Part VI. Conclusion

The formal standards-setting process is, it is argued in the present thesis, an efficient and inclusive form of industry coordination, potentially resulting in near-optimal levels of investment in research and development and rapid standard adoption. At its core, a predictable and rewarding structure of returns guarantees, on the one hand incentives to invest and contribute the best technologies available and on the other hand incentives to invest in production of innovative standard compliant products. FRAND licensing terms is the contractual expression of this intricate balance of interests and incentives. Technology transfer on terms outside the FRAND range would inevitably result in the disruption of the current structure of returns and consequently in restrictions to competition, higher prices, lower output, less choice and weaker incentives to innovate.

Although market forces constrain the behaviour of holders of SEPs in many occasions, opportunism in the enforcement of SEPs is not implausible. In major jurisdictions, an array of legal frameworks provides safeguards against abuses in the enforcement of SEPs and in particular against threats or enforcement of injunctions that could significantly impair competition. Competition law had so far a residual, though meaningful, role in maintaining open and competitive markets. Contract law and patent law provide victims of abuses in the enforcement of SEPs with valuable remedies. However, in the last analysis, antitrust enforcement provides the most reliable and effective safeguard against anticompetitive behaviour by SEP holders, in that it produces significant deterrent effect.

Antitrust enforcement in the context of standards-setting has so far focused too narrowly on FRAND terms as stemming from patent owners' voluntary commitments; anticompetitive harm is thus viewed as primarily originating from the evasion of such voluntary commitments and not from the foreclosure effects of non-FRAND licensing terms. This approach, which could be viewed as an element of formalism in antitrust analysis, leaves open an important loophole, illustrated in the PAE and privateering scenarios. PAEs holding SEPs are typically unbound by FRAND or any other commitment. Antitrust enforcement should move beyond this narrow view of anticompetitive harm in the standards-setting context.

Instead, it should embrace an effects-based approach of the anticompetitive effects of imposing non-FRAND terms, thus encompassing all current or future forms of abuse in the enforcement of SEPs. Such a shift fits well with the current 'modernised' analytical framework of the European Commission on exclusionary abuses of market power; US antitrust and its traditionally more economic approach is even more apt in adopting such an approach. It is also a sound framework from a public policy perspective; a FRAND obligation based directly on competition law would increase legal certainty; it would create a level-playing field for all classes of SEP holders regardless of their previous voluntary commitments. A FRAND obligation based on competition law and an effects-based approach to antitrust enforcement would be the best safeguard for the undistorted performance of the standards-setting process.