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Recent Developments in The Interface of Competition Law, Patent Law and Standardization

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Summary

Standardization plays a key role in modern industries. Standards provide compatibility and interoperability of products, thus increasing their value for consumers. In fact, standards go beyond that and positively affect market integration, consumer safety, environment issues etc. The European Union actively supports standardization run by Standard Setting Organizations. These organizations operate on voluntarily participation. However, benefits generated by standards to businesses, attract companies to take part in the adoption of such standards. Standards, especially in ICT market, are usually sophisticated and consisting of hundreds or thousands technologies subject to Intellectual Property rights of different companies. Once technology is included into a standard and covers key functionalities for the standard to work effectively, patent covering the technology gains status of Standard-essential patent. This means, standard implementers cannot design around it, and must get access from the proprietor of such patent. Owners of such patents receive plenty of benefits from their technology inclusion into a standard and in exchange are required, by SSO, to commit to license their SEPs on fair, reasonable and non-discriminatory terms (FRAND). However, Intellectual Property law grants exclusionary rights to patent owners to seek for patent injunctions against alleged infringers. Assessing these rights without limitations would endanger competition and the efficiency of standard-setting process. Therefore, competition law is entitled to provide restrictions on the freedom of SEP owners right to seek for patent injunctions. In 2015, the European Court of Justice delivered a long awaited ruling in the case *Huawei v ZTE*. The Court aimed to strike a balance between maintaining free competition, under Article 102 TFEU, and the requirements to safeguard SEP proprietor's rights guaranteed by the Charter of Fundamental Rights of the European Union. The ruling led to many discussions, whether the requirements provided in *Huawei* are sufficient to prevent SEP owners from premature seeking of injunctions.

Preface

This thesis was a great challenge towards completion of my Master's studies in Lund University. I would like to thank my thesis supervisor Timo Minssen for suggesting a great topic and giving useful advices. Many thanks to all the teachers in Lund University for providing interesting courses and sharing their professional knowledge: Xavier Groussot, Justin Pierce, Hans Henrik Lidgard, Julian Nowag and others.

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Abbreviations

CJEU	European Court of Justice
ETSI	European Telecommunications Standards Institute
EU	European Union
FRAND	Fair, Reasonable And Non-Discriminatory
ICT	Information and Communication Technology
IP	Intellectual Property
IPR	Intellectual Property Right
SEP	Standard Essential Patent
SSO	Standard Setting Organisation
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of European Union
TRIPS	Trade Related Aspects of Intellectual Property Rights

1. Introduction

1.1 Background

One of the central objectives for the creation of European Union was the establishment of Internal Market.¹ The Internal Market relies on four economic freedoms- free movement of persons, goods, capital and services.² Another fundamental for success of Internal Market is the highly competitive environment, protected by EU Competition Law.³ Competition law safeguards Internal Market, businesses and consumers from harmful effects that may be result of anticompetitive behaviour. Cartels, monopolies and dominant firms hold greatest power to produce such effects, thus deserved special attention from competition authorities.⁴ Nevertheless, the European Union also seeks to ensure continuous technological progress through promoting innovation. But ‘innovation is costly and risky business’ requiring large investments which may not generate any profits.⁵ The importance to promote inventors’ incentives to innovate was recognised at the global level under TRIPS agreement⁶, which offers a wide range of Intellectual Property rights and delineates the minimum standards for states to ensure IP protection. In modern industries such as ICT, IPRs play a key role for successful competition of businesses. Firms, that are first to place technology on the market and limit third party’s ability to use their inventions, gain opportunity to extract large profits. Therefore, it was long thought that patents confer monopoly to their owners.⁷ Additionally, Competition Law and Intellectual Property Rights were viewed to be at the opposite sides of the barricade. However, the widespread approach now is that in fact these two laws share the common objectives and complement each other towards dynamic highly competitive market, defined by intense innovation. On the other hand, disputes of interplay between Intellectual Property and Competition arise again in the context of standardisation. The standard-setting generated obvious benefits to number of aspects in the economy, innovation, consumer welfare, safety, environment etc. This led competition authorities to bypass standardization fearing that intervention may lead to negative effects on innovation. Also, Standard-Setting Organizations were considered to do a good job towards the common market and public goals. However, the increased number of players in modern industries created incentives for companies to shield themselves from competition with the help of IPRs in

¹ Article 3 TEU.

² Article 26 (2) TFEU.

³ Articles 101-109 TFEU.

⁴ Alison Jones, Brenda Sufrin. *EU Competition Law: Text, Cases and Materials*. Oxford University Press. Fifth edition, 2014. Pg. 3.

⁵ N. Petit, S. Bostyn *Patent=Monopoly: A Legal Fiction* (December 31, 2013). Pg. 1.

⁶ Agreement On Trade-Related Aspects of Intellectual Property Rights. See at: https://www.wto.org/english/docs_e/legal_e/27-trips.pdf

⁷ See N. Petit, S. Bostyn n 5.

standard-setting process. Competition authorities addressed the dangers of deceptive behaviour in standard-setting and encouraged SSOs to include the requirements of *ex ante* IPR disclosure and FRAND commitments into their policies. Nevertheless, companies, in ICT market, are now battling each other through premature patent injunctions, thus putting effective implementation of standards and public interest at risk.⁸ Competition law is called upon again to curb the selfish actions of firms. Standardization, however, generates many complex questions that are subject for discussions in many fields: IPRs, Competition Law, engineering, economics, finances and functioning of patent systems. Therefore, some issues flowing from standard-setting are not for competition law to solve. This paper will discuss the recent developments in antitrust treatment of standard-essential patents and FRAND licensing. In 2015, the European Court of Justice delivered a long awaited ruling in *Huawei* case laying down the principles governing abuse of dominant position under the Article 102 TFEU by patent injunction seekers. *Huawei* is considered to be the first precedent on this matter and was hoped to harmonise different approaches taken by national courts and the EU Commission.

1.2 Purpose

As the title indicates, the thesis aims to address the degree of current interplay of Competition Law, Intellectual Property Rights and standard-setting. However, as if the matter was not sophisticated enough, many aspects, in particular those concerning standard-setting deserved a closer look on their own. Therefore, paper first aims to provide simplified explanations of the origins and rationale behind standard-setting, SSOs, SEPs and FRAND to lay basis for further understanding of complex legal issues. Another aim is to introduce the reader to a variety of legal theories and proposals from scholars towards solving the problem. This thesis will try to answer the following questions:

- Is SEP owner, who previously committed to FRAND licensing, entitled to seek injunctions against alleged infringer?
- Should FRAND concept be more specified?
- What are implications of requirements set in *Huawei*?

1.3 Method and materials

The descriptive method is used to untie the net of complex aspects surrounding standard-setting activities of SSOs particularly in the ICT market. Paired with historical overview, it will help to bring the reader into reality of standardization and understand its importance in technology driven industries. It is important to notice, that historical overviews were usually provided relying on single sources from competent authors:

⁸ Also known as ‘patent wars’.

1. History of Standardisation (see subchapter 2.2) - Wang Ping: *A Brief History of Standards and Standardization Organizations: A Chinese Perspective*. East-West Center Working Papers (2011).
2. Origins of FRAND (see page 17.)- Jorge L. Contreras. *A Brief History of FRAND: Analyzing Current Debates in Standard Setting and Antitrust Through a Historical Lens* (January 15, 2015); American University, WCL Research Paper No. 2014-18.

Because of short theory and jurisprudence, the discussion will rely on plenty of academic articles, representing different approaches. Most of them address SEPs, FRAND and injunctions from antitrust perspective. Rich in arguments, they may provide support or criticism for current approach taken by competition authorities as well as guide the way for future developments. Analysis of the *Huawei* and other relevant case-law, from the CJEU and the Commission, is provided using traditional legal dogmatic method. Finally, thesis will rely on Communications from the Commission in order to outline the newest trends of EU's policy in the field of innovation, standardization and ICT.

1.4 Limitations

Activities of standard setting organisations are at the core of European Union's policy towards accelerating innovation. This thesis, therefore, will focus on formal standards approved by standard-setting organisations. Nevertheless, some examples given of popular standards and case analysis on *Microsoft* and *Orange-Book-Standard* concern *de facto* standards. It is not the aim of the analysis to provide the answer of antitrust treatment to the aspects regarding *de facto* standards. Second, Intellectual Property law offers a wide range of rights, but whenever term 'IPRs' is used, it will mostly concern patents, however, some cases mentioned regard copyrights, but they are discussed in as much as author saw it relevant to the main topic. Also, only those patents that are essential to implementation of the standard and are FRAND-pledged lie at the centre of discussion. However, general topics, for example, 'Standard and the ICT market' may cover all kinds of patents. Finally, the discussion rarely steps out of the European Union, however some suggestions, included in the thesis, are provided by American authors, relying on their home situation of FRAND licensing. Thus they are discussed to supplement the variety of possible solutions.

1.5 Outline

This thesis is divided into four parts. The Chapter 1- Introduction- provides a guide to background and purpose of this work, also determines the methods and materials used for the research. The Chapter 2 will introduce to the historical circumstances of standardization and its importance for the ICT market and European Union. It also discusses the interplay between

competition law and Intellectual Property in the context of standard-setting. The Chapter ends with overview of FRAND controversy and approaches taken by scholars how to improve licensing of standard-essential patents. The Chapter 3 will present the proceedings of *Huawei* case before the European Court of Justice. For the better understanding on the developments brought by *Huawei* the same Chapter will discuss the preceding case-law on the relevant points and the in depth analysis of the *Huawei* judgment will be provided in the Chapter 4. Finally, the Chapter 5 will address the author's conclusion of this thesis.

2. Standardization

2.1 Introduction

Today, standardization is acknowledged to be an indispensable element for the free international trade and the growth of global economy. It affects almost everyone, from companies and governments to the public and consumers. Standardization played a significant role in the creation of the EU Single Market. According to the Commission Guidelines, standards encourage the development of new and improved products, ‘thus normally increase competition and lower output and sales costs, benefiting economies as a whole.’⁹ Companies, that conform with standards, reduce their costs and increase productive and innovative efficiencies thus gaining a better market position and access to new markets.¹⁰ Standardised products are usually safer, easier to use, and provide better quality, thus they lead to better relations with suppliers and clients.¹¹ For example, something as simple as an A4 sheet paper relies on a standard, whereas high-tech devices (phones, laptops, computers) contain hundreds of them. Standards, therefore, are all around us. In 2009, The Commission has requested major mobile phone producers to harmonise mobile chargers in the EU, that complies with Micro-USB connector. Additionally, new EU standards will ensure continued safe charger use.¹² Consumers will no longer need to buy a new charger of the same brand as the new phone, which is expected to cut down 51 000 tons of electronic waste annually.¹³ Standards, therefore, bring convenience and freedom for the users to mix and match their items less expensively and reduce unnecessary variety to the benefit of environment.

Generally, standards can be understood as bases and rules for measuring in various human activities.¹⁴ This definition includes both formal and informal standards (e.g. moral norms). This paper mainly focuses on legal relationships between companies in the context of standardization, therefore will rely on a narrower definition provided by the International Organization for Standardization (ISO). Formally, standard is defined as ‘a document, established by consensus and approved by a recognised body, that provides

⁹ Commission Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements, 2011/C 11/01, point 263.

¹⁰ Communication from the Commission COM/2011/0311 final. A strategic vision for European standards: Moving forward to enhance and accelerate the sustainable growth of the European economy by 2020. Para. 5.

¹¹ Ibid.

¹² Commission welcomes industry’s commitment to provide a common charger for mobile phones, Brussels, 29-06-2009.

¹³ http://ec.europa.eu/growth/sectors/electrical-engineering/rtte-directive/common-charger/index_en.htm

¹⁴ This definition suggested by Wang Ping in: *A Brief History of Standards and Standardization Organizations: A Chinese Perspective*. East-West Center Working Papers, No. 117, April 2011

for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context'.¹⁵ Consequently, standardization is the activity of establishing such documents. For the better understanding of the standardization's role and impact on the economic development, it is important to outline the historical circumstances that gave rise to standards as solution to market issues.

2.2. History of standardization

While the first examples of a standard could go as early as the creation of a calendar, standardization, as we understand it nowadays, started with the Industrial Revolution in the clash of 18th and 19th centuries. Transitioning from hand method to machines gave birth to mass production and cheap labour, therefore increased the need for high precision and simple use tools, as most of the workers were new to the machinery. In addition, companies were seeking to maximise the capacity of production, profit and quality, which was the driving force for early attempts of in-company standardization.¹⁶ Applying standards within company, allowed employee labour division and specialization working in assembly-line. Standardised mass production increased the efficiency of companies and market, quality of the products, social and industrial development. Innovation was considered to be the key element of firm's successful performance and competition on the market. In-company standards served a great basis for R&D and technical modernization. Series of most valuable inventions emerged during Industrial Revolution. Special attention to innovation resulted in products so complex that manufacture and design of a whole product within a single company was too burdensome. Firms started to divide and specialize in producing spare parts, creating a long chain of manufacturers needed to assemble the final product. However, this led to unnecessary diversity and incompatibility among products as engineers across companies had a different idea on the measurements of each part. The lack of cooperation in trade relations and technical solutions among companies led to increased waste of resources and negative effects on the whole industry. It was realised that competitive market alone was no longer able to fix the economic issues and that companies in fact are dependent on each other and share common interest for larger profits.¹⁷ First standard-setting organizations (SSOs) were created in England in 19th century. A group of specialists, which usually consisted of representatives of firms, government, society and relevant field experts, would decide on a technical standard that companies voluntarily agreed to conform with. This allowed to achieve continuous and uniform manufacturing throughout market stream, which was highly beneficial for public interest and the order of the

¹⁵*The Consumer and Standards: Guidance and principles for consumer participation in standards development (ISO/IEC)*, March 2003, pg. 5

¹⁶ See Wang Ping n 14, p. 4-7.

¹⁷ *Ibid*, 8-12.

market.¹⁸ SSOs were acting on the principles of transparency, openness and consensus.¹⁹ The positive impact on the market performance brought by standards deserved the interest to create national SSOs for a more uniform and harmonised standardization. In the 20th century developed European countries and United States founded their national SSOs. After the end of World War II, there was a rapid rise of globalization and international trade. However, differences between the standards across countries created obstacles for free trade, which triggered the creation of international and regional SSOs.

Modern SSOs are non-profit organizations or associations that do not possess any legal authority and their activities on standardization rely on voluntary participation. Standards are usually adopted by voting and participants are free to decide whether to conform with standards. Standards that no or very few companies comply with are not effective whether they are standards at all. In order to ensure the legitimacy of its decisions and uniform application of standards, SSOs try to include many different stakeholders and encourage their consensus, with the help of expert opinion, over developing a standard.²⁰ Consensus and development of trustful relationships among participants lead to the success of the standards. However, public authorities may enforce mandatory standards for health, safety or, as in the previous example of common charger, environmental reasons. It is, therefore, important to maintain variety of participants in standardization, so the standard conforms with not only the best technical solutions but also represents the interests of society, businesses and market integration.²¹

2.3 Standardization in European Union

European Union pays special attention to standards. The integration of Internal Market depended heavily upon standardization which helped against trade barriers caused by differences of materials and products across Member States as the excuse for their protectionist policies.²² Standards in EU are used as policy instruments for the proper functioning of Single Market, interoperability of networks and systems, environmental and consumer protection, social development and innovation. EU Commission closely cooperates with European Standardization Organisations (ESOs) and encourages higher cooperation between ESOs and International SSOs. CEN, CENELEC and ETSI are three officially recognized organizations to have competence over adoption of European Standards (EU and beyond) and at the

¹⁸ Ibid p. 8-9.

¹⁹ Ibid, pg. 11.

²⁰ N. Brunsson, A. Rasche, D. Seidl: *The Dynamics of Standardization: Three Perspectives on Standards in Organization Studies*. Organization Studies, Vol. 33, No. 5-6, pp. 613-632.

²¹ See COM/2011/0311 final n 10 'An inclusive standards development process'.

²² Ibid. European standardization system contributed significantly mainly in relation to free movement of goods.

request of Commission, so called harmonised standards (EU).²³ The Commission, nevertheless, expresses concerns that European Union is not doing good enough in terms of innovation and investments and falls behind the U.S and Japan. Modern European competitiveness depends on the ability to foster innovation in products. Europe is a home to many great inventions and researchers, however, under-investment in a knowledge foundation, poor access to finance, costly IPRs and slow standardisation directs companies to invest and conduct research in many other parts of the world. Innovation, therefore, has been placed at the heart of the Europe 2020 strategy.²⁴ Affordable IPRs and faster setting of interoperable standards are among the core tasks that EU should achieve in order to maintain its competitiveness.²⁵

2.3.1 Standards and the ICT market

The impact and necessity of standards varies across markets. Modern industries demand higher density of standards as opposed to traditional ones. This paper provides discussion on standards in relation to Information and Communication Technologies market (ICT)²⁶, whereas ICT standards stand out for their complexity and additional interoperability feature, which, in perfect world, is the ability of a product and system to work together with other products and systems, regardless the manufacturer, operator and other technical details. However, high number of companies, sophisticated products and intense innovation leads to fragmentation of ICT market and creates barriers for higher interoperability among products and systems. Interoperable standards, therefore, are necessary to serve as bridges between technologies and products to interact within single network, providing freedom of choice for consumers as well as the platform for new technical developments. The European Union bodies stress out the key role of standardization to the further development of Single Market, and seeks to promote and harmonize standard-setting process in ESOs, through additionally financing their activities, also increase their cooperation with international SSOs and those in Member States. Regulation 1025/2012 on European Standardisation seeks to provide a framework for a more transparent, efficient and effective European standardization. The Regulation stresses out the importance of standards to wide range of economic and social aspects.²⁷

²³ Regulation (EU) No 1025/2012 of the European Parliament and of the Council on European standardization, 25 October, 2012, para. (4).

²⁴ COM(2010) 546 final. Europe 2020 Flagship Initiative ('Innovation Union'). Brussels, 6.10.2010. Pg. 2.

²⁵ Ibid, Pg. 3. Point 7.

²⁶ Term ICT is chosen for its ability to cover everything that collects, stores, process, receives and transmits information including communication networks and systems. Additionally, Communications from the European Commission favor the use of ICT. Some authors however use terms such as technology-enabled markets (N. Petit) and New Economy (A. Jones).

²⁷ See Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardization, pt. (3), (22),

‘<...> Standards produce significant positive economic effects, for example by promoting economic interpenetration on the internal market and encouraging the development of new and improved products or markets and improved supply conditions <...> Standards may maintain and enhance quality, provide information and ensure interoperability and compatibility, thereby increasing safety and value for consumers. Standards can have a broad impact on society, in particular on the safety and well-being of citizens, the efficiency of networks, the environment, workers’ safety and working conditions, accessibility and other public policy fields.’

Effective standardization and intense innovation laid the foundations for Internet of Things market (IoT). To keep at pace with world economy’s transformation to digital economy, European Commission issued a strategy on creation of Single Digital Market:²⁸

The goal is to ensure that ICT-related standards are set in a way that is more responsive to policy needs, agile, open, more strongly linked to research and innovation, better joined-up, and thus that they ultimately have more impact for the wider European economy as it transforms into a digital one.²⁹

The key point of IoT, is to create connection between ICT and non-ICT sectors. To be precise, IoT aims to accommodate digital systems (sensors, hardware, software, network connections) to the physical objects (houses, cars, bridges, heart monitors etc.) across all industries, modern or traditional.³⁰ Standards will enable all ‘smart’ objects to connect and communicate with each other, share gathered data from virtual or physical environment, thus creating digital ecosystem and networked society that is able to provide best solutions for science, industries and our daily lives.³¹ In the light of digital shift, European Commission stresses the need for fast, predictable, efficient and globally acceptable IPR licencing approach.³² Various debates are taking place around standard-setting, IPRs and competition policy. For now, it is clear that current licensing principles do not satisfy the needs of modern economies. It is helpful to take a look at the specifics of ICT sector, which provides basis for further discussion on complex legal and economic issues generated by standard-setting. Characteristics inherent to ICT:

1. *Intense innovation and density of IPRs.* Firm’s success in ICT market is highly determined by the magnitude of efforts and investments it contributes to Research and Development (R&D). Successful R&D results in inventions over which company acquires IPRs.³³ Ownership

²⁸ Communication from Commission: ICT Standardization Priorities for the Digital Single Market. Brussels, 19.4.2016. COM (2016) 176.

²⁹ Communication from Commission on Digital Single Market, pg. 2.

³⁰ Ibid, pg. 3.

³¹ One of IoT goals is to reduce human to machine interaction and promote machine to machine interaction (M2M). See for example <http://www.ericsson.com/res/docs/2013/networked-society-essentials-booklet.pdf>

³² Communication from Commission on Digital Single Market, pg. 13.

³³ M. Rato and N. Petit. *Abuse of Dominance in Technology-Enabled Markets: Established Standards Reconsidered?* (January 29, 2014). European Competition Journal, April 2013. Pg. 3. Available at SSRN: <http://ssrn.com/abstract=2387357>

of IPRs allow companies to perform better in ICT market and generate higher revenues than the ones that do not hold IPRs.³⁴

2. *Short product life-cycles*. Due to rapid innovation across whole sector, ICT products after launch soon come out of date, and need improvements and updates to keep at pace with newly developed technologies from competitors.³⁵
3. *Standard-setting activities* play a crucial role in ICT market.³⁶ For example, company manufactures graphic cards for the computers, in order for the product to be successful, company needs to make sure that graphic card works together with the rest of hardware as well as software, made by other companies. Consequently, firms that specialize in making other hardware parts and software want their products to comply with the all produced graphic cards. The higher degree of interoperability product carries, the higher value it has for consumers. Furthermore, companies that manufacture multifunctional products such as smartphones face greater challenges to satisfy interoperability demands. The product needs to interoperate with higher number of elements like networks and systems, phone operators, various services, applications and phones of other brands. Standard-setting is an effective tool to bring all industry players for cooperation in producing highest quality products and reduce market fragmentation.

Standards usually refer to technologies covered by patents. To comply with an ICT standard, company must get access to a number of patented technologies that are owned by different firms and are essential to the implementation of that standard. Patents that protect such technologies are called Standard-essential patents (SEPs). Companies cannot design around SEPs, but only participate in adoption of alternative standards. While standardization and SSOs still runs on voluntary participation, some standards like USB are so widely spread that non-compliance with them and attempt to adopt alternative standard would result in serious economic issues for the one's business. ICT market heavily relies on innovation and IPR's, new inventions come into light each day, therefore SSOs must react quick to better developments and adopt new standards, making improved products available for public use. The interoperability goals, dynamic innovation and high concentration of IPRs raises tensions between competitors in the ICT market. Firms must get licenses from number of SEP proprietors per standard and invest in modification of their products or processes according to that standard. The need of multiple licenses from different patent holders would drag the company into never ending negotiations over licensing terms and royalty stacking, therefore traditional licensing practices became too cumbersome for satisfying the needs of modern industries. In order to avoid wasting efforts on legal issues and be able to focus on business matters, firms

³⁴ Stefano Comino and Fabio Maria Manenti. *Intellectual Property and Innovation in Information Communication Technology (ICT)*. Editor: Nikolaus Thumm. JRC-IPTS report, 2015. Pg. 2.

³⁵ See M. Rato, N. Petit n 33 pg. 4.

³⁶ Ibid, pg. 5.

enter cross-license agreements and technology pools that provide one-stop licensing. These agreements allow a cost and time effective way for technology sharing and helps to avoid royalty stacking and patent disputes in the future.³⁷ On the other hand, inclusion of patented technology into a standard awards its owner with increased market power which can be exploited in anticompetitive manner through the exercise of IPRs.

2.3.2 Intellectual Property and anti-competitive behaviour

Intellectual Property and Competition Law should not be seen as conflicting laws. They both share the same objectives: promotion of consumer welfare and innovation. Essentially, IP law seeks to protect IP owners' rights to their inventions from unlawful copying by less successful innovators. In ICT market IPR's are dominant and strategically important for companies. Due to the nature of high tech products, patents are the most prevailing form of IP. The development of new technologies is usually very costly and risky while the process of reverse engineering is not. Patents offer the inventor exclusionary rights to be the first seller of a new product and prevent others from free-riding. This time-limited opportunity to extract the profit by exploiting IP rights, whether through marketing or licensing, is the driving force for companies' incentives to innovate.³⁸ It is not difficult to see the potential of patent rights as strategic move to increase market power and eliminate competitors ultimately creating monopoly. Therefore, IPR's are not immune from the intervention of competition law, which provides mechanisms to prevent the anti-competitive behaviour. As will be seen below, exercise of IPR's in the context of standardization, are subject to even stricter limitations.

Usually, standardization takes place in the form of agreements between companies. These are called standardization agreements, and when they are concluded between competitors, are subject to article 101 TFEU.³⁹ Standardization agreements '*have as their primary object the definition of technical or quality requirements with which current or future products, production services or methods may comply*'.⁴⁰ Generally, the Commission views standardization agreements as having significant positive effects on integration of the market, competition on the merits and product value for consumers.⁴¹ However, the Commission stresses out, that meetings in the context of standard-setting, provide forum for competitors to collective decision-making and, like all meetings between competitors, raises risks of

³⁷ H.H Lidgard and J. Atik: *Licensing in an International Context. Cases on US and EU Law and Practices* (2015, Lund University), pg. 393-395.

³⁸ See N. Petit, S. Bostyn. *Patent=Monopoly: A Legal Fiction* n 7 pg. 5-6. Available at SSRN: <http://ssrn.com/abstract=2373471>

³⁹ See Horizontal Guidelines n 9, point 5.

⁴⁰ Ibid, point 257.

⁴¹ Ibid, point 263.

collusive outcome on the market.⁴² Furthermore, these agreements conclude that one technology is chosen over the others, which eliminates competition between current and future technologies. Companies that manufacture competing technologies may face barriers to entry and be excluded from the market.⁴³ Therefore, the Commission addresses the importance of unrestricted and transparent participation in standard-setting.⁴⁴ In addition, Carl Shapiro suggests, that in the absence of cooperation, firms would compete *for the market*, thus may ‘*incur initial losses as the attempt to become dominant network.*’ Cooperation allows implementers of the standard to compete *within the market* rather focusing to attract buyers with other qualities such as product price, features and post-sales services.⁴⁵ Standards, thus, create a uniform network of products that comply and/or interoperate with each other and strengthen competition by enabling consumers to easily switch between the products of different firms.⁴⁶ Moreover, standard implementers enhance inventive performance through financing further innovation instead of overlapping R&D. Antitrust authorities will carefully examine standardization agreements whether their generated efficiencies outweigh restrictive effects on competition. Nevertheless, not only standardisation agreements but also the behaviour of companies in the standard-setting activities deserved special attention from competition agencies, whether prior or post the adoption of standard.⁴⁷

Patent hold-up

Usually, companies seek for their own technology to be incorporated into standard, approved by SSOs, for number of reasons. First, companies acquire the collection of royalties from licencing their SEPs to standard implementers. Second, the base of potential licensees of SEPs is much higher than the one before the technology was included into a standard.⁴⁸ This compensates the investments in previous and future R&D. Firms need less modification of their products to comply with standards which is also cost saving. Reduced costs and holding SEPs increase company’s market power and the dependency of other companies on SEPs holders’ will and terms to license. Benefits generated by holding SEPs, lure firms to act in anti-competitive ways. This naturally raises concerns from EU Competition law

⁴² Case COMP/38.636 *Rambus*, 9 December 2009 (Commitment’s Decision), para. (30).

⁴³ See Horizontal Guidelines n 9, points 264-266.

⁴⁴ *Ibid*, point 280.

⁴⁵ Carl Shapiro, *Setting Compatibility Standards: Cooperation or Collusion?* In *Expanding the Boundaries of Intellectual Property* 91–93 (Rochelle Dreyfuss et al. eds., 2001). Pg. 89. According to author, cooperative standard-setting decreases competition at some dimensions in a near term, while increases competitive environment in other dimensions in the future.

⁴⁶ Case AT.39939-Samsung-Enforcement of UMTS standard essential patents, 29.04.2014. Recital (22).

⁴⁷ Alison Jones. *Standard-Essential Patents: FRAND Commitments, Injunctions and the Smartphone Wars*. February 12, 2014. (2014) 10(1) *European Competition Journal* 1-36; King's College London Law School Research Paper 2014-19. Pg. 4. Available at SSRN: <http://ssrn.com/abstract=2394495>

⁴⁸ See Case AT.39939-Samsung. Recital (25).

perspective. For example, before the standard is agreed and approved by SSO, company may conceal the fact that it holds patents, or pending applications for the patents, essential to that standard. After the standard is adopted, SEP proprietor starts claiming royalties for the use of its patents. This so called ‘*patent ambush*’ was addressed in the case *Rambus v. FTC*.⁴⁹ Standard-setting does not only focus around best technical solutions but also represents interests of businesses and consumer welfare. Where competing technologies provide similar technical quality, SSO is likely to choose patent-free technology over proprietary ones, in order to avoid royalty fees, which later are passed on to downstream consumers. The secrecy of holding SEPs allows company to capture a standard and charge higher royalties, which, absent deceptive conduct, it would not have been able to charge.⁵⁰ Such conduct is also known as patent hold-up, which arises ‘*when a gap between economic commitments and subsequent commercial negotiations enables one party to capture part of the fruits of another’s investment*’.⁵¹ Prior to the agreement on standard, companies are free to test and abandon undesirable technologies, whether *ex post* standard-setting, parties likely already made significant investments into compliance with new standard. This situation *de facto* locks the industry into both standard and relevant SEPs.⁵² Companies fearing to incur losses will be forced to accept less favourable licensing terms and conditions, such as royalty rates. Therefore, the value of SEPs, *ex post* inclusion into standard, greatly exceeds its value *ex ante*. The issue is greater in ICT industry where interoperable standards, include large number of SEPs, each of them reading only on a small component of a larger end product. Standard implementers may produce goods being unaware that they are in breach of someone’s SEPs.⁵³ Such conduct, under IP law, enables patent holders to seek for injunctions before courts. Enforcing injunctions against SEP implementers would sabotage the success of standard’s interoperability and harm competitor’s business, even in situations where he wasn’t acting in bad faith.⁵⁴ Furthermore, injunctions of SEPs after industry lock-in reward their owners disproportionately to their inventive contribution. The fear of possible hold-up after standardization may discourage standard implementers

⁴⁹ *Rambus Inc., v. Federal Trade Commission*, 22 April 2008, 522 F.3d 456, (D.C. Cir. 2008). FTC concluded that due to Rambus’s ‘deceptive course of conduct’ JEDEC(SSO) included its patents into a standard, which it wouldn’t have done in the case of complete disclosure. Or, such conduct was aimed to avoid RAND assurances with possible *ex ante* licensing negotiations.

⁵⁰ See COMP/38.636 *Rambus*, n 42, para. (28), (40).

⁵¹ Joseph Farrell, John Hayes, Carl Shapiro, Theresa Sullivan: *Standard Setting, Patents, and Hold-Up*. 74 *Antitrust Law Journal* No. 3 (2007), pg. 603.

⁵² *Competition Policy Brief*. Occasional discussion papers by the Competition Directorate-General of the European Commission. Issue 8, June 2014. Pg. 3.

⁵³ Thomas F. Cotter. Patent Hold-up, Patent Remedies and Antitrust Responses: The Role of Patent Remedies and Antitrust Law in Dealing with ‘Patent Holdups.’ March 10, 2009. Pg. 1-2.

⁵⁴ Carl Shapiro. *Navigating the Patent Thicket: Cross-Licenses, Patent Pools, and Standard-Setting* (March 2001). Author addresses the problem of the patent flood caused by patent issue agencies which leads to patent thicket. ‘Companies like IBM, Intel, or Motorola find it all too easy to unintentionally infringe on a patent in designing a microprocessor, potentially exposing themselves to billions of dollars of liability and/or an injunction forcing them to cease production of key products’.

to invest in standard enabled market *ex ante*.⁵⁵ Another issue, generated by standards in ICT market, is the potential of royalty stacking. ICT standards consist of many complementary technologies, owned by different patent holders. Standard implementer gains no value from license agreement of one or few SEPs if he does not have access to the rest of SEPs. Multiple SEP owners set their desired royalties independently and thus royalties stack to a rate that is much higher than the amount of royalties if single SEP owner would licence whole package of SEPs.⁵⁶ Even holders of SEPs that cover minor components of the standard, gain power to *ex post* overcharge of royalties through the threat of seeking injunctions. In the end, consumers face high prices which reduces sales for downstream firms and efficiency of a standard.⁵⁷

It was observed that power, resulting from SEPs inclusion into a standard, should not be exploited through refusal to license, imposition of predatory terms and patent injunctions on willing licensees.⁵⁸ To restrict the probability of *ex post* anti-competitive behaviour, mainly in relation to hold-up, SSOs, at the request of competition bodies, tightened their IPR policies by requiring their members to disclose any relevant SEPs and commit to license those SEPs on fair, reasonable and non-discriminatory (FRAND) or reasonable and non-discriminatory (RAND) terms.⁵⁹ Origins of FRAND can trace as early as 1940's, when U.S courts and antitrust agencies recognised abusive licensing as anticompetitive and harmful to innovation and consumers.⁶⁰ In subsequent Decades a chain of American cases focused on remedies to curb such licensors, mainly imposing requirements of reasonable terms and non-discrimination against licensees. However, early cases did not regard standard-setting. Only in 1960's, after the government issued decrees in antitrust case against AT&T and Western Electric, American Standard Association (ASA) revised their policy and permitted technology inclusion into a standard only if those patents were promised to be licensed on reasonable terms. Further antitrust cases against *Dell Computer* and *Rambus* triggered the wide adoption of FRAND inclusion within the policies of SSOs.⁶¹ As opposed to court issued decrees, FRAND commitments are made voluntarily by standard participants, nevertheless they share the similar interpretation of good licensing principles as those provided by U.S courts in the middle of 20th century.

⁵⁵ Ibid, pg. 2.

⁵⁶ Philippe Chappatte: FRAND Commitments—the Case for Antitrust Intervention. European Competition Journal, August 2009. Pg. 326.

⁵⁷ See Alison, Jones n 47 pg. 5.

⁵⁸ Philippe Chappatte: *FRAND Commitments—the Case for Antitrust Intervention*. European Competition Journal, August 2009. Pg.319-320.

⁵⁹ FRAND and RAND are used as synonyms. See also Alison Jones supra n 18. Pg. 6.

⁶⁰ Jorge L. Contreras. *A Brief History of FRAND: Analyzing Current Debates in Standard Setting and Antitrust Through a Historical Lens* (January 15, 2015). 80 Antitrust Law Journal 39 (2015); American University, WCL Research Paper No. 2014-18. Available at SSRN: <http://ssrn.com/abstract=2374983>

⁶¹ Ibid, pg. 43-44.

2.3.3 FRAND

The importance of FRAND commitment is addressed in the Horizontal Guidelines together with other principles for procompetitive standard-setting. Standardization agreements which risk creating market power, will normally fall outside article 101 (1), if they fulfil this criteria:

- Unrestricted participation in the standard-setting process.
- Transparent adoption of a standard.
- No obligation to comply with a standard.
- Access of standard is ensured on FRAND terms.
- Good faith disclosure, by SSO members, of all relevant IPRs that may be essential to a standard.

The non-fulfilment of these conditions will not make standardization agreement automatically in a breach of article 101(1). However, then it will be examined whether it falls under article 101(1) and if so, whether it can be justified under article 101(3).⁶² These principles do not only safeguard competition but also contribute to the efficiency of a standard. Wide application of a standard leads to its success to reduce market fragmentation and bring more market players to compete, providing larger variety of choice for consumers. However, companies fearing hold-ups from SEP owners may be discouraged to comply with a standard. ICT standards may, and usually do, read on thousands of patents from different proprietors. Each of those proprietors, after the standard is agreed, gain market power to control the access to standard and charge excessive royalties. Therefore, it is upon SSOs to ensure fair process of standard-setting *ex ante* by requiring of disclosure of any relevant IPR's and licensing on FRAND terms. Generally, under IP law, patent holders have the right of refusal to license or are relatively free to decide on licensing terms.⁶³ According to N. Petit and S. Bostyn:

'A patent simply offers market opportunity for the patentee to commercialise successfully a product implementing the patented technology. A patent is however not any guarantee that the patented technology will gain such massive traction on the market...'⁶⁴

However, in the context of standard-setting, inclusion of SEP into a standard, increases the value of that patent, by expanding the market for patented technology and eliminating competition from other technologies.⁶⁵ SEP owner bears less risks than normal patent owner, to be precise, standardisation provides that guarantee of essential patent's success through increased licensing opportunities, arising from the market lock-in, with third parties that

⁶² See Horizontal Guidelines supra n 9. Points 277-286.

⁶³ See Philippe Chappatte n 58. Pg. 327.

⁶⁴ See S. Bostyn, N. Petit. *Patent=Monopoly: A Legal Fiction* n 7. Pg. 2. Authors note that while patents may assist in granting market power, such power depends not on a patent as right but on the number of other factors, such as time advantage in bringing the product to the market, successful marketing, better cost management etc. Pg. 14-15.

⁶⁵ See Philippe Chappatte n 58. Pg. 330.

already made large investments into standardised products. Therefore, in exchange for those benefits, SEP owner is required to provide FRAND commitment prior to the adoption of standard as a promise not to exploit its newly acquired market power to extract higher royalties, than would be normally agreed upon absent the standard. In other words, FRAND assurances seek to protect standard implementers while ensuring that SEP owners are awarded for their contribution to standards and innovation, but no more than the true value of patent *ex ante* the adoption of standard. However, due to its flexibility or rather vagueness, concept of FRAND terms lead to great uncertainty and disputes among licensing parties and are far from bringing peace to SEP licensing. SSOs provide different guidelines on FRAND terms and avoid to deliver clear and explicit indication on its scope. The broad definition of FRAND allows to incorporate a large variety of market players with different business models into ICT standard-setting.⁶⁶ Douglas Lichtman, provides reasons why loosely defined FRAND is more attractive for companies participating in the standard-setting than explicit price negotiations.⁶⁷ Primarily, since FRAND commitments take place before the adoption of standard, negotiations over validity and value of hundreds of patents owned by dozens of companies would take enormous time:

‘One charm of the RAND commitment for participants and the public alike, then, is that RAND allows technological implementation to move forward while the parties in parallel work out legal and financial details.’

Second, standardization is a process ‘run by engineers, not lawyers’. It would be too expensive for companies, who participate in multiple standard-settings:

‘To send to each of those bodies not only the obviously necessary engineers but also an army of lawyers, business executives, and pricing specialists. The RAND commitment thus simplifies the conversation, allowing the engineers alone to run the show until the technical details are fully selected and documented.’

Sometimes new technologies may look more promising than their true commercial value. The time gap between FRAND commitment and actual negotiations allow standard implementers to wait for ‘additional information before they commit to a specific royalty structure’.⁶⁸

However, Lichtman agrees, that the concept of today’s FRAND is not good enough to solve issues arising from *ex post* negotiations. Especially, if in legal proceedings courts are to value and price patents, which they unlikely do better than companies themselves. Shall the court pick too high or too low royalty rates, such judgement will not only be imposed on litigating parties

⁶⁶ Yann Meniere: *Fair, Reasonable and Non-Discriminatory (FRAND) Licensing Terms*. Research Analysis of a Controversial Concept. JRC science and policy report, 2015. Pg. 4.

⁶⁷ Douglas Lichtman. Understanding the RAND Commitment. Houston Law Review, Vol. 47, p. 1023, 2010; UCLA School of Law, Law-Econ Research Paper No. 100-08. Available at SSRN: <http://ssrn.com/abstract=1783406>

⁶⁸ Ibid, pg.1028-1029.

but as well will affect other ongoing negotiations over the same SEPs.⁶⁹ Licensing parties seeing the possible outcome will always agree on whichever royalty rates rather than enter long and pricey litigations. Philippe Chappatte, seconds this opinion, providing that national courts in EU may not be competent to address what is fair and reasonable, and that FRAND will be applied in inconsistent manner throughout Member States.⁷⁰

Courts and competition authorities previously hesitated to intervene within the discretion of SSOs and licensing negotiations between companies.⁷¹ Some argue, that successful work of SSOs, to promote voluntary cooperation between stakeholders, attract new entries and enable high degree of competition and interoperability between ICT products, well positions SSOs to approach better FRAND licensing through revision of IPR policies with the consensus of their members. SSOs should take the task to better frame FRAND bargaining, as a guidance for courts and stakeholders, without favouring one party over the other.⁷² In contrast, Philippe Chappatte claims that FRAND licensing should be addressed by antitrust authorities and European Commission is best positioned to deliver clear precedent for the national courts and competition authorities to follow.⁷³ Standard-setting, which results in hold-up, impairs competition and consumer welfare, and as a guardian of the Treaty, European Commission has highest competence to prevent such behaviour. Article 101 TFEU provides assessment of those standardization agreements that restrict competition by object or effect. Finding an infringement under article 101 TFEU brings such agreement being void. However, this would cause high losses for all companies involved where the market was locked into the standard and large investments being made. Enforcement of article 101 TFEU may cause more harm than good on those agreements where parties legitimately expected licensing on FRAND terms. Therefore, article 102 TFEU shall be enforced in those situations where SEP owner exploits its market power, gained from standard-setting, to impose excessive royalties on willing licensees that fearing to lose large investments are forced to accept such terms. 102 TFEU provides ‘a clear legal basis for enforcing FRAND.’⁷⁴ Article 102 reads:

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) Limiting production, markets or technical development to the prejudice of consumers;

⁶⁹ Ibid, pg. 1049-1050.

⁷⁰ See Philippe Chappatte n 58. Pg. 335-336.

⁷¹ Craig Simpson. *Standardizing technology. A further look at patent ambush and FRAND licensing undertakings*. Competition Law Insight, 6 May 2008. Pg. 9.

⁷² See Yann Meniere n 66. Pg.5, 16.

⁷³ See Philippe Chappatte n 58. Pg. 335-336.

⁷⁴ Ibid, pg.332.

- (c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, <...> have no connection with the subject of such contracts.

It is easy to notice that FRAND terms impose duties and/or prohibits actions similar to those set by article 102 TFEU. EU Commission, by no doubt, has most experience in enforcing article 102 TFEU and providing legal and economic expertise on what is fair, reasonable and non-discriminatory in a number of different categories, including licensing of IPRs. The Commission has competence worldwide to require third parties to provide confidential information of their IPR licensing activities. Therefore, it is best placed to assess whether conduct was fair, reasonable and non-discriminatory.⁷⁵

Some authors propose *ex ante* price negotiations, provided by policies of SSOs, as a solution to minimize *ex post* overcharge of royalties.⁷⁶ To comply with a standard, especially in ICT, companies put at stake millions of euros as investments, that, as addressed before, could be captured by ‘bad’ SEP owners. Naturally, companies want to count their legitimate expectations and know in advance the price that comes from compliance with a standard. Such *ex ante* policy of SSOs certainly would ease the risks of patent hold-up at some degree.⁷⁷ However, critics of *ex ante* pricing raise stronger counter arguments. First, it was discussed above with reference to Douglas Lichtman, that standard-setting process, especially in relation to ICT standards, from technical perspective is as difficult as it gets. Therefore, loosely defined FRAND and *ex post* negotiations unburdens participants from dealing with legal matters and allows to concentrate on what is most important: quality of a standard. Second, meetings between competitors in the context of standardization raises suspicions from competition authorities. The Commission, in decision against *Rambus*, stated that the process of standard-setting amounts to collective decision-making with a risk of anticompetitive outcome, such as collusive price fixing.⁷⁸ The line between collective price-fixing and *ex ante* term negotiations appears to be too thin, that SSOs, at least in Europe, would venture to adopt such rules in a near future. This emerges from the fact that EU Commission closely cooperates with European SSOs, such as ETSI which explicitly warns its participants against disclosing licensing terms within ETSI:⁷⁹

‘Specific licensing terms and negotiations are commercial issues between the companies and shall not be addressed within ETSI. Technical Bodies are not the

⁷⁵ Ibid, pg. 335-336.

⁷⁶ See for example Jorge L. Contreras. *Technical Standards and Ex Ante Disclosure: Results and Analysis of an Empirical Study*. Jurimetrics j., Vol. 53, No. 1, 2013. Available at SSRN: <http://ssrn.com/abstract=2249926>

⁷⁷ See Jorge L. Contreras n 76. Pg. 168.

⁷⁸ See *Rambus* n 42.

⁷⁹ See ETSI Guide on Intellectual Property Rights. 19 September 2013. Section 4.1 *Licensing terms and ex ante disclosure*.

appropriate place to discuss IPR Issues. Technical Bodies do not have the competence to deal with commercial issues. Members attending ETSI Technical Bodies are often technical experts who do not have legal or business responsibilities with regard to licensing issues. Discussion on licensing issues among competitors in a standards making process can significantly complicate, delay or derail this process.’

FRAND was designed to solve patent hold-up issues, generated by specifics of standard-setting. Intellectual property rights and *ex ante* investments by potential licensees confer a significant market power on SEP holders to extract profits at the expense of reduced competition and consumer welfare. Refusal to license, desirable royalties, right to injunctive reliefs are normally considered patentee’s justifiable interests that protect the incentives to innovate. However, inclusion into a standard increases patent’s value simply because third parties contributed significant investments to comply with a standard. The rationale of patents is that they ‘reward invention, not commercialisation.’⁸⁰ Therefore, in the context of standard-setting, SEP holders should not be allowed to abuse these rights to extract higher rewards than the true value of their inventions. Present litigations, confusion of courts and discussions in legal community indicate that the concept of FRAND does weakly serve its purpose. The most widespread controversy is, whether FRAND commitments prohibit SEP holders from seeking injunctive reliefs against willing licensees. Neither rules of SSOs, neither competition authorities and short jurisprudence of European courts provide the clear answer. SEP owners right to injunction is subject to many considerations, which will be addressed below together with the recent judgment delivered by European Court of Justice in the case *Huawei Technologies v ZTE*.⁸¹ The beginning of Chapter 3 will provide analysis of legal treatment prior *Huawei* judgement. Second part will discuss the case in depth and will try to answer whether *Huawei* delivers a long-awaited precedent towards clarifying FRAND in relation to patent injunctions.

⁸⁰ See S. Bostyn, N. Petit. *Patent=Monopoly: A Legal Fiction* n 64. Pg. 2.

⁸¹ *Huawei Technologies v ZTE*, C-170/13, EU:C:2015:477

3. Case discussion

3.1 Introduction

Patent owner's right to seek injunction against alleged patent infringer is among essential rights, granted by Intellectual Property Law, which guards patentee's exclusive rights and incentives to innovate.⁸² IPR protection is also recognised as fundamental principle by the Charter of Fundamental Rights of European Union.⁸³ To ensure the full respect of Intellectual Property, Directive 2004/48/EC⁸⁴ provides remedies for effective IPR enforcement in Member States. Paragraph 1. of Article 9 of that directive, states that:

'Member States shall ensure that the judicial authorities may, at the request of the applicant:

- (a) issue against the alleged infringer an interlocutory injunction intended to prevent any imminent infringement of an intellectual property right...'

Therefore, patent injunctions are granted by national courts under national IP rules, with no distinction between European and national patents. Nevertheless, recital 12 in the preamble of the Directive confirms that protection of IPR's is not absolute and may be limited for the purposes of competition law:

'(12) This Directive should not affect the application of the rules of competition, and in particular Articles 101 and 102 of the TFEU. The measures provided for in this Directive should not be used to restrict competition unduly in a manner contrary to the Treaty.'

Seeking injunctions against patent infringers is the fundamentally acknowledged right. However, in the proceedings for injunctions against SEP infringements, defendants raise claims that seeking for injunction by SEP owner amounts to abuse of a dominant position under article 102 TFEU. While there is no clear precedent whether seeking for patent injunction amounts to abuse under article 102 TFEU, the Commission takes the view that seeking for injunctive reliefs of SEPs may result into anticompetitive effects ultimately harming the consumers. Additionally, national courts in Member states were hesitant to grant injunctions on a mere finding that there was an infringement of FRAND encumbered SEPs. However, in Germany, national courts inconsistently dealt with this type of cases and some been

⁸² TRIPS agreement articles 41,44.

⁸³ Article 17 (2). Charter of Fundamental Rights of the European Union, 2012/C 326/02. Official Journal of the European Union.

⁸⁴ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, 2004 O.J. L 195/16.

granting injunctions against licensees that were willing to accept FRAND terms and made appropriate offers. This led to confusion among courts in other Member States, where SEP holders were referring to the decisions of German courts in order to be granted patent injunction. Therefore, in *Huawei v ZTE* the German court decided to stay proceedings and refer to the CJEU for clarification.

3.2 Huawei Technologies v ZTE

In 2009, Huawei technologies, operator in telecommunications sector, notified ETSI that it was holding a European patent (under reference EP 2 090 050 b 1),⁸⁵ essential to the Long Term Evolution (LTE) standard, and committed to grant licenses to third parties on FRAND terms. Anyone willing to implement LTE standard had to use the teachings of Huawei's patent. In 2010, ZTE Corp. which is another operator in telecommunications sector, engaged into discussions with Huawei, concerning FRAND licensing in relation to ZTE's products which were linked to LTE standard and manufactured without paying royalties to Huawei in respect of past acts of use. Huawei indicated the amount of royalties which it considered to be reasonable. ZTE Corp. was itself a holder of patents essential to LTE standard and sought cross-licensing as a better solution. However, the negotiations broke down and no licensing agreement was concluded. In 2011 Huawei Technologies brought an action against ZTE for patent infringement before the Landgericht Dusseldorf in Germany, seeking to obtain a prohibitory injunction, the rendering of accounts, the recall of products and award of damages. In its defence, ZTE claimed that it was willing to conclude the license on FRAND terms and the action, brought by Huawei Technologies for the injunction prohibiting the infringement, amounts to an abuse of a dominant position. The German court asked the European Court of Justice the following questions:

- (1) Does the proprietor of an SEP, which informs a standardization body that is willing to grant any third party a licence on FRAND terms, abuse its dominant market position if it brings an action for an injunction against a patent infringer even though the infringer has declared that it is willing to negotiate concerning such licence?
- (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 willingness to negotiate? In particular, can willingness to negotiate be presumed where the patent infringer has merely stated (orally) in a general way that it is prepared to enter into negotiations, or must the infringer already have entered into negotiations by, for

⁸⁵ Patent bearing the title 'Method and apparatus of establishing a synchronization signal in a communication system', granted by the Federal Republic of Germany.

example, submitting specific conditions upon which it 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 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 SEP 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 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 SEP 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?⁸⁶

In short, the referring court asked the CJEU to determine when SEP owner's actions for patent injunction infringe article 102 TFEU. However, before the analysis of the Court's answer takes place, it is important to take a look at the previous case law on assessment of the abuse of dominant position in relation to the exercise of IPRs.

3.3 Dominant position

Article 102 TFEU is applicable only in those situations where company holds a dominant position in the market. Dominant position is 'a position of economic strength held by an undertaking which enables it to prevent effective competition from being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers.'⁸⁷ The ownership of IPRs, including SEPs, does not constitute dominance *per se*. However, possession of IPRs can confer dominant position to their owner, if holding IPRs enables company to prevent effective competition on the market.⁸⁸ Establishment of dominance relies on the examination of all the relevant circumstances specific to the case. In *Motorola* the Commission addressed that combination of large market shares and existence of barriers for

⁸⁶ See *Huawei Technologies v ZTE*, paragraph 39.

⁸⁷ *United Brands Company and United Brands Continentaal BV v Commission*, 27/76, EU:C:1978:22. Paras. 65,66.

⁸⁸ *Astra Zeneca v Commission*, C-457/10P, EU:C:2012:770, para. 186.

competitors to enter or expand in the relevant market determines whether SEP owner enjoys dominant position.⁸⁹ It follows, from the further considerations in *Motorola Mobility*, that SEP owner holds dominant position whereas:⁹⁰

1. It is *indispensable* for the companies to get access to the standard in order to remain or enter the relevant market;
2. *Market lock-in*. Access to standard is necessary for the licensee's products to interoperate within uniform network with products and services provided by other standard implementers. Also whereas, switching to alternative technology or standard is highly doubtful in the absence of competitive substitute and the industry players made large investments into infrastructure of current standard-compliant products.

These factors constitute barriers to entry and determine SEP owner's dominant position. Special characteristics of ICT market lead to suggestion that, in most cases, SEP's inclusion into ICT standard confers its owner a dominant position. For example, successful performance of ICT industry requires wide adoption of standards to achieve interoperability among products and services of different manufacturers. In addition, technical standards are usually very complex and requiring precise follow for final product to operate. One standard may read on hundreds of SEPs and non-compliance with a single SEP would impede the implementation of a whole standard. Therefore, the Commission declined Motorola's claims that its dominant position was restricted by Apple's bargaining power, on the grounds that the presence of such power does not change the fact, that there are no substitutes for Motorola's SEP and anyone willing to implement the standard must get license from Motorola.⁹¹ In the event, it is difficult for SEP owner to prove that it does not hold dominant position. Access to SEPs is always indispensable to comply with the standard. Moreover, supplying not only interoperable but also cutting-edge products is the critical factor for success of ICT businesses. It is common practice to make early investments into new standard infrastructure in order to stay in the game. Thus, adoption of a standard nearly always leads to industry lock-in. According to some scholars,⁹² presumption that owning SEPs equals holding dominant position is incorrect. Standards regularly face competition from other, whether existing or future, standards as well as non-standardized technologies, which, in innovation driven markets, are quickly adopted. Also, formal standard-setting is a 'repeated-game', which constrains SEP owners to exercise market power with regard to one standardized technology, as SSO members would punish such behavior by avoiding to include that technology in subsequent standard-setting. Furthermore, SEP holders face the need to obtain access to the same or another standard from other SEP proprietors, thus 'one cannot be dominant and 'dominated at the same time within one and the same business

⁸⁹ COMMISSION DECISION of 29.04.2014. Case AT.39985 - Motorola - Enforcement of GPRS standard essential patents. Recitals (222)- (224).

⁹⁰ Ibid, recitals (227)- (236).

⁹¹ Ibid, recitals (237)- (257).

⁹² See M. Rato, N. Petit n 33.

relationship.⁹³ These arguments were put before the Commission by Motorola. Motorola claimed that Apple holds a large patent portfolio of SEPs and non-SEPs which makes it indispensable trading partner as it is impossible to avoid patent portfolio of that size.⁹⁴ The Commission noted that it assessed whether Motorola, as a SEP holder, enjoys dominant position on a market as a whole and not on the basis of its negotiating position vis-à-vis one or more customers, such as Apple. Even if Motorola needs to obtain access to other SEPs or non-SEPs of other potential licensees, the fact remains that there are no substitutes for Motorola's Cudak GPRS SEP and potential licensees cannot switch to another supplier. Were Motorola to accept lower royalty rates in exchange for obtaining access to other patents, it only means obtaining remuneration it desires, though it is not in a form of cash royalties. Therefore, there is no effect on Motorola's ability to act to an appreciable extent independently of one or more potential licensees that hold patents indispensable for Motorola.⁹⁵ Even, if one or few potential licensees could countervail Motorola's negotiating power, due to their SEPs and non-SEPs, this would ensure that only particular customers are safe from the market power of Motorola. That would lead the existence of dominant position being dependent on the bargaining position of each potential licensee, relating to whether Motorola wants the access to its patents or not.⁹⁶ The Commission also doubted whether standard-setting as a 'repeat-game' could constrain Motorola's behavior, since Motorola did not provide any specific evidence. Shall Motorola experience any repercussions, it will depend on its market position and that of other participants in subsequent round of standard-setting.⁹⁷ Perhaps, counter arguments provided by the Commission to Motorola, led the referring court to presume existence of a dominant position in *Huawei*. Advocate General criticized the referring court, for not showing whether and how it found Huawei to hold dominant position. He pointed out that such findings should be based not on hypotheses but circumstances specific to the case, since constituting a dominance imposes special responsibility on the undertaking concerned. If holding SEPs, that potential licensees necessarily need to get access to, give rise to such presumption, it must be possible to rebut it with specific detailed evidence. However, under article 267 TFEU, the European Court of Justice is not entitled to change substance of referred questions and shall only give rulings on the interpretation or the validity of a provision of EU law on the basis of the facts put before it by the national court.⁹⁸ Therefore, the assessment given by the Commission remains the only source indicating whether SEP holders enjoy dominant position, which does not mean that CJEU will provide the same outcome if such matter is raised before it.

⁹³ Ibid, pg. 15 -16.

⁹⁴ *Motorola* decision n 89, recital (238).

⁹⁵ Ibid, recitals (241), (242). The Commission also noted that Motorola in its submission described general bargaining power and not countervailing buyer power. The establishment of countervailing buyer power relies on the key factor that buyer is able to switch to another supplier. See recital (243).

⁹⁶ Ibid, recitals (244), (245), (246).

⁹⁷ Ibid, recitals (263), (264).

⁹⁸ Opinion of Advocate General delivered on 20 November 2014 in Case C-170/13 *Huawei Technologies Co. Ltd v ZTE Corp, ZTE Deutschland GmbH*. Points 53-58.

3.4 Abusive conduct

The CJEU stated, that in order to provide the answer and assess the lawfulness of seeking injunction against the SEP infringer with which no licensing agreement has been concluded, it must strike the balance between maintaining free competition and the requirement to safeguard SEP holder's rights guaranteed by IP law and the Charter.⁹⁹ Fundamental rights enshrined in the Charter are not absolute and may be subject to limitations under Article 52 (1), provided that those limitations respect the essence of those rights and freedoms and are imposed in order to meet the objectives recognised by the Union or for the need to protect the rights and freedoms of others and meet the principle of proportionality. The objective of promoting free competition and internal market is enshrined in the Article 3 TEU. Therefore, limitations on fundamental rights can be imposed for the purposes of EU competition law, in this case, article 102 TFEU. The right to access courts as possible breach of article 102 TFEU was addressed in the case *ITT Promedia NV v Commission*¹⁰⁰, it was observed that:

‘The ability to assert one's rights through the courts and the judicial control which that entails constitute the expression of a general principle of law which underlies the constitutional traditions common to the Member States <...> 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 a dominant position...’¹⁰¹

The exception to the general rule, that accessing the court is not the abuse of dominant position, applies whereas: an undertaking brings actions before the court, not as an attempt to establish its rights, but as a mean to harass the opposite party and an overall goal of these actions is to eliminate competition.¹⁰² These conditions must be ‘construed and applied strictly, in a manner which does not defeat the application of the general rule.’¹⁰³ The CJEU also pointed out that undertakings in a dominant position may be deprived of the right to adopt a course of conduct or take measures which are not in themselves abuses and which are permitted for the non-dominant firms.¹⁰⁴ According to settled case-law, the concept of abuse of a dominant position is an objective concept and refers to the conduct of a dominant undertaking which is such as to influence the structure of a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, and which, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the

⁹⁹ *Huawei* judgment, para. 42.

¹⁰⁰ *ITT Promedia NV v Commission*, T-111/96, EU:T:1998:183.

¹⁰¹ *ITT Promedia*, paragraph 60.

¹⁰² *ITT Promedia*, paragraph 30.

¹⁰³ *ITT Promedia*, paragraph 61.

¹⁰⁴ *ITT Promedia*, paragraph 139.

market or the growth of that competition.¹⁰⁵ Therefore, dominant firm's behaviour, whether normal business practice or assertion of its statutory rights, may produce anticompetitive effects which do not arise from the conduct of non-dominant companies. The list of abusive practices under article 102 TFEU is not exhaustive. Indeed, it can be anything that causes direct damage to consumers or those practices which are detrimental to consumers through their impact on competition.¹⁰⁶ Legitimate exercise of IPRs is not an exception:

'The illegality of abusive conduct under Article 102 TFEU is unrelated to its compliance or non-compliance with other legal rules and, in the majority of cases, abuses of dominant positions consist of behaviour which is otherwise lawful under branches of law other than competition law.'¹⁰⁷

The European Court of Justice in *Michelin* ruled out that holding dominant position in itself is not the infringement of article 102 TFEU, but the undertaking in such position has 'a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.'¹⁰⁸ The actual scope of dominant undertaking's special responsibility must be considered in the light of specific circumstances to that case, which show that competition has been weakened.¹⁰⁹ In *Magill* case, which involved refusal to license and obtaining injunctions against copyright infringements, the CJEU held that the exercise of an exclusive right by the proprietor does not constitute an abuse of dominant position *per se*, but present exceptional circumstances, seeking for protection and enforcement of IPRs may involve abusive conduct.¹¹⁰ The Court provided that exceptional circumstances in the case were: refusal to supply prevented the appearance of a new product for which there was a consumer demand; the proprietors were reserving themselves the secondary market by excluding all competition on the market; and there was no justification for such refusal.¹¹¹ Consequently, in *IMS Health*, the CJEU noted that refusing to give access to a product or service which is indispensable for carrying on a particular business will be treated as abusive if it does meet three cumulative conditions set in *Magill*.¹¹² It was also observed that anticompetitive effects, generated by refusal to license, have to be seen on secondary market:¹¹³

¹⁰⁵ See for example *Hoffman-La Roche v Commission*, 85/76, EU:C:1979:36, para 91; *AstraZeneca v Commission*, C-457/10 P, EU:C:2012:770, para. 74; *AKZO v Commission*, C-62/86, EU:C:1991:286, para. 69.

¹⁰⁶ *Konkurrensverket v TeliaSonera*, C-52/09, EU:C:2011:83, paragraph 24.

¹⁰⁷ *AstraZeneca v Commission*, C-457/10 P, EU:C:2012:770. Para. 132.

¹⁰⁸ *NV Nederlandsche Banden-Industrie Michelin v Commission*, 322/81, EU:C:1983:313, para. 57.

¹⁰⁹ *Konkurrensverket v TeliaSonera*, C-52/09, EU:C:2011:83, para 84. *Tetra Pak International SA v Commission*, C-333/94 P, EU:C:1996:436, para. 24.

¹¹⁰ *RTE&ITP v. Commission*, C-241/91, EU:C:1995:98, para 50.

¹¹¹ *Ibid*, paras. 53-56.

¹¹² *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG*, C-418/01, EU:C:2004:257, para. 37.

¹¹³ *IMS Health*, para. 48.

‘As the Advocate General stated in point 62 of his Opinion, that condition relates to consideration that, balancing of the interest in protection of copyright and the economic freedom of its owner, against the interest in protection of free competition the latter can prevail only where refusal to grant a license prevents the development of the secondary market to the detriment of consumers.’

It follows, that competition interests will override IPR holders’ rights only when refusal to grant access to those IPRs prevents development of secondary (upstream or downstream) market to the decreased consumer welfare.¹¹⁴ It is feared that competition law intervention into IPRs would decrease inventors’ incentives to innovate and set the condition for competitors to free-ride on IPR holders’ inventions. This argument was put before the CJEU by Microsoft.¹¹⁵ The Commission found that Microsoft refused to supply full interoperability information, protected under copyright, to producers of servers. It was concluded that Microsoft’s conduct met the exceptional circumstances set in *Magill* and *IMS Health*, therefore was abusive.¹¹⁶ Microsoft argued that protection of its incentives to innovate provides the objective justification for such conduct.¹¹⁷ Furthermore, it claimed that competitors would be discouraged from taking the trouble to create their own technology and just rather wait to see what technology they can obtain under a license.¹¹⁸ The Court and the Commission dismissed these arguments on numerous grounds. First, the Community legislature considers that the disclosure of interoperability information benefits the innovation, especially in the software sector.¹¹⁹ In normal competitive circumstances software developers have every incentive to favour interoperability between their products and their competitors’ products, through disclosure of interoperability information, as consumers place great significance on interoperable products.¹²⁰ Microsoft’s refusal to disclose information precludes the competitors to take advantage from their own innovation by the lack of interoperability, thus impairing genuine technical development to the prejudice of consumers. The Commission claims that refusal to license impairs ‘consumer’s ability to benefit from such innovation, as well as the competitors’ ability to earn in return on their innovation-and hence in the longer term their incentives to innovate.’¹²¹ Therefore, Microsoft’s arguments, that order to license such information would reduce competitors’ incentives to invest in their own innovation and instead copy Microsoft’s intellectual property, was ungrounded. The Commission noted that Microsoft’s incentives to innovate are not relevant to the assessment of the consequences which the abusive practice has for its competitors’ incentive to innovate.¹²² ‘All things considered, the positive impact on the level of

¹¹⁴ Alison Jones, Brenda Sufrin (2014) pg. 534.

¹¹⁵ *Microsoft v Commission*, T-201/04, EU:T:2007:289.

¹¹⁶ *Microsoft*, para. 332.

¹¹⁷ *Microsoft*, para. 111.

¹¹⁸ *Microsoft*, para. 670.

¹¹⁹ *Microsoft*, para. 686. See also Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L 122, 17/05/1991 P. 0042-0046.

¹²⁰ *Microsoft*, para. 149.

¹²¹ *Microsoft*, para. 636.

¹²² *Microsoft*, para. 637.

innovation in the whole industry outweighed the negative impact of the dominant undertaking's incentives to innovate.¹²³ Furthermore, Microsoft failed demonstrate in which way information disclosure would reduce its own incentives to innovate, since previously it did supply such information to producers of servers, but cut it back when it entered the market itself.¹²⁴

¹²³ *Microsoft*, para 669.

¹²⁴ *Microsoft*, para 701.

4. *Huawei v ZTE: ‘The Middle Path’*

4.1 *Samsung/Motorola and Orange-Book-Standard*

The Commission in *Microsoft* expanded the criteria laid down in *Magill/IMS Health*. Although, the refusal to license did not prevent entry of new products to the market, it did limit the technical development or ‘follow-on’ innovation of new products, which, according to the Commission, has the same outcome-decreased welfare of consumers.¹²⁵ *Magill*, *IMS Health* and *Microsoft*, concerned refusal to license copyrights, however the wording by the Court did not seem to limit its judicial treatment in the field of copyrights.¹²⁶ Indeed, the Commission included *Magill/IMS Health* criteria in its Guidance, which provides that the Commission will consider refusal to license IPRs as abusive where the three circumstances are present: the refusal relates to a product or service for effective competition on a downstream market; the refusal is likely to eliminate effective competition on the downstream market; the refusal is likely to lead to consumer harm.¹²⁷ Nevertheless, the list of exceptional circumstances is not exhaustive.¹²⁸ In, 2014, the Commission adopted the decision concerning Samsung’s seeking of injunctions against Apple on the basis of its SEPs covering UMTS standard.¹²⁹ The Commission held that exceptional circumstances were the UMTS standard-setting process and Samsung’s commitment to ETSI to license its SEPs on FRAND terms and conditions.¹³⁰ The same conclusions were made in decision against Motorola in relation to GPRS standard.¹³¹ The Commission stressed the special role that standards play in European competitiveness. Standards provide interoperability and compatibility between related products which is highly beneficial for innovation and freedom of choice for consumers. In addition, standards contribute to the Treaty objectives of achieving integration between national markets. Therefore, European Union is highly interested in promotion of effective and widely adopted standards¹³² However, the Commission expressed concerns towards the power gained by SEP holders

¹²⁵ *Microsoft*, para. 632.

¹²⁶ Alison Jones, Brenda Sufrin (2014).

¹²⁷ 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/C 45/02). Paras. 78-81.

¹²⁸ See, for example *Microsoft*, para. 303.

¹²⁹ Case AT.39939-*Samsung- Enforcement of UMTS standard essential patents*. 29.4.2014 C (2014) 2891.

¹³⁰ *Samsung*, recital (56).

¹³¹ *Motorola*, recital (281).

¹³² *Samsung*, recitals (22), (24), *Motorola* recitals (46), (48).

due to their technology inclusion into a standard.¹³³ Such power used in anti-competitive ways may negatively affect competition, consumers and effectiveness of a standard. The nature of fast-moving markets pressure companies to adjust their products to newest technical trends and interoperability qualities in order to maintain successful competition. Accordingly, it is strategically important to start investments into standard-compliant products as early as possible, which usually is before the formal adoption of standard. The commitments made by SEP owners to license their technologies on FRAND terms encourage such investments even to a higher degree.¹³⁴ The Commission stresses out the serious tensions in industry, where sunk costs amount to hundreds of billions, due to potential patent hold-up. Even temporary exclusion of products in fast-moving market can result in significant losses.¹³⁵ The industry's sensitivity to SEP owners' will and terms to license lead to conclusion that the context of standard-setting process and FRAND commitments provide exceptional circumstances which limit SEP owners freedom to exercise its IPRs and impose special responsibility not to impair the access to standard by anyone willing to do so.¹³⁶ However, it is necessary to strike a fair balance between public interest in free competition and the respect of SEP owners' rights and freedoms, safeguarded by the Charter: protection of intellectual property (Article 17 (2)); access to tribunal (Article 47) and freedom to conduct business (Article 16). The Commission noted that it conducted balancing test in conformity with Article 52 (1) of the Charter.¹³⁷ The Commission concluded that seeking injunctions against Apple by Samsung and Motorola amounts to abuse of dominant position, because SEP holders, when contributing their technology to standard, agreed to license their SEPs, and to license those SEPs on FRAND terms.¹³⁸ The Commission noted that such conduct could be justified by licensee's unwillingness to conclude license on FRAND terms.¹³⁹ However, Apple was 'not unwilling' to enter these licenses therefore such conduct cannot be justified. According to the Commission, Apple's proposal to Motorola to enter FRAND licensing with full judicial review and determination of proposed royalties by court, was enough to conclude that Apple was a 'willing licensee'.¹⁴⁰ The Commission's definition of 'willing licensee' differed from the one applied by German courts under *Orange-Book-Standard*, which set stricter terms on willing licensees in favour of SEP holders.¹⁴¹ In *Orange-Book-Standard* case the German Supreme Court stated that abuse of dominant position by seeking injunctions would occur only if the license seeker:

¹³³ *Samsung*, recital (39).

¹³⁴ *Samsung*, recital (48).

¹³⁵ *Samsung*, recital (49), *Motorola*, recital (326).

¹³⁶ *Samsung*, recitals (56) -(61), *Motorola*, recitals (281) - (299).

¹³⁷ *Samsung*, recitals (71), (72), *Motorola*, recitals (501) - (509).

¹³⁸ *Samsung*, recital (71), *Motorola*, recital (542).

¹³⁹ *Samsung*, recitals (65) -(67), *Motorola*, recital (423).

¹⁴⁰ Apple proposed to enter FRAND licensing with full judicial review and determination of proposed royalties by court. The Commission concluded Apple was a willing licensee. See *Motorola*, recital (437).

¹⁴¹ Marco Lo Bue. *The Commission Decision on Samsung and Motorola: The Antitrust Effects of Licensing 'SEPs'* (July 1, 2015). Italian Antitrust Review. Vol. 2, No. 1 (2015). Pg. 203. Available at SSRN: <http://ssrn.com/abstract=2630045>

- a) Makes an unconditional binding offer to conclude a license, that patent owner cannot reject without violating antitrust law.¹⁴²
- b) Satisfying in advance the conditions of that license agreement. The licensee has to show its willingness to pay (into court deposit) and render accounts.¹⁴³

The potential licensees were obliged to take positive steps so they could rely on competition law defence against injunctions. ‘Unconditional’ offer means, that it should not be conditional on a court holding that alleged infringer’s behaviour did infringe the patent. Furthermore, infringer seeking to rely on competition law was required by German courts to waive its rights on challenging the validity of the patent.¹⁴⁴ Apple did not fulfil these obligations set by *Orange-Book-Standard* and the German court granted an injunction against it. The Commission criticized the German courts for not paying attention that the original *Orange Book* judgement¹⁴⁵ related to specifications that had become a *de facto* standard and not to specifications agreed by the SSOs. Moreover, owners of the patents regarding *de facto* standards did not commit to licensing on FRAND terms.¹⁴⁶ The Commission also clarified that a willing licensee retained its right to challenge the validity of the patent, as it is of public interest to eliminate any obstacles to economic activity, which may arise where a patent is granted in error.¹⁴⁷

4.2 *Huawei* judgment

Confusion between different approaches in *Orange-Book-Standard* and in *Samsung/Motorola* pressured the District Court of Dusseldorf to submit a request for preliminary ruling to the CJEU in *Huawei* case. The European Court of Justice chose to respond to request by answering altogether the first 4 Questions and 5 Question in so far as that question concerns legal proceedings brought with a view to obtaining the recall of products. The Court repeated that:¹⁴⁸

‘exercise of an exclusive right linked to intellectual-property right – in the case in the main proceedings, namely the right to bring an action for infringement- forms part of the rights of the proprietor of an intellectual-property right, with the result that the exercise of such a right, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute an abuse of a dominant position <...>’

¹⁴² See Alison Jones n 47, pg. 11.

¹⁴³ Ibid, see also Marco Lo Bue n 141.

¹⁴⁴ James Killick, Stratigoula Sakellariou (White & Case). *Huawei v ZTE- No More Need to Look at The Orange Book in SEP Disputes*. Pg. 3.

¹⁴⁵ Decision by the Federal Supreme Court [BGH], May 6, 2009 -KZR 39/06-OLG Karlsruhe.

¹⁴⁶ *Motorola*, recitals 83, 84.

¹⁴⁷ *Samsung*, recital 106, 107.

¹⁴⁸ *Huawei*, para. 46.

However, the Court also relied on case-law, that in the presence of the exceptional circumstances, such exercise by the proprietor may involve abusive conduct for the purposes of Article 102 TFEU.¹⁴⁹ Nevertheless, it pointed out that the particular circumstances in *Huawei* distinguish the case from *Magill* and *IMS Health*.¹⁵⁰ Advocate General M. Wathelet in his Opinion noted that similarly to previous case-law, having a licence to use Huawei's SEP is *indispensable* to the production of LTE standard-compliant products and services. Nevertheless, the contrast lies in Huawei's voluntary commitment to grant licenses on FRAND terms, which 'cannot at first sight, be treated as a refusal akin to those envisaged in the case-law.' Thus, the attention must be paid to the manner on which Huawei fulfilled its commitment.¹⁵¹ The Court affirmed, that indispensability of SEP at issue to all competitors that envisage manufacturing standard-compliant products, constitutes exceptional circumstance. Furthermore, patent at issue, obtained SEP status only in exchange for Huawei's irrevocable commitment to ETSI, that it is prepared to grant licenses on FRAND terms. Those commitments created legitimate expectations on the part of third parties, that SEP owner will in fact grant licenses on such terms. Additionally, Huawei accepted that royalties fixed according to FRAND principles is the adequate compensation for the use of its patents.¹⁵² Advocate General was more thorough in addressing why indispensable use of SEPs and FRAND commitments constitute exceptional circumstances. First, he pointed out that 'Huawei did not waive its right to bring actions for prohibitory injunctions against persons using the teaching protected by the patent at issue without its consent.' Nevertheless, by undertaking the FRAND commitment, Huawei showed the willingness to exploit its SEP not only by using it exclusively but also through licensing it to the others and accepts FRAND fixed royalty as adequate for the use of that patent.¹⁵³ It should be noted that ETSI is extremely cautious that all technologies, covered by patents, included into a standard are available through licensing. Non-availability of licenses leads ETSI to look for the alternative solutions. Huawei's voluntary commitment of FRAND licensing given to ETSI, had an impact on the standardization procedure and the content of LTE standard itself.¹⁵⁴ Therefore, FRAND commitment by Huawei led to the inclusion of its patent into LTE standard; such inclusion and gaining SEP status led to competitors' technological dependence on Huawei; and that technological dependence leads to economic dependence-potential licensees legitimately expecting to obtain FRAND licenses start investments for the compliance with the standard. Therefore, following from these circumstances and that where infringer 'has shown itself to be objectively ready, willing and able to conclude such a licensing agreement', bringing an action for prohibitory injunction, which varies from the FRAND commitments, constitutes recourse to a method different from those,

¹⁴⁹ Ibid, para. 47.

¹⁵⁰ Ibid, para. 48.

¹⁵¹ Opinion of the Advocate General Wathelet, delivered on 20 November 2014 in case C-170/13 *Huawei Technologies Co Ltd. v ZTE Corp., ZTE Deutschland GmbH*. Para. 70.

¹⁵² *Huawei*, paras. 49-52.

¹⁵³ Opinion of AG Wathelet, para. 60.

¹⁵⁴ Ibid, para. 71. Also see Annex 6: ETSI Intellectual Property Rights Policy, paras. 3,4,6,8.

governing normal competition. Such conduct ‘has an adverse effect on competition to the detriment, in particular, of consumers and the undertakings which have invested in the preparation, adoption and application of the standard; and it must be regarded as an abuse of a dominant position for the purposes of Article 102 TFEU.’¹⁵⁵ The Court noted that Article 102 TFEU, however, imposes obligation on SEP owner only to grant a license on FRAND terms. Nevertheless, the Directive 2004/48, in accordance with the Charter, provides high level of protection for IPRs, and the substance of those rights must be respected, even if SEP owner previously gave FRAND commitments. The issue though arises, that parties to the case are in disagreement on what are FRAND terms. In order to balance out the interests of the parties, the Court provided a list of requirements that SEP owner must fulfil, when seeking for prohibitory injunctions or recall of products, in order for such conduct not to amount to abuse of dominant position under Article 102 TFEU.¹⁵⁶ Here is the list of steps for the proprietor and alleged infringer to follow:¹⁵⁷

1. SEP owner must first alert the alleged infringer by specifying the SEP and the way in which it has been infringed;
2. If the infringer has expressed its willingness to conclude a FRAND license, the SEP owner shall present a specific, written offer for a FRAND license, specifying the amount of the royalty and the way in which that royalty is calculated;
3. The alleged infringer shall diligently and in good faith, in accordance with recognised commercial practices, respond to that offer by accepting it or submit to the proprietor, promptly and in writing, a specific counter-offer that corresponds to FRAND terms.
4. If the proprietor rejects the counter-offer and the infringer is already using the teachings of the SEP, the infringer shall provide appropriate security, for example a bank guarantee or place the amounts necessary to deposit. The calculation of that security must include the number of past acts of use of the SEP and the alleged infringer must be able to render an account in respect of those acts.
5. Additionally, when proprietor rejects the counter-offer, the parties may, by common agreement, request that the amount of royalty may be determined by an independent third party, by decision without delay.

Only if SEP owner follows these obligations, it may bring proceedings for prohibitory injunction without breaching article 102 TFEU. Accordingly, the alleged infringer may not rely on abusive conduct by the SEP holder in the defence, if it didn’t follow these steps. Indeed, the Court took ‘*the middle path*’ between only-licensee obligations in the *Orange-Book-Standard* and ‘not unwilling licensee’ interpretation by the Commission, as promised by Advocate General.¹⁵⁸ The Court distributed duties on both parties to show

¹⁵⁵ Opinion of AG in *Huawei*, paras. 71-74.

¹⁵⁶ *Huawei* judgment, paras. 57-59.

¹⁵⁷ *Huawei* judgment, paras. 60-68.

¹⁵⁸ Opinion of AG in *Huawei*, paras. 50-52.

their willingness to conclude a FRAND license. The Court's reasoning is that the infringer may sometimes be unaware that he's using the teachings of proprietor's SEP, especially where standard includes large number of SEPs.¹⁵⁹ Furthermore, if, after the alert, the licensee expresses its will to conclude FRAND license, the owner of SEP shall make a first offer as he is best placed to know whether that offer complies with non-discrimination requirement, especially if he already concluded licensing agreements with other competitors.¹⁶⁰ Also, where the SEP holder has given commitments to license on FRAND terms, he is expected to make such an offer. On its part, the infringer should either accept or submit counter-offer, and, if that counter-offer is rejected by the proprietor, to provide appropriate security for its past acts of use. Additionally, the CJEU concluded that patent infringer retains the right to challenge the validity or essentiality of the SEPs during the negotiations and in the future, due to rights of effective judicial protection, guaranteed by the Charter.¹⁶¹ In regard to the second part of fifth Question, the CJEU stated that actions for infringement brought by the SEP proprietor seeking the rendering of accounts in relation to past acts of use, do not have a direct impact on the products complying with the standard in question manufactured by competitors appearing or remaining in the market. Therefore, the list of requirements does not apply for seeking the rendering of accounts and cannot be regarded as an abuse of dominant position under Article 102 TFEU.¹⁶²

4.2 Implications of *Huawei* requirements

Standardization, FRAND and IPRs gave much room for speculations and disputes in the legal community. Ongoing patent wars between companies, mainly in mobile telephony sector, using their patents to exclude competitors and inconsistent dealing with patent injunctions throughout the Union courts reached the critical point for demand of antitrust intervention provided by the highest Union's court. *Huawei* gave that opportunity for the CJEU to step forward and provide long awaited clarification. However, it seems that *Huawei's* incomprehensive ruling gave little answers and raised more questions around FRAND licensing and seeking for injunctions. The discussion follows on most common questions throughout legal community triggered by *Huawei*. First, existence of dominant position preconditions application of Article 102 TFEU. Unfortunately, the Court was not entitled to provide such analysis. AG, nevertheless warned that the fact that undertaking owns a SEP does not necessarily mean that it holds dominant position, and it is for the national court to determine on case-by-case basis if that is indeed

¹⁵⁹ *Huawei* judgment, para. 62.

¹⁶⁰ *Huawei* judgment, para. 64.

¹⁶¹ *Huawei* judgment, para 69.

¹⁶² *Huawei* judgment, paras. 72-75.

the situation.¹⁶³ The analysis provided by the Commission remains the only reliable source indicating when SEP holder enjoys dominant position. In fact, according to *Samsung/Motorola*, most of the SEP owners, even where relevant standard consists of hundreds of SEPs of different proprietors, will enjoy dominance unless there are substitutable standards. Second, the criticism focuses on the manner in which the Court addressed the case. The referring court asked when the SEP holder, seeking injunctions, is incurring antitrust liability. Instead the CJEU provided conditions when there is no antitrust liability.¹⁶⁴ Thus, implication may be that *Huawei* leaves out more injunction cases that may be subject to Article 102 TFEU than it should. Third, the Court did not define FRAND or guide to FRAND pricing. As stated before loose FRAND leads to many situations causing disputes: hold-up situations where SEP owner will demand excessive royalties; or hold-out where implementer will make counter-offers of too low royalties. However, what if both parties offer royalties contrary to FRAND terms? Is the proprietor abusing its dominant position for seeking injunction, because he was the first to make an offer and thus first to breach the requirement to identify FRAND royalties? In contrast, there may be situations where both SEP proprietor and infringer set royalties that satisfy FRAND terms, but are different in respect of each other. The Court in the list of requirements states that if the counter-offer is rejected, the amount of royalties may be determined by the third party. However, the condition is that both parties reach a common agreement to seek for third party's help, therefore it is not a requirement but rather a proposal. The Court, however, provides no answer what happens when parties disagree to third party's determination.¹⁶⁵ On the other hand, it is unclear whether this is an issue at all. SEP owner and standard implementer are best suited to know the business practice in relevant sector and the value of the SEP in question. It is thus for proprietor and licensee to express FRAND in numbers. Shall they fail to conclude such an agreement then the parties can place their bets on 'the wisdom of national courts'.¹⁶⁶ The next concern focuses around proprietors' incentives. According to this argument, the *Huawei* exceptional circumstances doctrine may discourage patent owners to participate in formal standard-setting in SSOs and instead obtain *de facto* SEP, without undertaking FRAND commitments.¹⁶⁷ This is quite opposite to N. Petit concerns, that *Huawei* extends antitrust liability only to a small line of injunction cases.¹⁶⁸ It was seen before, that not only public or competition authorities consider standard-setting as highly beneficial, but also the companies themselves. The incorporation of IPRs disclosure and FRAND commitments into policies of SSOs didn't seem to reduce incentives of companies to participate. Furthermore, incentives of the whole industry outweigh that of separate firms. Wouldn't a more lenient approach towards

¹⁶³ Opinion of AG Wathelet, para. 57.

¹⁶⁴ N. Petit in *Huawei v ZTE: Judicial Conservatism at the Patent-Antitrust Intersection*. CPI Antitrust Chronicle, October 2015 (2). Pg. 3.

¹⁶⁵ *Ibid*, Pg. 7.

¹⁶⁶ *Ibid*, pg. 8. N. Petit may be right to say that 'the Court believes that hold-up is an issue of less concern than anticompetitive exclusion.'

¹⁶⁷ *De facto* standards would generate more wealth than *de jure* standards. See Björn Lundqvist. *Some Early Comments on the Huawei case*. Pg. 8.

¹⁶⁸ See N. Petit n 164. Pg. 2.

SEP proprietors reduce whole industry's incentives to implement standards in the future? Nevertheless, the question remains on antitrust treatment of *de facto* SEPs, along the one where injunctions are sought not by a competitor but an upstream company that does not implement standards itself. Therefore, *Huawei* does leave many questions open, and some of them may not be for competition law to answer. For now, it should be welcomed that the CJEU tries to bring bona fide commercial discussions between parties to actually conclude a FRAND licence instead of battling with injunctions and abusive conduct claims. It is certain that *Huawei* will not allow SEP owners to use injunctions aiming to exclude their rivals and limit free competition, nor it will safeguard the standard implementers free-riding on SEPs without intention to obtain a licence or unable to pay royalties. Perhaps, it was the Court's goal to clear out standard-setting from these extremities first, with a view to provide further clarification in subsequent disputes.

5. Conclusion

SEP holder retains the essence of its right to seek for patent injunctions against alleged infringers. However, holding SEPs and commitments to FRAND licensing constitute exceptional circumstances under which SEP proprietor may be liable for seeking prohibitory injunctions under Article 102 TFEU. Existence of dominant position preconditions application of Article 102 TFEU, it is, therefore, important that SEP proprietor indeed enjoys dominant position, which is only found on case-by-case basis on the facts relevant to the case. SEP holder, who enjoys dominant position and committed to FRAND licensing, must follow the requirements imposed by the CJEU in *Huawei* in order not to be held liable for seeking injunctions as abuse of dominant position under Article 102 TFEU. *Huawei* requirements also regard potential licensee, who must show its willingness to conclude FRAND license. Only when alleged infringer fulfilled those obligations, it then can rely on competition law defence that SEP proprietor is abusing its dominant position in patent injunction cases.

It was seen that the Court is still unwilling to give more weight to the concept of FRAND. Defining explicit FRAND meaning in terms of royalty rates may provide some legal certainty for companies and lawyers. Nevertheless, legal precedent setting royalties may cause more harm than good. First, it is difficult to balance a fixed royalty rates for all companies with different business models participating in standard setting. Upstream companies are sole inventors, where their main revenue comes from licensing, and usually they desire higher royalty rates. Vertically integrated companies, on the other hand, can afford to accept lower royalties. Thus, explicit FRAND may discourage some innovators to participate in formal standard-setting and/or grant higher rewards than it is contributed to developing a technology. Therefore, competition authorities are still hesitant to intervene into commercial freedom of private parties to agree on prices themselves. FRAND, on the other hand, is not perfect. The Commission stresses out the problem of costly IPRs as one of the obstacles for EU's performance in innovation. This may be because current FRAND does not effectively prevent companies from setting high royalties.

In author's view, *Huawei* took the first step towards better standard-setting and competition in ICT market. Costly and long litigations do no good. Some may argue, whether *Huawei* does effectively impose antitrust liability for premature seeking for patent injunctions. For example, the Commission did not impose fines on Samsung and Motorola mainly because there were no relevant case-law covering this matter. But now there is, and maybe the risk of getting fines for trying to exclude the competitors will discourage companies from battling each other and settle for FRAND agreements instead.

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