3. The Applicability of Article 102 TFEU to Enforce FRAND Commitments

Most often licensors and licensees are able to reach mutually satisfactory agreements when negotiating licensing agreements in so-called *ex ante* circumstances, *i.e.* before any industry standard has been chosen. However, in some instances licensors and licensees will have to negotiate under so-called *ex post* circumstances, *i.e.* when a standard has already been chosen and implemented. Under *ex ante* circumstances various attractive technologies are at hand, whereas under *ex post* circumstances, per definition technologies alternative to the technologies included in the standard have become less attractive. This is due to the fact that once a standard has been chosen, the industry will start to develop and produce goods, which comply with the standard specification. During this time, significant investments will be made, and once equipment manufactures and network operators have incurred such significant sunk costs, they will effectively become locked into the application of a particular technology for a long time. This unavoidably leads to a situation, where the standard imposes competitive constrains and restricts the development of future competing technologies.

The strong bargaining power of patent holders in *ex post* circumstances creates a significant risk that patent holders will demand royalty rates that do not comply with FRAND terms. In response, licensees may be tempted to rely on competition rules, namely Article 102 (a) and (c) TFEU.

In the absence of precedents defining the exact meaning of FRAND commitments, some commentators, such as *Anderman and Kallaugher,* have attempted to define FRAND commitments by reference to Article 102 (a) and (c) TFEU. Article 102 (a) TFEU requires that dominant companies refrain form imposing "*unfair*" prices and trading terms. Article 102 (c) in turn bars dominant companies from applying dissimilar conditions to equivalent transactions.[80] The discussion below attempts to determine the meaning of FRAND commitments against the principles developed under the underlying policy goals of Article 102 (a) and (c) TFEU.

80 Steven D. Anderman & John Kallaugher, *Technology Transfer and the New EU Competition Rules, Intellectual Property Licensing after Modernisation* ,Oxford University Press, 2006, p.253.

3.1 Market Definition in Technology Markets

In the following, I will only examine abusive pricing under Article 102 TFEU in the IP licensing context if imposed by a dominant company. When defining dominance, the European Court of Justice ("ECJ") has focused on the ability of a dominant undertaking to act independently of its competitors, customers, and consumers and to prevent effective competition.[81]

Before assessing whether a company possess a dominant position, the relevant technology market has to be defined. When doing so, it is important to remember that the market definition is not an end in itself. Rather, it is a preliminary step, a tool, aimed at making it possible to answer the real question: Does the undertaking concerned possess such market power that it amounts to dominance under Article 102 TFEU?

When defining the relevant product market, one first has to assess the so-called "*demand side substitutability*". In the context of patents incorporated into a standard, this means that the relevant market will consist of the licensed technology and its substitutes. Whether other technologies are substitutable or interchangeable to a licensed technology, depends primarily on whether the licensees concerned are able to switch to alternative technologies, *e.g.* in response to permanently increased royalty rates charged by a licensor for use of the standardized technology.[82] If the licensees can switch from the standardized technology to alternative technologies, then the alternative technologies will form part of the relevant product market.

Although the conceptual frame for standardized products, on a first glance, does not appear to differ from the one applicable to traditional product markets, it is should be kept in mind, as pointed out by *Anderman* and *Kallaugher,* that the task of defining the relevant market with regard to standardized technology products is much more complex.[83]

The increased complexity stems from the fact that the technology forms part of a standard. In many standards, multiple companies hold essential patents to a given standard. The IPRs of these companies will also typically cover different aspects

81 See *e.g.* case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, [1979] 3 CMLR, para. 38 and 39.
82 See *e.g.* the European Commission's Guidelines on the application of Article 81 EC to Technology Transfer Agreements, 2004 OJ C101/2, p.22.
83 Supra note Steven D. Anderman & John Kallaugher, p.150-159.

of the standard. Therefore, as discussed above, the potential licensee, who wishes to manufacture and sell standard-compliant products, must obtain a license for each of the patents included into the standard. Accordingly, these patents do not constitute a separate product market, since they are considered complements, not substitutes.[84] As stated by *Anderman* and *Kallaugher*, it is obvious that the existence of non-substitutable complements has profound implications on the market definition.

In several cases where the product assessed has been rather complex, the European Commission has used its discretion to define markets narrowly, which in turn also makes it easier to establish dominance.[85] For example, in the *Hilti* case,[86] the European Commission decided that the relevant market did not include the entire wall construction market, since separate markets for nail guns, nails, and patented cartridge strips were deemed to exist.

Existing case law on intellectual property rights and competition law shows that the European Commission's practice of defining markets narrowly is not targeted solely at giant IPR owners. As argued by *Etro*, the European Commission's practice can be seen as part of a wider strategy aimed at enabling the Commission to regulate essential infrastructures, which are dependent on IPRs or so-called "*lock-ins*" in after markets.[87] As shown by the European Commission's actions in the *Microsoft* case, there is arguably a legitimate desire and need to use Article 102 TFEU to supervise effective competition in the information technology markets.

3.2 Dominance in Technology Markets

In some cases, the ownership of intellectual property rights may lead to dominance. In the context of standards, the key question is whether the holding of a patent portfolio or even only a single patent may amount to the holder being deemed to possess a dominant position enabling him to impede competition to an appreciable extent on the relevant market.

84 Supra note Steven D. Anderman & John Kallaugher, p.156-157.
85 This can also be seen in the recent *AstraZeneca* case dealing with the pharmaceutical industry, Case COMP/A.37.507.F3, *Generic/AstraZeneca,* 15th June 2005, IP/05/737, on appeal Case T-321/05, pending judgment.
86 Case *Hilti v Commission* [1994] ECR I-667.
87 Supra note Federico Etro, p.241-240.