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# ANTITRUST POLICY TOOLS & IP RIGHTS: U.S., TRANSATLANTIC & INTERNATIONAL EFFECTS

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## ABSTRACT

*The paper tracks recent developments in the United States and EU competition systems with regard to the different policy tools used to address matters arising from the intersection of IP and competition policies. The analysis compares the enforcement and advocacy efforts carried out by the different antitrust agencies in the United States and EU.*

*This Article first traces how different authorities with antitrust mandates in the United States have dealt with the issue of balancing the rights of standard essential patent holders with innovation driven public welfare. This article then looks at how the antitrust authorities are using their antitrust statutes (e.g. Section 5 of the FTA Act, merger review provisions) to tackle IP-rights-related issues that have tenuous connections to competition concerns.*

*All of the above issues have been highlighted with the aim to bring attention to the spillover effects that these moves may have in the national, transatlantic and international context.*


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## I. INTRODUCTION

Recent developments in prominent competition jurisdictions raise the question as to whether antitrust laws are being used in an optimal manner relating to intellectual property rights ("IPRs"), particularly in the context of Standard Setting Organizations ("SSOs"). Assuming that the leading competition regimes acknowledge that antitrust law is about promoting competition and ultimately consumer welfare, some of the recent case law involving IPR holders might be blurring this idea and sending the wrong message to other emerging competition regimes, particularly China.

Given the way the European Union ("EU") and the United States have been deciding IPR related matters, they seem to be deviating from the consumer welfare goal. Furthermore, other jurisdictions, such as Japan, Korea and Canada, are revising their antitrust guidelines relating to standard essential patent ("SEP") holders. As a result, SEP holders will be considered liable for antitrust violations when seeking injunctions against FRAND[1]-encumbered patent infringers or when renegotiating original FRAND terms to seek higher royalties. These phenomena give rise to internal legal dissonance as well as ambiguity in the signals sent to the international competition regimes—especially the nascent ones and more particularly, China.

Since the 1990s, the competition community has enlarged vastly, and there are currently more than 120 competition authorities.[2] Many of these nascent competition authorities operated in the context of emerging market economies.[3] Typically, younger competition authorities look up to more experienced jurisdictions in search of guidance regarding the implementation of competition laws in their home countries.[4] In most of

1. FRAND stands for "fair reasonable and non-discriminatory," and the term refers to the voluntary licensing commitment instituted through an SSO for an IP right that is, or maybe become, a technical standard in a given industry. [CITATION]. The term "reasonable and non-discriminatory" ("RAND") is also commonly used. Please note that the terms FRAND and RAND will be used interchangeably throughout this Article.

2. William E. Kovacic, *The Institutions of Antitrust Law: How Structure Shapes Substance*, 110 MICH. L. REV. 1019, 1042-43 (2012).

3. William E. Kovacic & Ben Slay, *Perilous Beginnings: The Establishment of Antimonopoly and Consumer Protection Programs in the Republic of Georgia*, 43 ANTITRUST BULL. 15, 15-43 (1998).

4. Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 502 (2012); Herbert J. Hovenkamp, *Distributive* Just*ice and Consumer Welfare in Antitrust* (Aug. 3, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1873463; Huffman, Symposium, *Neo-Behavioralism?* (Dec. 23, 2010); John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191 (2008); Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133 (2011); Joshua

these nascent competition systems, competition regimes are not yet exclusively concerned about consumer welfare and the promotion of competition.[5] In fact, in young competition regimes, several competition goals coexist, including over-arching latent political ones.

Against this backdrop, it is alarming to note that leading jurisdictions with consumer welfare oriented competition systems misinterpret the antitrust norms in the context of IPR policies. This is a cause of concern, as many emerging competition systems might view the outcome of recent developments (in the mature competition systems) in IP and antitrust law as a validation to continue using competition norms to further nationalistic goals to the detriment of competition, IPR holders and, ultimately, innovation.

Joshua Wright clearly phrased this problem in a recent speech where he described this phenomenon as "a dangerous signal of approval to emerging antitrust regimes that special rules for IP are desirable from a competition perspective and that business arrangements involving IPRs may be safely presumed to be anticompetitive without rigorous economic analysis and proof of competitive harm."[6]

This paper seeks to analyze the recent case law decided in the United States and EU that explores the interface between antitrust and IP. In order to appreciate the implications of such case law, this Article looks first at the legislative framework and case law in question, examines the available policy tools to address the extant issues and then mulls over the global spillover effects of such issues.

## II. THE KEY CONCERNS OF THE ANTITRUST AND SEPS DEBATE

The setting of standards for essential patents has become indispensable for the technology industry, as it allows interoperability that, in turn, spurs technological advancement. Smartphones, e-readers, tablets, laptops and every other technical gadget that is available in the market is the result and the sum of a considerable number of inventions that operate together within a system. To ensure the interoperability of each of the independent devices

D. Wright, Symposium, *Abandoning Antitrust Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 ANTITRUST L.J. 241 (2012).

5. *See* J.D. GERBER, GLOBAL COMPETITION: LAW, MARKETS, AND GLOBALIZATION (Oxford University Press 2010).

6. Joshua D. Wright, Comm'r, F.T.C.,, Does the FTC Have a New IP Agenda?, Remarks at the 2014 Milton Handler Lecture: "Antitrust in the 21st Century", (Mar. 11, 2014).

when put together, SSOs adopt standards through voluntary consensus.[7] The advantages of having standards set are straightforward. Once a standard has been adopted, the industry can design and invest in products based on the standardized technology to the benefit of innovation and consumers.[8]

The patents of these standards become the so-called standard essential patents that are incorporated in the design of gadgets. SSOs typically mandate inclusion of patents in a standard by seeking a commitment from an SEP owner to license the technology on FRAND terms to ensure that hold-ups can be precluded.[9] Patent hold-ups may occur when an SEP owner's bargaining power in negotiating royalties substantially increases after the technology has been included in the standard designs. In practice, high switching costs leave the patentee at the mercy of the SEP owner.[10]

As a consequence, the U.S. Federal Trade Commission ("FTC") and the U.S. Department of Justice ("DOJ") (together, the U.S. Antitrust Agencies) have raised concerns regarding IPR policies.

Some of the key issues that are at the crossroads of the debate are the following. Can an exclusion order of the International Trade Commission ("ITC") in respect of SEPs adversely impact U.S. consumers, innovation and, ultimately, society's future? Should the competition agencies review the acquisition of SEPs portfolios in the context of merger with a different standard than mergers that do not include SEPs? Should antitrust be used to scrutinize IPR-related contracts? What are the implications of these decisions for the institutional design of the agencies?

To address many of the above questions, the U.S. Antitrust Agencies and the EU have employed different policy tools. In some instances, such as the matters involving equitable reliefs, the agencies have focused on advocacy tools. Differently, to deal with other concerns, the agencies have used enforcement tools. The option to choose either one of the policy tools has multiple implications analyzed below in Section 3.

7. *See* F.T.C, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition*, at 28, 197 (Mar. 2011), http://www.ftc.gov/os/2011/03/110307patentreport.pd.

8. *See* Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CAL. L. REV., 1889, 1896–97 (2002).

9. *See* Apple, Inc., v. Motorola, Inc., 869 F.Supp.2d 901 (N.D. Ill. 2012); *see also* eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 400 (2006) (Kennedy, J., concurring) (noting that hold-up results when "an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent").

10. *See Apple, Inc.*, 869 F. Supp. 2d at.914.

### *A. Concern 1: Antitrust to Police Contractual Opportunism*

#### 1. The United States

The U.S. Antitrust Agencies have raised concerns regarding the current equitable reliefs available for patent owners in the United States. Specifically, they have particularly been unnerved about a grant of injunctive relief against SEP holders who wish to exploit the terms of patent in an extractive manner.[11]

Given that the price of the royalties for the SEP is a subject of negotiation between the patent owner and patentee, and that such negotiations usually take place once a patent has been included in a standard, the SEP owners enjoy a strategic and almost monopolistic leverage when negotiating royalties for licensing. Further, the patentees cannot negotiate with SEP owners on an equal footing, as demand for SEPs far outstrips the supply. Consequently, circumstances become ripe for practicing contractual opportunism and potentially creating patent "hold-ups" despite the FRAND commitment. However, there appears to be little administrative or business recourse from such predicament, as any attempt to fix or cap the royalties using antitrust norms would be tantamount to violating the tenets of the free markets.

Before jumping headfirst into the concerns and controversies relating to patent hold-ups by SEP owners in the United States, it would be useful to understand the institutional canvas on which such issues play out.

In the United States, patent holders have two main forums where patent disputes are solved: the district courts and the ITC. Each of the forums requires different standards and provides divergent solutions to claimants' patent rights. Since the duality of the U.S. system is at the heart of the U.S. Antitrust Agencies' concern relating to patent hold-ups, it is critical to understand the institutional dichotomy in this regard.[12] To this end, each of the litigation paths available to FRAND encumbered SEP is discussed summarily below.

11. *See Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents*: Before the U.S. Senate Comm. On the Judiciary (2012) (testimony of Edith Ramirez, Comm'r of the FTC); *Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents*: Before the U.S. Senate Comm. On the Judiciary (2012) (statement of Joseph F. Wayland, Acting Assistant Att'y Gen., U.S. DOJ Antitrust Division).

12. *See* FTC Report, The Evolving IP Marketplace (Mar. 2011), http://www.ftc.gov/os/2011/03/110307patentreport.pd.

*a. Litigation Before a District Court*

The U.S. Code ("U.S.C.") empowers the competent courts to grant relief by way of an injunction when a patent infringement arises. In particular, 35 U.S.C. § 283 provides that "the several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable."[13]

Up to about 2006, the district courts interpreted this statute favorably for the patent holders, in many cases immediately granting an injunction upon a finding of patent infringement.[14] While granting such automatic injunctions, the district courts assumed that monetary damages could not adequately compensate for patent infringements.[15] Owing to this practice of district courts granting quick injunctive relief upon establishment of patent infringement, the negotiating power of the licensee was significantly diminished. Consequently, in many instances, licensees were left with only two options: Either switch standards and incur heavy expenditures and delays, or pay high royalties despite the RAND commitments.

In a watershed judgment decided in 2006, the U.S. Supreme Court granted certiorari to an appeal brought by eBay,[16] and eventually overturned the Federal Circuit's longstanding standard to automatically grant permanent injunctive relief against patent infringers.[17] In the *eBay* case, the Supreme Court examined whether it was appropriate to grant automatic injunctive relief against patent infringers and concluded that it was not. In doing so, the Supreme Court adopted a new four-prong test that patent holders have to satisfy in order to obtain an injunction:

A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by permanent injunction.[18]

13. *See* 35 U.S.C. § 283 (2015).

14. *See, e.g.*, W.L. Gore & Assocs., Inc. v. Garlock Inc., 721 F.2d 1540, (Fed. Cir. 1983); Smith Int'l Inc., v Hughes Tool Co., 759 F 2d. 1572, 1574–76 (Fed. Cir. 1985).

15. *Id.*

16. *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

17. *Id.* at 395–96 (Roberts, Ch. J., joined by Scalia and Ginsburg, JJ., concurring)

18. *Id.* at 391.

The *eBay* judgment modified the litigation landscape[19] for patent related cases as illustrated in the figure below:

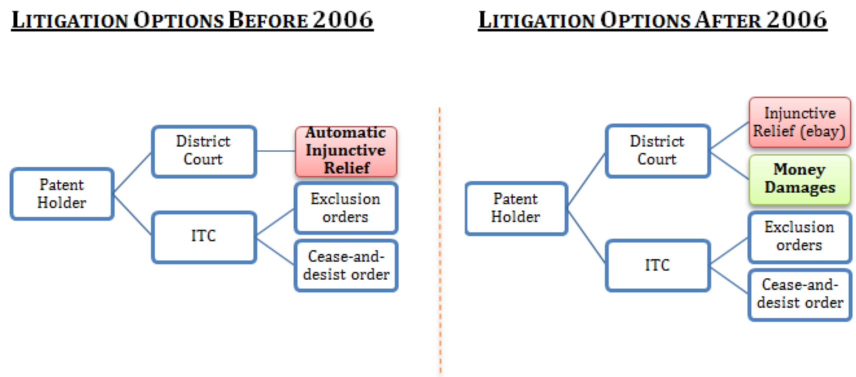


FIG. 1

The *eBay* decision weakened patent holders' bargaining power via the district court path, by requiring the patent holders to satisfy the equitable criteria laid down in the four-prong test. Consequently, patent owners could no longer expect to be granted injunctions as a matter of right; instead, injunctions became a matter of judicial discretion.

Accordingly, as of date, a patent holder's recourse to injunctions through district courts is substantially curtailed, and the strategic option to litigate before courts to seek better settlements has been limited. The latter is particularly important for non-practicing patent holders[20] who try to abuse patent rights on the premises of obtaining injunctive relief, which would hardly meet the *eBay* test.[21]

### *b. Litigating Before the International Trade Commission*

The second option for patent holders is to claim their rights before the ITC. The ITC is a quasi-judicial federal agency responsible for taking direct action against unfair trade practices and determining the impact of imports on US industries. The ITC's five areas of operations are: (1) import injury

19. *See* Bernard H. Chao, *After eBay, Inc. v. MercExchange: The Changing Landscape for Patent Remedies*. 9 MINN. J.L. SCI. & TECH. 543, 543–72 (2008).

20. Non-practicing entities are defined as patent owners that do not make products but assert their patents against others. These companies may also be referred as "patent trolls."

21. *See* Miranda Jones, *Permanent Injunction, A Remedy by Any Other Name is Patently Not the Same: How eBay v. MercExchange Affects the Patent Right of Non-Practicing Entities*, 14 GEO. MASON L. REV. 1035, 14, 1063–70 (2007).

investigations, (2) intellectual property-based import investigations; (3) research program; (4) trade information services; and (5) trade policy support.[22]

Section 337 of the Tariff Act of 1930 empowers the ITC to ban imports that, inter alia, infringe patents.[23] Once default has been established, the ITC may seek immediate relief—an exclusion order, a cease and desist order or both—against the defaulting party.[24] In issuing an order of foregoing nature, the ITC may consider the effect of such orders upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, as well as U.S. consumers and public interest at large.[25]

Given such broad discretion of the ITC, it is likely that stakeholders do not stand the *eBay* analysis, but wish to gain traction or likely seek jurisdiction before the ITC. However, the likelihood of an import ban order from the ITC remains slim.

In order to seek an import restriction before the ITC, patent holders have to comply with two preconditions. First, patent holders must prove that goods are being imported into the US. Second, patent holders must demonstrate that they developed activities related to the patent-in-suit in the US. Clearly, the two prerequisites restrict jurisdiction of the ITC to import related cases affecting the US industry.

Ideally, this option should remain very limited for non-practicing entities, since the domestic industry requirement would not be met.[26] But in 1988, the legislature noted that non-practicing entities should be entitled to obtain remedies from the ITC,[27] allowing non-practicing entities to continue to use the ITC litigation path.[28]

22. *See* USITC, *About the USITC*, UNITED STATES INT'L TRADE COMM'N (last visited Mar. 21, 2016), https://www.usitc.gov/press_room/about_usitc.htm

23. *See* 19 U.S.C.A. § 1337 (2004).

24. https://www.usitc.gov/press_room/us337.htm

25. https://www.usitc.gov/intellectual_property/documents/337_faqs.pdf

26. *See, e.g.*, 337-TA-694, USITC Pub. 4292 (June 22, 2011).

27. *See* 132 Cong. Rec. H. 1782, 99th Cong., 2nd Sess. (Apr. 10, 1986).

28. The non-practicing entity Walker Digital recently filed a complaint before the ITC for patent infringement regarding Blu-ray disc players. It based its domestic industry allegations on licenses it has with companies that sell Blu-ray disk players that practice the patent-in-suit. More details available at http://www.itcblog.com/non-practicing-entity-walker-digital-files-new-337-complaint-regarding-certain-blu-ray-disc-players-relying-solely-on-licensing-activities-for-alleged-domestic-industry. On January 5, 2012, the ITC voted to institute the investigation against thirty-five entities, including LG, Panasonic, Samsung, Sony, and Toshiba. More information available at https://www.usitc.gov/press_room/news_release/2012/er0105kk2.htm

Recently, the Federal Circuit ruled on whether licensing efforts and litigation expenditures related to a patent-in-suit were sufficient to meet the ITC's domestic industry requirement.[29] The court held that "expenditures on patent litigation do not automatically constitute evidence of the existence of an industry in the US established by substantial investment in the exploitation of a patent."[30]

The figure below sets out different US authorities with jurisdiction over matters related to patent rights and their specific concerns.

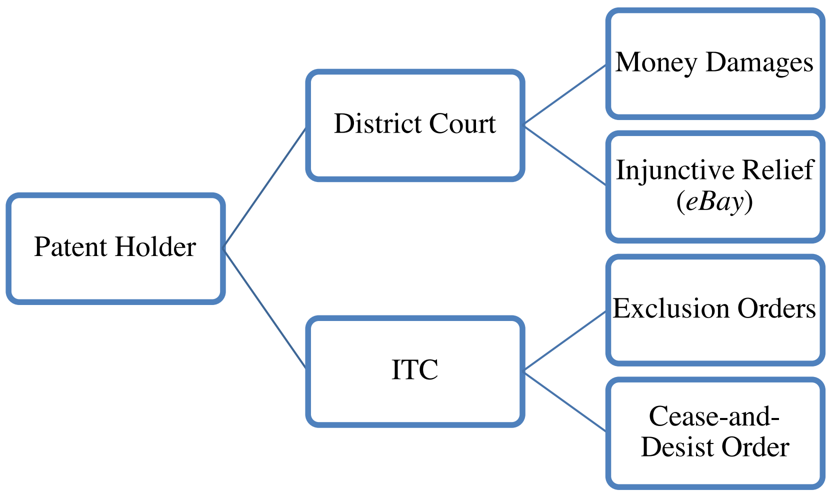


FIG. 2

### *c. The Federal Trade Commission's Viewpoint*

In July 2012, Commissioner Edith Ramirez testified on behalf of the FTC before the US Senate and highlighted the FTC's concern regarding ITC's exclusion orders in favor of SEP owners.[31] According to the FTC, the ITC is attracting litigation by patent holders that would have difficulties in

29. John Mezzalingua Associates, Inc. v. Int'l Trade Comm'n, 660 F.3d 1322 (June 24, 2011).

30. *Id.* at 1328.

31. *See Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents*, Before the U.S. Senate Comm. On the Judiciary (2012) (testimony of Edith Ramirez, Comm'r of the FTC); *Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents*, Before the U.S. Senate Comm. On the Judiciary (2012) (statement of Joseph F. Wayland, Acting Assistant Att'y Gen., Antitrust Division U.S. Department of Justice).

obtaining injunctive relief in district courts after the *eBay* decision.[32] It appears that the FTC disapproves of SEP owners litigating before the ITC and opines that the ITC's failure to consider equitable factors when issuing an exclusionary order or refusing to grant monetary damages raises systemic risks.

To solve this problem, the FTC proposed two main solutions. First, the ITC may grant relief to SEP owners under the broad public interest consideration criterion by considering public welfare, the competitive conditions in the US economy and US consumers when deciding whether to grant an exclusion order under § 337.[33]

By relying on public interest premises, the FTC suggested the ITC could deny an exclusion order if the patent owner had not complied with its RAND obligations, including the duty to negotiate in good faith. Alternatively, the FTC proposed that the ITC delay the effective date of its § 337 remedies, subject to the parties mediating in good faith for damages for past infringement and/or an ongoing royalty for future licensed use. Moreover, the FTC argued in favor of limiting the injunctive remedies of SEP holders that had committed to RAND, especially given that the patent system would not be undermined: Patent holders would still have the possibility to seek damages for past infringements and other non-injunctive relief.[34] Finally, if the ITC fails to consider competition as a public interest concern, the FTC may call Congress for a statutory amendment.

#### *d. The Department of Justice's Viewpoint*

Also, in July 2012, Joseph Wayland, an acting Assistant Attorney General in the DOJ's Antitrust Division, testified before the Senate's Judiciary Committee, concerned about potential patent hold-ups arising from litigation before the ITC.[35] Wayland suggested that the ITC "should continue to gather the types of information necessary to evaluate whether the statutory public interest factors counsel against the imposition of an exclusion

32. *Id.*

33. 19 U.S.C. § 1337(d)(1) (permitting the ITC to consider "the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers.")

34. Prepared Statement of The F.T.C. Before the U.S. S. Committee on the Judiciary Concerning Oversight of the Impact on Competition of Exclusion Ord. to Enforce Standard Essential Patents (July 11, 2012), www.ftc.gov/os/testimony/120711standardpatents.pdf.

35. *Regarding Oversight of the Impact on Competition of Exclusion Orders to Enforce Standards-Essential Patents*, Before the Committee on the Judiciary, U.S. S. (July 11, 2012) (Statement of Joseph F. Wayland, Acting Assistant Att'y Gen. Antitrust Division), www.justice.gov/atr/public/testimony/284982.pdf.

order."[36] Thus, the DOJ appears to tacitly support the ITC's endeavor to consider FRAND-encumbered patent litigation under the public interest umbrella.

According to Wayland, the appropriateness of exclusion orders reliant upon FRAND-encumbered SEP's merits special attention for interoperability reasons. The DOJ foresees potential patent hold-ups that could result in the exclusion of competitors from a market, and in higher royalties that eventually are passed on to consumers.

As a solution, the DOJ has suggested that the ITC "ha[ve] the authority to stay the imposition of an exclusion order contingent on the infringing party's commitment to abide by an arbitrator's determination of the fair value of a license."[37] In other words, in cases where the issue at stake is limited to the determination of the FRAND terms, the DOJ proposes that the ITC delays the imposition of an exclusion order, and allows a third party to determine the licensing terms.

More recently, the DOJ and the U.S. Patent and Trademark Office ("USPTO")[38] have published a policy statement expressing their concern about the potential impact of exclusion orders on the U.S. competitive conditions and consumers involving RAND-encumbered SEPs.[39] These two agencies argue that injunctive relief remedies involving RAND-encumbered SEP patents should be determined on the need to provide for incentives to innovators to participate in standards-setting activities and the necessity to provide appropriate compensation to patent holders.[40]

In the policy statement, the DOJ and USPTO both argued that public interest should preclude the issuance of such exclusion orders in certain cases.[41] Moreover, the DOJ and USPTO urge the ITC to consider whether monetary damages would be an appropriate remedy for infringement of RAND encumbered SEP patents.[42] Alternatively, and in the same line as the FTC, the DOJ and the USPTO suggest delaying "the effective date of an

36. *Id.*

37. *Id.*

38. The USPTO is the executive-branch agency charged with responsibility for examining patent applications, issuing patents, and—through the Secretary of Commerce—advising the President on domestic and certain international issues of intellectual property policy.

39. United States Department of Justice & United States Patent & Trademark Office, Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (January 8, 2013), http://www.uspto.gov/about/offices/ogc/Final_DOJ-PTO_Policy_Statement_on_FRAND_SEPs_1-8-13.pdf.

40. *Id.*

41. *Id.*

42. *Id.*

exclusion order for a limited period of time to provide parties the opportunity to conclude a F/RAND license."[43]

The U.S. Antitrust Agencies are concerned that "a patent holder may use the threat of an ITC exclusion order, or an injunction issued in district court, to hold-up or demand higher royalties or other more costly licensing terms after the standard is implemented that could have been obtained before its IP was included in the standard."[44] In particular, U.S. Antitrust Agencies have raised concerns in regards to the discrepancy of solutions offered by district courts and the ITC in SEP litigation cases. The U.S. Antitrust Agencies are antagonized by the possibility that SEP owners can obtain injunctions from the district courts; thus circumventing the equitable test for injunction laid down in the landmark *eBay* decision. This gulf between the approach to grant relief to SEP owners by the district courts on one hand, and the ITC on the other, has become more pronounced in recent cases.[45]

According to the U.S. Antitrust Agencies, the ITC has become the preferred jurisdiction for patent owners to abuse their rights since 2006. As a consequence, SEP owners are awarded exclusion orders that substantially increase the costs of small components. Thus, royalties do not reflect market competition, but rather the price resulting from the hold-up. Eventually, the patent hold-ups result in the increase of prices to the consumers, distort incentives to innovate and undermine the standard setting process.

### 2. The European Union

The EU, as well as some of its member states, is confronting similar problems as the United States with patent hold-ups and injunctive reliefs. It is interesting to briefly analyze the policy options existing in some of these jurisdictions since the verdict of one court has a cascading impact in transatlantic litigation and businesses.

#### *a. The European Union Approach*

The litigation culture of the United States is markedly different from the enforcement culture existing elsewhere, especially in the EU. In the EU, the European Commission ("EC") regards antitrust enforcement policies,

43. *Id*.
44. Prepared Statement of The F.T.C., *supra* note 34.
45. *See* Third Party U.S. F.T.C.'s Statement on the Pub. Int., In re Certain Wireless Communication Devices, Portable Music & Data Processing Devices, Computers & Components Thereof, Inv. No. 337-TA 745 (June 6, 2012), www.ftc.gov/os/2012/06/1206ftcwirelesscom.pdf; *see* In re Certain Gaming and Entertainment Consoles, Related Software, & Components Thereof, Inv. No. 337-TA-752, http://www.ftc.gov/os/2012/06/1206ftcgamingconsole.pdf.

including antitrust investigations, as a sufficient tool to impede potential abuses from SEP owners.

For example, in the Google/Motorola Mobility merger, the EC cleared the transaction, relying on the fact that the EC is empowered to investigate abuse of dominance cases and when such anti-competitive behavior surfaces. In particular, the EC stated, "The Commission considers that Google's incentives to use the threat of injunctions to forcibly extract cross-licenses from good faith licensees are most likely to be constrained by the prospect of an investigation based on Article 102 TFEU."[46]

Nonetheless, the EC has also reiterated that if good faith negotiations fail, patent owners may seek injunctions. According to the EC, "[i]n the event licensing discussions fail, the SEP holder may ultimately take its counter-party to court and seek an injunction."[47] Therefore, in the EU, it is legitimate for the SEP holder to seek injunctions if the following two-prong test is met: (i) the licensor tries to negotiate in good faith with the licensee and (ii) the licensee is not willing to negotiate in good faith on FRAND terms.[48]

Recent case law has brought some clarity on this front in the EU. In the *Motorola* decision of 2014, the court held that a refusal to license by a dominant company (EU law considers SEPs owners dominant by definition) would constitute a violation of Article 102 of the TFEU only in "exceptional circumstances."[49] Notably, those "exceptional circumstances" include the situation where an SEP owner commits to license SEPs on FRAND terms in the context of an SSO.

Furthermore, the European Court will soon decide whether an SEP owner has the obligation to license if it has given a FRAND promise in the context of the *Huawei v. ZTE* case.[50] The following table[51] summarizes the EU context in relation to the availability of equitable relief for SEP owners.

46. Google/Motorola Mobility Merger Procedure, COMP/M.6381 (European Comm'n 2012), http://ec.europa.eu/competition/mergers/cases/decisions/m6381_20120213_20310_2277480_EN.pdf.

47. *Id.*

48. *Id.*

49. Comm'n Decision addressed to Motorola Mobility LLC relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement, at 39985 (European Comm'n 2014), http://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf.

50. Huawei Tech. Co. Ltd. v ZTE Deutschland GmBH, C-170/13 at *57-58 (CJEU 2014), http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d538681487d4074efbb18cd58cc2d504aa.e34KaxiLc3eQc40LaxqMbN4OchaQe0?text=&docid=159827&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=487416.

51. This table is copied from the OECD background material by Maurits Dolmans (Cleary Glottlieb, London) for Item VII of the 122nd meeting of the OECD Competition Committee on 17-18 December 2014.

Table 1: Maurits Dolmans (Cleary Glottlieb, London) for Item VII of the 122nd meeting of the OECD Competition Committee on 17–18 December 2014.

| | SEP Owner has offered a license on terms to be set by a court or arbitral tribunal | SEP Owner has offered a license on specific terms, but has not agreed to be bound by terms set by a court or arbitral tribunal | SEP Owner has not offered terms and refuses to submit to court/arbitration (and has not objective justification to refuse to grant a license) |
|---|---|---|---|
| User has offered to take a license on terms to be set by a court or arbitral tribunal | **Injunction denied/irrelevant**<br><br>License terms are set by court or arbitral tribunal (and injunction request, if not withdrawn, is denied or suspended) | **Injunction suspended** pending FRAND review, and **granted** if Court finds terms offered by SEP owner are GRAND and user does not accept<br><br>Injunction **denied** if Court finds terms offered by SEP owner are **not** FRAND, or if the user accepts the FRAND terms the owner offers | **Injunction denied** |
| User has offered to take a license on specific terms, but has not agreed to be bound by terms set by a court or arbitral tribunal | **Injunction granted** unless Court finds terms offered by user are FRAND and SEP owner does not accept them | Same as above | **Injunction denied** |
| User has not offered to take a license (and has no objective justification to refuse to take a license) or user's conduct is purely tactical and/or dilatory and/or not serious | **Injunction granted** | Same as above | **Injunction denied,** unless user has explicitly refused to take a license, or user's conduct is purely tactical and/or dilatory and/or not serious |

Based on the table above, it appears that the injunctive relief to SEP owners in the EU is available only when there is an objective justification for seeking such relief.

Notwithstanding the EC approach, the EU member states have adopted different approaches not always in line with the EC, as discussed below. Illustratively, Germany's Mannheim Court allows parties to seek injunctions against SEP assertion,[52] whereas in the UK, the High Court has ruled that an injunction should not be available to an owner of a SEP if there are FRAND obligations.[53]

### *b. The German Approach*

Recently, in a significant ruling in the realm of SEP patent infringement suits, the Regional Court of Mannheim (in Germany) allowed Motorola to seek an injunction against Microsoft when asserting patents related to a standard (the H.264 Video CODEC) applicable to Windows 7 and XBox 360.[54] The court ruled that "[FRAND] cannot be understood as a binding license offer to any number of third parties unknown to the plaintiff, requiring only acceptance by a third party, but is a request to license seekers to submit their own FRAND offers."[55]

Moreover, the Mannheim Court stated that a FRAND pledge does not constitute a

> waiver by the patent holder of injunctive relief as a means of enforcing its patent claims against an unknown number of potential patent infringers . . . a patent holder who submits a patent statement and licensing declaration form merely offers to waive its exclusivity rights under the patent by establishing a license agreement—and not unconditionally.[56]

To prevent the enforcement of the German Court ruling, a U.S. district court ordered a restraining order barring Motorola from enforcing the Mannheim ruling.[57] The appellate panel considered that the U.S. district court ruling did not infringe comity principles, since the litigation procedure

52. http://www.fosspatents.com/2012/05/frand-abuse-german-court-hands-motorola.html

53. Foss Patents, UK High Court Denies Patent Injunction Against Nokia in Light of a FRAND Commitment, May 30, 2012, http://www.fosspatents.com/2012/05/uk-high-court-denies-patent-injunction.html.

54. http://www.fosspatents.com/2012/05/frand-abuse-german-court-hands-motorola.html

55. *See*, *Foss Pats., The German Approach to FRAND: Let's Err on the Side of Injunctions* (May 23, 2012), http://www.fosspatents.com/2012/05/german-approach-to-frand-lets-err-on.html.

56. *Id*.

57. http://www.fosspatents.com/2012/05/frand-abuse-german-court-hands-motorola.html

under the U.S. contract had been initiated before the German case was filed and both corporations were American.[58]

Essentially, according to the Mannheim Court, when a SEP holder that made a FRAND commitment made some attempts to negotiate a license and such negotiations failed (whether or not those attempts were made in good faith), it can seek injunctive relief unless its actions constitute a violation of antitrust laws.[59] To put it simply, the Mannheim Court contradicts the policy adopted by U.S. district courts after the *eBay* judgment and does not entirely comply with the EU's policy since the German court does not mandate good faith negotiations.[60]

### *c. The UK Approach*

In the UK, the High Court refused an injunction to IPCom against Nokia in a dispute relating to a 3G standard called UMTS.[61] In particular, the patent-in-suit detailed how access channels are assigned to users in 3G networks.[62] Nokia lost the case, but notwithstanding the fact that the UK High Court asserted the validity of IPCom patents, it denied IPCom's request for an injunction.[63]

In particular, the UK High Court stated:

> I have to say in those circumstances I am very uncertain, to put it mildly, to see why a permanent injunction should be granted in this case at all or indeed any injunction. It seems to me a classic case for consideration of the [Shelfer v City of London Electric Lighting Co] criteria, given these circumstances. You are willing to give a license. Nokia wants to get a license. You cannot agree on the terms. They will be determined. There will then be a license. In those circumstances for a non (unclear) to get an injunction seems to me quite extraordinary. That has been raised in the written arguments. It seems to me that is the area which I would like you to address me because that may resolve this matter quite apart from all these difficult questions of what the different German judgments mean and which principles of res judicata should be applied. It comes down then

58. http://www.fosspatents.com/2012/05/us-court-extends-ban-motorola-cant.html

59. http://www.fosspatents.com/2012/05/frand-abuse-german-court-hands-motorola.html

60. *See* Colleen V. Chien & Mark A. Lemley, *Patent Holdup, the ITC, and the Public Interest* 19 fig. 3 (Cornell Law Rev. 2012, Stanford Law Working Paper No. 2022168), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2022168. The statistics show a drop from a grant rate of about 95 percent pre-*eBay* to about 75 percent post-*eBay*.

61. Nokia GmbH v IPCom GmbH & Co. KG, [2012] EWHC 1446 (Ch) (May 18, 2012).

62. Id.

63. http://www.fosspatents.com/2012/05/uk-high-court-denies-patent-injunction.html

> to the discretion of this court whether it is appropriate to grant an injunction at all.[64]

The fact that IPCom is a non-practicing entity might have influenced the UK High Court's decision.

The *Shelfer* case is an old ruling that established the test used to decide when injunctive relief may be denied because monetary compensation is sufficient.[65] There are considerable similarities between the *Shelfer* and the *eBay* rulings.[66]

Despite what the UK High Court Judge stated in *Nokia v. IPCom*, the *Shelfer* jurisprudence holds in the UK, even though it is not an exhaustive test. In fact, the debate over public interest and equitable relief still persists in British courts, as UK Courts have adopted different approaches to the debate over public interest. In some instances, the courts have considered granting injunctive relief for public interest reasons.[67] In other instances, however, the UK courts have considered that the Patent Act was sufficient to protect the public interest.[68]

### *B. Concern 2: Breach of FRAND Commitments as an Antitrust Violation*

The FTC argues that in the post-*eBay* judgment era, patent litigation has shifted from district courts to the ITC, which remains a more favorable jurisdiction for SEP owners.[69] The debate over the ITC's usage of public interest considerations in its decisions leads to a more general follow up question pertaining to the appropriateness of the antitrust competition agencies to discuss FRAND-encumbered SEPs disputes.

64. *Foss Pats., UK High Ct. Denies Pat. Injunction Against Nokia in Light of a FRAND Commitment* (May 30, 2012), http://www.fosspatents.com/2012/05/uk-high-court-denies-patent-injunction.html.

65. Shelfer v. City of London Elec. Lighting Co., 1 Ch 287 *304 (1984).

66. *Id.* (holding that damages may be awarded if a four prong test is met: (i) the injury to the claimant's legal rights must be small; (ii) it must be capable of being estimated in money; (iii) it must be adequately compensated by a small money payment; and (iv) the case must be one in which it would be oppressive to the defendant to grant an injunction).

67. *See, e.g,.* Roussel-Uclaf v. G. D. Searle and Co. Ltd., F.S.R. 125 (High Ct. of Just., Chancery Division 1976) (holding that when the infringing product is a unique, lifesaving drug, "it is at least very doubtful if the court in its discretion ever ought to grant an injunction and I cannot at present think of any circumstances where it should")

68. *See, e.g.* Chiron v Murex (Aldous, J.) (stating the patent act was sufficient to protect the public interest). According to the court it was inherent in the patent system that patents would sometimes impede research, and the research exception in the Patents Act of 1977 was sufficient to protect the public interest, more information available http://whoswholegal.com/news/features/article/28371/injunctions-english-patent-litigation-big-thing-small-winner-takes-all.

69. The FTC nonetheless quotes a study that refers to the triplication of patent challenges in the past ten years due to imports rather than for reasons related to the *eBay* judgment.

When a patent owner commits to FRAND licensing, it implicitly acknowledges that a royalty is adequate compensation for a licensee to use that patent. In other words, FRAND-encumbered patent owners assume that their ultimate goal, for which they engage in such commitments, is to obtain monetary compensation. Therefore, the use of remedies other than monetary damages should remain residual. However, antitrust authorities both in the United States and in the EU have used competition concerns to challenge conduct relating to SEP in the context of the standard setting process. As discussed later, the U.S. FTC has relied on Section 5 of the Federal Trade Commission Act ("FTC Act") to police some corporations with regards to the IPR policies.[70] In contrast, in the EU, the EC and other national authorities rely on the broader EU legislation to sanction particularly dominant firms for IPR related infringements.

### 1. The United States

The U.S. Agencies have traditionally relied on the Sherman Act and the Clayton Act as its primary antitrust enforcement tools. The FTC, however, has also made use of the FTC Act provisions as an additional enforcement tool. In particular, the FTC has authority to bring, among other things,[71] administrative proceedings challenging "unfair methods of competition"—including conduct that violates § 2 of the Sherman Act—under § 5 of the FTC Act.

In theory, an SEP owner's licensing practices could be addressed under both § 2 of the Sherman Act and § 5 of the FTC Act. However, taking U.S. Supreme Court cases into consideration, it is difficult to imagine that an SEP owner would be found liable under § 2 of the Sherman Act. To overcome this enforcement challenge, the FTC has been relying on § 5 to bring stand-alone actions, including those against SEP owners.

Section 5 of the FTC Act prohibits both "unfair and deceptive acts and practices" and "unfair methods of competition," without further detailing practices that belong under each of those categories.[72] The FTC has recently

70. 15 U.S.C. § 45 (2006).

71. The FTC can also issue a cease and desist order and seek enforcement of that order, including civil penalties and injunctive relief, in federal court. Additionally, the FTC may apply for injunctive relief pending adjudication of its own administrative complaint or, in a "proper case," for permanent injunctive relief against entities that have violated or threaten to violate the laws it administers. William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929 (2010), https://www.ftc.gov/sites/default/files/documents/public_statements/competition-policy-and-application-section-5-ftc-act-marc-winerman/2010kovacicwinermanpolicyapp.pdf.

72. 15 U.S.C. § 45(a).

made some efforts to issue some form of guidance on the scope of § 5 of the FTC Act's prohibition of "unfair methods of competition."[73] Despite some efforts devoted to the clarification of which anticompetitive practices can be sanctioned under § 5, the lack of clear and substantive guidance allows the FTC to expand its use to certain practices.[74] However, from a strategic viewpoint, this expansion might have a boomerang effect against the FTC as the leading U.S. antitrust institution (shifting to the DOJ as the preferred institution) and internationally.[75]

In November 2012, the FTC stated, "Patent holders that seek injunctive relief against willing licensees of their FRAND-encumbered SEPs should understand that in appropriate cases the Commission can and will challenge this conduct as an unfair method of competition under Section 5 of the FTC Act."[76] This statement was made in the context of the Robert Bosch GmbH acquisition of SPX services from SPX Corporation.[77] But earlier than 2012, the FTC had already reached several settlements with corporations based on the underlying principle that § 5 of the FTC Act could be used to sanction businesses for carrying out anticompetitive practices.[78] In 1996, the FTC had its first case showing a willingness to expand the use of § 5 to enforce antitrust in the IPR field.[79] This very first case involved Dell Corporation, that had "certified" that it had no IP on a computer related standard, and later

73. FTC Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (2015); Joshua D. Wright & Angela Diveley, *Unfair Methods of Competition After the 2015 Commission Statement*, THE ANTITRUST SOURCE (2015).

74. DISSENTING STATEMENT OF COMMISSIONER MAUREEN K. OHLHAUSEN (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735371/150813ohlhausendissentfinal.pdf (relating to the FTC statement of enforcement principles regarding "unfair methods of competition" under section 5 of the FTC Act).

75. 15 U.S.C. § 45 (1994). Section 5 prohibits entities from engaging in unfair or deceptive acts or practices in interstate commerce, and states, in pertinent part:

> (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.
>
> (2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, [except certain specified financial and industrial sectors] from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

*Id.*

76. *See* In the Matter of Robert Bosch GmbH, Statement of the Fed. Trade Commission, FTC File Number 121-0081, http://www.ftc.gov/os/caselist/1210081/121126boschcommissionstatement.pdf.

77. *See* In the Matter of Robert Bosch GmbH, Decision and Order of the FTC in the Matter of Robert Bosch GmbH FTC File Number 121-0081, https://www.ftc.gov/sites/default/files/documents/cases/2013/04/130424robertboschdo.pdf.

78. *See* M. Sean Royall, *The Role of Antitrust in Policing Unilateral Abuses of Standard-Setting Processes*, ANTITRUST MAG., Spring 2004, at 44-–49, http://www.lawseminars.com/materials/08NDATATB/ndatatb%20m%20Royall.pdf.

79. *See* In the Matter of Dell Computer Corp., FTC No. C-3658, 1996 FTC LEXIS 291 (Decision and Order) (May 20, 1996).

challenged a standard under § 5 on the ground that its technology was being used.[80] The FTC concluded that Dell had misled the SSO, due to its failure to disclose its IPRs.[81] Eventually, the parties settled, and Dell agreed not to collect royalties when its patent was used in the standard.[82]

Following the Dell settlement, the FTC continued with its efforts to expand the use of § 5 in the N-Data case,[83] which was eventually settled.[84] The FTC considered that N-Data had engaged in post-contractual opportunism by not honoring a promise to license patents that had been adopted as a standard.[85] According to the FTC, N-Data was trying to extract higher royalty fees once its technology had been widely adopted, and these practices constituted violations of § 5.[86]

More recently, in 2012, the FTC issued a decision and ordered against Bosch. The FTC used as a legal basis the FTC's § 5 on the basis of a breach of a commitment to license SEP to standard.[87] Briefly, Bosch had committed to licensing patents that were necessary to a standard in an air conditioning related technology.[88] The Bosch decision followed the FTC's N-Data

80. *Id*.

81. *See* Dell Computer Corp., 121 F.T.C. 616, 618 (1996) (Complaint, Decision, and Order)], available at http://www.ftc.gov/os/ 1999/08/9823563c3888dell.htm.

82. *Id*.

83. *See* In the Matter of Negotiated Data Solutions LLC, FTC No. 0510094 (Jan. 23, 2008), https://www.ftc.gov/sites/default/files/documents/cases/2008/09/080923ndsdo.pdf.

84. See Negotiated Data Solutions LLC, FTC No. 051 0094 (Decision and Order) (Jan. 23, 2008), http://www.ftc.gov/os/caselist/0510094/080122do.pdf

85. Dissenting Statement of Chairman Majoras, In the Matter of Negotiated Data Solutions LLC, FTC No. 0510094, (2008). https://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122majoras.pdf. Chairman Majoras argues that the facts did not support antitrust liability because, in her view, N-Data's actions were consistent with IEEE policy and practice. Id. In addition, Chairman Majoras questioned whether "N-Data enjoyed measurable market power" through its NWay patents, concluding instead that NWay was an "optional technique" for Ethernet manufacturers. Id. In any event, the industry was partly to blame for N-Data's position because no company had sought a license to use NWay prior to Vertical's 2002 "revision" of National's promise. Id. In short, Chairman Majoras's findings of fact were very different than the facts described by the Commission majority. Commissioner Kovacic, writing separately, concluded that N-Data's conduct did not violate Section 5 of the FTC Act, but did not comment on whether Section 2 of the Sherman Act applied. Dissenting Statement of Commissioner William E. Kovacic, In the Matter of Negotiated Data Solutions LLC, FTC No. 0510094, (2008). https://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122kovacic.pdf.

86. *See Analysis of Proposed Consent Order to Aid Public Comment*, *In the Matter of Negotiated Data Solutions LLC*, FTC No. 051 0094, at 4 (Jan. 23, 2008), https://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122analysis.pdf.

87. *See* In the Matter of Robert Bosch GmbH, Decision and Order of the FTC In the Matter of Robert Bosch GmbH FTC File Number 121-0081, https://www.ftc.gov/sites/default/files/documents/cases/2013/04/130424robertboschdo.pdf.

88. *See* In the Matter of Robert Bosch GmbH, Decision and Order of the FTC In the Matter of Robert Bosch GmbH FTC File Number 121-0081, https://www.ftc.gov/sites/default/files/documents/cases/2013/04/130424robertboschdo.pdf.

Consent Order that noted that "the Supreme Court has not hesitated to impose antitrust liability on conduct that threatens to undermine the standard-setting process or to render it anticompetitive."[89] Finally, in 2013, the FTC issued a consent order in an investigation of Google, and ratified a consent decree that contained only some commitments from Google to modify certain elements of its business and no other provisions of legal consequence.[90] With such a consent order, both the FTC and Google avoided the long winding litigation route.

The FTC has also confronted cases where § 2 of the Sherman Act was used to target IP related monopolizations. In 2003, in the UNOCAL case, the FTC determined through an administrative complaint that the company had wrongfully acquired monopoly power, attempted to monopolize and unreasonably restraint trade.[91] The FTC opined that UNOCAL manipulated the standard setting process by persuading the Board of California Air Resources to adopt certain standards at the same time that it acquired certain patents overlapping with those standards.[92] The FTC prevented UNOCAL from enforcing such patents.[93] It was not until 2005, in the context of a merger with Chevron Corporation, that UNOCAL agreed with the FTC not to enforce the relevant patents.[94]

One year later, in 2006, the FTC found that RAMBUS violated § 2 of the Sherman Act, because it failed to disclose certain pending patents applications to the SSO, in order to monopolize markets for computer memory technologies that were included in the standard.[95] In other words, the FTC alleged that a deception or failure to disclose an SEP before the SSOs constituted a violation of § 2 of the Sherman Act. The FTC considered that two other scenarios could have existed, had it not been for RAMBUS's strategy to deceive the SSO: either (i) the SSO would have selected an alternative non-proprietary technology different from the one included in RAMBUS' patents or (ii) if the SSO had chosen RAMBUS's technology, it

89. *See* https://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122analysis.pdf

90. In the Matter of Motorola Mobility LLC, FTC No. 121-0120 (Jan. 3, 2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolaagree.pdf.

91. *See* In the Matter of Union Oil Co., FTC Docket No. 9305 (July 7, 2004), https://www.ftc.gov/sites/default/files/documents/cases/2004/07/040706commissionopinion.pdf.

92. *Id.*

93. *Id.*

94. *See* Joseph Farrell, et. al., *Standard Setting, Patents, and Hold-Up*, 74 ANTITRUST L.J. 603, 603, 607 (2007), http://eml.berkeley.edu/~farrell/ftp/FHSS_ALJ_2007.pdf.

95. *See* Rambus, Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008), *cert. denied*, No. 08- 694, 2009 WL 425102 (Feb. 23, 2009), http://cyber.law.harvard.edu/people/tfisher/2008%20Rambus.pdf.

would have demanded a commitment to license its technology on FRAND terms.[96]

The D.C. Circuit reviewed the case and ruled in favor of RAMBUS, as it considered that RAMBUS could only be held liable under the first scenario.[97] Eventually, in an appeal to the Supreme Court, the FTC lost the case, because the Court denied the certiorari.[98] As a result, the FTC's ability to use § 2 of the Sherman Act to build a case of antitrust based on IP matters remains limited.[99]

In contrast to the RAMBUS decision, *Qualcomm v. Broadcom* foreshadows the possibility of a corporation being held liable under § 2 of the Sherman Act for failure to license its technology under FRAND terms.[100] Broadcom filed a case against Qualcomm, alleging that the latter was violating the FRAND terms when licensing its technology previously incorporated through an SSO. The district Court dismissed the complaint.[101] But, on review, the Third Circuit Court of Appeals overturned the dismissal, and reinstated the case.[102] Eventually, the Third Circuit decided that:

> the [N.J. District] Court reasoned that Qualcomm enjoyed a legally-sanctioned monopoly in its patented technology, and that this monopoly conferred the right to exclude competition and set the terms by which that technology was distributed. . . . [T]he inclusion of ̄ . . . [the] technology in the [] standard did not harm competition because an absence of competition was the inevitable result of any standard-setting process.[103]

## 2. The European Union

The resolution of cases involving SEP in the context of SSOs in the EU differs from the U.S. evolution of the FTC's settlements. The main reason for this divergence is the fact that EU competition laws in this context are broader than § 2 of the Sherman Act. The flexibility available to the EU competition courts in FRAND-encumbered SEPs is responsible for this chasm in the transatlantic systems' approaches. In the EU, the spectrum of practices that Article 102 of the TFEU grants gives more flexibility to the

96. *Id.*
97. *Id.*
98. *Id.*
99. *See* Herbert J. Hovenkamp, *Patent Continuations, Patent Deception, and Standard Setting: The Rambus and Broadcom Decisions*, 28 U. IOWA LEGAL STUD. RES. PAPER NO. 08-25 (July 20, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1138002.
100. *See* Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 311, 312 (3d Cir. 2007).
101. *See Qualcomm Inc. v. Broadcom Corp., "Qualcomm II", 2008 U.S. Dist. LEXIS 911 (*S.D. Cal. Jan. 7, 2008*).*
102. *See* Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 311, 312 (3d Cir. 2007).
103. *Id.* at 305 (internal quotations omitted).

EC to use competition law to rule over FRAND of SEPs in the context of SSOs.[104]

In 2007, similar to the case filed by the FTC, the EC opened a case against RAMBUS for breach of Article 102, TFEU.[105] The EC considered that RAMBUS was seeking unreasonable royalties for the use of patents in the computer memory chips market, and as such, was abusing its dominant position. In parallel to the U.S. litigation, the EC claimed that "by not disclosing the existence of the patents which it later claimed were relevant to the adopted standard" Rambus may have committed a form of "patent ambush."[106] In addition, the EC stated that "by subsequently claiming unreasonable royalties for the use of those relevant patents," RAMBUS had abused its dominant position. [107] RAMBUS settled the case with the EC and agreed to cap the royalties for its new technology and to license older patents at no cost.[108]

In 2005, Broadcom, Ericsson, NEC, Nokia, Panasonic Mobile Communications, and Texas Instrument Search lodged complaints with the EC against Qualcomm, which holds certain essential patents in the standard for mobile telephones. The complaint was based on the allegations that Qualcomm violated the FRAND terms to which it had agreed, in the context of the SSO relating to the chipset downstream markets. The EC closed investigations without taking action, because the EC could not prove that the license fees were unreasonably high.[109]

More recently, the question of compulsory licensing has been reviewed by the Court of Justices, in the *ZTE-Huawei* case.[110] The case concerns the question of whether an action for infringement brought by the holder an SEP who has committed to granting licenses on FRAND terms constitutes an abuse of a dominant position. The Advocated General Wathelet opined:

104. *See* Piotr Staniszewski, *The Interplay Between IP Rights and Competition Law in the Context of Standardization*, 2 J. INTELL. PROP. L. & PRAC. 666, 671 n.52 (2007) ("In contrast to US law, Art 81 and 82 EC do not require an element of intention to prove anticompetitive conduct.").

105. *See* Commission Decision (EC), Case COMP/38.636 - Rambus, of 9 Dec. 2009, art. 102, http://ec.europa.eu/competition/antitrust/cases/dec_docs/38636/38636_1203_1.pdf.

106. *Id*.

107. *Id*.

108. https://www.rambus.com/european-commission-accepts-rambus-commitments-in-final-settlement/

109. *See Standard Essential Patents and Injunctive Relief*, JONES DAY (Apr. 2013), http://www.jonesday.com/files/Publication/77a53dff-786c-442d-8028-906e1297060b/Presentation/PublicationAttachment/270fc132-6369-4063-951b-294ca647c5ed/Standards-Essential%20Patents.pdf.

110. *See* Case C-170/13, Huawei Technologies Co. v. ZTE Corp., 2015 E.C.R. 477, http://curia.europa.eu/juris/document/document.jsf?text=&docid=165911&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1160150.

> In order to honor that commitment and to avoid abusing a dominant position, the SEP holder must, before making a request for corrective measures or seeking an injunction, alert the infringer to the infringement at issues in writing, giving reasons, and specifying the SEP concerned and the way in which it has been infringed by that company, unless it has been established that the alleged infringer is fully aware of the infringement. The SEP holder must, in any event, present the alleged infringer with a written offer of a licence on FRAND terms and that offer must contain all the terms normally included in a license in the sector in question, including the precise amount of the royalty and the way in which that amount is calculated.[111]

In July 2015, the Court of Justice admitted that an antitrust violation could exist under EU law when seeking injunctive relief relating to a FRAND-encumbered SEP.[112] That said, in it's decision, the Court of Justice adopted a safe harbor that foresees several requirements that, if met, would exclude injunctive relief seekers from liability.[113] In detail, FRAND-encumbered SEP holders would be required to take the following steps before they seeking injunctions against potential infringers without violating EU competition law:

1. SEP holders must alert SEP users of the alleged infringement;
2. SEP users must indicate a willingness to conclude a license on FRAND terms;
3. SEP holders must present a detailed written offer for a license on FRAND terms;
4. SEP users must respond promptly and in good faith, and not engage in delaying tactics;
5. If the SEP user does not accept the offer, it must submit, promptly and in writing, a specific counter-offer on FRAND terms;
6. If no agreement is reached, an SEP user that is already using the technology must provide appropriate security and be able to render accounts;
7. The amount of the royalty may, by common agreement, be determined by an independent third party;
8. SEP users can challenge validity, essentiality, and infringement in parallel to licensing negotiations and also after conclusion of the license agreement.[114]

111. *Id*.
112. *Id*.
113. *Id*.
114. *Id*.

In view of the foregoing, it may be concluded that the Court of Justice has been tempted to adopt a middle ground position by balancing SEP owners and licensees' interests. In other words, FRAND-encumbered SEP owners will continue to have the right to seek injunctions, but with limitations.

The long awaited judgment raises many questions as to the implementation of the safe harbor and the role that national courts will play in such respect. Nonetheless, the balancing position adopted by the European Court of Justice is a better option than completely eliminating the right to seek injunctions to SEP owners that have committed to FRAND terms. In this sense, nascent jurisdictions focusing on the same matter should consider the European approach if the only alternative is to consider seeking injunctions a per se violation of antitrust norms with respect to FRAND-encumbered SEP owners.

### *C. Concern 3: Abusing Merger Review Involving SEPs*

Merger review procedures exist as a part of almost every competition system as an enforcement mechanism preventing anticompetitive transactions from materializing in the markets. Typically, corporations are required to file a merger before the relevant authorities when the deals meet the notification thresholds. However, recent developments, and in particular the *Bosch* and *Google* decisions, have removed the FTC's blinkers in such matters and have revealed that the U.S., authorities and eventually the EU authorities might utilize merger review processes to tackle IPR issues.

#### 1. The United States

In *Bosch*, it is interesting to note that the FTC admitted to deciding to tackle the SEP issues together with the clearance of the proposed merger.[115] But the key question that remains is whether the FTC would have been concerned about Bosch's IPR issues if it had not been for the Hart-Scott Rodino ("HSR") filing.[116]

Shortly after *Bosch*, the FTC again resorted to its merger review powers to tackle certain SEP issues of Google's subsidiary, Motorola Mobility.[117]

115. *See* In the Matter of Robert Bosch GmbH, Statement of the Federal Trade Commission, FTC File Number 121-0081, http://www.ftc.gov/os/caselist/1210081/121126boschcommissionstatement.pdf.

116. Elyse Dorsey & Matthew R. McGuire, *How the Google Consent Order Alters the Process and Outcomes of Frand Bargaining*, 20 GEO. MASON L. REV. 979 (2013), http://ssrn.com/abstract=2252006.

117. Motorola Mobility LLC, FTC File No. 121-0120 (Jan. 3, 2013), http://ftc.gov/os/caselist/1210120/130103googlemotorolado.pdf.

Here, the FTC concluded that Motorola Mobility had infringed § 5 of the FTC Act because it had not honored its licensing commitments to the SSOs.[118] In particular, the FTC determined that Motorola Mobility was in breach of its FRAND commitments by filing a case before the ITC seeking injunction and exclusion orders.[119] Therefore, again, the FTC used its mandate to review mergers to address IPR issues and expanded the usage of § 5. The case was settled.[120]

The resolution of *Bosch* and *Motorola Mobility* represent the increasingly aggressive attitude of the FTC towards the SEP in SSOs that may eventually lead more and more to transactions being refused clearance on grounds other than competition related concerns. Recent policy changes by the FTC in HSR filings in the pharmaceutical sector edify the notion that the FTC is tightening the merger clearance noose in deals involving patent acquisitions.[121] Notably, the FTC has recently changed its policy regarding exclusive patent license transfers in the pharmaceutical sector. As of 2013, licenses providing an exclusive licensee with "all commercially significant rights" over a patent in a particular therapeutic field will have to file an HSR filing before the FTC.[122] Previously, only a limited number of license transfers that involved the right to make use and sell certain products had to be reported to the antitrust authorities.[123] By this shift in its policy, the FTC that typically reviews deals in the healthcare sector is expanding its jurisdiction over transactions involving patents. In light of the lack of detailed guidance on which pharmaceutical deals will have to be reported to the antitrust authorities, many corporations might decide to file the HSR filing as a precautionary measure. These corporations, in turn, and in view of the *Bosch* and *Motorola Mobility* outcomes, risk facing a more stringent scrutiny from the FTC.

There is a significant difference in the policy the DOJ adopted when reviewing mergers involving SEPs. In fact, the DOJ published a statement announcing the closing of its investigations into the Google/Motorola

118. *Id.*

119. *Id.*

120. *Id.*

121. *See* Press Release, FTC, FTC Finalizes Amendments to the Premerger Notification Rules Related to the Transfer of Exclusive Patent Rights in the Pharmaceutical Industry (Nov. 6, 2013), http://www.ftc.gov/news-events/press-releases/2013/11/ftc-finalizes-amendments-premerger-notification-rules-related.

122. *See* Premerger Notification; Reporting and Waiting Period Requirements, 78 FED. REG. 68705 (Nov. 15, 2013) (to be codified 16 CFR pt. 801), https://www.federalregister.gov/articles/2013/11/15/2013-27027/premerger-notification-reporting-and-waiting-period-requirements.

123. *Id.*

Mobility, Rockstar/Bidco and Apple/Novell mergers.[124] These three leading cases serve to display such divergence. In the Google-Motorola Mobility merger, more than 17,000 issued patents and 6,800 applications included SEPs relevant to wireless devices were at stake.[125] In the Rockstar/Bidco, a partnership including RIM, Microsoft and Apple, was formed to acquire patents at the Nortel bankruptcy auction, and to license and distribute them to certain partners.[126] Many of these patents were SEPS with licensing commitments through SSOs.[127] Finally, in the Apple/Novell merger, Apple also acquired patents with cross-licensing commitments on a royalty-free basis from Novell-CPTN to be used in the Linux system.[128] In these three transactions, the DOJ determined that competition would unlikely decrease and that market dynamics would not change significantly.[129] In this regard, it may be concluded that the DOJ might be reconsidering other policy tool options to deal with SEP issues in the context of antitrust.

### 2. The European Union

The EU is no alien to the use of merger control to review IP related issues affecting the merging parties. In 2011, Google filed a transaction before the EC merger control directorate. whereby it planned to acquire Motorola Mobility.[130] As part of the deal, Google proposed to acquire Motorola's patent portfolio amounting to approximately 7,000 to 8,000 patents.[131] The EC cleared the transaction, but not without reviewing Motorola Mobility's patent portfolio.[132] Eventually, in the words of Almunia, "[W]e concluded that Google's acquisition of Motorola's large portfolio of standard-essential patents for mobile devices would not lead the merged entity to foreclose other suppliers, also thanks to existing FRAND

124. *See* Press Release, DOJ, Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research in Motion Ltd. (RIM) of certain Nortel Networks Corporation patents, and the acquisition by Apple of certain Novell Inc. patents (Feb. 13, 2012), https://www.justice.gov/opa/pr/statement-department-justice-s-antitrust-division-its-decision-close-its-investigations.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. Merger Procedure Article 6(1)(b) Decision (EC), Case No COMP/M.6381, Google/Motorola Mobility (Feb. 13, 2012), http://ec.europa.eu/competition/mergers/cases/decisions/m6381_20120213_20310_2277480_EN.pdf.

131. *Id.*

132. *Id.*

commitments."[133] Notwithstanding the clearance of Google's deal, in April 2014, the EC found that Motorola Mobility was in breach of EU competition law over its use of SEPs.[134]

The deal involving Microsoft and Nokia is another example of how the EC could use the merger review procedures to scrutinize companies' IP strategies. The merger was unconditionally cleared, but not without a debate over the possibility of Nokia being able to extract higher returns from this portfolio. In relation to the IP involved the transaction, the EC considered that:

> [A]ny possible competition concerns, which might arise from the conduct of Nokia, following the transaction, in the licensing of the patent portfolio for smart mobile devices which it has retained falls outside the scope of the EU Merger Regulation. The Commission cannot take account of such concerns in the assessment of the current transaction. Indeed, Nokia is the seller whereas the Commission's investigation relates to the merged entity. However, the Commission will remain vigilant and closely monitor Nokia's post-merger licensing practices under EU antitrust rules, in particular Article 102 of the Treaty on the Functioning of the European Union (TFEU) that prohibits the abuse of a dominant market position.[135]

In relation to the approach taken by the EC, Commissioner Almunia publicly stated "If Nokia were to take illegal advantage of its patents in the future, we will open an antitrust case—but I sincerely hope we will not have to."[136]

## III. THE IMPACT OF THE USE OF DIFFERENT POLICY TOOLS

Based on the foregoing, a few broad trends with respect to competition law's treatment of FRAND encumbered SEPs are discernible. First, in the United States and in light of the *eBay* decision, there is movement towards equitable analysis of such cases—a shift from the previous trend of automatic injunctions in favor of patent holders and an increasing desire from antitrust agencies to have a word on this subject. Next, there is increasing propensity to view SEP related patents issues as an antitrust violation leading to a review on a post facto basis by the relevant competition courts, notably in the EU. Finally, another palpable trend is the

133. *See* Press Release, Joaquin Almunia, Vice President, EC, Almunia Speech on Intellectual Property and Competition Policy (Dec. 9, 2013), http://europa.eu/rapid/press-release_SPEECH-13-1042_en.htm.

134. http://europa.eu/rapid/press-release_IP-14-489_en.htm

135. *http://europa.eu/rapid/press-release_IP-13-1210_en.htm*

136. *See* Press Release, Joaquin Almunia, Vice President, EC, Almunia Speech on Intellectual Property and Competition Policy (Dec. 9, 2013), http://europa.eu/rapid/press-release_SPEECH-13-1042_en.htm.

predisposition of the EU and US competition authorities to consider patent/SEP issues at the merger review stage.

In isolation, these developments may seem innocuous; however, given the widening of the international competition canvas, each of these moves may have significant internal reverberations. This is particularly the case when mature competition authorities' developments serve to validate emerging competition systems' opportunistic decisions, to the detriment of bona fide business interests. The effects of the above cases considered as a sum reveal a trend that has diverse impacts at national, transatlantic and international levels. These conclusions are easier understood when responding to questions on its bearings on the institutional design of agencies, the cooperation between agencies and eventually the international dimension of such decisions.

### *A. National Impact and the Effect on Institutional Design*

An increasing amount of attention is being devoted to the impact of institutional design in the policy outcomes of competition agencies. Similarly, it is important to note the competition agencies' case outcomes also may have an impact on the institutional design and lifecycle of the agencies The comparison of the FTC and DOJ cases included in part two of this paper discloses that either agency has opted for a different policy tool to advance its agenda relating to antitrust in the IP arena. In this respect, whereas to a certain extent the DOJ seems to prefer to rely on advocacy, the FTC has opted to continue with its enforcement agenda.

In view of the above, the institutional implications cannot to be ignored. On the one hand, from a business perspective, it is easy to imagine that corporations with patent portfolios will start developing a preference for the DOJ review of transactions. When choosing enforcement as a preferred policy tool to advance an antitrust agenda in the IP field, the FTC is simultaneously imposing a deterrence effect towards its institution from a market perspective. This is due to the fact that corporations understand the outcome of the FTC cases as a decision of the agency, using its merger review mandate to take advantage of businesses and require an entire menu of potential antitrust issues for the agency to decide.[137]

On the other hand, the existence of the FTC is based principally on its expertise, i.e. consumer protection and antitrust. Some politicians may

137. Dina Kallay, Director, I.P. & Competition at Ericsson. Inc., New Considerations in I.P. - Antitrust and Negotiating Standard Essential Patents, Global Competitive Rev., 3rd Annual Antitrust Leaders Forum (Feb. 7, 2014).

understand a policy tool that extends the arms of antitrust into other domains, as if the FTC is overarching its institutional mandate. Against this background, the choice of enforcement as a policy tool in the field of IP risks the FTC no longer being considered the agency exclusively dedicated to the implementation of antitrust and consumer protection commands. Consequently, it is less likely that courts will easily grant deference to the agency's decisions, particularly if the statutory command used to that end is § 5 of the FTC Act.[138] As such, the FTC might be imposing more difficulties before courts to hear antitrust and consumer core cases by imposing higher barriers to succeed in its core policy outcomes.

Finally, in a context where institutional duplicities are at the heart of public expenditure cuts, and taking into consideration that most competition systems count with a single agency, the FTC's policy tool does not help its future. Recent trends in institutional design of agencies point to the conclusion that multiagency competition systems are moving towards the unification of agencies.[139] Eventually, if the United States follows the former trend, the agency with the best reputation among the different stakeholders (congress, private sector, etc.) will survive.

### *B. Transatlantic Impact and the Effect on Dynamic Developments*

Recent developments have shifted the original idea of antitrust law being inherently in conflict with IP. In fact, the current view offers the notion that IP and antitrust are complementary in encouraging innovation, industry and competition. In line with this current view, there seems to be convergence between the United States and the EU with respect to the idea that antitrust policy has a role to play in relation to certain IP matters, and particularly addresses patent hold up. Nonetheless, there seems to still be some divergence with regards to the choice of policy tool to do so.

As previously stated, the EU has historically been the jurisdiction focusing on enforcement rather than litigation from an antitrust policy perspective. Therefore, it is unsurprising that the EC has used competition related legislation to decide on cases potentially involving hold-ups. Differently, the US has repeatedly stated that antitrust law and policy should not constrain the legitimate exercise of IP rights by for example stating

138. William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929 (2010).

139. *See* William E.Kovacic & Marianela Lopez-Galdos, The George Washington University, *UNCTAD-Benchmarking Competition Authorities: A Global Survey of Major Institutional Characteristics*, UNCTAD-RPP Meeting (July 7, 2013), http://unctad.org/meetings/en/Presentation/RPP2013_LopezGaldos_en.pdf.

that"we need to ensure that the application of antitrust laws does not illegitimately stifle innovation and creation by condemning pro-competitive activities that would maximize incentives for investments or efficiency-maximizing business arrangements."[140] As a result, US policy tools other than enforcement, such as advocacy, have played a key role in shaping its competition system.

The evolution of US antitrust laws is characterized as the pursuit of consumer welfare by relying on accumulated knowledge and economic analysis embedded in the "rule of reason" analytical framework. It is, in fact, the rule of reason and its permeability to economic analysis that has allowed U.S. antitrust to evolve throughout the years. The apparent shift in the US tradition towards preferring enforcement tools with regards to hold-ups may eventually impact the dynamic nature of US antitrust, to the benefit of more stagnant EU competition developments. The continuation of an enforcement policy vis-à-vis SEPs in the United States lacking substantial economic analysis may hinder the evolution of a more sophisticated approach to the matters and to the benefit of consumers. Furthermore, the consequence of opting for a more European-styled policy tool reassures the EU's enforcement nature competition system to the detriment of the US advocacy agenda.

### *C. International Impact and the Effect in Emerging Competition Systems*

In 2006, China announced the 2020 Plan, which contained a strategy to move from a "Made in China" to a "Made by China" economy.[141] The 2020 Plan included the objective to invest 2.5% of the Chinese GDP in research and development.[142] It is expected that by 2020, key Chinese companies (e.g., Haier, Legend, Huawei, Tsingdao) will set up innovation centers to boost technological transformation.[143] In fact, by 2006, the Chinese government already provided a fund of 700 million yuan to boost protection of Chinese

140. Remarks by Makan Delrahim Deputy Assistant Attorney General Antitrust Division U.S. Department of Justice Presented at American Bar Association, Section of Antitrust Law Spring Meeting Washington, D.C. "US and EU Approaches to the Antitrust Analysis of Intellectual Property Licensing: Observations from the Enforcement Perspective", 1 April, 2004.

141. *See, e.g.,* News Update, CAS Clarifies Its Development Vision in the Next 15 Years, CHINESE ACADEMY OF SCIENCE (Mar. 30, 2006), http://english.cas.cn/; *China is considering investments of up to $1.5 trillion over five years in seven strategic industries*, NEXT BIG FUTURE (Dec. 5, 2010), http://nextbigfuture.com/2010/12/china-is-considering-investments-of-up.html.

142. *See, e.g.,* Cong Cao, Richard P. Suttmeier & Denis Fred Simon, *China's 15-Year Science and Technology Plan,* PHYSICS TODAY, Dec. 2006 (Magazine), at 38.

143. *See* George S. Yip, Bruce McKern, *China's Next Strategic Advantage: From Imitation to Innovatio*n, MIT Press, 2016.

brands and patents.[144] However, the 2020 Plan and its success are at crossroads with China's antitrust policy adopted in 2008.

Along with other nascent competition regimes, China's competition law establishes a competition system with a multiplicity of goals, such as consumer welfare or the healthy development of the socialist market economy.[145] One of the peculiarities of the Chinese competition regime is that the competition law includes some provisions that touch upon IPR policies. In particular, Article 55 states,

> [T]his law shall not apply to the conduct of undertakings to exercise their intellectual property rights in accordance with the relevant laws and regulations on intellectual property rights; however, this Law shall apply to the conduct of undertakings to eliminate or restrict market competition by abusing their intellectual property rights'.[146]

In 2012, the State Administration of Industry and Commerce ("SAIC") clarified that abuses of IPRs would fall under the general prohibitions of competition, such as anticompetitive agreements or mergers and abuse of dominance.[147]

In this context, it may not be far from the truth to conclude that recent developments in more mature competition regimes (viz. EU and United States) relating to the intersection of IPR policies and competition laws might be sending a wrong message to other regimes. For instance, the recent decisions of U.S. and EU authorities could be interpreted as a validation to the Chinese regime by confirming that competition provisions are good tools to shape IPR Policies.

The use of antitrust to police contractual opportunism is seen by some Chinese corporations as a window of opportunity to export this use of antitrust to enable the Chinese corporations to obtain IP related advantages from SEP owners. Illustratively, ZTE's welcomed the Advocate General's resolution, as it considers that

> [t]his opinion is a further step towards clarifying that the EC law restricts the availability of injunctions under SEPs. It makes clear that if the patent

144. *See, e.g.,* Terence P. Stewart, *China's Industrial Subsidies Study: High Technology*, Vol. 1, 56–57 (Trade Lawyers Advisory Group April 2007), http://origin.www.uscc.gov/sites/default/files/Research/China%27s%20Industrial%20Subsidies%20High%20Technology.pdf.

145. *See* David J. Gerber, *Economics, Law and Institutions: The Shaping of Chinese Competition Law*, 26 WASH. U.L.J. & POL'Y 271 (2008), http://ssrn.com/abstract=1285102.

146. *See* Bruce M. Owen, Sun Su & Wentong Zheng, *China's Competition Policy Reforms: The Antimonopoly Law and Beyond* (Stanford Law and Economics Olin Working Paper No. 339, April 2007), http://ssrn.com/abstract=978810, http://dx.doi.org/10.2139/ssrn.978810.

147. *See* D. Daniel Sokol & Wentong Zheng, *FRAND in China*, 22 TEX. INTELL. PROP. L.J. 71, 77 (2013).

> holder has given a FRAND licensing commitment, seeking an injunction to leverage licensing deals may have the effect of distorting competition.'[148] In particular Guo Xiaoming, Chief Legal Officer of ZTE, said: 'ZTE is delighted that the position of the Advocate General is so closely aligned with its own position on injunctions under SEPs. There seems to be a convergence between ZTE's and the AG's approaches towards a good compromise between rewarding innovation whilst not unfairly blocking companies from providing standard compatible products. The position of the AG would also reduce the ability of NPEs to act unfairly in negotiations with technology companies.'[149]

In the merger field, the decision of the Chinese Ministry of Commerce on Google's acquisition on Motorola Mobility illustrates this phenomenon.[150] Whereas the merger was reviewed by several jurisdictions including the USA and the EU, only China conditionally approved the transaction. The remedy consisted of obliging Google to license, free of charge, Android for a period of five years to the benefit of the Chinese Android platform and in order to honor Motorola's existing FRAND commitments. [151]

In the context of monopoly regulation, China is willing to impose the broadest essential facility doctrine existing worldwide. In addition, it is worth noting that the Chinese state upholds the decisions on standard setting.[152] The wording of the Draft IP Enforcement Regulation states that it is a competition violation to refuse to license an IPR that is an essential facility.[153]

This use of antitrust laws to justify protectionist IPR policies could be particularly important in view of the Plan 2020. On the one hand, China has presented itself with a solid commitment to modernize its IPR policies, boost

148. *See ZTE Welcomes Advocate General's Opinion on Patent Licensing; Clearer Legal Standard Could Stop Injunction Abuse by NPEs*, BUSINESS WIRE (Nov. 21, 2014), http://www.businesswire.com/news/home/20141121005540/en/ZTE-Welcomes-Advocate-Generals-Opinion-Patent-Licensing#.VNJLkEZ0xFo.

149. *Id.*

150. *See* Announcement No. 25, 2012, Ministry of Commerce of People's Republic of China, Announcement of Approval with Additional Restrictive Conditions of the Acquisition of Motorola Mobility by Google (May 31, 2012).

151. *Id.*

152. *See* Sokol & Zheng, *supra* note 151, at 81.

153. *See* 关于知识产权领域反垄断执法的指南 [Guide on Antimonopoly Law Enforcement in the Field of Intellectual Property Rights], State Administration for Industry and Commerce Task Force, http://www.aipla.org/committees/committee_pages/IP_Practice_in_China/Chinese%20IP%20Law%20%20Regulations/SAIC-Draft%202012%20China%20Guidelines%20on%20Antimonopoly%20law%20enforcement%20in%20IP%20field.pdf. For the latest version of the draft regulation, see 工商行政管理机关禁止滥用知识产权排除、限制竞争行为的规定[Rules on the Prohibition of Abuses of Intellectual Property Rights for Purposes of Eliminating or Restricting Competition] [Draft for Comments] (Sept. 18, 2013).

research and development, and become a leading reference in innovation. On the other hand, for those sectors or markets where the 2020 Plan fails to succeed, the Chinese government could still protect its companies from foreign IPRs by using its competition law. And this could be particularly important in the FRAND arena, where worldwide prices and negotiating dynamics may stoop to the bottom.[154] Consequently, Chinese antitrust authorities could strengthen an anti-patent policy disguised under international competition practices to the detriment of others, but not for Chinese companies.

The above-described scenario is a strategy that would make Chinese corporations benefit from the positive outcomes of market competition and develop their business under the safety net of competition law. The Chinese government could use this strategy when Chinese corporations cannot meritoriously win in the free market game. This is the main reason why Western and more mature competition systems should consider recent developments in those cases that deal with the intersection of IP and competition laws, since a narrow view of the challenges faced internally might be preventing authorities from observing that it is not just the elephant in the room that needs to be tamed, but the hungry dragon next door.

## IV. CONCLUSION

Antitrust agencies, notably including more mature ones, count on different policy tools to advance antitrust agendas with the objective of maximizing consumer welfare. Some of these policy tools include advocacy or enforcement actions. Nonetheless, the misinterpretation of the antitrust norms and misuse of such policy tools may play against consumer welfare.

It seems that antitrust agencies both in the United States and EU have a renewed interest to address SEPs related concerns with a particular focus on patent hold ups. From a U.S. perspective, while the increasing advocacy efforts are welcome, the enforcement trend lead by the FTC should sound alarm bells. Similarly, the EU seems to be going down a perilous path, too.

In particular, the United States' latest enforcement actions in the field of SEPs do not represent a smart institutional strategic decision. The expansive use of § 5 of the FTC Act to challenge patent hold-ups is likely to play against the FTC when seeking deference from courts in cases not related to IPRs. Further, the use of merger control provisions to advance the opportunity to review other antitrust concerns having nothing to do with the

154. *See* Sokol & Zheng, *supra* note 151, at 73 ("What happens in China on FRAND now impacts decision-making in the boardrooms of Silicon Valley.")

merger and extort voluntary commitments will continue to turn the business community against the FTC. Eventually, the reputation of the FTC individually, and the U.S. competition system widely (including the DOJ), as a credible and leading regime might be negatively impacted.

Finally, these enforcement decisions may set a bad precedent globally and create a motivated and self-centered agenda for any other competition system that wants to place vested interests of SEP owners above public welfare. Living in a global pond, mature agencies need to be wary of how they row their boats, for they cannot later complain that others, following their lead, are playing unfairly.