INTERNATIONAL DEVELOPMENTS

Huawei: Injunctions and Standard Essential Patents—Is Exclusion a Foregone Conclusion?

BY SEAN-PAUL BRANKIN, SALOMÉ CISNAL DE UGARTE, AND LISA KIMMEL

ON JULY 16, 2015, THE COURT OF Justice of the European Union (CJEU) issued the long-awaited judgment in *Huawei Technologies Co. Ltd v. ZTE Corp., ZTE Deutschland GmbH*.[1] The judgment clarifies the circumstances under which a dominant firm may seek an injunction for infringement of a standard-essential patent (SEP) that is subject to a commitment to provide access on fair, reasonable, and non-discriminatory (FRAND)[2] terms without running afoul of EU antitrust rules, specifically the prohibition on abuse of dominance under Article 102 of the Treaty on the Functioning of the European Union (TFEU).[3]

The judgment is the first in which the EU's highest court, the CJEU, has ruled on these issues. During the CJEU's consideration of the case, on April 29, 2014, the European Commission issued two decisions addressing the same subject matter. In the first, the European Commission found that Motorola Mobility had abused a dominant position by seeking injunctions against Apple for infringement of an SEP subject to a FRAND commitment.[4] In the second, the Commission accepted binding commitments from Samsung to resolve concerns relating to similar conduct, also against Apple.[5] These decisions were not directly before the CJEU, but formed part of the background to the judgment.

The judgment in *Huawei* recognizes the importance of FRAND commitments given in the context of standard-setting processes. But it also stresses the importance of the fundamental rights of the SEP holder to property and judicial protection. As a result, it mandates a careful balance between safeguarding intellectual property rights and access to the courts on the one hand and protecting competition on the other. Despite this, the judgment contains only a very brief discussion of the circumstances in which the protection of competition requires the patent owner's fundamental rights to yield.

The brevity of the discussion risks creating the impression that, consistent with the European Commission's decisions in *Motorola* and *Samsung*, the CJEU endorses a broad theory of harm under which a dominant SEP holder would infringe Article 102 TFEU whenever it sought injunctive relief against a firm that acts in good faith to negotiate a license on FRAND terms, regardless of the competitive relationship between the parties.[6] However, a close reading of the judgment—corroborated by the decision of the CJEU not to follow the Opinion of its Advocate General (AG) Melchior Wathelet in certain key respects—reveals that the CJEU has in mind a much narrower theory of antitrust harm, more in line with that established in the CJEU's so-called essential facilities case law. Specifically, and in contrast to the European Commission's finding in *Motorola*, it seems that the effect of the abusive behavior must be to exclude "products manufactured by competitors" and possibly to "reserve to itself the manufacture of the products in question."[7]

In this article, we review the CJEU's decision against the backdrop of the European Commission's decisions in the *Motorola* and *Samsung* cases, and contrast the CJEU's narrow theory of abuse with the wider theory adopted by the European Commission. Our analysis suggests that the CJEU standard for abuse requires a showing of anticompetitive exclusion, something that is absent from the European Commission's analysis in *Motorola* and *Samsung* but is consistent with the European Commission's own policy on enforcement priorities under Article 102. We conclude with a comparison of the landscape under U.S. law, finding that Federal Trade Commission actions against firms engaged in similar conduct mirror the European Commission's expansive view of competitive harm in the *Motorola* and *Samsung* matters.

Huawei

Background. The judgment in *Huawei* arose from a patent licensing dispute between Huawei Technologies and ZTE Corp., both Chinese telecommunications companies, before the *Landgericht Düsseldorf* in Germany (Düsseldorf Court). In April 2011, Huawei filed suit in the Düsseldorf Court for infringement of European Patent 2 090 050 B 1 (the LTE patent) seeking an injunction, an accounting of money due, the recall of products, and an award of damages.

In March 2009, Huawei had declared the LTE patent to be potentially essential to the Long-Term Evolution (LTE) wireless broadband standard developed by the European

Sean-Paul Brankin and Salomé Cisnal de Ugarte are partners in the antitrust group at Crowell & Moring LLP in Brussels, Belgium. Lisa Kimmel is senior counsel in the antitrust group at Crowell & Moring LLP in Washington, DC. The views expressed in this article represent the views of the authors alone and do not necessarily represent the views of their current or former employers, or any current or former clients.

Telecommunications Standard Institute (ETSI) and had, in the course of the ETSI standard-setting proceedings, agreed to provide access to the LTE patent on FRAND terms.

According to the Düsseldorf Court, ZTE marketed base stations in Germany that were unquestionably made for use with LTE software and operated on the basis of the LTE standard. As a result, ZTE inevitably made use of, and infringed, the LTE patent.

Between November 2010 and March 2011, Huawei and ZTE had engaged in discussion related to the infringement of the LTE patent and the possibility of concluding a licensing agreement. Huawei had proposed licensing terms that it considered reasonable, including naming the amount it considered a reasonable royalty. In response, ZTE sought a cross-license. No agreement on FRAND terms was ultimately concluded. Despite this, ZTE continued to market LTE base stations in Germany without paying a royalty or rendering an account for past use.[8] As a result, Huawei filed the above-mentioned suit. In its defense, ZTE argued that seeking an injunction was an abuse of Huawei's dominant position in the market for the licensing of the technologies as specified in the LTE standard technical specifications and was therefore in breach of Article 102 TFEU.

The Düsseldorf Court concluded that its decision on the substance turned on whether Huawei's action constituted an abuse of dominance contrary to Article 102 TFEU and/or the equivalent provisions under German law. However, it noted that the circumstances in which seeking an injunction would constitute an abuse for the purposes of German law were narrower than those in which the European Commission had indicated an abuse of dominance would arise under Article 102 TFEU in the press release announcing its formal charge sheet (a statement of objections or SO) in *Samsung*.[9]

The German law was established in the Orange Book judgment of the German Federal Court of Justice (Bundesgerichtshof) of May 6, 2009.[10] In that case it was found that a claimant seeking injunctive relief based on a patent essential to a de facto standard in relation to which no FRAND commitment has been given, only abuses its dominant position if the alleged infringer can prove that (1) it has made an unconditional offer to conclude a licensing agreement with the patent holder at a rate that is so high that the plaintiff cannot reasonably refuse or at a rate to be determined by the patent holder but being subject to court review and adjustment, and (2) it behaves as if it were an actual licensee and complies with the obligations that will be incumbent on it for use of the patent under the future licensing agreement, such as accounting for acts of use and payment of the sums resulting from this use. In contrast, the European Commission had indicated in the *Samsung* SO that an SEP holder that had given a FRAND commitment engaged in abuse if it threatened an injunction against a technology user that was willing to abide by a license on FRAND terms.[11]

The Düsseldorf Court decided to stay the proceedings and ask the CJEU for a preliminary ruling under Article 267 TFEU to clarify the issue.[12] The question of Huawei's dominance was not in dispute nor was the question of essentiality for the patent in suit, so the issues before the CJEU related solely to the question of abuse.[13]

The CJEU's Judgment. The CJEU's judgment notes the need to "strike a balance between maintaining free competition . . . and safeguard[ing] that proprietor's intellectual-property rights and its right to effective judicial protection, guaranteed by Article 17(2) and Article 47 of the Charter [of Fundamental Rights of the European Union]."[14]

In an effort to strike that balance in concrete terms, the CJEU described the circumstances in which the owner of an SEP subject to a FRAND commitment may pursue an injunction without the risk of running afoul of Article 102 TFEU. In particular, the CJEU concluded that it is not abusive for the owner of an SEP subject to a FRAND commitment to seek an injunction if it has notified the alleged infringer of the unlawful use and the alleged infringer has failed to signal that it is willing to conclude a license on FRAND terms. Where the alleged infringer has expressed that it is willing to conclude a license on FRAND terms, the SEP owner may pursue an injunction if it has provided a written offer, specifying the royalty and the way in which it is to be calculated, and the alleged infringer has failed to respond to the written offer in good faith.[15]

However, Article 102 TFEU limits an SEP owner's ability to seek an injunction where the alleged infringer acts in good faith to negotiate a license after receiving a written offer. Where the alleged infringer does not accept the written offer, good faith is to be judged according to objective factors. Those factors include whether the alleged infringer has promptly provided the SEP owner with a specific FRAND counter-offer, has not employed delaying tactics, and has otherwise acted "in accordance with recognized commercial practices." In other words, the CJEU fleshes out the notion of 'willingness' or in the CJEU's words "good faith."[16]

Where the alleged infringer makes a counter-offer but the parties cannot reach agreement, it must demonstrate continued good faith from the time its counter-offer is rejected by providing the SEP owner with appropriate security for continued use of the patent according to recognized commercial practices, such as providing a bank guarantee or deposit that reflects an accounting of past use of the patent. An alleged infringer does not, however, demonstrate bad faith by merely challenging infringement or validity while negotiating the terms of a license.[17]

Where the alleged infringer fails to act in good faith (by some objective measure rather than subjectively), the SEP owner may pursue an injunction without infringing Article 102 TFEU, provided it has issued a written offer to license on FRAND terms and given notice of its intention to take legal action. The Court confirmed that Article 102 becomes relevant only when the SEP holder seeks a prohibitory injunction or a recall of the infringing products: no infringement of Article 102 will occur as a result of the owner of an

SEP subject to a FRAND commitment seeking damages or a rendering of accounts.[18]

Motorola and *Samsung*

On April 29, 2014, while the CJEU was considering *Huawei*, the European Commission adopted two decisions, both concerning whether Article 102 TFEU bars the owners of SEPs subject to a FRAND commitment from seeking injunctions against alleged infringers. In a memorandum issued on the day of the decisions, the Commission explained: "The Motorola decision provides a 'safe harbour' for standard implementers who are willing to take a licence on FRAND terms [while] Samsung's commitments implement . . . the 'safe harbour' concept established in the Motorola decision in practical terms."[19]

Motorola. The *Motorola* case grew from a licensing dispute between Motorola and Apple. In 2011, Motorola initiated proceedings in the German courts seeking injunctive relief against Apple on the basis of patents including EP 1010336 (the GSM patent).[20] In the context of an ETSI standard-setting process in 2003, Motorola had declared the GSM patent essential to an integrated part of the second generation (2G) GSM standard and committed to license the patent on FRAND terms.[21]

In the course of the subsequent litigation, Apple made a number of offers to license the GSM patents. The second offer allowed Motorola to set royalties at its discretion, subject only to retrospective court review to confirm FRAND compliance. Motorola rejected this offer and went on to obtain and enforce injunctions against Apple banning the online sale of Apple mobile products. The litigation was ultimately terminated when the parties entered into a licensing agreement that, among others, prevented Apple from challenging the validity of Motorola SEPs.

While the European Commission stated that an SEP does not necessarily give rise to market power, it concluded that the mobile industry was "locked-in" to the relevant 2G GSM standard. As a result, it concluded that a separate market existed for the technologies on which the GSM patent read, and that Motorola was dominant in that market holding a 100 percent share.[22]

The European Commission recognized that patent holders, including those owning SEPs subject to a FRAND commitment, generally have the right to seek injunctions.[23] However, it concluded that—in the exceptional circumstances of the case and in the absence of objective justification—Motorola had infringed Article 102 TFEU.[24] The exceptional circumstances of the case were (1) the standard-setting process and (2) Motorola's commitment to license its SEP on FRAND terms.[25] The absence of objective justification related to the fact that, following its second offer, Apple was willing to license on FRAND terms.[26]

Samsung. The Samsung matter also began as a private licensing dispute. In 2011, Samsung initiated proceedings seeking injunctions against Apple for infringement of certain SEPs in various national courts in the EU. Samsung had previously committed to ETSI that it would license certain patents potentially essential to the 3G UMTS mobile telephony standard on FRAND terms.[27]

On December 21, 2012, the European Commission sent an SO to Samsung in which it informed Samsung that it had reached the preliminary view that Apple was willing to accept a license on FRAND terms and therefore that Samsung's actions constituted an abuse of dominance. To settle the case Samsung offered commitments involving establishing a licensing framework covering all Samsung SEPs, present and future. Samsung committed not to seek injunctive relief in courts in the European Economic Area against any technology user that agrees to a negotiation period of up to 12 months, and to be bound by a third-party determination of FRAND terms (by a court or arbitrator if both parties agree) if no agreement is reached within that period.

The EU Abuse of Dominance Standard and Competitive Effects

The concept of harm under Article 102 TFEU is notoriously broad and covers harm that results from exploitative as well as exclusionary behavior. In an EU context, the exclusionary/exploitative distinction has been framed by the European Commission as follows: "Abuses are commonly divided into exclusionary abuses, those which exclude competitors from the market, and exploitative abuses, those where the dominant company exploits its market power by—for example—charging excessive prices."[28]

Exploitation. That Article 102 TFEU covers exploitative behavior is embedded in the text of the Article itself.[29] In the early days of antitrust enforcement in the European Union, the ability to pursue exploitative behavior under Article 102 TFEU was embraced.[30] However, over time, the European Commission has shifted its enforcement activities under Article 102 TFEU away from exploitation and towards exclusion. This policy shift was, in part, the reason for the Article 102 review process launched in 2005. During that process, then Competition Commissioner Neelie Kroes made the point expressly stating: "We also think that it is sound for our enforcement policy to give priority to so-called exclusionary abuses."[31]

The Article 102 review concluded with the European Commission's 2009 Guidance document on enforcement priorities in applying Article 102 to abusive exclusionary conduct (2009 Guidance).[32] While not excluding the possibility of Article 102 enforcement on the basis of exploitative theories, the 2009 Guidance states:

> Conduct which is directly exploitative of consumers, for example charging excessively high prices or certain behaviour that undermines the efforts to achieve an integrated internal market, is also liable to infringe Article [102]. The Commission may decide to intervene in relation to such conduct, in particular where the protection of consumers and the proper functioning of the internal market cannot otherwise be adequately ensured.[33]

Exclusion. In terms of what constitutes exclusionary behavior, the EU Court of first instance, the EU General Court, held in *Intel Corp. v. European Commission* that "a foreclosure effect occurs not only where access to the market is made impossible . . . it is sufficient that access be made more difficult."[34] The European Commission has however set a high standard for exclusion in the context of its 2009 Guidance (¶ 19):

> The aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way. In this document, the term 'anti-competitive foreclosure' is used to describe a situation where effective access of actual or potential competitors to supplies or market is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers.

But an even higher standard will apply in the context of certain categories of abusive behavior. In the context of the so-called essential facilities cases concerning refusals to supply (or license) a new customer, a finding of abuse requires that the dominant undertakings "by their conduct, reserved to themselves the secondary market . . . by excluding *all competition on that market*."[35] This higher standard in essential facilities cases is said to reflect:

- the need for careful justification of any incursion into property rights and the freedom to choose one's trading partners;
- the need to balance the conflicting considerations in relation to such incursions; and
- the fact that the primary purpose of Article 102 is to protect competition rather than particular competitors.[36]

A Careful Balance?

The CJEU's judgment in *Huawei* provides much needed clarity on the application of Article 102 TFEU to the pursuit of injunctions for infringement of SEPs subject to a FRAND commitment. Importantly, the judgment affirms the need to strike a careful balance between EU antitrust rules and intellectual property rights, given, in particular, the high level of protection accorded to such rights under the EU Charter of Fundamental Rights. This means that "in principle, the proprietor may not be deprived of the right to have recourse to legal proceedings to ensure effective enforcement of his exclusive rights."[37] It also provides clear confirmation that an SEP holder can seek injunctive relief against a technology user that is unwilling to negotiate a FRAND license—and even gives some guidance as to the circumstances in which an infringing entity may be considered unwilling. In this regard, it adopts a safe-harbor approach that requires a more meaningful showing of good faith on the part of the infringer than the European Commission required in *Motorola* or *Samsung*.

However, the judgment is extremely brief in relation to one fundamental issue, which is determining when the balance tips in favor of the protection of effective competition. In particular, the judgment contains no direct discussion of the theory of competitive harm that justifies antitrust intervention.[38] Nonetheless, a close reading of the judgment suggests that meaningful exclusionary harm is necessary to establish abuse, and the brevity of the discussion of harm is primarily a reflection of the underlying facts of the case (albeit that these were not technically at issue in a preliminary reference). Specifically, the fact that ZTE was manifestly unwilling to negotiate a FRAND license drove the CJEU to focus on that issue—which was determinative of the outcome of the case—rather than the explanation of the type of harm that could have given rise to abuse in other circumstances.

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The judgment contains two key paragraphs that specifically address the circumstances in which an abuse would arise. Paragraph 73 provides:

> As is apparent from paragraphs 52 and 53 above, the exercise by the proprietor of the SEP of its intellectual-property rights, by bringing actions for a prohibitory injunction or for the recall of products, may be characterized, in circumstances such as those in the main proceedings, as an abuse, where those proceedings are liable to prevent products complying with the standard in question *manufactured by competitors* from appearing or remaining on the market.[39]

Paragraph 52 provides, in similar terms:

> Although the proprietor of the essential patent at issue has the right to bring an action for a prohibitory injunction or for the recall of products, the fact that that patent has obtained SEP status means that its proprietor can prevent products manufactured by competitors from appearing or remaining on the market and, thereby, *reserve to itself the manufacture of the products in question*.[40]

These passages are important for two reasons. First, they put the emphasis on the exclusion of competitor products as the basis for a finding of abuse. In this regard they represent an express departure from the assessment proposed by AG

Wathelet in his Opinion in the case. At paragraph 65 of his Opinion, AG Wathelet stated:

> I believe that the commitment given by Huawei in the dispute before the referring court to grant licences to third parties on FRAND terms bears some similarity to a "licence of right." . . . I would point out that, where a patent licensee has a licence of right, an injunction may not, in principle, be issued against him.

Later, at paragraph 73, AG Wathelet referred to "[on the one hand] a relationship of dependence between the intellectual property right holder occupying a dominant position and other undertakings and, on the other, to the abusive exploitation of that position by the right holder through recourse to methods different from those governing normal competition." In other words, AG Wathelet proposed an analysis based on exploitation rather than exclusion and relied on an analogy with a license of right to all comers. This would imply that abuse would occur whenever injunctive relief was sought against *any* willing licensee, not just a competitor. Instead, paragraph 73 of the CJEU judgment expressly adopts a narrower, and exclusionary, analysis of abuse.

Second, the CJEU's reference in paragraph 52 to the effect of the SEP's behavior being to "reserve to itself the manufacture of the products in question" is a direct echo of the CJEU's language in *Magill*, i.e., that the dominant undertaking[s] must have "by their conduct, reserved to themselves the secondary market … by excluding all competition on that market."[41] The implication would appear to be that the standard of foreclosure in these cases is not the limited requirement that "access be made more difficult" from *Intel* but the higher "exclusion of all competition" standard in essential facilities cases. Given that the *Huawei* case also involves a delicate balancing of interests to justify an interference with property rights, and the CJEU's express recognition of the need for that balance, the application of a higher standard would seem justified.[42]

The CJEU's focus on exclusionary harm, and by implication a high standard of exclusion, stands in contrast to the European Commission's approach in *Motorola* and *Samsung*. The European Commission identified three categories of harm:

- the temporary ban on online sales of Apple mobile products;
- the disadvantageous terms forced on Apple in the context of the settlement agreement (including the de facto prohibition on challenging the validity of Motorola's SEPs); and
- harm to the standard-development process because, in the future, firms weighing a decision to invest in the development of standard-compliant products might not have confidence that a license to essential patents would be available on FRAND terms.[43]

A temporary ban on Apple's online sales does not, on its face, involve the complete disappearance of Apple's competing products from the market or meet the requirement that the SEP holder "reserve to itself the manufacture of the products in question."[44]

In addition, neither the disadvantageous licensing terms at issue nor harm to the standard-development process are consistent with the CJEU's focus on "prevent[ing] products manufactured by competitors from appearing or remaining on the market" and "reserv[ing] to itself the manufacture of the [downstream] products" as prerequisites for abuse.[45] The disadvantageous settlement terms, could not have been sufficiently burdensome to exclude Apple from the market. This is a purely exploitative abuse. Similarly, harm to the standard-development process is not truly exclusionary because it does not materially foreclose competing technologies and is therefore also better thought of as a form of exploitative abuse.

Further, the theories of harm pursued by the European Commission in *Motorola* and *Samsung* are hard to reconcile with the European Commission's own policy of focusing on exclusionary theories of harm and a high standard of foreclosure ("impair[ing] effective competition by foreclosing . . . competitors in an anti-competitive way" leading to an increase in the pricing power of the dominant company) in the enforcement of Article 102 TFEU.[46]

The Sherman and Federal Trade Commission Acts in the United States

The Sherman Act and Exclusionary Harm. A similar split exists between courts and agency enforcement activity in the United States. The U.S. antitrust standards for single-firm conduct are primarily defined by Section 2 of the Sherman Act. No court or U.S. enforcement agency has concluded that seeking an injunction, even against a firm willing to negotiate a license, constitutes a violation of the Sherman Act. As an initial matter, petitioning activity, which includes seeking relief in court, is protected by the First Amendment and immune from antitrust liability under the *Noerr-Pennington* doctrine if the underlying lawsuit is not a sham (objectively baseless).[47] The conduct at issue, seeking an injunction, is nothing more than a request to a court for a particular type of relief. Federal courts have held that *Noerr* immunity applies to antitrust and state unfair competition claims premised on the efforts of the owners of SEPs subject to a FRAND commitment to enforce their patent rights where the underlying assertion is not a sham.[48]

But even absent that immunity, the conduct at issue in *Huawei* could support a Sherman Act claim only if an injunction led to the kind of anticompetitive exclusion the CJEU required in that case. The critical issue under Section 2 is whether a firm has either acquired or maintained monopoly power through exclusionary conduct, rather than "as a consequence of superior product, business acumen or historic accident."[49] The Sherman Act does not support claims based on exploitative abuse, such as excessive pricing or other consumer harm that is not the consequence of a restriction on competition.[50] It is a fundamental premise of U.S. antitrust policy that the possession of monopoly power "and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system."[51] Moreover, conduct that injures or excludes rivals will support a claim only where it has an anticompetitive effect. Exclusionary conduct must "harm the competitive process and thereby harm consumers . . . [H]arm to one or more *competitors* will not suffice."[52] Exclusion of a single competitor does not necessarily create the kind of marketplace harm that will support a Section 2 claim.

The D.C. Circuit's decision in *FTC v. Rambus* illustrates the critical role that anticompetitive exclusion plays in both the letter of the Sherman Act and the broader economic policies that drive single-firm conduct standards in U.S. courts.[53] The FTC claimed that Rambus participated in the development of standards for computer memory at the Joint Electron Device Engineering Council (JEDEC) and deceptively failed to disclose to JEDEC that it held patent interests (including existing patents, applications and plans to file or amend applications) that were relevant to four technologies that JEDEC ultimately incorporated in several standards. According to the FTC, Rambus acquired monopoly power in four technology markets relevant to the standard through ownership of essential patents.[54] The agency claimed that Rambus acquired that monopoly power unlawfully, in violation of Section 2, because absent the deception, JEDEC would have selected alternative technologies or would have required that Rambus agree to license its patents on RAND terms before its technologies were incorporated into the standards.[55]

The D.C. Circuit reversed the FTC decision finding that Rambus had violated Section 2 of the Sherman Act.[56] In particular, the court held that to find Rambus liable under Section 2, the FTC must find that Rambus both deceived JEDEC and that the deception permitted Rambus to exclude alternative technologies from the standard and acquire monopoly power unlawfully. The court explained that merely evading a contractual restraint on licensing fees did not harm the competitive process, as that term is understood under the Sherman Act, because it did not exclude competition. Since the FTC did not state that one or the other outcome was more likely, the court held that it failed to meet its burden to show that Rambus acquired its monopoly power unlawfully or otherwise injured the competitive process.

Other cases make clear that even a firm with monopoly power must do more than evade a contractual restraint or breach a commitment to establish liability under Section 2. In a decision that drew a clear distinction between commercial disputes and antitrust violations, the Federal Circuit reversed a lower court decision finding that Intel had violated Section 2 by ending certain commercial agreements with Intergraph, a customer that used Intel's microprocessors in the development and sale of computer workstations.[57] For several years before the dispute arose, Intel and Intergraph had worked cooperatively to design next-generation workstations. Intel designated Intergraph as a strategic customer and provided the company with various special benefits, including early disclosure of design changes that allowed Intergraph to plan its own product roadmap more easily. However, Intergraph later sued several of Intel's customers (and later Intel itself) for patent infringement. Negotiations to resolve the dispute failed, the commercial relationship between the parties deteriorated, and Intel discontinued the privileges it had provided to Intergraph as a strategic customer.

Intergraph filed suit on various grounds, including monopolization, seeking an injunction that would require Intel to continue to provide it with the same strategic customer services despite the infringement litigation. The district court found in favor of Intergraph, finding that Intel had monopoly power in microprocessors and that by reneging on prior commitments, it harmed Intergraph's business. Though the Federal Circuit accepted for the purposes of the appeal that Intel had monopoly power in high-performance microprocessors, it concluded that harm to Intergraph's business, even if inflicted by a firm with market power, did not alone raise an antitrust issue. The court noted that Intel and Intergraph were not competitors in microprocessors, or in any market where Intel arguably held market power. Consequently, the commercial dispute between the parties had no impact on the "area of effective competition between the defendant and plaintiff" and did not permit Intel to either acquire or maintain monopoly power in any relevant market.[58] The Federal Circuit ultimately accepted Intel's argument that "this 'garden variety patent dispute' does not warrant the antitrust remedy imposed here."[59]

Section 5 and Exploitative Abuse? While most single-firm conduct cases in the United States are brought under Section 2 of the Sherman Act, the FTC has the authority under Section 5 of the FTC Act to pursue unfair methods of competition that may fall outside the scope of the Sherman Act, often called its standalone Section 5 authority.[60] In recent years the FTC has used its standalone Section 5 authority to bring enforcement actions against firms that pursued injunctions for infringement of SEPs subject to a FRAND commitment. In 2012, the FTC settled a claim against Bosch for seeking injunctions for infringement of patents relevant to air conditioning recycling, recovery, and recharge equipment (ACRRR). According to the FTC, before Bosch agreed to acquire its competitor, SPX Service Solutions, SPX had participated in the development of ACRRR industry standards and agreed to provide access to patents that read on those standards on FRAND terms. After making that commitment, SPX filed patent infringement actions and sought injunctions against competitors implementing the ACRRR standards, including Bosch.[61] The following year, the FTC settled claims against Google, which had recently acquired Motorola Mobility, for continuing to pursue injunctions for infringement of patents essential to cellular wireless communications, WiFi, and video compression standards.[62]

The FTC challenged the conduct in both *Bosch* and *Google/Motorola* under its standalone Section 5 authority.

The central allegation in both cases was that the SEP owner had breached a prior FRAND commitment by pursuing injunctions against firms that were willing to accept a license on FRAND terms.[63] The theory of harm differed somewhat in the two cases. In *Bosch*, the FTC focused on competitive harm in the ACRRR product market, alleging that SPX held a market share of over 80 percent and, by seeking injunctions against competitors, threatened harm to competition in the ACRRR market. And like the European Commission in *Motorola*, the FTC focused on harm to the standard-setting process itself.[64]

The theory of harm is more attenuated in *Google/Motorola*. The FTC alleged that the relevant market was defined by "technology covered by any Google-owned SEP and all substitutes for that technology" and claimed that as a result of the standardization process, Google held monopoly power in those markets.[65] Though the agency limited its analysis of the relevant market and monopoly power to the upstream technology market, it listed a menu of likely anticompetitive effects in undefined downstream markets that included the risk of excluding products from the market, raising the price of licensed products to consumers, dampening competition between Google and rivals and "undermining the integrity and efficiency of the standard-setting process."[66] While the theory of harm in Bosch is, at least in part, based on the type of exclusionary harm the CJEU appears to require in Huawei, that is not the case in *Google/Motorola*. Instead, the FTC adopted the European Commission's broader approach that emphasizes competitor harm and exploitative abuse.

In a recently issued policy statement, the FTC constrained its use of its standalone Section 5 authority to matters that harm consumer welfare and "cause, or [are] likely to cause, harm to competition or the competitive process . . . ."[67] By excluding harm to consumer welfare that is not the product of harm to competition, the FTC seemingly puts the kind of direct consumer harm that supports an EU claim for exploitative abuse, as well as the harm to competitors standard behind the EU's *Intel* decision, outside the scope of Section 5 enforcement. Consequently, whether the FTC will continue to rely on a broad abuse of dominance standard after issuing a policy statement that emphasizes at least incipient harm to competition or the competition process, remains to be seen.

Conclusion

The *Huawei* judgment is significant in several respects. Importantly, it identifies the key principle that should guide antitrust law at the intersection of intellectual property rights—the need to carefully balance fundamental rights to property and judicial protection against the protection of effective competition. In addition, it recognizes that the FRAND commitment is a two-way street: even dominant firms that own SEPs subject to a FRAND commitment have the right to seek an injunction against technology users that turn to the antitrust laws for leverage in licensing negotiations—or worse, for a free ride. The CJEU also provides the business community with practical guidance by describing concrete steps a technology user can take to establish that it is acting in good faith.

More broadly, with the *Huawei* judgment, the CJEU has shown a relatively modest appetite for antitrust intervention in the face of the fundamental rights of intellectual property owners. This stands in marked contrast to the European Commission's appetite for intervention on a much broader basis in *Motorola* and *Samsung*, but aligns well with the European Commission's own 2009 Guidance on enforcement priorities in applying Article 102 TFEU. The divergent approaches that the CJEU and the European Commission take to similar conduct mirror the analytic gulf in the United States between courts applying the Sherman Act and enforcement action taken by the FTC taken under Section 5 of the FTC Act and resolved through settlements. In both cases, given the respect due to fundamental rights to property and judicial protection, the narrow approach of the courts would appear to represent sound antitrust policy.

1 Case C-170/13, Huawei Technologies Co. Ltd v. ZTE Corp., ZTE Deutschland GmbH (*Huawei*), Judgment of the Court of July 16, 2015 (CJEU).

2 The legal and analytic issues discussed in the article apply equally to RAND, which are reasonable and non-discriminatory terms, and FRAND commitments.

3 Consolidated Version of the Treaty on the Functioning of the European Union, Sept. 5, 2008, 2008 O.J. (C 115) 47 (effective Dec. 1, 2009) [hereinafter TFEU]. As of December 1, 2009, the Treaty of Lisbon became effective and introduced a renumbering of the articles in the Treaty Establishing the European Community. Relevant to the discussion here: Article 82 is now Article 102.

4 Case AT.39985, Motorola—Enforcement of GPRS Standard Essential Patents, Comm'n Decision (Apr. 29, 2014), http://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf.

5 Case AT.39939, Samsung—Enforcement of UMTS Standard Essential Patents, Comm'n Decision (Apr. 29, 2014) (summary at 2014 O.J. (C 350/8)), http://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1501_5.pdf.

6 *See, e.g.*, Nicholas Banasevic, *The Implications of the Court of Justice's Huawei/ZTE Judgment*, 6 J. Eur. Competition L. & Practice 463, 463–64 (2015) ("The judgment is highly significant. It confirms the Commission's general approach.").

7 *Huawei* ¶ 52.

8 *Huawei* ¶¶ 24–26.

9 Press Release, European Comm'n, Antitrust: Commission Sends Statement of Objections to Samsung on Potential Misuse of Mobile Phone Standard Essential Patents (Dec. 21, 2012) (IP/12/1448).

10 *See* Judgment of the Bundesgerichtshof of May 6, 2009, in case KZR 39/06 referred to as the Orange-Book Standard.

11 *Samsung* ¶¶ 3–5.

12 The CJEU ultimately confirmed that the Orange Book Standard cannot be applied without modification to SEP holders that have given FRAND commitments.

13 *Huawei* ¶ 28.

14 *Id.* ¶ 42.

15 *Id.* ¶¶ 61–66, 71.

16 *Id.* ¶¶ 65, 71.

17 *Id.* ¶¶ 67–69.

18 *Id.* ¶¶ 74, 75.

19 Press Release, European Comm'n, Antitrust Decisions on Standard Essential Patents (SEPs)—Motorola Mobility and Samsung Electronics—Frequently Asked Questions (Apr. 29, 2014) (Memo/14/322).

20 *Motorola* ¶ 115.

21 *Id.* ¶¶ 95–96. Specifically, the GSM patent read on the General Packet Radio Service (GPRS) standard which adds packet-switched wireless data functionality to the (2G) GSM standard allowing Internet connectivity, *Id.* ¶ 87–88.

22 *Id.* ¶¶ 213, 225, 226, 231, 270.

23 *Id.* ¶ 278, *Samsung* ¶ 55.

24 *Id.* ¶¶ 1, 278–280.

25 *Id.* ¶¶ 2, 281.

26 *Id.* ¶¶ 3, 307.

27 *Samsung* ¶¶ 3, 5. The relevant jurisdictions were France, Germany, Italy, the Netherlands, and the UK.

28 Press Release, European Comm'n, Competition: Commission Publishes Discussion Paper on Abuses of Dominance (Dec. 2005) (IP/05/1626).

29 *See, e.g.*, Article 102(a) TFEU, which provides that abuse may, in particular, consist in "imposing unfair purchase or selling prices."

30 Perhaps most famously in the 1978 judgment of the CJEU in Case 27/76 United Brands Company and United Brands Continental BV v. European Communities, 1978 E.C.R. 207 (CJEU), ¶ 250, where the Court upheld the Commission's Decision that United Brands had abused its dominance in the European markets for bananas by charging prices that "bear no reasonable relation to the economic value."

31 Competition Commissioner Neelie Kroes, Preliminary Thoughts on Policy Review of Article 82, Remarks at the Fordham Corporate L. Inst. (Sept. 23, 2005) (Speech/05/537)). This had in fact been established Commission policy for well over two decades. *See* European Commission, 24th Report on Competition Policy in 1994, ¶ 207 ("The Commission in its decision-making practice does not normally control or condemn the high level of prices as such . . . . Rather it examines the behaviour of the dominant company designed to preserve its dominance, usually directly against competitors or new entrants.").

32 Commission Guidance on the Commission's Enforcement Priorities in Applying Article [102 TFEU] to Abusive Exclusionary Conduct by Dominant Undertakings, 2009 O.J. (C 45) 7-20.

33 *Id.* ¶ 7.

34 Case T-286/09 Intel Corp. v. European Comm'n, Judgment of June 12, 2014, ¶ 41 (Gen. Ct.) (not yet published).

35 Joined Cases C-241/91 P and C-242/91 P, Radio Telefis Éireann and Independent Television Publications Ltd (RTE & ITP) v. Commission (*Magill*), 1995 E.C.R. I-743, ¶ 56 (CJEU) (emphasis added). The application of the essential facilities doctrine under Article 102 TFEU was further clarified by the CJEU in Case C-7/97, Oscar Bronner GmbH & Co. KV v. Mediaprint Zeitungs und Zeitschriftenverlag GmbH & Co. KG, 1998 E.C.R. I-7791 (CJEU), which confirmed that this doctrine only applies in exceptional circumstances. Case C-418/01 IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co KG, 2004 E.C.R. I-5039 (CJEU), also cited in *Huawei* by the CJEU, illustrates further the exceptional circumstances in which a refusal to license intellectual property rights is abusive.

36 Opinion of Advocate General (AG) Jacobs in Case C 7/97, 1998 E.C.R I-7794, ¶¶ 56–58 (CJEU).

37 *Huawei* ¶¶ 42, 57–58.

38 The point is made most clearly by the failure of the CJEU judgment (or even the AG's opinion) to address whether Huawei and ZTE were downstream competitors. In fact, it seems that they were.

39 *Huawei* ¶¶ 73 (emphasis added).

40 *Huawei* ¶¶ 52 (emphasis added).

41 *Magill* ¶ 56.

42 Some doubt is cast on the CJEU's intent as regards the higher foreclosure standard in *Magill* and the so-called essential facilities cases that followed on from *Magill* by the statement earlier in the CJEU's judgment that "it must be pointed out, as the Advocate General has observed in point 70 of his Opinion, that the particular circumstances of the case in the main proceedings distinguish that case from [the *Magill* case law]." *Huawei* ¶ 48. However, the CJEU's intention does not appear to have been to distinguish these cases completely: in ¶ 70 of his Opinion, to which the CJEU refers, AG Wathelet expressly states that the *Magill* case law remains "partially relevant."

43 *Motorola* ¶¶ 311, 322, 377, and 415–420. In *Samsung* the Commission focused only on the first two categories of harm, i.e., that Samsung's actions were capable of (1) excluding a rival range of UMTS-compliant mobile devices, and (2) inducing Apple to accept disadvantageous licensing terms. *Samsung* ¶ 62.

44 *Huawei* ¶ 52.

45 *Id.* ¶¶ 52, 73.

46 2009 Guidance, *supra* note 32, ¶ 19.

47 Eastern R.R. Presidents Conf. v. Noerr Motor Freight Inc., 365 U.S. 127 (1961).

48 Apple, Inc. v. Motorola Mobility, Inc., 886 F. Supp. 2d 1061, 1077 (W.D. Wis. 2012). Courts have held that *Noerr* does not protect an SEP owner from liability for the same conduct under a breach of contract theory. *Id.* at 1082; *see also* Microsoft Corp. v. Motorola Mobility, Inc., 2015 U.S. App. LEXIS 13275, at *1047 (9th Cir. July 30, 2015).

49 United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

50 Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

51 *Id.* at 407.

52 United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001).

53 Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008).

54 Rambus Inc., FTC Docket No. 9302, https://www.ftc.gov/sites/default/files/documents/cases/2006/08/060802commissionopinion.pdf.

55 *Id.* ¶ 97.

56 The FTC challenged and condemned Rambus's conduct as both a violation of Section 2 and as a stand-alone violation of Section 5. However, the FTC defended its decision before the D.C. Circuit solely on Section 2 grounds.

57 Intergraph Corp. v. Intel Corp., 195 F.3d 1346 (Fed. Cir. 1999).

58 *Id.* at 1353.

59 *Id.* at 1351.

60 15 U.S.C. § 45(a)(1); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986).

61 Complaint ¶¶ 18–19, Robert Bosch GmbH, FTC Docket No. C-4377, https://www.ftc.gov/sites/default/files/documents/cases/2012/11/121126boschcmpt.pdf.

62 Complaint ¶¶ 11, 25–27 Motorola Mobility LLC, FTC Docket No. C-4410, https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolacmpt.pdf.

63 *Bosch,* Complaint ¶¶ 17–18, 23, *Google/Motorola*, Complaint ¶¶ 25.

64 *Bosch*, Complaint ¶¶ 6–8, 20, 23 (stating that the alleged breach, "if left unchecked, tends to undermine the vitality of the standard-setting process").

65 *Google/Motorola*, Complaint ¶ 20–21.

66 In *Google/Motorola*, the FTC also alleged that Google lacked an efficiency justification for its conduct sufficient to outweigh the threatened harm to competition and consumers.

67 Federal Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.