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## Antitrust Enforcement and Civil Rights: SEPs and FRAND Commitments

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### I. INTRODUCTION

The views expressed in this article are inspired by two recent decisions taken by the European Commission ("Commission") on April 29, 2014, the *Motorola*<sup>2</sup> and the *Samsung*<sup>3</sup> decisions. These decisions are the first Commission decisions concerning competition law enforcement in relation to standard essential patents ("SEPs"). In essence the Commission has found that, in certain circumstances, seeking and enforcing an injunction may constitute an abuse of dominant position. This raises important constitutional issues with regard to civil rights.

For centuries it has been a fundamental element of democratic countries governed by the rule of law, such as the Member States of the European Union, that, if private parties cannot agree on issues of a legal character, they will have access to a court which will decide in a final and binding manner on the dispute between the parties. They would not be turned away by the court unless there was no legal issue to decide upon.

This right of access to a court is a fundamental right enshrined in Article 6(1) of the European Convention of Human Rights and in Article 47 of the Charter of Fundamental Rights of the European Union. Neither of these two articles recognizes any exception to the right of access to court. It is in principle an absolute right and it is only for the national court in question to decide whether the case brought shall be admitted or dismissed; a dismissal may be decided by the national court if, for example, it finds the application vexatious or manifestly unfounded. It follows from this fundamental civil right that a person who has brought a case before a national court should not be prosecuted or punished for doing so, neither by administrative authorities nor in principle by the courts. This is a fundamental principle of law also within the area of EU competition law. The two recent decisions by the Commission do not, however, seem compatible with that principle.

### II. THE *MOTOROLA* AND *SAMSUNG* DECISIONS AND QUESTIONS RAISED

The Commission's decision of April 29 this year, in which Motorola was found guilty of abuse of dominance by infringing Article 102 TFEU because it had sought and enforced an injunction against Apple in Germany on the basis of a SEP, which it had committed to license on Fair, Reasonable and Non-Discriminatory terms ("FRAND") seems difficult to reconcile with this fundamental principle. Basically, the Commission found that since Apple had declared itself

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<sup>2</sup> Case AT.39985 - *Motorola - Enforcement of Gprs Standard Essential Patents*.

<sup>3</sup> Case AT.39939 - *Samsung - Enforcement of UMTS Standard Essential Patents*.

willing to take a license on the SEP and to be bound by a determination by a German court of the FRAND royalties for the license, it was an abuse of dominance by Motorola to go to a national court to seek and enforce an injunction against Apple. However, in view of the novelty of the case, the Commission decided not to impose a fine on Motorola.

Second, on the same day, the Commission, instead of perhaps adopting a decision like in the *Motorola* case, adopted a decision under Article 9(1) of Regulation 1/2003 which made commitments, offered by Samsung to meet the Commission's competition concerns, binding on Samsung. These commitments are aimed at putting an end to a long lasting dispute between Samsung and Apple on terms which the Commission found eliminated its concerns.

These two cases concern the same issue, namely whether a SEP holder, who has committed to grant licenses on FRAND terms could be in breach of the prohibition on abuse of dominant position under Article 102 TFEU, by seeking and enforcing an injunction against another party's new or continued use of the SEP. If this is the case, as was found by the Commission, it represents a novel approach which will give rise to considerable concern for those who have invested, often huge sums of money, in new technology for which they have obtained a patent which they, on the one hand, declare to be a SEP and, on the other hand, commit to license on FRAND terms which—as the Commission clearly recognizes—is of great value and importance to society in general.

If such SEP owners, when they believe that the only way to get an implementer (a possible licensee) to accept to take a license is to seek an injunction against the unauthorized and thus illegal use of the SEP, run the risk of being found to abuse a dominant position with the ensuing risk of potentially large fines, it puts them in a position of unwarranted legal uncertainty. This may discourage them from contributing their technology to standards and from accepting to commit to license on FRAND terms, or even discourage them from investing in R & D as much as they would otherwise have done. Such a possible consequence of the Commission's recent decisions would be very unfortunate for society in general and not necessarily bring about any immediate advantages for consumers that might sufficiently counterbalance these long-term risks.

As the Commission itself stated in both decisions, seeking an injunction before the courts is generally a legitimate remedy for patent holders in case of patent infringements. In fact, such injunctions are sought before national courts around the world practically every day and constitute a necessary means of protecting patents against infringements. It is a fact of life that third parties very frequently either deliberately, negligently, or simply by lack of knowledge of an existing patent infringe patents. If and when the patent holder becomes aware of such infringement, the normal and legitimate reaction will be to try to stop the infringement by (i) contacting the infringer and asking him to stop the infringement, (ii) asking him to take a license, or (iii) seeking an injunction before the relevant court.

An ordinary patent holder, under general patent law, is not normally obliged to give a license on the patent, but may indeed prefer to produce the goods himself. If, on the other hand, he agrees to grant a license, it is in principle for the patent holder himself to decide the rate of the royalty, just as a shop owner is normally entitled to decide at what price he wants to sell his goods. However, EU competition law also applies to patent holders, which means that they may

not abuse their dominance (provided dominance effectively exists) for example by demanding excessive royalty, by tying, or by discriminating. For the purpose of this article, I base myself on the situation of a SEP holder who is in a dominant position.<sup>4</sup>

In the two decisions of April 29 this year the Commission found that, under the *special circumstances* of these cases, namely that the SEP holders had committed to license on FRAND terms and where the other party was willing to enter into a license agreement, the seeking and enforcement of an injunction may constitute an abuse of dominance. The competitive harm, which according to the Commission may be caused by such an injunction, would be the risk of excluding products from the market (the so-called patent hold-up issue).<sup>5</sup> The Commission further argued that the threat of seeking an injunction may distort licensing negotiations and lead to anticompetitive licensing terms.<sup>6</sup>

When a patent holder declares his patent to be a SEP, he indicates to the world that—in his view—this patent is indispensable for anyone in order to meet/comply with a certain standard. The declaration of the SEP will normally be made to one of the standard-setting institutes, such as ETSI—the European Telecommunications Standardization Institute. Whether the claimed SEP is actually a standard essential patent is not verified by the standardization institute. In the two cases mentioned, the SEPs concerned the GPRS standard, part of the GSM standard. Under normal practice for ETSI, if a patent holder declares his patent to be a SEP, he must at the same time agree to license the SEP on FRAND terms. This agreement establishes in reality a third-party legal right to obtain a license on such terms; a right which the third party can in principle enforce before national courts vis-à-vis the SEP holder on the condition that the third party is willing to pay the royalty demanded by the SEP holder in so far that the royalty/or other terms claimed are found to be FRAND.<sup>7</sup>

As the Commission itself states in the decisions, it is also a logical consequence of its approach to these problems that, if the potential licensee is not willing to take a license on FRAND terms, the patent holder is clearly entitled to and thus does not abuse his dominance by seeking and enforcing an injunction if the other party either starts to or continues to use the SEP.

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<sup>4</sup> In the two decisions, the Commission based its findings on the existence of dominance by the SEP holders. Even though, of course, a patent grants the owner exclusivity as to the patent, it does not necessarily follow from this that patent holder obtains sufficient market power to become dominant. It is a fact that the SEP holder can only enforce its right through courts (after a court review) when faced with a licensee unwilling to take a license. There is no other way for the SEP holder to force an infringer to stop unauthorized use of the SEP. There may also be other existing technologies, either patented or non-patented, which may compete with the SEP to the extent that such technologies allow to circumvent the technology of the SEP and thus allow the implementer to comply with a certain standard.

<sup>5</sup> It is, in this regard, worth noting that the mere seeking of an injunction does not necessarily lead to immediate exclusion of the product concerned for the simple reason that such cases will very often be pending before the national court concerned for a long time before the court finally decides to grant the injunction. Only when a granted injunction is actually enforced will the product be barred and withdrawn from the market.

<sup>6</sup> It should be noted in that regard that the threat from a potential licensee of complaining to the Commission about alleged abuse may also distort licensing negotiations and thus lead to anticompetitive licensing terms.

<sup>7</sup> In such a case, the burden of proof regarding the question of whether the royalty demanded by the SEP holder is supra-FRAND will rest on the applicant. If, however, the applicant has initially been able to demonstrate sufficiently that the royalty seems likely to be supra-FRAND, the SEP holder will be submitted to rules of disclosure to allow the court to decide the case.

The key questions in this regard are first, whether the SEP holder has complied with his FRAND undertaking, i.e. whether the royalty demanded is FRAND, and, second, whether the potential licensee is willing or unwilling?

### **A. When Is A Price FRAND?**

As to the first question of when a price is FRAND, there is no clear-cut answer to be found either in legislation or in the case law. In deciding on this, consideration should be given to a number of factors potentially relevant in the specific case, such as:

- value of end product and the relative importance of the SEP to the end product,
- importance of the relevant standard,
- how big is the market and what is the potential licensee's market share,
- number of competitors (other SEP holders and manufacturers),
- size of turnover and profits to be made,
- price of comparable licenses granted by the SEP holder, and
- strength of the SEP (or a SEP portfolio).<sup>8</sup>

Given that there is no clear-cut answer to the question of what a FRAND price is, I think it must be generally accepted that no **one** price is the **only right** FRAND price and that one must therefore operate within a range of prices with an upper and a lower limit. To provide a hypothetical example, \$1.26 is not necessarily the only right FRAND price, it may be anywhere between \$1 and \$2. In such a scenario, if the SEP holder demands \$3 per unit, his offer cannot be considered to be FRAND<sup>9</sup> just as, if the potential licensee insists on paying only \$0.85, he is insisting on a sub-FRAND price and should not be considered to be a willing licensee, i.e. not willing to pay a fair price for the license.<sup>10</sup> If, on the other hand, the potential licensee declares to be willing to pay \$1.05, he must in principle be considered a willing licensee. If in that situation the SEP holder still wants \$1.95 per unit, he is, however, in our example requesting a FRAND price and there does not seem to be any legal or economic reason to insist that he should accept the lower price offered by the other party or for that matter just a lower price.

As this example demonstrates, if the SEP holder is within the FRAND range, he is offering a license on FRAND<sup>11</sup> terms. He is in principle entitled to say no to the potential licensee and, if that person nevertheless either starts or continues to use the SEP, the legal and logical

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<sup>8</sup> In this article I only discuss the issues seen in relation to a single or a very limited number of SEPs. In cases of licensing of a portfolio of SEPs the question of a FRAND royalty and a willing licensee is in principle the same but is, on the one hand, more complicated because of the number of SEPs and, on the other hand, less complicated because the royalty will not be based on a calculation of the sum of individual royalties for each SEP in the portfolio.

<sup>9</sup> In such a case the court should not grant an injunction.

<sup>10</sup> The fact that a SEP holder has accepted to license on FRAND terms does not only mean FRAND vis-a-vis the licensee but also a fair price for the SEP holder.

<sup>11</sup> It should logically follow that the first step in a case, in which an injunction is applied for, is that the judge should start by examining whether the royalty demanded by the SEP holder /the applicant is FRAND. If it is, there is no legal, economic, or any other reason to examine whether any counter offer by the implementer/potential licensee is also FRAND but lower.

consequence must be that the SEP holder is entitled to seek and enforce an injunction without having to fear that he may be fined by a competition authority for an infringement of competition law.

To take this reasoning a bit further, are there really sufficient legal reasons to find a punishable infringement of competition law if a SEP holder could reasonably believe that a price of \$2.50 was within the FRAND range? I do not think so since deciding the FRAND range is in any event a difficult and not at all straightforward exercise. In that respect, it should not be forgotten that the case law under Article 102 TFEU regarding unfair prices as an abuse<sup>12</sup> indicates that for a price to be considered to be unfair it must be found to be excessive. In the words of the Court of Justice in *United Brands*,<sup>13</sup> a price will be excessive if it “has no reasonable relation to the economic value of the product.”<sup>14</sup>

In other words, the price must be found to be not only above, but also much above the economic value of the goods in question. Only if it is excessive, may demanding such a price constitute an abuse. I fail to see any legal reason why a SEP holder should be found guilty of abuse and fined in so far as he could reasonably believe that his price was FRAND, i.e. not manifestly above what the FRAND range is later found to be in the specific case. It should also not be forgotten that the court dealing with an application for injunction normally has, or at least should have, discretion to refuse the application if the royalty asked for by the applicant is clearly supra-FRAND.<sup>15</sup>

### ***B. When Is the Potential Licensee/Implementer a Willing Licensee?***

As to the second question of when the potential licensee/implementer is a willing licensee, the answer must obviously depend on all the circumstances of the specific case. On the one hand, he is clearly not a willing licensee if he simply refuses to pay any royalty for the use of the SEP. If, on the other hand, the implementer has declared that he is willing to pay for the license and does so in a manner that clearly indicates his commitment to conclude a binding license agreement, the starting point just as obviously is that he is in principle a willing licensee.

It is, however, not enough to just declare oneself to be willing. This must be shown by concrete follow up actions such as signaling a commitment to conclude a binding license agreement and not frustrating negotiations by (i) not answering within a reasonable time, (ii) not insisting on terms clearly outside the bounds of what may reasonably be considered to be FRAND, or (iii) not continuously demanding new and supplementary but clearly unnecessary information to cause further delays. Furthermore, another clear way of demonstrating real willingness to take a license would be to start paying at least what the potential licensee himself

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<sup>12</sup> In cases regarding infringement of Article 102 TFEU, the Commission and the courts will normally be looking at the behavior of the dominant undertaking. This should also be the case in the type of scenario dealt with in this article. In other words, it needs first to be examined whether the SEP holder has complied with his obligation, which is to offer licenses at a royalty that is within the FRAND range. If that is the case, he is entitled to that royalty.

<sup>13</sup> *Case 27/76 - United Brands Company and United Brands Continentaal BV v Commission of the European Communities*.

<sup>14</sup> *Id.*, ¶250.

<sup>15</sup> If the court makes it clear to the applicant that it considers dismissing the application for that reason, it would most likely lead the applicant to settle the case with the implementer by lowering the royalty demanded.



may have presented as a counter offer or by paying into an escrow account the amount requested by the SEP holder.

But what if the potential licensee insists on paying what is clearly a sub-FRAND royalty? Is the SEP holder in that situation not entitled to consider him an unwilling licensee? Or what if the potential licensee accepts to pay within the FRAND range but insists on an amount at the bottom or the lower end of the range whereas the patent holder wants a royalty at the top or at the higher end of the range and thus within the FRAND range? As indicated above, I find that the patent holder is legally – as well as from both an economic and moral point of view - entitled to that price and can refuse the licensee without infringing either his FRAND commitment or competition law. In that regard the SEP holder must also pay attention not to discriminate with respect to potential previous licenses granted to other parties at a price decided by him within the FRAND range.

Should competition law be able to force the SEP holder to keep on negotiating with the potential licensee towards a lower price? In this regard, it is worth observing that the role of competition law and competition authorities is not to be price regulators or to decide the prices of specific individual contracts. If the price requested by the patent holder is within the FRAND range and thus FRAND, that must be it, and it is neither for the competition authorities nor the courts to force the patent holder to accept a lower price. Nor can it legally, or from an economic point of view, be the case that the SEP holder should be obliged to continue to negotiate over and over again, month after month, in an attempt to reach an agreement which would inevitably end up being below his own FRAND price. Is there any legal, economic, or moral reason why one should give priority to the interests of the potential licensee over the rights of the one who, as is most often the case, has invested heavily in R & D and thus managed to get a patent of perhaps essential importance to some standard?

What about the argument that, if a SEP holder demanding supra-FRAND royalties can say no and may seek injunctive relief, this may force the potential licensee to accept a higher than FRAND price or otherwise end up in the so-called “patent hold-up” situation? There is some truth in this argument in particular if national courts omit to hear potential claims about non-compliance with FRAND commitments by the SEP holder and thus allow such a behavior. The argument is, however, not very convincing for the simple reason that the Commission also accepts that the SEP holder may seek injunctions if the other party is not a willing licensee.

In other words, the Commission accepts that seeking an injunction may be not only acceptable, but may also be something which may force the other party to the negotiation table, or back to it. As suggested above, an implementer is not just an unwilling licensee if he totally refuses to pay a royalty but also—in my opinion—if he insists on a price that is clearly sub-FRAND and, indeed in reality, also when the potential licensee refuses to pay the FRAND price requested by the patent holder. However, in the *Motorola* decision, the Commission states that, if the potential licensee declares himself to be willing to have the question of the royalty decided by courts or arbitration, the SEP holder must consider him a willing licensee and can therefore not

seek and enforce an injunction without running the risk of being found guilty of abuse.<sup>16</sup> That may be considered to be a safe harbor, I agree, to the extent that the SEP holder—if he accepts such an indication by the potential licensee—does not run the risk of being fined by the Commission. It is, however, not only somewhat surprising but also legally unacceptable if that should be **necessary** in order to avoid fines.

Compare this to the situation where an Aston Martin stops outside a jeweler's shop and the owner of the Aston enters the shop, picks up a Piaget gold watch with a price tag of £25.000, puts £20.000 on the desk, and leaves with the watch saying "I am a willing buyer but your price is too high; this is my price, sue me in court if you want the remaining £5.000 and, if the court says I must pay £23.000 or £25.000, I'll accept that." We would be somewhat surprised if the shop owner were told that he cannot go to the police but must wait for a judge to tell him whether his price was fair or unfair.

It cannot be right, without a specific legal basis to that effect, that if the potential licensee clearly refuses to pay the FRAND royalty demanded, the SEP holder must nevertheless allow him to start or continue to use the SEP and wait until a judge or an arbitrator tells him whether his price was fair/FRAND, even if he is aware that the licensee is clearly capable of paying him compensation when—and if—some years later<sup>17</sup> a judge decides that way.

It should not be forgotten that implementers very often either "forget" or use every trick in the book to avoid taking a license or at least try to drag out<sup>18</sup> negotiations for as long as possible; in practice sometimes for months or years, without paying anything in the meantime. The "Orange Book" principle, adopted by some courts in Germany, is not something followed voluntarily by all implementers and is not in all respects an ideal solution since it has in practice meant that a potential licensee has had to give up his right to challenge validity in order to be permitted to raise competition law claims in his defense.

If, however, the SEP holder, when he may reasonably find a potential licensee unwilling in the sense indicated above, decides—as he should be allowed to without fear of being fined—to seek an injunction, the defendant should of course remain free to claim not only non-infringement or invalidity of the patent, but also abuse of dominance. Such questions will be examined and decided by the national court, which is both competent and under a duty to apply article 102 TFEU if the pleas and facts of the case make it relevant. That the SEP holder runs that risk before the national court is a consequence of the rights of defense of the defendant but it is also quite different from running the risk of being prosecuted and punished by a competition authority such as the Commission for going to court in accordance with the fundamental right of access to courts.

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<sup>16</sup> In cases of portfolio licensing, it would create serious problems for the licensor if the fact that a potential licensee agrees to adjudication of the royalty for just one single (out of the number of patents in the portfolio) SEP would necessarily mean that the potential licensee must be considered to be a willing licensee with the effect that this would exclude the possibility of seeking an injunction. Such a state of law might have the negative effect to destroy portfolio licensing and thus a system that appears to have worked fine and to the advantage of all parties involved.

<sup>17</sup> It is well-known that injunction proceedings may take very long time, often up to 2-3 years.

<sup>18</sup> For instance, by insisting on taking licenses on a patent-by-patent basis and then only after having litigated each patent all the way.



Furthermore, under the Commission's approach of finding abuse where a SEP holder who has given a FRAND commitment seeks an injunction in a situation where the two parties cannot agree on the royalty (for example where the potential licensee simply does not accept the FRAND price requested by the patent holder), one risks creating the opposite situation where the SEP holder finds himself forced to accept a lower royalty than the FRAND royalty he demanded, simply to avoid the risk of having the Commission make a finding of abuse, impose a fine and thus punish him.<sup>19</sup>

It is often argued that a SEP holder should in general refrain from seeking injunctions because he may obtain compensation for the use of the SEP, if necessary, by bringing a normal case for damages before the relevant court. This is not a convincing line of argument: first, because it results in compensation for past use and does not concern future use; second, because it would force the patent holder to bring successive court actions if the infringing implementer does not stop the illegal use of the patent; and third, because it simply misses the point that nobody should have to accept that an illegal use of the patent can go on and on. The illegal use is in reality a form of theft and the courts are there to protect owners against such theft.

The Commission, which—with its approach taken in the recent decisions—has created unwarranted one-sided barriers for SEP holders' access to have their cases examined by national courts, should generally leave this type of case to national courts which are used to dealing with patent litigation and which are—as I said—both competent and obliged to apply Article 102 TFEU if the circumstances of the case and the pleas in law lead to it.

### III. THE ABUSE OF DOMINANCE QUESTION

Let me then, finally, address the question of whether going to court to seek a solution to litigation between two parties may constitute an abuse of dominance. The Commission has said yes and relies in this regard on former judgments of the EU courts relating to refusal to deal, including cases such as *Magill*,<sup>20</sup> *IMS Health*,<sup>21</sup> and *Microsoft*,<sup>22</sup> in which the courts found that in **exceptional circumstances** an IP right holder may be under an obligation to grant a license. These cases did not, however, regard the question of whether going to court in itself may constitute an abuse. Furthermore, they did not at all concern the type of situation dealt with above concerning SEPs and contractual FRAND commitments where the SEP holder has already promised in a legally binding way to license the technology.

As mentioned above, the questions in SEP- and FRAND-related cases concern, in principle, only two things: Has the SEP holder complied with his FRAND commitment by having offered what is FRAND in the given case? Is the other party in reality a willing licensee? If the price requested by the SEP holder is found to be FRAND, even if at the higher end of the FRAND range, and the potential licensee refuses to pay that price, is it then legally an abuse for the SEP holder to seek or enforce an injunction?

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<sup>19</sup> This might have further consequences with regard to previously granted licenses.

<sup>20</sup> *Joined Cases 76, 77 and 91/89 R - Magill TV Guide/ITP, BBC and RTE*

<sup>21</sup> *Case C-418/01 - IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG*

<sup>22</sup> *Case T-201/04 - Microsoft Corp. v European Commission*

The General Court has dealt with this very question of whether seeking an injunction may constitute an abuse in its judgments in *ITT Promedia*<sup>23</sup> and *Protégé International*.<sup>24</sup> In these cases the General Court found that, in order for this to constitute an abuse, two cumulative conditions must be met. First, it must be the case that the action by the dominant firm cannot reasonably be considered as an attempt to establish its rights and second, that the action was conceived within the framework of a plan whose goal was to eliminate competition.

The Court stressed that as the right to assert one's rights in court and subject them to judicial control is a fundamental right, it can only be in "wholly exceptional circumstances" that the bringing of proceedings before a court may constitute an abuse of dominance, and it stressed that the two criteria must be construed and applied strictly. It is difficult to see how the decisions by the Commission fulfill these two criteria.<sup>25</sup> It is, of course, as already mentioned, the case that neither of these two judgments by the General Court concerned the SEP and FRAND scenario. The decisive element of the two court cases was, however, **that the applicant tried to seek protection for his rights**, just as the SEP holder tries to seek protection for his rights if an unwilling licensee either starts or continues to use a SEP without paying the royalty demanded, provided that the royalty asked for by the SEP holder could reasonably be considered to be FRAND.

#### IV. CONCLUSION

Instead of having this kind of commercial dispute being handled by the Commission under Article 102 TFEU, I believe that it is best left to national courts. This dispute is, in principle and at the heart of it, nothing more than specific and concrete litigation between two private parties regarding the price for a product. A SEP holder should not be put in a situation where he must seriously consider the risk of fines for abuse of dominance just because he does not accept the lower royalty rate acceptable to the potential licensee who may perhaps be called a willing licensee, but only on his own terms, and where the rate may be either sub-FRAND or at the bottom or lower end of the FRAND range as opposed to the high end FRAND terms requested by the SEP holder.

The national courts dealing with such cases are better placed to decide whether an application for injunctions should, exceptionally and under the specific circumstances of an individual case, be considered abusive or not.

It should furthermore, and finally, be mentioned that the approach adopted by the Commission in these cases must give rise to concerns of a more constitutional nature. It is, in democratic countries based on the rule of law, a basic and fundamental principle, which follows from the generally accepted principle of separation of state powers, that neither parliament nor government may interfere in cases brought before the national courts. It is not for those state organs to prosecute and punish citizens for seeking protection for their rights before the courts. Starting competition law infringement proceedings against an undertaking which has brought a

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<sup>23</sup> Case T-111/96 - *ITT Promedia NV v Commission of the European Communities*

<sup>24</sup> Case T-119/09 - *Protégé International Ltd v European Commission*

<sup>25</sup> The *Samsung* decision is a commitment decision that will probably not be brought before the General Court and, according to the press, the *Motorola* decision will not be appealed.

case before a national judge, simply for doing so, seems hardly compatible with the duty to respect the fundamental principle of right of access to courts and non-interference in that regard by administrative bodies.