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# Praxis

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## Antitrust

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### **Faster, Greener, and More Digital: The EU Commission's IP Strategy and Antitrust Law**

Companies from all sectors have realized that in this day and age, easy and fast access to knowledge, data and technologies is essential for successful business(es). The EU Commission takes this into account in its November 25, 2020 IP Action Plan with the illustrious sub-title “Making the most of the EU’s innovative potential.” (See full report at <https://ec.europa.eu/transparency/regdoc/rep/1/2020/EN/COM-2020-760-F1-EN-MAIN-PART-1.PDF>). The EU Commission emphasizes that Intellectual Property Rights (IPR) are closely linked to both “sustainability” and “data”. And, of course, antitrust law also plays a role: for antitrust law-compliant instruments to ensure access to IPR, there is a need to adjust the way SEPs are licensed and data is shared—and more.

### **IoT Cannot Work without SEP**

In 2017, the EU Commission issued a communication on how to deal with SEPs (see

<https://ec.europa.eu/transparency/reg/1/2017/DE/COM-2017-712-F1-DE-MAIN-PART-1.PDF>). It, however, remained difficult for companies to (especially quickly and without going to court) agree on SEP licensing on FRAND terms, meaning “fair, reasonable and non-discriminatory.” The EU Commission notes in its Action Plan that the biggest problems with SEP licensing seem to occur in the automotive sector (as can be seen not least from a recent decision of the Regional Court of Duesseldorf which decided on November 26, 2020 to submit several questions on the licensing of SEP within multi-tier supply chains in the automotive sector to the ECJ). The EU Commission also sees problems in the health, energy, intelligent manufacturing, digital and electronics sectors. All these sectors have in common that they are essential for the vision of the “Internet of Things” (IoT). The consequence: no IoT without SEP—the licensing of SEPs must work. The EU Commission therefore announces in its Action Plan that it will promote short-term industry initiatives to mitigate and decrease the number of disputes. Even more importantly, it will consider parallel reforms to improve the “legal framework” (and therefore possibly binding legal rules?) for the registration, licensing and

enforcement of SEPs. For example, an expert group appointed by the EU Commission suggests an independent “third party essentiality assessment” of SEPs, where a neutral third party would clarify whether a technology contained in a standard is actually standard-essential—a question that in practice is often contentious, time consuming and costly. While seen individually this is a good idea, the benefit it actually creates will of course depend to a large extent on who the “third party” is and whether its decisions are subject to judicial review.

### **Sharing Is Caring**

“Data” also plays a major role in the EU Commission’s IP Action Plan. Thierry Breton, EU Commissioner for the Internal Market, commented that the ability to pool knowledge will be a key factor in the success of the green economy (see [https://ec.europa.eu/commission/press-corner/detail/en/ip\\_20\\_2187](https://ec.europa.eu/commission/press-corner/detail/en/ip_20_2187)). Improving the possibility of such pooling would not only be desirable in times of crisis but should also be available to companies beyond that. Such pooling would not be limited to classic IPR but would have to include access to data as well. The EU is therefore planning to create a robust framework that will enable companies not only to generate and access data, but also to exchange and use it.

However, the joint use of data (which may also be protected as IPR or trade secrets, depending on the circumstances) often means an exchange of information within the meaning of the ban on cartels according to Article 101 (1) TFEU. For the antitrust assessment, it is

particularly relevant which types of data are exchanged, with which level of detail, how often, how up to date the data is and who exchanges it. Agreements between companies which (may) restrict competition are, however, generally permissible if they contribute to improving the production or distribution of goods or to promoting technical or economic progress, while at the same time allowing consumers a fair share of the resulting benefit. An information exchange relevant under Article 101 (1) TFEU may, however, be exempted not only on a case-by-case basis but may also be block-exempted—for example, under the R&D BER. And there is movement on that issue: The EU Commission is currently revising its horizontal guidelines as well as the horizontal block exemption provisions contained in the R&D BER and Specialization BER (see <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11886-Evaluation-of-EU-competition-rules-on-horizontal-agreements/public-consultation>). In particular, the EU Commission is examining whether guidelines on data sharing are necessary for new forms of R&D cooperation. The EU Commission is also considering whether businesses need further guidelines on when there could be a forced access to data under antitrust law—which leads back to an issue that is the starting point of all

considerations regarding SEPs as well (where patent owners can be forced to grant licenses and thereby access to their IP). The EU Commission will therefore certainly pay close attention to this issue in the revision of its horizontal guidelines and block exemption regulations.

## Green Patents, Green Antitrust Law

Moreover, it remains to be seen to what extent the revision of the horizontal guidelines and the horizontal block exemption regulations will also consider sustainability and environmental protection aspects. In the end, the purpose of the block exemption regulations is facilitating forms of cooperation between companies which are desirable from an economic and competition policy perspective. It would certainly be desirable to take green issues into account for the antitrust assessment—as the progressive initiatives of the Greek and Dutch antitrust authorities show (See <http://hoganlovells-blog.de/2020/10/30/klimawandel-diskussion-um-gruenes-kartellrecht-nimmt-fahrt-auf/>). The EU Commission has just completed a consultation on this issue. (See [https://ec.europa.eu/competition/information/green\\_deal/call\\_for\\_contributions\\_en.pdf](https://ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf)). The IP Action Plan

also sees IP as a building block in the “new green and digital economy” project—not least because of the high share of “green patents” held by EU companies.

Data access, licensing of SEPs and the “green economy”—these are topics which will be central for antitrust law advice in the years to come and the Action Plan puts them right into the spotlight. It remains to be seen to what extent the emerging new legal framework can help companies to engage in innovative types of cooperation and avoid disputes. One thing is for sure though: the interface between antitrust law and IP will play a major role in this context.

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