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INJUNCTIONS FOR FRAND-PLEDGED SEPS: THE QUEST FOR AN APPROPRIATE TEST OF ABUSE UNDER ARTICLE 102 TFEU

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A. Introduction

This paper discusses the legal test under which owners of standard-essential patents (SEPs) who have pledged to grant licences to those SEPs on fair reasonable and non-discriminatory (FRAND) terms can be held guilty of an abuse of a dominant position under Article 102 of the Treaty on the Functioning of the European Union (TFEU) by seeking, or threatening to seek, injunctions against unlicensed implementers of their technology.

This question has generated significant debate amidst the so-called global "smartphone war". Many of the world's information and communication technology (ICT) giants (eg Samsung, Apple, Microsoft, Google, Huawei, Cisco) are fighting tooth and nail in court. On one side, patent owners are enforcing their intellectual property (IP) portfolios by asking judges to grant injunctions preventing the sale of unlicensed rival products. While these cases usually involve patents that are not core to underlying standardised technologies, several of those legal disputes involve SEPs encumbered by a FRAND commitment.[1] On the other side, patent implementers are raising allegations of unlawful abuse as a counterclaim (eg Apple's counterclaims in multiple patent infringements suits brought by Samsung in the EU) or are lodging abuse of dominance complaints with competition agencies (eg the two investigations recently launched by the Commission against Samsung and Motorola regarding patent infringement proceedings brought by those companies against Apple).[2]

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1 Though the vast majority of patents asserted on the smartphone patent wars are non-essential, and generally software patents. For an exhaustive discussion of standards and FRAND commitments, see D Geradin and M Rato, "Can Standard-Setting Lead to Exploitative Abuse? A Dissonant View on Patent Hold-Up, Royalty-Stacking and the Meaning of FRAND" (2007) 3 *European Competition Journal* 146.

2 Commission's press release, "Commission Opens Proceedings against Samsung", IP/12/89, europa.eu/rapid/press-release_IP-12-89_en.htm (accessed on 15 March 2013). Commission's

The very existence of a discussion over the legal standard applicable to such judicial proceedings under Article 102 TFEU may come as a surprise to the reader. This is because a well-established legal standard set forth in the EU courts' case law governs such cases. In *ITT Promedia*, the General Court (GC) held that, because the right of access to the courts is a fundamental principle of EU law, dominant firms are generally free to start litigation against their rivals. Only in "wholly exceptional circumstances" clearly laid out by the GC can they be held guilty of abuse.[3] The GC recently reaffirmed this principle in *Protégé International*.[4]

This notwithstanding, the idea that firms seeking injunctions might be guilty of a novel, *sui generis*, form of abuse under Article 102 TFEU has recently gained prominence, specifically where such firms have made a FRAND commitment to a standard setting organization (SSO).

In Germany, for instance, the Federal Supreme Court (FSC) appears to have held in the *Orange Book Standard* case that it could be an abuse of a dominant position for a patentee to seek injunctions against a "willing licensee" even absent a formal FRAND pledge.[5] According to the FSC, an implementer of an industry standard will be considered a "willing licensee" if he has made a licensing offer that the patentee cannot reasonably refuse and if he has acted as if he was already a licensee (by performing certain acts of fulfilment such as paying licensing fees into escrow).

press release, "Commission opens Proceedings against Motorola", IP/12/345, europa.eu/rapid/press-release_IP-12-345_en.htm (accessed on 15 March 2013). There is a third investigation in a dispute between Motorola and Microsoft, but it has not yet reached the stage of formal proceedings.

3 Case T-111/96 *ITT Promedia NV v Commission* [1998] ECR II-2937.

4 Case T-119/09 *Protégé International Ltd v Commission*, not yet published.

5 See Judgment of the Bundesgerichtshof of 6 May 2009—Case KZR 39/06—*Orange Book Standard* (Orange Book was the informal name for Philips and Sony's de facto Recordable CD Standard). Translation available at: www.ipeg.eu/blog/wp-content/uploads/EN-Translation-BGH-Orange-Book-Standard-eng.pdf (last accessed on 1 June 2013). Importantly, the *Orange Book Standard* case concerns a de facto standard without a FRAND commitment and was based on national competition law. There has also been a lot of litigation before other national courts. However, to date, none of those national courts have yet conducted an in-depth analysis of the issue under EU or national competition law. In France (see Tribunal de Grande Instance de Paris, Ordonnance de référé, 8 December 2012, 11/58301), Italy (see Court of Genoa, orders 7 May 2004, 14 October 2004 and 15 November 2004, *Koninkijlke Philips Electronic N.V. v Computer Support Italcard srl* and *Computer Support Italcard v Koninkijlke Philips Electronic NV*; Court of Milan, orders of 18 October and 2 November 2011, *Ical SpA, Cardmania Multimedia Srl and Italvideo International Ltd v Rovi Guides and United Video Properties*), the Netherlands (see *Koninklijke Philips Electronics NV v SK Kassetten GmbH & Co KG*, District Court The Hague, The Netherlands,17 March 2010, Joint Cases Nos 316533/HA ZA 08-2522 and 316535/HA ZA 08-2524) and the UK (see *Naitaire v EasyJet*, EWHC 0282, 2005, concerning copyright infringement; see also www.fosspatents.com/2012/05/uk-high-court-denies-patent-injunction.html), judges have simply considered whether it would be abusive to refuse to license, or whether it would be an abuse of right (under patent law or the law of obligations) for the patentee to obtain a remedy.

Similarly, with the adoption of two Statements of Objections (SOs) in the *Samsung* and *Motorola* investigations,[6] and the recent settlement talks entered into with Samsung,[7] the Commission has given credence to the possibility that the threat of, or the seeking of, injunctions in circumstances where the patent holder had given a FRAND commitment could be abusive. Judging from the content of the Commission's press releases, it seems that the Commission—a bit like the German FSC—considers that the act, by a holder of SEPs (who has committed to license them on FRAND terms) of seeking injunctive relief against a licensee who is otherwise "willing" to take a licence constitutes an abuse of a dominant position, regardless of *ITT Promedia/Protégé International*:

> "The European Commission has informed Samsung of its preliminary view that Samsung's seeking of injunctions against Apple in various Member States on the basis of its mobile phone standard-essential patents ('SEPs') amounts to an abuse of a dominant position prohibited by EU antitrust rules. While recourse to injunctions is a possible remedy for patent infringements, such conduct may be abusive where SEPs are concerned and the potential licensee is willing to negotiate a licence on Fair, Reasonable and Non-Discriminatory (so-called 'FRAND') terms."[8]

Unlike the German FSC, however, the Commission's statement leaves open the circumstances under which an implementer can be deemed to be a "willing licensee".

Against this background, a national court has recently decided to make a preliminary reference to the CJEU on this issue.[9] In *Huawei v ZTE*, the District Court of Düsseldorf has requested the CJEU to clarify whether national courts should follow a standard of abuse close to the German *Orange Book Standard* test or whether it should apply a laxer, more licensee-friendly test, as surmised in the Commission's press releases.[10] To that end, the District Court of Düsseldorf

[6] Commission's press release, "Commission Sends Statement of Objections to Samsung on Potential Misuse of Mobile Phone Standard-Essential Patents", IP/12/1448, europa.eu/rapid/press-release_IP-12-1448_en.htm (accessed on 10 June 2013). See Commission's press release, "Commission sends Statement of Objections to Motorola Mobility on Potential Misuse of Mobile Phone Standard-Essential Patents", IP/13/406, europa.eu/rapid/press-release_IP-13-406_en.htm (accessed on 10 June 2013). The Commission had already alluded to this in its Google/Motorola Mobility decision. See European Commission, 13 February 2012 COMP/M.6381 *Google/Motorola Mobility* [2012] OJ C75. The Commission, however, stated at para 158: "it can be left open whether Article 102 TFEU further restricts the possibility of the holder of SEPs in seeking and enforcing injunctions".

[7] Commission press release, "Commission Seeks Feedback on Commitments Offered by Samsung Electronics to Address Competition Concerns on Use of Standard Essential Patents—Questions and Answers", MEMO/13/910 17 October 2013.

[8] Commission press release IP/12/1448, *supra* n 6.

[9] Request for a preliminary ruling from the Landgericht Düsseldorf (Germany) lodged on 5 April 2013, Case C-170/13 *Huawei Technologies Co Ltd v ZTE Corp, ZTE Deutschland GmbH*; *Huawei v ZTE*, District Court *Düsseldorf*, Germany, 21 March 2013, Case No 4b O 104/12.

[10] Some believe that the Düsseldorf Court decision to seek guidance directly from the CJEU rather than from the Commission under Art 15 of Regulation 1/2003 signals an attempt to

has addressed five comprehensive questions to the CJEU. Interestingly, all five questions seem to take for granted that the "willing licensee" test is the right framework, or at least a good starting point, for the assessment of abusive conduct under Article 102 TFEU.[11] Conversely, all five questions implicitly seem to rule out the *ITT Promedia/Protégé International* as a relevant precedent:[12]

"1. Does the proprietor of a standard-essential patent who informs a standardisation body that he is willing to grant any third party a licence on fair, reasonable and non-discriminatory terms abuse his dominant market position if he brings an action for an injunction against a patent infringer although the infringer has declared that he is willing to negotiate concerning such a licence? Or is an abuse of the dominant market position to be presumed only where the infringer has submitted to the proprietor of a standard-essential patent an acceptable, unconditional offer to conclude a licensing agreement which the patentee cannot refuse without unfairly impeding the infringer or breaching the prohibition of discrimination, and the infringer fulfills his contractual obligations for acts of use already performed in anticipation of the licence to be granted?
2. If abuse of a dominant market position is already to be presumed as a consequence of the infringer's willingness to negotiate: Does Article 102 TFEU lay down particular qualitative and/or time requirements in relation to the willingness to negotiate? In particular, can willingness to negotiate be presumed where the patent infringer has merely stated (orally) in a general way that that he is prepared to enter into negotiations, or must the infringer already have entered into negotiations by, for example, submitting specific conditions upon which he is prepared to conclude a licensing agreement?
3. If the submission of an acceptable, unconditional offer to conclude a licensing agreement is a prerequisite for abuse of a dominant market position: Does Article 102 TFEU lay down particular qualitative and/or time requirements in relation to that offer? Must the offer contain all the provisions which are normally included in licensing agreements in the field of technology in question? In particular, may the offer be made subject to the condition that the standard-essential patent is actually used and/or is shown to be valid?
4. If the fulfilment of the infringer's obligations arising from the licence that is to be granted is a prerequisite for the abuse of a dominant market position: Does Article 102 TFEU lay down particular requirements with regard to those acts of fulfilment? Is the infringer particularly required to render an account for

focus the debate on the *Orange Book Standard* test, and meanwhile to sentence the Commission to silence pending the resolution of the case.

11 In this context, the order for reference suggests that a "balance of interests" test ought to be applied. This test hinges on balancing on the one hand the interests of the patent holder against those of the infringer and, on the other hand, the interests of implementers who already have a license against those of infringers who are likely to be advantaged in licensing talks if they are prospectively shielded from injunctions. See Summary of the request for a preliminary ruling—Case C-170/13, *supra* n 9, para 20.

12 Text of the questions published in the Official Journal of the EU, 2013/C 215/04, available at eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:215:0005:0005:EN:PDF

past acts of use and/or to pay royalties? May an obligation to pay royalties be discharged, if necessary, by depositing a security?

5. Do the conditions under which the abuse of a dominant position by the proprietor of a standard-essential patent is to be presumed apply also to an action on the ground of other claims (for rendering of accounts, recall of products, damages) arising from a patent infringement?"

The Court of Justice remains, of course, entirely free in its reply to these questions. It may, for instance, refuse to reply to some of them. But it may also decide to regroup them, rephrase them and reinterpret them, or even complete them.

Ahead of any forthcoming pronouncements on the issue by the CJEU, the present paper aims to contribute to the debate by discussing the applicability of various legal standards of EU competition law to conduct consisting in the seeking of injunctions for SEPs encumbered by a FRAND commitment. To that end, we use the theoretical framework described in a previous paper on rule-making in EU competition law.[13] First, we sift through the various tests of abuse potentially applicable in positive EU competition law (Section B). Secondly, we show that an objective criterion should command the selection of a test of abuse, and suggests using the notion of "consistency" (Section C). Thirdly, we rank the applicable tests of abuse on grounds of consistency (Section D). Fourthly, we conclude (Section E).

At this juncture, several methodological remarks are in order. First, this paper is not written by an "IP fundamentalist". It thus does not call into question the basic applicability of Article 102 TFEU to the seeking of injunctions by SEP holders. In EU competition law, the notion of abuse is open-ended. In the words of the case law, Article 102 TFEU covers "anything" that hampers competition, including the act of seeking relief in court.[14] Instead, the focus of this paper is on the test of abuse –ie the substantive conditions that must be established to find an infringement.

Secondly, the paper does not draw a distinction between the acts of seeking interlocutory and permanent injunctions. In addition, where necessary, we distinguish between the "threat" of an injunction and the "act" of seeking an injunction, since both possibilities seem to be the focus of the Commission's investigations.[15]

Thirdly, this paper does not address a number of issues that would be of relevance to the finding of an infringement of Article 102 TFEU, nor the

[13] N Petit, "The Future of the Court of Justice in EU Competition Law" in A Rosas, E Levits and Y Bot (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case Law* (Springer, 2012), 397.

[14] Case C-85/76 *Hoffmann-La Roche & Co AG v Commission* [*1979] 461*; *Case* C-322/81 *Michelin v Commission* [1983] 3461; Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359.

[15] The act of seeking, or of threatening to seek, an injunction was a key concern in the *Google/Motorola Mobility* merger decision. See Commission decision, *Google/Motorola Mobility*, *supra* n 6.

critical issue of access to the court under the European Treaties and national constitutional traditions. It focuses on the sole issue of abuse, and leaves aside the contentious link between ownership of SEPs and dominance.

Fourthly, our paper is based on a number of assumptions: (i) the patents at stake are valid, infringed and essential for the implementation of an industrial standard;[16] (ii) a FRAND commitment has been made by the patent holder; and (iii) each request for an injunction affects a geographical relevant market that covers the whole territory of the Member State where the action is initiated.[17]

Fifthly, the paper does not discuss the issue of the relationship between the exercise of a patent right, lawfully under that system of law, and the role that antitrust rules can play in restricting this exercise.

B. Available Tests of Abuse under Article 102 TFEU

This section reviews the various possible tests of abuse. The analysis is conducted on the basis of the case law of the European courts and recent scholarship. For each test, a general description is given. It is followed by a short discussion regarding the specific context of injunctions for SEPs. The purpose of this section is introductory only. It does not discuss all tests at length, and seeks only to pave the way for the subsequent analysis.

1. Abusive "Refusal to Supply"

The act of seeking an injunction in court reveals that the SEP holder has not concluded a licence with the defendant. In the recent "FRAND disputes" between companies active in the smartphone space, this will typically occur because the patent holder has offered the defendant a licence to its patents on terms that the defendant does not consider to be FRAND. In EU competition parlance, the seeking of an injunction may thus be envisioned as an implied "refusal to supply",[18] or, to be more accurate, as a "constructive" refusal to supply (in the sense that there is no "actual" refusal: at most, only a refusal to grant a licence on terms that the alleged infringer considers not to be FRAND).[19]

[16] Be it a formal or de facto standard.

[17] In the US, injunctions are nationwide too, but the relevant market is significantly larger in terms of sales (volume and/or value) than that of an EU Member State.

[18] Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, [2009] OJ C45, 7–20 (the Guidance Paper), para 78, where refusals to license IPRs are categorized as "refusals to supply".

[19] *Ibid*, para 78: "Likewise, it is not necessary for there to be actual refusal on the part of a dominant undertaking; 'constructive refusal' is sufficient. Constructive refusal could, for

The substantive test applicable to constructive refusals to supply is set in *Magill* and *IMS Health*.[20] Under this case law, a refusal to grant a licence to an IP right can only be abusive in "exceptional circumstances" that prevent the development of a secondary market. Those circumstances are present if four cumulative conditions are met, namely that the refusal: (i) concerns a product or service "indispensable" for carrying on a particular business; (ii) prevents the emergence of a "new product" for which there is potential consumer demand; (iii) is unjustified; and (iv) is such as to exclude any competition on a secondary market which the dominant firm seeks to "reserve" for itself.[21]

The *Magill/IMS Health* standard has been abundantly commented in the literature. Its applicability to the issue of patent injunctions, however, has been less discussed (if at all). In our view, three remarks are in order. First, the *Magill/IMS Health* standard holds the potential to outlaw injunctions only where these are sought by vertically integrated firms who supply products implementing their technology. The above four conditions make clear that the theory of harm underpinning the *Magill/IMS Health* case law is a "transfer of power" theory: a firm refuses to license in order to leverage its dominant position into a secondary, adjacent market. Injunctions sought by non-implementing entities (ie pure licensors with no productive activity in a secondary market) are, in contrast, immune from antitrust exposure under the *Magill/IMS Health* case law.

Secondly, the appraisal of the first condition of the *Magill/IMS Health* test, ie the "indispensability" requirement, may be relaxed in injunction cases. At paragraph 83 of the its Guidance Paper, is the Commission states that if the "requesting undertaking . . . had made relationship-specific investments in order to use the subsequently refused input, the Commission may be more likely to

example, take the form of unduly delaying or otherwise degrading the supply of the product or involve the imposition of unreasonable conditions in return for the supply".

[20] Joined Cases C-241/91 P and C-242/91 *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* (Magill) [1995] 743; Case C-418/01 *IMS Health, GmbH & Co OHG v NDC Health GmbH & Co KG* [2004] ECR I-5039. This precedent is also the one affirmed by the General Court in *Microsoft III*. Case T-167/08 *Microsoft Corp v Commission* (also known as the compliance case), not yet published.

[21] *IMS Health*, para 52: "Accordingly, the answer to the first question must be that the refusal by an undertaking which holds a dominant position and owns an intellectual property right in a brick structure indispensable to the presentation of regional sales data on pharmaceutical products in a Member State to grant a licence to use that structure to another undertaking which also wishes to provide such data in the same Member State, constitutes an abuse of a dominant position within the meaning of Art 82 EC where the following conditions are fulfilled: (i) the undertaking which requested the licence intends to offer, on the market for the supply of the data in question, new products or services not offered by the owner of the intellectual property right and for which there is a potential consumer demand; (ii) the refusal is not justified by objective considerations; (iii) the refusal is such as to reserve to the owner of the intellectual property right the market for the supply of data on sales of pharmaceutical products in the Member State concerned by eliminating all competition on that market".

regard the input in question as indispensable".[22] Relation-specific investments are frequent in standard-setting processes, because e*x post* design decisions are specifically based on the essential technologies selected *ex ante*.

Thirdly, in its *Google/Motorola Mobility* decision, the Commission expressly accepted that the *Magill/IMS Health* test could apply to the seeking of injunctions over non-essential patents.[23] In contrast, however, the decision envisioned a distinct and somewhat unclear legal test in relation to SEPs. Thus, in the Commission's (implicit) view, the *Magill/IMS Health* does not seem to be the appropriate legal standard.

2. Abusive "Litigation"

The SEP owner who seeks injunctions may be starting judicial proceedings to harass a rival. The act of seeking an injunction can thus potentially be construed as an act of abusive litigation.[24] This story is the one routinely spun by many newspapers, business analysts and industry experts.

The law of "abusive" litigation is set out in *ITT Promedia*.[25] According to the General Court, a finding of abuse can only occur in "wholly exceptional circumstances".[26] Such circumstances are present if two cumulative conditions are met:

> "the action (i) cannot reasonably be considered as an attempt to establish the rights of the undertaking concerned and can therefore only serve to harass the opposite party; and (ii) it is conceived in the framework of a plan whose goal is to eliminate competition".[27]

[22] Guidance Paper, *supra* n 18.

[23] Commission decision, *Google/Motorola Mobility*, *supra* n 6, para 59.

[24] In layman's terms, judicial harassment.

[25] For a discussion of this case and of its implications in relation to injunctions, see M Rato and N Petit, "Abuse of Dominance in Technology-Enabled Markets: Established Standards Reconsidered?" (2013) 9(1) *European Competition Journal* 1. In the *ITT Promedia* case, the GC did not clearly rule on the relevance of the criteria chosen by the Commission but simply assessed whether the Commission had correctly applied the test that it had defined in its decision. Most authors, however, read in this judgment an implicit endorsement of the Commission's test. See A Jones and B Sufrin, *EC Competition Law. Text, Cases and Materials* (Oxford University Press, 3rd edn, 2008), 582. In *AstraZeneca AB and AstraZeneca plc v Commission*, Advocate General Mazák, however, opined that in *ITT Promedia* the GC had not conclusively endorsed those criteria. According to the AG, para 52 "the General Court did not actually rule on the criteria necessary in order to establish whether legal proceedings constitute an abuse of a dominant position in the *ITT Promedia v Commission* case. Thus the appellants" reference to those "criteria" in its pleadings is somewhat speculative". See Opinion of Mr Advocate General Mazák delivered on 15 May 2012, C-457/10 P *AstraZeneca AB and AstraZeneca plc v Commission*, not yet published. The GC, however, extinguished the controversy in *Protégé International Ltd v Commission*, by explicitly affirming the two cumulative criteria of *ITT Promedia*.

[26] *ITT Promedia NV v Commission*, *supra* n 3, para 60.

[27] *Ibid*, para 55. See also, paras 55–57, 58 and 72.

Those conditions are cumulative and sequential: the second condition will only be examined if the first condition is satisfied,[28] and, given the fundamental right of access to court, the two conditions "must be construed and applied strictly".[29]

The GC judgment in *Protégé International Ltd v Commission* sheds light on the interpretation of those conditions. The first condition is "subjective" in nature.[30] It seeks to determine whether the intent of the plaintiff is "to harass",[31] with the court noting that the conduct "can . . . *only* serve to harass" (emphasis added). This means that any alternative explanation trumps a finding of abuse.[32]

To that end, the GC applies an indirect rule of inference (as opposed to requesting direct documentary evidence).[33] There must be evidence that the request is either (i) "manifestly" "objectively unreasonable"; or (ii) "devoid of any basis in law".[34] A wholly unreasonable demand is one that goes beyond the asserted rights—for instance, a request for the court to order the removal of products or accessories that do not practice the infringed patents. A wholly baseless request may consist in seeking to enforce an invalid patent in court, for instance where the patentee conceals previous invalidation by a patent office during the suit.[35]

The second condition is "objective". The impugned conduct must form part of a larger "plan whose goal is to eliminate competition".[36] The requirement of a "plan" suggests that the plaintiff has adopted a pattern of exclusionary measures to wall off rivals, be it (i) by starting other proceedings (eg injunctions in other jurisdictions, or in relation to other IP rights) or (ii) by engaging into other anticompetitive tactics. According to O'Donoghue and Padilla, the

[28] *Ibid*, para 119: "Since the applicant has failed in its first four pleas, relating to the application of the Commission's first criterion to Belgacom's first two actions, and since the two criteria are cumulative (see paragraph 59 above), the fifth plea, relating to the application of the second criterion to those same actions, has become irrelevant".

[29] *Ibid*, para 61.

[30] We use here the terminology employed by the applicant and the Advocate General in *AstraZeneca*.

[31] *Protégé International Ltd v Commission*, *supra* n 4, para 52, the term "harassment" is explicitly used by the Court.

[32] This stringent causality standard is not infrequent in competition law. In *Woodpulp*, for instance, the Court held that parallel conduct gives rise to a violation of Art 101 TFEU if "concertation constitutes the only plausible explanation for such conduct". Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *Ahlström Osakeyhtiö a o v Commission* [1993] ECR I-1307.

[33] The use of indirect rules of inference is not uncommon in modern competition law. For instance, unlawful predatory intent can be inferred from below AVC pricing, under the so-called *AKZO* case law.

[34] *Protégé International Ltd v Commission*, *supra* n 4, para 57.

[35] This was the theory of the applicant in *AstraZeneca AB and AstraZeneca plc v Commission*, *supra* n 25, para 312. Some guidance on those issues may also be searched in the case law of the Court in relation to interim measures where similar conditions apply (the *Camera Care* case law) and Art 8(1) of Regulation 1/2003.

[36] *Protégé International Ltd v Commission supra* n 4.

requirement of additional anticompetitive activity besides the contemplated judicial action takes root in the fact that it is lawful to initiate proceedings.[37] Concretely, this means that an individual request for an injunction cannot, alone, be abusive.

Moreover, the concept of a "plan" seems to imply a certain consistency in the dominant firm's litigation tactics. In *Tetra Pak II*, the Court relied on a "whole series of important and convergent factors" to support its finding of the existence of an abusive "plan".[38] Conversely, if the plaintiff has licensed some standards implementers but not others, doubts arise over the existence of a "plan" to eliminate competition.[39] The dispute may therefore be a mere commercial dispute that the courts can and should arbitrate like any other standard dispute.

Further, the purpose of the plan must be exclusionary. This means that the use of injunctions as a bargaining device to extract "onerous" licensing terms and conditions from standard implementers cannot be considered abusive.[40]

Finally, the plan must target "competition".[41] Hence, Article 102 TFEU only catches injunctions that target the SEP owner's competitors ("primary-line injury" harassment), not injunctions against trading parties ("secondary-line injury" harassment). In line with our remarks on refusals to supply, non-implementing entities cannot be held guilty of abuse when they seek injunctions against implementers, for they are not in a competitive relationship with each other.

All these conditions bring limitations to the applicability of Article 102 TFEU to the act of seeking injunctions. This explains why, in the case law, such strategies have never, in and of themselves, been deemed abusive. In *Eurofix-Bauco v Hilti*, the Commission simply ignored the allegations of unlawful injunction seeking raised by the complainant, and decided to focus on distinct

[37] R O'Donoghue and J Padilla, *The Law and Economics of Article 82 EC* (Hart Publishing, 2006), 281. In other areas of Art 102 TFEU case law, conduct that is presumably lawful—eg above cost pricing—can only be unlawful "when it is coupled with a range of other exclusionary measures" or "where linked with other exclusionary practices". This approach was followed in Case T- T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969; Case T-112/05 *Akzo Nobel NV ea v Commission* [2007] ECR II-5049; Case T-30/89 *Hilti v Commission* [1991] ECR II-1439; Case C-333/94 *Tetra Pak v Commission* [1996] ECR I-5951.

[38] Case T-83/91 *Tetra Pak International SA v Commission* [1994] ECR II-755, para 151.

[39] Although timing may explain the difference.

[40] Therefore, conduct by an SEP owner aimed merely at "forcing the potential licensee into agreeing to potentially onerous licensing terms which it would otherwise not have agreed to" or forcing "a holder of non-SEPs to cross-license those non-SEPs to it in return for a licence of the SEPs"—the two possibilities raised as the main competitive concerns regarding SEPs in the Commission's *Google/Motorola* Decision (*supra* n 6)—is not sufficient alone to satisfy the *ITT Promedia* standard.

[41] In *AstraZeneca AB and AstraZeneca plc v Commission*, the Court talked of the abusive initiation of legal proceedings *"against a competitor*". See *AstraZeneca AB and AstraZeneca plc v Commission*, *supra* n 25, para 363.

practices of the dominant firm.[42] In *Van den Bergh Foods v Commission*, the Commission and the Court incriminated a dominant firm's contractual exclusivity agreements, yet never called into question the dominant firm's strategy of seeking injunctions in courts when such contracts were breached.[43]

The reasons behind such a restrictive test appear clear. Not only is access to the court a fundamental right protected by European law, but the courts themselves do not want to be denied the ability to rule on such matters due to administrative act.

3. Abusive "Anticompetitive Foreclosure"

A SEP holder who seeks an injunction attempts to ban the sale of infringing products on a given territory. In other words, he tries to take out products from a market. If those products are rival products, this may fall within the generic concept of "exclusionary abuse".[44] More precisely, injunction requests can potentially be looked at as a form of "non-price predation" strategies, together with abuse of government procedures, misuse of import relief legislation, excessive advertising, etc.[45] Like those strategies, requests for injunctions may lead to the outright or partial foreclosure of existing standards implementers. And threats of injunctions may put off potential standards implementers.[46]

Modern EU competition law outlaws unilateral conduct that results in "anticompetitive foreclosure".[47] In contrast, pro-competitive foreclosure—or foreclosure caused by competition on the merits—is given antitrust immunity.[48]

The law of anticompetitive foreclosure is set out in *Post Danmark*. This judgment follows the analysis that the Commission had previously articulated, and bound itself to follow, in its Guidance Paper. Both sources approach the issue under the rule of reason. On the one hand, anticompetitive effects must be established with evidence of foreclosure[49] and "consumer harm".[50] On the other hand, the dominant firm can invoke countervailing pro-competitive

[42] Commission Decision of 22 December 1987, IV/30.787 and 31.488—*Eurofix-Bauco v Hilti* [1988] OJ L65, 19–44.

[43] Case T-65/98 *Van den Bergh Foods v Commission* [2003] ECR II-4653.

[44] Guidance Paper, *supra* n 18.

[45] OECD, "Predatory Pricing" (1989), available at www.oecd.org/competition/abuse/2375661.pdf.

[46] They may renege on selling products if they anticipate judicial proceedings, removal orders and damages actions.

[47] *Ibid*, para 19: put differently, conduct that "impair[s] effective competition by foreclosing their competitors in an anticompetitive way".

[48] This approach was recently recalled by the CJEU in *Post Danmark*. Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, not yet published. This is to date the most authoritative precedent on anticompetitive foreclosure.

[49] Understood as a situation where "access of actual or potential competitors to supplies or markets is hampered or eliminated". See Guidance Paper, *supra* n 18, para 19

[50] This refers to a situation where the dominant firm "is likely to be in a position to profitably increase prices, to the detriment of consumers" or to "limi[t] quality or reduc[e]consumer

effects to rebut a finding of abuse. In such case, it must prove that its conduct is "objectively necessary" or yields "substantial efficiencies" which offset the harm imposed on consumers.[51]

Under the first limb of the rule of reason analysis, anticompetitive effects can be established if the conduct has led to the "actual" anticompetitive foreclosure of existing rivals or entrants.[52] But this can be done well before the appearance of exclusion in the market place. Article 102 TFEU will apply as soon as the impugned conduct is "likely to" lead to anticompetitive foreclosure.[53] Former Commissioner Kroes has colourfully captured the rationale of this policy: agencies "cannot resuscitate a corpse".[54] Enforcement should thus be set in motion early, after the occurrence of suspicious conduct but before the appearance of full-blown foreclosure effects (*ex post* conduct; *ex ante* effects).[55]

The above-mentioned press releases suggest that the Commission may follow an even more anticipative approach in relation to injunctions. The Commission takes issue not only with the "act" but also with the "threat" of seeking an injunction. This is reminiscent of the US "incipiency" doctrine. Under this approach, agencies can act even more preventively, to arrest anticompetitive

choice". The Guidance Paper also talks of an "adverse impact on consumer welfare". See Guidance Paper, *ibid*, para 19.

51 The *Post Danmark* case law does not talk of conduct that is "objectively necessary". It simply talks of efficiencies. Yet, previous case law and the Guidance Paper refer to conduct that is "objectively necessary". See Guidance Paper, *supra* n 18, para 28. In our view, the *Post Danmark* judgment has not invalidated this case law.

52 In our opinion, conduct that deters or has deterred the entry of potential competitors falls within the notion of actual anticompetitive foreclosure.

53 Those scenarios are not mutually exclusive. The Commission may establish that the dominant firm's conduct has both had, and will have, anticompetitive foreclosure effects. The term "liable" is often used as a synonym for "likely". EU agencies—unlike their US counterparts—predominantly bring allegations of abuse on grounds of "likely" anticompetitive foreclosure. See D De Smet, "The Diametrically Opposed Principles of US and EU Antitrust Policy" (2008) 29(6) *European Competition Law Review* 356, 360. They only test actual effects as corroborating evidence that the dominant firm's conduct is "likely" to lead to anticompetitive foreclosure. For a recent confirmation, see *AstraZeneca v Commission*, para 112: "although the practice of an undertaking in a dominant position cannot be characterised as abusive in the absence of any anti-competitive effects on the market, such an effect does not necessarily have to be concrete, and it is sufficient to demonstrate that there is a potential anti-competitive effect".

54 See N Kroes, "Exclusionary Abuses of Dominance—The European Commission's Enforcement Priorities", Fordham University Symposium, New York, 25 September 2008, SPEECH/08/457. Another, prosaic explanation for the attractiveness of the "likely" effects approach lies in the fact that empirical investigations of "actual" effects are painstaking. In contrast, the doctrine of incipiency offers a fast-track route to a finding of abuse. All the more so given the absence of a threshold of "likelihood" above which anticompetitive foreclosure are deemed material.

55 In our view, the "dead corpse" metaphor is absurd: a firm is neither "in" a market nor "out". Exit takes some time, so agencies can probably intervene before exit, yet rely on actual evidence of anticompetitive effects. In her speech, Commissioner Kroes actually recognised this, saying that [agencies] "miss many examples of consumer harm that weaken competitors, but do not kill them. Competitors may be wounded, confined to a small corner of the market, but not killed".

practices "in their incipiency and before consummation" (*ex ante* conduct; *ex ante* effects).[56] This approach remains untested in modern EU competition law.

4. "Willing Licensee" Test

Another option is to construe the act of seeking injunctions as an "independent form of abuse", and to review it under a novel legal standard that stands outside the exceptions set out above.[57] It is not uncommon for the EU judicature to identify new abuses. In the early *Continental Can v Commission* case, the Court of Justice departed from the wording of the Treaty, and held it abusive for a dominant firm to acquire a competitor.[58] In *Konkurrensverket v TeliaSonera Sverige AB*, it considered that a margin squeeze "constitute[s] an independent form of abuse distinct from that of refusal to supply".[59] And in *AstraZeneca v Commission*, it expanded the list of known abuses, by holding that submission of "objectively misleading" statements was an infringement of Article 102 TFEU.[60]

Against this background, an increasingly popular proposition is to view the seeking of injunctions for FRAND-pledged SEPs as a *sui generis* abuse, subject to a novel substantive standard.[61] In turn, the proposed test hinges on whether the injunction is sought against a "willing licensee". If the technology implementer is willing to take a licence, there is an unlawful abuse. In contrast, seeking injunctions against an "unwilling licensee" would remain lawful.

Several versions of the "willing licensee" standard exist. In Germany, where it was first introduced, the "willing licensee" test serves as a procedural defence against injunctions (i). The Commission, however, seems to be trying to recast it into a substantive competition law offense, subject to looser applicability conditions (ii). As noted, the CJEU has recently been asked to consider the validity and interpretation of the "willing licensee" test under Article 102 TFEU (iii).

[56] In other words, competition rules can catch conduct that is yet to be implemented. With this, the incipiency doctrine limits risks of type II enforcement errors ("false acquittals").

[57] In line with the analysis followed by ECJ in Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-00527, where it found margin squeeze to constitute set a new "independent form of abuse distinct from that of refusal to supply", and to set a new standard.

[58] Case C-6/72 *Europemballage Corporation and Continental Can Company Inc v Commission* [1973] ECR I-215. See also R Joliet, *Monopolization and Abuse of a Dominant Position—A Comparative Study of the American and European Approaches to the Control of Economic Power* (Martinus Nijhoff, 1970), 645, 681.

[59] *Konkurrensverket v TeliaSonera Sverige AB*, *supra* n 57.

[60] R Subiotto and D Little, "The Application of Art 102 TFEU by the European Commission and the European Courts" (2013) 4(3) *Journal of European Competition Law & Practice* 255, 257.

[61] Commission press release IP/12/1448, *supra* n 6.

(a) The German "Orange Book Standard" Test

In *Orange Book Standard*, the FSC held that a defendant sued for infringement by a patent holder can resist a claim for injunctive relief "by pleading that the latter abuses a dominant position" by "refu[sing] to conclude a patent license agreement".[62] In other words, defendants can put forward a "competition law defence" against an injunction.

Interestingly, an *Orange Book Standard* counterclaim does not lead to a definitive judicial determination that the request for an injunction is abusive. Rather, a successful *Orange Book Standard* defence means just that the adjudicating court is procedurally barred from granting the injunction, without ruling fully on the merits of the abuse counter-allegation. This procedural duty stems from the old Roman law principle *dolo petit qui petit quod statim redditurus est*: anyone who claims a benefit which will have to be returned immediately because the defendant has an appropriate counterclaim acts in bad faith. Thus, he shall receive no assistance from the enforcement system.[63]

Courts faced with an *Orange Book Standard* defence must nonetheless establish a prima facie abuse.[64] According to the FSC, a presumptive abuse will be found if the firm against which an injunction is sought is a "willing licensee". For this, two conditions must be met.[65] First, the defendant must have made the SEP holder "an unconditional offer to conclude a licence agreement which the patent proprietor cannot reject".[66] IP practitioners often refer to this as the "godfather" condition. This is because the threshold at which an offer cannot be rejected is high. The defendant can surely offer a fee that he considers "reasonable". To be on the safe side, however, he may propose to conclude a licence agreement for a fee to be later determined by the patentee. Moreover, the offer must be unconditional. An offer conditional on a finding that the asserted patent has been infringed is not sufficient.

Secondly, the potential licensee must have "compl[ied] with the obligations on which the use of the licensed subject matter depends". In other words, as soon as he makes the offer, the defendant must behave as if he was a licensee. To that end, he must "pay the royalties resulting from the contract or ensure

[62] *Orange Book Standard* judgment, *supra* n 5.

[63] This principle is also proximate to the principle *ex turpo causa non oritur action*, which states that "no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act". See *Tinsley v Milligan* [1994] 1 AC 340, 371–72.

[64] *Orange Book Standard* judgment, *supra* n 5: "the enforcement of the claim for injunctive relief is therefore just as prohibited as the refusal to conclude the license agreements that would annihilate the claim for injunctive relief".

[65] In addition to this, it must also be proved that the firm seeking the injunction occupies a dominant position by virtue of the insertion of its patents into a standard.

[66] *Ibid*.

their payment" in an escrow.[67] He must also provide regular accounting of those payments.

A critical feature of *Orange Book Standard* is that the licensee's willingness is not merely inferred from explicit statements. Acts of fulfilment are needed: a "serious" offer, and subsequent conduct in the form of anticipative payments. For those reasons, the *Orange Book Standard* test is often deemed "patentee friendly"—and the facts tend to prove this right. To date, successful *Orange Book Standard* defences have remained scant.[68]

In *Orange Book Standard*, the FSC appears to have applied national German competition law (although this remains somewhat unclear). Doubts thus remain whether the "willing licensee" test applies equally to competition law defences based on Article 102 TFEU. Similarly, there was no FRAND commitment in the *Orange Book Standard* case. It is thus open to question whether the demanding conditions of the "willing licensee" test should be relaxed in the presence of FRAND commitments.

(b) The Commission's Test

In the press release and accompanying memorandum in the *Samsung* case, the Commission stated that, in "exceptional circumstances", the act of "seeking an injunction for SEPs" may constitute an abuse of a dominant position:[69]

> "The seeking of an injunction for SEPs can constitute an abuse of a dominant position in the exceptional circumstances of this case—where the holder of a SEP has given a commitment to license these patents on FRAND terms and where the company against which an injunction is sought is willing to negotiate a FRAND licence".[70]

In the Commission's view, two conditions are necessary to trigger the application of Article 102 TFEU. The first condition is that a FRAND commitment

67 *Ibid.*

68 The defence has been successful in only two cases: District Court of Mannheim, *Philips v SonyEricsson*, 27 May 2011, Doc No 7 O 65/10; Court of Appeal in Karlsruhe, *Motorola v Apple*, 27 February 2012, Doc No 6 U 136/11.

69 The Commission's test is more restrictive of the rights of SEP holders than the FSC judgment. Under the *Orange Book Standard* rule, there was no adverse finding of competition infringement by the applicant.

70 European Commission's memo, "Samsung—Enforcement of ETSI Standards Essential Patents (SEPs)", 21 December 2012, available at europa.eu/rapid/press-release_MEMO-12-1021_en.htm, where the notion of willing and unwilling licensee is key: "Today's Statement of Objections sets out the Commission's preliminary view that . . . where a commitment to license SEPs on FRAND terms has been given by Samsung, and where a potential licensee, in this case Apple, has shown itself to be willing to negotiate a FRAND licence for the SEPs, then recourse to injunctions harms competition". In contrast, the Commission's says: "The preliminary view expressed in today's Statement of Objections does not question the availability of injunctive relief for SEP holders outside the specific circumstances present in this case, for example in the case of unwilling licensees".

must have been given by the SEP holder.[71] The second condition is that the unlicensed implementer must be "willing to negotiate a FRAND licence".

The second condition is clearly inspired by *Orange Book Standard*. The reading of the press release and accompanying memorandum issued in the *Motorola Mobility* case confirm this. In those documents, the Commission states that "the acceptance of binding third party determination for the terms of a FRAND license" in case of disagreement is a sign that the potential licensee is willing to enter into a FRAND licence. Also, the Commission states that the fact that a potential licensee remains "passive and unresponsive to a request to enter in licensing negotiations or is found to employ clear delaying tactics cannot be generally considered as 'willing'". This is more or less in line with the "acts of fulfillment" approach of *Orange Book Standard*.

However, other Commission pronouncements suggest a more extensive interpretation of the "willing licensee" concept. For instance, the Commission considers that a potential licensee who rejects an offer of a licensing agreement that contains "no challenge" clauses cannot be deemed "unwilling".[72] Similarly, the Commission seems ready to accept that a potential licensee who challenges the validity of a patent (eg in patent opposition procedures) or its essentiality (eg in the context of the SSO) is not necessarily "unwilling". Those statements stray from the FSC's stricter proxy.[73]

Moreover, unlike the FSC, the Commission seems to require few "acts of fulfillment". In the 2012 *Google/Motorola Mobility* merger decision, it relied on direct, documentary evidence to establish the willingness (or unwillingness) of a licensee. On the facts, the Commission reviewed internal documents from Google, and concluded that the SEP holder was a willing licensor.[74] This again departs from *Orange Book Standard*, where "willingness" is established, on the basis of the exteriorised conduct of the licensee.

[71] In the German case, the competition law defence appeared to be prima facie applicable to all patents, including non-essential ones, and regardless of the existence of a FRAND commitment. The Commission seems only concerned with FRAND cases. See Commission's memo, "Samsung—Enforcement of ETSI Standards Essential Patents (SEPs)", *ibid*: "What is the relevance of the fact that Apple first sought injunctions against Samsung?"; "Apple launched injunctions against Samsung on the basis of non-SEPs, ie patents for which no commitment to license on FRAND terms had been given in a standardisation context. The Commission's case derives from the specific standardisation context and the associated commitment to license SEPs on FRAND terms".

[72] This is in marked contrast with the FSC. Under the *Orange Book Standard* judgment, a potential licensee cannot be considered "willing" if he introduces nullity actions to invalidate the patent or if he challenges its essentiality.

[73] M-Lex, 6 May 2013 ("these conditions are generally seen as onerous on the defendant").

[74] Commission decision, *Google/Motorola Mobility*, *supra* n 6, para 150.

(c) A CJEU Test?

The Commission's statements in the *Samsung* and *Motorola* investigations have created great uncertainty. Given the manifest inconsistency between the test apparently proposed by the Commission and *Orange Book Standard*,[75] the District Court of Düsseldorf has sent a preliminary reference to the CJEU in the context of the ongoing *Huaweï v ZTE* case.[76] The Düsseldorf court asks five questions to the CJEU, all of which relate to the interpretation of Article 102 TFEU.

Despite the referring court's doubts over the practicability of the "willing licensee" test—and its manifest preference for a "balance of interests" approach—four of the questions concern the requirements necessary under Article 102 TFEU to consider that a licensee is "willing".[77] For instance, the referring court queries whether the mere fact that the infringer declares himself "willing" renders the request for an injunction abusive. In the alternative, the referring court asks whether the licensee's willingness must spring from concrete, specific acts: eg a binding offer by the defendant, payments of royalties in an escrow.[78]

There has been speculation on the motives that prompted the Düsseldorf court to question the CJEU instead of the Commission under Article 15 of Regulation 1/2003.[79] Some informally believe that the German court seeks to thwart the Commission's attempts to craft a test of abuse looser than the *Orange Book Standard*, and in turn to prompt the CJEU to "standardize", or "Europeanize", the German legal standard.[80] The wording of the questions posed to the

[75] www.fosspatents.com/2013/03/german-court-refers-huawei-zte-standard.html: the German court

> "interpreted the European Commission's public statements on the SO in the Samsung case as an indication that Brussels appears to be more skeptical of SEP-based injunctions than German courts have been in recent years. The Düsseldorf court sees a need for clarification in order to ensure the consistency between its own decisions (under the German Orange-Book-Standard framework) and evolving EU-level case law".

[76] Case T-170/13 *Huawei Technologies*, Request for preliminary ruling.

[77] Summary of the request for a preliminary ruling—Case C-170/13, *supra* n 9, paras 21–22:

> "It follows that a reasonable and fair balance must be struck between interests, taking into account all the parties' interests that merit protection and ultimately leading to both sides having a negotiating position on more or less equal terms. It appears doubtful whether such a balance is possible if the only criterion is the infringer's willingness to negotiate . . ."

[78] The questions also seek to elicit an answer to the question whether for a binding offer to be appropriate, it must cover all contractual terms, or only a few of them. A final question is whether the solutions applicable to injunctions (as possible abuses of dominance) also apply, and bar other remedies, besides injunctions (recall, damages, etc).

[79] Art 15 of Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articless 81 and 82 of the Treaty, OJ L1, 4 January 2003, 1–25.

[80] The preliminary reference has not brought Commission proceedings to a halt. The Commission has said in a press release that it would "fully take account" of any guidance provided by the Court. But far from staying its investigations pending the CJEU judgment, the Commission

EU upper court appears to confirm this. It borrows heavily from *Orange Book Standard*, as if the referring court was trying to steer the CJEU towards the concepts outlined by the FSC.

5. Abusive "Bargaining"

The conduct of SEP owners seeking injunctions may also be looked at through more exotic theories of antitrust liability. Mariniello has proposed the following theory of abusive bargaining:

> "The use of injunction could be deemed anticompetitive if it turns out that the adoption of the standard altered the balance of bargaining powers in favour of the player seeking injunction relief after having tried to charge a price which is above what it would have been able to charge if the adoption of the standard would not have altered the balance of bargaining powers".[81]

The language is complex, the idea simple. Having one's patents incorporated in a standard confers leverage. Unless he possesses *ex ante* a truly unique technology, any patentee whose invention is embedded in a standard benefits from increased bargaining power *ex post* if the standard avers to be a success. Filing for injunction, or threatening to do so, would be just a means to exercise that leverage and extract high fees from prospective licensees. This is allegedly abusive.

Mariniello's theory is innovative. Instead of pursuing the act of charging unfair licensing fees for SEPs—assessing unfair pricing is notoriously complex—he proposes that liability be attached to the earlier use of injunctions (or threats thereof) as a bargaining tactic to extract "unfair prices" *ex post*, and this regardless of the actual level of the licensing fees.[82] In his opinion, Article 102(a) TFEU, which prohibits "unfair pricing", provides a legal basis to that end.[83]

Mariniello's theory is also self-restrained. In his view, antitrust scrutiny should be limited to cases where the patent owner who requests an injunction has been "empowered" with "significant additional bargaining power" after the

keeps investigating those cases, including by sending SOs to suspected companies or entering into settlement talks. The Commission will likely intervene before the CJEU.

81 M Mariniello, "European Antitrust Control and Standard Setting", Bruegel Working Paper, 2013/01, 16.

82 In other words, the idea is that SEP holders use threats of injunctions to force firms to pay more. This theory can be traced back to M Lemley and C Shapiro, "Patent Holdup and Royalty Stacking" (2007) 85 *Texas Law Review*; or C Shapiro, "Injunctions, Hold-Up, and Patent Royalties" (2010) 12(2) *American Law and Economics Review* 27.

83 See, in the same sense, LH Röller, "Exploitative Abuses" in C-D Ehlermann and M Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing) (talking of "gap" cases); M Brenning, Electronic Newsletter of the Intellectual Property Committee, ABA Section of Antitrust Law, 3 July 2002, available at www.abanet.org/antitrust/committees/intell_property/july3.html.

adoption of a standard. To test this, he suggests "identifying the increase in market power and establishing the correct competitive counterfactual".[84] This can arguably be done by reference to the *ex ante* setting, ie before standardisation. If the technology was not unique *ex ante* (eg competing technologies existed), then its inclusion in a standard has magnified the patentee's bargaining position, and scrutiny under Article 102 TFEU is warranted. In contrast, if the technology was "already recognized ex-ante as the only truly viable technology for the industry, the adoption of the standard might not lend any significant additional market power to patent holders", and there would be no Article 102 TFEU concerns.[85] According to Mariniello, antitrust agencies are perfectly able to determine whether there has been an increase in bargaining power due to the adoption of the standard. To that end, they should use their broad powers of inquiry to review "the internal documentation and correspondence of companies before, during and after the adoption of the standard".[86]

A significant feature of Mariniello's test is that it bypasses the vexing issue of whether the seeking of an injunction is a violation of a FRAND commitment. In his view, the sole relevant issue is whether the patentee enjoys incremental bargaining power as a result of standardisation. If this is "identified, antitrust scrutiny should be warranted, regardless of the existence of FRAND commitments".[87]

Another important feature is that Mariniello's test requires the threat of an injunction to be a credible threat, sufficient to significantly affect the bargaining power of the parties. As a result, the extent to which SEP injunctions are granted and enforced is a critical element to the test.[88]

C. Methodology for the Selection of a Test of Abuse under Article 102 TFEU

Having described the various legal standards being proposed, and whilst agencies and courts in Europe mull their options, this section proposes a criterion for the selection of the test under which seeking, or threatening to seek, injunctions for SEPs covered by a FRAND commitment should be examined.

[84] Mariniello, *supra* n 81. He concedes that there might be additional conditions: "Additional conditions can be conceived of to identify when the bargaining power is effectively and significantly enhanced by the adoption of the standard".

[85] This solution allegedly preserves the incentives to innovate of, and rewards for, those that marketed successful technologies before standardization.

[86] See Mariniello, *supra* n 81,15.

[87] *Ibid*, 16.

[88] See G Langus, V Lipatov and D Neven, "Standard Essential Patents: Who Is Really Holding Up (and When)?", mimeo, available at repec.graduateinstitute.ch/pdfs/Working_papers/HEIDWP04-2013.pdf, suggesting that injunctions may not be often granted.

1. "Consistency" as a Selection Rule

There is no universally accepted rule of selection when several tests of abuse are available. The principles applied by the EU courts to choose amongst a variety of potentially applicable standards are not clearly discernible or stated explicitly. With rare exceptions,[89] the EU courts seem to be path dependent. In most appeals cases, the EU judges uphold or reject the test applied by the Commission in the decision under appeal, or the alternative standard(s) proposed by the appealing party. In preliminary reference cases, the deference to the Commission's and the parties arguments may be less obvious, though, in areas like competition law, the Commission will typically intervene, and occupies a prominent place in the intellectual debate before the CJEU.

Standard selection is thus primarily determined on a case-by-case basis by the Commission within the flexible perimeter of judicial precedent set by the CJEU. As in other areas of EU law in which the Commission is in the driving seat, this process gives ample room to scholarly debate between academics and practitioners (and possibly lobbyists).[90]

In the scholarship, a wealth of conflicting views exists on what should be considered a "good", and conversely a "bad", substantive test.[91] As a crude proxy, economists typically praise standards that limit decisional errors and promote economic welfare.[92] In a recent op-ed, Padilla relies on such arguments to criticize "a per se rule against preliminary injunctions for SEP owners".[93] In contrast, many lawyers prefer tests of abuse that privilege legal certainty.[94] For instance, former President of the GC Bo Vesterdof resorts to legal certainty arguments to contest the application of the "abusive refusal to supply" test to injunctions and to support the "abusive litigation" standard.[95]

But this is not all. Economists and lawyers often disagree amongst themselves. Competition economists are split on whether competition policy is best served by minimising decisional errors of type I (false convictions, or over enforcement)

[89] In preliminary rulings, notably.

[90] The dozens of articles, position papers, policy briefs, newsletters, conferences, seminars and workshops devoted to injunctions for FRAND-encumbered SEPs bear testimony to this.

[91] See, eg, using the expression, E Barbier de la Serre, "Competition Law Cases before the EU Courts: is the Well Running Dry" in M Merola and J Derenne (eds), *The Role of the Court of Justice of the European Union in Competition Law Cases* (Bruylant, 2012).

[92] D Geradin and N Petit, "Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment" in Merola and Derenne, *ibid*, 21.

[93] Because that risks "chill rather than foster innovation". See J Padilla, "Standards, Essential Patents and Antitrust" (2012) 3(6) *Journal of European Competition Law and Practice* 509.

[94] *Ibid*.

[95] B Vesterdorf, "Article 82 EC: Where Do We Stand After the Microsoft Judgment?", speech delivered at the ICC Annual Competition Law and Policy Lecture, 12 March 2008 (arguing that the application of the refusal to supply test must remain "exceptional". It thus cannot apply to "whole sectors of industry" covered by FRAND commitments. This would be "odd". Vesterdorf is in favour of the second test. He argues that competition rules must not curtail the "fundamental right of access to court").

or type II (false acquittals, or under enforcement). Some believe that agencies should adopt new legal standards to avoid type II errors. On the seeking of injunctions for SEPs, for instance, the point may be made that the *Magill/IMS Health* test is unduly permissive, and too patentee-friendly. Others may argue that agencies should develop new legal standards to avoid type I errors. On FRAND licensing, for instance, the *United Brands* standard has been described as unduly prohibitive and too licensee-friendly.[96]

Similarly, competition lawyers disagree on whether legal certainty is promoted by "forms-based" or "effects-based" standards of abuse. For instance, Ortiz Blanco and Lamadrid criticise the "more economic", effects-based approach as a source of legal uncertainty.[97] At the other end, Marsden considers that the more economic approach "allows EU competition law to better accord with the rule of law".[98]

Those divergences are inevitable. They are the result of educational, ideological, psychological, social and other subjective biases. More specifically, antitrust lawyers and economists often (and justifiably) support tests that are aligned with their clients' interests (which may coincide with the public interest). And antitrust officials often support tests that promote the interests of their agency (which is often deemed to coincide with the public interest).[99]

This paper submits that the choice of a legal standard can and should be rendered objective by resorting to a selection rule based on the notion of "consistency". The idea is to select standards that are coherent when applied to related factual, economic and legal settings,[100] and to apply different standards to scenarios that are unrelated from a factual, economic and legal standpoint.

[96] D Geradin, "Pricing Abuses by Essential Patent Holders in a Standard-Setting Context: A View from Europe" (July 2008), available at SSRN: ssrn.com/abstract=1174922

[97] L Ortiz Blanco and A Lamadrid De Pablo, "EU Competition Law Enforcement Elements for a Discussion on Effectiveness and Uniformity" in *Fordham 38th Conference on International Antitrust Law and Policy* (2011).

[98] P Marsden, "Checks and Balances: European Competition Law and the Rule of Law" (2013) 22(1) *Loyola Consumer Law Review*, special issue: The Antitrust Marathon: Antitrust and the Rule of Law.

[99] Though this cannot be taken for granted!

[100] P Craig and G De Burca, *The Evolution of EU Law* (Oxford University Press, 2nd edn, 2011), 733. In competition law, the concept of consistency is not entirely unknown. Recital 21 of Regulation 1/2003 talks of the necessary "consistency in the application of the competition rule". This recital (and Art 16 of Regulation 1/2003) is derived from Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, where the Court held that national courts "cannot" take decisions "running counter" to previous Commission decisions on similar agreements or practices (see para 52). The concept of consistency also applies in state aid law, to assess the legality of certain types of fiscal advantages. See Commission notice on the application of the state aid rules to measures relating to direct business taxation, [1998] OJ C384/3. Finally, the Court sometimes refers to consistency when scrutinising the judicial review carried out by the GC. See, eg Case C-386/10 P *Chalkor AE Epexergasias Metallon v European Commission*, not yet published, para 48; Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 *Aalborg Portland A/S a o v Commission of the European Communities* [2004] ECR I-123, para 133.

For instance, if contractual exclusivity clauses are immune from Article 101 prohibition when they foreclose less than 30% of a market, then equivalent exoneration standards should apply for the assessment of fidelity rebates, including under Article 102 TFEU.[101] Consistency in decision-making is the offshoot of the general principle of legitimate expectations, upheld by the Court in all areas of EU law.

This proposition is based on common sense. Unlike other possible selection rules (eg innovation, efficiency, welfare, predictability, fairness, economic freedom), consistency is a dispassionate, agnostic notion. It leaves little space for ideology, conflicts of interests, and other sources of bias and prejudice.

Moreover, it is practical. Consistency is a flexible concept, respectful of the necessary discretionary power bestowed upon courts and agencies. Several "consistent" legal standards may compete for the regulation of a given course of unilateral conduct. In such settings, agencies and courts, with the assistance of the parties, keep a margin of manoeuvre to set what they deem the most adequate standard.[102]

Finally, the concept of consistency is not entirely unfamiliar to EU lawyers. As said above, it is a derivative of general principles of EU law, such as the principle of legal certainty and the rule of protection of legitimate expectations.

The following section seeks to flesh out the meaning of the notion of "consistency" and explore the ramifications of its application as a rule guiding the selection of the appropriate legal standard.

2. Various Facets of the Notion of "Consistency"

Four best decisional practices can be derived from our proposed notion of "consistency".[103]

(a) Internal Consistency

A first best practice is to select a test consistent with existing law under Article 102 TFEU. New cases should be treated on the basis of existing, positive tests of abuse, rather than under new ones. The rule is pragmatic. Existing standards are by definition lawful, practicable and predictable. New standards are not.

[101] Consistency is close to the notions of conformity and compatibility.

[102] Put differently, the concept of consistency leaves room for debate. It does not necessarily dictate a given standard of abuse, but acts as a filter which narrows the range of options available to the Court or agency.

[103] This in no way suggests that the Court does not test, under its current judicial practice, the "consistency" of competition law standards. It probably does so, although not explicitly, through its own methods, or under the authority of other related yet distinct principles, such as the principle of legal certainty, or the principle of uniformity of EU law.

If, however, agencies and courts are intent on selecting a new standard of abuse, an internally "consistent" approach requires that they convincingly distinguish the new case from older ones, or explicitly reverse the old legal standard (and give cogent reasons for such reversal especially where they seek to avoid existing limiting standards).[104]

(b) Transversal Consistency

A second best practice is to select a test of abuse consistent with the legal principles adopted in the other areas of EU competition law, ie Article 101 and the EU Merger Regulation (EUMR). Despite their distinct scope of application, Article 101 TFEU, Article 102 TFEU and the EUMR share a unity of purpose.[105] They seek to ensure "that competition is not distorted"[106] through the exploitation of significant market power (also referred to as "power over price")

[104] In practice, the quest for "internal consistency" is not easy. The *Konkurrensverket v TeliaSonera Sverige AB* judgment illustrates the inherent difficulties. See *Konkurrensverket v TeliaSonera Sverige AB*, *supra* n 57. In this ruling, the Court subjected margin squeeze cases to a new test distinct from, and less stringent than, the traditional standard applicable to refusal to supply cases. However, the reasons advanced to distinguish a margin squeeze from a refusal to supply fail to convince. In support of its new legal standard, the Court made the extraordinary statement that categorizing a margin squeeze as a refusal to supply "would unduly reduce the effectiveness of Article 102 TFEU". See para 58. Of course, this reasoning is utterly flawed, for any legal precedent which imposes substantive requirements *ex hypothesi* restricts the "bite", the "teeth" and the "catch zone" of Art 102 TFEU. This notwithstanding, the Court held that a margin squeeze "constitute[s] an independent form of abuse distinct from that of refusal to supply". See para 56. According to the Court, it is a form of abuse that imposes "unfair prices" on customers within the meaning of Art 102(a) TFEU. *Ibid*, para 25:

> "As regards the abusive nature of pricing practices such as those in the main proceedings, it must be noted that subparagraph (a) of the second paragraph of Art 102 TFEU expressly prohibits a dominant undertaking from directly or indirectly imposing unfair prices."

[105] The Court actually recognized this in *Continental Can* insofar as Arts 101 and 102 are concerned. See *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, para 25:

> "Articles 85 and 86 seek to achieve the same aim on different levels, viz the maintenance of effective competition within the common market. The restraint of competition which is prohibited if it is the result of behaviour falling under article 85, cannot become permissible by the fact that such behaviour succeeds under the influence of a dominant undertaking and results in the merger of the undertakings concerned."

[106] Protocol No 27 on the internal market and competition, [2008] OJ C115, 309:

> "The High Contracting Parties, considering that the internal market as set out in Art 3 of the Treaty on European Union includes a system ensuring that competition is not distorted, have agreed that to this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Art 352 of the Treaty on the Functioning of the European Union. This protocol shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union."

The existence of distinct provisions simply seeks to make sure that no form of conduct with anti-competitive effects goes unpunished.

or the foreclosure of competitors (also referred to as "power to exclude").[107] A certain degree of homogeneity and convergence is thus warranted in the analysis of anticompetitive agreements, unilateral practices and concentrations.[108]

(c) Constitutional Consistency

A third best practice is to select substantive standards that impinge on "constitutional" EU law principles minimally. Those include general principles of EU law (eg procedural autonomy, duty of loyal cooperation, subsidiarity), the EU Charter of Fundamental Rights (eg right to property, right to a fair trial), core EU values (eg market integration) and cross-sectional Treaty clauses (eg environmental protection, public health, cultural diversity).

In our opinion, the choice of a legal standard should not hinge primarily on this factor. Yet constitutional consistency can serve as a tie-breaker criterion when several standards remain on the table for the regulation of unilateral conduct.[109]

(d) Economic Consistency

Finally, the chosen legal standard should be economically consistent. In layman's terms, this means that courts and agencies should select abuse standards that "make sense" from an economic standpoint. They may even go as far as to draw inspiration from industrial economics when crafting new legal standards.[110]

Of course, industrial economics are not a very cohesive field. There is a hodgepodge of microeconomic theories, many of which conflict with one another.[111] More than one test of abuse may thus be economically consistent.

[107] On those notions, see T Krattenmaker, R Lande and S Salop, "Monopoly Power and Market Power in Antitrust Law" (1987) 76 *Georgetown Law Journal* 241.

[108] L Ortiz Blanco, *Market Power in EU Antitrust Law* (Hart Publishing, 2012). The author, for instance, observes that there is no valid reason to differentiate market power thresholds in the various areas of EU competition law (282). In the case law, the *Post Danmark* ruling brings a good example of a transversally consistent standard of abuse. Here, the Court introduced a possibility of exemption within Art 102 TFEU, tailored along the wording of Art 101(3) TFEU and aligned with the spirit of Recital 29 of the EUMR.

[109] The case law on abusive refusals to supply is a clear example of constitutional consistency. Since *Brönner* and *Magill*, the Court's case law has repeatedly held that obligations to supply can only be ordered in "exceptional circumstances". Similarly, the Guidance Paper states that "intervention on competition law grounds requires *careful consideration* where the application of Art [102] TFEU would lead to the imposition of an obligation to supply on the dominant undertaking" (emphasis added). This is because, as Advocate General Jacobs stated in *Brönner*, "the right to choose one's trading partners and freely to dispose of one's property are generally recognized principles in the laws of the member states, in some cases with constitutional status".

[110] As Ortiz Blanco and Lamadrid observe: "the design of legal rules must necessarily be the fruit of the efforts of a hybrid community in which lawyers and economists should understand each other's disciplines". See L Ortiz Blanco and A Lamadrid, "Expert Economic Evidence and Effects-Based Assessments in Competition Law Cases" in Merola and Derenne, *supra* n 91, 308.

[111] In the field of predatory pricing, for instance, economists remain divided on whether proof of recoupment is necessary to establish an unlawful abuse.

Conversely, there may always be a handy economic theory to rebut a proposed test of abuse on grounds of inconsistency.

This notwithstanding, several principles of industrial economics are robust enough to inform the selection of the appropriate test of abuse.[112] Most economists, for instance, concur that prices below marginal costs do not make sense unless they aim to exclude rivals; that industries with high fixed costs yield increasing returns to scale; that the marginal cost of intangible products is proximate to zero; that price discrimination is efficient, etc.[113]

Certainly, economic principles often have exceptions; but so too do legal principles. This is thus no basis to throw the baby out with the bathwater, and discard altogether the use of economics in the design of legal rules.

D. Assessment of the Available Tests of Abuse under the Selection Rule

This section applies the analytical framework elaborated in Section C, ie the guiding principle of "consistency", to the five potential tests of abuse identified in Section B.

1. Internal Consistency

Reviewing requests for injunctions (or threats of injunctions) under the abusive refusal to supply, abusive litigation or anticompetitive foreclosure standards meets the requirement of internal consistency, for those tests are rooted in established Article 102 TFEU case law. In contrast, novel standards generate risks of internal inconsistency. The following paragraphs seek to identify them.

(a) The "Abusive Bargaining" Test

The theory of "abusive bargaining" is not supported by any judicial precedent. But what really makes this theory internally inconsistent is that it violates general principles of the law on abuse of dominance. Let us focus for a minute on Mariniello's test: when a SEP owner seeks (or threatens to seek) injunctions in court, he abusively uses his (standard-granted) bargaining power so as to

112 Meaning they are consensual and not too contingent on specific assumptions. See R Posner, *Antitrust Law* (The University of Chicago Press, 2nd edn, 2001), preface, IX: "Almost everyone professionally involved in antitrust today . . . agrees on the essential tenets of economic theory".

113 For instance, the *AKZO*, *Tetra Pak II* and *Post Danmark* judgments rightly apply price-cost tests to the assessment of abusive predation (regardless of the actual cost benchmark retained: the average variable cost in *AKZO* and *Tetra Pak II*; the average incremental costs in *Post Danmark*, etc). The Court also reached an economically consistent ruling in the *Laurent Piau* case, where it held that the proof of collective dominance hinges on the analytical framework established by non-cooperative game theory. Case T-193/02 *Laurent Piau v Commission* [2005] ECR. II-2.

extract excessive fees from licensees. This is arguably abusive because "unfair prices" are unlawful under Article 102 TFEU.[114]

Three fatal internal inconsistencies undermine Mariniello's proposition. First, under the case law on unlawful exploitation, what is abusive is the practice of charging "unfair prices" itself, not the practice(s) that operationally allows a dominant firm to charging such "unfair prices". In the leading *United Brands* case, the Court took issue with the dominant firm's pricing levels. It did not, however, condemn the practices that allowed such high prices to be charged as abusive (despite evidence of anticompetitive restrictions on "arbitrage").[115] If one were to follow the test proposed by Mariniello, the catchment area of Article 102 TFEU would be broadened to embrace a whole new type of practices, ie those that facilitate abuse. This would also relieve agencies and courts from the burden of proving that an "unfair" price has been charged.

Secondly, the plain wording of Article 102 TFEU makes clear that the perpetrator of the abuse must be the dominant firm. However, Mariniello seems to suggest that Article 102 TFEU could be used to sanction a dominant firm for the conduct of third parties. In his view, the key criterion for a finding of abuse is the increment in bargaining power caused by the decision to include a patent in a standard. But this decision does not belong to the dominant firm; rather, it is a joint decision of the SSO members, and it is made following specific procedures. Unless the text of Article 102 TFEU is amended to sanction dominant firms for the abusive conduct of third parties, one fails to see how Mariniello's test could apply.

A possibility would be to argue that the SSO participants jointly occupy a dominant position and that the SEP-holder would individually abuse it (against the other participants). But the doctrine of collective dominance remains an academic invention, devoid of practical implementation under Article 102 TFEU.[116] Moreover, in *EMC/European Cement Producers*, the Commission held that participation in standard setting was "not sufficient to prove the existence of a collective dominant position".[117] Finally, even if a collective dominant position could be identified, Mariniello's proposed theory would lead to an odd

[114] Art 102(a) declares unlawful the act of "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions".

[115] Case C-27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] 207.

[116] Much to our dismay, as we have argued elsewhere, see N Petit, "The Oligopoly Problem in EU Competition Law" in I Liannos and D Geradin (eds), *Research Handbook in European Competition Law* (Edward Elgar, 2013), 259.

[117] Commission decision, COMP/F-2/38.401, *European Cement Producers*, not yet reported, para 120, "The mere fact that Portland cement producers are members of Cembureau and that their representatives take part in meetings of the Technical Committee of CEN is not sufficient in order"; decision confirmed in Case T-432/05 *EMC Development AB v Commission* [2010] ECR II-1629, para 77. More is needed to prove the existence of a collective dominant position. In particular, proof that the standard participants belong to a tacitly collusive oligopoly.

situation: it would attach antitrust liability to conduct directed against dominant firms.

Thirdly, the Commission has clearly expressed its reluctance to pursue exploitation cases in its Guidance Paper on Enforcement Priorities in applying 102 TFEU, which focuses on exclusionary conduct only.[118] Applying Mariniello's test would thus lead to the additional internal inconsistency of contradicting the policy expressed in the Guidance Paper.[119]

(b) The "Willing Licensee" Test

The "willing licensee" test of abuse sketched by the Commission in recent press releases and informal documents remains unclear. In our view, this test can be construed in two ways. Each of them is internally inconsistent.

(i) The Breach of Contract Theory

A first interpretation is that a FRAND commitment imposes a contractual obligation to license upon the patent holder, and that the breach of this contractual duty—through the seeking of injunctions—would be abusive.[120]

In EU competition law, no judgment ever held that a breach of contract can, in and of itself, be abusive. This is not surprising. Otherwise, countless contractual disputes devoid of anticompetitive effects would fall within the scope of antitrust law (a type I error). More fundamentally, the CJEU is unlikely to rule that a FRAND pledge gives rise to a contract. Contract law falls generally under the jurisdiction of the Member States, and the EU judicature is generally wary of encroaching upon such jurisdiction.

That said, even in the absence of a contractual duty to license, it could still be argued that a FRAND commitment entails an antitrust duty to license. EU competition officials say just this when they contend—though without much textual or theological justification—that FRAND has "antitrust content".[121]

In positive case law, a duty to license can only occur in "exceptional circumstances", as set out by the EU Courts in *Magill/IMS Health*. To apply the "willing licensee" test, the Commission must thus establish the four conditions for an abusive refusal to supply set out in those rulings.[122]

[118] Guidance Paper, *supra* n 18, para 7.

[119] The limited number of cases where the Commission has brought proceedings against conduct deemed exploitative appear to us to have been justified by wholly exceptional circumstances, such as where there is alleged evidence of deception (as in the *Rambus* case; see K Blind *et al*, "Study on the Interplay between Standards and Intellectual Property Rights (IPRs)", 2011, 24, available at ec.europa.eu/enterprise/policies/european-standards/files/standards_policy/ipr-workshop/ipr_study_final_report_en.pdf) or where the dominant firm had promised to charge no price at all (as in the *Standard & Poor's* case).

[120] If, however, the other party is "unwilling", the contract falls apart as a whole.

[121] N Banasevic, oral remarks at GCR Live conference, Brussels 24 May 2013. There is no evidence in the legislative history that FRAND ever had an antitrust function.

[122] On this, however, see our discussion below.

This, however, is a heavy burden to discharge. Emanuelson has therefore proposed applying a truncated refusal to supply test, which would trump the four conditions of *Magill/IMS Health*. Under this approach, the making of a FRAND commitment in a standard-setting context would by its very nature give rise to "exceptional circumstances".[123] In turn, SEP holders can arguably be compelled, under Article 102 TFEU, to grant licences as soon as they give a FRAND commitment. By parity of reasoning, they can also be barred from seeking injunctions in court.[124] With distinct arguments, Körber reaches a similar conclusion. In cases of FRAND-pledged SEPs, the above four conditions would, in practice, always be fulfilled.[125]

To be sure, it could be argued that the EU case law does not rule out findings of the existence of "exceptional circumstances" where the four conditions set out in *Magill/IMS Health* are not met.[126] It would simply hold

[123] See A Emanuelson, "Standardisation Agreements in the Context of the New Horizontal Guidelines" (2012) 2 *European Competition Law Review* 75:

> "The argument has sometimes been raised that competition law could not intervene against prohibitive pricing of IPR, or that at least competition law could not intervene absent the presence of "exceptional circumstances" such as those required for a refusal to license IPR to be abusive. First, the case law of the European courts would not seem to require the presence of such exceptional circumstances absent the very specific situation of a refusal to license. Secondly, it is submitted that, should such "exceptional circumstances" be required, competition law intervention in the context of IPR could be justified by other circumstances than those relevant for a refusal to supply case. For example, in the Rambus case, the Commission's preliminary view was that without its "patent ambush", Rambus would not have been able to charge the royalty rates in question and that, in those very specific (or exceptional) circumstances, merely exercising its patent rights could be abusive. *It could also be argued that the mere fact of having given a FRAND commitment (which implies a willingness to license) could also qualify as an "exceptional circumstance*" (emphasis added).

It should be noted that the author is a Commission official.

[124] *Ibid.*

[125] T Körber, *Standard Essential Patents, FRAND Commitments and Competition Law* (Nomos, 2013), 216.

[126] So far, relaxations of the legal standard have only been introduced for cases concerning tangible assets. For instance, the *Telefonica v Commission* judgment and the Guidance Paper hold that the standard conditions of a duty to deal need not be established if (i) there is a regulatory duty to deal; (ii) exclusive/special rights have been granted; or (iii) the infrastructure under consideration has been financed by the taxpayer. See Guidance Paper, *supra* n 18, para 82:

> "In certain specific cases, it may be clear that imposing an obligation to supply is manifestly not capable of having negative effects on the input owner's and/or other operators" incentives to invest and innovate upstream, whether ex ante or ex post. The Commission considers that this is particularly likely to be the case where regulation compatible with Community law already imposes an obligation to supply on the dominant undertaking and it is clear, from the considerations underlying such regulation, that the necessary balancing of incentives has already been made by the public authority when imposing such an obligation to supply. This could also be the case where the upstream market position of the dominant undertaking has been developed under the protection of special or exclusive rights or has been financed by state resources. In such specific cases there is no reason for the Commission to deviate from its general enforcement standard of showing likely anti-competitive foreclosure, without considering whether the three circumstances referred to in paragraph 81 are present".

that those conditions are "sufficient" for a finding of abuse. But this would not mean that they are "necessary". Scholars such as Larouche have argued that the case law on refusal to supply, and its accompanying test, would be just a set of proxies.[127]

However, even if one were to accept this view, in recent years the Court has tightened the legal standard on refusals to supply. In its 2012 *Microsoft v Commission* judgment, the General Court implicitly disavowed the 2007 *Microsoft v Commission* judgment which had eliminated the "new product" requirement by replacing it with the looser concept of "limitation of technical development".[128] This more conservative stance in the case law (at least in cases involving intellectual property) casts doubt on Emanuelson's proposed shortcut.

Perhaps more importantly, the truncated refusal to supply approach is fraught with another risk of inconsistency, this time logical. Bo Vesterdorf, the former President of the GC, has captured it well. Given the widespread nature of FRAND commitments, accepting that the FRAND commitment in and of itself would qualify as an "exceptional circumstance" would mean that "whole sectors of industry might find themselves in so-called exceptional circumstances, which could be considered somewhat bizarre".[129]

(ii) The False Commitment Theory

A second, more innovative interpretation involves a *Weberian* theory of abuse. In short, seeking an injunction would reveal that the FRAND promise was a sham. This, in turn, would be abusive. It is indeed contrary to the "ethic and spirit" of the market economy to make commitments that are not intended to be honoured. Firms, and in particular dominant ones, must "compete like gentlemen".[130] More prosaically, the idea is that it is immoral for a patent owner to "objectively mislead" third parties.

This theory too is not supported by any EU law precedent.[131] Cases that articulate a theory of "immoral" abuse remain rare.[132] *AstraZeneca v Commission* is one of the few such cases. The Court held here that it was abusive for a dominant pharmaceutical company to resort "to misrepresentations with the

[127] P Larouche, "The European Microsoft Case at The Crossroads of Competition Policy and Innovation" (2008) 75 *Antitrust Law Journal*.

[128] See chillingcompetition.com/2012/07/05/microsoft-v-commission-t-16708-the-magill-ims-health-re-animator/#comments.

[129] B Vesterdorf, "IP Rights and Competition Law Enforcement Questions" (2013) 4(2) *Journal of European Competition Law and Practice* 109.

[130] C Bengtsson, "Loyalty Discounts, the Approach in EU", Developments in the Law and Economics of Exclusionary Pricing Practices (Washington, DC, 18 March 2004).

[131] With the possible exception of lose statements in *Hoffmann-La Roche* and *Michelin I* referring to abuse as "methods different from those governing normal competition". See *Hoffmann-La Roche & Co AG v Commission*, *supra* n 14; *Michelin v Commission*, *supra* n 14. However, the notion of normal competition remains vacuous.

[132] With the exception of cases on unfair contract terms, which constitute a distinct breed of abusive practices, in the sense that they are not exclusionary, but exploitative abuses.

aim of leading public authorities into error".[133] And on the facts, the Court insisted that the conduct was both "deliberately" and "highly" misleading.[134]

The *AstraZeneca v Commission* case law is hardly transposable to the act of objectively misleading SSO participants by giving a FRAND commitment with no intention of abiding by it. First, AstraZeneca, the company that had misled the public authorities, was a dominant firm. This is not the case of patent owners who make FRAND promises. Such pledges are generally made *ex ante*, before the adoption of a standard, when it is unlikely that the patent owner could be considered dominant.[135] At best, such conduct would constitute an abuse of a non-dominant position, which does not constitute an infringement of Article 102 TFEU.

Secondly, in *AstraZeneca v Commission*, the EU Courts took issue only with the act of misleading public authorities. It thus remains unclear whether this case law can be extended to the act of misleading private parties.

Finally, to find a course of abusive "objective misleading",[136] one would need to consider that an *ex ante* FRAND pledge entails an unconditional promise to license. This, however, is a false assumption to make. FRAND is clearly not unconditional: it is conditional on licensing terms being FRAND.[137]

Another possible case that articulates a Weberian theory of abuse is *Rambus*. Here, the Commission took the preliminary view that Rambus's failure to disclose patents (and patent applications) which were later claimed to be relevant to JEDEC (an SSO active in the microelectronics industry) standards constituted "intentional deceptive conduct" which "undermine[d] confidence in the standard-setting process".[138]

The *Rambus* case is, however, a weak precedent. The *Rambus* decision was adopted under Article 9 of Regulation 1/2003. The Commission thus did not reach a finding of infringement. Moreover, the decision was not put to the test of judicial proceedings before the EU courts. Its validity, and in particular the possibility to sanction non-dominant firms for arguably deceitful conduct, remains highly doubtful.[139]

[133] Such conduct is "manifestly not consistent with competition on the merits". See *AstraZeneca AB and AstraZeneca plc v Commission*, *supra* n 25, para 98.

[134] *Ibid*, paras 79–93.

[135] If, in contrast, the patent owner is in a dominant position ex ante, this is likely due to the fact that his technology has no substitutes, in which case standardization does not confer any market power upon him. See Rato and Petit, *supra* n 25, commenting on the *Rambus* case.

[136] Subiotto and Little, *supra* n 60.

[137] His true goal was to mislead other participants to the standard setting process, by prompting them to include his technology in the standard (a sort of "patent ambush").

[138] Commission Decision of 9 December 2012, Case COMP/38.636—*Rambus*, para 3. This conduct would also likely breach the rules of the standard setting organization, and could give rise to sanctions.

[139] P Marsden, "The Emperor's Clothes Laid Bare: Commitments Creating the Appearance of Law, While Denying Access to Law", *CPI Antitrust Chronicle*, October 2013(1).

(c) Conclusion on Internal Consistency

In light of the above, the "abusive bargaining" test should be disregarded. And if agencies and courts were to choose another test, they could not avoid having to prove "exceptional circumstances". The judgment in *Micro Leader Business v Commission*—a case that has largely been ignored despite its similarities with SEP injunctions—makes this abundantly clear. At issue was a possible abuse through the enforcement of copyright. The dominant copyright holder was attempting to block imports of infringing products. Whilst the General Court declined to articulate a test of abuse, it nonetheless noted that "such enforcement may, in exceptional circumstances, involve abusive conduct".[140] And the mere fact that the patent holder gave an FRAND commitment cannot constitute such "exceptional circumstances", in particular because there is nothing exceptional about it.

2. Transversal Consistency

There is no case law on concerted injunction seeking under Article 101 TFEU. No manifest risk of transversal inconsistency thus arises from the application of the above standards to injunction seeking cases. On closer examination, however, the "willing licensee" test generates several indirect risks of transversal inconsistency.

(a) Unilateral Conduct in Article 101 TFEU Case Law

The "willing licensee" standard appears to rely on the idea that a FRAND commitment is akin to a joint understanding, a gentleman's agreement, a pact. The argument is that a FRAND pledge generates expectations amongst other SSO participants—similar to a contract, though in a looser form—and in turn reliance on the FRAND-pledged technology in subsequent design choices. At the end of the line, this can result in "hold up", if "locked-in" implementers are denied licences, requested unreasonable fees or cross-licences, or sued for patent infringement.

This theory presents a risk of transversal inconsistency. Under Article 101 TFEU, the Court has repeatedly held that unilateral announcements, including accurate pricing announcements, do not form a basis upon which rivals can rely in their business strategies. This principle has drastic consequences. Unilateral price signaling falls short of the concept of a horizontal "agreement" under Article 101 TFEU. Similarly, when suppliers issue recommended price lists to their retailers, this falls short of a vertical "agreement".

[140] Case T-198/98 *Micro Leader Business v Commission* [1999] ECR II-3989, para 56, referring to the *Magill* case as precedent.

Similar principles exist in merger control law. In *Gencor v Commission*, the General Court expressed skepticism about the reliance value of pledges. To secure merger clearance, the notifying parties had promised that they would not abuse a dominant position.[141] On appeal, the Court noted that:

> "where the Commission concludes that the concentration is such as to create or strengthen a dominant position, it is required to prohibit it, *even if the undertakings concerned by the proposed concentration pledge themselves vis-à-vis the Commission not to abuse that position* (emphasis added)".[142]

In sum, pledges have no reliance value under Article 101 TFEU and EU merger control case law. Despite some arguments to the contrary in the scholarship (Kaplow suggests that unilateral promissory conduct should in certain circumstances fall foul of antitrust law as an agreement[143]), the same principle should also apply under Article 102 TFEU, unless a very compelling reason is brought forward to stray away from it (and justify such transversal inconsistency).

(b) The Notion of "Agreement" in Article 101 TFEU Case Law

The case law on the notion of "agreement" under EU competition law requires a "meeting of the minds", a "concurrence of wills" between two, or more, parties. In the Court's words, there must be "actual acquiescence" to the envisioned coordination.

In *Bayer v Commission* and *Volkswagen v Commission*, the court clarified the notion of acquiescence.[144] In particular, it ruled that there is no "acquiescence" when one party to the agreement "reacts against" the other. Similarly, if one of the parties' conduct is inconsistent with the purported agreement, there is no acquiescence.

This case law is potentially important in the assessment whether a technology implementer is "willing" to take a licence. It implies that a mere declaration of an interest to conclude a licensing agreement is insufficient to establish the existence of a "willing licensee". The implementer's interest in a licence must be established on the basis of exteriorised conduct. In other words, "acts of fulfillment" are necessary. Conversely, the fact that the implementer challenges the validity of the SEP should rule out any willingness to conclude a licensing agreement.

141 Case T-102/96 *Gencor Ltd v Commission* [1999] ECR II-753.

142 *Ibid*, para 316.

143 L Kaplow, "On the Meaning of Horizontal Agreements in Competition Law" (2011) 99(3) *California Law Review*.

144 Case T-41/96, *Bayer AG v Commission* [2000] ECR II-03383, esp para 129; Case T-208/01 *Volkswagen v Commission* [2003] II-5141, esp para 35.

(c) Act of State Doctrine

Several statements in the Article 101 TFEU case law suggest that requesting a state authority to take certain measures is not an infringement of EU competition law even if those measures restrict competition.[145] As noted by Advocates General Jacobs and Leger in their respective opinions in *Albany* and *Arduino*, in such cases any possible restriction of competition "is a consequence of subsequent State action", not of business conduct.[146] Against this background, an SEP holder who seeks an injunction in court simply requests a state authority (a court) to issue a measure (an injunction) that may restrict competition (through the removal of infringing products). The act that restricts competition is thus an "act of State" immune from the application of Article 102 TFEU. The SEP holder merely requests the act. If anyone is to be prosecuted, it is the state. The Commission can open infringement proceedings against Member States pursuant to Article 258 TFEU.[147] And judicial authorities may be found guilty of a violation of the duty of loyal cooperation provided in Article 4(3) TUE, read in combination with Article 102 TFEU.[148]

(d) Commitments under Article 9 of Regulation 1/2003

The Commission's interpretation of the "willing licensee" test attaches a marked importance to the existence of a FRAND commitment, which it arguably views as binding promises to license.

However, in other competition law instruments, the EU main legislative organ, ie the Council, has endorsed a distinct interpretation of the notion of "commitments". Pursuant to Article 9 of Regulation 1/2003, firms who are potentially guilty of an infringement of Article 101 and/or 102 TFEU can settle cases with the Commission if they offer "commitments" that meet the concerns expressed by the Commission in its preliminary assessment. Importantly, Regulation 1/2003 states that "the Commission may by decision make those commitments binding on the undertakings". Conversely, this implies that,

145 I am grateful to Thomas Graf for bringing this point to my attention.

146 See Joined Opinion of Mr Advocate General Jacobs delivered on 28 January 1999, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (C-67/96), *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* (Joined Cases C-115/97 to C-117/97), *Maatschappij Drijvende Bokken BV v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* (C-219/97) [1999] ECR I-5751. See also, Opinion of Mr Advocate General Léger delivered on 10 July 2001, C-35/99 *Criminal proceedings against Manuele Arduino, third parties: Diego Dessi, Giovanni Bertolotto and Compagnia Assicuratrice RAS SpA* [2002] ECR I-1529, para 74.

147 See Art 258 TFEU: "If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union".

148 See, eg Case C-13/77 *SA GB-INNO-BM contre Association des détaillants en tabac (ATAB)* « *INNO/ATAB* » [1977] 2115.

in EU competition law, firms' commitments to prospectively act in a certain way are non-binding, and we fail to see any obvious reason to distinguish between commitments made before a competition agency and those given to a SSO. In our opinion, this interpretation of commitments as non-binding pledges should also command the appraisal of FRAND pledges in Article 102 TFEU proceedings. After all, if FRAND commitments have "antitrust content", as argued by competition officials, they should be construed in congruence with the key Regulation that governs the enforcement of antitrust rules.

3. Constitutional Consistency

The selected test of abuse should also comply with higher constitutional provisions of EU law. In the abstract, the above tests seem to impinge on two core constitutional provisions of EU law, as well as on several general principles of EU law.[149]

(a) Freedom to do Business

With the exception of the vexatious litigation standard, all the proposed tests undermine the "freedom to do business" of dominant firms, protected under Article 16 of the EU Charter on Fundamental rights (the EU Charter). At the same time, however, those tests protect the "freedom to do business" of rivals (as aptly noted by the Commission in *Google/Motorola Mobility*).[150] Accordingly, there can be no concerns, in one sense or another, of constitutional inconsistency on grounds of "freedom to do business".

[149] The following paragraphs do not discuss the issue of a possible violation of the "right to property" protected by Art 345 TFEU.

[150] In *Scarlett Extended*, para 46, the Court observed that the rights linked to intellectual property are not absolutely protected and must be balanced against the protection of freedom to conduct business. See Commission decision, *Google/Motorola Mobility*, *supra* n 6, note 55:

> "The Commission has previously, in a case different from the one at hand, taken a narrow view on when the initiation of legal proceedings by a dominant company may constitute an abuse (see Case T-111/96 *ITT Promedia v Commission* [1998] ECR II-2937). Moreover, in that case, the General Court emphasised that, as access to the Court is a fundamental right and a general principle ensuring the rule of law, it is only in wholly exceptional circumstances that the fact that legal proceedings are brought is capable of constituting an abuse of an dominant position within the meaning of Article 102 TFEU (paragraph 60). More recently, the Court of Justice addressed the issue of whether EU law, including fundamental rights, precluded the grant of an injunction made by a national court against an internet service provider ('ISP') which required certain onerous action to be taken by that ISP. In that case, the ECJ acknowledged that the fundamental right to property, which includes the rights linked to intellectual property, is not absolutely protected but must be balanced against the protection of other fundamental rights such as the freedom to conduct business. (See Case C-70/10 Scarlet Extended, judgment of 24 November 2011, paragraphs 41 to 46)."

(b) Right of Access to Court

None of the above tests are consistent with the right of access to court enshrined in Article 47 of the EU Charter, with the notable exception of the "abusive litigation" standard. Under the *ITT Promedia/Protégé International* case law, findings of abuse are confined to "wholly exceptional circumstances".[151] In the General Court's own words: "access to the Court is a fundamental right and a general principle ensuring the rule of law".[152]

In our view, the drastic adverbial restriction added in *ITT Promedia* and *Protégé International* ("wholly") reflects the EU judicature view that the right of access to courts is the mother of all rights. Without the right of access to court, all other rights, constitutional or not, are ineffective. And unlike other fundamental rights which can be balanced with the free and undistorted competition imperative, not only does the right of access to court admit almost no encroachment, the circumstances in which such an encroachment is possible on competition law grounds are very narrow and explicitly set forth in the *ITT Promedia* and *Protégé International* judgments. Moreover, only the courts and not the administrative agencies can balance such rights.

Our interpretation is confirmed by the fact that, in standard cases of conflict between Article 102 TFEU and constitutional values (for instance, the right to intellectual property),[153] antitrust enforcement is admitted in "exceptional circumstances" (only).

(c) General Principles of EU Law

Of all the proposed legal standards discussed above, the "willing licensee" test is the least consistent from a constitutional perspective. Like others, it impinges on the right of access to court. However, unlike them, it also infringes two general principles of EU law.

(i) The No Implied Waiver Rule

Under the "willing licensee" test, the right to an injunction against certain firms ceases when a FRAND commitment is given.[154] However, the forms customarily used for FRAND declarations contain no explicit waiver of injunctive relief, and we are not aware of any such waiver in the rules of all major SSOs[155] The European Telecommunications Standards Institute (ETSI) information

[151] *ITT Promedia NV v Commission*, *supra* n 3, para 60; *Protégé International Ltd v Commission supra* n 4.
[152] *ITT Promedia NV v Commission*, *ibid*, para 60.
[153] See *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission (Magill)* [1995] ECR I-00743.
[154] A theory formulated by M Dolmans, "Standards for Standards" (2002) 26(1) *Fordham International Law Journal* 163.
[155] See the form available at: www.etsi.org/about/iprs-in-etsi/14-about/571-how-to-declare-essential-iprs-to-etsi.

statement and licensing declaration forms (IS&LD), for instance, say nothing of injunctions. The "willing licensee" test thus surmises that a firm that makes a FRAND declaration implicitly waives its right to judicial remedies against (some) third parties. This breaches the general principle of law that there is no implied waiver.

(ii) The Principle of Legitimate Expectations

The "willing licensee" test is also inconsistent with the substantive interpretation given to the general EU law principle of "legitimate expectations".[156]

As explained earlier, the "willing licensee" test is built on a simple premise: locked-in standard implementers had legitimate expectations that they would become licensees after FRAND declarations were made.

Pursuant to a general principle of EU law, firms can only nurture "legitimate expectations" where the administration (ie the state) has given them "precise assurances".[157] It is disputable that FRAND declarations can ever give rise to legitimate licensing expectations as the principle is construed under EU law. First, FRAND declarations do not come close to constituting "assurances". Those declarations do not express an outright commitment that licensing will occur. Rather, the SEP owner declares that he is ready to enter into licensing negotiations with the aim of concluding a licence on FRAND terms. Words matter. And the typical formulation used in FRAND declarations is "I am *prepared to* grant licenses", not "I will grant licenses".[158]

Secondly, a FRAND declaration lacks the kind of "precision" required by the case law on the EU law principle of legitimate expectations. The General Court confirmed this in *Microsoft v Commission* when it ruled that is the notion

[156] To be clear, the argument is not that the "willing licensee" test infringes the principle of legitimate expectations. This principle only covers the conduct of government. Rather, the contention is that if a court or agency ever applied the "willing licensee" test, it would have to resort to intellectual constructs inconciliable with those governing the interpretation of the principle of "legitimate expectations".

[157] Joined Cases T-427/04 and T-17/05, *French Republic* (T-427/04) and *France Télécom SA* (T-17/05) *v Commission* [2009] ECR II-4315, para 260.

[158] In the ETSI IS&LD, the formulation is:

> "the Declarant hereby irrevocably declares that (1) it and its AFFILIATES are prepared to grant irrevocable licenses under its/their IPR(s) on terms and conditions which are in accordance with Clause 6.1 of the ETSI IPR Policy, in respect of the STANDARD(S), TECHNICAL SPECIFICATION(S), or the ETSI Project(s), as identified above, to the extent that the IPR(s) are or become, and remain ESSENTIAL to practice that/those STANDARD(S) or TECHNICAL SPECIFICATION(S) or, as applicable, any STANDARD or TECHNICAL SPECIFICATION resulting from proposals or Work Items within the current scope of the above identified ETSI Project(s), for the field of use of practice of such STANDARD or TECHNICAL SPECIFICATION; and (2) it will comply with Clause 6.1bis of the ETSI IPR Policy with respect to such ESSENTIAL IPR(s)."

See IPR Licensing Declaration Form, available at www.etsi.org/images/files/IPR/etsi-ipr-form.doc.

of FRAND encompasses a range of possible outcomes, and that "several rates may be covered by the notion of "reasonable remuneration rates".[159]

4. Economic Consistency

(a) Screening of the Tests

Most economists, even the most ardent free-marketeers, consider that anticompetitive exclusion can occur through the abuse of judicial procedures (though they disagree on the effectiveness and frequency of non-price predation strategies). The upshot of this is that all the tests that treat the seeking of injunctions (or threats) as a possible exclusionary abuse are a priori economically consistent. This is the case for the "abusive refusal to supply", "abusive litigation" and "anticompetitive foreclosure" standards.[160]

In contrast, economists are far less keen on the theory of abusive exploitation that underpins the "abusive bargaining" and "willing licensee" tests (also known as the "hold-up" theory):[161] in a nutshell, injunctions (or threats of injunctions) would be a bargaining device used by SEP holders to extract onerous licensing fees or advantageous cross-licensing terms.

From an epistemological standpoint, theories of exploitation are the "black sheep" of antitrust economics, especially in the presence of IPRs.[162] Most economists subscribe to the view that high prices deliver efficient outcomes (they incentivise innovation), and that competition law enforcement is not only unlikely to ameliorate a market characterised by high-prices, but may

[159] The compliance case, *supra* n 20, para 95.

[160] To date, there have been few cases of non-price predation, as opposed to financial predation. One of them is *Astrazeneca v Commission*, where the Commission sanctioned a dominant drug manufacturer who sought to obtain the removal of certain marketing authorization to delay the entry of generics on the market. Another is *Compagnie Maritime Belge*, where the Commission viewed the inducement and incitement of a government to take certain actions as a component of an abusive strategy. The Court, however, declined to rule on the issue whether this constituted a stand-alone abuse. Case T-276/04 *Compagnie maritime belge SA v Commission* [2008] ECR II-1277.

[161] As explained by the FTC, the theory is that:

> "The threat of an injunction will lead the manufacturer to pay royalties up to its switching costs, which may be higher than the cost at the time of product design. Commentators explain that the threat of hold-up gives patent holders excessive bargaining".

See FTC, "The Evolving IP Marketplace—Aligning Patent Notice and Remedies" (March 2011), available at www.ftc.gov/os/2011/03/110307patentreport.pdf.

[162] The author of those lines cannot be suspected of ideological bias here, for we have written in support of exploitation theories of abuse in certain settings. See N Petit, "Excessive Pricing: The Flaws of "Tea Party" Competition Policy" (2011) 2(6) *Journal of European Competition Law and Practice* 519.

make matters worse (risks of errors are high, due to important informational asymmetries).[163]

Moreover, the theory of hold-up has not undergone empirical testing. Lemley and Shapiro, the founding fathers of the hold-up theory, simply posit that courts grant injunctions whenever requested by the patent holder if the patent is found valid and infringed.[164] However, according to Langus, Lipatov and Neven, the award of injunctions is not automatic.[165] Courts do not automatically award an injunction upon a finding of validity and/or infringement of the asserted patent, whether encumbered by a FRAND commitment or not. In reality, taking account of the commitment to license on FRAND terms, most courts will consider whether licensing terms proposed by the patent holder during negotiations can be considered FRAND and will typically only award injunctions where they have satisfied themselves that that is the case and some additional specific conditions are met. The upshot of this is that, currently, economists are unable to say if patent hold-up through injunction is a fable or a plague. After 10 years of debate, there is still neither empirical nor circumstantial evidence of industries being held up or of standards failing to be deployed.[166] Some even expressly deny that hold-up exists.[167] And most unfortunately, public information on the rate of injunctions awarded across jurisdictions is unavailable.

We have undertaken a basic empirical research through the well-known IP database Darts-IP.[168] This research was conducted on 28 October 2013. It tends to confirm that patent injunctions are not automatically awarded by first instance courts in Europe (Figs 1 and 2). Rather, the probability for a patent owner to obtain an injunction is randomised, in particular in large patent litigation venues (Germany, France, England). Moreover, our research shows that there are some jurisdictions that are injunction friendly, and others that are injunction unfriendly.

Any empirical analysis can be criticised on methodological grounds, and this basic research is certainly too generic to reach accurate conclusions on the issue (for instance, it does not specifically focus on SEPs). Nonetheless, the above findings gives a first indication that patent holders are far from certain to be awarded injunctions in patent infringement cases. This crude result casts

163 Because of the vagaries of determining what is a "fair" price.
164 Lemley and Shapiro, *supra* n 82; Shapiro, n 82.
165 Langus *et al*, *supra* n 88.
166 Some believe that the fact that there is little academic research on hold-up has to do with the fact that it is a variant of the well-known and over-researched theory of monopoly. Accordingly, economic researchers would disregard this subject as it is unlikely to advance their career in the competitive academic world. That said, many private corporations are hiring economists to write on the subject. But there nonetheless remains a dearth of empirical studies.
167 Marsden, *supra* n 139, note 13 and the references cited therein.
168 http://app.darts-ip.com/darts-web/client/welcome.jsf.

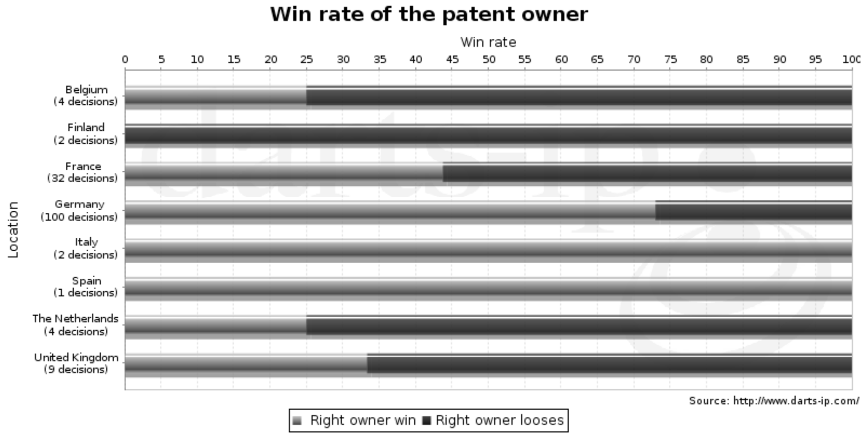

Fig 1 Win rate of patent owner in infringement cases in Europe, first instance cases (merits), Judiciary, Telecommunications, 2000–13

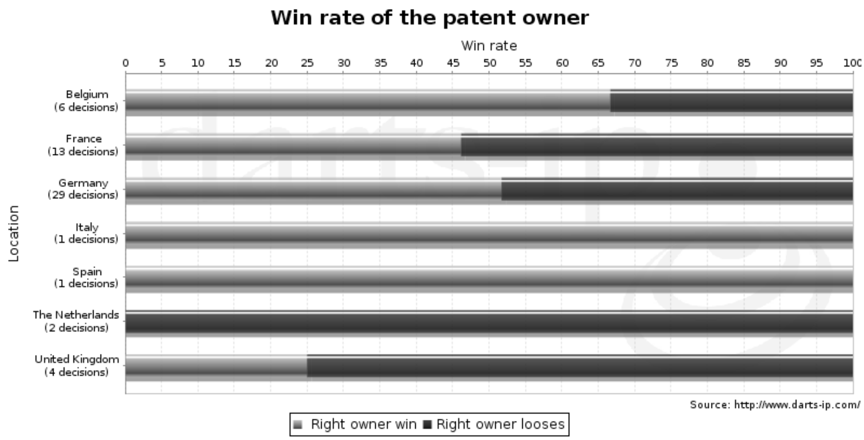

Fig 2 Win rate of patent owner in infringement cases in Europe, first instance cases (merit), Judiciary, Electronic Communications, 2000–13

doubt on the robustness of the hold-up scenario, for this theory of harm rests on the key assumption of a high-probability of award.

In light of the above, tests of abuse that treat injunctions as a bargaining device are economically inconsistent, and should thus be disregarded. From a legal standpoint, it would indeed be problematic, and contrary to best administrative practice, if agencies were ever to build theories of antitrust liability on the basis of fictional economic assumptions (ie that the act of seeking an injunction—or the threat of so doing—can induce potential licensees to accept unfair terms).[169]

(b) More on Anticompetitive Exploitation Tests

In addition to the previous general remarks, several specific flaws also vitiate the "willing licensee" and "abusive bargaining" tests.

The "willing licensee" test accords an excessive—some would say obsessive—importance to patentees' FRAND declarations. Borrowing the words of Farrell—incidentally one of the other earlier proponents of hold-up theories—FRAND declarations shall be seen as "cheap talk".[170] They carry little "commitment value" because they are not enforceable.

The same applies to prospective licensees. Agencies and courts should err on the side of caution when they rely on licensees' ostensible strategies to infer their "willingness" to take a FRAND licence. The Dusseldorf court noted, in its order for reference: "Such a declaration [of willingness to enter into licensing talks] may easily be made. It hardly gives rise to any obligation and may be changed, withdrawn and, if necessary, renewed at any time."[171] Exteriorised conduct is a "cheap" surrogate for intent. Rather, as Mariniello explains, agencies and courts should use their investigative powers to uncover the real intent of prospective licensees (eg by reviewing internal documents).[172]

The "abusive bargaining" test also rests on dubious economic foundations. This test only covers settings where alternatives to the standardised technology existed *ex ante*. However, *ex post*, there is no obvious reason to assume that those alternatives have disappeared, and if those alternatives still exist, the switching costs that give rise to lock-in concerns may be trivial. Prospective licensees are thus not deprived of the ability to design around,[173] and the increment in bargaining power of the SEP owner is at best relative.

Of course, the standard participants may have made relationship specific investments in relation to the SEP. However, those investments are not necessarily sunk. They may well be redirected towards other technological alternatives. If this is the case again, the lock-in concerns are moot.

[169] B Love, "The Misuse of Reasonable Royalty Damages as a Patent Infringement Deterrent" (2009) 4 *Missouri Law Review* 909, notes 62 and 63. We have been informed that some empirical surveys have been made by some of the private corporations involved in the smartphone war. However, those surveys are not available in the public domain.

[170] J Farrell, "Cheap Talk, Coordination and Entry" (1987) 18 *RAND Journal of Economics* 34.

[171] See Summary of the request for a preliminary ruling—Case C-170/13, *supra* n 9, para 22.

[172] Mariniello. *supra* n 81

[173] The existence of a possibility of design around does not mean the patent is not an SEP as such. A solution to a technological problem envisaged in the standard may be found through another method which would not strictly speaking be standard-compliant.

(c) More on Tests of Anticompetitive Exclusion

The above discussion suggested that treating injunctions as exclusionary strategies is good economics. However, doctrines of non-price predation are not mainstream economics. Scheffman and Higgins—who support such theories of harm—concede that their major weakness "is that there are so many false positives".[174] Others even go as far as to challenge the very existence of non-price predation.

In reality, the main flaw of non-price predation theories of harm is evidentiary. Unlike in cases of financial predation, where exclusion can be forecasted with price–cost tests, no such handy proxy exists for non-price predation cases. The seeking of injunctions illustrates this issue. No proxy exists to second-guess the outcome of pending judicial proceedings (if there ever was one, litigation would actually be moot, and lawyers would never go to court). Surely, this problem could be surmounted with accurate statistics showing a significant rate of award for the litigated technology. However, no such data exists in the public domain (with the limited exception of databases like Darts-IP). This is particularly true if the technology is novel, which will often be the case for FRAND-pledged SEPs. Reviewing injunctions under an exclusionary abuse framework is thus, in our view, fraught with insuperable evidentiary obstacles.

The inability to safely predict the exclusionary effects of non-price predation strategies is no cause for blanket antitrust immunity though. Some economists explain that non-price predation practices raise rivals' costs.[175] For instance, seeking injunctions may impose litigation expenses on rivals, inflict a competitive disadvantage on them and ultimately result in exclusion.[176] This would be sufficient to trigger antitrust liability.

One of the problems with this theory is that litigation is equally costly for the dominant firm.[177] Yet a finding of abuse could still be reached with proof that the conduct inflicts comparatively greater litigation costs on the defendant (eg the defendant is comparably much smaller, has fewer resources for litigation, benefits from a limited access to capital).[178] And this may be the case because

[174] D Scheffman and R Higgins, "Twenty Years of Raising Rivals' Costs: History, Assessment, and Future" (2003) 12(2) *George Mason Law Review* 382.

[175] SC Salop and DT Scheffman, "Raising Rivals' Costs" (1983) 73(2) *American Economic Review* 267; TG Krattenmaker and SC Salop, "Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price" (1986) 96 *Yale Law Journal* 209.

[176] In another scenario, the request (or threat) of injunction could also lead to likely anticompetitive foreclosure if used by the dominant firm to conclude licences with infringing implementers on terms which likely will hamper or eliminate "access of actual or potential competitors to . . . markets". In this last variant, the theory of anticompetitive harm at hand is a constructive refusal to supply. Our previous remarks on this category of abuse apply *mutatis mutandis*.

[177] In EU continental law systems, proof is on the claimant. Most of the litigation costs will thus accrue to the dominant firm.

[178] R Bork, *The Antitrust Paradox, A Policy at War with Itself* (Basic Books, 1978), 348.

the dominant firm can spread fixed litigation costs over a larger output than its rivals (and thereby raise the latter's costs disproportionately).

But injunction proceedings for SEPs often take place at early stages of market development. The SEP holder thus rarely enjoys a scale of production (he may actually be a non-implementing entity, with no productive activity) such that he can spread fixed litigation costs over a large productive scale than the defendant. More specifically, the global litigation war currently at play in the ICT sector is a war of technology giants with deep pockets. Imbalances in scale are moderate, and litigation expenses remain trivial in comparison with revenue. For instance, it has been reported that the $100 million in legal costs incurred by Apple in 2012 represents less than 0.1% of its total revenues.[179] On the facts, there is thus little to support a "raising rivals' costs" theory of harm.

5. Ranking

The above analysis suggests that consistency militates in favour of preserving the existing legal standard, ie the "abusive litigation" standard, and that if there ever was uncertainty on the applicable standard, the "willing licensee" standard would be by far the worst performer on grounds of consistency. Table I summarises our analysis.

Table I

	Internal consistency	Transversal consistency	Constitutional consistency	Economic consistency
Abusive litigation	+	+	+	+
Refusal to supply	+	+	–	+
Anticompetitive foreclosure	+	+	–	+
Willing licensee	–	–	–	–
Abusive bargaining	–	–	–	–

[179] See www.zdnet.com/blog/foremski/apples-100m-in-legal-costs-are-tiny-expect-more-lawsuits-in-2012/2109.

E. Conclusion

In competition law, as in other fields, there is often a temptation to reinvent the wheel. Agency technocrats have a natural bias for this. Likewise, lawyers on all sides like to argue that their case is the game changer (if only to convince clients to take the case seriously). Finally, the EU courts, as guardians of the *effet utile* of EU law, occasionally consider that existing categories of abuses (and their companion substantive requirements) raise obstacles to the effectiveness of Article 102 TFEU.[180]

Insofar as the seeking of injunctions on FRAND encumbered SEPs is concerned, there is no need for a new standard because the existing *ITT Promedia* standard a priori applies, as recalled recently by the GC in *Protégé International*. If doubts on its applicability were nonetheless to be raised, none of the other proposed standard seems to fulfil the requirement of "consistency" in rule making. This further militates in favour of keeping *ITT Promedia* as the relevant legal test in the context of the ongoing global smartphone war.

[180] This reasoning was followed in the *TeliaSonera* ruling. The Court made the bewildering statement that categorizing a margin squeeze as a refusal to supply "would unduly reduce the effectiveness of Article 102 TFEU". See *Konkurrensverket v TeliaSonera Sverige AB*, *supra* n 57, para 58. As said previously, the *TeliaSonera* reasoning is utterly flawed, for any legal precedent which sets a string of substantive conditions affects the "bite", the "teeth", the "catch zone" of Art 102 TFEU over new and old form of abuse.