

IP Europe Welcomes US DOJ's Re-Affirmation that Longstanding Practice of End-Device Licensing is Pro-Competitive

[Brussels: 12, August, 2020] IP Europe welcomes the U.S. Department of Justice Antitrust Division's (DOJ) recent re-affirmation that licensing standard essential patents at the end-device level is pro-competitive in the context of its positive [Business Review Letter to Avanci](#) ("DOJ BRL")¹ on 28 July 2020.

The DOJ has concluded its comprehensive review of Avanci's new 5G licensing programme targeting connected cars. This programme offers a single global licence with legal and commercial assurances to car manufacturers and their suppliers (through "have made" rights) when implementing many of the patented technologies included in the 5G mobile communications standards.

In particular, the DOJ BRL:

- Highlights the many pro-competitive benefits of end-device licensing to both licensees and licensors, given the complex and opaque automotive supply chain landscape. Such recognised benefits include significant efficiencies, reduction of hold-out, simplifying scope price and royalty collection, and ensuring that licensors are appropriately compensated for their innovations.
- Clarifies that, because "have made" rights give component suppliers freedom to supply, a field of use license limited to the end device is unlikely to harm competition. Furthermore, the BRL cites reference to the fact that, even without explicit 'have made' rights, upstream component makers are unlikely to be prevented from supplying licensed entities.
- Recognises that licensing only at the "end device" level is a common practice and that, in the context of connected cars, it is a legitimate field of use under competition law.

The BRL demonstrates that end-device licensing has been the industry practice for decades, and has previously been affirmed by competition agencies in the past, as reflected, for example, in the approval of the 3G Patent Platform in 2000 by the Japan Fair Trade Commission², followed by the simultaneous US DOJ³ and European Commission⁴ approvals in 2002.

¹ See U.S. DOJ Business Review Letter regarding 5G Patent Platform (28 July 2020) <https://www.justice.gov/opa/pr/justice-department-issues-business-review-letter-avanci-proposed-licensing-platform-advance>.

² See Japan Fair Trade Commission Opinion regarding 3G Patent Platform (20 Dec. 2000) <http://www.ffii.fr/Japanese-Competition-Authority-Approves-the-3G-Patent-Platform>.

³ See U.S. DOJ Business Review Letter regarding 3G Patent Platform US DOJ Business Review Letter (12 Nov. 2002) <https://www.justice.gov/atr/response-3g-patent-platform-partnerships-request-business-review-letter> and press release https://www.justice.gov/archive/atr/public/press_releases/2002/200454.htm.

⁴ See Press Release, European Commission DG COMP Comfort Letter Regarding 3G Patent Platform EC DG COMP Comfort Letter (12 Nov. 2002) https://ec.europa.eu/commission/presscorner/detail/en/IP_02_1651.



Commenting on the DOJ BRL, Francisco Mingorance, Executive Secretary of IP Europe said: *“Licensing standard essential patents at the end-device level powers the proven success of the cellular revolution benefiting billions of consumers. The DOJ letter creates the legal and business predictability for technology implementers to pay fair, reasonable and non-discriminatory licence fees for the use of the mobile technologies licensed by Avanci. In turn, it will continue to incentivise cellular technology developers to invest billions of Euros annually to develop the key 5G/6G technologies needed by the market.”*

Mingorance continued that: *“The DOJ’s opinion is a matter of US law. However, if European and US competition law analysis starts to diverge, the foundation on which global mobile standards are created and sold will be substantially undermined. We cannot afford a situation in which global standards are licensed using competing models in the EU and US, especially if the European model undercuts the ability of standards developers to make a fair return.”*

The 2002 simultaneous EU-US approval letters on the 3G Patent Platform, and the substantive similarity between the EC Technology Transfer Guidelines and the US Guidelines for the Licensing of Intellectual Property, are testament to the close alignment of competition analysis of these issues on both sides of the Atlantic.

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About IP Europe

IP Europe is a coalition of research and development-intensive organizations headquartered in Europe, whose inventions are protected by intellectual property rights. From global technology leaders and research institutes creating the technologies that underpin the 5G cellular standard, to innovative SMEs which rely on their patent portfolios to grow, IP Europe gives a voice to organisations that recognise the value of IP in fostering innovation, growth and jobs.

Our goal is to promote the vital importance of Intellectual Property Rights to the European digital and knowledge-based economy and to ensure that EU policies support a world-leading innovation ecosystem. Today in the EU, 40% of economic activity and 35% of employment – spanning 77 million jobs – are generated by IPR-intensive companies.



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