

The Application of Antitrust Principles to SEP/FRAND Disputes: Anticompetitive Exploitative and Exclusionary Conduct. And What About Anti-Suit Injunctions?

PAUL LUGARD*

Baker Botts

Abstract

As the dissemination of 5G and other standard essential technologies becomes more important and traditional intellectual property licensing models are increasingly criticised, the importance of competition law principles in SEP/FRAND disputes is also likely to increase. This applies to conduct that may be qualified as exclusionary, as well as exploitative within the meaning of Article 102 TFEU. This contribution provides a tour d'horizon. While excessive and discriminatory pricing claims continue to raise a number of evidentiary hurdles, the area where we may expect most developments is the field of exclusionary conduct involving SEPs. This applies both to the question of whether end-level licensing may be qualified as an abusive refusal to deal, and to the question whether the strategic use of ASIs may be objectionable under the ITT/ Promedia standard for anticompetitive vexatious litigation, or may otherwise infringe Article 102 TFEU.

* Partner, Baker Botts (Belgium) LLP. The author is grateful for valuable comments and feedback from Daniel Vasbeck, senior associate, Baker Botts (Belgium) LLP. All the views expressed in this paper are entirely personal.

I. Introduction

This contribution highlights a number of current issues on the interface of competition and intellectual property law. The interaction of principles, norms and practices developed over many decades in two very distinct fields of the law raises a number of intricate, topical and important questions, which have almost certainly already raised Fred's curiosity.

After all, for more than 25 years, Frédéric Jenny has shown a keen interest in competition law matters that require consideration of public policy objectives prevailing outside the area of competition law and policy. The relationship between trade and competition law, the receptiveness of competition policy to sustainability initiatives, the role of competition policy in the economic recovery in the post – COVID-19 world, the interaction between poverty and competition policy and of course the respective pros and cons of *ex ante* regulation and *ex post* competition law enforcement in digital markets, are just a handful of recent topics that Fred has taken on. Frequently, when studying and commenting on these topics, Fred skilfully dissects government enforcement, signals pertinent conceptual questions, inspires dialogue, structures the discussion and leads the debate in new directions.

Licensing of standard essential patents (SEPs), i.e. patents that are necessarily infringed when manufacturing a product in accordance with a technical standard, brings the inherent tension between antitrust law and intellectual property law to the surface. This phenomenon is, of course, well known.¹ However, as this contribution illustrates, the specific nature of SEPs, coupled with new economic and commercial interests associated with the Internet of Things (IoT) and 5G wireless communication technologies, bring a number of conceptual issues to light in a novel and perhaps unprecedented manner.

SEP licensing also raises a number of interesting cross-border issues. While intellectual property, and, to some extent, antitrust law regimes, are necessarily confined to national jurisdictions, SEP licensing often takes place on a regional or global basis. As a result, courts and competition enforcement agencies adjudicating disputes on SEPs and Fair, Reasonable and Non-Discriminatory (FRAND) terms are increasingly confronted with diverging conceptions and decisions of agencies and courts located in other jurisdictions. This has recently become significantly more topical as a number of courts in different jurisdictions, including the UK Supreme Court, have taken the view that they are competent to set global FRAND royalty rates, even in the absence of both parties' consent.²

1 See, for example, OECD, "Competition Policy and Intellectual Property Rights" DAF/CLP(98) (1997), OECD, "Competition, Patents and Innovation" DAF/COMP(2007)40 (2006) and Pablo Ibáñez Colomo, "Restrictions on Innovation in EU Competition Law" (2016) EL Rev 41.

2 *Unwired Planet International Ltd and another v Huawei Technologies (UK) Co Ltd and another* [2020] UKSC 37 <www.supremecourt.uk/cases/uksc-2018-0214.html>.

An important basis for national courts' global rate-setting power is the fact that SEP portfolios are in many cases licensed on a global basis. In the event that SEP owners and implementers of the essential technologies at issue do not agree on FRAND terms, it is not uncommon to seek a temporary or permanent injunction against the party that is claimed to be "unwilling" to take a licence on FRAND terms, or to request a court to set the terms of the licence at hand. In those cases, courts are led to review industry practice and may, as a result, find that only a regional or even a global licence is consistent with the parties' FRAND commitments. Perhaps not surprisingly, however, courts and agencies in different jurisdictions may have different opinions about the value of intellectual property, the importance of follow-on innovation and, more generally, the proper analytical framework for establishing whether or not SEP licensing conditions are FRAND and whether they are objectionable under competition law rules. And this leads us into another area that is dear to Fred's heart: the challenges to convergence of antitrust norms and meaningful international cooperation between competition enforcement agencies and courts across jurisdictions.

Licensing of SEPs is topical and important. Already in 2017, the European Commission estimated that the economic potential of IoT applications in devices for humans, homes, offices, factories, worksites, retail environments, cities, vehicles and the outdoors would amount to €9 trillion per year by 2025 in developed countries. It noted that the digitalisation of products and services could add more than €110 billion in revenue to the European economy per year over the next five years. The ability of connected devices and systems to work together is crucial for maximising this economic potential. Without interoperability, enabled by standards, 40 % of the potential benefits of IoT systems would not be reaped. Without formal standardisation and SEPs, there would be, for example, no connected vehicles. Tele-diagnosis or remote operations with distant hospitals or to exchange patient information would not be possible either.³

In sum, SEPs play a fundamental role in the Fourth Industrial Revolution, which involves the automation of traditional manufacturing and industrial practices, whereby large-scale machine-to-machine communication and IoT are integrated for increased automation, improved communication and self-monitoring, and devices that can analyse and diagnose issues without the need for human intervention. However, the fact that new 5G and IoT SEPs will be used for many different purposes and implemented in a large range of different devices also raises new questions on the proper licensing arrangements for those technologies and the limits that the antitrust laws may set in that regard.

This contribution is not intended to provide a detailed, comprehensive technical discussion of the many different ways in which competition law may impact on SEP

3 Commission, "Setting out the EU approach to Standard Essential Patents" (Communication) COM(2017) 712 final <<https://ec.europa.eu/docsroom/documents/26583>>.

licensing arrangements, but instead seeks to merely provide a *tour d'horizon* to illustrate a number of current topics in the current SEP/FRAND – antitrust debate on the interface between intellectual property, contract and competition law.

II. SEPs, FRAND Licensing and FRAND Disputes

Nowadays, wireless devices, such as smartphones and tablets, as well as vehicles and many other connected products, have many functionalities, including wireless voice, internet connectivity, over personal area networks (Bluetooth), local area networks (Wi-Fi) and cellular networks; the ability to run applications, take photographs and play and store audio and video content, touchscreens that facilitate user interaction with the device, and other features.

Technical protocols and standards define the technical features of devices and ensure that cellular devices and infrastructure equipment are technically compatible and interoperable. Standards may include hundreds of individual functions, which describe how products communicate or interoperate and are generally developed in standard development organisations (SDOs), where groups of developers and technology implementers discuss and agree on the most appropriate technical solutions and establish technical standards. Mobile communication standards have over the years evolved from 2G, to 3G and 4G today, with 5G now being implemented in some areas and for some applications.⁴

Two of the leading SDOs involved in developing mobile communication standards are the European Telecommunications Standards Institute (ETSI) and the Third Generation Partnership Project (3GPP), a collaboration between ETSI and several other SDOs. The Institute of Electrical and Electronics Engineers Standards Association (IEEE) is another well-known SDO that has promulgated Wi-Fi standards.⁵

It is undisputed that technical standards, including those for mobile telecommunication, have the potential to generate very significant pro-competitive benefits and can increase consumer welfare. Indeed, if the standards are widely adopted and feature many products and users, they create the opportunity and incentive to offer compatible products. This may result in significant economic benefits in the form of improved products, greater variety and lower prices.⁶

4 For an overview of the evolution of standards in the mobile communications sector, see, for example, David Edward Cooper, “Evaluating Standards Essential Patents in Mobile Cellular” (2019) XIV(4) *les Nouvelles* 274.

5 On standard development, IP policies and SEP licensing terms, see, for example, Chryssoula Pentheroudakis, Justus A Baron and Nikolaus Thumm, “Licensing Terms of Standard Essential Patents: A Comprehensive Analysis of Cases” (EU 2017) <<https://ec.europa.eu/jrc/en/publication/eur-scientific-and-technical-research-reports/licensing-terms-standard-essential-patents-comprehensive-analysis-cases>>.

6 See, for example, Commission, “ICT Standardisation Priorities for the Digital Single Market” (Communication COM/2016/0176 final, 6; and Commission, “Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements” [2011] OJ C11/1 <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52011XC0114%2804%29>>, [263].

If patented technology is included in a standard, it becomes essential to the manufacturing of product in conformity with the standard at issue. In practical terms this means that, if a manufacturer wishes to manufacture a product in accordance with technical standards, for instance, the (4G) Long Term Evolution (LTE), or the Wi-Fi standards, it needs a licence under the relevant SEPs. SDOs have adopted “IP Policies” that require participants in standard development activities to license any future essential technology that they will hold on FRAND terms.

It is not always straightforward to determine the value of standard essential technology and to determine whether – in light of the established value of the technology at issue – licensing terms are FRAND.⁷ One additional complicating factor in this respect is the fact that the objectives, nature and scope of FRAND policies and terms may differ among SDOs. By way of example, the objective of ETSI’s IP Policy, including the obligation to license SEPs on FRAND terms, is to strike a balance between motivating investments necessary to develop new technologies that meet the performance and engineering goals set by ETSI, on the one hand, and ensuring widespread access to the resultant standardised technologies on the other.⁸

It is important to realise that FRAND commitments given by participants in standard development work are contracts between the future SEP-holder and the relevant SDO that can be relied upon by third parties as third party – beneficiaries, such as implementers of the technology.⁹ Typically, SDO IP Policies do not define the precise contract terms of licence agreements, but merely facilitate good faith negotiations; the actual terms of licence agreements are subject to negotiations between the SEP-holder and the implementer of the standard essential technology, taking into account the parties’ respective FRAND commitments and the specifics of their relationship. Accordingly, disputes over FRAND terms are first and foremost contractual disputes that require an understanding of the objectives and scope of the FRAND commitments at hand, as well as any relevant relationship-specific circumstances.

One additional observation is that, in practice, implementers of standard essential technologies often develop, manufacture and may even sell standard-compliant components and final products before they have concluded a licence agreement for the use of the technology with SEP-holders. While this is not an uncommon feature in many technology-driven markets and perhaps somewhat understandable in light of SEP-holders’ FRAND commitments and the certainty that the

7 For a brief overview of FRAND rate determination methodologies, see, for instance, Haris Tsilikas, “Comparable Agreements and the ‘Top-Down’ Approach to FRAND Royalties Determination” (*CPI*, July 2020) <www.competitionpolicyinternational.com/comparable-agreements-and-the-top-down-approach-to-frand-royalties-determination/>. See also “Group of Experts on Licensing and Valuation of Standard Essential Patents ‘SEPs Expert Group’ – full contribution” (European Commission 20201) <<https://ec.europa.eu/docsroom/documents/44733>>.

8 ETSI IP Policy (3 September 2020) <www.etsi.org/images/files/IPR/etsi-ipr-policy.pdf>.

9 See, for example, Jean-Sébastien Borghetti, Igor Nikolic and Nicolas Petit, “FRAND Licensing Levels under EU Law” (2021) ECJ <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3532469>. Under the ETSI rules, the norm is to use the (value of the) end-device as the royalty base in license agreements.

technology will therefore be made available on FRAND terms, it involves a risk: if the parties are unable to agree on the (FRAND) terms of their licence, or if the implementer simply refuses to take a licence, the implementer exposes itself not only to damage claims for the unauthorised use of the SEP-owner's technology, but also to temporary or permanent injunctions on the basis of national patent law. The practical consequences of such a court measure may be significant and may even result in the forced recall of all infringing products from the market, as well as a prohibition to sell any such products in the future

Accordingly, FRAND disputes are particularly likely to arise in settings where the parties are unable to negotiate or renew a manufacturing SEP licence agreement. This may, for example, happen where SEP-owners and implementers have different views on the value and, as a consequence, the appropriate royalty rate, of the licensed SEP portfolio, or the appropriate calculation methodology underlying those rates. Similarly, an SEP-owner may take the position that the applicable FRAND terms dictate that a licence is a global licence, while the implementer believes that it is entitled to a national or regional licence.¹⁰

In any event, it is precisely in these types of circumstances that SEP-holders may be tempted to seek injunctive relief against manufacturers that are infringing the SEP-owner's intellectual property rights. The (in)famous smartphone wars that started around 2010 and that involved manufacturers including Sony Mobile, Apple, Samsung, Microsoft, Nokia, Motorola, Huawei, LG Electronics, ZTE and HTC all originate from these types of disputes.¹¹

III. The FRAND – Antitrust Interface

1. The role of competition law in FRAND licensing disputes

For the purposes of this contribution, it is interesting to consider the relationship between FRAND-based claims on the one hand and antitrust claims on the other. This is particularly relevant because the availability of claims based on antitrust law – next to contractual claims – may potentially strengthen the SEP-owner's or implementer's case in an SEP/licensing dispute. This would, for instance, be the case if an implementer would be able to credibly argue that licensing terms offered by the SEP-owner are not only non- or supra-FRAND, but also excessive or discriminatory within the meaning of, respectively, Article 102(a) and (c) TFEU. And is it conceivable that licensing terms that are held to be FRAND would nonetheless violate European (or other jurisdictions') competition rules?¹²

10 For an overview of SEP/FRAND litigation post-Huawei/ZTE, see, for example, 4iP Council, "Case law post CJEU ruling *Huawei v ZTE*" (2021) <<https://caselaw.4ipcouncil.com/>>.

11 See, for example, Paul Lugard, "Technology Licensing: Evolving Antitrust Standards in the Smartphone and Other Sectors" (*CPI Antitrust Chronicle*, 2 May 2012).

12 The UK Supreme Court has effectively cut off the argument that FRAND rates could still infringe the European competition rules (see n 2).

When assessing the potential “overlap” between FRAND-based claims and antitrust claims, one complicating factor is that there are marked differences between the scope of the competition rules among key jurisdictions. In particular, while “unfair” and “discriminatory” price abuses are cognisable claims under European competition rules, the competition law regimes of the member states of the EU and many jurisdictions outside the EU and the United States, those “exploitative” pricing claims are not covered by US antitrust law. Indeed, with regard to unilateral conduct US antitrust law is limited to exclusionary behaviour.¹³

Over the past two decades, courts, faced with requests for SEP-infringement actions, claims for damages and requests for SEP-related injunctive relief, have increasingly postulated creative and innovative approaches to resolve SEP- and FRAND-related disputes. One phenomenon in that respect is the growing significance of competition law principles in the settlement of these disputes. Interestingly, the influence of competition law rules is first and foremost felt in relation to potentially exclusionary conduct. Increasingly, however, in particular in the EU and in jurisdictions with comparable competition law regimes, questions arise whether (and if so, under which circumstances) SEP/FRAND licensing practices may give rise to “exploitative” violations of competition law, such as excessive or discriminatory pricing within the meaning of, respectively, Article 102(a) and (c) TFEU.

2. Exclusionary conduct within the meaning of Article 102(b) TFEU

Let’s start with exclusionary conduct.¹⁴ Perhaps the most common fact pattern that may give rise to exclusionary conduct claims is the scenario where an SEP-owner seeks an injunction against an infringing implementer, thereby potentially excluding that party from the market. The question then arises whether doing so might raise concerns under Article 102(b) TFEU. The EU Court of Justice (CJEU) addressed this question in *Huawei v ZTE*.¹⁵

In *Huawei v ZTE*, the Court of Justice considered a well-defined set of factual circumstances, where: (i) an SEP-holder has voluntarily agreed to licensing on FRAND terms; (ii) the licensee can properly be considered a “willing licensee”; and (iii) the SEP-holder seeks an injunction against that party. In this scenario, the judgment considers whether the infringer can raise a competition law defence.¹⁶ The court held that an SEP-holder may, when seeking an injunction against a prospective licensee who is “willing” to take a licence, infringe Article 102(b) TFEU. The judgment identifies

13 See for a brief overview, for example, Gregory J Werden and Luke M Froeb, “Antitrust and Tech: Europe and the United States Differ, and It Matters” (August 2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3442798>.

14 This contribution is limited to a number of potentially exclusionary practices that appear most frequently in areas where SEPs are prevalent.

15 Case C-170/13 *Huawei Technologies Co Ltd v ZTE Corp and ZTE Deutschland GmbH* EU: C: 2015:477.

16 See, for example, Dina Kallay, “The ECJ Huawei – ZTE Decision: En Route to Ending Hold-Out?” (*CPI Antitrust Chronicle*, 27 October 2015) <www.competitionpolicyinternational.com/the-ecj-huaweizte-decision-en-route-to-ending-hold-out/>.

The Application of Antitrust Principles to SEP/FRAND Disputes: Anticompetitive Exploitative and Exclusionary Conduct. And What About Anti-Suit Injunctions?

a number of specific guidelines for SEP licensing negotiations which include the steps that, if complied with by an SEP-holder, prevent an application for an injunction from being regarded as an abuse of dominance within the meaning of Article 102 TFEU. Crucially, the judgment does not set out any obligation to license as such: it only sets out when the seeking of an injunction against an infringing party who is a “willing licensee” may potentially be in violation of Article 102 TFEU.¹⁷

Importantly, in *Huawei v ZTE* the court did not articulate that an SEP-owner would be obliged to offer licences to any party who wishes to take a licence, including categories of implementers or component suppliers it has never licensed in the past.¹⁸ This question has more recently come to the fore in the scenario whereby a party who manufactures a product or component according to the 5G standard wishes to obtain a patent licence under a particular SEP, and where the SEP-owner has committed to licensing its SEPs on FRAND terms but has elected to only license a specific class of implementers, for instance those located at a particular level of the production chain (e.g. end-device level). Assuming the licensor’s licensing policy is in line with the FRAND commitments of the relevant SDO, the question arises whether the refusal to license a particular implementer at another level of the production chain may constitute anticompetitive exclusionary conduct within the meaning of Article 102 TFEU,¹⁹ despite the fact that such refusal would not infringe the licensor’s contractual FRAND obligations.²⁰

In contrast to the first exclusionary *Huawei/ZTE* scenario, this question is currently heavily debated and pending with the CJEU.²¹

An SEP-owner’s decision to only license a specific class of licensees, may first be framed as an anticompetitive refusal to deal under Article 102(b) TFEU in relation to other classes of implementers. The intuition underlying this theory of harm is that the refusal to license an indispensable input would prevent new products coming to the market and excludes any effective competition on a particular market.

A party wishing to obtain a licence under SEPs to ensure that the manufactured products are formally licensed, is likely to argue that it requires an SEP licence.

17 *ibid.*, [53] – [55], [60] – [61] and [71], as well as operative part of the judgment.

18 This is confirmed by the court’s statement in para 54 of the judgment that “under Article 102 TFEU, the proprietor of the patent is obliged only to grant a licence on FRAND terms”.

19 For example, component-makers in the EU who supply car manufacturers in the EU have argued that there is an obligation for SEP-holders under Article 102 TFEU to offer a FRAND license to any third party requesting a license, irrespective of their level in the supply chain. See, for example, Mlex, “Connected-cars patent fight to explore legal gray area for licensing” (*Mlex*, 29 April 2019).

20 Note that under the *Huawei/ZTE* standard SEP-owners would be unable to secure an injunction against a particular implementer without first extending a FRAND offer to that implementer, and thus could not deny access to that implementer.

21 On 26 November 2020, the Regional Court Düsseldorf referred a number of questions relating to the dispute between Nokia and Daimler to the CJEU. See Mathieu Klos, “BREAKING: Regional Court Düsseldorf refers Nokia vs. Daimler questions to CJEU” (*Juve Patent*, 26 November 2020) <www.juve-patent.com/news-and-stories/cases/breaking-regional-court-dusseldorf-refers-nokia-vs-daimler-questions-to-cjeu/>. Case C-182/21 Nokia Technologies.

However, the question is whether this would be sufficient to establish that the SEP licensor's refusal to grant such a licence amounts to an antitrust violation. The answer is that this is not in and of itself the case. What would the prospective licensee have to prove to establish an abusive refusal to license under Article 102(b) TFEU?

It is widely accepted that, as far as competition law is concerned, IP owners should generally be free to refuse to license their IP to other firms, and to limit exploitation of the innovation either to themselves or to its selected licensee(s).²² Under EU competition law, a refusal to license may under exceptional circumstances constitute a violation of Article 102 TFEU where the IP-owner holds a dominant position and where the refusal to license eliminates competition and prevents the developments of new products for which there is potential demand.²³

The position under EU competition law is consistent with US antitrust law, which does not generally impose upon parties, including IP-owners, a duty to deal or to otherwise aid competitors.²⁴ With respect to IP rights in particular, the US antitrust agencies have stated that “antitrust liability for mere unilateral, unconditional refusals to license patents will not play a meaningful part” in their enforcement efforts.²⁵

In sum, it appears that under the applicable EU antitrust standard, a prospective licensee faces a number of significant hurdles. It would first have to demonstrate that the SEP licence meets the indispensability standard, something that may in particular meet scepticism if the prospective licensee has already been active on the relevant market for a period of time and has, for example, benefited from have-made rights under licences concluded with its customers. Similarly, prospective licences would be well-advised to carefully substantiate their arguments that the SEP-licensor's refusal eliminates competition on the affected relevant market(s).

It is too early to take a final view on this matter. While the European Commission has since 2019 been investigating a complaint lodged by Daimler against Nokia regarding Nokia's refusal to license Daimler's suppliers of 5G compliant components for Daimler's connected cars, it has not yet taken a view on the matter. Meanwhile, the Landgericht Düsseldorf has recently referred a number of preliminary questions to the CJEU to clarify whether an SEP-owner who is bound by its FRAND commitments may legitimately restrict licensing its SEPs to the manufacturer of the final product.²⁶

22 See OECD, “Licensing of IP Rights and Competition Law, Background Note” DAF/COMP(2019)3 (2019) <[https://one.oecd.org/document/DAF/COMP\(2019\)3/en/pdf](https://one.oecd.org/document/DAF/COMP(2019)3/en/pdf)>, 31.

23 See, in particular, Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, [332]; and Case C-418/01 *IMS Health v NDC Health* [2004] ECR I-5039, [38].

24 See *Verizon v Trinko* 540 US 398 (2004).

25 See DOJ/FTC “Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition” (April 2007); DOJ and FTC “Antitrust Guidelines for the Licensing of Intellectual Property” (12 January 2017), 3. See also US Court of Appeals for the Ninth Circuit, 19-16122 *FTC v Qualcomm Inc.*

26 See Klos (n 21).

3. The potential for exploitative abuses within the meaning of Article 102(a) and (c) TFEU

Let's now turn to the question of whether there is any meaningful scope for exploitative abuses in the FRAND context, in particular excessive and discriminatory pricing claims.

As a starting point, successful excessive pricing claims under EU competition law are rare, mainly as a result of the intricacies involved in applying the *United Brands* standard.²⁷ The *United Brands* standard is centred around a comparison between the economic value of a product and the price charged. A price which significantly exceeds the value will be prima facie excessive.

However, determining whether royalty rates bear a clear relationship to the economic value of the patented technology raises a number of complex practical and conceptual issues, not least because there may be differences of opinion about the value that the technology adds to the licensed product, the fact that pricing in an SEP context is by its nature often well above marginal costs and that SEPs are differentiated products, which makes reliable price comparisons particularly difficult.²⁸

In any event, it is difficult to imagine how royalties that have been found FRAND can still be found abusive under Article 102(a) TFEU. In fact, the UK High Court in *Unwired Planet* put it even more clearly: “if the rate imposed is FRAND then it cannot be abusive. But a rate can be higher than the FRAND rate without being abusive too.”²⁹

Similarly, while successful Article 102(c) TFEU discriminatory pricing claims in the SEP-context cannot be excluded, they raise a number of intricate evidentiary hurdles.

There is an impressive body of empirical and theoretical economic studies that makes clear that the economic effects of price discrimination are at most ambiguous and in many circumstances have positive welfare effects.³⁰ Those general economic insights apply *mutatis mutandis* to the pricing of IP. In addition, however, the pricing of IP displays a number of specificities that should be factored into the analysis of differential pricing of IP. For instance, differential pricing in the form of lower royalties for early adaptors, or royalties that take account of the nature of the licensee's business, may serve pro-competitive ends. It may also reflect different

27 See Case 27/76 *United Brands v Commission* [1978] ECR 207.

28 See, for example, Marco Botta, “Unfair Pricing and Standard Essential Patents” (2020) EUI Working Paper RSCAS 2020/60.

29 *Unwired Planet v Huawei Technologies* (n 2).

30 For an overview, see OECD Competition Committee, “Background Note on Price Discrimination” DAF/COMP(2016)15 (2016) <www.oecd.org/daf/competition/price-discrimination.htm>. See also, for example, Eskil Ullberg, “Economic efficiency and field-of-use pricing of SEP licenses under FRAND terms” (2019) 9(4) QMJIP 392.

stages of technological development, implementation or outside competitive conditions. The notion that price differentiation – including concentrating licensing efforts on specific categories of implementers of the technology – likely leads to the broadest possible use of standardised technology and may be desirable to sustain development of the next generation of technology, implies that a credible discriminatory SEP pricing claim should at minimum substantiate why a particular differential treatment would result in negative welfare effects. This is not an easy task.

In line with these economic insights, it is equally well established that price discrimination does not in itself raise antitrust concerns. This is particularly well illustrated by the CJEU’s judgment in *MEO*, which dispelled any suggestion that price discrimination might per se infringe Article 102(c) TFEU.³¹ It was already clear that this provision only applies to pricing that can be regarded as “discriminatory”, i.e. pricing policies that involve the application of dissimilar conditions to equivalent transactions.³²

Moreover, applying the ruling in *MEO* to the context of SEP licensing, it follows that even where differential SEP licensing terms are effectively “discriminatory”, an infringement of Article 102(c) TFEU only arises where the price differential places at a competitive disadvantage the licensee that was charged comparatively higher or more unfavourable royalties, by distorting the competitive relationship between competing licensees. Such distortion of competition cannot be inferred from the mere presence of a disadvantage due to the fact that one licensee is charged more than another. In fact, the ruling suggests that where the effect of a price differentiation on the profitability and profits of a given licensee is not significant, it may be inferred that there is no distortion of competition as required by Article 102(c) TFEU.³³

In sum, while claims of anticompetitive exclusionary and exploitative claims appear to be on the rise in FRAND disputes and may potentially strengthen a claimant’s position that the licensing rates are objectionable, they are also subject to high evidentiary thresholds.

IV. The International Dimension: Anti-suit Injunctions (ASIs) and Anti-ASIs

1. Injunctions and ASIs

Disputes relating to SEPs and FRAND licensing terms often involve the use of patents in multiple countries. Accordingly, many of these disputes involve parallel or sequential legal proceedings in a number of jurisdictions, with both SEP-owners and infringing implementers seeking judicial remedies.

31 Case C-525/16 *MEO – Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência* EU: C: 2018:270.

32 *ibid.*, [23] and [25]. Often, SEP licensing agreements may not qualify as “equivalent transactions”.

33 *ibid.*, [26] – [35].

As briefly touched upon, one important instrument in the SEP-owner's toolbox is injunctive relief: a temporary or permanent restraining order aimed at the discontinuation of the infringing use of the SEP-owner's SEP by the implementer. The intuition is that, if successfully applied for and issued in a jurisdiction where the infringer generates significant sales, the prospect of an obligation to no longer sell the infringing products may result in significant pressure and lead the infringing party to the negotiating table.

Over time, courts have considerably limited the circumstances in which SEP-owners may successfully request injunctive relief against infringing implementers of their technology. In general terms, this has strengthened the position of infringing implementers. However, perhaps the main check on SEP-owners' discretion to request and enforce injunctive remedies against the infringing use of their standard essential technology has come from European competition law, in particular in *Huawei/ZTE*, where the CJEU held that seeking an injunction against a "willing" licensee may constitute an abuse of a dominant position within the meaning of Article 102 TFEU. In practical terms, this means that SEP-owners must have a high degree of confidence that they have made a FRAND offer and that they have complied with the Huawei/ZTE negotiation framework before they proceed to injunctive proceedings.

While the *Huawei/ZTE* judgment has in some respects strengthened the position of implementers, it is important to realise that even before that judgment was rendered implementers were not without any means to strategically sequence, delay, obstruct or sometimes to entirely avoid adverse legal action from SEP-owners. For example, in the UK and other jurisdictions, implementers may dispute the validity or essentiality of the SEPs at issue, thereby complicating an SEP-owner's action for injunctive relief. Similarly, in Germany, a party fearing litigation might file "protective letters" to prevent an injunction in the German courts.³⁴

2. ASIs

One novel strategic instrument that has recently attracted attention in FRAND litigation is the ASI. The primary objective of an ASI is to prevent a party from commencing parallel, duplicative foreign litigation which would frustrate the domestic court's jurisdiction and its ability to render judgment. An ASI is a controversial instrument used to combat the conflict of jurisdiction and forum shopping, and it is not issued frequently or lightly. One main reason is that, by their nature, ASIs interfere with foreign courts' exercise of their own jurisdiction. This would, for example, occur, if a court in jurisdiction A, seised by a party X to decide on a particular dispute with party Y, issued an ASI preventing party Y

34 See Richard Vary, "The Wuhan Submarine surfaces at Christmas in global Ericsson/Samsung SEP battle" (*The IPKat*, 6 January 2021) <<https://ipkitten.blogspot.com/2021/01/guest-post-wuhan-submarine-surfaces-at.html>>.

to commence duplicative litigation in jurisdiction B, thereby preventing a court in jurisdiction B hearing that duplicative matter.³⁵

When deciding on requests for ASIs, courts typically consider a number of factors, in particular whether allowing the two sets of litigation to proceed would lead to inconsistent outcomes and whether the foreign litigation is vexatious or oppressive. As will be shown below, however, courts in the foreign jurisdiction may, when confronted with an ASI issued by a foreign court, conclude that the ASI at issue is vexatious or otherwise objectionable and issue an order neutralising the effect of the original ASI: an anti-ASI.³⁶

While the recent use of ASIs and anti-ASIs in global FRAND disputes has given rise to some critical observations, one question has so far not been explicitly addressed: is it conceivable that the use of ASIs would constitute an abuse of a dominant position within the meaning of Article 102 TFEU and, if so, under which circumstances? This question is perhaps less theoretical than one may think. Indeed, there is a growing body of precedents regarding ASIs that have been held “vexatious” or “oppressive” and that have, as a result, led courts to issue anti-ASIs. It is not too far-fetched to assume that under specific conditions a party’s request for an ASI may then also constitute vexatious and anticompetitive litigation under the *ITT/Promedia* standard of Article 102 TFEU or may otherwise violate that provision. In any event, it seems too optimistic to take the view that requests for ASIs are immune under (European) competition rules, in particular if the ASI would unduly restrict the other party’s access to European courts.

Interestingly, in the past few years, some courts have started issuing ASIs in the context of FRAND licensing disputes, in particular in the US, the UK and, more recently, in China. Contreras notes that ASIs can be a “particularly powerful tool for prospective licensees alleging that [patent-] holders have failed to comply with their FRAND licensing commitments.”³⁷ In particular, SEP implementers may request a court to issue an ASI to prevent an SEP-holder from bringing foreign patent infringement claims (including injunctions against the sale of infringing products) until the question of licensing terms has been resolved in the domestic jurisdiction.

To date, FRAND disputes in which ASIs have been requested and issued are relatively rare. One example of US FRAND rate-setting litigation involving an ASI is the 2012 dispute between Microsoft and Motorola.³⁸ In that case Microsoft

35 See, for example, Clare Ambrose, “Can Anti-Suit Injunctions Survive European Community Law?” (2003) 52(2) *Intl & Comp LQ* 401. An example of a well-established, legitimate use of ASIs where a party breaches a contractual arbitration or jurisdiction clause.

36 Under US law, courts asked to consider an injunction against the prosecution of a foreign lawsuit apply the so-called “Unterweser” factors. See *In re Unterweser Reederei, GmbH*, 428 F.2d 888, 890 (5th Cir 2002).

37 Jorge L. Contreras, “The New Extraterritoriality: FRAND Royalties, Anti-Suit Injunctions and the Global Race To The Bottom In Disputes Over Standards-Essential Patents” (2019) 25 *BU J Sci & Tech L* 251 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3339378>.

38 *Microsoft Corp v Motorola, Inc (Microsoft I)*, 871 F Supp. 2d 1089, 1097 (WD Wash), *aff’d*, *Microsoft II*, 696 F.3d 872 (9th Cir 2012). See Contreras (n 7).

requested a FRAND licence from Motorola. When the negotiations broke down, Microsoft brought a breach of contract claim against Motorola in the US District Court for the Western District of Washington. In response, Motorola sued Microsoft for patent infringement in Germany. The German court found that Microsoft had infringed Motorola's SEPs and enjoined Microsoft from selling infringing Xbox and laptop computers in Germany. Microsoft then sought an ASI in the federal district in Washington to prevent Motorola from enforcing the German injunction. The district court entered the ASI against Motorola, a decision that was upheld on appeal. All in all, Contreras mentions seven US cases that were brought before 2020, where ASIs were requested and issued by courts to enjoin foreign proceedings in FRAND disputes.³⁹

Given the potentially serious effects an ASI may have by preventing a party – most often the SEP-holder – from seeking (injunctive) relief in the courts of a foreign country, that party may try to seek countermeasures in the form of an anti-ASI in the foreign jurisdiction, which prevents the other party from enforcing the original ASI. Courts in the foreign jurisdiction may in particular grant a request for an anti-ASI if they consider that the litigation brought before them is not vexatious or oppressive, nor duplicative of the parallel foreign litigation. As we will see, some courts also issue anti-ASIs on the basis that ASIs are intrinsically contrary to the fundamental right of access to courts.

As the number of FRAND disputes where parties have requested ASIs has so far been limited and anti-ASIs appear to have been available, it may be argued that the IP system works reasonably well and does not give rise to fundamental concerns. Indeed, even if a party to a FRAND dispute seeks and obtains an over-broad ASI, the other party might be able to neutralise the adverse effect of the ASI by requesting and obtaining an anti-ASI in individual jurisdiction. Unfortunately, however, that reassuring assumption is not necessarily true.

A number of courts have recently claimed jurisdiction to set global FRAND rates, even in the absence of a patent infringement dispute over national patents. This phenomenon, combined with those same courts' willingness to issue broad-scope ASIs, raises a number of novel concerns as those courts may be opportunistically seized and ASIs may be requested and issued for strategic and anticompetitive reasons. Indeed, "the combination of national courts' willingness to determine global patent licensing rates, coupled with the rising prevalence of the anti-suit injunction, threatens to cause a new 'race to the bottom' among jurisdiction in this commercially significant area of the law."⁴⁰

Recently, Chinese courts in particular have accepted actions for global FRAND rates and, more importantly, have shown a willingness to issue broad ASIs in

39 See Contreras (n 7). See also Damien Geradin and Dimitrios Katsifis, "The use and abuse of anti-suit injunctions in SEP litigation: Is there a way forward?" (*SSRN*, 19 March 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3807899>.

40 See Contreras (n 7), 251.

connection with those proceedings.⁴¹ Within a short time span, this phenomenon has made Chinese courts an attractive venue for parties seeking to stall FRAND negotiations and to – potentially – inflict competitive harm on their counterparty. This trend has not, however, gone unnoticed and European courts in particular, called upon to issue anti-ASIs, have reacted strongly to the limitation of their jurisdiction by the Chinese courts.

First, in 2020, in a rate-setting dispute in the Chinese courts between Huawei and Conversant involving 2G, 3G and 4G Chinese SEPs held by Conversant, the Chinese Supreme Court issued an ASI preventing Conversant from requesting a German court to enforce a judgment of the Düsseldorf court holding that Huawei had infringed Conversant's German patents of the same patent family and that Conversant was entitled to a much higher FRAND rate than the rate determined by the Chinese court in relation to the corresponding Chinese patents.⁴² Reportedly, when issuing the ASI, the Chinese Supreme Court noted that the enforcement of the German judgment would have a negative impact on the case pending in the Chinese court and the need to prevent irreparable harm to Huawei.⁴³

The second case concerns a FRAND dispute between the Chinese company Xiaomi and InterDigital and proceedings brought by Xiaomi in the Wuhan Intermediate Court requesting the determination of the global FRAND rate for SEPs held by InterDigital. In response, InterDigital started infringement proceedings in the Delhi High Court in India. At the request of Xiaomi, the Wuhan Intermediate Court issued an ASI preventing InterDigital from seeking and applying injunctions and requests for the determination of FRAND rates in any countries.⁴⁴

The third and most recent global FRAND dispute that culminated in a Chinese ASI was the litigation between Samsung and Ericsson over the terms of a cross-licence covering 4G and 5G patents. In that case, on 11 December 2020, Samsung turned to the Chinese Wuhan Intermediate Court to set global FRAND rates for Ericsson's patent portfolio. A few days later, Ericsson, unbeknownst of Samsung's action in China, filed a suit in the US District Court for the Eastern District of Texas, requesting the Texas court to determine whether, during their negotiations, the parties breached or complied with their mutual FRAND obligations.⁴⁵ Three

41 It has been suggested that the Chinese judiciary is not independent. See, for example, Michael Forsythe, "China's Chief Justice Rejects an Independent Judiciary, and Reformers Wince" *The New York Times* (New York, 18 January 2017) <www.nytimes.com/2017/01/18/world/asia/china-chief-justice-courts-zhou-qiang.html>. Chinese courts are reported to set low FRAND rates. See, for example, Sophia Tang, "Anti-Suit Injunction Issued in China: Comity, Pragmatism and Rule of Law" (*Conflict of Laws.net*, September 2020) <<https://conflictoflaws.net/2020/anti-suit-injunction-issued-in-china-comity-pragmatism-and-rule-of-law/>>.

42 See *Huawei v Conversant*, (2019) Zui Gao Fa Zhi Min Zhong 732, 733 and 734 No 1.

43 See Tang (n 41).

44 See *Xiaomi v Intel Digital* (2020), E 01 Zhi Min Chu 169 No 1. Technically, the Wuhan court ordered an ASI and an anti-anti-ASI.

45 See *Ericsson v Samsung*, No 2: 2020cv00380 (ED Tex 2021).

days later, Samsung requested the Wuhan court to issue an ASI against Ericsson, which was granted on 25 December 2020.⁴⁶ Interestingly, the scope of the ASI was particularly broad, even compared with the Xiaomi ASI that the same Wuhan court had issued only a few months earlier. Not surprisingly, the ASI prevented Ericsson from seeking and enforcing an injunction on its 4G and 5G SEPs against Samsung. In addition, the Wuhan ASI prevents Ericsson from requesting any court to determine FRAND licensing conditions for its 4G and 5G patents. Moreover, it precluded Ericsson from contesting or prohibiting the enforcement of Samsung's ASI and was sanctioned by civil and criminal sanctions.

3. Anti-ASIs

In each of the three cases mentioned above, Chinese courts issued broad-scope ASIs against the SEP-holder at issue in response to (potential) SEP litigation outside China. As alluded to above, the reaction of the courts “at the receiving end” of the Chinese ASIs has been unequivocal, especially in *Xiaomi v InterDigital* and *Ericsson v Samsung*.

In response to the ASI in *Xiaomi v InterDigital*, InterDigital applied for anti-ASIs in India and Germany. On 9 October 2020, the Delhi High Court issued an anti-ASI against the Wuhan ASI, holding that it was improper to restrain InterDigital's actions against Xiaomi in relation to the infringement of its Indian patents.⁴⁷ Similarly, the Regional Court Munich I issued the requested anti-ASI for Germany on 9 November 2020 and confirmed the interim injunction in its judgment of 28 January 2021.⁴⁸ In a remarkably outspoken judgment, the Munich court held that an ASI is an interference with the proprietary rights of the patentee and that foreign ASIs are not to be recognised in Germany as they constitute a violation of the *ordre public*. Interestingly, it added that the conditions for an anti-ASI under German law are also met if the implementer has threatened a request for an ASI or has filed an action for the determination of FRAND rates in a jurisdiction that generally grants ASIs, or has requested ASIs against other SEP-holders.⁴⁹

More recently, in the *Ericsson v Samsung* saga, Ericsson applied for an anti-ASI in the Texas court. On 11 January 2021, the US District Court for the Eastern District of Texas issued the requested anti-ASI. It found that Samsung's Wuhan ASI amounted to vexatious or oppressive litigation; enforcing the ASI would impose “inequitable hardship” on Ericsson by unfairly depriving it of its right to enforce legitimate claims under US law; it would unfairly put Ericsson in “a weaker

46 See *Samsung v Ericsson* (2020), E 01 Zhi Min Chu 743.

47 High Court of Delhi, *InterDigital Technology Corporation & Ors v Xiaomi Corporation & Ors* <<https://indiankanoon.org/doc/118671167/>>.

48 Regional Court Munich I – 7 O 14276/20, *InterDigital v Xiaomi*.

49 Significantly, the Munich court also observed that implementers who apply for an ASI, or threaten to do so, cannot, as a rule, be regarded as sufficiently willing to take a license on FRAND terms within the meaning of the *Huawei/ZTE* judgment. See *InterDigital v Xiaomi* (n 48).

negotiating position” in cross-licensing its SEPs to Samsung and others and it would “frustrate and delay the speedy and efficient determination” of Ericsson’s claims before the Texas court. Finally, the court noted that the proceedings before the Chinese Wuhan court and the US Texas court were not duplicative.⁵⁰

The position of a number of other European courts is consistent with the decisions taken by the US District Court for the Eastern District of Texas, the Munich I court and the Delhi High Court.⁵¹ In particular, the UK High Court found that the ASI issued at Lenovo’s request by the US District Court for the Northern District of California prohibiting IPCom from bringing patent infringement actions was unnecessary, vexatious and oppressive and warranted an anti-ASI.⁵² Similarly, the Paris Court of First Instance found that the same ASI prevented IPCom from access to courts and thus infringed its fundamental rights.⁵³

In sum, it appears that ASIs are increasingly attracting criticism. The sceptical approach of European courts and courts of other jurisdictions is not surprising in light of the interference that ASIs may have on the courts’ exercise of their own jurisdiction. It seems, however, that ASIs are particularly likely to raise concerns where (i) the foreign ASI appears unnecessary or disproportionate to protect the originating court’s jurisdiction to decide on a legitimate claim made in that jurisdiction by the claimant at issue, (ii) extend beyond the dispute at hand by restricting the other party from litigating against other, non-related parties or, more generally, (iii) restrict the other party’s access to court.

From a competition law perspective, these developments may appear innocuous. After all, even if an ASI would potentially disadvantage the other party, i.e. the SEP-holder, and potentially bring about competitive harm, then the SEP-owner is able to defend itself by requesting an anti-ASI.

However, in specific instances, requesting an anti-ASI may not be that simple. The question arises whether in that case, there is or should be a role for competition law.

4. Limits to the availability of anti-ASIs and the role of competition law

In some specific circumstances, the theoretical availability of anti-ASIs may not be sufficient or effective to neutralise over-broad and potentially anticompetitive ASIs issued by Chinese courts or courts from other jurisdictions. In those cases, there is a potential role for competition law.

50 See *Ericsson v Samsung* (n 45).

51 See also Paris Court of First Instance, *IPCom v Lenovo* Case No RG 19/59311 and Munich Higher Regional Court, *Continental v Nokia* Case 21 O 9333/19.

52 *IPCom v Lenovo* [2019] EWHC 3030 (Pat). See also Matthieu Dhenne, “Anti-suit or ant anti suit injunctions? That is the question” (*Kluwer Patent Blog*, 15 December 2020) <<http://patentblog.kluweriplaw.com/2020/12/15/anti-suit-or-anti-anti-suit-injunctions-that-is-the-question/>>.

53 *IPCom v Lenovo* Case No RG 19/59311.

Litigation in the SEP/FRAND field may have an important strategic dimension as the consequences of an action in a particular jurisdiction may produce significant effects in other jurisdictions. This phenomenon does, of course, not in and of itself imply that any request for determining SEP FRAND rates, injunctive relief or another court action violates competition law rules. However, the fact that a number of courts have recently claimed jurisdiction to determine, if so requested, global FRAND rates and are prepared to issue ASIs aimed – or alleged to be aimed – at protecting those courts’ jurisdiction, provides the parties in this field with an important additional strategic tool. Based on recent events in *Huawei v Conversant*, *Xiaomi v InterDigital* and *Ericsson v Samsung*, it seems that tool plays first and foremost into the hands of technology users that seek to optimise their chance to lower rates, delay the establishment of rates, or forego the conclusion of licensing agreements altogether.

A request to a court to determine (global) FRAND rates, especially if made by the technology user and especially if made to a court or in a jurisdiction that is known to set implementer-friendly rates, may already have a significant impact on the SEP-owner’s ability to conclude licence agreements on FRAND terms with the requesting party in an efficient and time-effective manner or to otherwise monetise its patent portfolio. In turn, this may affect the SEP-owner’s position vis-à-vis other prospective licensees and may translate into competitive harm. These effects may be amplified in the event the court issues an ASI that further constrains the SEP-holder from seeking relief from courts in other jurisdictions. For example, an ASI issued by a rate-setting court preventing the SEP-owner from seeking injunctive relief in any jurisdiction may already significantly weaken the SEP-holder’s position vis-à-vis the implementer that has initiated the proceedings.

The effects of an ASI on the receiving party may give rise to concerns if the ASI exceeds what is effectively required to properly protect the issuing court’s ability to render judgment in the case before it, bearing in mind that, as a principle, ASIs are only exceptionally merited. For example, an ASI order eliminating any injunctive relief, may, depending on the facts of the case, be unnecessary and disproportionate. It seems however that the effects of an ASI on the receiving party may be particularly significant in two sets of circumstances. This would first be the case if the scope of the ASI extends beyond the pending dispute between the SEP-owner and the implementer and constrains the SEP-holder in its dealing with third parties, for example by prohibiting the SEP-owner from requesting courts to determine licensing conditions for the same SEPs in relation to parties entirely unrelated to the party that has requested the ASI. Indeed, it is difficult to see how such a prohibition is reasonably necessary for the issuing court to perform its task.

A second scenario where ASIs may produce disproportionate effects is where they prohibit any actions aimed at forcing the requesting party to withdraw the ASI or prohibit its enforcement. While in a number of jurisdictions

anti-ASIs are available as an effective tool to dispute the original ASI or the terms thereof, the latter obligation may make it impossible to even request such an anti-ASI.⁵⁴

Competition law may potentially come in where the potentially undesirable impact of over-broad or inappropriate ASIs cannot be effectively addressed by the court system. This is potentially true where the ASI makes a request for an anti-ASI illusory. To be fair: European competition rules – and Article 102 TFEU in particular – do not provide a straightforward and general answer in these scenarios and any competition law intervention – either through the court system or through complaints to competition enforcement agencies – would in any event require a detailed assessment of the facts of the case. Having said that, ASIs (as any other litigation) may be contrary to Article 102 TFEU where they fit the requirements of vexatious litigation within the meaning of the *ITT/Promedia* case law of the CJEU, or would otherwise violate that provision.⁵⁵

To meet the conditions for anticompetitive, vexatious litigation under the *ITT/Promedia* standard, a party would first have to show that the ASI or any of its terms does not constitute meritorious litigation, but only serves to harass the other party. The second condition is that the request for an ASI is part of a plan which has the goal of eliminating competition.⁵⁶

Surely, these conditions are not easily met and require a detailed factual assessment, especially with respect to the existence of an exclusionary or anticompetitive plan. It is, however, not too far-fetched to assume that such a plan may exist where a court that is called upon to issue an anti-ASI in response to a foreign ASI, observes that the “real motivation” behind the request for a broad-scope ASI was to put the other party in “a weaker negotiating position when it came to cross-licensing” its SEPs to the requesting party and others.⁵⁷

V. Concluding Observations

As the dissemination of 5G and other technologies becomes more important and traditional licensing models are increasingly put to the test, the importance of competition law principles in SEP/FRAND disputes is also likely to increase. This applies to conduct that may be qualified as exclusionary and exploitative within the meaning of Article 102 TFEU. While excessive and discriminatory pricing claims continue to raise a number of evidentiary hurdles, the area where

54 Whether this is indeed the case will depend on the facts of the case, including sanctions for not complying with the terms of the ASI.

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

56 See, for example, Ioannis Lianos and Pierre Regibeau “‘Vexatious’/‘Sham’ Litigation: When can it Arise and How can it be Reduced?” (2017) 62(4) *Antitrust Bull* 643, 645–648.

57 See *Ericsson v Samsung* (n 45).

The Application of Antitrust Principles to SEP/FRAND Disputes: Anticompetitive Exploitative and Exclusionary Conduct. And What About Anti-Suit Injunctions?

we may expect most new insights is the field of exclusionary conduct involving SEPs. This applies both to the question of whether end-level licensing may be qualified as an abusive refusal to deal, and to the question whether the strategic use of ASIs may be objectionable under the *ITT/ Promedia* standard for anticompetitive vexatious litigation, or may otherwise infringe Article 102 TFEU.

I hope and am confident that Fred will continue to follow the developments in this interesting area of the law with interest.