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Position Statement on the European Commission's Proposal for a SEPs Regulation

Niccolò Galli, Igor Nikolic, Marco Botta, Roberta Carlini, Chiara Carrozza, Danielle Da Costa Leite Borges, Lapo Filistrucchi, Leonardo Mazzoni, Natalia Menendez, Pier Luigi Parcu, Anna Renata Pisarkiewicz, Maria Alessandra Rossi

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Abstract

On 27th April 2023, the European Commission published a proposal for a Regulation on Standard Essential Patents (hereinafter, SEPs Regulation) and allowed the public to provide feedback. The Centre for a Digital Society (CDS) of the European University Institute (EUI) is thankful for the opportunity to offer its comments and make suggestions on the proposed Regulation. Our team of researchers has significant research, policy and training experience in the areas of intellectual property, telecommunications regulation, standardisation and EU competition policy. In this Position Statement, we caution against adopting the proposed SEPs Regulation in its current form and suggest adopting guidance under Arts. 101 and 102 TFEU to clarify how SEP licensing should occur not to breach EU competition law. In the sub-optimal scenario where EU institutions would continue to pursue an immediate regulatory intervention, we provide substantial suggestions in an attempt to improve the current proposal of SEPs Regulation and limit certain negative consequences. Our constructive criticism aims to be a catalyst for the debate in the legislative process about the appropriate SEP licensing framework.

Keywords

Patents, SEP, FRAND, standards, innovation, regulation

Contents

Florence, 26th July 2023[1]

On 27th April 2023, the European Commission published a proposal for a Regulation on Standard Essential Patents (hereinafter, SEPs Regulation) and gave the public the possibility to provide feedback.[2] The Centre for a Digital Society (CDS) of the European University Institute (EUI) is thankful for the opportunity to offer its comments and make suggestions on the proposed Regulation. Our team of researchers has significant research, policy and training experience in the areas of intellectual property, telecommunications regulation, standardisation and EU competition policy.[3] With its inter-disciplinary approach relying on in-house expertise in law, economics and political sciences, the CDS aims to advise policy makers on how to cope with the challenges of digital transformation and its impact on markets and democracy.[4]

Executive Summary

According to the Explanatory Memorandum, the goals of the Regulation are to: (i) ensure that end users, including small businesses and EU consumers, benefit from products based on the latest standardised technologies; (ii) make the EU attractive for standards innovation; and (iii) encourage both SEP holders and implementers to innovate in the EU, make and sell products in the EU and be competitive in non-EU markets.[5] As discussed below, we believe the proposed Regulation, as currently envisaged, will fail to achieve several of its goals. Especially, it is unlikely to make SEP licensing smoother and more transparent. First of all, we do not see sufficient empirical data pointing to a market failure that would justify a regulatory intervention in every possible SEPs licensing market. Evidence on the success of the telecommunication sector, where open standardisation has long played a crucial role, and even the data gathered by the European Commission's own study,[6] caution against an encompassing regulation of SEP-reliant markets. Second, the Regulation appears to redistribute revenues in various and not easily predictable ways. However, if most of its benefits, as it seems likely, would go to foreign device manufacturers, this may unintentionally harm major European SEP holders. Third, by significantly increasing the administrative costs of standard-technology markets, the Regulation may discourage SEP holders' and implementers' participation in the open standardisation system. A part of the industry, in fact, might opt-out of standardisation in favour of 'closed' innovation systems. The latter are not as inclusive and transparent as open standardisation and have their own market problems, such as the contestability and fairness issues of digital ecosystems. Finally, the Regulation is likely to set a precedent on a global stage and encourage other countries, such as China,[7] to adopt their own SEP regulations. Such piecemeal national laws could be used for industrial policy reasons to devaluate the technology contributions of European firms and FRAND royalties of Europan SEPs, and, even more seriously, could fragment the global standardization system and jeopardize its effectiveness. For all these reasons, we caution against the adoption of the proposed Regulation in its current form and suggest the adoption of

1 This Position Statement presents the views only of the Centre for a Digital Society and does not involve other programmes or the EUI. All websites are last accessed on 26th July 2023.

2 Proposal for a Regulation of the European Parliament and of the Council on Standard Essential Patents and Amending Regulation (EU) 2017/1001, COM(2023)232, 27 April 2023.

3 See our previous position statement on the Commission's Call for Evidence for an Impact Assessment on SEPs: Nikolic, I., Galli N., et al., 'Position Statement on the European Commission's Call for Evidence for an Impact Assessment on Standard-Essential Patents' (2022) available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4155887>.

4 For further information concerning the activities of the Centre for a Digital Society, see <https://digitalsociety.eui.eu/>.

5 European Commission, Explanatory Memorandum for Proposal for a Regulation of the European Parliament and of the Council on Standard Essential Patents and Amending Regulation (EU) 2017/1001, COM(2023) 232 final (Explanatory Memorandum).

6 Baron, J., Argue-Castells, P., Leonard, A., Pohlman, T., Sergheraert, E., 'Empirical Assessment of Potential Challenges in SEP Licensing' (2023).

7 Rafferty, O., 'Patent Holder Pushback Could Shake Up Draft Chinese SEP Regulation' (IAM Media, 16 June 2023 <https://www.iam-media.com/article/patent-holder-pushback-could-shake-draft-chinese-sep-regulation>. See also Chinese sources translated through Deepl: *EPO-China, 'Europe SEPs in Disarray'* 3 April 2023 <https://mp.weixin.qq.com/s/WZQc2RW3Ydscu27Cz4WDdQ>; IPToday, 'Will EU's Upcoming New SEP Regulation Be For Good or For Ill?' 27 April 2023 <https://rb.gy/b90w5>; jiweinet, 'EU Is Set to Unsheathe Its Sword of New SEP Regulation. Will the 'Chinese Proposal' Follow Suit?' 27 April 2023 <https://rb.gy/46xa0>.

guidance under Arts. 101 and 102 TFEU to clarify how SEP licensing should occur not to breach EU competition law (Section 1). In the sub-optimal scenario where EU institutions would continue to pursue an immediate regulatory intervention, we provide substantial suggestions in an attempt to improve the current proposal of SEPs Regulation and limit certain negative consequences (Section 2).

1. General Remarks About the Proposal for a SEPs Regulation

1.1. No Empirical Evidence of a Market Failure Justifying a Regulation

According to the Impact Assessment, the Commission identified uncertainty and high transaction costs as the main causes of licensing inefficiencies. More concretely, the problems were identified in the insufficient transparency on SEP ownership and essentiality, the lack of information about FRAND royalties and a dispute settlement system not adapted for FRAND determinations. Each aspect is being addressed by the proposed SEPs Regulation.

While we understand the Commission's concerns, we do not see solid and consistent empirical evidence of the existence of a market failure that would justify a regulatory intervention or the proportionality of proposed measures. In fact, the Commission's study found that perceived SEP licensing inefficiencies have not led to increased litigation, pervasive infringement or systemic negative effects.[8] The study found that SEPs litigation cases are relatively stable in Europe, while decreasing in the US but increasing in China.[9] Then, the study showed that the prevalence of SEP litigation is low compared to non-SEPs, the incidence of SEP litigation per license, and does not increase over time. According to the study, there are fewer than 0.05 litigations per license involving major SEP licensors and patent pools.[10] Regarding the effects of the current SEP licensing system on the incentives of SEP holders and implementers, the study found no evidence that SEP holders contribute less to standard-development because of FRAND licensing frictions.[11] The econometric evidence suggests that a significant share of contributions to standard development rely on patent-related incentives, indicating the importance of preserving innovation incentives for the successful standard-development process.[12] On the side of implementers, the study found no evidence that SEP licensing frictions lead implementers to switch to alternative standards (e.g., royalty-free or open-source) or to systematically depressed or delayed standard implementation.[13]

Moreover, the evidence in the mobile telecommunication sector, where innovation and technology diffusion has long rested on open standardisation, cautions against an encompassing regulation of every SEP licensing market.[14] The telecommunication sector experienced increased output, lower prices, new market entries and billions of euros in investment in research and development (R&D) for connectivity standards and the roll-out of new network infrastructures.[15] The latest estimate for the

8 Baron, J., Argue-Castells, P., Leonard, A., Pohlman, T., Sergheraert, E., 'Empirical Assessment of Potential Challenges in SEP Licensing (2023).
9 Ibid, 109-110
10 Ibid, 108, 112.
11 Ibid, 164.
12 Ibid.
13 Ibid.
14 We made the same argument in our previous Position Statement on the European Commisison's Call for Evidence for an Impact Assessment on SEPs, see Nikolic, I., Galli N., et al., (2022).
15 For some of the voluminous literature see: Galetovic, A., Haber, S., Levine, R., 'An Empirical Examination of Patent Holdup' (2015) 11(3) *Journal of Competition Law & Economics* 549; Mallinson, K., 'Don't Fix What Isn't Broken: The Extraordinary Record of Innovation and Success in the Cellular Industry Under Existing Licensing Practices' (2016) 23 *George Mason Law Review* 967; Teece, D., 'The "Tragedy of the Anticommons" Fallacy: A Law and Economics Analysis of Patent Thickets and FRAND Licensing' (2017) 32 *Berkeley Technology Law Journal* 1490; Sidak, G., 'Is Patent Holdup a Hoax' (2018) 3 *Criterion Journal on Innovation* 401; Galetovic, A., Haber, S., Zaretzki L., 'Is There an Anti-Commons Tragedy in the Smartphone Industry' (2018) 32 *Berkeley Technology Law Journal* 1527; Spulber, D, 'Licensing Standard Essential Patents with FRAND Commitments: Preparing for 5G Mobile Telecommunications' (2020) 18 *Colorado Technology Law Journal* 79; Auer, D., Morris, J., 'Governing the Patent Commons' (2020) 38(2) *Cardozo Arts & Entertainment Law Journal* 291.

mobile economy in 2022 was 8.4 billion SIM connections and 4.4 billion mobile internet subscribers, contributing $5.2 trillion or 5% of the global gross domestic product and supporting directly and indirectly 28 million jobs creation.[16] In Europe, available estimates highlight that, quantitatively, the weight of SEP licensing revenues is relatively limited. For instance, one research found that the total revenue from cellular SEP licensing was estimated to be less than 0.5% of the size of the mobile economy.[17] Other studies found that the cumulative royalty yield of 2G, 3G and 4G SEPs was only 3.4% of the smartphone's average selling price, or just $9.60.[18]

While it is true that there are competition law issues[19] and some obstacles to more efficient FRAND licensing – today it is a sophisticated, expensive (estimated cost between €2 million to €11 million per licence) and lengthy endeavour[20] – we believe that empirical evidence has not been systematically gathered to support the proposed SEPs Regulation, especially in its broad scope as currently drafted.

1.2. Increasing the Uncertainty Regarding the Open Standardisation Systems

The Regulation's effective impact on the level of royalties is difficult to predict, as recognised by the European Commission. According to the Impact Assessment, the effects of the Regulation may go in two opposing directions: "i) potentially more firms taking a license (increasing implementers' costs and income for SEP holders) or ii) potentially lower royalties paid (decreasing implementers' costs and income of SEP holders).[21]

We would like to stress the importance of a flexible and balanced legal framework to support our delicate open standardisation systems. Otherwise, if participation in open standardisation becomes too costly or does not ensure adequate incentives to all participants, companies may decide to switch to other, less inclusive, organizational forms, such as vertical integration or 'closed' platforms.[22] Voluntary, transparent and consensus-based standardisation systems require both the supply and demand sides of technology markets. FRAND licensing commitments made such bipartisan participation possible for over thirty years: they ensure non-discriminatory access to the standard to implementers while, at the same time, providing fair and reasonable remuneration to SEP holders.

In practice, parties can disagree on the amount of FRAND, namely on how to share the returns from the standardisation investments. However, such disagreements can be settled only *ex-post* as the scope, applications and market acceptance of standards become clearer.[23] Any public intervention that *ex-ante* sets the level and scope of FRAND licensing commitments and tilts their balance in favour of either the supply side or demand side of standard-technology markets risks jeopardising the other side's participation in the open standardisation system. The disadvantaged technology market side can opt-out of open standardisation in favour of other innovation systems, which are not necessarily better than standardisation and have their own market problems. For example, the gatekeeping role of large digital platforms has been recognised in the Digital Markets Act for giving

16 GSMA, 'The Mobile Economy' (2023).

17 Heiden, B., Padilla, J., Peters, R., 'The Value of Standard Essential Patents and the Level of Licensing' (2021) 49(1) *AIPLA Quarterly Journal* 1, 5-6.

18 Galetovic, A., Haber, S., Zaretzki, L., 'An Estimate of the Average Cumulative Royalty Yield in the World Mobile Phone Industry: Theory, Measurement and Results' (2018) 42 *Telecommunications Policy* 263; Mallinson, K., 'Cumulative Mobile SEP Royalties' (19 August 2015); Sidak, G., 'What Aggregate Royalty Do Manufacturers of Mobile Phones Pay to License Standard-Essential Patents?' (2016) 1 *Criterion Journal of Innovation* 701.

19 For instance, see the competition law-related questions dealing with licensing in the value chain referred to the CJEU for a preliminary ruling in C-182/21 *Nokia Technologies v Daimler* EU:C:2021:575. The case was closed without answers from the CJEU due to the parties' settlement.

20 On average, it was estimated that the a licence is concluded 3.75 years ather the implementer first introduced its products using standardised technology, see Baron, J., Argue-Castells, P., Leonard, A., Pohlman, T., Sergheraert, E., 'Empirical Assessment of Potential Challenges in SEP Licensing (2023) 108.

21 Ibid, p. 50.

22 Parcu, P.L., Carrozza, C., Solidoro, S., 'SSOs v. Silos and the "Quality of Innovation"' (March 2020) *CPI Antitrust Chronicle*.

23 Possible mechanisms to improve/integrate ex-ante FRAND contracts, through clauses of ex-post updating to market realizations, have been studied but have never been experimented, see Parcu, P.L., Silei, D., 'An algorithm approach to FRAND Contracts' (2020) EUI *RSCAS 2020/61 Working Paper*.

rise to severe contestability and fairness issues in platform ecosystems.[24]

1.3. The Side Effect of Fragmented SEP Regulatory Regimes Across the Globe

The proposed Regulation might have the unintended consequence of being used as a template for other countries to introduce their own regulatory frameworks for SEP licensing. They could easily justify their action as a simple 'best practice' coming from Europe. If similar piecemeal regulations are adopted by other countries – i.e., requiring notification of national SEPs, conducting local essentiality checks, determining global aggregate royalty rates for a standard and setting global FRAND licensing terms – then the costs to SEP holders for enforcing SEPs would be compounded, since they would need to comply with parallel regulatory regimes in multiple countries. The effects on innovation incentives, participation in collaborative standardisation and global trade by the increased costs of SEP enforcement and licensing would need to be assessed. A radically changed and fragmented SEP licensing environment would also lead to even more uncertainty and opposing decisions by national regulations.

SEP regulations implemented by other countries might easily backfire and could be used as strategic tools to devaluate the royalties of innovative European SEP holders. China might be especially receptive to the idea of regulating SEP licensing.[25] Recent studies have evidenced how China strategically deployed competition and patent law to reduce royalties for SEPs held by foreign companies to the benefit of domestic manufacturers.[26] The EU has also launched a complaint before the WTO against China's practice of issuing wide anti-suit injunctions preventing the enforcement of SEPs in other jurisdictions.[27] Instead of using competition and patent law, a regulation similar to the one proposed by the European Commission could easily advance the same industrial policy and protectionist aims.

1.4. Soft Law Guidance Instead of Regulation

Due to the lack of systematic evidence concerning market failures in industries characterised by open standardization, the European Commission could consider using less intrusive and more flexible measures to improve FRAND licensing without distorting the standardisation ecosystem or harming European innovation. We believe that an ad hoc communication from the Commission would be a more natural, fast and proportional policy intervention in the highly sensitive SEP field.[28] A communication from the Commission could build upon and expand the EU legal framework for licensing SEPs that so far rested on competition law, particularly on the *Huawei v ZTE* abuse of dominance case law, the Horizontal Cooperation Guidelines and the Technology Transfer Guidelines.[29] Further, the simplified adoption procedure of the administrative instrument would ensure more prompt intervention. Finally, the non-binding and amendable soft law would accommodate the sensitivity of innovative technology markets, the diversity of national patent laws and the development of the unitary patent system.

24 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (2022) OJ L 265/1.

25 See fn 7.

26 Barnett, J., 'Antitrust Mercantilism: The Strategic Devaluation of Intellectual Property Right in Wireless Markets' (2023) *Berkeley Journal of Law & Technology* forthcoming; also Suchodolski, J., Harrison, S., Heiden, B., 'Innovation Warfare' (2020) 22 North Carolina *Journal of Law & Technology* 175.

27 World Trade Organization, 'DS611: China-Enforcement of Intellectual Property Rights' (2022) available at: <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds611_e.htm>.

28 Stefan, O., et al., 'EU Soft Law in the EU Legal Order: A Literature Review' (2018) *SoLaR Working papers*.

29 Case C-170/13 *Huawei v ZTE* EU:C:2015:477; Commission 'Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-Operation Agreements' (2023) (HCG) available at: <https://competition-policy.ec.europa.eu/system/files/2023-06/2023_revised_horizontal_guidelines_en_0.pdf>; Commission, 'Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements' (TTG) (2014) OJ C 89.

Content-wise, such an administrative instrument could contain guidelines both on how the Commission considers that EU competition law needs to be interpreted vis-à-vis the licensing and litigation of SEPs and on how the Commission will interpret and apply it in infringement proceedings. To that end, the Commission could collect best practices from the national jurisprudence following Huawei v ZTE and, as detailed below, endorse the SEP Expert Group's recommendations on value chain licensing into a communication under Arts. 101 and 102 TFEU. The new "FRAND Licensing and SEP Litigation Guidance" could complement and specify the existing soft laws. Indeed, the Horizontal Cooperation Guidelines touch upon FRAND licensing tangentially in the standardisation chapter, while the Technology-Transfer Guidelines cover several patent licensing restraints but lack a specific focus on SEPs and on negotiation and litigation tactics.

Besides recalling general principles, the Guidance could clarify several issues that are debated in the SEP field. First, it could extrapolate from national case laws and antitrust practice proxies of potential patent hold-up and patent hold-out practices such as, respectively, tying SEPs to unneeded patents[30] and ignoring negotiation communications for a long time.[31] Second, it could clarify the assessment of specific FRAND licensing clauses affecting the scope of the license (e.g., patent rights included in the licence, field of use restrictions), territorial and temporal limitations (e.g., multi-country vs country by country licensing, short term vs long term or renewable licence) and the consideration to be paid (e.g., running royalties, lump sums, royalty caps, discounts). Finally, the Guidance could endorse the SEP Expert Group's principles for finding the optimal solution for licensing SEPs in the value chain,[32] while leaving their implementation to the market, allowing different solutions for different IoT industries.[33]

Overall, balanced guidelines of established best practices on the willing licensee and licensor behaviours would increase legal certainty and reduce transaction costs and litigation instances while leaving the necessary flexibility to the market to arrive at the most suitable licensing models. Not least, such FRAND licensing and SEP litigation guidelines may ensure the coherent interpretation of the *Huawei v ZTE* framework, avoiding divergent national or even sub-national court approaches.

2. Suggestions to Improve the Text of the Proposed SEPs Regulation

This section provides specific comments on the proposed SEPs Regulation in case the European Parliament and the Council decide to go ahead with the EU Commission's legislative proposal, although our general position remains that the Regulation is unnecessary and that soft law guidance may be a better solution. Our constructive criticism aims to be a catalyst for the debate in the legislative process about the appropriate SEP licensing framework. In particular, we focus on six specific aspects of the proposed SEPs Regulation that would need significant improvement:

1. Clarify and limit the scope of application of the proposed SEPs Regulation;
2. Balance SEP registration requirements with FRAND licenses registration;
3. Incentivise implementers to negotiate FRAND licences sooner;
4. Focus on EU rates rather than global ones;
5. Shield the aggregate royalty notification system from collusion risks;

30 See the CJEU case law cited in Galli, N., Botta, M., 'It's Unfair! Non-price Exploitation in ICT Patents Licenses' (2023) *54 IIC* 200, 216-217.

31 See, e.g., *Sisvel v Haier*, KZR 36/17 Federal Court of Justice (05 May 2020).

32 The EU Commission's SEP Expert Group's principles for licensing SEPs in the value chain are: 1) licensing at a single level in a value chain for a particular licensed product (or case of applications); 2) a uniform FRAND royalty for a particular standard-implementing product, irrespective of the level of licensing; 3) the FRAND royalty is a cost element in the price of a non-finished product and should be passed through downstream.

33 For the same argument in our previous position statement see Nikolic, I., Galli, N., et al., (2022), 15-16.

6. Align the essentiality check system with pro-competitive behaviour.

2.1. Clarify and Limit the Scope of Application of the Proposed SEPs Regulation

As currently envisaged, the proposed Regulation will apply to all standards licensed on FRAND terms that are published after its entry into force. We believe such wide scope of application is unnecessary as it can potentially catch numerous standards in different industries to which there is no evidence of any licensing inefficiencies.[34] We recognise that Article 1(4) enables the Commission to designate certain standards or use cases that "do not give rise to significant difficulties or inefficiencies affecting the functioning of the internal market", to which the provisions on aggregate royalty rates and mandatory FRAND determinations will not apply. However, even these non-problematic standards would still need to comply with the most costly obligations of registering SEPs and conducting essentiality checks.

We suggest that the scope of the Regulation be changed and limited only to specific use cases of certain standards that will be designated by the Commission after an in-depth evidence-gathering process similar to the market investigation into new services and new practices of Art. 19 of the DMA or the sector inquiry of Art. 17 of Regulation 1/2003.[35] During such a SEP Licensing market investigation, the Commission could request information regarding the licensing agreements and litigation between SEP holders and implementers of a given standard from a specific economic sector. The obtained information could clarify whether SEP licensing is subject to significant difficulties or inefficiencies affecting the functioning of the internal market. This way, the Regulation would apply only to use cases of certain standards where there is evidence of significant market inefficiencies, which might justify regulatory intervention. On the other hand, non-problematic standards or use cases would not be caught by the Regulation, which would lower the compliance costs and make the impact of the Regulation more proportional.

Summary of recommendations

- **Provide that the Regulation will only apply to specific use cases of certain standards designated by the European Commission after an appropriate market investigation establishing significant difficulties or inefficiencies affecting the functioning of the internal market.**

2.2. Balance SEP Registration Requirements With FRAND Licenses Registration

One of the aims of the Regulation is to provide greater transparency to SEP licensing. Instead of improving or harmonising national patent registers or individual SDOs' databases, the Regulation introduces a new registration system before the EUIPO. Although it is unclear if such transparency would lead to fewer FRAND disputes, we appreciate the one-stop-shop efficiencies of the – partly duplicative yet single – EUIPO registration system compared to the fragmented and incomplete status quo.[36] However, the Regulation puts most registration burdens and costs upon SEP holders, ignoring the valuable data that implementers could contribute as well. Such registration requirements, as evidenced by the calculations of the Impact Assessment, increase the cost of the supply side of standard-technology markets, weakening incentives for SEP holders' participation in open standardisation.

34 The overly encompassing approach of regulating all standards based on FRAND licensing is remindful of the centralised notification and exemption system in force before the modernisation of EU competition law under EEC Concil Regulation 17/1962 First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204.

35 Digital Markets Act, Art. 19; 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 OJ L001/1, Art. 17. For a similar argument in our previous Position Statement, see Nikolic, I., Galli, N., et al., (2022), 10.

36 Galli N., 'Patent Aggregation in Europe: The Spotlight on Patent Licensing by Patent Aggregators' (2020) *EIPIN-IS Research Paper* no. 20-03, 4.

To balance the data-feeding burdens evenly among the stakeholders, the SEPs Regulation could impose on implementers the obligation to record into the publicly accessible register the existence, patent scope and licensed products of their FRAND licences. Transparency on who takes a license for what patents and implementing products ensures a level playing field in both technology and product markets: in technology markets, SEP holders can learn about implementers licensed by other complementary SEP holders, while in product markets, implementers can identify whether their competitors are licensed or not. Not least, information on existing licenses enables implementers to determine whether their suppliers are already licensed and avoid taking a license for exhausted patents.

Summary of recommendations

- **The Regulation should impose on implementers the obligation to record into the EUIPO SEP register the existence, patent scope and licensed products of their FRAND licences to level the playing field and promote competition in both technology and product markets.**

2.3. Incentivise Implementers to Negotiate FRAND Licences Sooner

The proposed SEPs Regulation would turn EU SEPs into a unique type of patent whose exclusive rights are subject not only to examination by national patent offices but also to registration before the EUIPO (Art. 20). In fact, failure to register SEPs within the six months deadline precludes the enforcement against the relevant standard implementation in the Member States and the Unified Patent Court (UPC), and bars compensation for infringement acts occurring from the due time for registration until its late performance (Art. 24). However, the SEPs Regulation should balance the registration requirement imposed on SEP holders with an incentive for implementers to proactively seek a licence once a SEP is registered. To date, if implementers hold-out (i.e., delay licensing negotiations, negotiate in bad faith, insist on litigation), they are still entitled to a FRAND licence, the same as implementers that negotiated in good faith or accepted a licence without litigation.

To address this imbalance in the FRAND licensing framework and incentivise good faith negotiations, and considering that FRAND is a range,[37] the Regulation should provide that those implementers that have not approached a SEP holder for a license within six months from the registration of a SEP will need to pay a higher FRAND rate than those implementers that initiated negotiations in a timely manner. Such a royalty in the higher range of FRAND should be paid at least for the infringement acts occurring from the time of SEP registration until the conclusion of the FRAND licence.

Summary of recommendations

- **The Regulation should balance the SEP registration requirement with an incentive for implementers to proactively seek a licence after a SEP is registered. Considering that FRAND is a range, such an incentive could foresee that implementers that do not approach SEP holders within six months from the registration of a SEP should pay a higher FRAND rate than those implementers that initiated negotiations in a timely manner.**

37 Supreme Court of the Netherlands, *Wiko v. Koinklijke Philips*, judgement dated 2 July 2021, paras. 1.34 and 4.54-4.59; *Sisvel v Haier*, KZR 36/17 Federal Court of Justice 5 May 2020, para. 81.

2.4. Focus on EU Rates Rather Than Global Ones

The Regulation has extra-territorial effects. It allows SEP holders to notify global aggregate royalty rates (Art 15), non-binding expert opinions will relate to global aggregate rates (Article 18), and mandatory FRAND royalty determinations would concern global rates (Article 38.6) unless parties agree otherwise. The global aggregate and FRAND rates have a clear extra-territorial effect that contradicts the SEP registration requirement limited to SEPs validated in the Member State. In other words, while registration of SEPs and essentiality checks relate only to EU SEPs, conciliators will be determining global aggregate and FRAND rates.

For the concerns of international comity, the Regulation should, by default, aim for EU-only rates, leaving global rates to the parties' ad hoc agreement. Even geographically limited rates can serve as benchmarks for FRAND licensing negotiations over other geographic markets or global portfolios. While it is true that commercial negotiations typically concern global portfolio rates, it is an entirely different matter when parties voluntarily negotiate such arrangements than when national legislation mandates global royalty determinations that would be set for foreign companies. It can be expected that other countries would not look favourably at such extraterritoriality and might respond with their own legislation empowering their officials to sets global FRAND rates.

Summary of recommendations

- **The Regulation should concern EU-only FRAND rates, which can function as benchmarks for global or non-EU licensing negotiations.**

2.5. Shield the Aggregate Royalty Notification System From Collusion Risks

The Regulation should include competition safeguards against collusion and price fixing. Article 15 of the Regulation enables SEP holders to agree and fix the aggregate royalty rate after the standard is set, which goes beyond the competition law benevolence of paras. 447 and 474 of the draft new Horizontal Cooperation Guidelines, which relate to *ex-ante* disclosure of maximum accumulated royalty rates by SEP holders.[38] As the Regulation recognises (Recital 15), knowledge of the total royalty burden shortly after a standard is set provides legal certainty and business predictability for both implementers and SEP holders, which facilitates SEP licensing and enhances the diffusion of standard-implementing products. However, for such benefits to materialise without collusion risks, the process of setting the aggregate rate should adopt similar competitive safeguards to those set by paras. 244-261 of the Technology Transfer Guidelines to establish and manage patent pools, which also determine common prices for IP licenses.[39] Safeguards should be provided against the exchange of sensitive information, such as pricing and output data, which could reduce or eliminate price competition in the markets concerned, or limit or control production, thereby facilitating a collusive outcome on the market.[40] The danger of collusive outcomes is greater for vertically integrated SEP holders, which would set effectively the input price for their downstream products and might collude on the downstream market.

Moreover, the participation of implementers in the process of providing an expert opinion on global aggregate rates may be used as a vehicle for a buyers' cartel and could devaluate FRAND royalty rates. Namely, it is unclear from the text of the proposed SEPs Regulation if implementers are allowed to coordinate their submissions to conciliators. If this is provided, then implementers might use the process to exchange commercially sensitive information and agree on the maximum global aggregate royalties they would pay. This would be tantamount to price fixing of input costs and a

38 Ex ante disclosures are viewed favourably because they enable SDOs' members to take informed decisions based on both the quality and price characteristics of technologies candidate for a standard. See HCG (2023), paras 447 and 474.
39 TTG (2014), paras 244-261.
40 HCG (2023), para. 442.

buyers' cartel. Even if such coordination is not allowed, by individually submitting their maximum royalty expectations, which are made with the goal of minimising input costs, implementers might attempt to devaluate SEP royalties. Since implementers outnumber SEP holders by far, the position of the former might overcome the position of the latter and have an outsized influence on conciliators preparing expert opinions.

Summary of recommendations

- **Provide competition safeguards against collusion and exchange of sensitive commercial information in the processes of notifying aggregate royalty rates and non-binding expert opinion on aggregate rates.**

2.6. Align the Essentiality Check System With Pro-Competitive Behaviour

The proposed SEPs Regulation sets a detailed essentiality check system that might bring more drawbacks than benefits. Besides the widely-discussed reliability of sampling methodologies, imperfect assumptions based on patent families, and feasibility and usefulness of non-binding determinations, we highlight two additional limitations. On the one hand, by registering SEPs in the database, SEP owners are already submitting SEP they believe are essential. Accordingly, SEP holders' possibility to put forward annually up to 100 SEPs for checks seems redundant. On the other hand, implementers' possibility to indicate up to 100 SEPs each for checks gives room to coordinated hold-out tactics. Implementers with aligned incentives might coordinate their essentiality determination proposals to screen the entire SEP portfolio of a specific licensor. Up to several hundreds of standard-essentiality requests by multiple implementers, regardless of the merit of the requests, might put pressure on the licensor to devaluate its FRAND licensing offer. Therefore, competition safeguards over sensitive information exchanges should be in place against implementers' coordinated action. For example, keeping confidentiality over the requesters' identity would make it harder for implementers to act in concert and stack their requests one upon the other against different SEPs of the same licensor. Further, coordination could be limited if individual implementers could not direct more than a certain percentage (e.g., 20%) of their annual requests against the same SEP holder.

Finally, instead of allocating the costs of the essentiality checks to the requesting party, we propose to follow the "loser pays" principle, which is generally applicable in patent litigation across Europe.[41] To understand why such a principle is useful, one must consider that essentiality checks can lead to either positive outcomes that confirm the self-declared standard-essentiality or negative outcomes that confute it. Negative outcomes, very much like patent invalidity findings, produce a positive externality since all implementers benefit from not having to pay for a patent that is not standard-essential (so more likely non-infringed). As with any positive externality, essentiality check requests by implementers suffer from a collective action problem: an individual implementer has a reduced incentive to pay for an action that benefits its competitors that would free-ride on the results. The "loser pays" principle would solve, in part, such a collective action problem and, at the same time, charge implementers when essentiality is confirmed.

In practice, for random essentiality checks by the EUIPO, and if SEP holders can still propose checks on their SEPs, the SEP holders should pay the costs of negative findings only. The EUIPO should internalise the cost of positive findings confirming standard-essentiality and cover it with the other revenues from the SEP licensing framework. For essentiality checks proposed by implementers, implementers should pay for positive findings, whereas SEP holders should pay for negative findings. As a result, the "loser pays" principle in the EUIPO essentiality check system would add to the factors that discourage the over-declaration of SEPs before SDOs, reduce SEPs over-registration before the EUIPO and prevent opportunistic behaviour by implementers while enhancing the positive

41 European Patent Academy, 'Patent Litigation. Block 3: Costs' (EPO, 2018) available at <https://e-courses.epo.org/wbts_int/litigation/Costs.pdf>.

externalities of negative essentiality findings. The following table visualises the application of the "loser pays" principle to essentiality checks.

		Essentiality checks possible outcomes:	
		Positive (the SEP is standard-essential)	**Negative (the SEP is not standard-essential)**
Essentiality checks requesters:	**EUIPO Sample**	EUIPO internalises the cost (the check confirms diligent and good faith behaviour by the SEP holder)	The SEP holder pays (wrong declaration or registration)
	(SEP Holder)	EUIPO internalises the cost (the check confirms diligent and good faith behaviour by the SEP holder)	The SEP holder pays (wrong declaration or registration)
	Implementer	The implementer pays (the check check confirms diligent and good faith behaviour by the SEP holder)	The SEP holder pays (wrong declaration or registration, plus the implementer should not pay for the positive externality it generates)

Summary of recommendations

- **Provide competition safeguards against implementers' coordination over essentiality checks requests directed to devaluating a specific licensor's SEP portfolio.**
- **Adopt the "loser pays" principle for allocating costs in the essentiality check system.**

Conclusion

We are grateful for the opportunity to comment on the proposed SEPs Regulation. Based on the above, we are of the opinion that the proposed legal act, in its current form, is unlikely to achieve its aims of making SEP licensing smoother and transparent. In our view, the proposed SEPs Regulation includes disproportionate measures, will complicate SEP licensing even further and is unnecessary given that current empirical evidence has not established systemic negative effects in existing SEP licensing markets. Moreover, the Regulation is likely to lead to international responses with similar legislation in other countries. Such legislation might be used for industrial policy purposes in order to devaluate the royalties of European SEP holders and cause a fragmentation of the standardization system. We encourage the European Commission, the European Parliament and the Council to reconsider the Regulation and rather opt for a soft law instrument in the form of a communication from the Commission containing guidance under Arts. 101 and 102 TFEU to clarify how SEP licensing should occur not to breach EU competition law. In the sub-optimal scenario where the European Parliament and the Council decide to support the proposed SEPs Regulation, we have highlighted six specific aspects that would need significant improvement. Our suggestions aim for a balanced SEP legal

framework that takes the interests of both SEP holders and standard implementers into account and does not penalize innovative European companies. Finally, we think that any policy intervention in the SEP field should take into account and consistently support the EU's Standardisation Strategy to strengthen Europe's global competitiveness and technological sovereignty.[42] The CDS team remains at the European Commission's disposal for any further questions.

42 Commission, 'An EU Strategy on Standardisation: Setting Global Standards in Support of a Resilient, Green and Digital EU Single Market' COM(2022) 31 final.

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