



**INTERNATIONAL LEAGUE  
OF COMPETITION LAW**



**Competition Law Association**  
British Group of the  
Ligue Internationale du Droit de la Concurrence  
(International League for Competition Law)

## **LIDC Conference 8 November 2024**

### **Session 4A - FRAND and the Commission's SEP Proposals**

*A solution in search of a problem, or a step forward in this traditional antitrust and IP battleground?*

**Panel:** Peter D Camesasca Ph.D. (Camesasca BVA), Sophie Lawrance (Bristows LLP), Keith Mallinson (WiseHarbor), Cordula Schumacher (Arnold Ruess)  
Chaired by Collette Rawnsley (Nokia)

#### **Technical Background**

Collette Rawnsley began the discussion with a brief background of standard essential patents (SEPs) and licences on fair, reasonable and non-discriminatory (FRAND) terms. SEPs are designed to protect technological developments that have taken years and countless resources to develop, and which are being constantly developed. Organisations compete to get their tech adopted to be the standard, and patents are important for standardisation and to provide the protection that allows companies to share their developments. For widespread adoption of these tech standards, there needs to be a balance between the rights of those contributing to and those adopting these technological developments, which is where fair, reasonable and non-discriminatory licencing comes in.

#### **Where have we got to?**

##### ***The UK Position***

Sophie Lawrance set out the position in the UK, focussing on the jurisdictional questions. She noted that there have also been a number of FRAND determinations.

- *Unwired Planet International case*
  - o The case broke new ground, and while it was not the first case for FRAND, it was the first to truly progress it.
  - o It concerned the relief to be granted from patent infringement in respect of SEPs which are subject to obligations to license on FRAND terms.
  - o The Court gave the implementor a choice, either accept a FRAND licence or be enjoined from the UK.
  - o Critically, the Court held that the FRAND licence in this case was global in scope.
  - o Although contentious, the case was upheld on appeal. The Supreme Court focused on striking an adequate balance between the patentee and the licensee.
  
- *Conversant v Huawei case*
  - o This case raised the question of what would happen where there are multiple jurisdictions involved, and it is unclear whether those jurisdictions would determine global FRAND terms.
  - o It is now clear that the China Courts will determine global licences, but it remained unclear at the time of this case.



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- A further issue has therefore been debated in the UK, namely whether a licensee is able to stipulate that it is willing to accept a FRAND licence, but to condition its acceptance upon it being a determination of a different (non-UK) authority.
  - So far the English Court has rejected this, but in one case permission had been granted prior to a settlement to appeal on this point to the Supreme Court. This therefore remains an open question.
- The panel then identified that the most recent line of case law seems to be the most controversial, involving the court considering whether it should set interim licences.

### **The Current Practice in Europe (and Germany specifically)**

Cordula Schumacher identified that within central Europe and in Germany specifically, the issue of FRAND is considered a competition law issue. They approach it in the understanding that an SEP confers a dominant position, and patent holders must not abuse that position by denying access to technology to third parties.

Through the case law, the CJEU has taken a negotiation model, wherein the implementor is informed and there is offer and counteroffer. Cordula raised the idea that the German courts adopt a “humble” approach, believing that the parties themselves are best placed to find a fair and reasonable outcome. It is this that presents the biggest difference between the European and UK approaches.

### **Are we seeing a convergence or a divergence in these approaches?**

Within the UK, the court passes opinion on what FRAND is, which is attractive to clients that want to get disputes resolved and move on swiftly. On the other hand, Germany seems entrenched in its view that FRAND is a process and not a result; it is the process of negotiation that is FRAND in itself.

### **The difficulties with the FRAND determination process**

One point that was raised by the panel is the difficulty not only in determining what the FRAND rate itself should be, but also whether other terms of the licence should be included, and what value they should be given in determining damages. Parties to litigation have completely different ideas as to what licences are comparable. Keith Mallinson stated that when it comes to valuing these licences “the devil is in the detail”.

### **The European Commission’s Proposal for Regulation**

In response to the final question posed to them, the panel identified the dispute in what the proposals actually mean and there was contention as to the ideal level of regulator involvement. Keith Mallinson expressed his strong belief that regulator involvement is a solution looking for a problem. He noted that FRAND licensing has historically been extremely successful. Further, he noted that FRAND licensing obligations generally result in a relatively small royalty being paid (only about 5% for cellular phones, for example).