

Chapter 12

Competition Law and Standard Essential Patent (SEP) in India: A Few Critical Issues to Ponder



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1 Introduction

Several cases pertaining to standard essential patents (SEPs) and fair, reasonable, and non-discriminatory (FRAND) commitments have been filed before the Competition Commission of India (CCI). These cases pertain to well established technology companies that granted SEPs for their innovations in the telecommunications sector. As is to be expected, the allegations are mainly from smart phones manufacturers or assemblers. The parties have alleged in their representation to the Commission that SEP owners in the telecommunication sector have violated FRAND commitments of 'fair, reasonable and transparent' in the terms offered to licensees. Royalties in their opinion are high and discriminatory indicative of abuse by dominance in the technology of GSM, 2G, 3G and other expanding segments of the sector. Injunctions have also been sought from the High Court of Delhi as regards to royalty base and methodology including royalty stacking of SEPs suggesting hold-up by patent owners.

In India, these are the first cases pertaining to SEPs. Most competition jurisdictions which now include China and South Korea do not consider violations pertaining to SEP are in the domain of antitrust authorities. Accepting the argument that Intellectual Property Rights (IPRs) can create dominance they have opined that extending the liability referenced to standard antitrust arguments is inappropriate and self-defeating impacting technological development and consumer benefits. Concerns have however, been voiced on whether by including several Intellectual Properties (IPs) into a single portfolio there is possibility of monopolization and of unilateral action more so with the emergence of Patent Assertion Entities (PAEs) or of trolls. The literature on FRAND and SEPs however, all point to settlement of issues in court of law rather than as an antitrust issue. It raises the fundamental

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question as to why CCI directed investigation by the Director General (DG) in what is widely accepted as the domain of the courts and not an antitrust issue.

The decision of the Delhi High Court permitting the Commission to resume its investigation on the allegation of dominance and its abuse adds further substance to the question raised. In this chapter an attempt is made to examine the concerns of the Commission for initiating investigation and whether the unease of the Commission can be justified. It is significant that all cases pertaining to SEPs have been considered in the framework of Section 4 (Abuse of Dominance) in terms of their anticompetitive effects and not with reference to Section 3(4) which deals with agreements and Section 3(5) which deals with agreements protected under IPRs. This penchant for Section 4 raises several questions as the entry point for antitrust investigation. Does the textured rigidity and static arguments of the Section make it easier for the Commission in its assessment of anticompetitive effects? Or persuaded perhaps ironically, by the perception of informants of Commissions proclivity for the Section. The presumption is that SEP owners are dominant and therefore immune to competitive constraints. The author is of the opinion that the presumption and choice of the appropriate section while interlinked, suggests a 'per se' approach to competition law and SEP in India.

The author ventures further to fathom that the decision of the Delhi High Court suggests that it was an attempt on the part of judiciary to endorse a reasoned economic analysis of IP, SEP and FRAND in dynamic markets of innovation by an expert body. The Commission is yet to develop a reasoned approach and jurisprudence towards IPR. In absence of guidelines dealing with IP and with a track record of conservative judgements, it is imperative that instead of extending liability under uncertain circumstances an objective discussion may be initiated based on logic and reasoning.

This chapter examines the two basic but interlinked questions: Are SEPs *prima facie* dominant and whether dominance leads to a per se inference of abuse? The chapter is divided into two parts to address the two questions separately.

2 Dominance and Standard Essential Patents

The number of cases filed before the Commission on patents in the telecommunications sector and SEPs are about half dozen pertaining to abuse of dominance.¹ Allegations in all the cases pertained to abuses of dominance under Section 4 of the

¹*M/s ESYS Information Technologies Private Limited v Intel Corporation* (2011) Competition Commission of India, Case 48/2011; *Micromax Informatics Limited v Telefonaktiebolaget LM Ericsson (Publ)* (2013) Competition Commission of India, Case 50/2013; *Intex Technologies (India) Limited v Telefonaktiebolaget LM Ericsson (Publ)* (2013) Competition Commission of India, Case 76/2013; *M/s Three D Integrated Solutions Ltd. v M/s VeriFone India Sales Pvt. Ltd.* (2013) Competition Commission of India, Case 13/2013; *M/s Atos Worldline India Pvt. Ltd. v M/s Verifone India Sales Pvt. Ltd.* (2012) Competition Commission of India, Case 56/2012; *M/s*

Act on the premise that SEP owners are dominant in the relevant market. The prima facie Order in the case *Micromax Informatics Limited v Telefonaktiebolaget LM Ericsson (Publ)* identifies dominance as central to the allegation to be addressed: ‘From the perusal of the information and the documents filed by the Informant prima facie it is apparent that Ericsson is dominant in the relevant market of GSM and CDMA....’

Further, an explanatory phrase in the next paragraph: ‘The allegations made in the information and not refuted by OP concerning royalty rates sums up the initial responses of the Commission.’

Prima facie Orders are important although not in the same league as the Order after the investigation. A pre-investigation Order has less weightage. It indicates the mind of the Commission based on information available in public domain and what is filed by the parties. The investigations generally follow the line of thinking of the prima facie Order. It strengthens the initial presumption rather than pose counterfactuals or alternate lines of reasoning. There have been dissenting prima facie Orders too, but Members largely prefer to evaluate their decision on receiving the investigation Report of the DG. The Commission also has a policy: (i) to call for more information from the informant and the deponent and (ii) to provide for initial hearing of the arguments. The information filed can therefore be refuted at the early stages to which due weight is given by the Commission. In the SEP cases, decisions made based on similar information tend to carry weight in subsequent prima facie Order.²

It needs however, to be emphasized that a prima facie Order does not necessarily suggest thinking of the Commission but merely voices concerns on the possibility of dominance and the scope for abuse. For instance, in *Micromax Informatics Limited v Telefonaktiebolaget LM Ericsson (Publ)* (*Ericsson*) the market so defined (GSM and CDMA) suggested dominance of the enterprise indicative of indulgence in anticompetitive activities that call for further investigation. At the outset let us examine as to whether SEPs are necessarily dominant in the relevant market as alleged in an assertion that devolves on a ‘per se’ understanding based on a static traditional approach of economics of competition law that patents provide a monopoly right. This approach raises several uncomfortable questions in the telecommunications sector, the sector itself is no longer confined to the lines and wires networks and related equipment has expanded to include internet services, digital transmission of voice and data, cloud computing, internet of things and requisite technology accessed by consumers.

Firstly, a monopoly right and the scope afforded for earning monopoly profit while an incentive for existing patent owners is also the incentive for aspiring innovators. It is also debatable whether monopoly profits are sufficiently conducive

Best IT World (India) Private Limited (iBall) v M/s Telefonaktiebolaget L M Ericsson (Publ) (2015) Competition Commission of India, Case 04/2015.

²ibid.

for further innovation and degenerate to the general advantage of patent as an entry barrier. The counter to this argument is that patents are awarded only to new innovations that are original and patentees have to prove that it is not mere imitation or improvisation at the most. The scope for innovation and the time cycle of innovation differs among industries. Studies and evidence have shown that in the telecommunications sector the speed of innovation has been remarkably fast.

Secondly, the telecommunications sector and its convergence with the internet and artificial intelligence has seen two developments: (i) a wide range of alternatives to the GSM/CDMA technologies and (ii) combining of different innovations enabling different functions in a mobile and of course, the emergence of apps.

Technological developments redefine markets spaces and dominance which have not been taken into account in the prima facie Orders. Orders uniformly state that as SEP owners in the telecommunications sector, the firm is but dominant. The same arguments have been applied in other cases also, for instance, *Intel* in the microprocessor segment.

The Order notes that in the market for GSM and CDMA technology in India, Ericsson³ is dominant. Globally the market share of Ericsson was estimated at 35%. In India as the Order points out the company holds 30,000 patents of which 400 patents have been granted in India.⁴ The Order opines that since the firm holds an SEP, it is an indication that there is no alternate technology in the market. This is indicative of market power and dominance. The same argument continues in later Orders.⁵ In the case of Intel and microprocessors (chips) the Commission found the firm in a dominant position in three of the four defined markets.⁶

Market data shows that towards the end of 1990s, 85% of the GSM market consisted of five players—Ericsson, Nokia, Siemens, Motorola and Alcatel.⁷ Major SEP owners with licensing programs includes Lucent, Ericsson, Nokia, Interdigital and Qualcomm.

The data on market share clearly points to two facts. Firstly, the telecommunications sector is highly innovative with ever expanding horizons of the internet from 2G to LTE to Cloud computing. As a lucrative market, entry of new firms with competing and often disruptive technology is the hall mark of technology based markets. Dominance at best is a temporary phenomena subject to the threatening presence of competitive constraints. As is argued later the presence of competitive constraints restricts the ability of a SEP owner to charge exorbitant royalty fees. The

³ibid.

⁴*Micromax* (n 1).

⁵*Intex* (n 1).

⁶*M/s ESYS* (n 1).

⁷Claudia Tapia, Director IPR Policy, 'DT: A New Technological and Economic Paradigm' (Speech at the Going digital: the future of industry and jobs Workshop, Paris, 24 April 2017) <<http://www.isigrowth.eu/wp-content/uploads/2017/03/Tapia.pdf>>.

importance of looking at competitive constraints rather than dominance points to moving towards effects based analysis using rigorous economic analysis by the Commission. The argument that SEPs are dominant is powerful but not necessarily borne out by evidence.

Secondly, the need to appreciate the significance of SEP in promoting competition. Standardisation is a mechanism created by standard setting organisations (SSOs) and as the name indicates it enables the creation of a portfolio of patents that maintains standards and ensures compatibility. Several patents grouped together provide for the numerous activities that are looked for in smartphones with each generation providing for more functions. Standardization is the process where all patents are grouped together. Negotiations are simplified for a firm seeking a license. Multiple licenses are no longer required. A single license combines all patents in a set.

Thirdly, the argument that SEPs create entry barriers is not sustainable. The data shows that in the telecommunications sector, requirements of interoperability and of incorporating new features in the smartphone, the mechanism of standardization is appropriate. Standardization is a process whereby a group of patentees that combine as a package seek approval from SSOs. There are several SSOs who issue SEPs incorporating different technologies. A safe selection process of a SEP is to choose from a credible SSO such as the European Telecommunications Standard Institute (ETSI). As so much doubt has been raised on SEPs and standard setting process perhaps the Commission could consider hosting an open forum for discussion on SSOs and the process of selection before taking the final decision.⁸

Fourthly, the hallmark of a SEP approved portfolio of patents is that FRAND condition is voluntary and ensures that for a licensee the technology is available to all firms who agree to pay. SEP and FRAND have resulted in the proliferation of smartphones both in terms of companies manufacturing them and in the new features that are advertised as each new model is introduced in the market. The booming market for smartphones which even a partial list shows more than two dozen manufacturers⁹ is testimony to the fact that SEPs have facilitated the growth of smart phones and telecommunication systems.

⁸DoT has attempted such an open forum discussion.

⁹ibid; Apple, Samsung, Huawei, BlackBerry, Google, Xiaomi, Blu, Foxconn (FIH Global), LG, Pantech, Acer, ZTE, Bq, GeeksPhone, Gradiente, Positivo, DataWind, Amoi, BBK, Coolpad, Cubot, Gfive, Gionee, Haier, Hisense, Konka, Letv, Meizu, Qihoo 360, Wasam, Technology Happy Life, Ningbo Bird, Smartisan, Zopo Mobile, Lenovo, Jablotron, Verzo, Jolla, Archos, Wiko, Videocon, Groupe Bull, MobiWire, AEG, Grundig Mobile, Telefunken, Tiptel, Celkon, IBall, Intex Technologies, Karbonn Mobiles, Lava International, LYF, Micromax Informatics, Onida Electronics, Ringing Bells, Spice Digital, Xolo, YU Televentures, Nexian, Evercoss, MITO, Polytron, Advan, Brondi, NGM, Olivetti, Onda Mobile Communication, TelitKyocera Communications, NEC, Panasonic, Sansui, Sharp Corporation, Sony Mobile Communications, DoCoMo, Just5, M Dot, Ninetology, Kyoto Electronics, Lanix, Zonda, Fairphone, John's Phone, Philips, Koryolink, QMobile, Voice Mobile, Advance Telecom, TCT, Dell, Microsoft, etc.

Lastly, and of importance in an analysis of market power exerted by a dominant player is the choice available for selection of technology. Selecting a specific FRAND license being voluntary, there is no compulsion on phone manufacturers to select a particular SEP. It does however raise the question as to why the cases filed before the Commission have been on SEP and that of Ericsson. The counter arguments on this linear approach is the uncomfortable fact that all cases before the Commission are bunched in terms of time i.e. within a year suggesting a pattern of comradeship.

Discussions on SEPs and the process followed by SSOs are an important dimension of selecting a particular patent.¹⁰ Credibility of an SSO is important as there are both public and private institutions including the emergent PAEs. In the present case ETSI is a well established SSO. The concern of the Commission is not on ETSI but on Clause 6 of ETSI which it is argued has been abused by Ericsson. Clause 6 as quoted by the Commission: ‘an IPR owner is required to give irrevocable written undertaking, that it is permitted to grant irrevocable license on FRAND terms, to be applied fairly and uniformly to similarly placed players.’¹¹

In adopting a legalistic approach the Commission placed emphasis on the last phrase of ‘fairly and uniformly’ as the phrase encapsulates abuse of dominant position stated as under Section 4(2). To quote: ‘... directly or indirectly, imposes unfair or discriminatory conditions in purchase or sale... ..or in the price of purchase or sale of a good or service.’ Taking recourse to Clause 6 the Order suggests that owners of SEP are not in conformity with ‘fair, reasonable, and non-discriminatory’ in making royalty claims. Interpretation of the phrase is open to multiple interpretations.¹² Reference to Clause 6 and the allegations in the Orders necessitates an examination of ‘fair, reasonable, and non-discriminatory’ royalty payments.

Recent provocation by the Indian Cellular Association to mobile manufacturers to calibrate their allegations against SEP owners on royalty payments and the non-disclosure agreement cite violation of ‘fair and reasonable’ condition of FRAND. Claims of royalty claimed as excessive and inappropriate in terms of methodology suggests attempts to persuade the Government to declare SEPs as ‘non-essential’ placing it outside the framework of essential and standard, in a misplaced understanding of ‘essential’ in SEP. It is also a move that will hit the growth of smartphone manufacturers and the emergence of strong IPR standards within the country.¹³

¹⁰Ankita Tyagi and Sheetal Chopra, ‘Standard Essential Patents (SEP’s)—Issues & Challenges in Developing Economies’ (2017) 22(3) Journal of Intellectual Property Rights 121.

¹¹*ibid*; *Micromax* (n 1).

¹²*ibid*; The most narrow limited interpretation is if a legalese approach is followed as in the *MCX Stock Exchange Ltd v National Stock Exchange of India Ltd* (2009) Competition Commission of India, Case 13/2009. Or more expansive and sound in terms of economic theory is possible with an effects-based approach as in the recent decision on Ola and Uber cabs.

¹³‘Handset firms trying to avoid paying royalty worrying’ *The Financial Express* (12 March 2016).

Does dominance lead to abuse seen in terms of royalty conditions? What is 'fair and reasonable' always provokes different responses. Interestingly arguments often made before the Commission not only in cases of SEP but across all cases of abuses relating to pricing clearly demonstrated an effort to define fair and reasonable from the perception of the informant and of uniformity irrespective of differences in the nature and characteristic of the product or on whether each price is a negotiated transacted amount. In this part the author will only emphasize upon few fallacies and misconceptions on pricing and royalty payments that have bothered her and calls for deeper analysis.¹⁴

The commonplace interpretation of 'fair and reasonable' argued as uniform royalty for all licensees tends to ignore the critical point that a license is a negotiated document between two parties defined by what is offered and what is sought. A price so negotiated is fair and reasonable disputed on grounds that a SEP owner is dominant and the agreement is not fair as it is between two unequal parties. There are several loopholes in the argument of unequal bargaining strength with shades of populism. Firstly, firms manufacturing handsets are not exactly small. As per the information filed by one of the informants Micromax, by its own admission is the 12th largest handset manufacturer in the world.¹⁵ Between a large domestic manufacturer and a large international SEP owner the situation is more akin to competing dominance than of unequal status at least in the Indian mobile and handset market. The issue devolves on who needs whom. Is it the patent owner or is it the patentee? Data on SEP technology for telecommunications showed several players vying for the market. The prevalence of competitive constraints balances the relationship in a negotiated settlement. Patent owners seek markets and generate funds by selling their patents. These funds cover investment in R&D vital to product development and innovation. To argue that a common (uniform) royalty rate be applicable to all seeking license is not a valid argument. Secondly, a competitive price is the rate at which a consumer satisfaction or marginal utility is met. It defines the value of a product (patent in this case) to the person seeking a license. Process of negotiation and the price settled reflects the value of the license in terms of the price fixed. There are different features that a phone incorporates and the choice of a specific patent is defined by the features that a phone manufacturer wishes to incorporate. Prevalence of competitive markets at the SEP technology and in the market for smartphones and other communication devices make for complexity of negotiations and royalty payments. To prove that royalty rates are reasonable and fair requires comparisons to be product specific, feature specific and

¹⁴The author has not gone into the arguments on the welfare aspects of price discrimination as set out in the Second theorem. As regards patents the word 'differential' is preferred to discrimination to avoid any pejorative connotation.

¹⁵ibid.

time specific, provoking the question, how is the market to be defined—technology, implementer and consumer? And then to examine the strength of each market(s) in providing the requisite competitive constraint.

A negotiated settlement normally involves the rights of two parties but in the case of smartphones and telecommunication equipment the rights of consumer have to be considered by antitrust authorities. The rights of a patent owner to his IP and the incentive to keep innovating as against the right of the patentee or implementer whose right stated in the *prima facie* Order is assured under Clause 6 of the ETSI.¹⁶ The Order points out that the patent owner has to grant irrevocable license to the following extent: ‘Manufacture, including the right to make or have made customized component and sub-systems to the licensee’s own design for use in manufacture, sell, lease, or otherwise dispose equipment so manufactured; repair, use or operate equipment’s; and use methods’.

Issuing of SEP licenses on FRAND terms enables the gains to be used by the implementer to benefit the consumer. Competition authorities concern should be with the consumers and not the implementers. Benefits of technology flows through the chain. How does one view the dynamic benefits of technology? How does one give a patent holder the right to his innovation? As stated in the Preamble of the Act, competition is to protect consumers. The argument put forth by Micromax and Intex in their filings with the Commission that consumers lose out on account of high royalty payments which result in higher costs is simplistic and tends to be an ‘accounts based approach’ towards pricing rather than an ‘economics based approach’ to pricing. The former is a methodology commonly used in cost based pricing schemes where all inputs plus a reasonable rate is added to arrive at a reasonable price. The arguments against royalty as a percentage of final selling price and for royalty pricing on the smallest saleable patent practicing component (SSPPC) proceeds on this logic and designated as ‘discriminatory’.¹⁷ The argument that royalty rates affect the final price resulting in consumer harm is based on simplistic concept of pancaking of costs to arrive at the final costs. In a competitive market, prices of handsets and of smartphones are based on several factors—such as elasticity of demand; number of firms and availability of substitutes; business strategies that different firms adopt to increase sales etc. notwithstanding that royalty payments where SEP is concerned would impact in the same manner for all telecommunication equipment manufacturers.¹⁸

It still leaves the question as to why the Order considered that charging of relevant fee on the total sale price was exorbitant and instead suggested royalty to be paid on the patented product or what is known as the SSPPC as the royalty base to determine a FRAND royalty. While arguments have been put forward for SSPPC it goes against the logic of standardization process. In fact, payment of royalty for

¹⁶ibid.

¹⁷The example cited in the Orders is that the royalty would be ₹1.25 in a phone costing ₹100. On a phone costing ₹1000 the royalty would be ₹12.5.

¹⁸Prices of smartphones and handsets have been falling as also that of mobile subscription.

each patent may result in a larger amount of royalty paid out and misses out on the importance of the basic intention of FRAND which is to determine a value of the entire portfolio.¹⁹

Primarily and most importantly, there are several inputs and complementary products that are part of a mobile. In a standard they are all part of a package where the royalty payment is for the package. All of them have been harmonized to complement each other leading to what is commonly known as network effects. The standards setting process of SSO coordinate the process of a SEP. The value of a single license is enhanced by all the complementary features. They can only function if interoperable. Networks create value and fixing royalty as a percent of the final price is to price the patent at the value consumers' perceive when they buy the product at a given price.²⁰

The recent Delhi HC judgement has brought to the forefront network economies and payment of royalty on the basis of total value associated with interoperability and complementarity of telecommunications systems rather than on the value of a single license. The court also noted that this was the method of fixing the base for royalty world over including US and China. The court also confirmed uniformity of approach after examining several licenses.²¹ The importance of these developments to the benefit of consumers (primarily achieved through network effects of compatibility) was highlighted. The essence of FRAND royalty is of network economies.²²

The Commission in examining cases of 'abuse of dominance' prefers the 'form-based approach' rather than 'effects-based approach'.²³ An 'effects based approach' would necessarily have to take into consideration the dynamics of market pricing as also the relevance of network economies. The concept of network economies did not find much favor during the prima facie Orders. In *MCX-SX v NSE*, network economies and the gains to consumers were overshadowed by

¹⁹ 'An appropriate way to determine a FRAND royalty is to determine a benchmark rate which is governed by the value of the patentee's portfolio'; *Unwired Planet v Huawei* [2017] EWHC 711.

²⁰ As a point of reference, cases on FRAND dispute in the US courts use the term 'price differentiation' and not 'discrimination' thereby removing the pejorative connotation of the term.

²¹ J. Gregory Sidak, 'FRAND in India: The Delhi High Court's Emerging Jurisprudence on Royalties for Standard Essential Patents' (2015) 10(8) *Journal of Intellectual Property Law & Practice* 609.

²² J. Gregory Sidak, 'The Meaning of FRAND, Part I: Royalties' (2013) 9(4) *Journal of Competition Law & Economics* 931; J. Gregory Sidak, 'The Proper Royalty Base for Patent Damages' (2014) 10(4) *Journal of Competition Law & Economics* 989; J. Gregory Sidak, 'The Meaning of FRAND, Part II: Injunctions' (2015) 11(1) *Journal of Competition Law & Economics* 201.

²³ Shift to an effects based approach is discernible in some of the recent orders of the Commission such as *XYZ v REC Power Distribution Company Ltd.* (2014) Competition Commission of India, Case 33/2014; *Bharti Airtel Limited v Reliance Industries Limited* (2017) Competition Commission of India, Case 03/2017; *Fast Track Call Cab Pvt. Ltd v ANI Technologies Pvt. Ltd.* (2015) Competition Commission of India, Case 6 & 74/201; as compared to the attempts to use effects based analysis as in the Minority Order of *MCX* (n 12).

concerns of predatory pricing and leveraging of a 'dominant' stock exchange. The prism of static analysis saw the Majority Order emphasizing in this case the importance of protecting competitors rather than competition.²⁴

3 Abuse of Dominance

Proceeding on the basis that SEP owners are dominant, the Order directed the DG to proceed with investigations within the framework of Section 4 'Abuse of Dominance'. The tempting dimension of the Section is the scope afforded for a 'per se' acceptance of abuse once dominance is established. In a form based approach the guiding factor in Section 4 of the Act is the word 'shall' in the phrase 'No enterprise of group shall assume its dominant position' enabling conditions for a 'per se' decision.²⁵ Section 19(4) which lists out conditions of dominance provides little legal comfort for an alternate understanding of dominance except for general clause (m) 'any other factor which the Commission may consider relevant for the enquiry'.²⁶ The approach is inadequate in cases involving IPRs and patents for SEPs in the telecommunications sector primarily on account of limited dominance, at the most is a temporary phenomenon as noted in the previous part. Given the rapidity of technological change it was also pointed out that there are several SEPs and SSOs. Any dominance is subject to competitive constraints. An 'effects based' approach is required but the temptation of resorting to a 'form based' approach is often too strong.

An 'effects-based' approach persuades investigation to define the market appropriately and in doing so be able to identify competitive constraints. An innovative Small but Significant Non-transitory Increase in Prices (SNNIP) test that looks at alternate technologies and alternate features that can be included in a smart phone can be considered. In defining the market with or without the SNNIP test several outcomes can be envisaged. Identify the number of SEPs and SSOs prevalent and popular in the market. Ranking of SEPs in terms of popularity could be a proxy to assessment of price ranges. Understanding the complex market indications of which were given in the first part could help to comprehend why there is no compulsion to use that patent even though it has been classified as 'essential'? In fact, a more clear understanding of the concept 'essential' in SEP comes to the forefront as argued in the Order as a criteria of dominance.

²⁴ibid.

²⁵The counter to the per se approach is that 'shall' is also used in the context of listing abuses is an argument that to the author is not sustainable.

²⁶According to the author, there is no record of this clause.

An inappropriate assessment of dominance can have long term damaging effects especially in the emergent technology and communications sectors. Scholars have hinted at the conservative approach of the Commission and some have termed it as 'Reductionist Approach of CCI' based on analysis of earlier decisions.²⁷ There is also a tendency to obfuscate the definition of consumer and in identifying a competitor as the consumer.

The proclivity of the Commission is more towards a conservative approach except that where IPR and SEP cases are concerned (as they pertain to agreements between an SEP owner and the buyer of the license). Section 3(4) would be the appropriate section for the scope afforded for assessing anticompetitive effects. Section 3(4) does not require establishing dominance. By traversing from Section 4 to Section 3(4) dominance is already established and abuses of Section 3(4) which are considered to cause AAEC are equated with abuses of dominance under Section 4 without the need for an investigation into possible efficiency outcomes listed under Section 19(3). This Section which lays down factors that need to be considered in assessing anticompetitive effects of vertical agreements includes both positive and negative outcomes that need examination before arriving at a decision. Section 19(4) only lays down factors that measure dominance. Contracts and agreements constitute the area of Section 3(4). Obfuscation of sections is distortionary with unintended outcomes affecting the sector, the economy and consumers.

4 Conclusion

This chapter addresses a few issues and highlights some of the critical misconceptions pertaining to SEPs and FRAND. The author's analysis points towards an effects based approach to technology, to patents and to SEPs. The ever growing evidence briefly summarized above reflects a dynamic market sustained on innovative and disruptive technological developments. Creating uncertainty by extending antitrust action of dominance where SEPs are involved could negatively impact the growth of the telecommunications sector and of technological development itself.

The author has shown how dominance itself is ephemeral. The prevalence of competitive constraints and the continuous changing scenarios that SEPs represent would require a rational approach to capture network economies. Pricing of patents and royalty payments accordingly need to be valued, based on the value created by networks. It also means that definition of 'fair, reasonable, and non-discriminatory' have to be located in the economic principles of pricing and not applied in a

²⁷Yogesh Pai and Nitesh Daryanani, 'Patents and Competition Law in India: CCI's Reductionist Approach in Evaluating Competitive Harm' (2017) 5(2) Journal of Antitrust Enforcement 299.

commonplace meaning. The aspect of SEP, technological development and innovation is a complex relationship. Several competition authorities are engaged in understanding the dimensions of competition law and IPRs without extending the liability.

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