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US FTC Qualcomm complaint to test SEP/tying clauses — analysis

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- China and South Korean agencies previously weighed in
- Jurisdictions employ 'different' theoretical frameworks
- How licensing affects FRAND commitments under scrutiny

Whether or not the tying of standard-essential patents (SEPs) to other patents or products is considered anti-competitive is one of the underlying antitrust issues in the ongoing US Federal Trade Commission (FTC) lawsuit against technology giant Qualcomm.

Competition agencies in China and South Korea have already forcefully identified tie-in licensing behavior by Qualcomm as anti-competitive in the past 24 months and imposed heavy monetary sanctions on the California-based chipmaker along with remedies to modify practices for domestic licensors.

It remains uncertain how a SEP-tying antitrust claim will unfold before a US court and what connection will be drawn with Qualcomm's promise to standard-setting organizations to license its wireless telephone technology on FRAND (fair, reasonable and non-discriminatory) terms.

While the word "tying" is not specifically mentioned, the FTC complaint alleges that Qualcomm has abused its dominant market position and engaged in anti-competitive licensing behavior through a so-called "no license/no chips" policy for the sale of its baseband processors, the modem chips that allow mobile devices to connect to cellular networks.

According to the 17 January complaint, "Qualcomm withholds its baseband processors unless a customer accepts a license to standard-essential patents on terms preferred by Qualcomm, including elevated royalties that the customer must pay when using competitors' processors."

Opinions are mixed if the US FTC case will underline a possible theoretical divide with some Asian regulators' approach to tying arrangements for SEPs, or mark the confirmation of a nascent global coalescence around SEP-tying and FRAND.

Greg Sivinski, assistant general counsel for Microsoft, said decisions involving Qualcomm by agencies such as the Korea Fair Trade Commission (KFTC) and China's National Development and Reform Commission (NDRC) indicate different theoretical concerns may be at play among regulators outside the US.

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Sector: TMT
Topics: Intellectual Property, Abuse Of Dominance/Single Conduct, Agencies

Grade: Strong Evidence

Companies
Qualcomm Incorporated

Agencies
Korea Fair Trade Commission (KFTC)

There are no files associated with this Intelligence

Prominent in KFTC and the NDRC deliberations is a belief that tying forces original equipment manufacturers (OEMs) to take licenses to other patents or purchase product that they do not need, he said.

"If the price of the tied good, either a non-SEP, or a product, exceeds the competitive price, then the forced sale of the tied good allows the SEP holder to obtain a royalty on the combined package that exceeds a FRAND royalty," Sivinski added, noting that a FRAND obligation imposes a cap on the patent holder's right to charge monopoly rent.

Sivinski made the comments during a recent panel discussion at George Mason Law Review's 20th Annual Antitrust Symposium in Washington.

In contrast, in some antitrust quarters, the practice of tying is believed by some economists to be pro-competitive rather than anti-competitive because such arrangements can generate efficiencies for portfolio licensing. One example is the reduction of administrative costs associated with the challenge of sorting through the thousands of patents in one device and separating out SEPs from non-SEPS.

While licensing on the level of a full portfolio may be considered as competitive, the recent agency decisions suggest it becomes uncompetitive unless it is voluntary on behalf of the licensees, and unless the SEP holder is willing to license its standard-essential patents on a "standalone" basis, said Siviniski.

Koren Wong-Ervin, director of the Global Antitrust Institute, at George Mason University Antonin Scalia Law School, acknowledged at the same event that there is a "fundamental difference of theories for tying" in the US and other jurisdictions and noted that the distinction that forced tying is not FRAND seems to be emerging more in Asia.

Wong-Ervin said that is "excessive pricing theory, which we [in the US] don't have here when we are talking about tying."

To what extent FTC attorneys will raise the question of reasonableness of the FRAND rate in connection with SEP-tying is also unclear at this early stage.

This is especially so given that US antitrust enforcers have stayed away from the business of determining what FRAND rates are or should be, instead leaving it up to parties to fight over what reasonable rates should be in bilateral negotiations or patent disputes before a judge or arbitrator.

The FTC complaint does allege that OEMs pay Qualcomm "far more in royalties that they pay other SEP licensors, even those with comparable portfolios of cellular SEPs."

But Wong-Ervin pointed out that the agency stopped short of alleging that Qualcomm's rates were unreasonable and reiterated that this was the conclusion of Maureen Ohlhausen, the acting FTC

chairman, who as commissioner issued a rare dissent against the legal action formally filed against Qualcomm on 17 January.

Qualcomm has called the FTC case "significantly flawed" and in a first statement responding to the claim insisted it "has never withheld or threatened to withhold chip supply in order to obtain agreement to unfair or unreasonable licensing terms."

The company is also in the process of appealing the KFTC decision and is scouting for US government support to protest what it claims was a lack of due process afforded American companies by the US-Korea Free Trade Agreement.

As previously reported, there is speculation that Republican appointments to fill vacancies at the FTC might result in a pull-back of the US legal action. But that development is not a sure thing and the political appointments could possibly be weeks if not months away.

Federal Trade Commission v. Qualcomm Incorporated is currently set to move forward on 19 April with an initial hearing before federal judge Lucy Koh, who presides at the San Jose division of the US District Court for the Northern District of California.

by Kathryn Leger in San Francisco

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