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EU SEP Communication Summary and Commentary - TILEC 2nd Conference on Competition, Standardization and Innovation

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TILEC 2nd Conference on Competition, Standardization and Innovation

EU SEP Communication

Summary and Commentary

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Objectives

Two main objectives:

- **incentivising** the development and inclusion of top technologies in standards, by preserving fair and adequate return for these contributions, and
- ensuring smooth and wide dissemination of standardised technologies based on fair **access** conditions

1. Transparency of SEP Exposure

1.1 quality and accessibility of SDO SEP databases should be improved

- data should be easily accessible through user friendly interfaces
- declared information should be searchable based on the relevant standardisation projects
- eliminate duplications and other obvious flaws
- links to patent office databases, including updates of patent status, ownership and transfer
- stricter scrutiny on compliance with declaration obligations

1. Transparency of SEP Exposure

1.2.1 Information tool to Assist Licensing Negotiations

- review the relevance of declarations at the time of adoption of the final standard (and subsequent significant revisions) and when a final granting decision on the patent is taken
- should make reference to the section of the standard that is relevant to the SEP
- clearly identify a contact for the owner/licensor of the declared SEP
- Report litigation outcomes re SEPs

1. Transparency of SEP Exposure

1.2.2 Essentiality Checks

- Essentiality analysis by an independent party with technical capabilities and market recognition
- Cost containment
 - scrutiny takes place at the request of either rightholders or prospective users,
 - calibrating the depth of scrutiny,
 - limiting checks to one patent within a family and to samples,
- Implementation
 - Self-certification with transparency criteria
 - Patent offices as essentiality certifiers?

2. FRAND General Principles

“parties are best placed to arrive at a common understanding of what are fair licensing conditions and fair rates, through good faith negotiations”

2.1 Licensing and Valuation Principles

- Licensing terms have to bear a clear relationship to the economic value of the patented technology
- value should be irrespective of the market success of the product which is unrelated to the patented technology
- an individual SEP cannot be considered in isolation. Parties need to take into account a reasonable **aggregate rate** for the standard, assessing the overall added value of the technology

2. FRAND General Principles

2.2 Non-Discrimination

- Don't discriminate between implementers that are '**similarly situated**'
- Cross-licensing may be ok depending on the industry
- country-by-country licensing may not be efficient and may not be in line with a recognised commercial practice in the sector

2. FRAND General Principles

2.3 Pools can facilitate licensing and should be encouraged

2.4 Increase accessibility of experience, expertise and know-how around FRAND determination

Commission will set up an “expert group” – volunteers needed???

3. Enforcement

3.1 Follow *Huawei v. ZTE*

3.2 Observe **proportionality** under IPR Enforcement Dir.: “ensure that injunctive relief is effective, proportionate and dissuasive”

3.3 **Portfolio licenses** are ok

use “consistent methodologies, such as sampling, which allow for efficient and effective SEP dispute resolution, in compliance with the industry practice of portfolio licensing”

3.4 **ADR** is not a bad idea

-- **outcomes** of disputes should also be included in SDOs' databases [?]

3.5 **PAEs** -- subject to the same rules as any other SEP holder

4. Open Source and Standards

“pay attention to the interaction between open source community projects and SDOs processes”

EC will “fund studies to analyse complementarities, ways of interacting and differences between the two processes, and recommend solutions for smooth collaboration between the two communities”

-- Yes!