, which could be used to address patent ambush on the EU level, such Commission's approach should be regarded as suitable for keeping the correct balance between the IPRs and the goals of the competition law, as well as maintaining confidence in the standard-setting procedures and preventing SEP-related abuses of the market dominance.

VI. Conclusion

1. The Rambus case could be regarded as a landmark case in the EU, drawing the guidelines of how to address new competition-related concerns, such as, patent ambush, which arises in the interface between IPRs and competition law, under the current provisions of the EU competition law. This case also raises the question whether the existing rules of the EU competition law are able to respond to such cases, that involve competition in innovation.
2. In the Rambus case the Commission has faced a difficult task to decide under which circumstances in patent ambush cases with regard to the current legal framework, the EU competition law is able to step into the field of exclusive rights of a patent owner and control the excessive royalty rates.

⁶⁷ *Id.* at 534.

⁶⁸ *See supra* note 32, para. 29 and 31.

3. Taking into consideration the existing EU competition law, the Commission demonstrated that while adjudicating in patent ambush cases, the deceptive conduct should be viewed as an important precondition for applying the Art. 102 TFEU. Such approach allows to keep the balance between the interests of IPRs owners and the goals of the competition law, as well as maintain the trust in the process of standard-setting.

Summary

Standard-setting is an essential tool for promoting technological development, innovation and competition, resulting in significant benefits to economic systems. Therefore, this procedure requires special attention and every attempt to impair standardization should be addressed immediately. Patent ambush, which is illustrated by the Rambus case, is one of the actions that could negatively affect this procedure and lead to serious distortion of competition. Despite the afore-specified adverse effects, as it is demonstrated by the European Commission's decision as of 9 December 2009 in the afore-mentioned Rambus case, the application of the provisions of the current EU competition law is quite problematic and unclear. Taking into consideration the afore-specified difficulties, this work aims at analysing the issues that have risen while assessing patent ambush as an abuse of a dominant position under the Art. 102 of the Treaty on the Functioning of the European Union and to evaluate the arguments of the European Commission regarding the application of the latter provision.

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