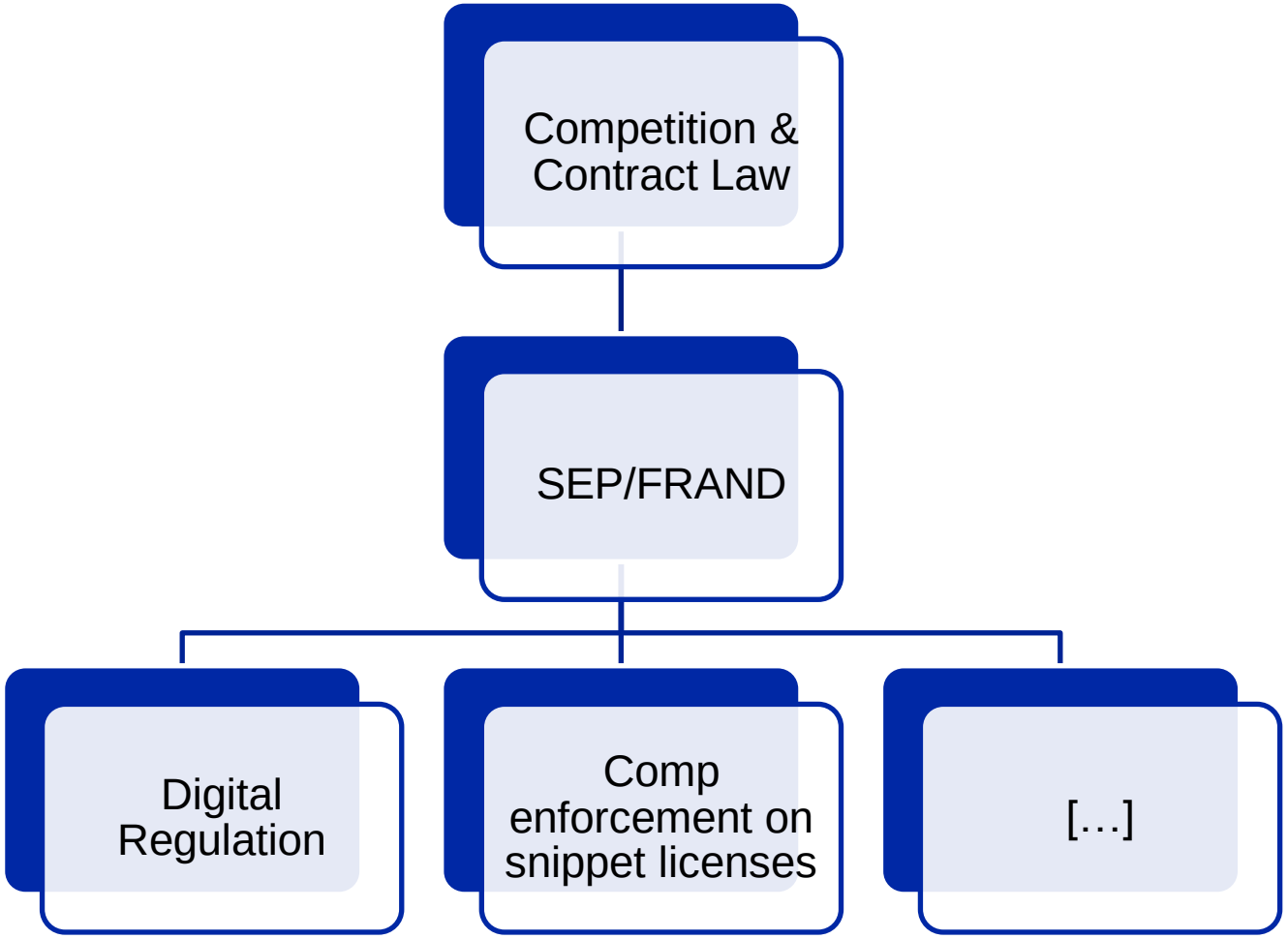
FRAND Beyond Patent Litigation

Prof. Dr. Peter Georg Picht, LL.M. (Yale)


Competition & Contract Law
SEP/FRAND
Digital Regulation
Comp enforcement on snippet licenses
[…]

Cutting the cord? – SEP/FRAND and competition law

- **Limited adjustments in 2023 Horizontal Guidelines**
  - Finally recognition not only of hold-up but also of hold-out risk
  - Slightly more demanding regarding IPR disclosure
  - Aggregate royalty setting, permissibility of SDO support, now mentioned
    - *"Standard development agreements providing for ex ante disclosure of […] a maximum accumulated royalty rate by all IPR holders will not, in principle, restrict competition"*
    - *"SDOs could take an active role in disclosing the total maximum stack of royalties for the standard"*
  - Top-down now mentioned, emphasis on plurality of calculation methods and cross-checks
- **Regulatory approach taking over**
  - No SEPs-related 102 TFEU-communication by DG Comp
  - Düsseldorf referral on, i.a., level selection aborted
  - SEP Regulation explicitly not based on competition law, DG Comp not in driver's seat

Cutting the cord? – SEP/FRAND and competition law

– SEP Regulation explicitly not based on competition law, DG Comp not in driver's seat

Recital (2): *"The Regulation aims to **incentivise participation** by European firms in the standard development process and the **broad implementation** of such standardized technologies, particularly in Internet of Things (IoT) industries. Therefore, this Regulation **pursues objectives that are complementary to, but different from that of protecting undistorted competition,** guaranteed by Articles 101 and 102 TFEU".*

⇔ Recital (52): *"objectives of this Regulation to **increase transparency** with regard to SEP licensing and to **provide an efficient mechanism to resolve disagreements on FRAND terms and conditions**"*

Art. 1(7): "*This Regulation is **without prejudice to the application of Articles 101 and 102 TFEU** or to the **application of corresponding national competition law rules***".

Cutting the cord? – SEP/FRAND and competition law

- Persisting divergence in national case law – at least at the surface

FRAND Einwand II (2020): *The abuse of dominance in FRAND cases arises from the dominant undertaking's refusal to fulfill the opposite market side's claim for legitimate access to the invention and to grant a license on FRAND terms for this purpose.*

Since the finding or denial of an ***abuse of dominance always requires considering all circumstances of the individual case and the balancing of interests, individual circumstances may justify stricter of less stringent obligations****. In this respect, the FRAND defense is no different from other cases of abuse of dominance.*

➔ Limited competition law assessment exercise in practice, especially on effects

Cutting the cord? – SEP/FRAND and competition law

- Persisting divergence in national case law

Optis/Apple (2023): *I accept that a price can be abusive under the Chapter I prohibition; and that if Apple had been forced to agree such a price then a claim for damages for abuse of a dominant position might lie. Equally,* ***if Apple had, in some way, been excluded from a market or inhibited in its commercial activities by the abusive conduct of a hypothetically dominant Optis, then again a claim might lie. But Apple has neither been excluded from a market nor inhibited in its commercial activities****.*

I have considered in some detail the negotiations between Optis and Apple, and I certainly have made a number of criticisms of how Optis conducted itself during the negotiations they had with Apple. But these criticisms do not even come close to the abusive. Apple's contention was – albeit disguised – an attack on a party's freedom to negotiate price. ***For competition law to be used as a control over parties' negotiations, when such negotiations are fundamental to the operation of a market economy, is a novel and remarkably dangerous contention.***

It was common ground between the economists but ***I hold as a matter of law that the boundary of what is and is not a FRAND rate is different from the boundary of what is and is not an unfair price*** *contrary to [the Chapter II prohibition].* ***If the rate imposed is FRAND then it cannot be abusive. But a rate can be higher than the FRAND rate without being abusive too.***

FRAND in the Digital Regulation Context

- **Ranking (Art. 6(5) DMA)**
  - Gatekeeper shall “apply transparent, fair and non-discriminatory conditions to such ranking”.

- **Search Data to Search Engines (Art. 6(11) DMA)**
  - Gatekeepers to “provide to any third-party undertaking providing online search engines, at its request, with access on fair, reasonable and non-discriminatory terms to ranking, query, click and view data in relation to free and paid search generated by end users on its online search engines”

FRAND in the Digital Regulation Context

- **Access to App Stores, Search Engines, Social Networks (Art. 6(12) DMA)**
  - Gatekeepers "shall apply fair, reasonable, and non-discriminatory general conditions of access for business users to its software application stores, online search engines and online social networking services**", shall "publish general conditions of access, including an alternative dispute settlement mechanism**", EU Commission "shall assess whether the published general conditions of access comply" with the access granting obligation under Art. 6(12) DMA.
- **Data Intermediation Services (Art. 12(f) DGA)**
  - Data intermediation services provider "shall ensure that the procedure for access to its service is fair, transparent and non-discriminatory for both data subjects and data holders, as well as for data users, including with regard to prices and terms of service".

FRAND in the Digital Regulation Context

- **Data Availability (Art. 8(1), (2), Art. 10, Art. 13(1), (2) Data Act)**
  - Art. 8(1) Data Act: Where a **data holder, in the sense of the Data Act, has to make data available to a data recipient, in a B2B relationship, "it shall do so under fair, reasonable and non-discriminatory terms and in a transparent manner"**.
  - Art. 13(1), (2) Data Act: "a contractual term is unfair if it is of such a nature that its use grossly deviates from good commercial practice in data access and use, contrary to good faith and fair dealing".
  - Art. 10(1) Data Act: availability of ADR regarding "the determination of fair, reasonable and non-discriminatory terms for and the transparent manner of making data available".

FRAND in the Digital Competition Law Enforcement

- **Autorité de la Concurrence imposes FRAND-style obligations on Google regarding snippet licenses**
- **Background**
  - Creation of press publisher right (copyright-related right): snippet display requires license
  - Google conditioned display of snippets on royalty-free license, 87% of press publishers acquiesced under protest, others suffered significant traffic reduction
- **Interim measure Autorité (meanwhile court confirmed)**
  - Bona fide negotiations with publishers towards a fair, non-discriminatory license at reasonable, appropriate royalty rates
  - Provision of information necessary for royalty calculation
  - Negotiation trustee and reporting to Autorité
  - Alternative dispute resolution if negotiations fail

Comparative Aspects FRAND in SEP and Digital Regulation

- **Access asset and addressee**
  - SEP: full-fledged IPRs; market power and/or FRAND commitment
  - DigReg: various intangibles (data, rankings, digital ecosystems, copyrights, trade secrets etc.); gatekeeper, DISP, data holder status

  ➔ Context sensitivity, e.g. incentives balancing (cf. Art. 18(12) SEP Reg – workable?)
- **Access mechanism**
  - SEP: FRAND declaration, immediate factual accessibility, *Huawei/ZTE* ping pong, injunction defense, competition law/regulation/contractual FRAND promise ➔ contractual license
  - DigReg: frequently absence of SDO mechanisms and FRAND declarations, factual inaccessibility ➔ heavy reliance on state-set regulation, access request/proactive access granting as initial ping pong step, FRAND offer as second step (dovetails with SEP), access as performance claim rather than defense, regulation ➔ “access contract” – license? applicable law?

Comparative Aspects FRAND in SEP and Digital Regulation

- **FRAND conduct**
  - SEP: detailed case law, jurisdiction-specific relevance (e.g. heavy in Germany)
  - DigReg: largely no rules ➔ transfer, also as a benchmarking exercise for SEP/FRAND
- **FRAND content**
  - SEP: licensing level, top-down and comparables, adjustment mechanisms, obligation on transferee etc. ➔ potentially substantial impact of SEP Regulation
  - DigReg: level selection issue less relevant, top-down unsuitable, comparables yet to develop, data protection arrangements, model conditions loom large ➔ stakeholder responsibility (especially SEP veterans)
- **Interaction regulation and general competition law**
  - SEP: eg control of aggregate royalty agreements, even though envisaged by SEP Regulation
  - DigReg: especially DMA-related discussions, eg Gatekeeper-conduct outside services/obligations under DMA

ADR

- Use of ADR for SEP/FRAND disputes (including high-value cases), though limited
- Strong push for more ADR from academia, judiciary, policy makers
- ADR under SEP Regulation, in particular FRAND determination (but also ARR mediation)
- FRAND ADR in DigReg, especially Art. 10 Data Act

ADR

	34 seq. SEP Reg	10 Data Act
Institution	EUIPO CC ➔ consiliators	DSBs, likely established market players + newbies + (?) MS run DSBs
Scope of competence issues	Patent validity and infringement, upon party request	Entirety of DA-relevant holder-user-relationship
Mandatory, unilateral initiation	Unilateral, far-reaching mandatory nature	Partly unilateral (?), non-mandatory
Lis pendens rule for non-EU proceedings	Termination depending on „other party“, „report by default“ risk	no
Detailed rules of procedure	SEP Reg, delegated act (how much consultation?), conciliator practice (how much coherence?)	DSB practice, no statutory guidance envisaged
Confidentiality	Internal: in camera risk; external: unclear delineations	Blatant lacunae

ADR

	34 seq. SEP Reg	10 Data Act
Duration	9 months, subject to parties	90 days
Binding nature of decisions	Dependent on parties, potential suggestive impact	Dependent on parties, potential suggestive impact
Quality & coherence oversight	No supervision on substance, no appeals envisaged	„eternal“ certification?, no appeals envisaged, no supervision on substance

- *Picht/Niedermaier*, ADR under Data Act and SEP Regulation, EuZW 2023 (forthcoming)

Concluding thoughts

- Remarkable cross-sector success of relatively young legal concept
- Dangers of FRANDialization: Confusing formula and solution; market mechanism mistrust; stepping stone for (regulatory) intervention that may reach too far
- As yet, unsatisfactory cross-sector cooperation and coherence; major responsibility of SEP/FRAND community in- and outside its realm

Thank you for your attention!

peter.picht@rwi.uzh.ch