1. INTRODUCTION

1. According to Article 9 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Regulation (EC) No 1/2003) (1), the Commission may decide — in cases where it intends to adopt a decision requiring that an infringement is brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment — to make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission. According to Article 27(4) of the same Regulation, the Commission shall publish a concise summary of the case and the main content of the commitments. Interested parties may submit their observations within the time limit fixed by the Commission.

2. SUMMARY OF THE CASE


3. According to the statement of objections, Samsung sought preliminary and permanent injunctions before the courts of various Member States on the basis of its standard essential patents (SEPs) covering Universal Mobile Telecommunications Service (UMTS) technology that Samsung has committed to license on fair reasonable and non-discriminatory (‘FRAND’) terms during the standard setting process in the European Telecommunications Standards Institute (‘ETSI’) (3).

4. The statement of objections reached the preliminary conclusion that, in the exceptional circumstances of the case (4), these practices constitute an abuse of a dominant position within the meaning of Article 102 of the Treaty on the Functioning of the European Union (‘TFEU’) and Article 54 of the EEA Agreement.

3. THE MAIN CONTENT OF THE OFFERED COMMITMENTS

5. Samsung does not agree with the concerns expressed in the statement of objections. It nevertheless offered commitments pursuant to Article 9 of Regulation (EC) No 1/2003 to meet the Commission’s competition concerns.

6. The key elements of the commitments are as follows.

7. Samsung commits not to seek an injunction before any court or tribunal in the EEA for infringement of its SEPs (including all existing and future patents) implemented in smartphones and tablets (‘mobile SEPs’) against a potential licensee that agrees, to and complies with, a particular licensing framework (‘licensing framework’) for the determination of FRAND terms of either a unilateral licensing

(1) OJ L 1, 4.1.2003, p. 1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and, respectively, 102 of the TFEU. The two sets of provisions are in substance identical. For the purposes of this notice, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82 of the EC Treaty when applicable.


(3) OJ L 1, 4.1.2003, p. 18.

(4) For the purpose of the statement of objections, the notion of ‘ETSI SEPs’ referred to patents that have been declared essential by their owner to any ETSI mobile phone standard, such as UMTS, W-CDMA, TDMA, CDMA, WLAN, GSM and GPRS.

(5) Where Samsung has given a commitment to license the SEPs in question on FRAND terms and in the absence of any objective justification (the absence of objective justification in particular relates to the fact that the potential licensee is not unwilling to enter into a licensing agreement on FRAND terms).
agreement covering Samsung’s mobile SEPs or, if either Samsung or the potential licensee so requests, a cross-licensing agreement covering both Samsung’s mobile SEPs and certain of the potential licensee’s mobile SEPs.

8. The licensing framework includes:

(i) a negotiation period of up to 12 months; and

(ii) a third party determination of FRAND terms, in the event no licensing agreement or alternative process for determining FRAND terms has been agreed upon at the end of the negotiation period. The third party determination of FRAND terms will consist of the submission of the dispute to arbitration or to court adjudication in order to determine the FRAND terms of either a unilateral licensing or cross-licensing agreement.

9. The licensing framework is set out in two annexed invitations to negotiate that constitute an integral part of the commitments and form the contractual basis for the application of the commitments between Samsung and a potential licensee.

10. The commitments allow Samsung to seek an injunction against a potential licensee on the basis of Samsung’s mobile SEPs where two cumulative conditions are met:

(i) a potential licensee has sought an injunction against Samsung on the basis of certain of its mobile SEPs; and

(ii) Samsung has subsequently signed and delivered the appropriate invitation(s) to negotiate licensing agreement(s) on FRAND terms covering its own mobile SEPs and certain of the mobile SEPs of the potential licensee.

11. The duration of the commitments will be five years from the date on which Samsung receives formal notification of the Commission’s decision pursuant to Article 9 of Regulation (EC) No 1/2003. Samsung will also appoint a trustee that will monitor its compliance with the commitments.

12. The commitments are published in full in English on the website of the Directorate-General for Competition at:

http://ec.europa.eu/competition/index_en.html

4. INVITATION TO MAKE COMMENTS

13. The Commission intends to adopt a decision under Article 9(1) of Regulation (EC) No 1/2003 making binding the commitments summarised above and published on the Internet, on the website of the Directorate-General for Competition.

14. In accordance with Article 27(4) of Regulation (EC) No 1/2003, the Commission invites interested third parties to submit their observations on the commitments. These observations must reach the Commission not later than one month following the date of this publication. Interested third parties are also asked to submit a non-confidential version of their comments, in which any information they claim to be business secrets and other confidential information should be deleted and replaced as required by a non-confidential summary or by the words ‘business secrets’ or ‘confidential’.

15. Answers and comments should preferably be reasoned and should set out the relevant facts. If you identify a problem with any part of the proposed commitments, the Commission would also invite you to suggest a possible solution.

16. Observations can be sent to the Commission under reference number AT.39939 — Samsung — Enforcement of UMTS standard essential patents either by e-mail (COMP-SAMSUNG@ec.europa.eu), by fax (+32 22950128) or by post, to the following address:

European Commission
Directorate-General for Competition
Antitrust Registry
1049 Bruxelles/Brussel
BELGIQUE/BELGIË