Group to retain voting shares of Charlevoix First Corporation, and thereby indirectly retain voting shares of Charlevoix State Bank, both in Charlevoix, Michigan.

B. Federal Reserve Bank of St. Louis (Yvonne Sparks, Community Development Officer) P.O. Box 442, St. Louis, Missouri 63166–2034:

1. Thomas H. Brouster, Sr., St. Louis, Missouri, acting individually, and in concert with a control group which consists of Thomas H. Brouster Trust TTE; Thomas H. Brouster Family Trust and Meredith E. Brouster Trust; Brouster & Associates, LLC; Thomas H. Brouster Consulting Pension Trust; and Thomas H. Brouster Consulting Pension Trust II; Lawrence P. Keeley, Jr.; Allan D. Ivie, IV; Allan D. Ivie, IV Self Directed IRA; David Sindelar, all of St. Louis, Missouri; Gaines S. Dittrich Self Directed IRA; Gaines S. Dittrich, Trustee Of The Gaines S. Dittrich Revocable Trust dated May 6, 1997, as amended; and Dittrich & Associates, all of Rogers, Arkansas; Robert M. Cox, Jr., Frontenac, Missouri; Dr. Richard M. Demko, Chesterfield, Missouri; Scott A. Sachtleben, Belleville, Illinois; Robert K. Jakel Living Trust; Robert Jakel Trustee; Eric K. Jakel as trustee of the Eric K. Jakel Living Trust u/a dated 6/6/85, all of Highland, Illinois; Sterling K. Jakel Living Trust dated 5/3/85, Sterling Jakel Trustee, Naples, Florida; Otto K. Jakel Living Trust dated 11/26/91; Otto K. Jakel Trustee, all of Clarmont, Georgia; Gordon Jakel, Scottsdale, Arizona; John W. Bradley Revocable Living Trust dated 2/19/92; John B. Bradley Revocable Living Trust dated 12/12/07; John Bradley, Trustee, all of Kirkwood, Missouri; and Ned Stanley, Ladue, Missouri; to acquire voting shares of Reliance Bancshares, Inc., Des Peres, Missouri, and thereby indirectly acquire voting shares of Reliance Bank, St. Louis, Missouri.

2. Stephen Wellington, Jr., Saint Paul, Minnesota; to acquire voting shares of Platinum Holdings, Inc., and thereby indirectly acquire voting shares of Drake Bank, both in Saint Paul, Minnesota.

3. Robert Bosch GmbH; Analysis of Agreement Containing Consent Orders To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent draft complaint and the terms of the consent order—embodied in the consent order.

DATES: Comments must be received on or before December 26, 2012.

ADDRESSES: Interested parties may file a comment at https://ftcpublic.commentworks.com/ftc/boschspxconsent online or on paper, by following the instructions in the Request for Comment part of the SUPPLEMENTARY INFORMATION section below. Write “Bosch, File No. 121 0081” on your comment and file your comment online at https://ftcpublic.commentworks.com/ftc/boschspxconsent by following the instructions on the web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Mergers Policy Division, 600 Pennsylvania Avenue, NW, Room 6027, Washington, DC 20580. In addition, you may submit your comments in writing by mail or hand delivery, or by facsimile to (202) 326-2706. Comments must be received on or before December 26, 2012.
I. Introduction

The Federal Trade Commission ("Commission") has accepted from Robert Bosch GmbH ("Bosch"), subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement"), which is designed to remedy the anticompetitive effects resulting from Bosch's acquisition of SPX Service Solutions U.S. LLC ("SPX Service Solutions") from SPX Corporation ("SPX") and to remedy anticompetitive conduct by SPX in violation of Section 5 of the FTC Act. Under the terms of the Consent Agreement, Bosch is required to (1) divest its air conditioning recycling, recovery, and recharge ("ACRRR") business, including RTI Technologies, Inc. ("RTI"), to Mahle Clevite, Inc. ("Mahle") by December 31, 2012; (2) terminate agreements with any persons that limit the ability of SPX's competitors, including Bosch, from advertising, servicing, distributing, or selling any ACRRR product in the U.S. market; and (3) make available for licensing certain patents which may be used in the implementation of two industry standards established by SAE International, an industry association responsible for setting standards for products so that they comply with regulations of the U.S. Environmental Protection Agency ("EPA"). The Consent Agreement has been placed on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement, modify it, or make it final.

II. The Parties

Bosch, headquartered in Stuttgart, Germany and with U.S. operations based in Broadview, Illinois, is a global supplier of automotive and industrial technology, consumer goods, and building technology. North American sales represent 18% of Bosch's...
revenues, and Automotive Technology is Bosch’s largest business sector in North America. Bosch is the second leading U.S. supplier of ACRRR equipment. It acquired RTI in 2010, and sells ACRRR equipment under both the Bosch and RTI brand, which account for approximately 10% of the U.S. ACRRR market.

Headquartered in Warren, Michigan, SPX is a diversified global supplier of highly engineered products for the following industries: power and energy, food and beverage, vehicle and transit, infrastructure and industrial processes. SPX’s Service Solutions business is a global supplier of automotive tools, equipment and services, for both original equipment manufacturers ("OEMs") and aftermarket repair shops and technicians. SPX’s Robinair brand is the leading supplier of ACRRR equipment in the United States, accounting for over 80% of sales in that market.

III. The Product and Structure of the Market

Bosch’s proposed acquisition of SPX Service Solutions would create a virtual monopoly in the ACRRR market. ACRRR devices are stand-alone pieces of equipment used by automotive technicians to remove refrigerant from a vehicle’s on-board air conditioning system, store the refrigerant while the air conditioning system is being serviced, and recycle the refrigerant back into the system, adding more as necessary. These tools are required to repair or service motor vehicle air conditioning systems because no other equipment performs the removal, recycling, and recharging functions while staying compliant with EPA regulations prohibiting refrigerant from escaping into the atmosphere. Devices that only extract refrigerant from air conditioning systems but do not recycle or recharge them are not cost-effective alternatives because they do not store or dispose of extracted refrigerant as required. As a result, if the price of ACRRR equipment were to increase 5–10%, customers would not switch to extraction-only equipment or to equipment that flushes other fluids from vehicles, which cannot be used in its place.

The relevant geographic area in which to evaluate the market for ACRRR equipment is the United States. Environmental regulations vary by country, so ACRRR machines designed to adhere to the regulations of one country are not necessarily compatible with those of other countries. In addition, differing electrical power specifications across the world necessitate that the internal pumps and motors vary to meet differing specification. As a result, purchasers in the United States could not turn to suppliers in other countries for ACRRR equipment.

SPX’s Robinair brand holds a dominant position in the ACRRR market, with a share of over 80%. Bosch’s RTI and Bosch brands comprise approximately 10% of the market and are Robinair’s most significant competition. Four other firms selling ACRRR equipment in the U.S. together account for the balance of ACRRR sales. Thus, the combination of Bosch and SPX would confer a virtual monopoly position on Bosch. The elimination of the direct competition between Robinair and Bosch would allow the combined entity to exercise market power by unilaterally increasing price, slowing innovation, or lowering its levels of service.

IV. Entry

Entry into the ACRRR market sufficient to deter the anticompetitive effects of this transaction is unlikely to occur in the next two years. While designing and engineering a system to work effectively and meet industry standards may be possible within a relatively short time frame, other barriers, including the challenges of obtaining effective distribution and developing a service network, make successful entry very difficult.

Advertising through leading automotive wholesale distributors is the most effective means of promoting ACRRR to independent auto repair shops and rapid-turnaround repair of ACRRR equipment is critical because repair shops cannot provide air conditioning service without this equipment. Obtaining effective distribution and service networks has been especially challenging for competitors of SPX because of limitations SPX puts on distributors and service centers that sell and service Robinair-brand ACRRR.

Another factor affecting the likelihood of significant new entry or expansion is the costs associated with meeting industry standards, which are established by SAE International, formerly the Society of Automotive Engineers.

IV. Effects of the Acquisition

The proposed acquisition would cause significant anticompetitive harm to consumers in the U.S. ACRRR device market. The transaction would combine SPX’s Robinair brand ACRRR, that already commands over 80% of the market with its leading competitor, Bosch, with its Bosch- and RTI ACRRR brands, with approximately 10% of the market, creating a near-monopolist with a share of over 90%. The impact of eliminating the competition between Bosch and SPX in the ACRRR market is highly likely to result in consumers, who are automotive repair shops and technicians, paying higher prices for ACRRR devices.

V. The Consent Agreement

A. The Merger Remedy

The proposed Consent Agreement eliminates the competitive concerns raised by Bosch’s proposed acquisition of SPX Service Solutions by requiring the divestiture of Bosch’s assets relating to the manufacture and sale of ACRRR devices in the United States, including the RTI business. Bosch and SPX have agreed to sell the U.S. ACRRR assets to Mahle Clevite, Inc. ("Mahle") before December 31, 2012.

Mahle possesses the resources, industry experience, and financial viability to successfully purchase and manage the divestiture assets and continue as an effective competitor in the ACRRR market. Mahle, headquartered in Stuttgart, Germany with U.S. operations based in Farmington, Michigan, is a supplier and development partner to the automotive and engine industry. Mahle’s diverse product lines include aftermarket parts and automotive equipment sold a similar customer base as RTI. Mahle’s significant size and global presence will allow it to quickly support additional expansion in the ACRRR market and replace the loss of competition presented by Bosch’s acquisition of SPX SS.

Pursuant to the Consent Agreement, Mahle would receive all the assets necessary to operate Bosch’s current U.S. ACRRR business, including RTI’s operations in York, Pennsylvania which include the RTI manufacturing plant, current inventory, and relevant intellectual property. In addition to ensuring that current RTI employees will continue their employment with Mahle, the Consent Agreement requires Bosch to provide access to certain key employees who may be necessary to help facilitate the transition and fully establish the Bosch ACRRR business within Mahle. The Consent Agreement also requires Bosch to transfer all relevant intellectual property and all contracts and confidential business information associated with the ACRRR business. In addition, the Consent Agreement requires Bosch to license, royalty-free, certain SPX patents that may be essential to the practice of two industry standards to Mahle.
B. The Conduct Remedy

In addition, the Consent Agreement includes a provision that requires Bosch to make certain patents available to its competitors in the ACRRR market. During its merger investigation, the Commission uncovered evidence that SPX holds certain potentially standard-essential patents necessary for implementing two SAE International ACRRR industry standards, J–2788 and J–2843, which govern the operation of ACRRR machines that handle the two most common types of air conditioning refrigerant in vehicles today. SAE International adopted J–2788 and J–2843 while SPX was a member of the SAE Interior Climate Control Committee, the committee responsible for developing the standards. SAE International rules require an obligation by working group members to disclose any patents or patent applications that would be essential to the practice of a standard being developed, and to offer a license to such patents on either royalty-free or fair, reasonable, and non-discriminatory ("FRAND") terms. After the standards were adopted, SPX issued a letter of assurance to SAE International acknowledging that it held patents that were potentially essential to both standards and committing to license them under FRAND terms. Following this letter of assurance, however, SPX continued to seek previously initiated injunction actions against competitors using those patents to implement the SAE International standards.

SPX’s suit for injunctive relief against implementers of its standard essential patents constitutes a failure to license its standard-essential patents under the FRAND terms it agreed to while participating in the standard setting process, and is an unfair method of competition actionable under Section 5 of the FTC Act. Standard setting is “widely acknowledged to be one of the engines driving the modern economy.” Participants in the standard setting process rely on the licensing commitments made by patent holders during the standard setting process to protect them against patent hold-up. Patent hold-up can occur when, after an entire industry has become “locked in” to practicing a standard, a patent holder reneges on a licensing obligation and seeks to exercise the market power that accrues to a patent by virtue of being incorporated in the standard. FRAND commitments and licensing obligations, such as those at issue here, are an important way to mitigate the risk of patent hold-up, and are common in the standard setting process. Seeking injunctions against willing licensees of FRAND-encumbered standard essential patents, as SPX is alleged to have done here, is a form of FRAND evasion and can reinstate the risk of patent hold-up that FRAND commitments are intended to ameliorate. As the Commission has previously explained, “negotiation that occurs under threat of an [injunction] may be weighted heavily in favor of the patentee in a way that is in tension with the [FR]AND commitment. High switching costs combined with the threat of an [injunction] could allow a patentee to obtain unreasonable licensing terms despite its [FR]AND commitment, not because its invention is valuable, but because implementers are locked in to practicing the standard.”

Bosch has agreed in the Consent Order to resolve the violations committed by SPX. The Consent Order requires Bosch to offer a royalty-free license to all potential implementers for certain enumerated patents for the purpose of manufacturing ACRRR devices in the United States. While a royalty-free license may not be an appropriate remedy in every case involving evasion of a FRAND commitment, in this matter Bosch has chosen to license these patents to the buyer of its ACRRR business, Mahle, royalty-free, and a license to other market place participants on the same terms is necessary to ensure that the merger remedy is not inequitable in application. The Consent Order further requires Bosch to deliver to the SAE a letter of license that makes a binding, irrevocable commitment to license any additional patents that Bosch may acquire in the future that are essential to practicing the J–2788 or J–2843 standards on FRAND terms to any third party that wishes to use such patents to produce an ACRRR device for sale in the United States. Pursuant to its FRAND obligations, Bosch has agreed not seek injunctive relief against such third parties, unless the third party refuses in writing to license the patent consistent with the letter of assurance, or otherwise does not license the patent on terms that comply with the letter of assurance as determined by a process agreed upon by both parties (e.g., arbitration) or a court.

The Consent Agreement also requires that Bosch discontinue its restrictive arrangements with wholesale distributors and independent service technicians. Bosch will be prevented from enforcing any agreement that restricts a distributor or repair service provider from advertising, servicing, distributing, or selling any ACRRR product from any third party in the United States. Bosch will be prevented from entering into such agreements for ten years after the date of the Order. This provision allows entry by other competitors, and will allow the existing competitors in the ACRRR market, including Mahle, to more easily have access to leading wholesale distributors and service providers to assemble repair networks to which customers can turn after they have purchased ACRRRs.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Decision and Order or to modify its terms in any way.

Statement of the Federal Trade Commission

The Federal Trade Commission ("Commission") has voted to issue for public comment a Complaint and Order against Robert Bosch GmbH ("Bosch") designed to remedy the allegedly anticompetitive effects of Bosch’s acquisition of SPX Services ("SPX"), a division of SPX Corporation. The Commission has reason to believe that the proposed acquisition would cause significant anticompetitive harm to consumers by creating a virtual monopoly in the market for automobile air conditioning servicing equipment known as “air conditioning recycling, recovery, and recharge devices” or “ACRRRs.” The proposed Order eliminates the anticompetitive concerns raised by the proposed acquisition by requiring the divestiture of Bosch’s assets relating to the manufacture and sale of ACRRRs to Mahle Clevite, Inc. The proposed Order further requires Bosch to discontinue restrictive arrangements SPX maintained with wholesale distributors and independent service technicians.

The Complaint also alleges that, before its acquisition by Bosch, SPX reneged on a licensing commitment made to two standard-setting bodies to license its standards-essential patents ("SEPs") relating to ACRRRs on fair, reasonable and non-discriminatory terms ("FRAND") by seeking injunctions against willing licensees of those SEPs. We have reason to believe this conduct tended to impair competition in the market for these important automobile air conditioning servicing devices. To its credit, Bosch has abandoned these claims for...
injunctive relief and agreed to license the SEPs at issue.

This case is another chapter in the Commission’s longstanding commitment to safeguard the integrity of the standard-setting process. Standard setting can deliver substantial benefits to American consumers, promoting innovation, competition, and consumer choice. But standard setting also risks harm to consumers. Because standard setting often displaces the normal competitive process with the collective decision-making of competitors, preserving the integrity of the standard-setting process is central to ensuring standard setting works to the benefit of, rather than against, consumers. The Commission’s action today does just that.

As explained in the Commission’s unanimous filings before the United States International Trade Commission in June 2012, the threat of injunctive relief “in matters involving RAND-encumbered SEPs, where infringement is based on implementation of standardized technology, has the potential to cause substantial harm to U.S. competition, consumers and innovation.” By threatening to exclude standard-compliant products from the marketplace, a SEP holder can demand and realize royalty payments that reflect the investments firms make to develop and implement the standard, rather than the economic value of the technology itself. This can harm incentives to develop standard-compliant products. The threat of an injunction can also lead to excessive royalties that can be passed along to consumers in the form of higher prices.

There is increasing judicial recognition, coinciding with the view of the Commission, of the tension between offering a FRAND commitment and seeking injunctive relief. Patent holders that seek injunctive relief against willing licensees of their FRAND-encumbered SEPs should understand that in appropriate cases the Commission can and will challenge this conduct as an unfair method of competition under Section 5 of the FTC Act. Importantly, stopping this conduct using a stand-alone Section 5 unfair methods of competition claim, rather than one based on the Sherman Act, minimizes the possibility of follow-on treble damages claims. Violations of Section 5 that are not also violations of the antitrust laws do not support valid federal antitrust claims for treble damages. There is also no private right of action under Section 5, and a Section 5 action has no preclusive effect in subsequent federal court cases.

In her dissent, Commissioner Ohlhausen claims that today’s decision imposes liability on protected petitioning activity and effectively undermines the role of federal courts and the ITC in the adjudication of SEP-related disputes. We respectfully disagree. As alleged in the Complaint, SPX committed to license its SEPs on FRAND terms. In doing so, we have reason to believe SPX voluntarily gave up the right to seek an injunction against a willing licensee. Moreover, the fact that both the federal courts and the ITC have the authority to deny injunctive relief where the SEP holder has broken its FRAND commitment does not mean that this conduct is not itself a violation of Section 5 or within our reach.

We also take issue with Commissioner Ohlhausen’s suggestion that the Commission’s action “appears to lack regulatory humility.” The Commission is first and foremost a law enforcement agency, and this consent decree, like all of our unfair methods of competition enforcement actions, is a fact-specific response to a very real problem that threatens competition and consumer welfare.

Indeed, we view this action as well within our Section 5 authority. The plain language of Section 5, the relevant legislative history, and a long line of Supreme Court cases all affirm that Section 5 extends beyond the Sherman Act. Moreover, this is not a circumstance where, as Commissioner Ohlhausen contends, there are no discernible limiting principles. SPX’s failure to abide by its commitment took place in the standard-setting context. In that setting, long an arena of concern to the Commission, a breach of contract risks substantial consumer injury. The standard setting context, together with the acknowledgment that a FRAND commitment also depends on the presence of a willing licensee, appropriately limit the Commission’s enforcement policy and provide guidance to standard-setting participants.

For these reasons, we find Commissioner Ohlhausen’s analogy of SPX’s conduct to a “garden variety breach-of-contract” to be unpersuasive. While not every breach of a FRAND licensing obligation will give rise to Section 5 concerns, when such a breach tends to undermine the standard-setting process and risks harming American consumers, the public interest demands action rather than inaction from the Commission.

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4 See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500–01 (1988) (noting that “private standard-setting associations have traditionally been objects of antitrust scrutiny” because of their potential use as a means for anticompetitive agreements among competitors).


6 Id. at 3–4 (“[A] royalty negotiation that occurs under threat of an exclusion order may be weighted heavily in favor of the patentee in a way that is in tension with the RAND commitment. High switching costs combined with the threat of an exclusion order could allow a patentee to obtain unreasonable licensing terms despite its RAND commitment, not because its invention is valuable, but because implementers are locked in to practicing the standard. The resulting imbalance between the value of patented technology and the rewards for innovation may be especially acute where the exclusion order is based on a patent covering a small component of a complex multicomponent product. In these ways, the threat of an exclusion order may allow the holder of a RAND-encumbered SEP to realize royalty rates that reflect patent hold-up, rather than the value of the patent relative to alternatives, which could raise prices to consumers while undermining the standard setting process.”).

7 See, e.g., Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 885 (9th Cir. 2012) (“Implicit in such a sweeping promise is, at least arguably, a guarantee that the patent-holder will not take steps to keep would-be users from using the patented material, such as seeking an injunction, but will instead prefer licenses consistent with the commitment made.”); Apple, Inc. v. Motorola, Inc., No. 1:11-cv–08540, 2012 U.S. Dist. LEXIS 99960, at *45 (N.D. Ill, June 22, 2012) (Posner, J., sitting by designation) (“I don’t see how, given FRAND, I would be justified in enjoining Apple from infringing the ’898 [patent] unless Apple refuses to pay a royalty that meets the FRAND requirement. Why compelling them to license its patents on FRAND terms, Motorola committed to license the ’898 to anyone willing to pay a FRAND royalty and thus implicitly acknowledged the royalty is adequate compensation for a license to use that patent. How could it do otherwise?”).

8 We have no reason to believe that, in this case, a monopolization count under the Sherman Act was appropriate. However, the Commission has reserved for another day the question whether, and under what circumstances, similar conduct might also be challenged as an unfair act or practice, or as monopolization.

By direction of the Commission, Commissioner Rosch and Commissioner Ohlhausen dissenting.

Donald S. Clark,
Secretary.

Statement of Commissioner Maureen K. Ohlhausen

I voted against accepting the proposed consent agreement in this matter because I strongly dissent from those portions of the consent that relate to alleged conduct by the respondent involving standard-essential patents, or SEPs. I would not view such conduct as violating Section 5 of the FTC Act. Simply seeking injunctive relief on a patent subject to a fair, reasonable, and non-discriminatory (“FRAND”) license, without more, even if such relief were to constrain a breach of a licensing commitment, should not be deemed either an unfair method of competition or an unfair act or practice under Section 5. The enforcement policy on the seeking of injunctive relief on FRAND-encumbered SEPs that the Commission has announced today suffers from several critical defects.

First, this enforcement policy raises significant issues of jurisdictional and institutional conflict. It is simply not in the public interest to effectively oust other institutions, including the federal courts and the International Trade Commission (“ITC”) from the important and complex area of SEPs through the use of our Section 5 authority. By imposing Section 5 liability on a firm that seeks injunctive relief on its SEPs, the Commission is doing exactly that.

The FTC is not, nor should it be, the only institution acting in the SEPs space. Moreover, it is unclear how the seeking of injunctive relief, in either the courts or the ITC, on a patent—even a FRAND-encumbered SEP—would not be considered protected petitioning of the government under the Noerr-Pennington doctrine. In fact, a court recently dismissed Sherman Act and state unfair competition claims grounded on the seeking of injunctive relief in the courts and the ITC on FRAND-encumbered SEPs, holding that such conduct was protected by Noerr. Second, this enforcement policy appears to lack regulatory humility. The policy implies that our judgment on the availability of injunctive relief on FRAND-encumbered SEPs is superior to that of these other institutions. I agree that the FTC is well positioned to offer its views and to advocate on the important issue of patent hold-up using its policy tools. For that reason, I supported the Commission’s June 2012 filing with the ITC. However, as the Commission testified to Congress shortly after filing its statement with the ITC, “Federal district courts have the tools to address this issue [hold-up], by balancing equitable factors or awarding money damages, and the FTC believes that the ITC likewise has the authority under its public interest obligations to address this concern and limit the potential for hold-up.” I see no reason why this unanimous statement no longer holds.

I concur with the consent agreement reached in this matter insofar as it requires the divestiture of certain assets to remedy the Clayton Act Section 7 violation that likely would have resulted from the proposed transaction. I do have strong reservations, however, about the relatively broad fencing-in relief included in the proposed Decision and Order that requires the respondent to cancel the exclusivity provisions in its contracts with various distributors and suppliers. See Decision and Order ¶ III. Fencing-in relief that modifies contracts entered into by participants across an industry raises concerns for me about whether such relief goes beyond that which is necessary to protect the viability of the divestiture buyer and thus effectuate the legitimately pursued remedy in this matter.

I see Complaint ¶¶ 11–20, 23. See also Decision and Order ¶ IV: Analysis of Agreement Containing Consent Order to Aid Public Comment ¶ B.V.


Third, to the extent that the SEP allegations in the complaint aspire to the consent agreement reached in the Commission’s N-Data matter, I would submit that that consent is an ill-advised guidepost for this agency to use in its enforcement of Section 5 for several reasons. Most importantly, the N-Data consent fails to identify meaningful limiting principles that would govern the Commission’s use of its Section 5 authority. As former Chairman Majoras explained in her dissent, the N-Data consent was a material departure from the prior line of standard-setting organization (“SSO”) cases brought by the Commission, which were grounded in deceptive conduct in the standard-setting context that led to, or was likely to lead to, anticompetitive effects. Then-Commissioner Kovacic also dissented, objecting to, among other things, the majority’s assumption that a Section 5 action would have no spillover effects in terms of follow-on private litigation.

The SEP allegations and consent in the instant matter suffer from many of the same deficiencies as the N-Data consent. I simply do not see any meaningful limiting principles in the enforcement policy laid out in these cases. The Commission statement of the Commission, at 2 n.6. Thus, far from supporting the position that the FTC should block access to other institutions, these cases clearly demonstrate that the courts are well equipped to address issues involving injunctions on FRAND-encumbered SEPs.
emphasizes the context here (i.e., standard setting); however, it is not clear why the type of conduct that is targeted here (i.e., a breach of an allegedly implied contract term with no allegation of deception) would not be targeted by the Commission in any other context where the Commission believes consumer harm may result. If the Commission continues on the path begun in N-Data and extended here, we will be policing garden variety breach-of-contract and other business disputes between private parties. Mere breaches of FRAND commitments, including potentially the seeking of injunctions if proscribed by SSO rules, are better addressed by the relevant SSOs or by the affected parties via contract and/or patent claims resolved by the courts or through arbitration.

It is important that government strive for transparency and predictability. Before invoking Section 5 to address business conduct not already covered by the antitrust laws (other than perhaps invitations to collude), the Commission should fully articulate its views about what constitutes an unfair method of competition, including the general parameters of unfair conduct and where Section 5 overlaps and does not overlap with the antitrust laws, and how the Commission will exercise its enforcement discretion under Section 5. Otherwise, the Commission runs a serious risk of failure in the courts and a possible hostile legislative reaction, both of which have accompanied previous FTC attempts to use Section 5 more expansively.

This consent does nothing either to legitimize the creative, yet questionable application of Section 5 to these types of cases or to provide guidance to standard-setting participants or the business community at large as to what does and does not constitute a Section 5 violation. Rather, it raises more questions about what limits the majority of the Commission would place on its expansive use of Section 5 authority.

24 The instant matter also raises concerns about the Commission imposing requirements on the respondent that go beyond those it agreed to as part of the SSO at issue here, which does not appear to ban the seeking of injunctions on SEPs included in its standards. See SAE International, Technical Standards Board Governance Policy § 1.14 (Nov. 2008), available at http://www.sae.org/standardsdev/tsb/tsbpolicy.pdf. Even more troubling is the question whether the patents at issue are even standard-essential. See, e.g., Complaint ¶ 16 (“After the adoption of SAE J–2786, SPX Corporation sued certain competitors, including Bosch, for infringing patents that may be essential to the practice of SAE J–2786.”).

25 See Ethyl, 729 F.2d 128; Official Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980); Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980); Abbott Labs., 853 F. Supp. 526.

26 See William E. Kovacic & Marc Winerman, Competition Policy and the Application of Section 5 of the Federal Trade Commission Act, 76 Antitrust L.J. 929, 943 (2010) (“In the 1950s and the 1970s, Commission efforts to use Section 5 litigation to reach beyond prevailing interpretations of Sections 1 and 2 of the Sherman Act elicited strong political backlash from the Congress.”).