

SEP licensing propelled to global spotlight as KFTC Qualcomm sanctions kick in

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- Korean remedy ‘unprecedented overreach’ -- critics
 - Global ‘effects’ require global remedy – supporters
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Global licensing of standard-essential patents (SEPs) is capturing fresh attention because of the global portfolio-wide remedy imposed on US technology giant **Qualcomm** by the Korean Fair Trade Commission (KFTC).

The Korean sanction on Qualcomm for abuse of market dominance related to SEP licensing and smartphone modem chipsets became a focus of attention as the Organisation for Economic Co-operation and Development (OECD), the Paris-based intergovernmental forum with 35 member countries, held a **roundtable** on extraterritorial remedies in antitrust patent licensing cases earlier this month.

While the OECD event was closed-door, *PaRR* caught up with some of those who participated in the roundtable, and others with opinions on the impact of the KFTC’s extraterritorial remedy for SEP owners and users.

Senior US Circuit Judge Douglas Ginsburg, one of the invited experts at the OECD roundtable, told *PaRR* the KFTC’s remedial order is “unprecedented” in extraterritorial reach, notably given its application to patents registered in countries outside of Korea.

“If this precedent is upheld [by Korea’s appeal courts] or followed in other countries, there would be chaos and conflict in the international antitrust regime of a magnitude we have never seen before,” said Ginsburg.

This is because the KFTC decision “requires the licensor to adhere to certain [licensing] practices, not only as they affect Korea, but as they affect the rest of the world,” said Ginsburg, also professor of law at George Mason University’s Antonin Scalia Law School and chairman of the international advisory board of its Global Antitrust Institute (GAI).

Jay Jurata, another invited expert at the OECD roundtable who heads up Orrick, Herrington & Sutcliffe’s antitrust and competition group out of Washington, DC, also sounded the alarm about the “overbroad” extraterritorial impact of the KFTC’s Qualcomm decision.

Jurata, who previously helped resolve a KFTC challenge of **Microsoft**’s acquisition of **Nokia**’s devices and services business, told *PaRR* he has no issue with the KFTC decision of Qualcomm on the merits.

But one big overreach of the remedy, said Jurata, is that it “ends up limiting a patent granted by another jurisdiction,” including the US, which essentially amounts to regulation of non-Korean patents.

Jurata said the remedy goes beyond licensing for sales into Korea, ultimately covering, for example, a smartphone sale into Europe by a Korean manufacturer with a patent that only has effect in Europe. Given that patent rights are accorded by jurisdiction and have geographic boundaries, the KFTC is “effectively setting a global patent rate” by saying how much Qualcomm can charge a Korean manufacturer, the attorney said.

Anticompetitive effects are ‘global’

Others closely involved with the business of global SEP licensing question placing too much emphasis on any impact of the KFTC’s order outside of its jurisdiction, pointing out that a global remedy by the regulator mirrors the global nature of SEP licensing.

“The remedy should follow the effects and if the effects [of alleged anticompetitive behaviour] are worldwide, then the remedy should be worldwide too,” one senior antitrust attorney at a large multinational technology firm told *PaRR*.

The same attorney said Qualcomm, along with other SEP owners, take “an inconsistent position” by seeking global portfolio licenses while seeking to restrict regulation based on national patents.

Robert Pocknell, chair of the Fair Standards Alliance (FSA), noted to *PaRR* that “many SEP licensing programs are only available on a global basis.”

“If a SEP holder is licensing their portfolio on a global basis, and will not grant licenses on a country-by-country basis, then it is not surprising that regulators and courts look at the patent licensing program as a whole and on a global level,” said Pocknell, whose association represents the interests of large technology users such as **BMW, Daimler, Google** and **Cisco**, and promotes the licensing of SEPs on fair, reasonable and non-discriminatory (FRAND) terms.

Morgan Reed, president of Washington, DC-based ACT/The App Association, another standards interest group that promotes FRAND and is sponsored by technology users including **Apple**, told *PaRR* “it is disingenuous at best to focus on extraterritoriality in the matter of the KFTC’s corrective order.”

“The KFTC’s action illustrates a global consensus [that also includes the US, EU and China] that abusive SEP licensing practices by SEP holders, exemplified by Qualcomm, are in violation of the FRAND commitment” and therefore competition law, said Reed.

For its part, the KFTC said in a [submission](#) for the OECD roundtable, that it is “reasonable” that corrective measures for Qualcomm are not “simply confined to the Korea region and patents registered in Korea.”

The KFTC said its decision was based on the fact that the “violation” committed by Qualcomm caused “anti-competitive effects at a global level.” It said further that “anti-competitiveness in the global market” had negatively affected both domestic Korean markets and consumers. The regulator added that it is “difficult and ineffective to distinguish correction measures for domestic and foreign applications since the effects are linked as are Qualcomm’s business policies and transaction practices.”

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