

**Summing it up. What should we do given what we know? What are the priorities for legal and economic analysis of FRAND and its consequences?**

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# Exploitative Abuse: checklist

Competition Economists' default: don't mess with "unfair" prices

... unless you really have to do it, because *if you don't* consumers are very likely to be worse-off

(most popular) **checklist:**

- very high, lasting barriers to entry
- super-dominance
- not effective/swift regulation
- dominance originates in past failure of competition control

# The issue

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- The issue is the **restriction of competition** that **permanently empowers** a player to reach a more favorable equilibrium than it would if there would still be competition in the technology market.

FRAND infringement – seems more an “**excuse**”



*if a firm commits to be fair and then **breaks its promise**... that seems to justify intervention: **pursuing an exploitative abuse case entails a lower risk of distortion** if something “wrong” was done in the past*

... but in principle **you don't need FRAND to apply 102!**

# No Incremental Power?

*Can a player that committed to FRAND be not significantly empowered by the standard? **YES!***



Example:

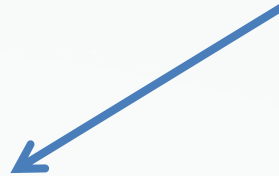
- 3 technologies A, B, C compete to become the standard
- Company X has core-essential IP in A, B and C
- *X had market power already before the adoption of the standard*

analogy with the ex-ante/ex-post approach... BUT...

# Consumer Harm

*Can a player that did not commit to FRAND be significantly empowered by the standard? **YES!***

Examples



## **Hold-up**

- \* patent ambush (Rambus)
- \* ex-post patent transfer (IPcom)

*Licensors technically didn't commit to FRAND*

# Consumer Harm

*Can a player that did not commit to FRAND be significantly empowered by the standard? **YES!***

## Examples



### Hold-up

- \* patent ambush (Rambus)
- \* ex-post patent transfer (IPcom)

### Reverse Hold-Up

- \* FRAND as reverse weapon
- \* Process manipulation

*Licensors technically didn't commit to FRAND    Licensees not required to commit to FRAND*

# Consumer Harm

*Can a player that did not commit to FRAND be significantly empowered by the standard? **YES!***

Examples



## Hold-up

- \* patent ambush (Rambus)
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## Reverse Hold-Up

- \* FRAND as reverse weapon
- \* Process manipulation

*The issue could be with the process – but 101 can be difficult to implement if the nature of the abuse is **essentially unilateral***



# Example - Reverse Hold-Up

Theory (eg Ganglmair et al 2012) and empirics (eg Lanjouw and Schankerman 2004):

*If you're a **small innovator**, you are likely **to get a lower price** than you should be entitled to – because **access to judicial system is imperfect***

iRunway: 20% of seminal patents in 4G-LTE held by small companies

Same applies to hold-up... the smaller, the lower bargaining power, the more vulnerable

→ *Perhaps here antitrust authorities can add most compared to courts??*

# Beyond FRAND

- Needs of an holistic and symmetric approach
- Focus on the restriction of competition not on FRAND
- How the standard alters the bargaining process? Who gains, who loses?

*In practice...*

- Within company ex-ante / ex-post correspondence, internal business plans, forecasts etc.
- Between companies ex-ante / ex-post correspondence
- Focus on the standardization process: inspect meetings' minutes, public info analysis (media coverage, reports, rumors...)
- Investments' actual pattern (when did real lock-in take place?)
- ...

→ **Competition authorities: best suited to reconstruct the competitive counterfactual** i.e. identify the significant alteration in the distribution of bargaining power. Art 102 should apply irrespectively of FRAND.



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**Back-up slides**

# ETSI voting rights

Electronic Communication Related Turnover (mln)	Votes
<b>SMEs</b> Small medium enterprises, universities, public research bodies and not-for-profit user associations, user & trade associations, additional membership, Micro-enterprises	<b>1</b>
Up to 15	2
136 to 200	3
201 to 450	6
451 to 700	9
701 to 1350	13
1351 to 2000	18
2001 to 3500	24
3501 to 5000	30
5001 to 8000	37
<b>above 8000</b>	<b>45</b>