

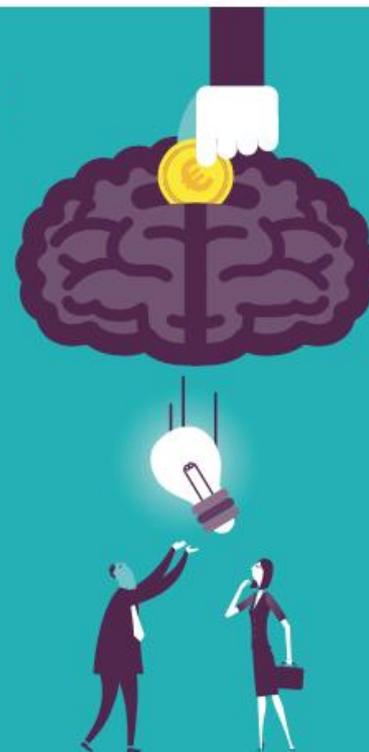


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FRAND ACCESS REGIMES IN EUROPEAN LAW

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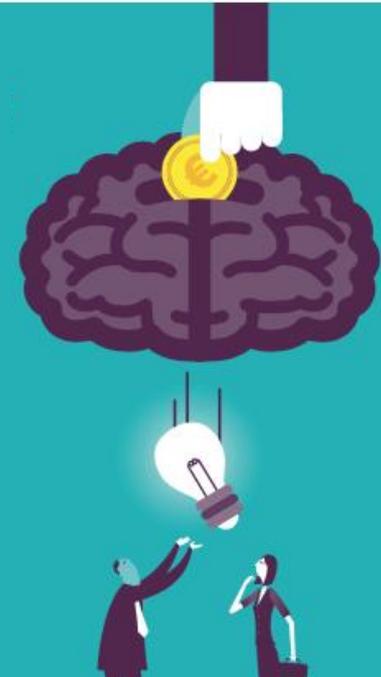


Mathew Heim works as an independent policy counsel, advising clients on managing legal, regulatory or political risks and crises, notably in competition and technology matters. His roles include Senior Adviser to 4iP Council; Visiting Research Fellow at Bruegel; Special Adviser to the OECD BIAAC Competition Committee; and Non-Governmental Adviser to the International Competition Network.



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Content, Context & Introduction



Content

- Context & Introduction
- Review:
 - Competition Policy & FRAND
 - European Regulation & FRAND
- Conclusions:
 - Nature of FRAND under European Law
- Q&As

Context for Research



- Despite 15 years of debate on **“what is FRAND?”** in the context of licensing Standard Essential Patents, no review of EU FRAND-based legislation
- DG Competition consultation on **‘dominant digital platforms’** to address tipping-point/lock-in/gate-keeper of platforms
- Digital platform debate has parallels with the SEP debate:
 - Policy discussions to on ensuring market access and contestability in complex, dynamic value chains (AI, 5G/IoT, M2M etc)
 - Focus on critical and intangible input
 - Recognition that market power is not a given
 - Recognition that compulsory licensing, break up etc. is not an option
 - Maintain incentives to invest and promote dynamic innovation upstream
 - Recognise balance between *ex post* competition intervention over *ex ante* regulatory solution

Given parallels, could an access regime based on FRAND terms be a solution?

Introduction



- Conclusions based on research paper *A FRAND Regime for Dominant Digital Platforms* by Mathew Heim & Igor Nikolic, published in the Journal of Intellectual Property, Information Technology and E-Commerce Law, 10 (2019) JIPITEC
- Legal framework reviewed:
 - EU Competition Law & Policy
 - 9 sources of EU regulation relying on a FRAND-type access regime
- Caveats on research:
 - Not an exhaustive review of EU Regulation
 - No opinion on market power regarding digital platforms
 - No attempt to apply finding given platform & data heterogeneity
 - No investigation of how individual FRAND regimes function



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EUROPEAN COMPETITION POLICY & FRAND



Competition Policy and FRAND



- **Article 102 TFEU is FRAND-based:**
 - Prohibits excessive prices
 - Promotes market access
 - Promotes innovation and just rewards
 - Promotes non-discrimination obligations (per ‘special responsibility’ of dominant firms)

Competition Policy and FRAND



- Compulsory licensing cases use FRAND to ensure access to essential input, while avoiding need for price setting by regulator
 - e.g. **Magill** (*TV listings*), **IMS Health** (*pharmaceutical sales structure*), **Microsoft** (*software*)

Magill (1988), para 27: “Accordingly the only remedy possible in the present case is to require ITP, BBC and RTE to supply **each other and third parties on request** and on a **non-discriminatory basis** with their individual advance weekly programme listings and to permit reproduction of those listings by such parties If they choose to supply and permit reproduction of the listings by means of licenses, any **royalties requested ... should be reasonable**”

Merger Policy and FRAND



- FRAND remedies in **merger** cases found across a number of European jurisdictions (and non-European)
- Applied in **diverse sectors** e.g. medical equipment, television broadcasting, payment processing, gas networks, flight search, missile systems, technology platforms and herbicides
- As relates to platforms, FRAND remedy seeks to ensure interoperability between device interfaces or communications protocols, and associated software and data management systems

Merger Policy and FRAND



- **FRAND remedies** in merger cases relating to platforms include:
 - ***Newscorp/Telepiù (2004)***: access to platform APIs on FRAND terms (“at fair, transparent, cost-oriented and non-discriminatory prices”) to 3rd parties. Measures require Newscorp to comply with FRAND rules found in the regulatory framework in Italy for pay-TV applications.
 - ***Siemens/Drägerwerk (2013)***: royalty-free FRAND commitments to ensure continued interoperability in between medical equipment platforms and hospital data management systems (including availability and maintenance of interfaces and protocols).
 - ***Worldline/Equens (2016)***: FRAND-based licensing to payment network service providers in Germany of key card and payment processing software (including source code for the Poseidon software and the ZVT protocol).

Pros & Cons



Pro: Tried-and-tested access regime

- ✓ Least intrusive remedies
- ✓ Useful where there is no regulatory framework
- ✓ Ensures that regulator need not engage in price setting
- ✓ Basing remedies on existing sector practices, including flanking measures
- ✓ Ensures a balance of interests, guaranteeing equality of arms in negotiations

Pros & Cons



Con: policy cannot be primarily driven through cases

- X Merger remedies dependent on merger filings
- X Remedies are merger-specific, not universal solutions
- X In conduct cases competition investigations are slow
- X Cases are fact-specific and should not be a vehicle for policy-making purposes
- X Remedies through commitments provide little precedential value

Competition law and 'Standardisation FRAND'



- **Huawei v ZTE (C-170/13):**
 - Court sets out licensing negotiation process that, where followed, should lead to a FRAND outcome
 - Infringers have competition law defence against a **dominant** SEP holder's request for an injunction, where SEP holder hasn't followed key steps in the negotiation
 - Infringers must also follow key negotiation steps to avail themselves of defence
- **European Commission's Horizontal Co-operation Guidelines (2011):**
 - EU competition law promotes FRAND licensing by providing a safe harbour under **Article 101 TFEU** to Standard Development Organisations that have FRAND policies
- **De facto standards:**
 - EU Microsoft PC operating system case
 - German Orange Book case

Vestager Expert Report



Expert Report ‘Competition Policy for the Digital Era’ (2019):

- Acknowledges role FRAND access in the competition context
 - Notes potentially competition duty to grant access to data e.g. through data portability, protocol interoperability etc.
 - Cost of providing interoperability could be recovered from companies benefiting from data interoperability
 - FRAND terms need to be specified case by case
 - Potentially the need to oversee that data access is granted on FRAND terms
- Competition law remedies can only complement broader policy measures



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EUROPEAN REGULATION & FRAND



Examples of EU Regulation relying on FRAND access regimes



1. EU Standardisation Regulation
2. REACH
3. European Electronic Communications Code
4. Re-use of Public Sector Information Directive
5. Horizon 2020 Research Framework Programme
6. Vehicle Emissions Regulation
7. Payment Services Directive
8. Credit Rating Agency Regulation
9. Benchmark Regulation

Breakdown



| | Focus of FRAND | Refers to 'FRAND'? | F, R, ND specified | Pricing elements? | Transparency? | Market power? |
|-----------------------------------|------------------|--------------------|--------------------|-------------------|---------------|----------------------------------|
| EU Stand'n Reg. | Patents | ✓ | | | | |
| REACH (Reg.) | Data | | ✓ | ✓ | ✓ | |
| EECC | Comms networks | ✓ | ✓ | | | ✓ Not for all FRAND instances |
| Re-Use of Public Sector Info Dir. | Information | | ✓ | | ✓ | |
| Horizon 2020 Reg. | Research results | ✓ | ✓ | ✓ | | |
| Vehicle Emissions Reg. | Data | | ✓ | ✓ | | |
| Payment Services Dir. | Data | | ND only | | | |
| Credit Rating Agcy Reg. | Data | | ✓ | ✓ | ✓ | |
| Benchmark Reg. | Data | ✓ | | | ✓ | ✓ After cartel cases |

FRAND Elements in EU Legislation



1. EU Standardisation Regulation

- FRAND regime for “*IP essential to the implementation of specifications*” to be licensed on FRAND basis, a requirement for having standards recognized as ‘technical specifications’ in EU policy
- Regulation reflecting WTO norms
- Includes at the discretion of the IPR-holder “*licensing essential intellectual property without compensation*”

FRAND Elements in EU Legislation



2. European Electronic Communications Code

- NRAs may require operators to interconnect networks & make services interoperable under
 - Objective, transparent, proportionate and non-discriminatory conditions,
 - FRAND-based access obligation
- NRAs may impose FRAND access requirements on IPR holders to manufacturers of consumer equipment
- NRAs may impose on operators with ‘significant market power’ obligations of transparency (making T&Cs public including pricing), non-discrimination or even direct price control measures for interconnection and access
- New FRAND-based interoperability requirement, to the extent necessary, between “interpersonal communication services” (e.g. social platforms) which reach a significant level of coverage and user uptake to ensure end-to-end connectivity

FRAND Elements in EU Legislation



3. Research and Innovation Framework Programme (Horizon 2020)

- Access rights for exploitation of results or to background information will be granted under FRAND conditions
- Article 2(1)(10) 'fair and reasonable conditions' means:
 - *“[A]ppropriate conditions, including possible financial terms or royalty-free conditions, taking into account the **specific circumstances** of the request for access, for example the **actual or potential value** of the results or background to which access is requested and/or the **scope, duration or other characteristics of the exploitation envisaged**”*
- Applies to all scenarios i.e. between project participants, affiliates or third parties
- EC’s Model Grant Agreements reflects language

FRAND Elements in EU Legislation



4. Credit Rating Agency Regulation

- Para 3(c) notes:
*“A credit rating agency shall ensure that fees charged to its clients for the provision of credit rating and ancillary services **are not discriminatory** and are **based on actual costs**. Fees charged for credit rating services **shall not depend on the level of the credit rating issued** by the credit rating agency or on any other result or outcome of the work performed”*

FRAND Elements in EU Legislation



5. Vehicle Emissions Regulation

- Obligations on vehicle manufacturers to enable access to vehicle repair & maintenance information, both to dealers and repairers of light passenger and commercial vehicles
- Access is on a 'ND' basis, permitting manufacturers to charge a "*reasonable and proportionate fee*" which is considered not reasonable or proportionate if it discourages access, where fee is not in proportion to the importance of the information to the user

FRAND Elements in EU Legislation



6. Re-use of Public Sector Information Directive

- Directive details FRAND-based access conditions, including reasonable remuneration, non-discriminatory access and transparency including:
 - Possibility to charge reasonable fees, *“limited to cost of collection, production, reproduction and dissemination”* given nature of public sector bodies and reasonable ROI
 - ‘ND’ requirement i.e. free exchange of information between public sector bodies when exercising public tasks, but differentiation permitted between public and non-public bodies and between commercial and non-commercial re-use
 - Conditions and charges to be transparent

FRAND Elements in EU Legislation



7. REACH

- Creates a FRAND-like access framework for entities that registered particular chemicals in order to share reports and data with potential registrants
- Parties should *“make every effort to ensure that the costs of sharing the information are determined in a fair, transparent and non-discriminatory way”*

FRAND Elements in EU Legislation



8. Payment Services Directive

- Account servicing payment service providers must allow third parties to obtain real-time data relating to customers' accounts on a Non-Discriminatory basis
- Assumption that access could be compensated under Fair & Reasonable terms

FRAND Elements in EU Legislation



9. EU Benchmarks Regulation

- Competition law context: regulation following LIBOR, EURIBOR benchmarks cartels
- Administrators of critical benchmarks to take *“adequate steps to ensure that licences of, and information relating to, the benchmark are provided to all users on a fair, reasonable, transparent and non-discriminatory basis”*



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NATURE OF FRAND UNDER EUROPEAN LAW



FRAND under EU Law



- The FRAND regime is a **general principle**; ‘FRAND’ policy needs not reflect the exact words (i.e. ‘fair, reasonable and non-discriminatory’), in that exact order, in order to achieve the same result
- FRAND access regimes are:
 - used to promote various public interests and public policy imperatives
 - applied to both private and public bodies
 - applied to regulated and unregulated sectors
 - used in Guidelines, Regulations and Directives
- The input need not be indispensable for market access and owners of the input often not possess market power (or similar notion)

FRAND Guidance under EU Law



- **Fair & Reasonable balance:**
 - REACH, European Vehicle Emissions Regulation, Re-use of PSI Directive and H2020 Regulation all provide parameters and guide points on calculating payment (“compensation”, “income”, “charge”, “financial terms”)
 - Emphasis on the balance between costs/investment & use/access and interests of the parties
- **Non-Discrimination:**
 - Re-use of PSI Directive: public sector bodies can discriminate between free access to public body fulfilling a public sector task and charged access to commercial parties
 - H2020 Regulation: permits differentiation where this can objectively be made (and it can therefore be assumed that non-discrimination is implicitly included)

FRAND Guidance under EU Law



- **Transparency:**
 - Re-use of PSI Directive: focuses on transparency of terms and conditions, including (on request) the calculation basis for the fee
 - REACH: places obligation on both holder and user of the input to find a fair and reasonable result.
 - Both mirror *Huawei v ZTE* requirements
- **Dispute Resolution:**
 - To achieve the FRAND balance, **both** parties obliged to act in good faith (expressly in REACH, *Huawei v ZTE* & implied in H2020)
 - Various forms of dispute resolution are available including the involvement of regulatory agencies, arbitration and mediation, but always preserving access to courts in the final instance

The Nature of FRAND under EU Law



- FRAND regime enables a **balanced, proportionate and pragmatic sharing of important input:**
 - ensuring broad and non-discriminatory access to the relevant input
 - being inherently flexible and business-model neutral
 - regulating legal relations e.g. through a license or similar
 - leaving detail of T&C to bilateral market-based negotiations, on recognised commercial terms, while including flanking measures for meaningful access
 - creating a level playing field between players
 - recognising the balance between ROI and access
 - creating an *ex ante* framework which competition and regulatory policy can support
 - side-stepping many regulatory difficulties e.g. treating dominant platforms' activities as essential facilities or public utilities

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Q&A

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