EIP

Flawed consultation on Standard Essential Patents launched by UK Government

Earlier this month, the UK Government unveiled its latest consultation on Standard Essential Patents, proposing some "practical steps" which they are considering to "create a more balanced system" both for licensing and litigating. While there may be some scope for measures which would create improvements in efficiency and cost, the consultation document appears to be based on a flawed premise that assumes that the current system is biased towards patent owners and against "innovators", particularly those which are SMEs (small and medium-sized enterprises). This can be seen in particular in two of the main proposals: a specialty pre-action protocol, and the introduction of a new "track" for SEP litigation, the "Rate Determination Track" ("**RDT**").

SMEs

While a 2023 survey of SMEs found that "83% of respondents involved in SEP licensing said they did not feel they had sufficient information on pricing", litigation evidence suggests that they are not the parties that struggle to resolve disputes. Indeed, almost all SEP litigation has been in relation to implementers which are large, well-resourced and well-known companies, such as Apple, Amazon, and Lenovo. This is in part because, even in a more cost-efficient regime, the level of royalties likely to be achieved from SMEs is likely to be minimal to the amount of costs required to pursue litigation.

Pre-Action Protocols

The consultation suggests that the existing pre-action protocols, which claimants are expected to engage with prior to commencing litigation, may be insufficient for the purposes of SEP litigation. However, this misunderstands the process by which the parties reach the point of commencing SEP litigation.

SEP owners are under an obligation to offer fair, reasonable and non-discriminatory licensing terms for their patents, and various jurisdictions around the world (in particular the CJEU with Huawei v ZTE) have set out steps that go beyond the pre-action protocols which an SEP owner needs to comply with in order to discharge their obligations. Indeed, in many instances the parties have been in negotiations for several years – in InterDigital v Lenovo, over 10 years of negotiations took place prior to InterDigital commencing litigation.

Pre-action protocols are therefore functionally irrelevant to SEP litigation, and even a specialist protocol would be unlikely to affect the transparency of information provided to potential defendants prior to litigation.

The Rate Determination Track

The RDT is proposed to be a new track, to be determined within the IPEC (Intellectual Property Enterprise Court), for SEP cases where infringement, validity and essentiality are not in dispute. This alone is artificial – although the Patents Court is increasingly holding the rate-setting trial prior to any patent-specific trials, the UK Court does not currently have jurisdiction unless at least one case of infringement or validity are formally in dispute.

Further, the Government's aim in introducing this new track is to create a more cost- and time-efficient way of achieving a court-determined rate. This is unrealistic – the Patents Court is already scheduling trials where expedition has been ordered for under 12 months, and it is unlikely that the level of evidence required to do perform the task will be possible in any less time.

The IPEC also does not hear cases where the trial will be more than two days. While the number of trial days required for a rate-setting trial is decreasing, a final determination is still usually scheduled for at least 15 days. The only shorter trials thus far have been for determinations on an interim basis, which is contrary to the aims of the RDT.

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Finally, the consultation suggests that the RDT would be beneficial on transparency grounds, as the decisions would be public. This is an odd statement, as current SEP rate-setting decisions are also public, at least for the final number. It is only the rates of confidential licences of one or both of the parties with third parties which are redacted from existing public judgments. The RDT as currently proposed therefore does not seem to give any additional transparency.