

# Developments in the EU Law Access to SEPs

Rafal Sikorski

Faculty of Law and Administration

Adam Mickiewicz University

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# Recent developments

- EU Commission decisions:
  - Case COMP/39939 Samsung - UMTS standards essential patents
  - Case COMP/39985 Motorola – GPRS standard essential patents
- CJEU
  - Case 170/13 ZTE v. Huawei (reference for a preliminary ruling from *Landgericht Dusseldorf*)
- Application of ZTE v. Huawei in national courts
  - Cases 4a O 93/14 and 4a O 144/14 Sisvel v. Heier Deutschland GmbH and Heier Europe Trading SRL.

# Context

- cases originate in German courts where SEP holders seek injunctive relief against the implementers
- special circumstances that justify finding that SEP holders by seeking injunctions abuse dominant position
- case law relates to the conditions for raising EU competition law defense based on art. 102 TFEU by SEP implementers against SEP holders
- *Orange-Book-Standard* conditions for EU competition law defense set by the German Supreme Court were at stake
- the debate concentrates on ensuring access to SEPs through competition law rather than by a more flexible approach to injunctions

# Orange-Book-Standard conditions

- Orange-Book-Standard criteria:
  - an unconditional offer from the potential licensee the refusal of which would constitute an abuse within the meaning of art. 102 TFUE
  - no challenges of validity and essentiality of a standard essential patent / termination clauses in case patent validity or essentiality is challenged
  - royalty payments to be made to the escrow account prior to conclusion of the licensing agreement / payments for past uses required /
- EU law effectiveness at stake - Art. 4(3) TEU

# Huawei v. ZTE conditions

- licensees need only generally indicate their willingness to conclude licensing agreements
- SEP holders must come up with FRAND licensing offers – written offers specifying the terms of the license
- implementers are required to act promptly and in good faith without employing delaying tactics, that relates to counter-offers equally
- in case of disputes over licensing terms, licensees required to provide security and render accounts
- challenges to essentiality, validity and infringement must be allowed

# Conclusions

- generally, potential licensees' position seems to be strengthened
- Huawei v. ZTE criteria for raising competition law defense are more favourable towards the licensees
- uncertainty as to what FRAND exactly means still unresolved
  - royalty rates (no direct guidance from the CJEU)
  - non-royalty terms (only limited guidance)