

Competition Authorities Support Grasshoppers: Competition Law as a Threat to Innovation

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Aesop's fable is of the ant and the grasshopper. In summer the ant works, gathering and storing food against the coming winter. The grasshopper laughs and sings, living only for the day. Innovators are the ants: using part of the income of today to build for the future. The grasshoppers are those who look only for profits for today and do not contribute to the future. Competition authorities are favouring grasshoppers, positively helping them sing in the summer (i.e. gather in profits now) and saying, "do not worry, sing away. When winter comes we will make the ants feed you." The danger to innovation is all too obvious for those who can see: it pays to be a grasshopper rather than an ant—better to be a copyist than an innovator.

I shall demonstrate this by reference to the competition authorities' conduct in relation to two industries heavily dependent on innovation: pharma and telecoms. Let us recall some basics.

I. BASICS: IP LAW ITSELF HAS INBUILT REGARD TO THE NEED FOR COMPETITION

IP rights are exceptions to the general Western model of free competition. They are justified by the advantages they provide to society outweighing the advantages provided by free competition. Some types of IP are completely uncontroversial. Thus, no-one contests that the law should prevent one trader from falsely representing his goods or services to be that of another. He may compete with another, but not by lying to the public. Where trade mark law goes further—for instance by preventing a man from honestly comparing his goods or services with another—controversy begins.² But the debate takes place within the context of the nature of the IP right itself; competition is taken into account in the legal assessment of the extent of the right. Competition law just does not come into.

As regards patent law its very basic rules are built round the idea of free competition. You cannot patent that which is old or obvious. Why not? Because otherwise, you would interfere with free competition. Nor can you patent more than you have invented. Why not? Because you would monopolise that which should be free for others to explore. A patent is limited by the rather crude 20-year³ term. Why term-limited? Because a longer monopoly would interfere with free competition.

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Thus, patent law rights and concepts are riddled with non-interference with competition. What you can patent is the practical application of new and ingenious ideas. You get a monopoly but it is a monopoly in something

which would not have existed (or existed as soon) but for your inventive contribution. The law interferes not with ordinary competition, but with competition in something which would not have existed but for the inventor.

The availability of a future monopoly is a major driver for innovation. It is no good bemoaning this reality.

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It is no good advocating abolition and replacement of the patent system with some alternative, such as State-sponsored research rewards. It has been tried (for instance, in the Soviet Union) and has not worked. There is, of course, much government or charity supported research, particularly in the field of medicines. But the reality is that the patent system remains the bedrock of future research both for new medicines and new medical devices.⁴ Abolitionist or dilutionist economists have been around a long time—since the mid-19th century, at least. All the current talk of thickets, “hold-up” and the like has happened before, and fortunately largely⁵ seen off with the result that innovation proceeds faster and faster.

II. THE APPROACH OF COMPETITION AUTHORITIES

Given that patent law is so aware of competition, why do competition authorities wish so much to restrict patent rights further? Or, what amounts to the same thing, the enforcement or attempted enforcement of patents? I think there are several, interrelated, reasons.

First is that they are largely staffed by somewhat theoretical economists. They not only have a very imperfect understanding of how the patent system actually works but also similar lack of understanding of how business—particularly innovative business—works and is financed. Patent monopolies do not fit their models of competition. These models look to the present, not the future. Of course, current patent monopolies interfere with current competition. They make current prices higher than they would be in a state of perfect competition—some economists’ ideal market. That some patents cover important products which do not have any significant alternative makes them worse in these economists’ eyes because such patents command markets in “inelastic goods”—something for which there is no substitute.

This view easily gains ill-informed populist support. Politicians always jump on a bandwagon when they see one. Who is not in favour of lower prices? Anyone who stands in the way of these—such a patentee—is a bad guy. But deep down, what the competition authorities are doing is pushing for instant gratification in the shape of lower prices⁶ to consumers now at the expense of the benefits of delayed gratification in the shape of innovation for the future. I shall demonstrate this by reference to two of the most important subject matters of patent protection: pharma and telecoms. In both of these industries the competition authorities have weighed in heavily in favour of the copyists and against the inventors. In so doing they are in conflict with other agencies (see, for instance, the recent highly pro-IP report from OHIM⁷) who support innovation and in conflict with innovating companies. They play the part of the Mayor of Hamlyn town. I quote from Browning’s poem:⁸

“If I can rid your town of rats
Will you give me a thousand guilders?”
“One? fifty thousand!” – was the exclamation
Of the astonished Mayor and Corporation.

Later, when the rats had all been drowned, the Mayor said:

“So, friend, we’re not the folks to shrink
From the duty of giving you something to drink,
And a matter of money to put in your poke;
But as for the guilders, what we spoke
Of them, as you very well know, was in joke.
Beside, our losses have made us thrifty.
A thousand guilders! Come, take fifty!”

III. THE PHARMA SECTOR INQUIRY

There was a preliminary report in 2008 and a final report in 2009.⁹ What led to the inquiry in the first place, I do not know. But the manner in which it was conducted was a disgraceful use of the Commission’s powers. For it began with simultaneous dawn raids on major pharma companies throughout Europe. Dawn raids without a judicially issued search warrant and without any justifiable suspicion that evidence would be destroyed are strongly reminiscent of a lawless regime. A Commission official at a conference I was at recently described dawn raids as “normal!” That itself is shocking to anyone who cares about civil liberties.

The preliminary report was appalling. It revealed a vast ignorance on the Commission’s part as to how the patent system actually works. In introducing it the then-Commissioner, Neelie Kroes, on 28th November 2008 said:

Several of the most damaging practices which delayed or blocked market entry of competitors include:

1. *Patent clustering*, where a company forms a dense network of patents around a medicine. The worst example we found of this method was 1300 separate patent filings, across the EU, for a single medicine.
2. A *large number of litigation cases* over patents, which originator companies invoked against generic companies. On average, these cases took three years to resolve, and originator companies lost a clear majority of cases.
3. *Patent settlements* which constrain market entry of generic companies, and sometimes involve direct payments from originator companies to generic companies. In total, these payments amounted to more than € 200 million
4. *Interventions before regulatory bodies*, which have to approve generic products and decide on their pricing and reimbursement status. These interventions slow down the approval process

by 4 months on average.

Where successful, these practices result in significant additional costs for public health budgets—and ultimately consumers—and reduce incentives to innovate.

That was entirely nonsense:

“Patent Clustering.” Of course there is patent clustering—there always has been. Some now speak of “thickets” and postulate that there are:

a dense web of overlapping intellectual property rights that a company must hack its way through in order to actually commercialize new technology.¹⁰

or

an overlapping set of patent rights which require innovators to reach licensing deals for multiple patents from multiple sources.¹¹

This is said to lead to “hold-up”—economists are fond of emotive tags. But there is no evidence of any such thing. Just look at these innovative industries and ask, if things are moving so fast, “where is this ‘hold-up?’” In the real world, clusters of patents are, and always have been, a sign of a technology in a state of high inventiveness and rapid change—the opposite of hold up. Edison surrounded himself with a thousand patents, the sewing machine wars of the 1850s and ‘60s were replete with patents,¹² and even Boulton, the business genius who, with Watt, was a key figure of the industrial revolution, used the patent system with clusters.

“A large number of litigation cases.” This was simply wrong: most pharma patents, like most patents in general, are not litigated. But that some important ones are is hardly surprising. There is a lot of money involved. Generic companies naturally challenge big pharma patents if there is a realistic possibility of winning. Equally naturally big pharma sues on its patents if there is a realistic possibility that they may be held valid. This sort of patent fight is and always has been a normal part of the pharma industry.

“Patent settlements restraining generic entry” is uncommercial and unrealistic. The Commission is worried about is a deal between a patentee and a generic company by which they settle a dispute about the validity of a patent by agreeing on a date, somewhere between the date of the agreement and the date of expiry, upon which the generic may enter the market. Money may pass. The emotive tag is “pay for delay.” The theory is that is anticompetitive because the generic agrees not to enter the market earlier than the agreed date. But the theory ignores reality for three distinct reasons.

First, put aside the rare case where the patent is surely invalid and the patentee knows that.¹³ The normal case is where there is real uncertainty about validity. Neither side knows who would win the prospective legal battle which if it takes place, will be expensive and time consuming. If the patent is valid then the agreement, far from being anti-competitive, is pro-competitive—it allows entry earlier than expiry. If the patent is invalid, then the agreement delays entry, but just by that generic company. However at the time of the agreement, no one knows whether it is or is not valid. That could only be determined by the end of final appeals in the very battle the agreement is designed to avoid. At the very least the Commission, if it wants to prove that such an

agreement is in fact anticompetitive, must surely prove the patent invalid.

The second reason is the real danger of deterring bona fide settlements. If these agreements are treated *ipso facto* as anticompetitive there is only one alternative: litigation to the death. The Commission has never really been able to cope with the commercial settlement of IP disputes where one party agrees not to do something.¹⁴ It is time it understood that settlement of IP disputes often involves one party agreeing not to do something. If that settlement is genuine and not bogus the Commission should keep out. If the Commission wants to prove that the agreement is bogus—a sham to cover what is, in reality, a market sharing agreement—then the onus must lie on it to prove it.

The third reason why this sort of agreement is not anticompetitive is that it in no way affects the right of any other generic to challenge the patent and to try to enter the market meanwhile. An agreement with just one generic cannot seriously affect the potential market in the drug concerned at all. You simply can't "pay for delay" by a deal with one company if anyone else who wants to sell the generic medicine is free to challenge the patent and try to enter the market meanwhile (subject to an interim injunction¹⁵). The position in Europe is not quite the same as in the US, where a first generic may in some cases get a limited period of exclusivity (see below) and cannot "clear the way" by attacking the patent well before intended marketing.

"Interventions in the courts with decisions of regulatory bodies" is equally fallacious. The report itself concedes that about a third of these interventions, are justified. Moreover, the legality of actions of administrative authorities must be open to challenge. Just because pharma companies sometimes challenge unsuccessfully is hardly a reason for saying they are doing anything wrong. DG Comp is saying that the very act of going to court is wrong—a point to which I return.

IT IS TIME IT UNDERSTOOD THAT SETTLEMENT OF IP DISPUTES OFTEN INVOLVES ONE PARTY AGREEING NOT TO DO SOMETHING. IF THAT SETTLEMENT IS GENUINE AND NOT BOGUS THE COMMISSION SHOULD KEEP OUT. IF THE COMMISSION WANTS TO PROVE THAT THE AGREEMENT IS BOGUS—A SHAM TO COVER WHAT IS, IN REALITY, A MARKET SHARING AGREEMENT—THEN THE ONUS MUST LIE ON IT TO PROVE IT.

In the end, the Sector Inquiry largely fizzled out but not before a very large amount of public and pharma company money was wasted. The Commission has, to its undemocratic shame, never said how much it cost the public purse. It is difficult to imagine that it involved less than 30 expensive officials for at least two years; a better estimate might be 50.¹⁶ As for the industry costs, even after the initial raids, each company was swamped with ill-thought-out questions on a weekly or less basis. It must have cost the industry as a whole of the order of half billion euros. A scandal that has not had the publicity it deserved.

All that is left is "monitoring" of pharma settlements. At first this seemed to be largely to save face. For initially there was only the investigation (still ongoing) of the *Servier* case where there indeed may be a case to answer.¹⁷ It is possible that it knew full well that the patent it sought to enforce was invalid.¹⁸ But this year, probably encouraged by US developments, DG Comp has gone on the warpath against pay for delay settlements. It may that some cases of this are justified—those where no patent validity settlement is involved.¹⁹ But others are very worrying indeed; for instance, the huge fine of €93 million on Lundbeck for settling patent litigation

with a number of generic companies.²⁰ I am glad to see that Lundbeck are fighting this.²¹ In a rational world they should win.

The final Pharma report was accompanied by a statement from then Competition Commissioner Neelie Kroes, who, unveiling the findings of an 18-month inquiry into the pharmaceuticals sector, said:

“There is something rotten in the state [of the pharmaceutical industry]. Makers of original medicines are actively trying to delay the entry of generic medicines on to their markets.” (18th July 2009).

Others may think there is something ill—a wrong mindset—within the Competition Directorate revealed by this. It was a wholly unjustified slur on a whole innovative industry: an industry which acted in a perfectly rational and legally justified way; an industry which spends (with great risk) 17 percent of its *income* on trying to find new or better medicines for humanity. And which, unlike lawyers, economists, judges, or officials, actually prevents people from dying or suffering.

Nowhere in its inquiry did the Commission look to see what profits were being made by the grasshoppers—the generic companies whose very business depends on the earlier inventive work of the ants, still less of how much or little of those profits were being spent on research.

I have just one thing to add by way of postscript in relation to this sorry story. As I have said, the Commission clearly knew almost nothing about how the patent system worked. This is hardly surprising—it has no staff of its own experienced in this. True it is that it sought some assistance from the EPO who sent a very able patent examiner to assist. But patent examiners are not the people to ask about the commercial working of the system after patents are granted. Their experience is about examining for validity, not the commercial exploitation or enforcement of patents. Once a patent is granted, it goes out into the wide commercial world, leaving the Office which gave birth to it in ignorance of its adult life.

The FTC and Pharma

The competition authorities in the USA, particularly the Federal Trade Commission, have been equally aggressive to innovative pharma in the USA. Although nothing like the full-blooded assault on a whole industry by DG Comp. is possible in the USA, the FTC’s campaign—almost vendetta²² against pharma—has been and is intensive. The key case is *FTC v Actavis*.²³

Before I discuss the US further, a difference between generic entry in the US and in Europe should be noted. In the US, the first generic is given a special position by the Hatch-Waxman Act. It is not only allowed to enter the market with regulatory authority without having to undergo a duplicative application process (Europe is in broadly the same position), but in addition, in some circumstances, it may get a 180-day monopoly as the first generic allowed on the market. This has to be before expiry. Europe has no equivalent; any generic with regulatory approval can come on the market once the patent is out of the way by expiry or earlier revocation. In Europe, the first generic gets no legal advantage from being first.

There is another significant difference between Europe and the USA. In Europe, there is no “standing”

requirement for a party who wishes to ask a court to revoke a patent. Anyone can challenge at any time. Any generic feeling itself impaired by a patent can attack it well ahead of its intended marketing. It is for that reason that the UK has a “clear the way” rule about interim injunctions. A pharma patent holder will normally get such an injunction against a generic company about to come on to the market but who failed to attack the patent earlier.²⁴ In the US there is a “standing” requirement before a party can seek a declaration of invalidity:²⁵ a generic company cannot, well before it intends to market, ask a court to clear the way.

I turn to *Actavis*. Solvay (the patentee) made a reverse payment to Actavis in return for Actavis agreeing not to enter the market for a set term and settling the ongoing patent litigation the key issue of which was the counterclaim for invalidity. The FTC said this was a violation of antitrust laws. It took a brutal, simplistic per-se anti-patentee stance:

“A payment from one business to another in exchange for the recipient’s agreement not to compete is a paradigmatic antitrust trust violation. The question presented here is whether such a payment should be treated as lawful when it is encompassed within the settlement of a patent infringement suit. The answer to that question is no.”²⁶

Throughout the argument there was simply no discussion of the effect sought by the FTC—less income for pharma companies with the inevitable depressing effect on research funding.

The Court came up with an unsatisfactory result: in effect, “that it all depends.” It rejected the FTC black and white position that all pay for delay settlements are inherently bad and rejected the alternative view that provided the settlement was of a bona fide dispute; antitrust law had no place. It said that each case should be judged by a “rule of reason.” But no-one knows what that means, with the result that the case (and others) is ongoing with much uncertainty. There is much to be said for the dissenting opinion of Roberts CJ to which two other members of the court assented.

For present purposes there are two things to note: first is that the FTC intervention has made it much more difficult to settle *bona fide* patent litigation between big pharma and generics. And secondly it was essentially anti-patent; the sooner patent protections falls away, the better was the driver behind the FTC’s approach. The result is less protection for the innovator companies who will have less income to fund their research. It would have been much better for our future medicines if the FTC had let well alone. The same thinking has now spread to Europe. I hope it is rejected.

Patents and Telecoms: Standard Essential Patents (“SEPs”)

I turn to the other area where the regulatory authorities’ interventions are mistaken and dangerous for innovation. It concerns “standard essential patents,” or “SEPs.” Many industries find it necessary to develop technical “standards” so that the products of one company can work with those of others. Standards are very old—standards for things like telephones go back to the 19th century, and for gramophone records not much later. Today we have many more standards—for broadcasting, Blu-ray, CDs, DVDs and on. Most prominent are the standards for mobile phones. Over the years, inventors have allowed their inventions to be used for standards without any problem. The general nature of the system is that all parties allow use of their patented inventions, either via licensing or a patent pool.

In particular, for mobile telephony, the standards are set by an industry-wide organization called ETSI.²⁷ It sets the standards for 3G, 4G and the future 5G, 6G, and so on. ETSI members get together to settle on the standard. It is a hugely complicated process requiring many thousands of engineers' hours. The aim is to make the standard work as well as possible—the better it does the more the market will want the parties' products.

DG Comp suspects that manufacturers vie to get their particular patented solution made part of the standard with a view to a large income stream later. It drew this inference from a study which showed a spike in patent applications shortly before a standard setting meeting. Again, this shows a lack of understanding of the patent system—you have to apply for a patent before you disclose your invention (as you will at ETSI) or your patent will lack novelty. It makes entire sense to apply for your patent just before you disclose because then you can put the most information about your invention into your application—also important for validity (insufficient disclosure being a ground of invalidity).²⁸ There is no evidence to support the Commission's hypothesis—the competition is between qualities of solutions to get the best standard—the best standard is the motivation.

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ETSI members must make a FRAND (Fair Reasonable and Non-Discriminatory) commitment to ETSI—to offer licences under their patents for use with the standard on Fair Reasonable and Non-Discriminatory terms. Other standard bodies sometimes use the acronym RAND.²⁹ The commitments are not the same for all standards.³⁰

No-one checks whether declared patents really are essential—or even reads the patents or patent applications. You could even declare a patent on a rubber boot as essential and it would be recorded as such. Broadly, over-declaration is a good thing—much better to err on the side of that than on the side of under-declaration with the result that an undeclared patent might cover the standard.³¹

The wording of the commitment to ETSI is that the patentee will give:

“...an irrevocable undertaking in writing that it is prepared to grant irrevocable licences on fair, reasonable and non-discriminatory terms and conditions under such IPR to at least the following extent [then follow manufacture and use details].”

Note that it is the patentee who commits to grant a licence on FRAND terms. It follows that if he makes an offer which is FRAND compliant he has complied with his commitment. The licensee has but to accept and the grant is made. The position of the would-be licensee, whether or not he is a “willing licensee” in some sort of loose sense or is prepared to enter into negotiations, is quite irrelevant.

So what happens if a SEP patentee sues someone on his patent? The Commission takes the view that the very act of asking for an injunction in his claim is an abuse of monopoly for which the patentee can be fined and enjoined. Here is the Press Release in *Motorola v Apple*:³²

The European Commission has informed Motorola Mobility of its preliminary view that the company's seeking and enforcing of an injunction against Apple in Germany on the basis of its mobile phone standard-essential patents ("SEPs") amounts to an abuse of a dominant position prohibited by EU antitrust rules. While recourse to injunctions is a possible remedy for patent infringements, such conduct may be abusive where SEPs are concerned and the potential licensee is willing to enter into a licence on Fair, Reasonable and Non-Discriminatory (so-called "FRAND") terms. In such a situation, the Commission considers at this stage that dominant SEP holders should not have recourse to injunctions, which generally involve a prohibition to sell the product infringing the patent, in order to distort licensing negotiations and impose unjustified licensing terms on patent licensees. Such misuse of SEPs could ultimately harm consumers.³³

One can hardly believe how wrong this is:

1. It is saying that merely going to court to ask for an order is an abuse of monopoly. That breaches two important principles:

(a) First at a very high level it breaches the right of a party's access to the courts contained in Art. 6 of the ECHR and well recognised in case such as *Golder v. UK*.³⁴ The Commission is in effect standing with a shotgun at the courthouse door and saying "if you go in there and dare even ask for an injunction, we will shoot you." Contrast that with the European Court of Human Rights in *Golder*:

The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally "recognised" fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6(1) must be read in the light of these principles. Were Article 6(1) to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. Such assumptions, indissociable from a danger of arbitrary power, would have serious consequences which are repugnant to the aforementioned principles and which the Court cannot overlook.

(b) Secondly, still at a high level, it breaches the principle of sincere co-operation in Art 4(3) of the bedrock Treaty on European Union. This provides:

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Commission is really saying, "we do not trust the Member States' courts—they might grant an injunction which we think would be an abuse of monopoly. We, an administrative agency, know better." So much for "mutual respect."

2. It is on the facts perfectly ridiculous—to suppose you can bully Apple, ZTE or Hauwei³⁵ by a mere application to court shows a profound ignorance of how real big businesses or courts work. If these companies

have a defence of abuse of monopoly they will surely deploy it with maximum force. None need the Commission to defend them.

3. It is virtually a *per se* rule—for although there is some concession in the case of a defendant who might be impecunious, it is difficult to see how that could work in practice. Suppose the patentee considered the defendant impecunious but the Commission thought otherwise? That the Commission takes the part of such big companies itself demonstrates the essentially *per se* nature of its position.

4. It overlooks the fact that before the Court decides whether or not to grant an injunction, it will not only hear the parties but could hear the Commission, too. For the Commission has a right to intervene.³⁶ Surely the Commission should take the least intrusive course of intervening rather than threatening fines?

5. It ignores the fact that litigation is a way of bringing things to a head. The pressure of a date in court is not a pressure to do a non-FRAND deal, but a pressure to do a FRAND deal. All defendants string things out if they can. Litigation is a continuation of negotiation by other means.

6. The Commission's focus on a "willing licensee" is entirely misplaced. Defendants will always say they are willing to negotiate—that really means stringing things out for as long as possible and paying as little as possible in the end, a sensible commercial tactic if you can get away with it. There may, of course, be negotiations, but all that matters legally is whether the patentee has made a FRAND offer. The focus should be on that, not what the defendant says is FRAND or whether he says he is willing to negotiate. The concept of a "willing licensee" is amorphous and impossible to pin down.

7. It asks the question of "abuse" at the wrong time—before the court is asked to make its decision. It treats an application for an injunction as if it were an injunction. When the court comes to make its decision it will have evidence from both sides and can decide what to do.³⁷

8. It ignores the fact that if the patentee has made no offer *when the court makes its decision* the court will surely refuse an injunction because the patentee has committed to make a FRAND offer—a commitment which the industry largely accepts is binding on all, never mind any legal theory which might suggest otherwise.³⁸

9. It assumes that a declared SEP is in itself market dominant. But a declared SEP may not be essential at all—many are not. Even an SEP, once essential, may cease to be so because ways around have been devised.

10. If the patentee has made an offer, it can be examined to see whether it is FRAND or not. That can be determined by the court if necessary, but there may be better ways, such as arbitration by an expert panel. Meanwhile, the court may make an interim order requiring the defendant to pay a minimum to the patentee, and the disputed difference into escrow. A solution I favour.

11. It ignores the reality that if the patentee is deprived of any right to an injunction or possibility of one, defendants will simply fight infringement and validity patent by patent. If they lose, why then all they have to pay is damages to be assessed on FRAND terms—"reverse hold-up" with a vengeance. The Commission's actions support just that. How much have Apple, Huawei and ZTE paid anyone for use of the standards on which they have been able to build their businesses?

12. It ignores the reality that this industry is one of the most competitive in the world—which company will be leader even in 3 years’ time? The competition is in products and innovation. Where is there a competition law problem?

13. None of this is in the consumer’s interest. If the non-innovators have to pay only little and late, does anyone think it will be passed on to the public? No, it will mean that the profits of the grasshopper companies will be greater at the expense of the ant innovators, who made the grasshoppers’ business possible. And consumers will lose by reason of less future innovation.

I suspect the Commission knows it is on shaky ground. For it is pursuing an insidious course of negotiating with patentees to get them to agree to limit their rights to go to court. It recently³⁹ issued a press notice:

The Commission has concerns that Samsung’s seeking of injunctions against Apple in the European Economic Area (EEA) on the basis of its mobile SEPs may have amounted to an abuse of a dominant position prohibited by EU antitrust rules (see IP/12/1448). To remedy these concerns, Samsung has offered to abstain from seeking injunctions for mobile SEPs for a period of five years against any company that agrees to a particular licensing framework. Interested parties can now submit their comments within one month. If the Commission concludes, in light of the comments received, that the commitments address the competition concerns, it may decide to make them legally binding on Samsung.

Seeking injunctions before courts is generally a legitimate remedy for patent holders in case of patent infringements. However, access to patents which are standard-essential is a precondition for any company to sell interoperable products in the market.

The Commission considers that the seeking of an injunction based on SEPs may constitute an abuse of a dominant position if a SEP holder has given a commitment to license its SEPs on Fair Reasonable And Non-Discriminatory (FRAND) terms and where the company against which an injunction is sought is willing to enter into a licence agreement on FRAND terms.

The Commission is concerned that the seeking of injunctions in such circumstances could allow Samsung to impose royalty rates or other licensing terms, such as broad cross-licenses, which a licensee would not agree to, absent the threat of having its products excluded from the market. This may unduly distort licensing negotiations and cause harm to consumers by increasing prices, reducing product choice and stifling differentiating innovation in the markets for smartphones and tablets.

This is trying to create precedent by creep. Undertakings of this sort imply that they are necessary. They are well attacked by Prof. Marsden’s, “Soft Law. The Emperor’s Clothes Laid Bare: Commitments Creating the Appearance of Law while Denying Access to Law.”⁴⁰

The Commission aims to extract the undertaking by the threat of fines. Companies are really frightened of the Commission:⁴¹ it behoves it to use its powers with care. It did not have to threaten fines. It could simply have said to Samsung and Motorola, “We think you are wrong, let us go to the CJEU and test the legality of your actions. We will levy fines only if we win and you carry on regardless.”

The time has come to stand up—not to pay Danegeld.⁴² Companies should say to the Commission: “See you in court. You can’t use your powers to deny access to the courts. You can’t allege abuse of monopoly, hold up and the like based on a theory which unsubstantiated on real facts but is obviously wrong given the rate of innovation in this sector. You should not be protecting those who contributed virtually nothing from the inventions which make up the standards. Leave it to the Courts; they can enforce the FRAND obligations.”

One other matter: the Commission’s current stance may have an unintended consequence—that it becomes a FRAND determining tribunal. On 21st November 2013, it was announced that Sierra Wireless had complained to the Commission that Nokia would not grant it a FRAND licence. What if Nokia’s response is that it had made a FRAND offer? The Commission will have to decide one way or the other. Surely the Commission is not the right tribunal for determining whether an offer is or is not FRAND. Yet it could find itself in a mire of complaints and counter-complaints.

All of the above applies in the US, *mutatis mutandis*. The FTC and Justice Department successfully persuaded President Obama to veto the import ban on Apple products which the ITC, following a reasoned decision of its administrative court, held infringed a valid patent of Samsung.⁴³ The theory was that the patent was subject to

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a FRAND declaration. The court had not accepted the FRAND defence. To an outsider it looks awfully like a Government overruling a court decision—something rather incompatible with the rule of law.

I end with this. The Competition Authorities’ anti-patentee actions penalise those who made the inventions in the past. Economists call the costs of making and developing those inventions (and all the abortive research and development) “sunk”—money already spent. If you say sunk costs produce results of little value today, you degrade the incentive to sink costs today—to do R&D for the inventions of tomorrow. For

inventions which might become the subject of SEPs, you are threatening not only invention but the very process of standardisation. If those who create the inventions for new and faster standards see the prospect of proper reward degraded then the rate of progress to 5G, 6G, and so on will diminish. Such is the public demand for more and faster capacity; the result could well be that existing standards will not cope—so that either our phone connections will clog up or the price of connection will have to go up to reduce demand. And if the pharma companies have less income, we will have less new medicines in the future.

The Competition Authorities should cease harassing inventive industries, remember that patents expire anyway and let the patent system do the job it was designed to do. Leave the ants alone. ▲

1. Hugh Laddie Professor of Intellectual Property, University College London, a former Lord Justice of Appeal of the Court of Appeal of England and Wales. I am grateful to Martin Adelman for trying to put me right about a couple of things. If I failed it is not his fault.

2. See e.g. my judicial criticism of the ECJ's decision that a trader in cheap perfume cannot honestly say his perfume smells like a famous brand, *L'Oréal v Bellure (No.2)* [2010] EWCA Civ 535.
3. 21 if you use the priority system well.
4. Indeed it is unfortunate that patent law does not go further in some cases – particularly in not really providing adequate protection for future uses of known medicines. This is a subject of towering importance. One major pharma company says it is as important as the search for new medicines. Some generic companies are of the same view: they too would like to do research for new uses for medicines they already make. Governments and the Commission would do well to think how such research can be incentivised.
5. Not always, for instance Holland abolished patents from 1869 to 1912. Maybe that enabled a backward economy to catch up. Once it did patents became vital to future progress. Philips, which started in that patent-free period, is now one of the major innovative (and hence patenting) companies of the world.
6. Or what they believe will be lower prices. Often their grasshopper protégées will simply keep the profit.
7. Intellectual Property Rights Intensive Industries Contribution to Economic Performance and Employment in the EU,
8. I quoted it the public debate about the preliminary findings of the Commission's Sector Inquiry into the pharma industry, 28th November 2008.
9. 8th July 2009. Much of the nonsense in the Preliminary Report was dropped.
10. C Shapiro, 'Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard-Setting' in AB Jaffe et al (eds), *Innovation Policy and the Economy* (MIT Press, 2001).
11. *Hargreaves Report* (n 8) 18.
12. See Mossoff: *The Rise and Fall of the First American Patent Thicket: The Sewing Machine War of the 1850s* *Arizona Law Review*, Vol. 53:165.
13. Such cases are very rare – it may well be that the law ought to have a remedy to deal with such case – in some countries it indeed may, under some sort of tort of *abus de droit*.
14. 14 In the 1970s I was involved in a Commission attack on a bona fide settlement of a trade mark dispute where the defendant agreed not only to change its name but not to use the plaintiff's name.
15. 15 Which can only be obtained on the terms that the patentee must compensate the defendant if in the end the patent is found invalid.
16. One pharma company told me that its dawn raid party had 7 officials.
17. The law may have something to say about an IP right dishonestly obtained. , but it is not clear that it is competition law: how can there be an abuse of monopoly when the complaint is that there was no monopoly only a purported one? The ECJ did not consider this point in *AstraZenica v EC Commission Case C-457/10P*. As far as the court was concerned the finding of abuse of monopoly turned on the obtaining of an IP right by a deliberate misrepresentation (see para. [99]). I have no real problem with the result. Liars deserve what they get. For present purposes the point to note is that the Commission apparently contended for something much more far-reaching, namely abuse of monopoly if the right granted was made by any misrepresentation, even if not dishonest – such is the tenor of the Commission decision of 15th June 2005.
18. See my Judgment in *Les Laboratoires Servier v Apotex* [2008] EWCA Civ 445 “This is the sort of patent which gives the patent system a bad name.”
19. As may be the case of *J&J* and *Novartis/Sandoz* see IP/13/1233 10th December 2013.
20. 19th June 2013. With a politician's bombast, Commissioner Almunia said: “Agreements of this type directly harm patients and national health systems which are already under tight budgetary restraints.” He is quite wrong if the patents are valid – pre-expiry entry then has a price reducing effect. And the Commissioner failed to mention the effect on future R&D – the fine alone will surely affect this.
21. Statement of September 2nd 2013

22. The Chairwoman of the FTC described the FTC's current challenges to patent settlements as a "mission", Law60, November 2013.
23. 570 U.S. ____ (2013)
24. *Novartis v Hospira UK* [2013] EWCA Civ 583.
25. The US does not actually have a formal revocation proceeding. "Standing" requires that the patentee has in some way indicated that it will try to enforce the patent. Merely owning it is not enough. Makes no sense to me: a patent is a running public claim to a monopoly, the public should be able to attack it at any time.
26. Deputy Solicitor General Malcolm Stewart opening the oral argument on March 25th 2013. A little later he qualified it by saying such an agreement was "presumptively unlawful" but that the presumption could be rebutted (he did not say within any precision how.)
27. The European Telecommunications Standards Institute.
28. I suspect another influence too – it is human nature to do things at the last minute!
29. No-one suggests that "Fair" adds anything.
30. And it may not be a mere difference in wording: there may be a real difference between a commitment actually to grant a licence on RAND or FRAND terms, and a commitment to offer a licence on such terms. The difference is that a commitment to grant leaves it open as to who is to determine the terms. The commitment to offer FRAND leaves it to the *patentee* to determine the terms of his offer – anything within the range of FRAND will comply with his commitment.
31. However some overdeclarations are deliberately done: to some extent numbers of patents count in licensing negotiations. The English Courts have held they have jurisdiction over whether or not a patent declared to be is in fact essential, *Nokia v Interdigital* [2006] EWCA Civ 1618. It involved a severe case of overdeclaration, 29 patents had been declared essential but only one found to be so, *Nokia v Interdigital* [2007] EWHC 3077 (Pat). Validity was never considered.
32. 6th May 2013
33. The Press Release in the case of *Samsung v Apple*, 31st January 2012, is similarly worded though there is no reference to "enforcing" for the obvious reason that Samsung never got as far as a hearing in which an injunction was asked for.
34. Series A No 18, (1979-80) 1 E.H.R.R. 524. See also Art. 47 of the EU Charter of Human Rights, Case C-279/09 *DEB Deutsche Energiehandels etc. v Germany* [2010] ECR I-13849. There is plenty more to like effect. True it is that the right of access is not entirely absolute, but it is only in "wholly exceptional circumstances that "the fact that legal proceedings are brought is capable of constituting an abuse of an dominant position within the meaning of Article 86 of the Treaty, Case T-119/09 *Protégé International Ltd v Commission* (13 September 2012) at §§48-49. See also *ITT Promedia v Commission* [1998] ECR II-2937.
35. These are all latecomers to mobile telephony and have no or hardly any SEPS themselves. Moreover it seems they are not contributing to 4G, 5G and so on: all published figures show they have very few SEPs between them.
36. Art. 335 of the TFEU.
37. There is no suggestion of ex parte injunctions in this field.
38. There is some debate about whether the FRAND commitment given to ETSI is enforceable by a third party. In the US Judge Robert held the RAND commitment was. In Europe the legal position fairly clearly is that a third party can indeed require the patentee to make a FRAND offer. For ETSI is in France and the commitment is fairly obviously given under French law which admits of what is sometimes called the *jus tertius* – the right of a third party to enforce a contract made by others for its benefit. It seems German Court said the issue in Germany was governed by German law because the patent was German. That cannot be right: the FRAND commitment must be governed by a single law – the parties cannot have intended the chaos of multiple laws, some of which have the *jus tertius* and others not.
39. 17th October 2013
40. CPT Antitrust Chronicle, October 2013(1)
41. Not surprisingly. I heard that one pharma company which

42. See Kipling's poem of that name.
43. Decision of 3rd August 2013.