The regulation of standard-essential patents (SEPs) has increasingly attracted the attention of policymakers in recent years. This includes the European Commission, which institutes multiple projects to profoundly review the European Union’s SEP and competition law framework. Some of these EU projects are still in the making, with the next public consultations coming up in early 2022.

EU review has been undertaken mainly for two reasons. The first is that the European Commission is responsible for the enforcement of European competition law. It is this set of rules that prohibits the abuse of a dominant market position in the European Union and, at least from an EU perspective, also obligates SEP holders to offer licenses on fair, reasonable and non-discriminatory terms (F/RAND terms). The second reason is the European Union’s goal to act as an international norm-setter in intellectual property (IP) protection.

In November 2017, the European Commission published an EU approach to standard-essential patents as part of its “IP Package.” The aim was to provide a clearer framework to incentivize and facilitate access to the key technologies enabling interconnection and connectivity.

These relatively narrow targets were made more concrete in November 2020 with the release of the “Intellectual Property Action Plan.” This plan sought to support the European creative and innovative industry sector in remaining a global leader. In the area of SEPs, the European Commission’s objective was to reduce friction and litigation between SEP holders and users by relying on potential regulatory reforms—in addition to industry-led initiatives—to clarify and improve the framework for SEP enrollment, licensing and enforcement. By providing incentives for good faith negotiations, the European Commission tried to reconcile the interests of SEP holders, standard development organizations (SDOs) and users of SEP-protected technologies.

In January 2021, the European Commission’s Group of Experts on Licensing and Valuation of SEPs published its contributions to the debate. This group, which consists of scholars, judges and stakeholders, proposed, inter alia, a number of principles for licensing SEPs, namely licensing at a single level of the value chain, a single F/RAND royalty, passing on F/RAND royalties downstream and establishing licensee negotiation groups. The European Commission’s next step in terms of a new framework for standard-essential patents is a public online consultation to be held in the first quarter of 2022.
Ahead of that event, on 2 February 2022, the European Commission presented its new Standardization Strategy, as well as a draft law amending EU Regulation No 1025/2012, with the aim of ensuring a balanced stakeholder representation within European SDOs and addressing the issue of agility and governance in the European standardization system. This strategy and the draft law highlight the European Union’s priority to defend its key position as a global standardization policymaker.

The EU Regulation of SEPs is also affected by the review of the EU Horizontal Block Exemption Regulation, which defines certain research and development (R&D) and specialization agreements that can be considered beneficial to public welfare and are therefore permitted under competition rules, and the EU Horizontal Guidelines, which set out a methodology for analyzing benefits and anticompetitive effects of horizontal cooperation. The evaluation phase of that review was completed with the publication of a “Staff Working Document” by the European Commission in May 2021. The evaluation established that the Horizontal Guidelines are overall a useful instrument for increasing legal certainty. Nevertheless, certain provisions were identified as lacking desired clarity regarding F/RAND licensing terms. The impact assessment phase, the second phase of that review, took place from July to October 2021. At this stage, the European Commission asked for stakeholders’ views on various policy options. The responses showed diverging views. SEP holders are concerned about potential anticompetitive effects of licensee negotiation groups that allow implementers to coordinate during licensing negotiations. SEP holders are also concerned that the new regulation may impose additional duties regarding disclosure and transparency towards SDOs. In an SEP holder’s worst-case scenario, a court could declare SEPs unenforceable if the patent holder does not fulfill its disclosure obligations in a timely manner.

Practice Note: Stakeholders should closely follow the European Commission’s next steps in reviewing the Horizontal Guidelines. There are signs of a stricter approach in European competition policy towards dominant positions in high-tech markets. Reaffirming the European Union’s already strict approach, in December 2021 the European Union launched a dialogue with the United States on a reorientation of competition policy in the technology sector, which revealed that the United States may return to an approach that is more open to considering competition law concerns and curbing potential abuse by SEP holders. Another indicator pointing towards a stricter European competition policy for high-tech industries is the legislative proposal for an EU Digital Markets Act, which targets large online platforms. This proposal by the European Commission is similar to the Intellectual Property Action Plan not only because of the date of publishing (end of 2020), but also because of its aim to ensure fair and open digital markets.

The current projects to review the EU framework on SEPs are broadly in line with policy review schedules in other jurisdictions. In the United States, a public consultation on a policy statement regarding the licensing for SEPs just ended on 4 February 2022. Similar consultations are also underway in the United Kingdom, where consultations on whether the SEP ecosystem is functioning efficiently is expected to be completed by 1 March 2022. The Japan Patent Office is also planning to update its SEP negotiation guide in 2022.

© 2023 McDermott Will & Emery

National Law Review, Volumess XII, Number 41

Source URL: https://www.natlawreview.com/article/net-tightening-european-sep-regulation