

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 *Astra-Zeneca* 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.

question still remains whether any conclusions drawn in this one particular case would provide any concrete operational future guidance for the enforcement of FRAND commitments in general. It is widely recognized, that one of the major problems in the standardized product market relates to the fact that companies' licensing policies usually are highly confidential. For instance, non-disclosure agreements are frequently used in licensing negotiations to assure confidentiality. The purpose of the non-disclosure agreement is to create a protected environment, which allows the parties to fully and freely disclose relevant business issues and risks without compromising their confidentiality. As argued by *Goldstein* and *Kearsey*, the core problem of using non-disclosure agreements when negotiating licenses for standard-essential patents is that many believe that this practice leads companies to cover-up non-FRAND practices.¹⁷⁵ Without transparent licensing schemes, one simply does not know on which terms individual licensing agreements have been made. Accordingly, as long as the rules of SSOs do not contain an obligation for licensors to reveal their licensing policies, the establishment of a valid “*benchmark*” for the assessment of whether competitive prices are offered to licensees remains extremely burdensome.

In my opinion, however, the above conceptual and practical obstacles do not imply that EC competition law has no role at all to play in averting anti-competitive behaviour vis-à-vis FRAND commitments. Future antitrust policy guidance from the European Commission and more knowledge about remedies imposed by the Commission will be of major importance.

On the other hand, it is also important to maintain the role of Article 102 TFEU as preventive and keep in mind that solutions are ideally achieved through the reinforcement of the rules of SSOs. Accordingly, in order to enhance the transparency and predictability of the FRAND regime, the risk of patent holders exercising opportunism should preferably be reduced through the introduction of appropriate additions and clarifications of the existing rules of SSOs. In addition, action by the industry itself would constitute the least costly and most prompt way of addressing the issues at hand. Furthermore, such solution would have the advantages of the industry being itself in control to some extent.

175 Larry M. Goldstein & Brian N. Kearsey, “*Technology Patent Licensing: An International Reference on 21st Century Patent Licensing, Patent Pools and Patent Platforms*,” Aspatore Inc., 2004, p.33, The usefulness of non-disclosure agreements is not as such challenged, as they serve the purpose of protecting both parties, but it is recognized that the current practice may create some IPR problems relating to the use of non-FRAND licensing terms.

Also the European Commission has stressed the importance of SSOs considering EC antitrust rules as part of their internal rules, and that parties only under specific circumstances would turn to the European Commission for assistance. *E.g.* former Competition Commissioner *Neelie Kroes* has stated:

“Standards are of increasing importance, particularly in high-tech sectors of economy. It is crucial that standard-setting bodies establish rules, which ensures fair, transparent and early disclosure of relevant intellectual property. We will continue to monitor the operation of standard-setting bodies in this regard.”¹⁷⁶

However, individual companies cannot impose industry-wide solutions applicable to everybody. It is neither realistic to think that national SSOs, which work by consensus, could solve all the problems without any application of competition law. Accordingly, as long as it is not possible to obtain sufficient consensus in the SOS context, it is likely that further legal proceedings around these issues will be instituted until the matters in question have been resolved through clear jurisprudence from relevant authorities. The increasing number of complaints lodged with the European Commission indicates that the telecom industry urgently needs a precedent. Meanwhile, the industry is forced to litigate about same type of matters simultaneously within several jurisdictions. Furthermore, as pointed out by *Magdalena Brenning* from the Commission’s Competition Directorate, in light of the Commission’s limited resources, it is not appropriate for the Commission to be drawn into a large number of standardization disputes on a case-by-case basis.¹⁷⁷

Although, the application of EC competition rules to the FRAND regime without doubt raises several conceptual, financial and practical difficulties, several arguments can, however, also be made in support of the Commission’s involvement.

First, as *Chappatte* argues, there is a real risk that national courts in the absence of legal certainty and general principles from the European Commission will apply Article 102 TFEU in an inconsistent manner when essential patents are enforced.¹⁷⁸

- 176 See *e.g.* the European Commission’s press release of December 2005 regarding their review of IPR rules under the ETSI regime, available at: <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/15/1565%type=HTML&aged=0%language=EN&guiLanguage=en>.
- 177 This statement is available at: http://www.abanet.org/antitrust/committees/intell_property/july3.html.
- 178 Philippe Chappatte, “FRAND Commitments- The Case of Antitrust Intervention,” *European Competition Journal*, Vol.5 Nr.2, August 2009, p. 334.

Second, it can be argued that the European Commission is best placed to adequately assess the lawfulness of whether the conduct of a dominant undertaking amounts to abuse, because the Commission, as for example in the *Qualcomm* case, can require third parties operating in multiple jurisdictions to provide confidential information about their licensing policies. When determining what constitutes a fair, reasonable, and non-discriminatory royalty rate this tool will often be of essential importance in cross-border situations. Even after the implementation of the Enforcement Directive within EU Member States¹⁷⁹, allowing for discovery in IP cases, it is still very difficult to obtain access to all of the documents needed from third parties, *i.e.* parties who are not involved in the litigation proceedings. Also, outside the area of IP litigation, discovery as such is only available in very few jurisdictions, notably in United Kingdom and United States.¹⁸⁰

Third, as demonstrated by IPR cases in the past, the European Commission has so far had a tendency to provide rather flexible future guidance and can also be expected to do so with regard to FRAND commitments. Therefore, leaving the matter to the European Commission will not necessarily lead to a drastic transformation of the entire licensing industry. The rather vague legal guidance provided by the European Commission in the past constitutes a clear indication that the Commission tries to avoid negative consequences and therefore can also be expected to refrain from issuing too rigid price regulations, which in turn could give reason to serious concerns within the innovative industries. Against this background, I have difficulties in believing that the European Commission would suddenly change its current practice when dealing with FRAND commitments. In my view, it is likely that the Commission will focus on procedure instead of substance, by approaching FRAND commitments in a pragmatic and flexible manner and by maintaining licensing flexibility for the IPR holders.

Fourth, as the chief guardian of EC antitrust law, the European Commission is best placed to protect continued availability of supply from multiple vendors and ensure the public interest in having interoperable systems within the area of information, communication and consumer electronics industries. Hence, I believe that it is feasible to argue that the application of Article 102 TFEU to dominant IPR holders is rather anticipatory. The Commission's aggressive fining

179 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004), Article 7.

180 David Wilson, "*International Patent Litigation: Developing an Effective Strategy*," Globe Business Publishing, 2009, p.13.

may very well lead to enforcement that is more effective.¹⁸¹ From the companies' viewpoint, commitments should better than excessive fines.

181 The record fines imposed by the European Commission in *e.g.* the *Microsoft* case and the *AstraZeneca* case demonstrate well the preventive effects of Article 82 EC. The Commission's handling of these cases will definitely have a significant impact on the way that *Microsoft* or *AstraZeneca* will do business in the future.