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“THE ROLE OF STANDARD DEVELOPMENT ORGANIZATIONS IN PREVENTING COMPETITION LAW INFRINGEMENTS”

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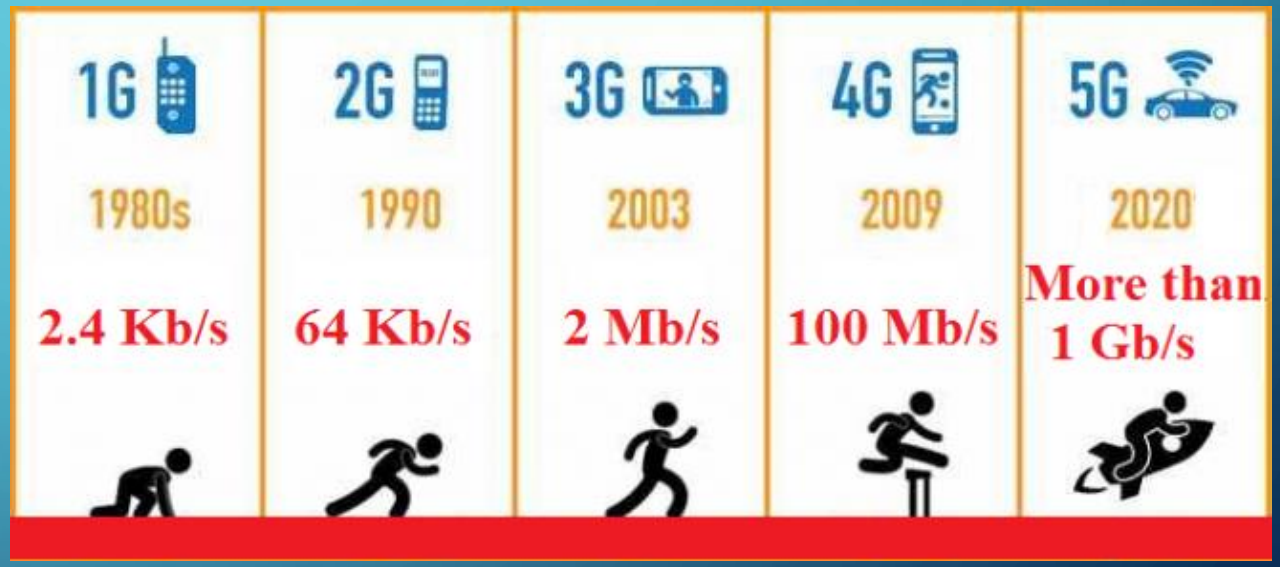
WHAT IS STANDARDISATION?

- SDOs define technical or quality requirements with which products, production processes, services or methods may comply

WHY STANDARDIZATION?

- Interoperability
- Internationalisation
- Reduce duplication of R&D
- Incentive to innovate



COMPETITION LAW AND STANDARD ESSENTIAL PATENTS (SEP)

- Declarations of essentiality and FRAND commitments

- SEP holder dominant under article 102 TFEU when certain conditions are met:

  European Commission, Motorola (Case Number AT. 39985)[2014], paras 225-226

- Guidance provided by the Court of Justice.

  CJEU, Huawei v. ZTE, C-170/13, 16 July 2015.

ISSUES IN THE 5G AND IOT INDUSTRY SEGMENTS

- Discussion between SEP-owners and technology users on the notion of FRAND
- Risk of delay in the uptake of 5G and the Internet of Things
- Political pressure to overcome the issue

EC COMMUNICATION "SETTING OUT THE EU APPROACH TO STANDARD ESSENTIAL PATENTS"

- Three proposals to enable SDOs facilitating negotiations and preventing competition law infringements:

1. Improving transparency of SDO databases
2. Turning SDO databases into licensing portals
3. Introducing essentiality checks at SDO level

1. IMPROVING TRANSPARENCY OF SDO DATABASES

- More user friendly interfaces.
- Easily searchable information.
- Update of data formats.
- Elimination of duplication.
- Links to patent office databases.

- More transparent databases may facilitate negotiations and reduce patent ambush risks

2. TURNING SDO DATABASES INTO LICENSING PORTALS

- Databases cannot be turned into licensing portals aimed at providing a universal definition of FRAND

- SDOs should focus on standardization and not on defining FRAND terms

- **ETSI Antitrust Compliance Guidelines**
  - “any discussion and/or negotiation of any licensing terms, including any price term, shall not be conducted in ETSI” (page 81 ETSI Directives/39)

2. TURNING SDO DATABASES INTO LICENSING PORTALS

- **EC November 2017 Communication**
  - “there is no one-size-fit-all solution to what FRAND is: what can be considered fair and reasonable differs from sector to sector and over time”.
  - “parties to a SEP licensing agreement, negotiating in good faith, are in the best position to determine the FRAND terms most appropriate to their specific situation”.

2. TURNING SDO DATABASES INTO LICENSING PORTALS

- **CJEU**, Huawei v. ZTE, C-170/13, 16 July 2015 is the leading case for Europe, setting out a framework for the conduct of international commercial negotiations
- **England and Wales Court of Appeal**, Unwired Planet vs. Huawei, *[2018] EWCA Civ 2344*
- **District Court, LG Düsseldorf**, 11 July 2018 – Case No. 4c O 81/17

2. TURNING SDO DATABASES INTO LICENSING PORTALS

- **EC Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements (2011/C 11/01)**
  - "Compliance with Article 101 by the standard-setting organisation does not require the SDO to verify whether licensing terms of participants fulfil the FRAND commitment. Participants will have to assess for themselves whether the licensing terms and in particular the fees they charge fulfil the FRAND commitment" (para 288).

2. TURNING SDO DATABASES INTO LICENSING PORTALS

- **What is at risk of happening?**
  - Turning SDO databases into licensing platforms aimed at providing a universal definition of FRAND may trigger concerted practises aimed at squeezing royalty fees.

- **What is at risk of being harmed?**
  - Efficiencies arising from standardisation
  - Incentive to innovate and compete for the market

3. INTRODUCING ESSENTIALITY CHECKS AT SDO LEVEL

- Issues identified by the Commission:
  - over-declarations of essentiality.
  - presumption of essentiality difficult to rebut.
  - need for a higher degree of scrutiny on essentiality by an independent party.
  - Pilot project

3. INTRODUCING ESSENTIALITY CHECKS AT SDO LEVEL

- Timely disclosure of standard-essential patents is required by competition law in order to prevent patent ambush (COMP/38.636, *Rambus*, 9 December 2009).
- Failure to timely disclose standard-essential patents within an SDO may result in relinquishing patent rights (US Federal Circuit, *Core Wireless v. Apple,* 16 August 2018, still ongoing).
- Uncertain impact of the proposed measure due to the dynamics of portfolio licensing. Many other factors considered by patent holders when setting the rates.
- Compulsory essentiality checks prior to the adoption of the standard are expensive and would harm openness of standardization at the expenses of SMEs and start-up (Horizontal Cooperation Guidelines, para 295).

3. INTRODUCING ESSENTIALITY CHECKS AT SDO LEVEL

- ETSI policy, Section 4
  - “each MEMBER shall use its reasonable endeavours, in particular during the development of a STANDARD or TECHNICAL SPECIFICATION where it participates, to inform ETSI of ESSENTIAL IPRs in a timely fashion
    - clause induced by DG COMPETITION to generate awareness of the risk of "patent ambush

3. INTRODUCING ESSENTIALITY CHECKS AT SDO LEVEL

- Essentiality checks should be performed, as it happens today, by the patent holders or patent pools after adoption of the technical standard.

- The outcome of the essentiality checks should be treated as confidential information and accessed upon execution of an NDA.

CONCLUSIONS

- Generally parties agree on FRAND licensing terms: litigation is not normal industry practise and provides a distorted view of SEP licensing.
- FRAND commitments already constrain SEP holders´ market power. Parties should define FRAND terms in bilateral negotiations.
- Entrusting SDOs with a para-commercial role would increase the antitrust risk for SDOs and endanger standardization itself.
- The development of the IoT and of the DSM will only be possible if SDOs focus on the technical merits of standardisation and refrain from accessing the commercial discussions

THANK YOU

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