

What kind of access regulation? FRAND conditions? Who defines what is FRAND?

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- ❖ Growing list of obligations to provide access to services under some type of exclusivity (patent, non-replicable infrastructure, essential facility), often creating market power, often in vertically integrated markets.

- ❖ Challenge: to define the access conditions.

- ❖ In Standard Essential Patents, Fair Reasonable and Non-Discriminatory Access:
 - ❖ Provides a safe harbour against competition law (fines),
 - ❖ If FRAND access to patents is provided, no abuse of dominant position.
 - ❖ Conditions defined : **offer**, **counter-offer**, where no agreement is reached on the FRAND terms following the counter-offer by the alleged infringer, the parties may, by common agreement, request that the amount of the royalty be **determined by an independent third party**, by decision without delay. (Huawei v ZTE, 2015).

- ❖ “The gatekeeper shall **apply fair, reasonable, and non-discriminatory general conditions of access** for business users to its **software application stores, online search engines and online social networking services** [...]” (Art 6(12)).
- ❖ “The gatekeeper shall not treat more favourably, in **ranking** and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party. The gatekeeper shall apply **transparent, fair and non-discriminatory conditions** to such ranking” (Art. 6(5)).
- ❖ What is unfair? “the **Commission shall also assess** whether the intended or implemented measures ensure that there is no remaining **imbalance of rights and obligations** on business users and that the measures do not themselves confer an advantage on the gatekeeper which is disproportionate to the service provided by the gatekeeper to business users (Art. 8(8)).
- ❖ Enforcement: more detail in implementing acts, dialogue, commitments, general conditions, compliance report, compliance officer... and last resort, **finances**.

FRAND in the Data Act proposal

- ❖ “Where a **data holder is obliged to make data available to a data recipient** under Article 5 or under other Union law or national legislation implementing Union law, it shall do so **under fair, reasonable and non-discriminatory terms and in a transparent manner** [...]” (Art. 8(1)).
- ❖ “Any **compensation** agreed between a data holder and a data recipient for making data available shall be reasonable” (Art. 9(1)). “This Article shall not preclude other Union law or national legislation implementing Union law from excluding compensation for making data available or providing for lower compensation (Art 9(3)).
- ❖ “Data holders and data recipients shall have access to **dispute settlement bodies**” Art. 10(1).
- ❖ What is unfair? Black and grey lists of “unfair” terms (Art. 13).

