

Licensing Executives Society (LES) Benelux Add-On: Competition Law and Licensing Terms

FRANDness and the proposed EU SEPs Framework Regulation

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Overview

- The proposed SEPs Framework Regulation
- \$20 is a lot of money for a car
- Everything is fine, or is it – Catch 22
- *Huawei / ZTE*: in 2015, and today
- What's next?

The proposed SEPs Framework Regulation

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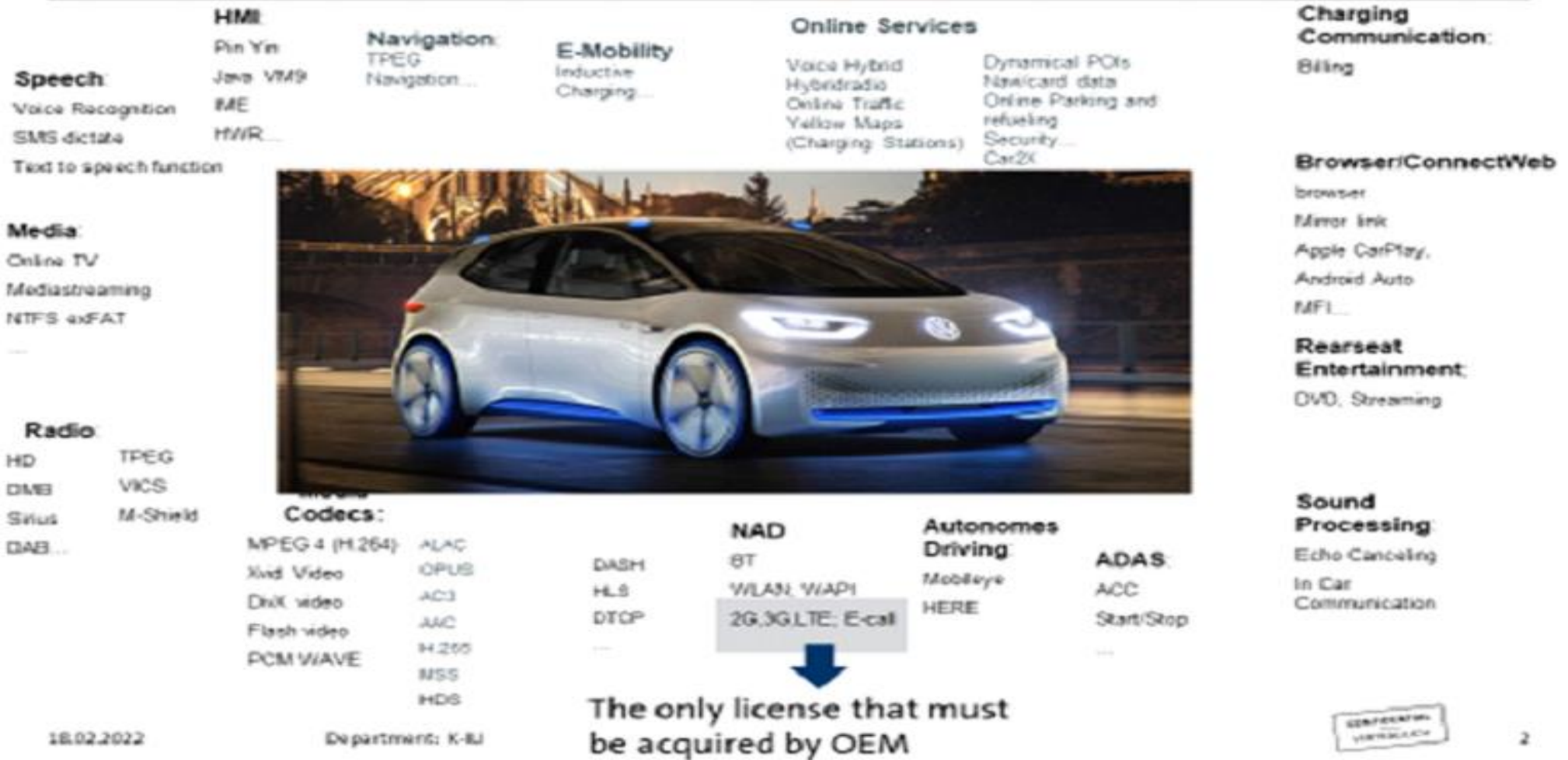
- 27 April 2023: EU Commission proposes a SEPs Framework Regulation
 - Contains registration requirements for SEPs in a database, with essentiality checks for SEPs (responsibility: SEP holders) (Art 4, 5; Art 28-33)
 - Introduces conciliation process for FRAND determination (non-binding, pre-litigation: Art 34-58), voluntary aggregate royalty determinations by experts (SEP holders, SEP implementers: Art 15-18)
 - Vested powers with the EU IPO (Intellectual Property Office, Alicante)
- Now navigating EU Parliament and Council
- Origin: 2017 Communication “EU approach to Standard Essential Patents”, and 2016 Study “Transparency, predictability, and efficiency of SSO-based standardization and SEP licensing” (Régibeau et al)
 - Feb/May 2022 call for evidence / public consultation
 - 2 Impact Assessments (Baron et al, Baron)
 - Apr/Aug 2023 adoption feedback
- The big gun: can the SEP holder injunct, or is that an Art 102 abuse?

\$20 is a lot of money for a car

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- Automobiles need connectivity, technically via a Telematics Control Unit (TCU), licensing wireless communication 3/4/5/6G
- TCU costs \$70-80
- Avanci pool: \$20 per car for a 4G license, “the price of a car wash” (3G was just “the price of a coffee”, at \$5)
- 2022: 67.2m new cars => \$1,344m royalty payments for 4G
 - That’s only for the SEPs in the Avanci pool
 - And only for one year of production
 - And only cars, no trucks, etc.
 - And no smartphones, no IoT applications, etc.
 - And no 2G, 3G, Wi-Fi, Bluetooth

And we are just talking digital



Everything is fine, or is it – Catch 22

Standardizing the digital dream

- To maximize the economic benefits of digitalization, connected applications – vehicles included – require SEPs-ensured compatibility
 - McKinsey (2015): Without formal SEP-enabled interoperability, 40% of the potential benefits of IoT systems would not be reaped
 - Régibeau et al (2016): Annual royalty payments in 2/3/4G ar. €18b
- Patent holders contribute technology for developing standards within standard setting organizations (SSOs)
 - SEP holders give a commitment (i) to license SEPs on fair, reasonable and non-discriminatory (FRAND) terms, *and* the technology included in the standard should be available (ii) to any potential user of the standard
 - Incentives – for SEP holders, to continue investing in R&D; and for net- and new-outside-ICT-sector SEP implementers (from household appliances to connected cars) to have access to patents to develop a connected society

The Catch 22

- It's all about balance
 - SEP holders claim that technology users free ride on their innovations and consciously infringe patents without engaging in good faith licensing negotiations
 - Technology users accuse SEP holders of charging excessive licensing fees based on weak patent portfolios and of using litigation (injunction) threats
- Already in 2017, the Commission found this problem to be “particularly acute” when players coming from new industrial sectors who are unfamiliar with the traditional ICT business need access to standardized technologies:
 - Disputes and delays in negotiations between technological users and holders may ultimately delay the widespread use of key standardized technologies, hampering the development of interconnected products in Europe (and thus, competitiveness)
 - Geopolitical aspects
- Or: willing, unwilling, to injunct, to abuse?

The proposed SEPs Framework Regulation (cont'd) – a no-brainer, then?

- No: intense lobbying, critique:
 - No market failure, no need to regulate (Baron; only for use cases w. direct evidence)?
 - Not apply to “well-established” use cases “such as standards for wireless communications” (Rec. 4)?
 - Retro-active application should go out (Art 1(2) jo. 66)?
 - Apply to Europe only (see Art 2(1)(1) and Art 2(1)(7), FRAND determination, aggregate royalties); but what about Art 47?
 - FRAND determination = price fixing?
 - Aggregate royalty determination for SEP implementers to be de-coupled (Art 18(6))
 - UPC (Grabinski J) says it is a denial of justice (registration, FRAND determination prior to access to court: Art 24(1), Art 34(1)(a)); or, system competition looming?
 - Doesn't sufficiently help SMEs?
- Over 1,000 amendments lodged within EU Parliament

Huawei / ZTE: in 2015, and today

Huawei / ZTE (2015)

- Proposed SEPs Framework = the regulator to the rescue
- But not after, or in spite of, the CJEU having attempted in *Huawei/ZTE (2015)* to re-balance the interests of SEP holders and SEP implementers, in 5 key steps:
 1. SEP holder announces it holds SEPs
 2. SEP implementer announces willingness to take a license (if not, SEP holder can injunct without infringing Art 102)
 3. SEP holder needs to make a FRAND offer
 4. SEP implementer does not respond or does not respond with a counter offer capable of being FRAND, the SEP holder can injunct
 5. SEP implementer responds with a counter offer capable of being FRAND, the parties seek arbitration (but no consequences if not)
- On paper: for a pretty low price (vague intentions), the SEP implementer obtains a FRAND offer – an un-balanced framework?

Huawei / ZTE reverted to Orange Book

- The (German) courts have given substance to what is required for the initial willingness declaration of the SEP implementer, favoring the SEP holder
- In reality, today:
 - The SEP implementer must confirm the initial declaration of willingness with consistent conduct throughout the negotiation. Short of that, there is no obligation on the SEP holder to make a FRAND offer, see BGH in *Sisvel/Haier II* (2020); LG Mannheim in *Nokia/Daimler* (2020); LG Mannheim in *LG/TCL* (2022)
 - Examples:
 - Raising supplier level licensing is unwilling
 - A counter-offer based on royalties calculated with reference to the purchase price of the TCU is unwilling
 - Negotiation conduct with a downstream patent pool is unwilling
 - See LG Mannheim in *Nokia/Daimler* (2020) and LG Munich in *Sharp/Daimler* (2020)

Huawei / ZTE reverted to Orange Book (cont'd)

- 9 out of 10 regional court judgments in Germany found the SEP implementer to be unwilling, with a bar as low as per the old *Orange Book* (2009) precedent
- Implication: no balance achieved, and hold-up is back, i.e., once the standard is set, and royalty negotiations take place ex-post, the SEP holder may be in a position to take advantage of the valuation Δ , both in terms of (i) the investments specific to the standard and (ii) the opportunity cost of delaying commercialization
 - See Farrell et al (2007), Lemley and Shapiro (2007) and Shapiro (2010)
- So what is FRAND? Rates negotiated before a technology became a (the) standard? And alternatives were still available?
 - See Swanson and Baumol (2005)

What's next?

What's next?

- The Keynesian way
 - EU Parliament position re the SEPs Framework Regulation before the 2024 elections, EU Council after?
 - Applicable from 2027 on?
- In parallel:
 - “Wettbewerb der Systeme” (UPC, national courts)
 - TTBER review (patent pools, LNGs) – also renewed from 2027 on
- And why didn't we (really) talk about FRAND?
 - UK Supreme Court in *Unwired Planet/Huawei* (2020), High Court in *Lenovo/InterDigital* (2023) and in *Optis/Apple* (2023)
 - Watch also developing UPC practice, China (2023 SAMR Provisions, at Art 19)

Thank you for your attention!

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