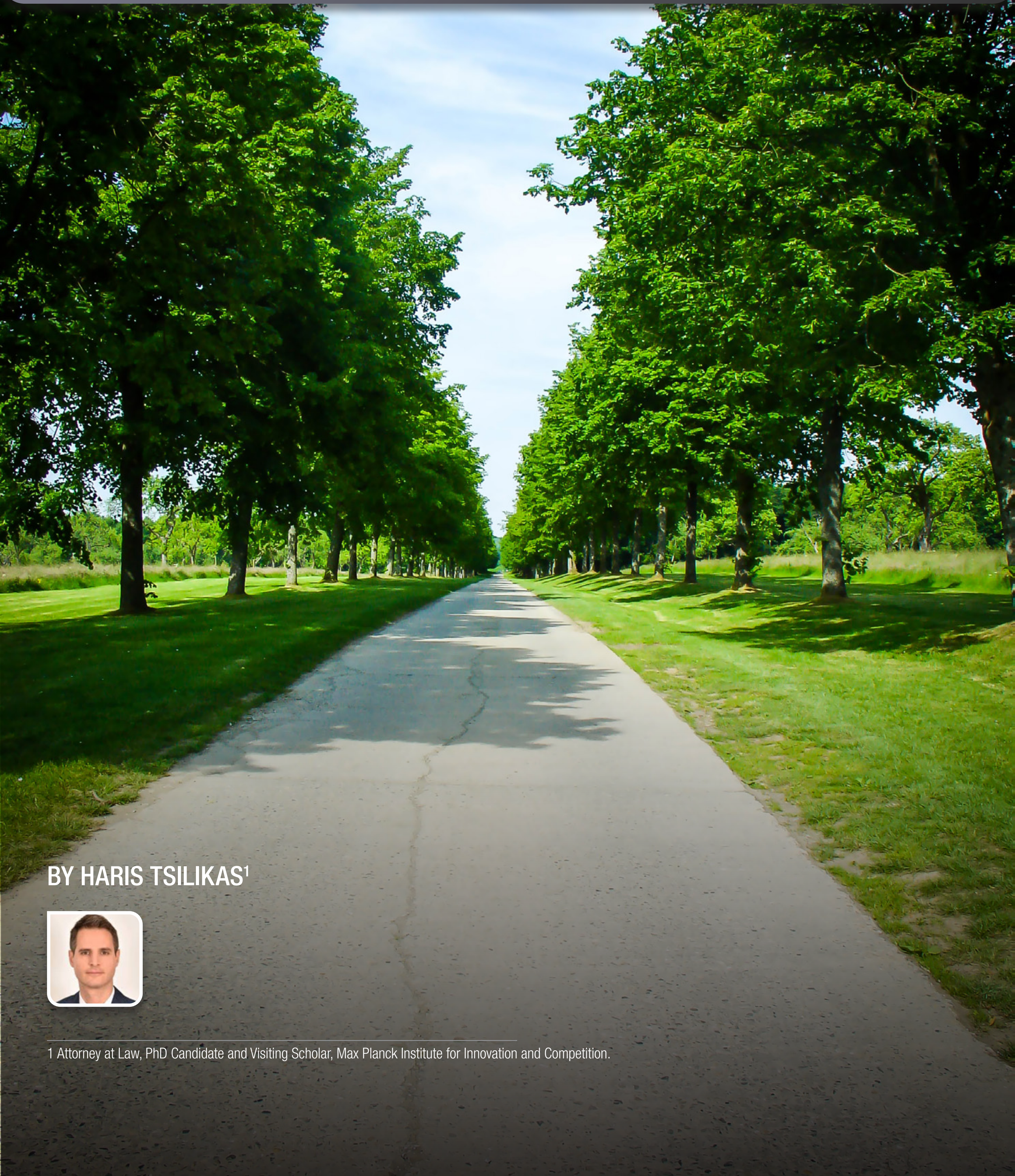
THE NEW LANDSCAPE IN FRAND LITIGATION



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I. INTRODUCTION

2020 marked a turning point in global FRAND litigation, a field that has produced a steady stream of cases and academic contributions for more than a decade now. In particular, three judgments by the Federal Court of Justice (*Bundesgerichtshof* – "BGH") of Germany, the Supreme Court of the UK, and the U.S. Court of Appeals for the 9th Circuit respectively change the landscape in international FRAND litigation.

In the new landscape, courts emphasize — and are guided by — industry practice (rather than abstract theories) in reviewing disputes between owners of standard-essential patents (SEPs) and technology users regarding FRAND (fair, reasonable and non-discriminatory) licensing terms and conditions. Courts in some of the most important jurisdictions worldwide declined to ascribe antitrust liability to common commercial practices, such as (a) comprehensive, worldwide licenses of portfolios of SEPs, (b) licensing at the end-device level of the value chain, and (c) calculating royalty rates on the basis of the end-product prices. Moreover, courts stressed that technology users that fail to demonstrate actual willingness to conclude a FRAND license, through their serious conduct of licensing negotiations, also fail to state an actionable claim against injunctions under antitrust law.

II. *SISVEL v. HAIER*

In the EU, the governing framework for injunctions for SEPs is set out by the Court of Justice of the EU (CJEU) in its *Huawei v. ZTE* judgement.[2] In *Huawei*, the Court established a safe harbor from antitrust liability under Article 102 TFEU for SEP-owners that satisfy specific requirements prior to requesting injunctive relief.[3] *Huawei*, however, only provided the general framework for the application of Article 102 TFEU on SEP-enforcement actions. The details remained for the national courts in the EU to flesh out. In Germany, the BGH, in its recent *Sisvel* ruling, decided on a broad range of issues around SEP-enforcement and clarified the law regarding injunctive relief for SEPs.[4]

In *Sisvel*, the Court reversed the findings of the Higher Regional Court of Dusseldorf which had held that an SEP-owner that fails to make an offer on FRAND terms infringes Article 102, regardless of the conduct of the prospective licensee.[5]

2 Case C-170/13, *Huawei Technologies Co. Ltd v. ZTE Corp.* [2015] ECLI:EU:C:2015:477.

3 *Ibid.* para. 71.

4 *Sisvel v. Haier*, Federal Court of Justice (*Bundesgerichtshof*) Case No. KZR 36/17 (May 5, 2020).

5 *Ibid.* para. 79.

At the outset, the BGH noted that a SEP-owner is not obliged, solely by virtue of his patent's standard-essentiality and his voluntary FRAND commitment, to tolerate the unlicensed used of his patent.[6] It can, however, constitute an abuse of dominant position for such a patentee to refuse an unconditional licensing offer on FRAND terms by an infringer that has already commercialized standard-compliant products, as per the BGH 2009 *Orange Book Standard* ruling.[7] Moreover, the patent proprietor will fall foul of Article 102 if he fails to satisfy the *Huawei* requirement to properly notify the infringer prior to the filing of an action for injunctive relief.[8]

Furthermore, the SEP-holder may be denied injunctive relief when his offer is not FRAND. In such a case, the primary burden of proof for the discriminatory, or otherwise unfair, nature of the licensing offer rests with the implementer.[9] The patentee, however, bears a secondary burden of proof in this regard, by having to refute allegations of discrimination with evidence to the contrary.[10] Importantly, according to the Court, this allocation of the burden of proof applies not only to court proceedings, but also to licensing negotiations: where concerns are raised by the implementer that the terms proposed are not FRAND, it is for the SEP-owner to justify the proposed terms "in detail."[11] The same rules apply for the licensing of an entire SEP portfolio.[12] In this regard, the Court emphasized both the substantial efficiencies of portfolio licensing and, conversely, the inefficiencies of a patent-by-patent approach to licensing.[13] In terms of substance, the FRAND conformity of a given licensing offer depends on "a variety of circumstances."[14] A FRAND commitment, however, does not entail an obligation on the part of the SEP-owner to offer identical terms to all licensees i.e., when it comes to the royalty rate, a "uniform tariff."[15]

Crucially, the Court observed that because FRAND terms cannot be objectively determined, but result instead from "negotiated market processes," serious participation by the implementer in negotiations is "of decisive importance."[16] In this respect, the BGH noted the infringer's incentives to hold out as far as possible, even until the patent's term of protection expires.[17] Therefore, before the patent proprietor's obligation to offer FRAND terms is to be fulfilled, it is first necessary for the implementer to respond to the notice of infringement, by indicating promptly and unequivocally its willingness to conclude a license on FRAND terms and participating in the licensing negotiations in earnest.[18] The notification must identify the rights infringed and the manner of their infringement.[19] Presentation of claim charts is customary but not mandatory for the SEP-holder.[20] In the case at hand, the implementer only responded to the notice of infringement after a whole year had passed, and the responses, according to the Court, fell far short of an unequivocal and unconditional willingness to conclude a license on FRAND terms.[21] Moreover, the Court indicated that the defendant's general conduct during negotiations suggested bad-faith delaying tactics.[22]

6 *Ibid*. para. 82.

7 *Ibid*. para. 83, citing *Orange Book Standard*, Federal Court of Justice (*Bundesgerichtshof*), Case No. KZR 39/06 (May 6, 2009).

8 *Sisvel v. Haier* (n. 4) paras 85-86.

9 *Ibid*. para. 88.

10 *Ibid*.

11 *Ibid*.

12 *Ibid*. para. 89.

13 *Ibid*. para. 90.

14 *Ibid*, para. 93.

15 *Ibid*.

16 *Ibid*.

17 *Ibid*. para. 94.

18 *Ibid*. para. 95, citing (in English) Birss's J findings in *Unwired Planet v. Huawei* [2017] EWHC 711 (Pat), para. 708 ('a willing licensee must be one willing to take a FRAND licence on whatever terms are in fact FRAND').

19 *Sisvel v. Haier* (n. 4) para. 97.

20 *Ibid*.

21 *Ibid*. paras. 104 et seq.

22 *Ibid*. para. 110.

Finally, the BGH reversed the lower court's finding regarding the alleged discriminatory nature of the reviewed licensing offers. The Court noted in this regard that differentiated pricing on the part of the dominant undertaking is, in and of itself, not sufficient for a finding of abuse of dominant position under Article 102(c) TFEU, provided that there is an objective justification for price differentiation.[23] Additionally, even an undertaking holding a dominant position cannot be precluded from defending its commercial interests when they are attacked.[24] In *Sisvel*, the lower court failed to take into account the arguments raised by the SEP-owner to justify offering a lower rate to another licensee, namely the 'absence of realistic possibilities for judicial enforcement of its claims [in the jurisdiction of a third country] and in view of the threat of personal or other economic disadvantages' by the state authorities of that jurisdiction.[25]

III. *UNWIRED PLANET v. HUAWEI*

In the UK, the Supreme Court recently published its decision in *Unwired Planet*, affirming prior decisions by the High Court and the Court of Appeal.[26] The starting point of the Supreme Court's analysis in *Unwired Planet* was the contractual nature of the European Telecommunications Standards Institute ("ETSI") intellectual property rights (IPRs) Policy, which is binding upon ETSI members and their affiliates, and is to be interpreted under French law.[27] According to the Court, the ETSI IPRs Policy serves a two-fold aim: (a) to ensure that the standard will be accessible to implementers by requiring SEP-owners to submit a FRAND undertaking, and (b) to ensure that technology contributors are fairly and adequately rewarded for their contributions to ETSI standards.[28]

The Court emphasized, however, that the first prong of ETSI policy is to be balanced against the second prong, which the Court reformulated as to "address the mischief of 'holding out' by which implementers [...] might knowingly infringe the owner's Essential IPRs by using the inventions in products which meet the standard while failing to agree a licence for their use on FRAND terms."[29] The Court further pictured hold-out as a practice that may "force the [SEP] owner to accept a lower royalty rate than is fair," by "drag[ging] out the process of licence negotiation and thereby put[ting] the owner to additional cost."[30]

In interpreting the ETSI IPRs Policy the UK Supreme Court reached the following preliminary conclusions: (a) the ETSI IPRs Policy contractual derogations from the provisions of patent law "are designed to achieve a fair balance between the interests of SEP owners and implementers," (b) the FRAND commitment is a contractual derogation from the SEP-owner's right to exclude infringers by seeking injunctive relief, (c) FRAND undertakings are submitted at a point in time when there is uncertainty regarding the validity and essentiality of the SEPs in question, (d) the only way for the implementer to avoid an injunction for a SEP infringement is to enforce the SEP-holder's contractual obligations by requesting a FRAND license, and (e) the Policy envisages that FRAND terms will result from bilateral negotiations and agreement between the parties or by recourse to national courts.[31]

With regard the appropriate geographical scope of a FRAND license, the central point raised on appeal, the Court observed that it is undisputed that worldwide portfolio licenses are the industry norm in the telecommunications sector.[32] Moreover, the Court noted the onerous litigation costs for SEP-owners should they have to enforce the entirety of their portfolio on a country-by-country basis.[33] The high costs associated with country-by-country negotiation and litigation explain, in the opinion of the Court, the clear industry preference for worldwide portfolio licenses which may also include patents that might be found in later proceedings invalid or non-essential.[34]

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23 *Ibid*. para. 114.

24 *Ibid*. citing Case C-468/06, *Sot. Lélos kai Sia EE and Others v. GlaxoSmithKline AEVE Farmakeftikon Proïonton* [2008] ECLI:EU:C:2008:504, para. 50.

25 *Sisvel v. Haier* (n. 4) para. 114.

26 *Unwired Planet International Ltd v. Huawei Technologies (UK) Co Ltd* [2020] UKSC 37.

27 *Ibid*. [8].

28 *Ibid*. [7].

29 *Ibid*. [10].

30 *Ibid*.

31 *Ibid*. [14].

32 *Ibid*. [15].

33 *Ibid*. [36].

34 *Ibid*.

The Supreme Court went on to address the contention that, in his first-instance decision Birss J, by deciding on a worldwide portfolio rate for plaintiff's SEPs, pre-empted decisions by foreign courts regarding the validity (and essentiality) of foreign SEPs. The Court clarified that, in setting a worldwide royalty rate for Unwired's global portfolio, Birss J merely determined the contractual terms the parties would have voluntarily agreed to, knowing very well that some of the patents in question could be invalid or non-essential.[35] Two methods can be used to evaluate a SEP-portfolio without having to go patent-by-patent: the "top-down" approach, and the examination of comparable licensing agreements.[36]

According to the Court, Birss J was fully entitled to set a global rate in light of the ETSI IRPs Policy, which is an enforceable contract.[37] The Court underscored that an approach calling for the patentee to establish the validity and essentiality of its entire portfolio on a country-by-country basis before enforcing its rights to exclude through injunctive relief "runs counter to the balance which the IPR Policy seeks to achieve."[38] The Court went on to examine in detail the uncertainties of SEP-licensing, as well as the substantial efficiencies in the industry practice of global portfolio licenses. The Court concluded: "By taking out a licence of an international portfolio of generally untested patents the implementer buys access to the new standard […] [i]t does so at a price which ought to reflect the untested nature of many patents in the portfolio; in so doing it purchases certainty."[39]

The Supreme Court also made some important observations regarding the purpose and function of injunctive relief for licensing on FRAND terms. According to the Supreme Court, the ETSI IPRs Policy incentivizes private parties to reach agreement on FRAND terms without recourse to litigation.[40] Injunctive relief is vital in the pursuit of this objective: "it is this which ensures that an implementer has a strong incentive to negotiate and accept FRAND terms for use of the owner's SEP portfolio."[41]

Similarly, the appropriate geographical scope of a FRAND license can be inferred by the ETSI IPRs Policy, which was intended to have international effect, by extending the ambit of the FRAND commitment beyond specific patents to entire patent families under Clause 6(2).[42] The Court also emphasized the decisive importance of industry practice for determining FRAND terms. According to the Court, industry practice is "an obvious practical yardstick which [the parties] can use in their negotiation," and lower courts were correct in their assessment that ETSI intended the parties to 'draw on commercial practice in the real world.'[43] In deciding for FRAND terms for Unwired's global portfolio, lower courts justifiably looked into the industrial practice in the relevant sector, in which global portfolio licenses are the norm.[44]

Additionally, the Supreme Court upheld the the lower courts' findings that the ETSI IPRs Policy does not entail an obligation for an SEP proprietor to offer identical terms to all licensees, or a 'hard-edged' non-discrimination obligation. According to the Court, the terms "fair," "reasonable," and "non-discriminatory" are to be interpreted in a "unitary way."[45] In rejecting a 'hard-edged' non-discrimination obligation the Court advanced two arguments: (a) ETSI has rejected in the past the inclusion of a most-favored nation ("MFN") clause in its IPRs Policy, and (b) price discrimination is the industry norm in the specific sector because it yields efficiencies, and promotes innovation and consumer welfare.[46] Moreover, practical concerns may force a patentee to offer a license at a below-FRAND rate, under specific circumstances, such as when aiming to secure a first-mover advantage or in a 'fire sale' when faced with insolvency.[47]

35 *Ibid*, [42].

36 *Ibid*, [42]-[43].

37 *Ibid*, [58] ("It is the contractual arrangement which ETSI has created in its IPR Policy which gives the court jurisdiction to determine a FRAND licence and which lies at the heart of these appeals").

38 *Ibid*. [59].

39 *Ibid*. [60].

40 *Ibid*. [61].

41 *Ibid*.

42 *Ibid*. [62].

43 *Ibid*.

44 *Ibid*. [63].

45 *Ibid*. [113]-[114].

46 *Ibid*. [116], [123]-[124].

47 *Ibid*. [125]-[126].

Finally, the UK Supreme Court upheld the lower courts' analysis under Article 102 TFEU and the *Huawei* framework. In particular, the Court reaffirmed that a patentee cannot, without infringing Article 102 TFEU, file an action for injunction prior to properly notifying the infringer, though "notification" is to be interpreted broadly and in accordance with the circumstances of each case.[48] Moreover, the Court held that *Huawei* could be deemed to provide a safe harbor to SEP-owners that fulfil the notification requirement and present the implementer with a proposal for a license on FRAND terms.[49] This, however, does not imply that an offer that is not FRAND is, in and of itself, sufficient for finding an abuse of dominance.[50] The Court accurately and concisely summarized *Huawei*: (a) it prevents an implementer being ambushed with an action for injunction before being properly notified, (b) it lays down a "route map" for the SEP-owner to pursue an injunction safe from antitrust liability, and (c) it provides "points of reference" to assist courts in determining which party is truly willing to conclude a FRAND license.[51]

IV. *FTC v. QUALCOMM*

In the U.S., the 9th Circuit recently issued its ruling in *Qualcomm*, reversing the 2019 first-instance judgment by the District Court for the Northern District of California (Judge Koh).[52] At issue was Qualcomm's business model of licensing its SEPs at the equipment manufacturer ("OEM") level and calculating the royalty rate based on the end-selling price of standard-compliant products.[53] Moreover, to ensure that its sales of chipsets to manufacturers do not exhaust its patent rights, under *Quanta*,[54] Qualcomm followed a 'no-license, no-chips' policy, under which it refused to sell chipsets to unlicensed manufacturers and concluded non-assertion agreements with competing chipset manufacturers.[55] The issue before the court was whether Qualcomm's business model was "anticompetitive behavior, which is illegal under federal antitrust law" or "hypercompetitive behavior, which is not."[56]

The court started with identifying the relevant antitrust market: the market for 2G modem chips and 4G premium chips. Although the 9th Circuit upheld the finding of the lower court in this regard, it noted as a preliminary remark (and foreshadowing its own later findings) that the district court's analysis of anticompetitive effects focused beyond the identified relevant antitrust market and, in particular, on effects of Qualcomm's policy on OEMs.[57]

The 9th Circuit went on to examine whether Qualcomm was under a duty to license competing chipset manufacturers under §2 Sherman Act.[58] The court reiterated the established principle in U.S. antitrust law that §2 does not impose on businesses a duty to deal with any particular customer.[59] The court highlighted that there is only one limited exception to this rule under *Aspen Skiing*, where the US Supreme Court ("SCOTUS") held that a monopolist may be liable under §2 if he unilaterally terminates a profitable business arrangement with a competitor and the only plausible rationale for this conduct is sacrificing short-term profits to exclude competition in the long-run.[60]

The district court's finding that Qualcomm's conduct fell within the *Aspen Skiing* exception was reversed. The 9th Circuit held that the lower court was incorrect in finding that Qualcomm terminated an existing arrangement with rivals, since there was little evidence on record that

48 *Ibid.* [150]-[151].

49 *Ibid.* [153].

50 *Ibid.*

51 *Ibid.* [157].

52 *Federal Trade Commission v. Qualcomm Inc.*, Case No. 19-16122 (9th Cir. 2020).

53 *Ibid.* 12-13.

54 *Quanta Comput., Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 625 (2008).

55 *Qualcomm* (n. 52) 14-15.

56 *Ibid.* 9.

57 *Ibid.* 30.

58 *Ibid.* 31 et seq.

59 *Ibid.* citing *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 457 (2009); *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2003).

60 *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

Qualcomm ever licensed at the chipset level.[61] Moreover, the lower court erroneously disregarded the changes in U.S. patent law on exhaustion under *Quanta*, which forced Qualcomm to its current policy.[62] More importantly, there was little evidence that, by licensing OEMs, Qualcomm sacrificed profits to pursue an exclusionary scheme; on the contrary, licensing at the OEM level was 'far more lucrative.'[63] Finally, the court distinguished the facts in *Qualcomm* from *Aspen Skiing* in view of the fact that Qualcomm's policy applied uniformly to all rival chipset manufacturers, whereas in *Aspen Skiing* the monopolist targeted a specific rival for exclusion by terminating dealing.[64]

The 9th Circuit further assessed FTC's argument that, even if Qualcomm was under no duty to deal under *Aspen Skiing*, its refusal to license rival manufacturers violated its own FRAND obligations and such conduct infringed §2 Sherman Act. In this respect, the court observed that, even if Qualcomm was under a contractual obligation to license rival chipset suppliers (a conclusion the court explicitly refused to reach), this may at most state a contractual rather than an antitrust claim.[65] The FTC identified a negative impact on OEMs, but it failed to establish a negative impact on competition in the relevant antitrust market, since rivals were allowed unlicensed use of Qualcomm's SEPs.[66] Moreover, the court underlined 'the persuasive policy arguments of several academics and practitioners with significant experience in SSOs, FRAND, and antitrust enforcement, who have expressed caution about using the antitrust laws to remedy what are essentially contractual disputes.'[67]

Next, court addressed the district court finding that Qualcomm's rates were unreasonably high, allegedly imposing an "anticompetitive surcharge" on rival chipset manufacturers. The 9th Circuit dismissed the "anticompetitive surcharge" theory for failing "as a matter of law and logic":[68] first, to the extent that Qualcomm's rates were found unreasonable because they were calculated based on the end-product price, instead of the "smallest salable patent-practicing unit" ("SSPPU"), the district court misrepresented the case law of the Federal Circuit on the SSPPU doctrine.[69] The court underlined that the SSPPU doctrine is merely "a tool in jury cases to minimize potential jury confusion when the jury is weighing complex expert testimony about patent damages."[70] Indeed, "[n]o court has held that the SSPPU concept is a per se rule for 'reasonable royalty' calculations."[71] Second, the first-instance ruling assumed that "unreasonable royalties" is tantamount to "anticompetitive" [royalties] — in the antitrust sense.[72] However, such theory finds no support in case law and, in any event, it merely states a harm to customers, not competitors.[73] The court concluded: "We decline to adopt a theory of antitrust liability that would presume anticompetitive conduct any time a company could not prove that the 'fair value' of its SEP portfolios corresponds to the prices the market appears willing to pay for those SEPs."[74]

61 *Qualcomm* (n. 52) 33.

62 *Ibid.*

63 *Ibid.* 34.

64 *Ibid.* 35.

65 *Ibid.* 36.

66 *Ibid.* 37.

67 *Ibid.* 39.

68 *Ibid.* 41-42.

69 *Ibid.* 42.

70 *Ibid.* 42-43.

71 *Ibid.*

72 *Ibid.* 43-44.

73 *Ibid.*

74 *Ibid.* 44.

V. ANALYSIS

The aforementioned developments in FRAND litigation in Europe and the US lead to the following conclusions:

First, there appears to be a convergence in the approaches to injunctive relief for SEPs in all major European jurisdictions (Germany, UK, France, the Netherlands). The basis for this convergence is the CJEU's *Huawei* framework. However, a uniform application of this framework remained elusive until the rulings in *Sisvel* and the *Unwired Planet*. Particularly problematic was the case of Germany, the European jurisdiction with the most extensive experience with FRAND disputes. The country's two most prominent patent infringement courts — those of Dusseldorf and Mannheim — took opposing views in interpreting *Huawei* and in particular on the question whether failure by a SEP-holder to offer FRAND terms implied automatically and ipso facto an infringement of Article 102 TFEU. *Sisvel* resolves this rift largely favoring the Mannheim approach and dismissing the interpretation of the Dusseldorf Higher Regional Court.

The emerging consensus regarding injunctions for SEPs in Europe can be summarized in three propositions: (a) *per se* illegality: SEP-proprietors that initiate injunction proceedings without first notifying the infringer face strict condemnation under Article 102; the language of both the CJEU and the highest courts in Germany and the UK point to a flagrant, "by object" breach of Article 102 in such a scenario, (b) *per se* legality: SEP-owners that have properly notified implementers and made an offer on FRAND terms are safe from antitrust liability, and (c) a grey area in between: when the SEP-owner has properly notified the infringer and the parties disagree on FRAND terms, the end result (injunction or no injunction) will depend on their respective conduct and whether they appear demonstrably willing to enter a FRAND license.

Second, there a growing convergence in the approaches of European and US courts regarding the potential antitrust liability for practices such as licensing at the end-device level and calculating royalties on the basis of the end-device price (and not on SSPPU). *Qualcomm* clarified that SEP-owners are under no obligation under §2 Sherman Act to license their patents to any particular customer but are, in principle, free to choose the value-chain level at which they will exhaust their rights. German courts have reached a similar conclusion (under Article 102 TFEU).[75] Moreover, *Qualcomm*'s rejection of SSPPU as a substantive rule for calculating FRAND rates and an antitrust obligation of the SEP-holder is in line with European case law which has uniformly rejected — implicitly or explicitly — an antitrust duty to calculate royalties in any particular way.[76]

Third, prevailing industry practice guides judicial review and is decisive for courts determining whether or not a given conduct is FRAND. Briefly put, conduct that conforms to prevailing industry norm will normally be approved by courts, unless there are compelling reasons for diverging from it. This approach is laudable because it appears unwilling to sacrifice real-world, tangible efficiency gains from voluntary market arrangements to protect against anticompetitive risks that are speculative and based on theories that are not validated by the facts on trial record.

Fourth, recent case law developments lend support to the U.S. DOJ's policy record on issues around FRAND/SEPs. Despite critics' claims to the contrary, the DOJ's policy under its present leadership is not an isolated exception to the antitrust mainstream regarding FRAND but is itself an integral part of this very mainstream. Just to take two examples, DOJ's recent business review letters to licensing platform Avanci[77] and the SDO IEEE (supplemental)[78] emphasize the efficiencies in market practices such as licensing at the end-device level and calculating rates based on end-device prices in the former case, and the value of injunctive relief for a balanced FRAND ecosystem. *Qualcomm*, *Sisvel*, and *Unwired Planet* provide strong case law support to these policy pronouncements.

75 See for instance, *Saint Lawrence v. Vodafone*, Dusseldorf District Court (*Landgericht Düsseldorf*), Case No. 4a O 73/14 (March 31, 2016), para 406 ('It is in principle always at the discretion of the patentee to choose the distribution stage at which to enforce its property rights […] The right of the patentee to decide for itself which infringers to enjoin is, in principle, not limited for a SEP under antitrust law').

76 See for example, *Archos S.A. v. Koninklijke Philips N.V.*, The Hague District Court (*Rechtbank Den Haag*), Case No. C/09/505587/HA ZA 16-20 (February 8, 2017), para 4.10 (dismissing an antitrust duty to use the SSPPU royalty calculation base under Article 102 TFEU). See also, *Ericsson, Inc. v. D-Link Sys.*, 773 F.3d 1201 (Fed. Cir. 2014); DOJ, USPTO, and NIST, 'Joint Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments' (December 19, 2019) 6-7.

77 Makan Delrahim, Assistant Attorney General, US DOJ, Letter to Mr. Hamer [Avanci Business Review Letter] (July 28, 2020) https://www.justice.gov/atr/page/file/1298626/download accessed November 9, 2020.

78 Makan Delrahim, Assistant Attorney General, US DOJ, Letter to Ms. Muirhead [IEEE Supplemental Business Review Letter] (September 10, 2020) https://www.justice.gov/atr/page/file/1315291/download accessed November 9, 2020.

Fifth, facts on the record in the above-mentioned cases paint a very different picture than the one promoted in antitrust circles in the past decade: that of standard users as hapless victims of patent enforcement abuses, a view that came to be known as "patent holdup." Instead, the picture that emerges is that of sophisticated parties, well-resourced, with global operations, that postpone the conclusion of a FRAND license as much as possible employing a wide range of negotiation and legal tactics to holdout. In this respect, the emphasis placed on holdout by the highest courts of Germany and the UK are highly instructive. These points of transatlantic convergence mark a step in the right direction, emphasizing the need for a balanced approach in FRAND litigation that takes into account efficient industry practices and preserves strong incentives to innovate and participate in standards development.