

EU should restrain itself on patent framework, US experts say

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The European Commission should seek specific evidence of a market imperfection as part of its work to improve the framework for evaluating standard-essential patents, say experts at the Global Antitrust Institute.

In [comments](#) published last week, the institute warned that government agencies' issuing best practices might "unduly influence" standard-setting organisations to adopt policies that do not best meet their needs, or those of their members and the public. The GAI experts also said the commission's communication on the consultation referred to a need for better regulation, "without providing evidence of an identifiable market imperfection".

The institute, which is part of the Antonin Scalia Law School at George Mason University, responded to a [consultation](#) launched last month by the European Commission's Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs on how to create a more balanced and predictable framework for standard essential patents.

The commission said the European Court of Justice's [Huawei/ZTE](#) ruling in 2015 – which held that SEP holders cannot seek injunctions unless they first offer a licence on fair, reasonable and non-discriminatory terms – leaves "more

technical questions” on SEPs unanswered. The consultation aims to fill in the “still very incomplete” framework.

Last week, the Global Antitrust Institute said it was concerned the commission appears to see variation in intellectual property rights policies between standard-setting organisations as a potential problem that could benefit from recommendations, but different organisations may need different approaches to best meet their members’ needs.

“Indeed, uniformity is generally ill-suited to deal with dynamic sectors such as 5G technology,” the GAI experts said, adding that a single set of practices could stifle experimentation and halt the evolution of standard-setting organisations’ intellectual property policies.

They noted that the Institute of Electrical and Electronics Engineers’s revision of its by-laws to fit US Department of Justice recommendations in 2015 led to a slowdown in the development of its 802.11ah WiFi standard, and said empirical evidence shows that organisations’ policies vary to respond to changes in perceived risks of patent holdup and other factors.

Speaking to *GCR*, GAI director Koren Wong-Ervin said the commission’s proposal to issue best practice recommendations and reference to better regulation are the consultation paper’s most troubling aspects.

“We’re concerned about government-issued best practice recommendations that may put a thumb on the scale,” she said, and urged the commission to instead “embrace the procompetitive benefits of variation among standard development organisations’ policies”.

The paper noted that the SEP-heavy smartphone market has grown hugely, with decreases in both market concentration and wireless service prices.

“These indicators, although not proof of causation, do suggest caution prior to potentially disrupting the carefully balanced fair, reasonable and non-discriminatory... ecosystem that has emerged organically.”

The GAI paper was co-authored by Wong-Ervin, US federal judge Douglas Ginsburg, George Mason University law school professor Bruce Kobayashi, and Joshua Wright, a senior of counsel at Wilson Sonsini Goodrich & Rosati and a former member of the US Federal Trade Commission.

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