Role of Institutions and Policy Makers

- Set substantive standards for new types of practices
  - *Greek decoders*’ *Pierre Fabre Dermocosmétiques*
  - *Expedia*
  - *TeliaSonera*
  - *Post Danmark*
  - And now *Huaweï v ZTE*
Content of the Presentation

1. Options for tests of abuse
2. Selection rule
3. Testing of tests
1. What (Legal) Technology is on the Market?

<table>
<thead>
<tr>
<th>Source</th>
<th>Tests</th>
</tr>
</thead>
<tbody>
<tr>
<td>Existing case-law proof test</td>
<td>Abusive Litigation (<em>Protégé International</em>) =&gt; “wholly exceptional circumstances”</td>
</tr>
<tr>
<td></td>
<td>Abusive refusal to supply (<em>Magill/IMS Health/Microsoft III</em>) “exceptional circumstances”</td>
</tr>
<tr>
<td></td>
<td>Generic abusive anticompetitive foreclosure (<em>Post Danmark</em>)</td>
</tr>
<tr>
<td>New test</td>
<td>Modified abusive refusal to supply (Emanuelson; Körber)</td>
</tr>
<tr>
<td></td>
<td>Abusive bargaining (Mariniello)</td>
</tr>
<tr>
<td></td>
<td>“Willing licensee” (reconfigured <em>Orange Book Standard</em>)</td>
</tr>
<tr>
<td>Other</td>
<td>“Serious doubts” (article 9, R1/2003)</td>
</tr>
</tbody>
</table>
2. How to Select the Right Standard?

- No criterion in the case-law
  - Lawyers v Economists
  - Economists v Economists; Lawyers v Lawyers
- “Consistency” as a selection rule?
- Various facets of consistency
  - Internal consistency
  - Transversal consistency
  - Economic consistency
  - Constitutional consistency
3. Testing

- Internal consistency
- Transversal consistency
- Constitutional consistency
- Economic consistency
Internal Consistency

- **Existing case-law tests are internally consistent**
- **Abusive bargaining**
  - Under Article 102 a) TFEU, what’s abusive is to set unfair price, not to adopt measures that may give rise to unfair price level (e.g. CJEU, *United Brands*)
  - The problem stems from the decision to include the impugned technology in standard. But this is not a decision of the dominant firm
  - Contrary to Commission policy under the Guidance Paper
“Willing licensee” => FRAND declaration means SEP owner must license all “willing licensees”

- “Contractual duty” variant
  - FRAND does not clearly give rise to contractual duty + not unlawful to breach a contract in EU competition law
  - Trick => FRAND gives rise to an antitrust duty => Yet, need to prove *Magill-IMS Health “exceptional circumstances”*
  - Trick 2 => FRAND setting is “exceptional circumstance” in itself => but not the tendency in the case-law

- “Moral duty” variant
  - *Weberian* theory of abuse => false commitment, not intended to be honoured
  - *AstraZeneca* => But AZ was an already dominant firm => here, patentee is not dominant at FRANDing stage
  - *Rambus*? => not CJEU-proof; deceit was not the key issue
No obvious transversal inconsistency of the various tests, absent case-law on collective injunction seeking

But “willing licensee” test is transversally inconsistent

- SEP owner => No reliance value of unilateral pledges in competition law
  - Article 101 TFEU
  - Merger control (GC, Gencor v. Lonhro)
- Prospective licensee => willingness of buyer to be ascertained on basis of exteriorized conduct (Bayer and VW case-law) => acts of fulfillment are needed, mere willingness declarations are not sufficient
- “Act of State” doctrine
  - Opinion of AG Jacobs in Albany
  - Opinion of AG Léger in Arduino
Constitutional Consistency

- Freedom to do business
- Right of access to courts
  - Sole test to pay heed to Article 47 EU Charter => *ITT Promedia/Protégé International*
  - “*King*” of all rights, cannot be balanced as easily as other fundamental rights
- General principles of law (incl. EU law)
  - Willing licensee => No implied waiver rule
  - Willing licensee => Principle of legitimate expectations (key notion of “*sufficiently precise assurances*”)
Economic Consistency

- **Screening**
  - Tests of abusive exploitation should be disregarded => black sheep of IO + no empirical validation of “holdup” theories (hence no credible threat)
  - Theories of exclusion are better accepted (i.e. refusal to supply, abusive litigation, anticompetitive foreclosure)

- **Yet, tests articulating a non price predation theory are not plain vanilla economics**
  - Complex to prove potential for anticompetitive exclusion => no good proxy to predict outcome of judicial proceedings (unlike in price predation)
  - “Raise rival costs” at any rate
    - Yes, but also raises the costs of Domco
    - Does it harm rivals more (cos’ Domco has scale?)
      - Not sure in emerging markets
      - Smartphone war is a conflict of giants
      - Litigations costs are trivial (0.1% of Apple’s revenues in 2012)
### Brief Overview of Implications

<table>
<thead>
<tr>
<th></th>
<th>Internal consistency</th>
<th>Transversal consistency</th>
<th>Constitutional consistency</th>
<th>Economic consistency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Refusal to supply</td>
<td>+</td>
<td>+</td>
<td>–</td>
<td>+</td>
</tr>
<tr>
<td>Abusive litigation</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>Anticompetitive foreclosure</td>
<td>+</td>
<td>+</td>
<td>–</td>
<td>+</td>
</tr>
<tr>
<td>Willing licensee</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
<tr>
<td>Abusive bargaining</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
</tr>
</tbody>
</table>
Worst-Case Scenario?

- Court shows deference
- No standard
- Or ruling à la *Pfleiderer* or *Sot Lélos kai Sia v GlaxoSmithKline*
- Legal uncertainty and high compliance costs
Josh WRIGHT, FTC Commissioner, recently made
the point that antitrust in high-tech markets should
be “disciplined by empiricism”
- Need for facts (ex post intervention is more adequate)

IP enforcement strategies only abusive in
“exceptional circumstances”

GC, T-198/98, *Micro Leader Business v Commission*

If law is to be made, this should be done with
binding legal instruments, and reviewable decisions
- Neither soft law, nor Article 9 decisions
- Wait for CJEU guidance?
Thank you