3.4 Other Exclusionary Practices

Excessive pricing and price discrimination are not the only types of abusive conduct under the FRAND regime in which Article 102 TFEU may come into a play. One has to remember, as discussed above, that the European Commission and the Court of Justice of the European Union recently have interpreted abuse under Article 102 TFEU broadly and have not required that proof of abuse necessarily relating to the actual effect of the abusive conduct complained be presented. For the purposes of establishing an infringement under Article 102 TFEU, it is thus sufficient to show that the abusive conduct of the undertaking tends to restrict competition. In other words, if it is shown that the object of the conduct pursued by the undertaking holding a dominant position is to limit competition, it is also likely that the conduct will be deemed to be abusive.[122]

3.4.1 The Misuse of Intellectual Property Rights

It is clear that any conduct, which prohibits effective competition within a certain market, can amount to exclusionary abuse. It is also possible that the mere intent to exclude can be relevant when assessing whether the behaviour is abusive. The European Commission recently applied this approach in the *AstraZeneca* case, concerning the acquisition of patents by deception.[123] In this particular case, the intent to exclude competitors seems to have been determinative for the outcome.[124] In the *AstraZeneca* case, the European Commission imposed a 60€ million fine to AstraZeneca for (i) misrepresenting certain dates before the national patent offices in order to extent its patent protection, and (ii) misusing marketing authorization procedures in order to delay the generic version of the drugs in question getting access to the market, which also hindered parallel import. As analysed by *Mr. Josef Drexl* in a recent article titled: *"Deceptive Conduct in the Patent World- A Case for US Antitrust and EU Competition Law?*"[125] the Commission's controversial decision in the *AstraZeneca* case clearly demonstrates the Commission's broad approach to the concept of abuse, striking at AstraZeneca's commercial strategy and stressing its intent to eliminate competition through patent exploitation.

122 See example Case T-23/01, *Michelin v Commission.*

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

124 Ibid, para, 628, 632, 648, 789, 908.

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

Interestingly, as *Mr. Drexl* points out in his article, deception under Article 102 TFEU may also arise in a standardization environment, in particular, where undertakings involved in the standardization process hold back relevant information about their patens or licensing policies.[126] Consequently, case law such the *AstraZeneca* case may also be relevant in a standardization context where dominant undertakings holding standard-essential patents pursue legal proceedings against its competitors.

The *AstraZeneca* case is also of particular interest to the technology industry in general as it contains observations by the European Commission about some of the factors which it may take into account when assessing whether a technology company is deemed to be in a dominant position. These factors, in particular, include: the strength of the company's patent portfolio and an examination of its enforcement policy and practice. After the decision in the *AstraZeneca* case, it is likely that the Commission, in particular, will put emphasis on assessing whether an undertaking holding standard-essential patents can be said to be in a "*striking position*" vis-à-vis its rivals.[127]

3.5 Conclusion on the Applicability of Article 102 TFEU on FRAND Commitments

In conclusion, when applying Article 102 TFEU and its established case law to technology licensing, competition authorities and courts are faced with significant theoretical and practical difficulties. In addition, it is generally considered a valid argument that competition authorities and courts should not engage in price control expect under extremely exceptional circumstances. One reason for the controversial nature of this area of law stems from the fact if these authorities were to have an obligation to control rates it is likely to turn competition authorities into quasi-permanent regulators even though they lack the resources to truly fulfil this task.[128] This may potentially lead to mistakes which in turn could have quite drastic consequences for the innovative industries.

126 Supra note Josef Drexl p. 137.

127 See Pierre-Anre Dupois, *"Technology sector- standardization, FRAND terms and patent misuse-recent developments,"* the European Commission's Antitrust Review, Kirkland & Ellis International LLP, 2007.

128 See speech delivered by Philip Lowe speech at the Fordham Antitrust Conference in Washington D.C., 23 October 2003, available at http://ec.europa.eu/comm/competition/index_en.html.