EARTO Background Note:
Shift of US Federal Competition Policy towards Standard Setting Organisations (SSOs)

24 November 2017

The US Federal Justice Department has recently been calling for a new balanced approach of competition law towards Standard Development Organisations (SDO) and FRAND licensing. Such approach is interesting to note during our current European debates on Standard Essential Patents (SEPs), Intellectual Propriety Rights (IPR) as well as Open Source and Open Access to Publications and Research Data. Indeed, the US Assistant Attorney General and Department of Justice antitrust chief, Makan Delrahim, made a well remarked speech at USC Gould School of Law's Centre for Transnational Law and Business Conference on 10 November 2017. His speech, which marks a shift in the US approach to antitrust policy versus IP in the context of standardisation and Standard Setting Organisations (SSOs), is entitled: "*Take it to the limit: Respecting Innovation Incentives in Tech Application of Antitrust Law*". Mr Delrahim especially stated the views of the US Federal Administration on the role of antitrust law in the context of SSOs. Mr Delrahim has been appointed as the Department of Justice's antitrust head late September by the US Senate. After a strong application of antitrust laws in the policing of SEP licensing by the US Federal Government in the last years, Mr Delrahim called for a shift of focus in favour of the interests of innovators, who develop patented technology versus the implementers, who typically manufacture devices. He called for a greater scrutiny of hold-out in licensing negotiations and criticised the current inability of holders of SEPs to get injunctions.

Interesting statements in the speech of the US Department of Justice Antitrust Head are:

- *The goal of antitrust law is to protect free market competition and thereby consumers, but if mis-applied, it can cause great harm to innovation, the competitive process, and the consumer. As I have explained in the past, "Antitrust enforcers should … strive to eliminate as much as possible the unnecessary uncertainties for innovators and creators in their ability to exploit their intellectual property rights, as those uncertainties can also reduce the incentives for innovation."*
- *In particular, I worry that we as enforcers have strayed too far in the direction of accommodating the concerns of technology implementers who participate in standard setting bodies, and perhaps risk undermining incentives for IP creators, who are entitled to an appropriate reward for developing break-through technologies. The dueling interests of innovators and implementers always are in tension, and the tension is resolved through the free market, typically in the form of freely negotiated licensing agreements for royalties or reciprocal licenses. Despite the benefits SSOs confer, the regulation of the interactions and licensing practices within an SSO through the misapplication of the antitrust laws threatens to disrupt the free-market bargain, which could undermine the process of dynamic innovation itself.*
- *The hold-out problem arises when implementers threaten to under-invest in the implementation of a standard, or threaten not to take a license at all, until their royalty demands are met.*
- *I view the collective hold-out problem as a more serious impediment to innovation. Here is why: most importantly, the hold-up and hold-out problems are not symmetric. What do I mean by that? It is important to recognize that innovators make an investment before they know whether that investment will ever pay off. If the implementers hold out, the innovator has no recourse, even if the innovation is successful. In contrast, the implementer has some buffer against the risk of hold-up because at least some of its investments occur after royalty rates for new technology could have been determined. Because this asymmetry exists, under-investment by the innovator should be of greater concern than under-investment by the implementer.*
- *My priority as Assistant Attorney General is to help foster debate toward a more symmetric balance between the seemingly dueling policy concerns between intellectual property and antitrust law. Unfortunately, in recent years, competition policy has focused too heavily on the so-called unilateral hold-up problem, often ignoring what fuels dynamic innovation and efficiency. New inventions do not appear out of the ether, and excessive use of the antitrust laws rather than other remedies can overlook and undermine the magnitude of investment and risk inventors undertake for the chance at being included in a standard. Every incremental shift in bargaining leverage toward implementers of new technologies acting in concert can undermine incentives to innovate. I therefore view policy proposals with a one-sided focus on the hold-up issue with great skepticism because they can pose a serious threat to the innovative process.*

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- *Antitrust enforcers should exercise greater humility and enforce the antitrust laws in a manner that best promotes dynamic competition for the benefit of consumers.*
- *The Antitrust Division will therefore be skeptical of rules that SSOs impose that appear designed specifically to shift bargaining leverage from IP creators to implementers, or vice versa. SSO rules purporting to clarify the meaning of "reasonable and non-discriminatory" that skew the bargain in the direction of implementers warrant a close look to determine whether they are the product of collusive behavior within the SSO.*
- *It is just as important to recognize that a violation by a patent holder of an SSO rule that restricts a patent-holder's right to seek injunctive relief should be appropriately the subject of a contract or fraud action, and rarely if ever should be an antitrust violation. Patents are a form of property, and the right to exclude is one of the most fundamental bargaining rights a property owner possesses. Rules that deprive a patent holder from exercising this right—whether imposed by an SSO or by a court—undermine the incentive to innovate and worsen the problem of hold-out. After all, without the threat of an injunction, the implementer can proceed to infringe without a license, knowing that it is only on the hook only for reasonable royalties.*
- *We should not transform commitments to license on FRAND terms into a compulsory licensing scheme. Indeed, we have had strong policies against compulsory licensing, which effectively devalues intellectual property rights, including in most of our trade agreements, such as the TRIPS agreement of the WTO. If an SSO requires innovators to submit to such a scheme as a condition for inclusion in a standard, we should view the SSO's rule and the process leading to it with suspicion, and certainly not condemn the use of such injunctive relief as an antitrust violation where a contract remedy is perfectly adequate.*
- *I therefore urge antitrust enforcers to take a more humble approach to the application of antitrust to unilateral violations of SSO commitments and to take a fresh look at concerted actions within SSOs that cause competitive harm to the dynamic innovation process. I likewise urge SSOs to be proactive in evaluating their own rules, both at the inception of the organization, and routinely thereafter. In fact, SSOs would be well advised to implement and maintain internal antitrust compliance programs and regularly assess whether their rules, or the application of those rules, are or may become anticompetitive.*
- *Bargaining over new and innovative technologies is a high stakes game, and each side has an incentive to use every means necessary to improve its end of the bargain. In this game, the competitive market process should win. SSOs should not be a tool for IP licensors or licensees to obtain more favorable terms than they would otherwise achieve in an unconstrained market.*
- *That is why concerns over possible innovator hold-up should not override the dangerous prospect of implementer hold-out. It's time to correct this asymmetry to ensure that there are maximum incentives to innovate, and equally proper incentives to implement.*

The full text of the speech can be found here.

This approach to patent hold-up versus patent hold-out questions is close to EARTO's approach on those questions in its recent paper on the European Licencing Framework for SEPs, published on 8 November 2017.

EARTO - European Association of Research and Technology Organisations
Founded in 1999, EARTO promotes Research and Technology Organisations and represents their interest in Europe. EARTO network counts over 350 RTOs in more than 20 countries. EARTO members represent 150.000 highly-skilled researchers and engineers managing a wide range of innovation infrastructures.

RTOs - Research and Technology Organisations
From the lab to your everyday life. RTOs innovate to improve your health and well-being, your safety and security, your mobility and connectivity. RTOs' technologies cover all scientific fields. Their work ranges from basic research to new products and services development. RTOs are non-profit organisations with public missions to support society. To do so, they closely cooperate with industries, large and small, as well as a wide array of public actors.

***EARTO Working Group Legal Experts**: is composed of 25 corporate legal advisers working within our membership. Established in autumn 2013, this Working Group has also worked on the revision of the state aid rules & the GBER. Our experts also contributed to the setting-up of the DESCA Consortium Agreement model for Horizon 2020. More recently they were at the origin of the EARTO Paper on Open X, the EARTO Background Note on the US Federal Agencies Data Sharing Policies, and the EARTO voting recommendation for Globally Competitive Standardisation in the Digital Single Market.*