Chapter 12
Standardization Commercial Strategy: An EU Antitrust Perspective

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ABSTRACT

This contribution offers an overview of recent developments in European Union antitrust regulation of single-firm strategies in standardization. The law has moved cuttingly towards a rigid enforcement model securing the foundations and future benefits of standardization. There remains a paradoxical gap between effective single-firm strategy and antitrust enforcement. Whereas firms are maximizing their strategies to a position of strength and maximum security within standardization, the law is acting is suspicious of such activities. The law currently applied to standardization strategies and especially those that involve essential intellectual property represents a strong warning to firms strategizing in t field of standardization. In the main the law has focused on single-firm strategies and largely on the exclusion by a dominant firm of rivals from access to or use of essential technologies protected by intellectual property. This contribution reviews the antitrust repercussions for single-firms in standardization activities under EU antitrust rules.

INTRODUCTION

Company strategy is fundamentally about forms of decision making and their rationales and impacts at a firm level. Business strategy as a field of study often has a holistic view, assessing the drivers, strategies, rationales and repercussions of decision-making strategies through a strategy or economic lens, the impact of law is often less considered. This may as pointed out by Denrell, et al. (2003) be a result of the predominance of strategy analysis through the prism of economics focusing on those strategies which optimize economic surplus and raise profits or enhance the market position of the firm. In some sectors, the focus of company strategies has come under more scrutiny and investigation than others, one such sector been the so-called high technology or technology-enabled markets.

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Although technology is prevalent in most sectors and markets, it plays a special and more centralized role in markets that have an intense degree of innovative activity. Since the 1980's a characterization of these markets are the high degree of intellectual property strategizing and particularly the use of patents (Economides, N. (1996), Katz & Shapiro (1994), Kortum & Lerner (1999)). In other words, they are populated by firms with significant research and development (R&D) activities and which rely heavily on the intellectual property (IP) system (Iversen, E. (1999)). In general, and at the risk of over simplification, these markets are comprised of sectors where technology plays a central role in the competitive process. Therefore, the strategic decision making and management in these markets naturally sees a focus on the way in which decision maker's use or benefit from technology or technologies. In recent years, especially at a European level, there has been debate and examination of these markets from an economic, strategy and general business perspective (Gifford & Kudrle, (2011). The focus of many of these studies has rested on the strategic positioning and decision making within companies and the link between strategies, innovation, and intellectual property (Blind, K. & Thumm, N. (2004)). More recently, and as standardization has become a strategy focus, understanding the benefits and dangers for companies from engaging, strategically, in standardization activities and commercial planning have formed focal points for researchers.[1] Standards and standardization in technology enabled markets potentially offer great synergies to companies especially where their technology plays a predominant role in the standard. As Swann (Swann (2010)) points out this is especially the case where these markets are overlaid with Network Effects, especially where such effects are 'direct Network Effects'. In these circumstances the Network Effect can be seen as creating value in the market, for example, the 3G mobile network enables communication between handsets, leading to a direct Network Effect for consumers.

Consumers are able to communicate with each other and interact by connecting to the network. Companies are able, by incorporating the 3G technology into their products, to access the pool of consumers. Moreover, it heightens competition on the market, and the use of one standard over another can add to the competitiveness of consumer products. 3G enabled devices were far more likely to be attractive to the consumer than the slower 2G option. It is here the strategic incentive for companies involving themselves in standardization can be drawn out (Bekkers, R., Duysters, G. & Verspagen, B. (2002)). Especially the inclusion of owned intellectual property into these standards potentially delivering not only a technological advantage but also a continuous revenue stream.

From a strategic point of view, simply put, it is better to be in the standard setting than simply following the standard, especially if firms strategically place themselves and incorporate their technologies.[2] To date, much of the research into standardization strategy, especially in sectors marked by Network Effect or reliant on Interoperability information, makes use of economics as a framework for understanding decision making, typically focusing on the wealth and market share objectives that private companies have. Surprisingly, however, is the lack of evaluation of the impact of the law. While many often raise, in a superficial way, the potential legal issues they are certainly not dealt with in any great depth. An approach that is surprising, especially in the field of Antitrust, which is, in many ways the flipside of the strategy coin.[3] Whereas strategy is often related to the growth of profitability, competitiveness and market share, Antitrust economics is concerned with the dangers of market power, specifically what it is, how it is sustained and what are its effects. The natural effect of this from a regulatory perspective is the action, through Antitrust, that is taken is to prevent the accumulation of market power and to prevent certain business strategies runs against the realization of firm strategies. Take as a general example, loyalty rebating or predatory pricing strategies of single-firm's been examples of where Antitrust steps restricting business strategizing.[4] Outside of these examples commercial strategy can and often does,