

Japanese government launches SEP advisory panel with renewed focus on competition

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- Panel to work under auspices of Ministry of Economy, Trade and Industry
 - Standardization organizations may help resolve global SEP disputes
 - Panel reports may be used as supporting evidence, lawyers say
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A newly launched advisory panel to the Japanese government on standard essential patents will study SEPs in the context of competition policies and the impact on industry, an official with the Ministry of Economy, Trade and Industry (METI) told *PaRR*.

Shuya Hayashi, a professor of law at Nagoya University and a former Japan Fair Trade Commission (JFTC) official is heading the new 15-member Study Group on SEP Business Framework.

The panel first met on 12 March.

The panel's ultimate aim is to design a cross-sectoral business framework for SEP licensors and licensees, the official said. It reports to two METI divisions: the Competition Enhancement Office and the Intellectual Property Policy Office of Economic and Industry Policy Bureau.

Japanese lawyers described the panel as an "all-star cast," that included another former JFTC official Kentaro Hirayama, Ryuichi Shitara, a former Chief Judge of Intellectual Property High Court, and Kenichi Nagasawa, a former IP head at Canon.

The involvement of several former JFTC officials marks a change from the previous SEP panel, established two years ago to advise the METI Manufacturing Industries

Bureau. Its April 2020 report, “The Fair Value Calculation of SEP for Multi-Component Products”, called for a “license for all” approach, where holders of patents declared as SEP and Fair, Reasonable and Non-Discriminatory (FRAND) terms provide the licenses to all willing licensees. The report, however, was not legally binding.

“METI may be considering some forms of regulatory enforcement by looking into how SEP licensing practices affect competition,” said one law professor, who declined to be named.

The new panel published an overview on 12 March that described how the competition laws conflicted with intellectual property rights (IPR) practices, the lawyers noted. There is a risk of standardization organizations infringing on competition laws, if they pass judgement on royalty fee calculations and how should licensees behave, the overview said.

Standardization organizations pro and con

Furthermore, it highlighted that standardization organizations do not exercise judgement on the essentiality of FRAND-declared SEPs. The essentiality judgement is left in the hands of license negotiators, as the process involves costs, imposes liabilities on the organizations for making the essentiality judgement, and possible violations of competition law, it said.

Back in 2015, panel head Hayashi wrote in the Japan Patent Attorneys Association journal that a system to ensure FRAND commitments by licensors was required, and that the standardization organizations were in the best position to run such systems. The 12 March overview raised anticipation among lawyers that the panel was likely to take up roles of standardization bodies, they said.

Attorney Takeshi Ishida of Anderson Mori & Tomotsune said if the standardization organizations became more actively involved in SEP licensing, a majority of global SEP disputes will be resolved.

“The standardization organizations are the best suited to ensure licensors adhere to FRAND commitments and to clarify what exactly the FRAND conditions are,” he said.

The METI official, however, denied that the panel was looking to address the role of standardization organizations. “The overview is only a summary of the past global trends. The panel has just started its activities and the discussions are open ended,” she said.

The panel is unlikely to propose changes to the JFTC guidelines on IPR, which describes the role of standardization organizations, one panel member told *PaRR*. Another panel member said ensuring transparency of the license negotiation process is important.

Takanori Abe, an attorney for Abe & Partners, said regardless of whether the panel recommendation are in favor of “license for all” or “access for all” approach, it will impact future SEP litigation in Japan. Parties filing suit are likely to use the panel publications as supporting evidence in court. Japan has seen only a handful SEP cases litigated in the past decades and legal documents addressing the issues are limited, he pointed out.

Aya Yasui, an attorney for Ikeda & Someya, said she observed many Japanese companies have in their hands potential SEP disputes but are taking a wait-and-see approach. “This panel is meaningful, as SEP disputes will be spreading to all sectors on the back of multi-industry links propelled by Internet-of-Things,” she said.

by Mayumi Watanabe in Tokyo