

ICC REPLY TO THE EUROPEAN COMMISSION'S PUBLIC CONSULTATION ON PATENTS AND STANDARDS

DISCUSSION PAPER

Prepared by the ICC Commission on Competition

In its comments on the Commission's proposed revised Technology Transfer Block Exemption Regulation¹, ICC affirmed that it "supports a competition policy that fosters innovation and robust intellectual property protection." ICC identifies this goal as its main concern in responding to the Commission's consultation about patents and standards, and addresses below the questions seen as most important in this respect.

1.1.4 Do you consider that standardization involving patents contributes to innovation and to the uptake of new technologies?

ICC believes that standardization involving patents is a major incentive for long-term fundamental research, as long as fair compensation for licenses of standard-essential patents is ensured while hold-up is prevented. Both elements have been so far achieved through FRAND commitments made by standard-essential patent holders before standard-setting organizations. Without these two critical elements of standardization and remuneration, much fundamental research is likely to be abandoned in favor of a business model favoring short-term development to help bring already-existing technology to market.

If standard-essential patents are devalued, the following trends could also be expected:

- More technology would be retained in trade secret form.
- Mutually-incompatible proprietary solutions may become more predominant again.
- With less standardization, service providers with large "ecosystems" can implement their own proprietary solutions and require manufacturers to comply. Such companies control access to their ecosystems and thus can
 - impose severe terms for licenses to their interfaces or
 - discriminate in deciding who will obtain access.

6.1.1 Notions "fair" and "reasonable": How, in your view, should the terms "fair" and "reasonable" be understood? Which of the above methodologies do you consider particularly appropriate, which other methodologies do you find important and what could be an appropriate mix of references?

Value of a technology is determined by the market alone. This is true for both standard-essential patents ("SEPs") and non-SEPs. For SEPs, it is not practicable to focus on the "value of the technology before the standard was adopted," as this assumes a demand and a market presence for the concerned technology even before its inclusion in the standard – an unrealistic assumption at

¹ "ICC's comments on DG COMP's Draft proposal for a revised block exemption for technology transfer agreements and for revised guidelines," 23 May 2013.

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least in the ICT context. An incremental value approach is based on the assumption that the rejected technology continues to compete with the included technology and that the two can be compared, an equally unrealistic assumption. Rather, the determination of “fair and reasonable” or “reasonable” royalties should start from reliable benchmarks such as existing license agreements concluded by patent holder with third parties in respect of the same or comparable technology.

6.1.5 Other methods of ensuring reasonableness of licensing terms and conditions: Can patent pool prices for a given standard be a proxy for FRAND terms and conditions? What are the limits of the use of patent pools as a proxy? How can bias coming from such a method be avoided?

The decision to join a patent pool is determined by a multitude of factors, including evidently the patent holder's business and licensing model in respect of the technology concerned. For instance, a patent holder may choose to enter a patent pool and accept a miniscule royalty rate in exchange for business opportunities generated by the proliferation of the pool technology. Therefore, the pool rates have very limited value as a reference. It would be especially inappropriate and unfair to apply the pool rate to patents relating to the same technology but not voluntarily submitted to the pool, or to patents covering a different technology.

6.2.1 Existing guidance: To your knowledge, what guidance on FRAND definition already exists (regulators, standard setting organizations, courts)? Which of this guidance do you consider as particularly useful? Would you welcome additional guidance? If so, on what specific aspects of FRAND?

(F)RAND license terms should be determined by bilateral negotiations of the parties closest to the facts; in case of dispute, by courts or arbitrators. Regulators and standard setting organizations should not attempt to codify existing court decisions, especially when they do not yield clear and binding case law, albeit that some principles are becoming clearer.

7.2.2 Target areas: Which situations/external factors render an alternative dispute resolution mechanism particularly useful? In what areas of patent based standardization would ADR be particularly useful?

ADR is likely to be most useful where the dispute involves a multitude of patents and spans several jurisdictions - both factors are characteristic of patent disputes in the ICT industry. Most national courts would decline jurisdiction to determine infringement of, or set royalty rates for, foreign patents, leading to costly patent-per-patent, country-by-country serial and parallel litigation.

7.2.3 Suitable forms of ADR: What form of ADR (mediation, arbitration, other) do you consider suitable for what type of conflict?

Arbitration will be necessary to ultimately resolve disputes, but could be preceded by mediation of limited duration.

7.2.4 Benefits of ADR: What are the benefits of alternative dispute mechanisms applied to SEP disputes respectively for patent holders and/or patent users? What are the most important conditions to ensure that these benefits materialize?

Patent holders will benefit from timely setting of a royalty rate while avoiding expensive litigation; patent users will quickly secure legal certainty and freedom to operate, avoiding lengthy litigation that could severely disrupt their operations and strain customer relations. Patent users, too, would save in litigation costs.

8.1 What needs to be done to ensure that holders of standard essential patents have effective means of obtaining appropriate remuneration for their patents and to defend themselves against implementers who are unwilling to pay royalties or who delay payment of such royalties?

It can be questioned whether it is a good development that some competition law authorities have formally decided they have the power under competition law to regulate the behavior of those companies involved in the standardization process. ICC understands that the exercise of such power (apart from enforcement against cartels) is driven by complaints. But competition law does not seem ideally suited to resolve what are essentially commercial and patent law disputes over the extent to which injunctions are appropriate when a licensee of a standard-essential patent does not appear willing to pay a reasonable royalty, or the meaning of a FRAND royalty rate.

At least it has become clear that a real market analysis has to be made before competition law may be invoked from the Advocate General's opinion. "I share the view ... that the fact that an undertaking owns a SEP does not necessarily mean that it holds a dominant position within the meaning of Article 102 TFEU, and that it is for the national court to determine, on a case-by-case basis, whether that is indeed the situation." Advocate General's opinion, *Huawei v. ZTE*, Case C-170/13 (20 Nov. 2014), paragraph 57. In other words, the key question of whether a SEP-holder, or for that matter any patent-holder, is dominant, must be considered seriously before an agency or a court even has the power to intervene in a dispute using competition law powers.

The concern about competition law overreaching into the domain of patent and contract law is not an abstract one. Initially, the investigative resources of competition agencies seemed to be readily engaged by complainants who had disputes with SEP holders. "Unwilling licensees" may have anticipated a potential new legal shield in persuading agencies to launch competition law investigations or approve policies restricting injunctions, as some competition authorities seemed sympathetic. Yet, there was no convincing evidence that such disputes cannot be handled adequately by patent and civil courts or by ADR (see above).

Fortunately, this tactic has begun to be confronted by pushback. Prominent commentators questioned the need for antitrust initiatives limiting injunctions:

“First, antitrust sanctions are not necessary, given the law of contracts and of injunctions, to avoid harm to consumers and, second, the application of antitrust law in this situation could, by undermining the ability of courts to tailor appropriate remedies, diminish the incentives for companies to innovate and for industries to adopt standards.”

D. Ginsburg [Senior Judge, U.S. Court of Appeals], T. Owings, J. Wright [Commissioner, U.S. Federal Trade Commission], “The Case Against Antitrust Liability for Standard Essential Patent Holders Who Seek Injunctions,” The Antitrust Source (ABA Oct. 2014).

ICC applauds the policy adopted by the European Commission: “SEP-based injunctions should be available when there is an unwilling licensee.” Motorola/Samsung Memo, 29 April 2014. It appears that the Advocate General agreed with this policy in his opinion. Huawei v. ZTE, paragraph 50. EU competition law formally recognizes that the possibility of an injunction may be needed to balance the negotiation power between a FRAND-compliant SEP-holder and an “unwilling” – sometimes a more apt term is “bullying” – licensee. Without this possibility, efforts to obtain compensation are likely to be futile and the incentive for innovation will wither away.

With the adoption by the EU of a balanced policy toward injunctions under competition law, injunctions should no longer be at risk as the remedy which offers SEP holders ultimate assurance of receiving fair compensation. However, ICC believes ongoing efforts by some unwilling licensees to make this remedy toothless must be closely monitored and rejected by the competition authorities and the courts.

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