3.3.2 Price Discrimination under Article 102 (c) TFEU

On its face, Article 102 (c) TFEU requires that a two-step test be applied in order to determine whether a certain undertaking's pricing policy violates EC competition law. First, the licensing term should be "*dissimilar*" assessed against terms applied in equivalent transactions. Second, the pricing policy should result in the licensee alleging discrimination being competitively disadvantaged.

The wording of the first requirement is important because Article 102 (c) TFEU does not require licensors to treat licensees in the exact same way. It is sufficient if the conditions offered to licensees by the dominant undertaking are "*similar*". In other words, the licensing terms as between licensees can vary as long as such terms do not significantly affect the costs imposed to end consumers.[112] However, as identified by *Anderman* and *Kallaugher* in a licensing context it is difficult to determine whether two transactions are equivalent, as several factors can be invoked to justify possible differences. As identified above, this is due to the fact that many IP licensing agreements, especially within standardization, contain an element of cross-licensing and due to the fact that the size of patent portfolios of potential licensees tends to vary considerably. In other words, in reality most IP licenses do not fulfil the "*equivalent transactions*" requirement under Article 102 (c) TFEU.

The requirement under Article 102 (c) TFEU for competitive disadvantage to be at hand seems to suggest that the dominant company's customers should be competing with each other. This condition is more likely to be met in practise, as demonstrated for example within the area of the GSM standard where most of the licensees do indeed compete on downstream markets. However, all of this is only relevant where the first condition of Article 102 (c) TFEU is already met.

The above strongly suggests that, if one were to force FRAND undertakings to offer identical licensing terms to all licensees, this would prevent efficient price discrimination and arguably discourage innovation, as licensors no longer would be able to freely extract proper return for their patent portfolios.[113] As argued by *Geradin* and *Petit* in article *"Price Discrimination under EC Competition Law: Another Antitrust Doctrine in Search of Limiting Principles?*" such a system would lead to undue rigidity within the area of licensing schemes and in effect

112 Supra note Steven D. Anderman & John Kallaugher, p.275.

113 Damien Geradin, "Abusive Licensing in an IP Licensing Context: An EC Competition Law Analysis," European Competition Law, 2007, p. 26-28.

prevent that mutually acceptable licensing deals are made, and as a consequence negatively affect technology transfer and entry into downstream markets.[114]

In the light of the issues discussed above, it is interesting to see whether the above analysis would be different if a certain proprietary technology has been included into a standard. As discussed above, undertaking FRAND commitments forces a dominant undertaking to make a number of choices. Once an IP owner, who takes part in a standardization process, discloses its essential IPRs to the SSO, it is asked to assure that it will make its rights available through licenses on FRAND terms to third parties[115], including to licensees who are competing within same market as the licensor.

In light of the above, when considering the applicability of 102 (c) TFEU to dominant patentees, strong arguments have been presented in academic literature that a key distinction should be drawn between vertically and non-vertically integrated licensors. *Swanson* and *Baumol* have examined this aspect in article *"Reasonable and Non-discriminatory (RAND) Royalties, Standard Selection and Control of Market Power"*. According to these authors, non-vertically integrated licensors, who are active only on the upstream licensing markets, generally do not have incentives to price discriminate their licensees.[116] By contrast, vertically integrated companies, who are also present in downstream product markets, generally have an incentive to price discriminate between its downstream operations and the operations of its competitors.[117] It may be in the interest of the patentee to increase the costs of its licenses to a level where it may influence the licensee's possibility to compete against the licensor. According to *Rahnasto,* in *ex post* standard situations where it is not any more an option for the licensee not to take a particular license needed for the implementation of the standard, the extensive royalty rates can be used as a viable offensive strategy by the patentee.[118] Thus, in increasingly competitive markets, even small differences in the cost structure of competitors may have a substantial impact on the competitive position of companies. In the light of above, strong arguments support that par-

114 See Damien Geradin and Nicolas Petit, "*Price Discrimination Under EC Competition Law: Another Antitrust Doctrine in Search of Limiting Principles?"*Journal of Competition Law and Economics, 2006.

115 See ETSI's IPR Policy, Article 3.2.

116 Daniel Swanson and William Baumol, " Reasonable and Non-discriminatory (RAND) Royalties, Standard Selection. And Control of Market Power," Antitrust Journal 1, 2005.

117 Ibid.

118 Ilkka Rahnasto, "*How to Leverage Intellectual Property Rights,"* Faculty of Law University of Helsinki, 2001, p.169.

ticular attention be paid by competition authorities and courts when assessing acts of foreclosure exercised by vertically integrated dominant undertakings.

When considering situations where a standard involves the choice of a single technology to produce a given downstream product, *Swanson* and *Baumol* state as follows:

"While discriminatory license fees will generally not raise significant concerns, there are cases where potentially valid reasons exist for concern about discrimination in license fees for intellectual property: those instances when the owner of the IP uses it as an input in downstream market where competitors also require the IP for the same purpose. A licensor exercising bottleneck market power that discriminated in licensing in order to handicap its competitors and favour its own downstream sales can create or enhance market power in downstream markets for standard-compliant products and services. By contrast, a pure licensor (even one with monopoly power) will ordinarily lack anticompetitive reasons for engaging in discrimination."[119]

According to these authors, the risk of foreclosure presented by vertically integrated licensors is presenting strong arguments in support of the FRAND non-discrimination requirement being justified. This is especially true with regard to the 3G system that represents an unusual complex patent environment. When a large amount of the concerned competitive parties are both major players in the 3G product/service markets and major players in the licensing markets, the task of ensuring compliance with FRAND licensing terms with regard to standard-essential patents is vital for the concerned undertakings. This strongly suggests that particular attention must be given to ensuring compliance with the non-discrimination principle, which is "*necessary and sufficient for a license fee to be competitively neutral in downstream markets*".[120] The purpose of the non-discrimination requirement is to prevent any attempts by vertically integrated licensors to raise their competitors cost by giving more favourable treatment to their own operations.[121]

119 Supra note Daniel Swanson and William Baumol.
120 Ibid.
121 Ibid.

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.