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## LES ITALY position paper on European Commission's Proposal for a

### ***"Regulation of the European Parliament and of the Council on Standard Essential Patents and Amending Regulation (EU) 2017/1001"***

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## 1. LES Introduction and opening remarks

### **Introduction of LES Italy (Licensing Executives Society – Italian Chapter)**

The Licensing Executives Society (LES) is a non-profit organization active in the field of Technology and Intellectual Property licensing – from technical know-how and patented inventions to software, copyright, and trademarks. LES International (LESI) has more than 10,000 individual members divided into 33 national and regional societies. LES Italy is the Italian group of the LESI. Its members include more than 500 representatives from major Italian companies, law and IP firms, universities, and research institutes as well as licensing companies. The association aims to encourage high professional standards among individuals engaged in the transfer and licensing of technology and Intellectual Property rights. It also assists its members in improving their skills and techniques through self-education, studies and research, educational meetings, publications, and the exchange of ideas related to domestic and foreign licensing. In a nutshell, LESI members are recognized to have an extensive experience in the field of licensing. As a key business stakeholder, LES Italy would like to express some considerations and concerns in relation to the proposal for a Regulation on Standard Essential Patents issued by the EU Commission ("Commission") on the 27<sup>th</sup> of April 2023 ("SEP

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Proposal”). We are grateful for the opportunity to comment on the proposed SEP Proposal and our observations are presented herein below.

### **Opening remarks**

Standard Essential Patents (“SEP”) play a fundamental role in the innovation landscape driving most of the investments in strategic technology areas such as wireless communications (3G/4G/5G) and the Internet of Things (IoT). According to the Commission, the SEP Proposal is intended to *“incentivize the participation by European firms in the standard development process and the broad implementation of such standardized technologies, particularly in IoT”* by enhancing transparency and removing information asymmetry.

The Commission acknowledges the value of transparency and the removal of information asymmetry as important goals to enhance SEP licensing efficiency. However, it is important to assess whether this proposed extensive SEP Proposal goes beyond what is necessary to achieve these objectives, considering that no market failure has been demonstrated. Even the key studies relied upon by the Commission fail to provide substantial support for the SEP Proposal. So, the Commission’s decision appears to be based on subjective considerations rather than clear-cut facts. The Commission claims this proposal is needed because self-regulation has not decreased the number of SEP licensing disputes, which would be likely to increase in the near future. However, empirical studies, including the ones relied on by the Commission, do not support this conclusion. In fact, it is worth noting that the number of SEP licensing disputes has consistently shown a downward trend over time. Disputes involving Fair, Reasonable and Non-Discriminatory (FRAND) terms in SEPs landscape reached a peak in 2014, with the lowest number of FRAND disputes in 2021<sup>1</sup> – see number of citations of FRAND in worldwide patent litigation taken from J. Baron et al., *“Empirical Assessment of Potential Challenges in SEP Licensing.”* The same study also confirms a decreasing trend of SEP disputes overall globally and specifically in Europe. Hence, no substantiated evidence suggests that the SEP disputes are of critical importance or expected to increase in the near future.

The SEP Proposal and the framework proposed by the Commission would imply a high level of bureaucracy imposing high level of costs (on SEP holders). There are serious concerns that the proposed regulation would threaten the standards-based ecosystem and discourage EU innovation rather than foster innovation and incentivize EU innovators, SMEs and universities in particular. The SEP Proposal in its current form lacks consideration for market dynamics and economic impacts, therefore underestimating the potential effectiveness of market-based solutions, such as patent pools. It is crucial to consider these factors when drafting the SEP Proposal to ensure the development of effective and efficient solutions.

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1 J. Baron et al. “Empirical Assessment of Potential Challenges in SEP Licensing” – 2023 [Empirical-Assessment-of-Potential-Challenges-in-SEP-Licensing.pdf \(iplytics.com\)](#) – quote of IP Europe [A \(bad\) solution in search of a problem - Part II - SEP Litigation Data Do Not Support Need for Proposed EU Regulation - IP Europe](#)



## 2. Interference with the right to access courts

Under the new SEP Proposal SEP holders have to register the patent before the EUIPO<sup>2</sup> prior to any patent infringement proceedings. After that, SEP holder shall go through a mandatory conciliation<sup>3</sup>, whereby an independent conciliator would seek to help the involved parties to agree upon FRAND terms. If parties fail to agree, the independent conciliator shall issue a non-binding report with a recommendation on the FRAND rate. Therefore, SEP holders are prevented from enforcing the patent(s) in any EU court (whether a national court or the Unified Patent Court) unless they have registered their SEP(s) and the process of FRAND determination (which may take a minimum of nine months) is completed.

According to the Commission, the temporary limitation on the right to enforce SEPs and, thus, on the right to seize the courts is deemed to be in line with the Charter of Fundamental Rights of the European Union, as well as with the principle of effective judicial protection and of proportionality laid down by the CJEU, according to which *“fundamental rights can be restricted provided that those restrictions correspond to objectives of general interest pursued by the Union and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference which infringes the very essence of the rights guaranteed.”* (Whereas 42)

### LES Italy observations

Contrary to the Commission's opinion, this "temporary limitation" of the right to enforce SEPs, significantly impacts the essence of intellectual property rights. This approach is in contrast with the EU's international commitments on intellectual property, including the Charter of Fundamental Rights, the WTO's TRIPS agreement, and the EU Directive 2004/48/EC on the enforcement of intellectual property rights. Additionally, it is in contrast with the constitutions of several EU countries and the principle of proportionality. The SEP Proposal's interference with the core principle of patent exclusionary effects, namely the right to exclude third parties from the exploitation of what has been patented, is particularly concerning.

Indeed, the SEP Proposal, by imposing limitations on the right of SEP holders to enforce their patents, unjustly limits the rights of SEP holders to prevent unauthorized use of SEPs without their consent, depriving them for a significant period of time of the right to access the courts. Consequently, it deprives SEP holders of the opportunity to request provisional measures for promptly resolution of infringements. By doing so, **the SEP**

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<sup>2</sup> Art. 22.3.

<sup>3</sup> Art. 34. It is worth to remark that even though art. 1.3 and 1.4 of the SEP Proposal enables the Commission to designate certain use cases of certain standards or parts thereof 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 nonproblematic use cases would still need to comply with the most costly obligations of registering SEPs and conducting essentiality checks. In line with the therein comments it seems to be more efficient and coherent with the policy method adopted by the Commission in other contexts (such as the Digital Market Act setting out the antitrust regulation concerning the online platforms) the scope of the Regulation should be changed and limited the application to binding rules only to specific use cases of certain standards that will be designated by the Commission after an in-depth investigation.

**Proposal affects and undermines the general principles and fundamental rights granted under EU law.** The temporary limitation it seeks to impose on SEP holders can be further criticized in detail as follows:

- a) It affects the general principal of effective judicial protection, enshrined in Articles 6 and 13 of the European Convention on Human Rights (ECHR) and reaffirmed by Article 47 of Charter of Fundamentals Rights of the European Union; such limitation in fact does not correspond to objectives of general interest and introduces a disproportionate interference that infringe the very essence of IP rights; hence the legitimate concerns raised during the Unified Patent Court (“UPC”) inauguration event on May 30, 2023 by Klaus Grabinski, Chief judge of the UPC Court of Appeal, according to whom *“I fully support the commission’s aim to enhance transparency, but access to justice is a core fundamental right.”*<sup>4</sup>
- b) It is clearly in contrast with the EU Directive 2004/48/EC, according to which ensuring to IP rights owners’ effective means of enforcing IP rights is essential to the proper functioning of the internal market and to ensure investments in innovation and creation, including the right to apply for preliminary measures for the immediate termination of infringements (see in particular Whereas 3 and 22 of EU Directive 2004/48/EC). Indeed, the proposed temporary limitation also hampers the ability to legitimately apply for preliminary injunction measures. These measures are typically sought in urgent cases, where immediate action is necessary, in a timely fashion. However, under the SEP Proposal, SEP holders will be unable to fulfil this requirement. For instance, under Italian law preliminary reliefs require the applicant to provide *prima facie* evidence both of *fumus boni iuris* and *periculum in mora*, namely not only the evidence of the validity and infringement of the patent in suit, but also of the serious risk of an irreparable damage caused by the infringer which justified the urgency to obtain immediate relief.
  - In German law the request for a preliminary injunction should be substantiated by *prima facie* evidence of the infringement of the patent in suit as well as of the urgency; and as a rule of thumb to show such urgency the preliminary injunction should be requested within a month as of the knowledge of the infringer and the infringement;
  - According to Spanish law, to obtain injunctive relief the applicant is required to provide evidence of the probability of success as well of the risk or irreparable harm if its petition is dismissed. In addition, the applicant needs to demonstrate that they have acted diligently and without undue delay in applying for the injunctive relief.

Given that the process of FRAND determination may take a minimum of nine months, there are well-founded concerns that SEP holders will also be deprived of the ability of effectively applying for such preliminary injunctive measures due to the lack of *periculum in mora* arising from the delay in their filing.

In light of the above, it becomes evident that the “*temporary limitation*” of the right to enforce SEPs fails to adhere to the principle of proportionality and the related principles established by the Court of Justice of the

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<sup>4</sup> <https://www.managingip.com/article/2bqbf0uyrki1fniy9ou8/breaking-upc-chief-urges-eu-to-rethink-sep-plan> .

European Union (CJEU) in the case laws cited by the Commission in Whereas 39 and 40<sup>5</sup>. Furthermore, it inhibits the effective functioning of the internal market and potentially weakens substantive law on intellectual property. Such consequences are likely to discourage innovation and investments in R&D.

Among other things, the Commission is incorrect when it refers to the fact that the "***fundamental rights can be restricted provided that those restrictions correspond to objectives of general interest pursued by the Union.***" In the case of SEPs, there is no general interest for the EU to weaken the scope of SEP's patent rights. In this scenario, we are not dealing with the situation like patents on Covid-19, where there was a clear general interest in providing widespread access to vaccines as quickly as possible. And also in this case, regulatory bodies did not intervene. The SEP Proposal, in its current form, tramples on the right of innovators to have a fair reward for their R&D efforts, while discouraging implementers from becoming willing licensees.

Moreover, it is incorrect to assume that implementers are only SMEs. In fact, SMEs as well as universities can also be SEP holders. This raises concerns about the general interest of the European Union, especially when SMEs are on opposite sides of the fence as both SEP holders and implementers. The same reasoning can also be applied to large industries which are often SEPs owners, and implementers.

Furthermore, **SEP Proposal also appears to be incompatible with the Member States' constitutional laws.**

The right to have its case heard before the courts is in fact a fundamental right protected as a constitutional rule in many Member States, such as Italy, Germany, Spain and Netherlands. More in detail:

- in accordance with article 24 of Italian Constitution "*Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law.*"<sup>6</sup>. In addition, article 25 says "*No one can be removed from the pre-established natural judge by law. [...]*" and article 102 provides that "*The judicial function is exercised by ordinary magistrates established and regulated by the rules on the judicial organization [see article 108]. Extraordinary or special judges cannot be established [see article 25, paragraph 1]. Only specialized sections for specific matters can be established within the ordinary judicial bodies, also with the participation of suitable citizens who are not members of the judiciary [see Section VI]. The law regulates cases and forms of direct participation of the people in the administration of justice.*";
- in accordance with article 101 of German Grundgesetz "*Exceptional courts are inadmissible. No one shall be deprived of his lawful judge.*"<sup>7</sup>;
- under article 24 of Spanish Constitution: "*Every person has the right to obtain the effective protection of the Judges and the Courts in the exercise of his or her legitimate rights and interests,*

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<sup>5</sup> Judgment of the Court of Justice of 13 December 1979, *Hauer v. Land Rheinland-Pfalz*, C-44/79, EU:C:1979:290, para. 32; judgment of the Court of Justice of 11 July 1989, *Hermann Schröder HS Kraftfutter GmbH & Co. KG v. Hauptzollamt Gronau*, C-256/87, EU:C:1999:332, para. 15; judgment of the Court of Justice of 13 July 1989, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, C-5/88, EU:C:1989:321, paras. 17 and 18; joint Cases C-317/08 to C-320/08 *Allassini and Others* of 18 March 2010, para. 63.

<sup>6</sup> Italian Constitution EN version [https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf).

<sup>7</sup> German Constitution EN version [https://www.gesetze-im-internet.de/gg/art\\_101.html](https://www.gesetze-im-internet.de/gg/art_101.html).

*and in no case may he go undefended. Likewise, all persons have the right of access to the ordinary judge predetermined by law.”<sup>8</sup>;*

- *in accordance with article 17 of Dutch Constitution: “No one may be prevented against his will from being heard by the courts to which he is entitled to apply under the law.”<sup>9</sup>*

It is important to underline that the same principles apply in other constitutions of the other EU Member States, such as Greece, Austria, France, Estonia, Luxembourg, Lithuania, Slovakia, and Slovenia.

It can be concluded that the “*temporary limitation*” of the right to enforce SEPs is fundamentally unacceptable, as explicitly stated in the same CJUE case laws cited by the Commission in Whereas 39, “*measures which are incompatible with the fundamental rights recognized by the constitutions of those States may not find acceptance in the Community.*”<sup>10</sup> Furthermore, addressing the additional problematic aspects of the temporary limitation on the right to enforce SEPs, the following points require further attention:

- (a) The SEP Proposal undermines both national courts and the new UPC, specialized in patent law, in favour of EUIPO, an administrative body, which is undoubtedly specialized in trademarks and design but has no experience in patents, particularly in relation to SEPs and FRAND licensing term assessment.
- (b) The provisions of SEP Proposal appear to lack alignment and coordination with the TRIPS agreement, in particular with reference to the principle of non-discrimination. Indeed, the temporary limitation on the right to enforce SEP imposed by the draft regulations could interfere with:
  - I. the principle enshrined in Article 27.1 of TRIPS, which forbids any form of discrimination against patent rights based on the “*field of technology*,”<sup>11</sup> since the specific regulatory framework on SEPs provided by the proposal is different from other sectors where patent rights are not subject to provisions / requirements comparable to those provided for in SEP Proposal;
  - II. the right granted to patent holders to enter into licensing contracts, including SEPs, negotiating the related terms and conditions, outlined in Article 28.2 of TRIPS and recently confirmed by the EU in a WTO case against China addressed by the Dispute Settlement Body (DSB)<sup>12</sup>, which requires Member States to abstain from adopting and/or implementing any measure that restrict or aim to limit the exercise of the right to negotiate and enter into licensing agreements on FRANDS terms.

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8 Spanish Constitution EN version <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf> .

9 Dutch Constitution EN version <https://www.government.nl/documents/reports/2019/02/28/the-constitution-of-the-kingdom-of-the-netherlands> .

10 Judgment of the Court of Justice of 13 July 1989, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, C-5/88, EU:C:1989:321, para. 17 (Whereas 39 of SEP Proposal).

11 In accordance with Article 27.1 of TRIPS “*patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.*”

12 For more details see Wayne Chinembiri, ‘*EC Draft SEP Regulation and the TRIPS Agreement Compatibility Assessment*’ (4IP Council – research paper, July 2023) <<https://www.4ipcouncil.com/research/ec-draft-sep-regulation-and-trips-agreement-compatibility-assessment>> accessed 10 July 2023.



- (c) The mandatory dispute resolution provided by SEP Proposal as a precondition to access to the courts is not compatible with the principle of effective judicial protection, since it does not actually follow the conditions for mandatory recourse to this type of alternative dispute settlement procedures outlined by the CJEU. Unlike the precedents referred to in Whereas 40 and 41 of the SEP Proposal, the mandatory settlement procedure provided by the new regulation adversely affects SEP holders' right to fully enforce their patent rights and results in a substantial delay in their ability to commence legal proceedings. Indeed, the abovementioned minimum time for completion of such procedures is notably lengthier than that of the other mandatory settlement and mediation procedures addressed in CJEU rulings<sup>13</sup>, which completely differ from IP rights. This is especially significant, as it confirms that the SEP Proposal does not actually take into account the unique characteristics of SEPs and of IP rights in general, where any delay in legal action, even if minimal, might in fact cause irreparable harm to the rightsholder.

Finally, the proposed provisions providing that SEPs that are not registered within the time-limit set out in Article 20(3) *“may not be enforced in relation to the implementation of the standard for which a registration is required in a competent court of a Member State”* and that such registration must be considered as matter of *“admissibility of the action”* have significant impact not only on the enforcement of SEPs before a civil court, but also before criminal courts. Similarly, the temporary limitation of the right to enforce SEPs outlined in art. 34 may also have such far-reaching effects. Both provisions have the potential to undermine the enforcement of national criminal law provisions against patent counterfeiting.

In fact, we should consider that in several EU member states, IP rights, including patents, are protected by criminal-law provisions which cannot be *“temporarily limited”* as it is designed to prevent repeated offenses. Accordingly, given that patent infringement is considered as specific criminal offence in some jurisdictions, compliance with national and European legislation on IP may be considered a *“condition for prosecuting .* Therefore, articles 20 and 34, as proposed by the Commission, have the potential to freeze the prosecution of patent infringement cases that, according to some national laws (such as Italian law) are treated as criminal offenses. One additional important aspect to consider is that in criminal enforcement cases the plaintiff is the Public Prosecutor. And it is incomprehensible how a European Regulation, that imposes obligations on the patentholder before enforcing their own patents can be applied to Public Prosecutors who represent a Member State of the European Union and do not hold any SEP patents.

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<sup>13</sup> The time limit for completion of the conciliation procedure considered in the CJEU judgements to joint cases C-317/08 to C-320/08 *Alassini and Others* of 18 March 2010 is 30 days as from the date of the request for the procedure (para 55). The time limit for the completion of the mediation procedure set out in Italian Legislative Decree No 28/2010 considered in the CJEU judgement C-75/16 *Menini and Rampanelli v. Banco Popolare Società Cooperativa* of 14 June 2017 shall be a maximum three months (Article 6, L.D. 28/2010).

### 3. The new role of EUIPO in royalty rate determination

The SEP Proposal provides for the creation of a 'Competence Centre' at EUIPO. This Competence Centre would have various responsibilities and functions including those of:

- creating, selecting and managing lists of experts and conciliators;
- appointing (independent and impartial) experts and conciliators;
- defining and administering the process for the determination of FRAND royalties-rate conditions;
- setting out a procedure for the determination of the aggregate royalties of a standard;

Particular attention is paid to the determination of the aggregate royalty. The EUIPO's role in this process includes:

- receiving notification from SEP holders of their estimated aggregate royalties for the entire standard and its amendments;
- making these notifications publicly available in accordance with prescribed procedures;
- promoting conciliation between the SEP holders to jointly determine the aggregate royalties of an entire standard; this can involve the appointment of a conciliator to assist in the process;
- if requested by the SEP holders, appointing an expert to prepare a non-binding expert opinion estimating the aggregate royalty for the entire standard. *"The expert opinion shall include an analysis of the value chain concerned and the potential impact of the aggregate royalty on the innovation incentives of both SEP holders and stakeholders in the value chain where licensing is to take place."* (Art. 18)

As to the conciliator appointed by the Competence Centre:

- he or she must be independent and impartial (similar to the expert);
- *"At any time during the FRAND determination, the conciliator or a party on its own motion or by invitation of the conciliator may submit proposals for a determination of FRAND terms and conditions"* (Art. 50);
- *"When submitting suggestions for FRAND terms and conditions, the conciliator shall take into account the impact of the determination FRAND terms and conditions on the value chain and on the incentives to innovation of both the SEP holder and the stakeholders in the relevant value chain. To that end, the conciliator may rely on the expert opinion referred to in Article 18 or, in case of absence of such an opinion request additional information and hear experts or stakeholders"* (Art. 50);
- *"The conciliator shall notify the parties a written recommendation of a determination of FRAND terms and conditions at the latest 5 months before the time limit referred to in Article 37"* (Art. 51);
- in the event of a successful conclusion of the conciliation proceedings, the conciliator shall, among other things, publish *"a non-confidential methodology and the assessment of the determination of FRAND terms and conditions by the conciliator."* (Art. 57)





The conciliation process is meticulously regulated so that, should a party decide to terminate the proceedings, specific provisions are in place to maintain a precise and detailed record of such an occurrence.

#### LES Italy observations

The new role assigned to EUIPO has generated various criticisms regarding the overall merits of the new institution and the feasibility of individual provisions. Some key points to consider regarding the overall merits concern how the rules governing the Competence Centre and its tasks approach the FRAND (Fair, Reasonable, and Non-Discriminatory) problem from a superordinate perspective in relation to the parties, granting the EUIPO significant administrative powers. The expanded authority of the EUIPO in FRAND-related matters has raised concerns about the potential imbalance of power and the potential for administrative overreach in resolving SEP disputes.

While it may be partially acceptable for the Competence Centre to collate, organize, and publish the necessary information for the determination of FRAND royalties, it is considered unacceptable for the EUIPO to have a direct role in the royalty determination process. The institutional-administrative-authoritative approach has received criticism for disregarding the principle of subsidiarity that substantiate the European Institutions. And in this case, the principle of subsidiarity is absent not only in terms of *European vs national institutions*, but also – and above all – in terms of *European institutions vs citizens*.

The institutional-administrative-authoritative approach is unnecessarily *maximalist*, placing the institution in an inherently “superior position” vis-à-vis the parties. This approach imposes challenges on the parties who wish to effectively pursue their interests autonomously and independently and, indeed, falsely assume that the institution has no knowledge of the fact that the parties could handle such issues more effectively. An evident demonstration of this approach can be seen in the role assigned to the conciliator. In fact, the conciliator has the authority to propose a conciliatory solution and impose negative consequences on the party that fails to comply with the proposal. This approach reflects an inappropriate perception of the EUIPO as being institutionally superior to the parties and unmotivated assumptions on conciliator’s abilities.

Another example of this approach is when a party decides to terminate the conciliation proceedings. The EUIPO’s final recorded account implicitly but unequivocally attributes the role of an “unwilling party” to the party itself, with all associated consequences. This appears to disregard the will and freedom of the parties which should always prevail in the relationship with an administrative institution, unless there are public interests at stake, which are absent in this context. The motives for a party deciding to abandon the conciliation proceedings can vary widely, notably including cases where the conciliator turns out to be inadequate and/or incompetent. Therefore, it would appear more productive and reasonable that EUIPO’s role be limited to the collation, organisation and publication of information relevant for the quantification of the FRAND royalties even in aggregated form, as well as the promotion of mere mediation proceedings, to be initiated only upon request by the parties.

With regard to the feasibility of single provisions, it is worth noting the following. Both conciliators and experts must have extensive experience in FRAND royalty matters, both in legal and contractual fields. It is



therefore unlikely that the conciliators currently appointed by the EUIPO for conciliation proceedings are individuals suitable for the task.

The number of professionals with the required expertise is in fact extremely limited worldwide, with the majority of them being employed by companies and corporate groups, and therefore unavailable for external tasks.

Also, the remaining freelancers can hardly be considered in average as truly independent or impartial, as envisaged by the proposed regulation, owing to professional ties that necessarily exist, or have existed in the past, with SEP holders. Furthermore, even if it were possible to find independent and impartial professionals for a given royalties determination process, it is likely that these professionals would be unwilling to restrict themselves to a role of independence and impartiality. Such a role would result in the loss of future opportunities in their chosen profession.

Considering these factors, it is believed that formation a Competence Centre of adequate quality for the purpose of determining FRAND royalties, even in aggregate, is beyond the capabilities of the EUIPO or any other administrative entity.

#### 4. Concerns on FRAND royalty rate determination and aggregate royalty rate

Even if it were possible to effectively define all the patents that make up a standard, determining appropriate aggregate royalties is considered to be beyond the practical possibilities of any administrative institution. This is due to several reasons.

Firstly, standards often consist of a large number of patents, as many products implementing the standard only require part of the standard's features. Each specific implementation of a standard configuration on a specific product type might therefore necessitate a separate aggregate-royalties determination.

Additionally, the rapid evolution of technological products results in a constantly changing landscape within which SEP aggregates are used. The continuous introduction of innovative products into the market further complicates matters, making the number of configurations of the standard currently available on the market increasingly unknown and unstable. As a result of this, it becomes practically impossible to achieve a comprehensive and definitive assessment of an aggregate royalties rate.

In addition to this:

- a) standards often include a significant number of *optional* SEPs, which each licensee can choose to implement or not to implement without impacting the core standard;
- b) many SEPs are licensed within patent bundles that also contain non-SEP patents which due to market demand end up becoming almost-SEPs.

In view of these circumstances, the SEP Proposal faces significant challenges in addressing the complexities of optional SEPs and patent bundles if they should be considered in the determination, which necessitate a case-by-case analysis which would conflict with the “one fits-all” approach of the Commission. Furthermore,



the impossible determination of aggregate royalties seems to serve little purpose. It would only be useful for estimating royalties using the 'top-down' method, something that precedents have shown not to be the right option.

The quantification of a hypothetical aggregate royalties for antitrust purposes such as identifying abuses of dominant position and the like would also be pointless: the different purposes of valuation would render EUIPO's estimates irrelevant for the Commission and vice versa. The same can be said about estimating royalties on individual patents or patent subgroups. The ever-changing and infinite variability of the set of patents combined with the need for a case-by-case approach based on factors such as product type, price, market positioning, customer base, margins, etc., make their 'one-fits-all' preventive determination completely impractical.

Considering the above, it is believed to be more productive for the role of the EUIPO to be limited to the collection, organisation and publication of information that may be useful for quantifying FRAND royalties.

## 5. Doubts on essentiality checks and SEPs registration framework

The SEP Proposal has introduced a requirement for SEP holders to register their SEPs if they intend to enforce a patent, seek damages or receive royalties.

### LES Italy observations:

Implementing a framework for SEP registration and certification can have potential benefits, particularly if it enhances transparency regarding the SEP landscape for standards. However, the formation of a Competence Centre for this purpose may be considered unjustified and cost-ineffective. This is because it could result in duplicating existing SEP databases already managed by Standards Development Organizations (SDOs) and overlapping with functions and competences of the European Patent Office (EPO). In this regard, ETSI's <sup>14</sup> concerns regarding the creation of a sort "second register in the EUIPO that would only confuse and possible disincentivize innovators to disclose their SEPs in Europe" are also worth noting.

In addition to the challenges of recruiting SEP evaluators for essentiality checks, the provisions in the SEP Proposal also entail duplicating EPO resources in relation to the tasks assigned to the Boards of Appeal (BoAs) of the EUIPO. The BoAs, which currently handle trademark and design matters, would be responsible for deciding the inclusion of a SEP in the SEP register in case of suspension (Art. 22(5) and Art. 23(6)) and review requests (Art. 29(11)). This expanded role for the BoAs of the EUIPO would require significant time and efforts to develop specific expertise in patent-related matters, which closely align with the areas of expertise of the EPO's BoAs.

There appears to be a significant imbalance in the proposed implementation of the SEP essentiality-check process, particularly in its cost model. On one hand, the costs associated with SEP registration and essentiality

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<sup>14</sup> [Proposal for a Regulation on SEPs – ETSI views \(documentcloud.org\)](#).



checks are primarily expected to be borne by SEP holders (as stated in Article 20(6) and Article 63(3)(c)). On the other hand, SEP holders would not be able to benefit fully from their investment in the process. This is because the SEP registrations and essentiality checks, even if having a positive outcome, would result in non-binding determinations (as outlined in Article 28(5)). Implementers would in fact still retain the ability to challenge the outcome of the Competence Centre process in court.

According to the SEP Proposal, essentiality checks conducted within the framework of patent pools should be provided by SEP holders (Art. 8), for publication in the SEP database and for use by the Competence Centre, but only until its operations commence, which should be two years after the regulation's entry into force as stated in Art. 29(4). While this provision seemingly recognizes the value of independent SEP evaluations conducted by independent evaluators in the context of patent pools, it ultimately disregards ongoing investments made by the SEP holders participating in patent pools as part of their pooling efforts. Neglecting independent SEP evaluations carried out by patent pools after the operation of the Competence Centre has started devalues the valuable contributions they provide to enhancing transparency within the SEP landscape. These evaluations are typically conducted by patents pools at no additional public cost, and they could play a crucial role in avoiding duplication of efforts and costs.

The concept of limiting essentiality checks to only one patent per family, as indicated in Article 28(3) of the SEP Proposal, may be driven by the intention to manage costs associated with the process. However, it overlooks a crucial consideration: the fact that a patent may be deemed standard-essential in one jurisdiction but not in another. This discrepancy can arise due to variations in patent claims or differences in how infringement is assessed across jurisdictions. By restricting essentiality checks to one patent per family without further scrutiny, a significant risk arises of generating both false-positive and false-negative results. False-positive results could mistakenly designate a non-essential patent as essential, potentially burdening the patent holder and licensees with unnecessary obligations. Conversely, false-negative results could fail to identify genuinely essential patents, leading to the exclusion of important patents from the process.

The SEP Proposal does not provide specific criteria for country selection by the Competence Centre in the sample selection process of SEPs to be checked for essentiality as outlined in Art. 29(1). If the sample selection process within the SEP Proposal were to primarily focus on EP patents and neglect patents registered at the national level in EU countries or elsewhere, it could lead to a limited representation and coverage of SEPs from various jurisdictions. This raises concerns about the ability of obtaining statistically significant results and the availability of meaningful information regarding the geographical scope of coverage of SEPs. Such information, however, would ensure a more accurate representation of SEP portfolios and enable the Competence Centre to provide expert opinions on global aggregate royalties, as indicated in Article 18(1) of the SEP Proposal.

It is worth noting that the definition of SEP implied by Article 20(2) of the SEP Proposal, which states that "at least one patent claim shall correspond with at least one requirement or recommendation to the standard," differs from the definitions of SEPs adopted by Standards Development Organizations (SDOs) in their Intellectual Property Rights (IPR) policies. The implied definition in Article 20(2) encompasses features that



are recommended but not necessarily required by the standard. In contrast, the typical understanding of a SEP is a patent that is essential to an optional feature of a standard. This understanding considers a patent as an SEP if it is essential to an optional feature of a standard. The inclusion of recommended features and the lack of explicit mention of optional features creates uncertainty as to which patents will be considered SEPs, at least as to their inclusion in the SEP register.

Based on the drawbacks identified above, it is evident that implementing a voluntary process for SEP registration and essentiality checks, without making SEP registration a prerequisite for enforcement, damage claims, or royalty collection, appears strongly advisable. Such a voluntary approach, as opposed to a mandatory-requisite approach, would ultimately encourage SEP holders to submit their patents for essentiality checks, thus strengthening their licensing position.

## 6. Lack of relevant technical experts

in accordance with Art. 22 of the SEP Proposal, EUIPO shall select “*a sample of SEP registrations for checks,*” and where the information is not in accordance with articles 4 and 5, or incomplete, the competence center shall request the patent owner to provide *complete and accurate information*.

in accordance with Article 4(c), the register shall contain “*the standard version, the technical specification and the specific sections of the technical specification for which the patent is considered essential,*” This information could be insufficient, as a patent owner could limit himself to associate standard sections to a patent number. This has nothing to do with a correct and complete evaluation of standard essentiality, and we expect that the patent owner should be requested to give evidence of standard essentiality. The essentiality check shall be conducted by an evaluator selected by the Competence Center.

### LES Italy observations

Candidate evaluators should be selected according to requirements that are not yet defined: according to the SEP Proposal an implementing act setting the requirements of evaluators is to be issued in 18 months from entry into force of the regulation.

Evaluating standard essentiality requires specialized skills and knowledge that are not commonly found in many individuals.

In the initial step standard essentiality assessment involves defining the scope of protection of the patent. This scope is defined by the claims, but as known to any patent attorney, claims must be construed. Each claim feature must be thoroughly analyzed and interpreted in the context of the patent specification and the knowledge of a person skilled in the art. Moreover, the scope of protection is not limited to the literal wording of the claim, and equivalents must also be considered. For an accurate evaluation of the scope of protection of the patent, it is fundamental to have an experienced patent attorney who can correctly interpret the claims and assess infringement by equivalence.



Being a competent patent attorney is not sufficient, however, as the evaluator must be able to understand the standard and make a proper comparison between the scope of protection of the patent and the standard. An experienced chemical engineer would not be able to properly assess standard essentiality of a telecom patent. This means that the roster of evaluators should consist of experienced patent attorneys specialized in the various standards, which narrows down the number of candidates eligible for the position of evaluator within a specific standard.

Often, standards like “LTE” or “3G”, are more a pool of standards than “a standard”. As an example, the 3G standard comprises parts relating to the mobile equipment, other relating to the USIM, and so on. In our experience, even in most important telecom companies it is difficult, if not impossible, to find a single individual who is an expert of all the ingredients of the standard. As a matter of fact, when essentiality is assessed by an expert, this expert usually needs to interact and get information from the patent owner’s technical staff, the expert alone seldom has access to all the technical information necessary to carry out an evaluation in a short time.

In view of the above, is therefore our belief that the number of experienced patent attorneys that could be eligible to evaluate standard essentiality is indeed limited, and these people are likely to be conflicted out from operating as evaluator for the Competence Center, because these very few experienced attorneys already operate essentiality evaluation or provide consultancy for one of the standard’s stakeholders in most cases.

As a final consideration, it is important to bear in mind that this "one- fits-all" approach by the Commission may lead to potentially awkward situations for EUIPO. Suppose an evaluator assesses a patent’s essentiality and concludes it is not a SEP. However, later in court the same patent is definitively confirmed to be a SEP. Such judgment could definitely undermine the credibility of the evaluators chosen by EUIPO and sound like a "donkey's license".

## 7. A notable underestimation of the patent pools’ role

The Commission has expressed concerns regarding lack of transparency and inefficiency in SEP licensing environment. However, the industry has already taken the initiative to design and implement solutions with the creation of the patent pools which already address many of these concerns. Unfortunately, the current version of the SEP Proposal does not consider incentivizing patent pools although they have been proven to be efficient and fair in SEP licensing.

### LES Italy observations

A patent pool facilitates technology licensing by creating a “one stop shop” solution, which means that a single license agreement grants the right to use a portfolio of patents essential for implementing a certain standardized technology owned by multiple patent holders. There has been a growing recognition that patent pools foster free competition and stimulate economic-technological development addressing the following issues:





1. **Transparency:** many patent pools have already taken the initiative to provide the necessary information required for assessing the need to acquire a license by providing the following:
  - a. *Patent lists:* comprehensive lists of patents included in the pool, offering transparency on the intellectual property covered.
  - b. *Patent owners:* clear identification of the patent owners, enabling potential licensees to understand the parties involved.
  - c. *Patent brochure:* an informative document that explains how the SEPs offered under the license are utilized in products complying with the standard. It points to the relevant sections of the standard, facilitating a better understanding of the patents' relevance.
  - d. *Full license terms:* the complete set of license terms that outline the conditions ensuring clarity and certainty for prospective licensees.
  
2. **Essentiality:** before including a SEP in a patent pool, it is essential to satisfy the following two conditions:
  - a. the patent must be granted by an institution that conducts a substantive examination, such as the European Patent Office (EPO), the United States Patent and Trademark Office (USPTO), or comparable patent offices. For the purposes to assess its validity it is important that a patent has been granted by an Office that carries out a substantive examination. This has also been sentenced by the CJEU decision in the Phoenix Contact vs. Harting case. Even if a patent has not been challenged or opposed, injunctions should be available for patent infringement, especially for patents granted by patent offices that conduct substantive examinations. Therefore, patents granted by such offices should inherently carry proof of their validity.
  - b. In each jurisdiction where a patent has been granted following a substantive examination, the patent owner must furnish the patent pool administrator with an opinion on the essentiality of the patent. This opinion must be provided by an independent and accredited third-party patent expert.

By adhering to these two conditions, patent pools ensure that they include SEPs that have undergone a substantive examination by Patent Offices and have passed the essentiality check made by independent third-party experts.
  
3. **Efficiency:** a "one-stop shop" license offers significant cost benefits by streamlining the licensing process compared to negotiating multiple licenses individually. It effectively reduces both the financial burden arising from individual negotiations and the associated transaction and administrative costs.
  
4. **Fair and reasonable royalty rates:** patents pools often consist of licensors who are also licensees. As a result, the royalty level accepted by the pool members who are also implementers serves as an additional confirmation of market acceptance.

5. **Promote innovation:** the patent pool structure proves to be positive for SMEs, as well as for R&D centers and universities that develop their own SEPs. In fact, it will be extremely expensive for such entities to run their own licensing programs. Instead, patent pooling could offer extensive benefits that facilitate increased participation in standards development while ensuring fair return on investments as pool licensors.
6. **Compliance with anti-trust regulations:** an independent patent pool administrator is another important pro-competitive element which safeguards efficiency and avoids potential antitrust risks, such as the disclosure of market information and licensee sensitive business data.

Patent pooling has been widely recognized as the “go-to” form of aggregation and promoted by several tests of antitrust authorities. It should be noted that the Commission, in its **Communication of 29 November 2017 to the European Parliament “Setting out the EU approach to Standard Essential Patent”**, stated: *“For instance, the creation of pools may be encouraged by means of measures such as strengthening the relationship between SDOs and pools, providing incentives to participation and making universities and SMEs more aware of the advantages of becoming a licensor in a pool”*.

An ad-hoc section is also dedicated to patent pools *“2.3. Patent Pools and Licensing Platforms to facilitate SEP Licensing”* where the Commission underlines that *“The creation of patent pools or other licensing platforms, within the scope of EU competition law, should be encouraged. They can address many of the SEP licensing challenges by offering better scrutiny on essentiality, more clarity on aggregate licensing fees and one-stop-shop solutions. For IoT industries, and particularly SMEs, newly exposed to SEP licensing disputes, this will bring more clarity to licensing conditions of SEP holders in a specific sector”*.

This is not the first time that patent pools have been mentioned in EU law. As a matter of fact, the Commission adopted on 21 March 2014 **new competition rules for the assessment of technology transfer agreements (TTBER and Guidelines)**, through which a licensor permits a licensee to exploit patents, know-how or software for the production of goods and services. It is worth noting that section 4.4 *“Technology pools”* states that *“technology pools can produce pro-competitive effects, in particular by reducing transaction costs and by setting a limit on cumulative royalties to avoid double marginalization*. Such section continues by highlighting that *“The creation of a pool allows for one-stop licensing of the technologies covered by the pool. This is particularly important in sectors where intellectual property rights are prevalent, and licenses need to be obtained from a significant number of licensors in order to operate on the market”*. The subsequent paragraph sets forth the additional elements for the assessment of the of patent pools, including “Safe harbour” provisions in paragraph 26. From a legal standpoint, the safeguards contained in the TTBER Guidelines means that patent pools are already obliged to put in place measures that address the concerns raised by the Commission. In particular:

- A transparent process by which the patent pools are created.
- The selection and nature of the pooled technologies to ensure only complementary patents and patents relevant to the standard are included.



- Involvement of independent experts in the creation and operation of the pool, in particular independent evaluators to determine which patents are truly essential to a particular standard.
- Incorporation of safeguards against exchange of sensitive information.
- Licensing out the pooled technologies on terms that are transparent and fair with the aim of achieving the goals of fair licensing. This means offering licenses on terms which are fair and reasonable and to allow access to the technology on non-discriminatory terms. For instance, Sisvel makes available transparently on its website all information and documents normally made available for SEP licensing programs.
- Freedom to challenge validity of the patents or their relevance to the technical specification.
- Freedom to develop competing products and technology.
- Independent dispute resolution mechanisms.
- Technologies are licensed into the patent pools on a non-exclusive basis.
- retaining the services of highly experienced antitrust counsel to ensure full compliance with applicable antitrust terms and regulations.

These guidelines already emphasize the crucial elements for a successful patent pool, namely transparency and strict adherence to these measures. It is rather surprising that these considerations were not reflected in the current version of the SEP Proposal. Instead of pursuing a potentially disruptive regulatory approach, we strongly believe that the Commission should incentivize SEP licensors and licensees to participate in pools. Complex technology sectors like IoT, wireless communications, AI will be helped with simple licensing solutions, solving a multitude of licensees in one go with a single efficient and fair license transaction and contributing to reduce the overall number of litigations, thanks to aggregation.

In conclusion, rather than creating a new, questionable mechanism that might disadvantage innovators, including SMEs, the Commission should actively promote the use of patent pools as a valuable tool for efficient SEP licensing.

## 8. Small Medium Enterprises (SMEs) are not incentivized to contribute to EU innovation

The goals outlined in the SEP Proposal aim to promote transparency, predictability, and more efficient SEP licensing for the benefit of the EU industry, EU consumers and SMEs in particular.

### LES Italy observations:

Undoubtedly, the initiative of providing SMEs with free information about SEPs and raise their awareness of SEPs importance is praiseworthy. However, when it comes to but as far as SMEs are concerned the SEP Proposal should stop there. In fact, patent pools already provide full transparency on terms and conditions as far as SEPs are concerned.

In addition to this, it should be noted that SMEs can be involved in SEP licensing either as SEP holders or as implementers of standardized technologies.



While SMEs are more rarely involved in litigations, there are SMEs which are already SEP holders. The increasing complexity of standards and the IoT era are likely to facilitate the growth of this trend by encouraging the inclusion of patented technologies developed by SMEs and universities. For example, the number of SMEs joining ETSI has more than doubled since 2015.

The complexity of the assessment framework currently proposed by the Commission will create huge obstacle rather than helping the SMEs and universities to get an economic reward from the contribution of their patents to the standards.

The Commission should carefully reconsider its stance on the SEP Proposal and reassess its economic impact. Rather than creating a costly new bureaucracy to address a non-existent problem, the focus should be on protecting SMEs who are also SEP holders seeking to license large corporations adopting systematic holdout tactics. Furthermore, the proposal in its current form does not impose any obligation on implementers to comply with the royalty rate determination. The absence of injunctive reliefs leave SMEs burdened with prohibitive costs to arrive to final and binding decisions (which involve in many jurisdictions three instances' proceedings). Considering these concerns, it is important to redefine the SEP Proposal and find a more balanced approach that safeguards the interests of all stakeholders, fosters fair licensing practices, and addresses the challenges faced by SMEs in their interactions with larger corporations.

## 9. Need to balance stakeholders' interests

The aim of the Commission was to foster innovation by rewarding innovators:

*“The overall objectives of this proposed initiative 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. The initiative aims to incentivise participation by European firms in the standard development process and the broad implementation of such standardised technologies, particularly in IoT industries.”*

And to reduce friction between innovators and implementers:

*“The EP also asked the Commission to provide more clarity on various aspects of FRAND, and to consider possible incentives for more efficient SEP licensing negotiations and reducing litigation.”*

### LES Italy observations:

While these goals are undoubtedly well-intentioned, the current version of the SEP Proposal has not yet achieved any of them for the following reasons:

The SEP Proposal reduces the strength of the IP rights owned by innovators, particularly by SMEs. Injunctions granted to SMEs can serve as an essential competition restoring a much-needed balance when negotiating



license agreements with larger corporations. In sectors like consumer electronics, large corporations can easily allocate hundreds of millions of dollars in their annual budgets to litigate against patent owners who lack the same financial strength. Abusing their dominant financial position, large corporations can act as free riders in the patent market. A market dominated solely by multinational implementers may lead to an undesirable oligopolistic scenario, leaving little room for small entities and no place for newcomers.

Moreover, the introduced delays in enforcing patents do not help to reduce frictions between SEP owners and implementers; instead, they may lead implementers to become unwilling licensees who may simply wait until SEP holders go through the entire complex process outlined by the SEP Proposal. Unfortunately, the SEP Proposal does not provide any mechanisms to incentivize implementers to accept the result of the FRAND royalty determination. This creates an unbalanced situation between the duties of SEP holders and implementers. In fact, the SEP Proposal lacks provisions or mechanisms to incentivize the implementers to take the license after the process of FRAND royalty determination has been completed nor does it require implementers to officially declare which standard is used in their products. In contrast, according to the SEP proposal a SEP holder is required to go through a lengthy FRAND royalty determination process before pursuing any infringement claims related to their SEPs. Conversely, an implementer is free, at any time, to challenge the validity of the SEP holder's patents, commence opposition proceedings, or request declarations of non-infringement or invalidity while the SEP holder can't start an infringement proceeding until the mandatory FRAND royalty determination process concludes.

Competition authorities and regulators must prioritize addressing the issue of "non-payers," as it creates an unfair and anti-competitive situation where some implementers diligently pay their dues, while others, either individually or through coordinated efforts, exploit the system as free riders.

## 10. Final remarks

It is important to acknowledge that any proposed regulation or framework should be seen as a complementary tool to existing solutions, such as the patent pools, rather than a mandatory imposition. While the current SEP patent licensing ecosystem may have its imperfections, the nature and extent of regulatory intervention suggested in the SEP Proposal might be excessive. Patent pools have demonstrated their effectiveness over the decades, and we encourage the Commission to promote and incentivize this efficient aggregation approach rather than disregarding their value.

To support the open standardisation systems it is important to set out a legal framework which is a flexible and balanced without imposing binding rules since if participation in open standardisation processes becomes too costly or does not ensure adequate incentives to all participants, patent owners and implementers, companies may decide to switch their investment to other, less inclusive, organizational forms, such as vertical integration or 'closed' platforms which it is doubtful that may provide consumers with the same benefits in terms of innovative products as open standardisation systems have done so far.



The SEP Proposal in its current form appears bureaucratic and complex, and it may significantly impact SEP licensing stakeholders. The concern is that it might hinder EU innovation instead of supporting it. Failing to recognize and rewarding virtuous EU innovators, which now includes an increasing number of SMEs, could discourage further investments in R&D impeding technical progress and societal well-being. To conclude, a more balanced and not mandatory approach is necessary to foster innovation and cooperation among the different stakeholders. In particular a non-binding soft law would better achieve the goal of promoting both existing and new innovative technology markets in a regulatory system characterized by many differences among national patent laws and, considering the coming future, more effectively support the development of a European unitary patent system.