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## Advocate General Wathelet in *Huawei Technologies*: Disappointing Opinion

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### Advocate General Wathelet's disappointing Opinion in *Huawei Technologies* sets out a test that is divorced from reality.

The application of competition and antitrust law to standard essential patents ("SEPs") is a matter of great debate in many jurisdictions. There have been a number of significant developments recently in Europe with the recent adoption of two controversial decisions by the European Commission (*Samsung* and *Motorola*<sup>1</sup>) and the consideration of these issues in an Opinion by Advocate General Wathelet to the European Union's highest court in the current *Huawei Technologies* case.

On 5 April 2013, the Landgericht Düsseldorf (Germany) referred a series of questions to the Court of Justice of the European Union ("CJEU") in relation to litigation between Huawei and ZTE requesting guidance on when an application for an injunction brought by the holder of SEPs could amount to an abuse of a dominant position contrary to Article 102 TFEU.<sup>2</sup> This reference resulted from the controversial application of the *Orange Book* standard<sup>3</sup> and its purported application by several lower German courts to conclude that a potential licensee can only be considered to have made a suitable licensing offer to the SEP holder if it commits not to challenge the essentiality, validity and infringement of the patent(s) in suit.

### No Reference to the Applicable Legal Test

On 20 November 2014, Advocate General Wathelet delivered his much anticipated Opinion on the issues raised by the referring court.

For those looking for clarity and guidance on these important issues, the Opinion was a disappointment: AG Wathelet confused the notions of abusive refusal to

<sup>1</sup> Commission decision of 29 April 2014 (Case COMP/39.939 *Samsung – Enforcement of UMTS standard essential patents*) and Commission decision of 29 April 2014 (Case COMP/39.985, *Motorola – Enforcement of GPRS standard essential patents*).

<sup>2</sup> C-170/13, *Huawei Technologies Co. Ltd.*

<sup>3</sup> BGH, Urteil vom 6. Mai 2009 – KZR 39/06 – OLG Karlsruhe.

license with the abusive recourse to a court of law. As regards the question of whether the seeking of injunctive relief by an SEP holder may constitute an abuse of a dominant position under Article 102 TFEU, no reference is made to the established legal test set out by the General Court in *ITT Promedia*<sup>4</sup> and *Protégé International*<sup>5</sup> of when the initiation of legal proceedings could constitute an abuse of a dominant position, namely when the legal action (i) is manifestly unfounded, and (ii) proves to be part of a plan to eliminate competition. The reader is referred to the comments of former President of the General Court Bo Vesterdorf, who has written on this subject extensively.<sup>6</sup>

### AG Wathelet's Proposed Approach

The approach recommended by AG Wathelet does not substantially differ from the one adopted by the Commission in the controversial *Samsung* and *Motorola* decisions, although the assessment of what constitutes a “willing” licensee has been modified slightly and what is required to demonstrate “willingness” has been developed beyond what is envisaged by the Commission in *Samsung* and *Motorola*. The Commission decisions established a “safe harbour” for standard implementers willing to take a licence on FRAND terms. Similarly, AG Wathelet suggested the legal test be centred on the conduct of the implementer in the licensing negotiations: seeking injunctive relief will attract antitrust liability if the implementer has shown itself to be “*objectively ready, willing and able*” to conclude a licence agreement (Opinion, para. 103(1)).

AG Wathelet added that the seeking of injunctive relief by the SEP holder<sup>7</sup> will “*not constitute an abuse of a dominant position if the infringer's [i.e. the implementer's] conduct is purely tactical and/or dilatory and/or not serious*” (para. 103(3)). He further explained that the implementer's conduct will be considered serious and not dilatory if:

- The implementer requests that “*FRAND terms be fixed either by a court or by an arbitration tribunal.*” In that case, it would be legitimate for the SEP holder “*to ask the infringer either to provide a bank guarantee for the payment of royalties or to deposit a provisional sum at the court or arbitration tribunal in respect of its past and future use of the patent*” (para. 103(4)).
- The implementer “*reserves the right, after concluding an agreement for such a licence, to challenge before a court or arbitration tribunal the validity of that patent, its supposed use of the teaching of the patent and the essential nature of the SEP in question*” (para. 103(5)).

The new legal standard proposed by AG Wathelet differs from the one applied in the Commission's *Samsung* and *Motorola* decisions in two material respects. First, AG Wathelet recognizes that a test based on mere, vague “*willingness to negotiate*” would be too licensee-friendly: “[...] *placing reliance only on the alleged infringer's mere 'willingness to negotiate' would result in pricing which falls well below the true economic value of the SEP*” (footnote 20). Second, under the standard proposed by AG Wathelet, the burden of proving that the SEP holder did not honour a FRAND commitment and that the implementer is “*willing*” appears to rest with the competition authority/plaintiff. Under the Commission's test, seeking an injunction would be presumed to be abusive unless the SEP holder proves, as part of the objective justification assessment, that the implementer was unwilling.

<sup>4</sup> T-111/96, *ITT Promedia* (EU:T:1998:183).

<sup>5</sup> T-119/09, *Protégé International* (EU:T:2012:421).

<sup>6</sup> Bo Vesterdorf, “IP Rights and Competition Law Enforcement Questions”, (2013) *Journal of European Competition Law and Practice*.

<sup>7</sup> AG Wathelet conflates the mere seeking of an injunction from a national court with its grant. It cannot be realistically expected that an application for an injunction will invariably result in an injunction being granted and enforced. In the EU, there have only been a handful of injunctions granted.

## An Opinion Divorced from Reality?

Regretfully, one cannot ignore that some observations by AG Wathelet reflect a lack of understanding of basic concepts relating to the licensing of intellectual property rights and how the negotiation of such licences operates in practice.<sup>8</sup> For instance, throughout his Opinion, AG Wathelet seems to consider that licensing agreements are negotiated unilaterally and on a per-SEP basis. The concepts of cross-licenses and patent portfolios are totally ignored. AG Wathelet does not seem either to appreciate that the “value” of individual SEPs, and hence portfolios, varies greatly depending on their importance to the standard and the technology implementing that standard. AG Wathelet also appears to treat declared SEPs as actual SEPs. The notion that every SEP will, by necessity, be infringed by a standard implementer is similarly accepted uncritically, thereby ignoring optional modes, features/specifications that may not be infringed by a different implementation, and so on.

More worryingly, other observations reflect a lack of understanding of the applicable case law. For instance, when commenting on the German *Orange Book* legal standard, at paragraph 48 of his Opinion, AG Wathelet states that an action for injunctive relief introduced by the holder of a non-SEP will be regarded as abusive only “*if the royalty it demands is clearly excessive.*” This clearly ignores pre-existing CJEU precedent that states that a dominant firm does not abuse its dominant position merely by refusing to license intellectual property rights for a reasonable royalty unless three cumulative conditions are satisfied, namely that such refusal (i) prevents the emergence of a new product for which there is potential consumer demand, (ii) is unjustified and (iii) is such as to exclude any competition on a secondary market (i.e. the *IMS Health* test<sup>9</sup>).

## Next Steps

An Opinion by an Advocate General is a normal procedural step in cases brought before the CJEU. Opinions do not bind the CJEU. One cannot therefore exclude that the Preliminary Ruling of the CJEU will differ on points of law. However, in complex intellectual property/antitrust reference cases historically, the CJEU has tended to follow the conclusions of the Advocate General even if it may not accept the reasoning or analysis in the Opinion.

The judges will now begin their deliberations. We expect the Preliminary Ruling will be delivered in spring 2015.

<sup>8</sup> It also appears that AG Wathelet’s Opinion was drafted on the sole basis of the written submissions. No reference is made to any of the arguments made during the oral interventions or to the questions raised during the hearing.

<sup>9</sup> C-418/01, *IMS Health* (EU:C:2004:257).

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