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Research paper summary and key messages

Report title: Lessons from Huawei v. ZTE

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Overview

This paper analyses the CJEU ruling in Huawei v ZTE. The authors explain that in practice, only an essential patent holder who starts proceedings claiming an injunction in a cavalier and egregious way is likely to breach competition law. If such a patentee has made what he reasonably considers a FRAND offer and the implementer disputes that the offer is FRAND, the patentee will be able to enforce his SEPs, unless the implementer engages in good faith with the patentee.

Points left unresolved by the Huawei decision are listed. These include how FRAND terms should be settled and what happens if both the patentee and the implementer make offers which are FRAND.

The authors conclude that the CJEU judgement is pragmatic and workable at the level of national courts and that any attempt to crystallise it in legislation would most likely be counterproductive due to the fact that issues not addressed in the judgement are best decided by national courts on a case by case basis.

Key messages

Message

The Commission's position pre-Huawei v. ZTE was unfavourable to patentees, in that it imposed a burden on patentees to prove that the implementer was an "unwilling" licensee. This approach was based on a theory of "hold-up", which assumed that if a SEP holder commenced proceedings for an injunction, the implementer, out of fear of the injunction, would agree to pay above-FRAND rates.

Proof points

This theory found expression in two EC decisions in 2014, Motorola and Samsung.

- In *Motorola*, the EC found that Motorola had abused its dominant position by seeking and enforcing an injunction against Apple based on alleged infringement of Motorola SEPs subject to a FRAND commitment.

- In *Samsung*, Samsung had sought injunctions against Apple in a number of EU Member States and the EC found that this constituted an abuse of Samsung's dominant position in circumstances where Apple was willing to negotiate a licence on FRAND terms.

Message

Huawei v. ZTE confirms that injunctions are in principle available to SEP holders, but that these may only be sought if certain conditions are met. And an implementer may in principle rely on an antitrust defence to defeat a claim by a patentee for an injunction, but may only prevail in certain circumstances.

Proof points

- Neither the Advocate General's opinion nor the CJEU judgment provides any support for the "hold-up" theory or the EC's position in *Motorola* or *Samsung*. There is no suggestion that by seeking an injunction a patentee might intimidate an implementer into agreeing to pay more than a FRAND rate; rather the CJEU was concerned about the potential exclusion of a competitor. It would now require clear evidence on the facts (not theory or speculation) before this view could be used to justify sanctions against a patentee for seeking an injunction in the courts.

Message

National courts are well equipped to work out the implications of the *Huawei* ruling in relation to the specific facts in hand.

Proof points

- German courts, for instance, followed the approach based on which an injunction could be granted unless the user made a binding offer to the SEP holder on terms that the SEP holder could not refuse. By contrast, in 2014 the EC considered an abuse of dominant position where a SEP holder threatened, sought and/or sought to enforce an injunction for a FRAND committed SEP where the implementer had expressed "*willingness to enter into a FRAND licensee*".

Message

Any attempt to crystallise the judgement in legislation would most likely be counterproductive. For the EC to issue formal guidance so soon after the *Huawei* decision could stultify the development of the law and prevent it from developing in response to new situations.

Proof points

- Any guidance would not be binding and, since it would not be based on the CJEU's case law, could not even claim any authoritative status. It would therefore need to be tested and elaborated in national courts.
- There would be a risk of setting national courts on the wrong track, if the EC's guidance failed to interpret the *Huawei* judgment correctly.

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