



Standards, innovation incentives and the formation of patent pools

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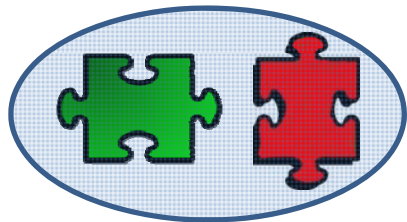
Summary

1. Patent pools and the complements problem: independent licensing as a possible solution
2. Patent pools and the holdup problem: the « full functionality approval » mechanism.

The complements problem

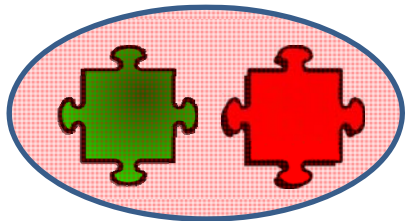
A patent pool is:

- beneficial if goods (technologies) are complements



« may lead to lower overall royalties (...) common royalty for the package as opposed to each fixing a royalty which does not take account of the royalty fixed by others. » (§ 217 TTA Guidelines)
-> falls outside article 101(1)

- detrimental if goods are substitutes

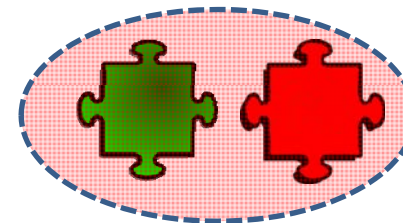
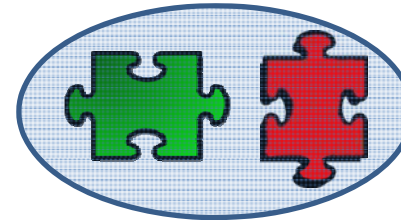


« amounts to collective bundling » (§ 219 TTA Guidelines)
« in the case of pools composed solely or predominantly of substitute technologies amounts to a price fixing cartel » (§ 213 TTA Guidelines)
-> violation of article 101(1)

Solution: independent licensing

- If goods are complements, the pool is unaffected.
- If goods are substitutes, the pool falls apart.

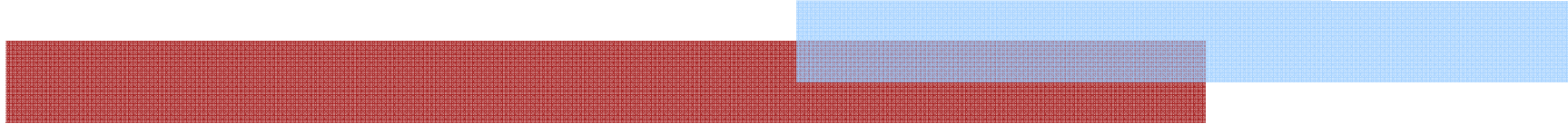
Same mechanism as a cartel:
unstable if members can secretly deviate.



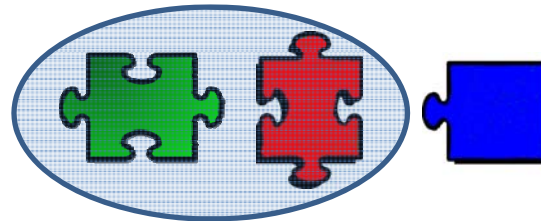
→ Policy implication:

Patent pools must allow for independent licensing.

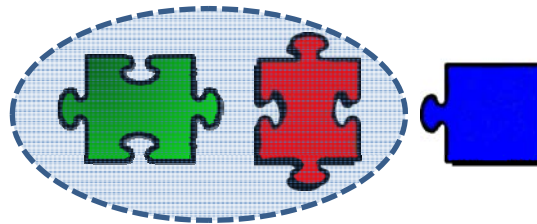
Free-riding and patent holdup



Blue firm is better off not joining the pool, free-riding on the pool's low royalties and setting a high royalty for its own (essential) patent:



Solution: if an essential patent is not included in the pool, the pool agreement shall be null and void.



The « full functionality approval » mechanism

- A patent pool is approved conditionally on all essential patents being included.
 - If it is not the case, the pool is dissolved (no incentive for patent ambush).
 - If a licensee proves that he has to pay for an essential patent that is not in the pool, pool members commit to grant him a free license for all the patents in the pool.
- All essential patent holders are incited to join the pool rather than acting as patent trolls.

Implementation: practical problems

Commitment to free licenses if outside patent is essential: will the patent pool really be dissolved?

- In case an outside patent is essential, a licensee is supposed to *report it to the competition authorities*, in order to obtain a free license for all patents in the pool. Subsequently, the pool is dissolved.
- But if the pool is still beneficial to its members in spite of the patent troll, they are incited to secretly grant free licenses but maintain the pool (without reporting to competition authorities)

Implementation: practical problems

Current (and future?) framework for horizontal cooperation agreements:

- Prior notification has disappeared since Regulation 1/2003
 - Agreements between *competitors* fall under article 101(1) even if parties are free to sell outside the agreement.
 - However, agreements between non-competitors (if goods are complements) fall outside article 101(1).
- in a world of complements, no competition concern: competition authorities cannot intervene, let alone impose commitments to free licensing as a prerequisite to clear an agreement.