

European Commission guidance on competition and patents in Internet of Things

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Introduction

FRAND and SEPs

New battleground

European Commission approach

Introduction

The European Commission recently presented its guidance on standard-essential patent (SEP) licensing.⁽¹⁾ This is a particularly sensitive issue, as a clear SEP licensing regime is widely regarded to be essential for the functioning and development of the Internet of Things, which is a priority area for the European Union. In the development of the Internet of Things, a variety of different companies will need access to SEP-protected technologies (eg, WiFi and long-term evolution technology standards and 5G technology once adopted). While IT companies already have experience in SEP licensing, with the evolution of the Internet of Things more and more companies (eg, household appliance and automobile manufacturers) will also need access for the development of products.

FRAND and SEPs

So far, regulators and antitrust authorities have dealt with the question of the availability of injunctions for SEP holders and the interpretation of fair reasonable and non-discriminatory (FRAND) SEP holders' obligation to license SEPs on the basis of fair, reasonable and non-discriminatory terms. The European Commission's decisions in the abuse of dominance cases against Samsung and Motorola in 2014 and the European Court of Justice judgment in *Huawei v ZTE* in 2015 clarified the limits of SEP holders' rights to seek injunctions against implementers under EU competition law. However, these cases left a number of important issues unresolved, including what constitutes an offer on FRAND terms and how FRAND should be determined.

New battleground

The new battleground on which the European Commission was expected to provide clarity, relates to the determination of:

- the royalty base – whether it would be determined by the smallest saleable practising unit (the chip) or the end-product;
- the royalty rate – whether it would be a percentage of the end product or a flat rate (the UK *Unwired Planet v Huawei* decision provides some guidance by suggesting that "a FRAND royalty rate can be determined by making appropriate adjustments to a 'benchmark rate' primarily based upon the SEP holder's portfolio"); and
- the level of licensing in the value chain – whether it would be determined at end-company or at chipmaker level.

European Commission approach

Licensing

In its guidance, the European Commission decided to adopt a neutral stance and did not explore any of the above issues. The guidance covered the following key points with regard to licensing:

AUTHOR

[Alik Benmayor](#)



- Licensing negotiations are up to the parties depending on each case – "there is no one-size-fits-all solution to what FRAND is: what can be considered fair and reasonable differs from sector to sector and over time".
- Royalties should be determined on the basis of the value that the technology adds to the end product – the European Commission does not embrace either a smallest saleable practising unit or an end-product approach.
- There is no mention of royalty rate and level of licensing issues – these are presumably left to be agreed by the parties.
- The non-discrimination principle must be followed for "similarly situated" implementers.
- Following *Unwired Planet*, licences can be global in scope.
- Patent pools and licensing platforms within the scope of EU competition law should be encouraged. They act as one-stop-shop solutions, capable of addressing some of the common challenges identified in the paper (eg, essentiality checks and clarity on licensing fees). This area is flagged as being particularly important for the Internet of Things.

However, further intervention is not excluded – the European Commission will continue to monitor developments and assess whether further measures will be required to ensure a balanced framework for the licensing of SEPs.

Enforcement

The guidance covered the following key points with regard to enforcement:

- Patent assertion entities and non-practising entities are subject to the same rules as other SEP holders, including with regard to injunctions.
- The FRAND process requires both parties to negotiate in good faith, including by responding in a timely manner. However, injunctive relief can be sought against parties acting in bad faith.
- Proportionality is still key when it comes to injunctions:

"The proportionality assessment needs to be done carefully on a case-by-case basis. The Commission feels that considerations need to be given to the relative relevance of the disputed technology for the application in question and the potential spill-over effects of an injunction on third parties."

- Mediation and arbitration should be encouraged for swift and less costly dispute resolution.

In its guidance the European Commission has pledged to:

- enhance cooperation with stakeholders to develop methodologies (eg, sampling), which allow for efficient and effective SEP litigation, in compliance with the industry practice of portfolio licensing;
- roll-out mediation and alternative dispute resolution tools; and
- monitor the impact of patent assertion entities in Europe.

For further information on this topic please contact [Alik Benmayor](mailto:aliki.benmayor@bakermckenzie.com) at Baker McKenzie by telephone (+32 2 639 36 11) or email (aliki.benmayor@bakermckenzie.com). The Baker McKenzie website can be accessed at www.bakermckenzie.com.

Endnotes

(1) Communication from the European Commission to the European Parliament, the Council and the European Economic and Social Committee (COM 712 final, November 29 2017), "[Setting out the EU approach to Standard Essential Patents](#)".

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