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The Japanese Government calls for views on SEP Licensing Negotiations

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Back in 2021 the Competition Enhancement Office and the Intellectual Property Policy Office at the Japanese Ministry of Economy, Trade and Industry (METI) established the “Study Group on Licensing Environment of Standard Essential Patents”. Various experts and corporate actors joined this group and reviewed the international environment surrounding SEP licensing negotiations and further discussed the measures that are preferable for Japan. The Study Group issued an [interim report](#) on 26 July 2021.

The Group held its first meeting after that report at the end of 2021. It discussed the low predictability and transparency issues related to SEP negotiations and the need to set new rules on “good faith negotiations”. It was concluded that:

“The Japanese government will promptly consider and externally disseminate rules on good faith negotiations that should be complied with by both SEP holders and implementers, taking into account international discussions, in order to realize an appropriate licensing environment through improvement of transparency and predictability of the SEP licensing negotiation processes.”

The report highlighted various reasons why new rules for the licensing negotiation process are needed, especially in the Internet of Things (IoT) sector. First, transparency and predictability within negotiations are required, especially to steer clear from any situations where Japanese companies are considered to be negotiating in bad faith, exposing them to the risk of (i) injunctions forcing them to accept unfavourable deals or conditions, or (ii) being restricted from exercising their rights. This is particularly important because advancing IoT has expanded the number of companies involved in SEP negotiations across different sectors, ranging from ICT to automobiles. Indeed, corporations in the automobile field may not be familiar with SEP licensing issues.

The second reason is related to the predictability of domestic litigations in preparation for future SEP disputes in Japan. The report mentions that there is only one precedent rendered over five years ago in Japan, in 2013 in [Apple v Samsung](#). The patent was ‘JP4642898’ and covers the technical method and apparatus for effectively transmitting and receiving packet data of cellular phones. It was finally held that seeking damages in excess of the royalty under FRAND conditions was an abuse of right unless special circumstances existed, with SEP implementers being considered unwilling licensees.

The reasons and principles highlighted by the Study Group make sense. Long-running licensing disputes create problems for both SEP holders and implementers, which ultimately is not good for the industry as a whole as it contributes to its stagnation. It is crucial to arrange an adequate licencing agreement in order to avert such situations. Both SEP holders and implementers must be compelled to follow guidelines in order to ensure that licencing negotiations are transparent and fair.

The study group has recently issued a [call for views](#) from all stakeholders regarding SEP negotiation guidelines. The focus is on four factors similar to those highlighted by the Court of Justice of the European Union in the seminal [Huawei v. ZTE](#) case: namely, (i) SEP holder's warning of infringement; (ii) implementer's expression of willingness to license on FRAND terms; (iii) SEP holder's concrete offer of FRAND terms; (iv) and implementer's counteroffer.

METI will take the submitted views into account, and publish the "good faith negotiation" guidelines at some point in 2022. This is certainly a good move as it will help the Japanese government understand the problems that are faced by both SEP owners and implementers on a deeper level and get an idea about what exactly is needed to make the guidelines better and more suitable for all stakeholders. The hope is that such move will improve the whole SEP environment in Japan.

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