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## International reports



### Injunctive relief for smartphone SEP holders: patent protection on hold?

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In a high-profile case, the European Commission initiated proceedings against Samsung Electronics and Motorola Mobility Inc on the grounds that the act of seeking injunctive relief against Apple and Microsoft, respectively, in various member states for infringements of mobile phone standards-essential patents (SEPs) amounts to a breach of antitrust rules.

SEPs protect a technology which is essential for the implementation of an industry standard developed by a standards-setting organisation. It is technically not possible to make a standard-compliant product without using the technology protected by the SEP.

The European Commission's concerns relate to the potential misuse of IP rights in the standardisation context in a way that could distort licensing negotiations and impose unjustified licensing terms on patent licensees. In its statement of objections, the European Commission hinted that the use of injunctive relief could result in an imbalance of power between the two parties.

In information and communication technology-based industries, it is crucial that the standard and its embedded patented technology remain accessible to all interested parties in order to ensure the compatibility and interoperability of products. Notwithstanding its acknowledgement of recourse to injunctive relief in general cases of patent infringement, the European Commission argued that SEP holders engaged in fair, reasonable and non-discriminatory (FRAND) licensing and facing a willing counterparty should not be able to resort to injunctions.

Such concerns are legitimate to a certain extent, particularly taking into account the fact that technology giants deploy intellectual property as a strategic weapon in their attempts to prevail in the ongoing patent wars. However, given the opacity surrounding allegations of breach of antitrust rules/abuse of dominance, the meaning of FRAND and the definition of a 'willing' licensee, the European Commission's statements raise some serious concerns.

The fact that SEP holders can be deprived of the prerogative to seek remedy against violations of their rights seems puzzling; in principle, injunctions act as a temporary (pre-trial interim injunction) or permanent (final injunction at full trial) remedy to rights holders whose IP rights have been infringed.

On the one hand, injunctive relief as a remedy against patent infringement is protected at a European and international level (EU Directive 2004/84/EC, the Agreement on Trade-Related Aspects of IP Rights and the Agreement on the EU Unified Patent Court). On the other, an overview of the IP rights policy of a standards-setting organisation leads to the conclusion that by committing to FRAND terms, a patent holder does not renounce the right to seek injunctive relief against patent infringement. The general principles of both continental and common law require that any waiver of rights be explicitly affirmed.

The question of whether it is within the national courts' competence to adjudicate on granting injunctive relief seems almost inevitable. In most cases, courts tend to deny injunctions when patentees seek to block competitors from using SEPs. National judges are highly experienced and well equipped to weigh the facts and decide on a case-by-case basis, particularly in jurisdictions that have enjoyed a monopoly over smartphone patent litigation. Further, the general principles under which injunctive relief can be granted are set by the national legislature. In Greece, a patentee is entitled to an injunction safeguarding its rights only if it establishes that the injunction is needed to prevent an imminent risk.

Recently Samsung, as part of its commitments to address the European Commission's concerns, offered to abstain from seeking injunctions for mobile SEPs for a five-year period against any company that agrees to a particular licensing framework.

A decision of the European Court of Justice on a preliminary reference by the Dusseldorf Regional Court concerning the availability of remedies to SEP holders in the context of a patent infringement lawsuit filed by Huawei against ZTE is highly anticipated. As the court's ruling is binding, its decision is expected to affect all future developments in the smartphone patent wars.



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