

# A FRAND REGIME FOR DOMINANT DIGITAL PLATFORMS

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## EU Context

- Discussion on how to address concerns linked to the market power of ‘**dominant digital platforms**’
  - Fast growth to significant scale; network effects exacerbate market position; tipping-point/lock-in/gate-keeper
  - Competition for the market not on the market
  - Multi-sided markets & leveraging market power to adjacent or downstream markets
- Discussions to leverage data economy, AI, 5G/IoT, M2M etc.
- What approach?
  - Regulatory focus tends to be on ensuring contestability by enabling market access or input access
  - Role of non-competition concerns e.g. privacy, data protection, media plurality, democratic health etc.?
  - Risk of *ex ante* regulation or *ex post* intervention in fast-moving innovation markets?
  - Competition or regulatory solution?
- **Question: could an access regime based on Fair, Reasonable and Non-Discriminatory terms be a solution?**

Looked at:

1. EU Competition Law Policy and FRAND
2. EU FRAND- Based Regulation

## COMPETITION POLICY AND FRAND

- **Article 102 TFEU** embraces a FRAND-based notion; it prohibits excessive prices while promoting access and non-discrimination obligations, as required under the ‘special responsibility’ of dominant firms
- FRAND-based access remedies have been used in compulsory licensing cases to ensure market access while avoiding price setting e.g. **Magill** (*TV listings*), **IMS Health** (*pharmaceutical sales structure*), **Microsoft** (*software*)

e.g. *Magill*, para 27: “Accordingly the only remedy possible in the present case is to require ITP, BBC and RTE to supply **each other and third parties on request** and on a **non-discriminatory basis** with their individual advance weekly programme listings and to permit reproduction of those listings by such parties .... If they choose to supply and permit reproduction of the listings by means of licenses, any **royalties requested ... should be reasonable**”

- FRAND remedies applies in **merger** cases by different jurisdictions across diverse sectors, e.g. medical equipment, television broadcasting, payment processing, gas networks, flight search, missile systems, technology platforms and herbicides
- As relates to dominant digital platforms, this includes ensuring interoperability between device interfaces or communications protocols, associated software and data management systems
- FRAND remedies in merger cases relating to platforms include:

***NewsCorp/Telepiù (2004)***: access to platform APIs was ensured on FRAND term (i.e. to offer “at fair, transparent, cost-oriented and non-discriminatory prices”) to third parties, to allow downstream pay-TV providers. EC imposed measures compelling NewsCorp to comply with the existing FRAND rules found within the legislative framework for its use by the merged entity in the Italian territory for pay-TV applications.

***Siemens/Drägerwerk (2013)***: royalty free FRAND commitments were given to ensure continued interoperability in between medical equipment platforms and hospital data management systems, including making available and maintaining all existing and future interfaces and communications protocols.

***Worldline/Equens (2016)***: parties agreed to license on FRAND terms to payment network service providers within Germany key card and payment processing software, as well as the source code for the Poseidon software and the ZVT protocol, on which most German point of sale terminals run.

## POLICY PROS & CONS

### Pro: Tried-and-tested regime

- Least intrusive remedies, minimising impact of regulatory intervention
- Useful where there is no adequate regulatory framework in place
- Ensures that EC does engage in price setting
- Basing remedies on existing sector practices
- Ensures a balance of interests, guaranteeing equality of arms in negotiations

### BUT, competition policy cannot be primarily driven through cases:

- Imposing FRAND access as a merger remedy is opportunistic and dependent upon having a notifiable merger
- FRAND access remedies would be merger-specific and not a universal solution
- In non-merger cases, competition law investigations are inherently slow while market develops fast
- Cases are fact-specific and companies under investigation should be confident that their case will not be 'hijacked' for policy-making purposes
- FRAND access remedy in commitments provide little precedential value

**Consequently, competition law remedies should be complemented by broader policy measures**

## Competition Policy and ‘Standardisation FRAND’

- **Huawei v ZTE (C-170/13):**
  - CJEU finds that a competition law defence can be raised by a SEP infringer against a request for an injunction by a SEP holder, where a dominant SEP holder has not followed certain steps, including making a FRAND offer
  - CJEU also set out certain steps that the infringer has to follow if they were to be able to avail themselves of such a defence
  - CJEU set out a negotiating process that, where followed, should lead to a FRAND outcome
- **Horizontal Guidelines:**
  - EU competition law promotes FRAND licensing by providing a safe harbour under **Article 101 TFEU** to SDOs that have FRAND policies
- **De facto standards:**
  - Bundesgerichtshof permits competition law defence where a infringer cannot get a FRAND-like licence (even where a FRAND commitment was not been made or was required by regulation)

## EU FRAND BASED REGULATION

1. EU Standardisation Regulation: Access to IPR
2. REACH: Access to data
3. European Electronic Communications Code: Access to Networks
4. Re-use of Public Sector Information Directive” Access to Information
5. Horizon 2020 Research Framework Programme: Access to Research Results
6. Vehicle Emissions Regulation: Access to Data
7. Payment Services Directive: Access to Data
8. Credit Rating Agency Regulation: Access to Rating fees
9. Benchmark Regulation: Access to Data



	Expressly refers to 'FRAND'	F, R or ND elements specified	Pricing parameters provided	Transparency	Refers to Market Power concerns
EU Stand'n Reg	X				
REACH		X	X	X	
EECC	X	X			X (not for all instances)
Re-use of Public Sector Info		X	X	X	
Horizon 2020	X	X	X		
Vehicle Emissions		X	X		
Payment Services Directive		ND only			
Credit Rating Agency		X	X	X	
Benchmark Regulations	X			X	X

## EU FRAND-Based Regulation

### 1. EU Standardisation Regulation

- FRAND regime the requirement for having standards recognized as ‘technical specifications’ in EU policy (reflecting WTO norms)

### 2. European Electronic Communications Code

- NRAs may require operators to interconnect networks & make services interoperable under
  - objective, transparent, proportionate and ND conditions,
  - FRAND-based access obligation
- NRAs may impose FRAND access requirements on IPR holders to manufacturers of consumer equipment
- NRAs may impose on operators with ‘significant market power’ obligations of transparency (making T&Cs public including pricing), ND or even direct price control measures for interconnection and access
- New FRAND-based interoperability requirement, to the extent necessary, between “interpersonal communication services” (e.g. social platforms) which reach a significant level of coverage and user uptake to ensure end-to-end connectivity

## EU Legislation Defining FRAND Elements

### 3. Research and Innovation Framework Programme (Horizon 2020)

- Access rights for exploitation of results or to background information will be granted under FRAND conditions
- Article 2(1)(10) 'fair and reasonable conditions' means:  
*“appropriate conditions, including possible financial terms or royalty- free conditions, taking into account the specific circumstances of the request for access, for example the actual or potential value of the results or background to which access is requested and/or the scope, duration or other characteristics of the exploitation envisaged”*
- Applies to all scenarios ie between project participants, affiliates or third parties
- EC’s Model Grant Agreements applies this model

### 4. Credit Rating Agency Regulation

- Para 3(c):  
*“A credit rating agency shall ensure that fees charged to its clients for the provision of credit rating and ancillary services are not discriminatory and are based on actual costs. Fees charged for credit rating services shall not depend on the level of the credit rating issued by the credit rating agency or on any other result or outcome of the work performed”*

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## EU FRAND-Based Regulation

### 5. Vehicle Emissions Regulation

- Obligations on vehicle manufacturers to enable access to vehicle repair & maintenance information both to dealers and repairers of light passenger and commercial vehicles
- Access is on a 'ND' basis, permitting manufacturers to charge a "*reasonable and proportionate fee*" which is not reasonable or proportionate if it discourages access where fee isn't in proportion to the importance of the information to the user

### 6. Re-use of Public Sector Information Directive

- Details FRAND-based access conditions including reasonable remuneration, non-discriminatory access and transparency including:
  - Possibility to charge reasonable fees, "limited to cost of collection, production, reproduction and dissemination" given nature of public sector bodies and reasonable ROI
  - "ND" requirement i.e. free exchange of information between public sector bodies when exercising public tasks but differentiation permitted between public and non-public bodies and between commercial and non-commercial re-use
  - Conditions and charges to be transparent

## EU FRAND-Like Regulation

### 7. REACH

- Creates a FRAND-like access framework for entities that registered particular chemicals to share reports and data with potential registrants
- Parties should *“make every effort to ensure that the costs of sharing the information are determined in a fair, transparent and non-discriminatory way”*

### 8. Payment Services Directive

- Account servicing payment service providers must allow third parties to obtain real-time data relating to customers' accounts on a ND basis
- Assumption that access could be compensated under FR terms

### 9. EU Benchmarks Regulation

- Competition law context: regulation following LIBOR, EURIBOR benchmarks cartels
- Administrators of critical benchmarks to take *“adequate steps to ensure that licences of, and information relating to, the benchmark are provided to all users on a fair, reasonable, transparent and non-discriminatory basis”*.

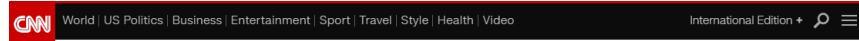
## Summing up

- FRAND access regimes **promote various public interests** whether relates to private and public bodies
- The input needs not be critical for market access and owners of the input often not possess market power, **where a public policy imperative exists**
- FRAND regime which will take a **balanced, proportionate and pragmatic approach** to the **sharing of critical or important resources**:
  - ensuring broad and non-discriminatory access to the relevant input
  - being inherently flexible and indeed business-model neutral
  - regulating legal relations e.g. though a license or similar but leaves detail of terms and conditions to bilateral market-based negotiations, on recognised commercial terms
  - creating a level playing field between players recognising the balance between ROI and access
  - creating an *ex ante* framework which competition and regulatory policy can support
  - side-stepping many regulatory difficulties including the need for treating at least dominant platforms' activities as essential facilities or public utilities
- The FRAND regime is a **general principle** so that a FRAND policy needs not reflect the exact words, in that exact order, in order to achieve the same result

## How to Implement FRAND-access regime?

- FRAND can be used as a remedy to provide both access to data and/or platforms
- EU Commission policy discussions for FRAND access to data:
  - Building a European Data Economy (2017): “A framework potentially based on certain key principles, such as fair, reasonable and non - discriminatory (FRAND) terms, could be developed for data holders, such as manufacturers, service providers or other parties, to provide access to the data they hold against remuneration after anonymisation “
  - Guidance on Sharing Private Sector Data in the European Data Economy (2018) – recommended voluntary granting of access to non-personal data to other companies
  - Competition Policy for the Digital Era (2019) – competition law insufficient, some sort of regulation required
- How to determine what is FRAND? Is this “kicking the can down the road”?
  - Terms determined *before* access is granted (unlike problems with SEPs where licences are negotiated after the manufacture of products)
  - It would be possible to approximate value: use comparable licences; cost-based benchmarks; applied in merger remedies and regulations





## Elizabeth Warren's call to disband tech giants is a step in the right direction

By Kara Alaimo

Updated 0103 GMT (0903 HKT) March 10, 2019



Source: CNN

Begala: Warren's tech proposal could gain support across party lines 05:18

**“Platform utilities would be required to meet a standard of fair, reasonable, and nondiscriminatory dealing with users.”**

**Warren Elizabeth, Senator, Democratic Presidential candidate**

**Available at SSRN:**

**[Here's how we can break up Big Tech](#)**

