

Japan modifies SEP guidelines

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A view of Tokyo (Credit: JD, Flickr)

Japan's Fair Trade Commission announced last week that it has amended the country's competition guidelines, governing how companies are to manage their standard essential patent rights.

The competition authority said under the tweaked guidelines, patent holders can now fall foul of antitrust rules if they refuse to license their patents or if they seek injunctive relief over patents that have been allocated on fair, reasonable and nondiscriminatory (FRAND) terms.

The enforcer said the updates, to the Guidelines for the Use of Intellectual Property under the

Antimonopoly Act and Guidelines on Standardisation and Patent Pool Arrangements, were implemented to clarify how Japan's competition statute regulates the use of intellectual property.

The amendments were originally proposed in July last year. A consultation process followed, with 54 independent opinions submitted, including from the US Federal Trade Commission.

Japan's enforcer said it will "adequately inform" enterprises and trade associations of the revised guidelines, to ensure they do not violate the country's antitrust rules when performing their ordinary business activities.

Koren Wong-Ervin, a director at the Global Antitrust Institute at George Mason University School of Law, said she was disappointed to see that the enforcer had created a competition law sanction for seeking injunctive relief. The institute, which is also led by Joshua Wright and appellate federal judge Douglas Ginsburg, issued its own advice to the JFTC about how best to amend its guidelines.

"I am pleased to see that the commission at least adopted the alternative recommended by then-FTC commissioner Wright and Judge Ginsburg to limit liability to situations when there is harm to competition," she said.

"Unfortunately, instead of adopting our alternative recommendation in full – to limit liability to situations when there is proof of harm to competition that outweighs any procompetitive benefits – the enforcer's final guidelines merely require a tendency to impede fair competition," Wong-Ervin said.

This approach could disrupt the carefully balanced and thriving FRAND ecosystem, she added, by harming incentives to participate in standard-setting – which would harm consumers.

Kimitoshi Yabuki at Yabuki Law Offices in Tokyo said the amendments will help to guide the commission's enforcement policy, building on recent decisions such as the *Apple/Samsung injunction case* in Japan's Intellectual Property High Court.

The Japanese court ruled that Samsung did not have the right to seek injunctive relief against Apple in relation to a patent that had been promised on FRAND terms.

“Criteria are specified in the amendment, but we need accumulation of the case law in the future on the difficult issues such as excessive royalty or pricing issues,” he said.

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