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Competition Law and Standard Essential Patents: Testing the Limits of Extra- territorial Enforcement

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The Importance of Standards

- **In the hyper-connected era, standards play an important role in rapidly developing markets which are characterized by digital technologies.** Standards can reduce transaction costs, facilitate market entry, and contribute to the dissemination of new technologies. The success of a standard, however, depends significantly on the quality of the technologies it encompasses.
- Most modern standards are created by consensus-driven ‘Standard Setting (or Development) Organizations’ (SSOs/SDOs), involving the collaboration of several different entities: firms, individuals, government agencies and academic institutions.



The Role of SSOs/SDOs

- **SSOs/SDOs' willingness to disclose and license SEPs is essential for standard implementation and its future success.** These organisations play a vital role in ensuring that concerns are minimized through proper disclosure of SEPs and fair, reasonable and non-discriminatory (FRAND) licensing commitments made by patent owners.
- **However, conflicting interests of stakeholders within SSOs may make it difficult for these organizations to provide clear guidance on these complex issues. In particular, this can happen when SEPs owners limit the use of a given technology or restrict it by imposing harsh licensing conditions.**



- At the same time, an excessive restriction of the rights of SEP owners may expose them to technology users' opportunistic behavior, such as long-term refusal to pay reasonable royalties.
- In both cases, the risk of delaying the widespread use of standardized technologies through disputes in negotiations between the parties is very high, with the main result of hampering the development of interconnected products in Europe and globally.
- Today's roundtable discussion will focus on the role of SSOs/SDOs in solving SEP-related problems, specially exploring whether these organizations may have a role in preventing competition law infringements.



The Communication published by the EU Commission on SEPs in November 2017 calls for SSOs to have a more active role in this area, in order to prevent judicial disputes between the parties.

The EU approach to SEPs in a nutshell:

- First, every SSO/SDO should establish an updated database including a detailed list of SEPs applicable to each industry standard.
- Secondly, the SEP declaration should be sufficiently detailed to clarify the exact scope of application of the patent vis-à-vis the standard.
- Finally, SEPs should be subject to a reliable scrutiny of their essentiality for a standard.



Which way forward?

- As the Communication is a soft law instrument, the question is whether any further legislative action will follow it.
- Also, is it reasonable to expect that SSOs will be able to comply with the recommendations included in the Communication?
- Have SSOs taken any steps for preventing violations of competition law?
- What measures have SSOs taken to address the risk of patent holdup?
- How did competition authorities assess the IEEE's policy revisions that were aiming at addressing the risk of patent holdup?
- Can SSOs do more on facilitating FRAND royalties quantification?



Let the discussion begin!