In practice, the principle of non-discrimination can be used flexibly to achieve two different objectives when applied to FRAND commitments. Most straight forwardly, it can be used to ensure that IPR owners treat similarly situated licensees equally, so as to prevent them from distorting downstream competition. This interpretation is in line with the *Swanson* and *Baumol* model[161] that takes into account the risk that vertically integrated licensors may have strong incentives to discriminate competing licensees. In addition, the flexible approach provides the licensor with the possibility of objectively justifying different treatment of licensees without reference to exclusivity.

In the *Qualcomm* case, it seems clear that the licensees in question compete with one another in the downstream market. Accordingly, if Qualcomm were to deny a discount to one of these licensees on the grounds that such licensee did not wish to offer exclusivity to Qualcomm, it would place this licensee at a competitive disadvantage in the downstream market and therefore its behaviour would most likely be deemed abusive under Article 102 TFEU because of its exclusionary effect. However, under the flexible approach, described in the *Microsoft* case, Qualcomm could justify any differences in treatment based on legitimate reasons. Qualcomm could *e.g.* argue that the differentiation stems from different costs of supplying different volumes, or the presence of a cross-license element. If this analysis is correct, then the European Commission would, however, still have to make a difficult assessment of facts, namely: What discounts were actually given, and has Qualcomm been able to objectively justify such discounts based on legitimate licensing practices?

4.2.2 Deceptive Conduct in the Standard-Setting Process - Is the AstraZeneca "*Doctrine*" Applicable to FRAND Commitments?

In light of current developments regarding the applicability of Article 102 TFEU to dominant patent holders, it is of particular interest to analyse whether deceptive behaviour by an undertaking, when taking part in the standardization process within standardization committees, can amount to abuse of dominant position as defined in the *AstraZeneca* case. This is particular relevant in the *Qualcomm* case, because the complainants' allegations appear to suggest that Qualcomm in the complainants' view did not fulfil its commitments to provide them with sufficient information while taking part in the 3G standardization process.

161 Daniel Swanson and William Baumol, *"Reasonable and Non-discriminatory (RAND) Royalties, Standard Selection* ***And Control of Market Power,"*** 73 Antitrust Journal 1, 2005.

As a starting point, one has to be aware that no authoritative precedents on the application of Article 102 TFEU to allegedly deceptive conduct or misuse of procedures in the context of FRAND commitments exist.[162] However, as recent developments have shown, strong policy reasons support intervention especially in the following two scenarios. Firstly, in a scenario where it can be proven that an undertaking has misled the standardization committee, for example by not disclosing crucial information[163] or by giving false promises. Secondly, in a scenario where a patent holder has agreed to FRAND commitments, in principle, no injunction should be available, since the threat of obtaining an injunction enables the patent holder to negotiate royalties in excess of the economic value of the patent holder contribution.[164] This particular aspect is the subject of the *IPCom* case, pending before German courts.

As stated above, IPR holders participating in a standardization process are obliged to disclose all of the IPRs they owe which might be relevant for the standard under development and give irrevocable declaration that they will license all of such relevant patens to third parties on FRAND terms.[165] These obligations are critical to the entire process and serve as an important trade-off, which is instrumental in obtaining industry consent to include patented technology in the common standard in the first place. As argued by *Chappatte* in a recent article titled: *''FRAND Commitments - The Case of Antitrust Intervention"*, in exchange for obtaining market power, the patent holder must comply with the obligations it has undertaken during the process, which in turn promote downstream competition and protects consumers interest.[166] The question to be assessed is whether a patent holder by misleading other implementers about his licensing intentions, with the effect that the adopted technology depends on particular patents, can be

162 Interestingly, the EC is currently in the midst of such type of investigation concerning the computer memory technology, also know as DRAM standards. In August 2007, the Commission confirmed that is had sent a Statement of Objections to Rambus (US based developer and licensor of DRAM technology, who participated in the standardization process within JEDEG) based on preliminary finding that it had breached former Article 82 "*by not disclosing the existence of the patent which it later claimed were relevant to the adopted standard*" and "*by subsequently claiming unreasonable royalties for the use of those relevant patents*." See the European Commission's Press Release of 23 August 2007, "*Antitrust: Commission confirms sending a Statement of Objections to Rambus,*" MEMO /07/330.

163 *E.g.* by not disclosing some of its essential patents or licensing policies.

164 See J Farrell, J Hayes, C Shapiro, and T Sullivan, ***"Standard Setting, Patents and Hold-Up",*** (2207) 74(3) Antitrust Law Journal 638 2007.

165 Supra note ETSI IPR Policy.

166 Philippe Chappatte,''*FRAND Commitments- The Case of Antitrust Intervention,"* European Competition Journal, Vol.5 Nr.2 August 2009, p.330.

said to amount to "*patent abuse*" within the meaning of Article 102 TFEU and its case law.

Although the *AstraZeneca* case is focused on issues of particular relevance to the pharmaceutical industry, it also captures the otherwise largely un-precedented doctrine of patent misuse under EC antitrust law and therefore it can be of interest also to other technology sectors. For instance, the European Commission's legal analysis in the *AstraZeneca* case effectively captures the special responsibility that dominant patent holders have towards their competitors. See in particularly the following statement made by the European Commission:
"The Court of First Instance has already considered that "an undertaking in a dominant position which enjoys an exclusive right with an entitlement to agree to waive that right is under a duty to make reasonable use of the right of veto conferred on it by the agreement in respect of third parties access to the market". Moreover, when an undertaking in a dominant position has a specific entitlement (in case marketing authorization), be it private or public, it has a duty, under its special responsibility mentioned above to make reasonable use of it and not to use it with the clear purpose of excluding competitors."[167]

In essence this recital seems to say that if a dominant undertaking voluntarily enters into an agreement to obtain exclusivity in a particular market, such as for instance a standardized technology market, it has a special responsibility towards its competitors to keep its promises in order not to impair genuine undistorted competition. This way of interpreting abuse under Article 102 TFEU would support that once a technology is adapted into a major standard, the owner of the technology in question is not allowed to abuse its substantial market power by charging excessively high royalty rates or discriminate between licensees.

On the assumption that all of the above apply to FRAND commitments, the specific responsibilities of a dominant undertaking towards its competitors under Article 102 TFEU could be assessed in at least two ways. Article 102 TFEU could be interpreted so as to require FRAND undertakings to comply with any promises they make, or should have made vis-à-vis other implementers during

167 Case COMP/A.37.507.F3, *Generic/AstraZeneca,* 15th June 2005, IP/05/737, on appeal Case T-321/05, pending judgment. In support of this assertation see the Commission's reliance in the cases: Joined cases T-24/93, T-25/93, T-26/93 and T-28/93 *Copmagnie Maritime Belge and others v Commission,* para. 108, and *British Leyland v Commission* [1986] ECR 3263, pare 21-24, as evidence for that a dominant undertaking must use public entitlements reasonably. In addition reference can be made to Case T-30/89 *Hilti v Commission,* para 99.

the standardization process. If so, third parties would be able to use Article 102 TFEU to enforce FRAND commitments made by dominant undertakings if relied upon by the standardization committee due to the special responsibility of dominant undertakings towards the standardized market as a whole. At least in the *AstraZeneca* case it was concluded that if a dominant licensor does not fulfil its promises, this kind of behaviour would be assessed as forming part of a concerted practice attempting to prevent competition. In this way, the objective of the enforcement would not be to penalize such misconduct *per se* but rather to prevent its anti-competitive effects in the market place.[168] This approach is supported by *Murphy*, who in his article *"Abuse of Regulatory Procedures- The AstraZeneca Case:Part III"* rejects that the *AstraZeneca* case would have introduced a concept of *per se* abuse under European competition law.

Nevertheless, this interpretation is subject to an important limitation and therefore one should be extremely cautious before applying it to FRAND commitments, namely the requirement of dominance. In a situation where an undertaking would give incomplete information about its licensing policies or give false promises to third parties prior to the acceptance of a particular standard, the question is therefore whether this deception "*leading"* to the dominance actually falls within the scope of Article 102 TFEU.[169] *Drexl* has examined this controversial question in an article titled: *"Deceptive Conduct in the Patent World - A Case for US Antitrust and EU Competition Law?"*

Even if one would attempt to answer this question in the affirmative, it should be taken into account that neither courts nor competition authorities are allowed to apply the law in the way they wish it to be. Most of all, it is important to keep in mind that the limitations arising from Article 102 TFEU do not apply to non-dominant undertakings as it only prohibits abuse of "*dominant position"*. As noted by *Drexl*, in contrast to Section 2 of the Sherman Act, Article 102 TFEU requires the presence of dominance and therefore does not censure the acquisition or attempted acquisition of a monopoly position as such.[170] In other words, contrary to US antitrust law, Article 102 TFEU is not targeted at the conduct leading to monopolization, irrespective of whether this position has been

168 It is also widely accepted that the concept of *per se* abuse under Article 82 EC has been progressively abandoned in case law, See Fances *"Abuse of Regulatory Procedures- The AstraZeneca Case:Part III,"* European Competition Law Review, Vol.30 Issue 7, 2009, p.291.

169 See *e.g*. Josef Drexl, "*Deceptive Conduct in the Patent World - A Case for US Antitrust and EU Competition Law?_Patents and Technological Process in a Globalized World*,"Springer-Verlag, Berlin Heidelberg, 2009, p.156.

170 Ibid.

achieved through the application of anti-competitive means, such as *e.g.* deception or misrepresentation before the standardization committee.

When analyzing the applicability of the findings in the *AstraZeneca* case to FRAND commitments, it should also be taken into account that this case contains elements that are materially different. In the *AstraZeneca* case the deceptive conduct considered abusive under Article 102 TFEU did not present the reason for AstraZeneca's dominance in the piston-pump inhibitors market.[171] At least, according to the European Commission, AstraZeneca's dominance existed already before the alleged deceptive conduct occurred.[172]

The question is whether Article 102 TFEU does at all apply to an IPR owner who obtains his dominant position in the market for standardized technology by demonstrating deceptive behaviour *ex post*. On its face, it would seem required for Article 102 TFEU to apply that the IPR owner enjoys a dominant position *ex ante* and not *ex post* of the standard. However, strong arguments support that the legal doctrines developed in the *AstraZeneca* case can also be applied to FRAND commitments, although only to a very limited extent.

Particularly in the *Qualcomm* case, it can be assumed that the European Commission will take a close look at the strength of Qualcomm´s patent portfolio and Qualcomm's position within the relevant technology market as a whole. In all circumstances, it should be kept in mind that this would require that the Commission assesses a number of complex matters. At least the following two significant problems would arise, none of which, as identified above, has been resolved so far. First, the mere possession of IPR does not necessarily confer dominance and before the acceptance of a new standard, a number of substitutable technological solutions might be at hand. Therefore, in order to conclude that an IPR holder taking part in standardization process has a dominant position within the relevant product market, it would require that the technology product market in question be defined narrowly. Second, it is still unclear how the relevant technology market should be defined. As seen in the *AstraZeneca* case, the European Commission seems to emphasise the strength of a company´ s patent portfolio and to have preferred a narrow definition of the relevant product market. Thus, as AstraZeneca within the pharmaceutical sector, also Qualcomm is clearly one of the pioneer inventors within the WDCAM technology market.

171 Fances Murphy, *"Abuse of Regulatory Procedures- The AstraZeneca Case:Part II,"* European Competition Law Review, Vol.30 Issue 7, 2009.

172 Case COMP/A.37.507.F3, *Generic/AstraZeneca,* 15th June 2005, IP/05/737, on appeal Case T-321/05, pending judgment, para 601, 774.

However, as the title of this chapter suggests, it remains to be seen how and to which extent the European Commission will apply the findings in the *AstraZeneca* judgment in its investigations of high-tech industries involving dominant IPR owners. The following statement, made on behalf of the European Commission in 2002, could serve as a starting point:

"As for Article 82, one must recall that unlike U.S. law, liability arises only for abuse of dominance, not anticompetitive creation thereof. Showing abuse may be problematic in a patent ambush context. The EC, moreover, has no equivalent to the Federal Trade Commission Act, which was the statutory basis for liability in Dell. To demonstrate this point: where a non-dominant SSO member intentionally conceals a patent that reads on the ultimate standard, and thereby becomes dominant as a result, it is difficult to say liability arises under Article 82. Similarly, the subsequent assertion of IP rights against other members of the SSO may not constitute abuse of dominance, since the patent itself was properly granted in the first place. The only apparent area for Article 82 liability might arise if the IP holder applies unfair license terms, engages in excessive pricing or refuses to license in order to monopolize a downstream market."[173]

This statement also highlights the differences between the US and the EU with regard to the application of antitrust law to dominant undertakings. As argued by *Drexl,* this deficiency of EC law may in fact prove to impose the most significant detrimental to the effective enforcement of FRAND commitments under EC antitrust law.[174]

4.3 Need for a Precedent from the European Commission

In the above, I have gone far in trying to contemplate the types of claims than one could invoke under the existing EC antitrust enforcement regime. Notwithstanding, it is essential to keep in mind that all of this is rather speculative, since only very limited case law exists. This being the case, I have little to lose by going one step further in my speculations.

Even if the European Commission were to find that Qualcomm's licensing practices with regard to the WDCMA standard do violate Article 102 TFEU the

173 Speech by Ms. Magdalena Brenning delivered at ABA's Anti-trust Spring Meeting in Washington D.C., 3 July 2002, available at: http://www.abanet.org/antitrust/committees/intell_property/july3.html.

174 Supra note Josef Drexl, p.156.