

## ***IP Europe Feedback on the European Commission Initiative on a New Framework for Standard-Essential Patents: Proposal for a Regulation\****

### **1. Introduction**

- 1.1. As a coalition of European innovators,<sup>1</sup> championing policies that boost investment in the creation of new technologies and businesses, IP Europe has welcomed the European Commission's review of the European Union's industrial and innovation strategies. Our mission is to promote policies that support a collaborative European [open] innovation ecosystem and help drive Europe's digital and green agendas, and broader growth and prosperity. Accordingly, IP Europe embraces the Commission's objectives to enhance Europe's technological sovereignty and promote its role in international standards. Its members actively contribute to these aims.
- 1.2. As regards the initiative for a new framework for SEPs, IP Europe supports the Commission's stated objectives of greater transparency, balance and efficiency in the SEP licensing ecosystem. Unfortunately, as IP Europe has observed, the Commission's proposed SEP regulation is flawed in several fundamental respects.<sup>2</sup> It is untenable legally, unbalanced and does not adequately reflect stakeholder diversity, and is not supported by objective evidence. From both a substantive and strategic perspective, the proposed initiative is misconceived. In our view (as technology developers, experienced licensors and licensees), it will not achieve the Commission's objectives. Instead, it will have serious unintended consequences, including harming technology innovators and SMEs, damaging the EU's leadership in the development of vital global technologies, thus undermining the EU's competitiveness, technological sovereignty and overall strategic autonomy.
- 1.3. This initiative will be detrimental to the standards ecosystem for Europe and globally. By focusing on owners of European SEPs that rely upon fair and reasonable compensation for their investment in risky R&D through licensing fees, the initiative will subject certain businesses to significant, ongoing and arbitrary regulatory requirements. Valuable European business assets will be negatively impacted, and incentives to contribute to open standards development will be undermined.
- 1.4. While the initiative claims to be focused on improving transparency, in practice it would provide licensees with additional opportunities to delay licensing with, in particular, the

---

\* The comments reflect the collective input of IP Europe's members, which have extensive experience of engaging in R&D, contributing to open standard development and SEP licensing. These may not represent the complete position of the individual members, nor their respective practices.

<sup>1</sup> From global technology leaders and research institutes to SMEs harnessing patent rights to grow, IP Europe brings together research, development and innovation-intensive organisations whose inventions are protected by patents. IP Europe members include both licensors and implementers of patents including standard essential patents (SEPs). For more information on IP Europe, see: <https://ipeurope.org/about/>.

<sup>2</sup> See <https://ipeurope.org/blog/ip-europe-position-on-eu-standard-essential-patents-proposal/>.

mandatory step of a ‘conciliation’ procedure before any legal recourse is available to the patent holder, resulting in a FRAND determination that is not binding on the implementer. Accordingly, rather than addressing the critical problem in the marketplace, i.e. the practice of “hold-out” (where bad faith actors delay the conclusion of a licence and payment of legitimate, fair, reasonable, and non-discriminatory (FRAND) licence fees, for as long as possible), the proposal exacerbates the issue by causing delay in finalising commercial transactions and not addressing any bad faith conduct by ‘unwilling licensees’.<sup>3</sup> In this context, it is deeply concerning that the Commission did not provide any financial and statistical data of the economic impact of hold-up or hold-out in the Impact Assessment, particularly given repeated requests from the European Parliament to collect and publish such data.<sup>4</sup>

- 1.5. Below, we outline our views on the key overarching issues as well as the individual elements of the initiative.

## 2. Cross-cutting Issues

### *Objective evidence and empirical data do not support the Commission's proposed initiative*

- 2.1 Available objective evidence and empirical data do not demonstrate the existence of a market failure that warrants regulatory intervention in SEP licensing. On the contrary, the Commission’s own evidence demonstrates the low (and declining) incidence of SEP litigation and that there are no systemic negative effects on either SEP holders or implementers.<sup>5</sup> Data presented in the ‘Empirical Assessment of Potential Challenges in SEP Licensing’<sup>6</sup> (hereafter the Empirical Study) that was commissioned to “support the EU Commission with providing relevant economic analysis necessary for an Impact Assessment”,<sup>7</sup> strongly suggest that SEP-related court cases are relatively limited in

---

<sup>3</sup> For further discussion on and evidence of hold-out, see: [Unwilling SEP Licensees: Hold-out Strategies - IP Europe](#). See also <https://www.ipeurope.org/blog/examples-of-hold-out-strategies/> and <https://ipeurope.org/press-release/a-european-commission-proposal-on-seps-must-support-eu-leadership-in-open-standards/>.

<sup>4</sup> See: the EU Parliament resolution of 4 July 2017 on European standards for the 21st century (2016/2274(INI)), available at: [https://www.europarl.europa.eu/doceo/document/E-9-2023-000530\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2023-000530_EN.html). See also, the [REPORT on an intellectual property action plan to support the EU’s recovery and resilience | A9-0284/2021 | European Parliament \(europa.eu\)](#), para 18. More recently, MEP Andreas Schwab [posed questions](#) on the impact of hold-out. However, the Commission has not gathered this data. Recent studies have shown the economic impact of patent holdout costing many billions of euros per year to the innovating companies of all sizes. See, e.g., ‘The Economic Impact of Patent Holdout’, Justus Baron, Bowman Heiden July 08, 2023; ‘A theory of socially inefficient patent holdout’, Jorge Padilla, Gerard Llobet, May 23, 2023; (and ‘The focus in Europe moves from patent hold-up to hold-out’, IAM, January 24, 2020. According to Baron and Heiden, “The royalty gap analysis in cellular licensing produced a patent holdout range of \$7-28 billion per year in 2021.”

<sup>5</sup> For further discussion see: [A \(bad\) solution in search of a problem - Part I - IP Europe](#) and [A \(bad\) solution in search of a problem - Part II - SEP Litigation Data Do Not Support Need for Proposed EU Regulation - IP Europe](#).

<sup>6</sup> See [Empirical-Assessment-of-Potential-Challenges-in-SEP-Licensing](#).

<sup>7</sup> See [Dr. Tim Pohlmann \(IPlytics\) and Dr. Justus Baron \(Northwestern University\) to lead consortium assisting the European Commission with “Economic Impact Assessment on Standard Essential Patents \(SEPs\)” – IPlytics](#).

number and becoming rarer.<sup>8</sup> This is consistent with data from the U.S.<sup>9</sup> Litigation, and the competency of European courts, do not therefore appear to be reasons for pursuing this initiative.

- 2.2 In particular, the study on the Empirical Study that was commissioned to “*support the EU Commission with providing relevant economic analysis necessary for an Impact Assessment*”,<sup>10</sup> concluded that it “*does not appear that the observed challenges in SEP licensing are sufficiently severe as to systematically discourage potential contributors from participating in standards development or discourage potential implementers from creating products that use technology standards subject to potential SEPs.*”<sup>11</sup> Yet, the Empirical Study, which provides extensive information and data on the SEP licensing environment, including this important conclusion, has been largely ignored by the Commission in its pursuit of this initiative.
- 2.3 When formulating the initiative, the Commission seems not to have conducted or relied upon an appropriate assessment of the totality of available evidence. Rather, the Commission’s review appears to have been driven by a pre-conceived (without strong evidentiary basis) notion that legislative intervention is required. Indeed, according to the Commission Staff Subsidiarity Grid<sup>12</sup>, it “*pre-selected and analysed those industry proposals that have the potential to achieve the objectives*”. Those specific objectives do not appear to be clearly articulated. There is no empirical evidence that SMEs or other companies face a systemic issue of being unfairly subject to SEP-related litigation.<sup>13</sup>
- 2.4 The Empirical Study also finds that diverging views between licensor and potential licensee regarding the number of SEPs to be included in a licence “*are very rarely the main factor in driving litigation*”.<sup>14</sup> This suggests that transparency during a licensing negotiation regarding SEPs is not an issue, as would be expected following the licensing framework affirmed by the CJEU in *Huawei v ZTE*. This data, however, is not reflected in the Impact Assessment, nor in the Commission’s assessment of either non-legislative

<sup>8</sup> Based on Darts-ip data, the Empirical Study finds that FRAND-related cases in the EU have reduced since 2014, and that the extent of disagreement between the parties in SEP licensing negotiations has narrowed (see Empirical Study, at pages 71 – 75). In Europe, after the CJEU decision in *Huawei v ZTE* regarding the FRAND licensing framework, there was some litigation on elements of a FRAND licensing negotiation (including aspects on FRAND licensing fees), however the Empirical Study finds that “*SEP licensing negotiations resulting in litigation are not representative of SEP licensing negotiations more generally*” (see Empirical Study, at page 75). The European Commission’s Impact Assessment Report appears to confirm this, stating that almost 75% of SEP Users replying to its consultation held between 14 February 2022 and 9 May 2022 on the licensing of SEPs request a license in order not to infringe an SEP (see page 65). It is acknowledged that the sample size for this consultation is not statistically significant enough to provide a level of confidence in its findings.

<sup>9</sup> Kappos, David and Gupta, Kirti, For ‘Patent War’ Alarmists, Time to Make Peace with the Empirical Data (August 26, 2022). Center for Strategic and International Studies (CSIS) 2022, at page 9. Available at SSRN: <https://ssrn.com/abstract=4218133>. Hereinafter referred to as Kappos and Gupta.

<sup>10</sup> See [Dr. Tim Pohlmann \(IPlytics\) and Dr. Justus Baron \(Northwestern University\) to lead consortium assisting the European Commission with “Economic Impact Assessment on Standard Essential Patents \(SEPs\)” – IPlytics](#).

<sup>11</sup> See [Empirical-Assessment-of-Potential-Challenges-in-SEP-Licensing](#), p. 185.

<sup>12</sup> See <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2023:0123:FIN:EN:PDF>.

<sup>13</sup> See ‘International Standards: Helping SMEs punch above their weight’ (June 19, 2023). Available at SSRN: <https://ssrn.com/abstract=4484325> or <http://dx.doi.org/10.2139/ssrn.4484325>.

<sup>14</sup> ‘Empirical Assessment of Potential Challenges in SEP Licensing’, at page 79.

or legislative options in relation to the licensing of European SEPs subject to a FRAND commitment.

### *Lack of legal basis*

- 2.5 The Commission's initiative is based on Article 114 of the Treaty on the Functioning of the European Union (TFEU). However, Article 114 TFEU cannot and should not be relied upon as the legal basis for fundamentally altering law and introducing policy that will impact global markets and the global standards licensing ecosystem.
- 2.6 In any event, the initiative fails to satisfy the requirements set forth in Article 114 TFEU, which empowers the European Union to adopt harmonising measures for the functioning of the internal market. Importantly, Article 114 clearly stipulates that such measures must be necessary to ensure the establishment and functioning of the internal market and must not go beyond what is required to achieve this objective. However, this wide-ranging initiative with its broad and undefined scope, extraterritorial measures, and global impact extends far beyond what is necessary for ensuring the functioning of the internal market.<sup>15</sup> As noted above, the Commission has failed to establish any (compelling) justification for this initiative or the restrictive measures it imposes, hence falling short of the criteria prescribed by Article 114. In any event, the choice of the legal basis may not depend simply on an institution's conviction as to the objective pursued but must rest on objective factors amenable to judicial review, which include in particular the content and the aim of the measure concerned.<sup>16</sup>
- 2.7 Further, when read in conjunction with Article 26 TFEU, Art 114 TFEU does not appear to provide the Commission with a legal basis for its initiative. The mere finding of disparities between national rules is insufficient to justify the reliance on Article 114 TFEU.<sup>17</sup>
- 2.8 As observed above, the stated goal of increasing innovation and competitiveness by furthering fast and widespread diffusion of the standardised technology is laudable. But this cannot be the basis for the Commission's proposal given that open standards and SEPs are readily accessible and have not created distortions of competition (in which case Articles 101 and 102 TFEU may be applicable). Aiming to reduce prices<sup>18</sup> or bring added value through the greater digitalisation of products and services are not sufficient justification for a measure, particularly when one considers how disproportionately affected certain actors (and ultimately EU innovation) will be if this initiative is adopted.

### *Competence, subsidiarity and proportionality*

---

<sup>15</sup> On the contrary, in practice, the initiative will be damaging to the functioning of the internal market and the operation of the rule of law.

<sup>16</sup> See, e.g., *Commission v Council* (C-300/89) 11 June 1991 CJEU at [10]; *Commission v Council (Accord avec l'Arménie)* (C-180/20) 2 September 2021, paragraph 15.

<sup>17</sup> *Germany v Parliament and Council* (C-376/98) 5 October 2000 CJEU, paragraph 84. See also for the confirmation of the 'genuine aim' in *Vodafone and Others* (C-58/08) 8 June 2010 CJEU, paragraph 32 ff.

<sup>18</sup> These prices have been, and can be, checked by the courts of EU Member States and now also the UPC.

- 2.9 Any exercise of power by the Commission also needs to comply with Article 5 of the Treaty on European Union (TEU),<sup>19</sup> which provides that: “*the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein*”. Unlike the exercise of IPRs (see, for example, Articles 101 and 102 TFEU), the existence of patent rights are governed by EU Member State national law. According to the Commission itself, no intellectual property right has been identified as a barrier that needs to be addressed in the single market.<sup>20</sup> Patent rights, particularly in the open standards context, do not hamper the functioning of the internal market. Indeed, by creating international standards they foster harmonisation of products. Standardised technology is effectively accessible and can be implemented by a third party without the SEP owner’s prior consent.<sup>21</sup>
- 2.10 Article 5 TEU also provides that: “*Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties*”. However, this initiative is not proportionate, either from a legal or objective evidentiary perspective. None of the Commission’s objectives justify a radical regulatory intervention on the envisaged scale, which would hugely impact innovators’ return on their R&D investment through licensing revenue and block licensors’ access to court when necessary.<sup>22</sup> The initiative introduces higher costs, complexity and uncertainty for the operation of the market, especially when it comes to SMEs. The objectives can be better and more easily achieved by building on current EU, Member State and industry initiatives<sup>23</sup> – and therefore with lower societal cost and better coherence with other EU strategic objectives, including fostering innovation and promoting SME participation in standards development.
- 2.11 The initiative is highly prescriptive, arbitrary and duplicative of existing processes.<sup>24</sup> Also, in contrast with current legal and policy frameworks, the initiative is not business model

<sup>19</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A12008M005>.

<sup>20</sup> See Commission Communication ‘Identifying and addressing barriers to the Single Market’ (10 March 2020).

<sup>21</sup> Effective access to standardised technology is not an issue if a FRAND commitment has been provided. See input provided by DG Competition to ETSI’s IPR Policy and related Guide, in particular the history of the ETSI Guide on IPRs at Article 4.6.3.2, pages 79-80 of the [ETSI Directives Version 47](#). See also *Optis Cellular Technology LLC v Apple Retail UK Ltd & Ors* Trial F [2021] EWHC 2564 (Pat) (hereinafter referred to as *Optis v Apple*), at paragraph 458.

<sup>22</sup> As the Commission has recently observed, SEP owners “*can ultimately only prevent the unlicensed use [of SEPs] by court action*”. See Footnote 317 of the Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, [Official Journal C 259, 21.7.2023, p. 1–125](#) (Horizontal Guidelines).

<sup>23</sup> Industry initiatives to address transparency regarding standardised technology, as well as essential IP and licensing arrangements, have been considerable. The catalyst for these market-driven initiatives is the entitled 2017 Communication ‘[Setting out the EU approach to Standard Essential Patents](#)’, which has been complemented by initiatives in SDOs like ETSI as well as at EU Member State level through National Standards Bodies (for example, the German NSB DIN). Rather than building on these efforts with complementary initiatives, such as through education and funding programs (particularly for SMEs), the initiative proposes to introduce profound changes with potentially very far-reaching detrimental impact on the SEP licensing ecosystem, including suspending and reducing the rights of owners of EU patents, which breaks with existing industry practices and decisions from EU courts. Absent any evidence of any market failure, such sweeping reforms are not only unwarranted, but also disproportionate.

<sup>24</sup> ETSI’s IPR Policy, for example, does not define or prescribe the timing requirement for making a patent declaration; rather, the application of the IPR Policy is assessed on a case-by-case basis, recognising the dynamic nature of innovation, development of registrable IP, and that there are all types of participants in an SDO (thus being business



neutral. Current frameworks do not dictate the precise manner in which innovation or business must be done.

2.12 The Commission has not considered the severe financial consequences that this initiative will have on business. Given the costs the proposal would impose and the reduced incentives to conduct R&D and contribute to open standardisation that will result if the initiative were to be adopted, it is not clear how SMEs, research organisations, or any company subject to the initiative can afford full compliance despite their best efforts and intentions. The ongoing compliance costs are not reflected in Section 8.1 of the Impact Assessment. These compliance costs are a highly relevant consideration given the importance placed on compliance and in the context of:

- page 129 of the Impact Assessment, where the Commission states that “*considering there are only a small number of SMEs affected, the impact of the initiative on SMEs as owners of SEPs will be limited*”; and
- the long-term initiatives in ETSI to encourage SMEs to participate in ETSI standards development <https://www.etsi.org/membership/sme>, as well as in Member States through NSBs given the increased role of SMEs in standards development through Regulation (EU) 2022/2480.

2.13 Yet, the risks of non-compliance are exceedingly high. Pursuant to Article 24, a European SEP the subject of a voluntary FRAND commitment, which has not been registered within the 6-month time limit set out in Article 20(3), may not be enforced against an infringer in the competent court of a Member State. Nor may it receive royalties or seek damages.<sup>25</sup> Non-compliance cannot be rectified by the patent owner. This is a denial of European patent rights and access to the courts.

2.14 Although the Commission enjoys a wide degree of freedom to propose any legal acts, it should articulate why a particular course of action is called for in the given case. This is particularly the case if there are fundamental rights that will be impacted (such as Articles 16, 17 and 47 of the Charter of Fundamental Rights of the European Union (CFREU)), which is the case for this initiative (see below).<sup>26</sup>

2.15 Article 2 of Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality provides that: “*Before proposing legislative acts, the Commission shall consult widely.*” Likewise, any initiative also needs to ensure procedural fairness by

---

model neutral). See [Optis v Apple](#), where the England and Wales High Court considered the ETSI IPR Policy requirement that a patent believed in good faith to be essential is to be disclosed ‘in a timely fashion’. The Court held that there is no fixed definition for ‘in a timely fashion’, and that its meaning depends on the circumstances of the discloser and the development of the relevant IP. This is consistent with the decision of the [Court of The Hague in Koninklijke Philips N.V. v Asustek Computers Inc., 7 May 2019 - Case No. 200.221.250/01; available in Dutch](#). See also [paragraph 440 of the Horizontal Guidelines](#). It is further noted that all patents are registered and published, and that the SDO databases are publicly available.

<sup>25</sup> The same can apply during a period of suspended registration. The initiative also provides that a competent court of a Member State is barred from exercising its jurisdiction when a patent is not registered pursuant to Article 24: Article 24(5).

<sup>26</sup> This rigorous approach should have been adopted from the moment the Commission began a post-2017 review of SEP licensing to assess whether any (non-legislative or legislative) initiatives are needed and can be justified. See Article 5 TEU and Articles 52 and 53 EU Charter of Fundamental Rights.

considering input from a broad array of affected stakeholders. Based on the Commission Staff Subsidiarity Grid (discussed above) it is not clear that the responses and input of a certain group of actors have been appropriately considered and reflected upon, nor that the necessary ingredients for sustainable innovation ecosystems have been considered. Having regard to the consultation process and the context of the Impact Assessment, although the Commission received input from various stakeholders, it has presented a lop-sided proposal<sup>27</sup> that takes a short-term approach to innovation strategy and reflects what it believes is the perspective of licensees. The rudimentary cost-benefit analysis undertaken highlights the one-sidedness of the proposal.<sup>28</sup>

### **Further inconsistencies with EU law**

- 2.16 The Commission’s initiative does not reflect that patent rights are explicitly recognised and protected in Articles 36 and 345 TFEU and appears inconsistent with these provisions.<sup>29</sup> Specifically, Article 36 refers to “*the protection of industrial and commercial property*”, which includes patents, as a ground to justify the restriction of free movement of goods.<sup>30</sup> Regard must also be given to Article 345 TFEU, which states that the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership and expressly states that the rules in Member States governing the system of property ownership (including IPRs) remain unchanged.<sup>31</sup>
- 2.17 Courts have accepted the subject-matter for patents to be in particular “*to reward the creative efforts of the inventor, to guarantee that the patentee has the exclusive right to use an invention with a view to manufacturing industrial products and putting them into circulation for the first time, either directly or by the grant of licences to third parties, as well as the right to oppose infringements*”.<sup>32</sup>

### **Inconsistency with Fundamental rights**

- 2.18 The initiative is likely to interfere with fundamental rights of SEP holders under the CFREU. These include the right to property, including IP (enshrined in Article 17

<sup>27</sup> See annex VII of the impact assessment.

<sup>28</sup> As discussed in Section 3, below, the Commission has only focused on benefits for a particular stakeholder group while being dismissive of incentives and rights of owners of European SEPs which are subject to a FRAND commitment the use of which requires appropriate remuneration (see for example Annex 3 Section 2 of the Impact Assessment).

<sup>29</sup> See 2.13, above.

<sup>30</sup> The Court of Justice has held that “[n]either the existence nor the substance of this national patents right [...] should be affected by the [TFEU]. [...] Article 36 recognises, although with reservations, the necessity of accepting restrictions on trade (or, in other words, the partitioning off of markets) contrary to the provisions of Articles 30 to 34, in so far as they are due to the existence of national industrial property. Article [345] of the Treaty expressly states that the rules in Member States governing the system of property ownership remain unchanged.” See Case [C-24/67](#), Judgment of the Court of 29 February 1968, - Parke, Davis and Co. v Probel, Reese, Beintema-Interpharm and Centrafarm. Reference for a preliminary ruling: Gerechtshof 's-Gravenhage - Netherlands. Page 77. Similarly, the legitimate exercise of intellectual property rights is also not disturbed by the freedom to provide services. See Article 56 TFEU and [Case C-62/79](#), Judgment of the Court of 18 March 1980, SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others, ECLI:EU:C:1980:84.

<sup>31</sup> [C-24/67](#), Judgment of the Court of 29 February 1968, - Parke, Davis and Co. v Probel, Reese, Beintema-Interpharm and Centrafarm. Reference for a preliminary ruling: Gerechtshof 's-Gravenhage - Netherlands. Page 77.

<sup>32</sup> [Joined Cases C-267/95 and C-268/95](#), Judgment of the Court of 5 December 1996, Merck & Co. Inc., Merck Sharp & Dohme Ltd and Merck Sharp & Dohme International Services BV v Primecrown Ltd, Ketan Himatlal Mehta, Bharat Himatlal Mehta and Necessity Supplies Ltd and Beecham Group plc v Europharm of Worthing Ltd. Paragraph 30.

CFREU) and specifically Article 17(2), which guarantees the right of individuals to “own, use, dispose of, and bequeath their lawfully acquired possessions” and further that “Intellectual property shall be protected”. In addition, the initiative appears incompatible with Article 52 CFREU which provides that any limitations to rights must respect the essence of the rights and be proportionate.

- 2.19 For example, the mandatory notification/registration requirements risk violating SEP holders’ right to property, by depriving them of effective protection, enforcement options and remuneration for the use of their patents. The same is true if mandatory FRAND determinations are imposed (e.g., under Article 34) prior to any infringement proceedings being commenced before a competent court in a Member State by the owner of a European SEP. Similarly, as discussed below, the FRAND determination and aggregate royalty provisions are intended to, or will, result in under-compensation of SEP holders.
- 2.20 Further, the initiative would infringe upon the fundamental right of access to justice, as enshrined in the legal framework of the European Union (Article 47 CFREU). It imposes restrictions and procedural hurdles that impede patent owners from seeking legal remedies and enforcing their legitimate intellectual property rights in a timely and efficient manner. By introducing a lengthy and potentially repetitive process requiring the EUIPO to issue a non-binding royalty rate recommendation before access to European Courts is permitted, and by creating a mandatory FRAND determination process, the initiative would unjustifiably deny patent owners their right to access the courts.

### Scope

- 2.21 The initiative is excessively broad in scope (and could become broader through the proposed use of delegated power by the Commission). The initiative creates uncertainty regarding IP rights, investments in R&D, business operations, stability of employment and business transactions (among other things). Such uncertainty can lead to significant distortions in the EU’s innovative capacity and markets. The broad scope is created by the initiative seeking to envelop a large number of SDOs developing open standards and a large number of technical specifications. It grants the European Commission the authority to determine whether an existing standard should be subject to the initiative through a delegated act. Per Article 66, this could occur in the event that “*the functioning of the internal market is severely distorted due to inefficiencies in the licensing of SEPs*”. However, this process, which could apply retrospectively to already-existing standards, lacks legal predictability as it is not clearly defined in Article 66. Nor is there any due process set out. This article solely stipulates that an “*appropriate consultation process*” should precede the EC’s decision to regulate a standard retroactively by way of a delegated act.
- 2.22 In addition, the lack of a defined scope means that it is not possible to assess fully the proportionality of the initiative. Although proposing to allocate to itself the power to



determine the scope of the initiative, the Commission has not sought to limit any exercise of delegated power but rather has left it open-ended as to which standards and use cases it might deem covered at any point in time.

### UPC

2.23 The Commission's proposal dramatically lessens the ability of patent owners to enforce their rights and may decrease confidence in the effectiveness and fairness of the legal and judicial patent system in the EU and compromise the proper functioning of the UPC (including its dedicated [patent mediation and arbitration centre](#)). The UPC's intended role in harmonising patent enforcement and fostering innovation is undermined by the initiative. The President of the Court of Appeal of the UPC, Klaus Grabinski, has expressed significant concerns about the initiative, including its compliance with fundamental rights.<sup>33</sup>

### Incompatibility with WTO TRIPS Agreement

2.24 The Commission has not identified how this initiative is compliant with the WTO TRIPS Agreement, which binds both the EU institutions and the EU Member State signatories.

2.25 Article 28 of the TRIPS Agreement sets out the rights to be recognised, with Article 30 providing a limited exception to Article 28 that may be called upon, but only by EU Member States. Even if the EU had power to rely on this exemption, the market conditions are not such that it can be called upon and nor could the proposal qualify as an Article 30 TRIPS Agreement limited exception. The Commission's proposal is not designed to be limited – indeed it provides for the proposal to become more expansive through the use of delegated legislation.<sup>34</sup> The other criteria in Article 30 TRIPS Agreement, which are cumulative in nature, have not been addressed by the Commission.

2.26 Moreover, it is not apparent that Articles 7 and 8 of TRIPS can be relied upon to create exemptions to Article 28 TRIPS Agreement by the Commission. The objectives of the TRIPS Agreement are set out in Article 7, which provides that:

*The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.*

---

<sup>33</sup> At the inauguration of the UPC on 30 May 2023 Judge Grabinski stated: “I fully support the commission’s aim to enhance transparency, but access to justice is a core fundamental right” adding that “I have no doubt that the regulation will be fully compliant with the EU Charter of Fundamental Rights after it has gone through the [full] legislative process”. See: <https://www.managingip.com/article/2bqbf0uyrki1fniy9ou8/breaking-upc-chief-urges-eu-to-rethink-sep-plan>.

<sup>34</sup> Article 30 TRIPS Agreement requires a limited exception to Article 28 TRIPS Agreement, which could not be met when an initiative proposes that there be no limitation on the quantity of production that can occur for implementing standardised technology in the internal market without an appropriate licence in place.

2.27 These objectives are to be understood to apply coherently to the whole TRIPS Agreement and are aligned with the principle of effectiveness. According to the principle of effectiveness, WTO members are to protect IP rights, reduce barriers to trade and promote international trade. The initiative appears to conflict with these objectives. Notably, the initiative will dispense with the current, balanced, legal and regulatory framework.

2.28 The Commission further suggests that limiting the rights of a SEP owner would also be “consistent with its principles of preventing the abuse of intellectual property rights and adopting measures for public interest reasons (Article 8)”.<sup>35</sup> Article 8 TRIPS does not allow for non-compliance with the provisions of the TRIPS Agreement. As noted above, these objectives cannot be interpreted in isolation:

*Articles 7 and 8, together with the preamble of the TRIPS Agreement, set out general goals and principles underlying the TRIPS Agreement, which are to be borne in mind when specific provisions of the Agreement are being interpreted in their context and in light of the object and purpose of the Agreement.*<sup>36</sup>

2.29 If the initiative is ultimately pursued, there appears to be a risk that the EU (and EU Member States) could be found in breach of the TRIPS Agreement and could potentially have exposure under international investment law.

### 3. EUIPO and the Commission as Price Regulators

#### *Price regulation*

3.1. A core feature of the proposal is the very significant delegation of power by the Commission to itself and to the EUIPO. The provisions for the aggregate royalty determination and mandatory FRAND conciliation go well beyond what is necessary to meet the stated goals of “provid[ing] clarity on FRAND royalty” and “facilitat[ing] SEP dispute resolution.”<sup>37</sup> Rather, in both sections, the Commission vests the EUIPO with the authority to act as a rate regulator, unilaterally setting FRAND royalty rates. It is one thing for the Commission to increase transparency of the market-driven FRAND royalty – it is something else entirely for the Commission to empower the EUIPO to set those rates itself. Indeed, the courts of EU Member States and ADR procedures are capable of evaluating FRAND negotiations. The decision of a price regulator could redistribute royalties amounting to billions of Euros, materially undermining the ability and incentives of innovators to invest in R&D and to contribute to the creation and improvement of open standards, and thus jeopardising the open standardisation ecosystem in Europe.

3.2. In addition to empowering the EUIPO to set royalty rates, the Commission reserves unto itself a significant ability to dictate how those rates are determined. The initiative lays down a policy objective by which royalties are to be assessed. In so doing, the

---

<sup>35</sup> See *Impact Assessment*, page 56.

<sup>36</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.2402.

<sup>37</sup> *Impact Assessment* at 25, §4.2. Specific objectives.

Commission makes clear that it has a specific goal in mind – the reduction of royalties to the benefit of users of standardised technology and to the detriment of certain European SEP owners. While the Commission purports that the FRAND determinations in the initiative are voluntary and non-binding, the provisions appear to intend that (i) the EUIPO be empowered to set royalty rates; and (ii) deem that any such EUIPO decision can be tendered as reliable evidence in court, even though the EUIPO decision is meant to be non-binding on the relevant parties.

- 3.3. Regarding aggregate royalty notification, Article 18 provides for the EUIPO to issue a “*non-binding expert opinion on a global aggregate royalty*” at the request of SEP holders and implementers.<sup>38</sup> While purportedly “*non-binding*,” the Impact Assessment states that the aggregate royalty would impact court decisions deciding royalty rates by setting a maximum royalty: “*in case licensing negotiations fail, an aggregate royalty would also **facilitate the work of [...] judges by providing a clear reference maximum price** for using a standard [...]*”.<sup>39</sup>
- 3.4. Similarly, regarding FRAND conciliation, Article 55 suggests that the EUIPO conciliator is to issue a “*reasoned proposal for a determination of FRAND terms*.”<sup>40</sup> While the conciliation process would purportedly be voluntary, the initiative makes clear that – should the parties reject the “*reasoned proposal*” – the EUIPO would publish it to influence future negotiations: “*If the parties [...] do not accept its proposal, the conciliator should draft a report of the FRAND determination [...]. The non-confidential version of the report [...] should be provided to the competence centre for publication in order to inform any subsequent FRAND determination between the parties and other stakeholders involved in similar negotiations*.”<sup>41</sup>
- 3.5. As the Commission, in its Impact Assessment, explains “*in case of a trial, courts can use the non-confidential report of the conciliator [...] on] FRAND rate assessment ... in SEP judgements*”,<sup>42</sup> the initiative is intended to have the royalty rates set by the EUIPO used in courts – even if the rates are purportedly “non-binding” – and even if the patent holder does not participate in the process.

***One-sided objective in FRAND rate determination, contradicting its own guidance and advice of its own experts***

- 3.6. The initiative further states that:
  - 3.7. When determining the aggregate royalties and making FRAND determinations the **conciliators should take into account** in particular any Union acquis and judgments of the Court of Justice pertaining to SEPs as well as **guidance issued under this Regulation**, the Horizontal Guidelines and the

<sup>38</sup> Proposal at Art. 18(1) (“A SEP holder or an implementer may request the competence centre for a non-binding expert opinion on a global aggregate royalty.”).

<sup>39</sup> Impact Assessment at 45, §6.4. PO4: Aggregate royalty for SEPs.

<sup>40</sup> Proposal at Art. 55(1) (“At the latest 45 days before the end of the time limit referred to in Article 37, the conciliator shall submit a reasoned proposal for a determination of FRAND terms and conditions to the parties or, as applicable, the party requesting the continuation of the FRAND determination.”).

<sup>41</sup> Proposal at ¶141.

<sup>42</sup> Impact Assessment at 54, Table 3: Comparison of the impacts of policy options on stakeholders.

Commission's 2017 Communication 'Setting out the EU approach to Standard Essential Patents'.<sup>43</sup> By providing that the EUIPO must heed "*guidance issued under this Regulation*," the Commission seems to want to allocate to itself the power to set the methodology for determining royalty rates. It expresses a clear preference for *ex ante* they are widely acknowledged to be difficult to apply in practice and that this approach does not allow the appropriation of the value of the technology in products using those standards<sup>44</sup> and may result in sub-FRAND royalty rates. In so doing, the Commission appears to ignore the guidance that it has offered in other contexts that different methods of valuation are appropriate in different circumstances as well as the advice provided by its own experts. This does not help to improve transparency or predictability.

- 3.8. In its own recently revised Horizontal Guidelines, the Commission states that: "*there are various methods of carrying out the assessment*" for royalty determination, and that, in practice, "*more than one method is often used to compensate for the shortcomings of a particular method and cross-check the result*".<sup>45</sup> The Commission's own Group of Experts reached the same conclusion, that "*no method is perfect*. The experts advised that "it may be *preferable to use several methods at once*, or to start with one method and use another as a cross-check".<sup>46</sup> They further cautioned that "*different valuation methods offer different insights*" as to what may constitute a FR royalty".<sup>47</sup>
- 3.9. Notwithstanding the existing guidance and experts' advice, the Commission articulates a clear policy preference for the *ex-ante* approach to valuation, stating that: "*The SEP owners' ex-ante incremental contribution to the product value seems an appropriate upper bound for the FRAND royalty [...]*".<sup>48</sup>
- 3.10. In addition to contradicting the Horizontal Guidelines, which state that more than one method of valuation is used, this selection also goes against the 2017 Communication from the Commission, acknowledging that "*licensing terms have to bear a clear relationship to the economic value of the patented technology*" and that "*determining a FRAND value should require taking into account the present value added of the patented technology*".<sup>49</sup> Further, the Commission does not refer to the use of comparable licences despite the fact that this is the one most often used methodology and is based on and represents real world commercial agreements, which courts have recognised is a

<sup>43</sup> Proposal at ¶141.

<sup>44</sup> *Unwired Planet v Huawei* [2017] EWHC 711 (Pat), at paragraphs 97, 268 – 270.

<sup>45</sup> *Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* ¶1460.

<sup>46</sup> *Group of Experts on Licensing and Valuation of Standard Essential Patents, Contribution to the Debate on SEPs* at 99.

<sup>47</sup> *Id.*

<sup>48</sup> *Impact Assessment* at 89, §A6.3 Mandatory aggregate royalty after the adoption of a standard SEP.

<sup>49</sup> Courts have also held that "*the SEP owner is entitled to 'a share' in the 'economic benefits of the technology to the saleable end product at the final stage of the value chain'. Reason for that is that the use of the protected invention 'creates the chance' to gain an 'economic profit' with the end product, which is based on the invention.*" (See *Nokia v Daimler*, District Court (Landgericht) of Mannheim, 18 August 2020, Case-No. 2 O 34/19; *Sharp v Daimler*, District Court (Landgericht) of Munich, 10 September 2020, Case-No. 7 O 8818/19; *Conversant v Daimler*, Regional Court (Landgericht) of Munich, 30 October 2020 - Case No. 21 O 11384/19).

*“reliable method of establishing fair and reasonable royalty rates that is consistent with its FRAND commitment.”<sup>50</sup>*

- 3.11. Use of the incremental value is known to depress royalty rates by devaluing technology. The Commission's own SEP Expert Group reported that the *ex-ante* incremental valuation “*approach may lead to the **under-compensation of SEP holders***”.<sup>51</sup> The Commission seems to acknowledge this effect in the proposal, but also seems to think that this is a desired result. In fact, it states that the *ex-ante* incremental value “*seems an appropriate upper bound for the FRAND royalty*” because, “*if SEP holders obtained more than their incremental contribution*”, this “*may **unduly suppress downstream innovation***” and that “*there would be a risk that upstream innovators are over-rewarded*”.<sup>52</sup> But it appears to have not considered the impact on the ability and incentives to develop the technology in the first place and to contribute it to open standards development.
- 3.12. In the proposal and in the Impact Assessment, the Commission acknowledges that the effect of this policy choice will be to lower royalty payments. In the Impact Assessment, the Commission explained that:
- Announcements of aggregate royalties and FRAND determination process may ... **contribute to lowering the royalties paid by implementers.***<sup>53</sup>
- 3.13. As noted in paragraph 2.16 above, such a policy objective is not a valid trigger for the purposes of Article 114. Further, such an objective undermines the ability of European SEP owners to exercise fundamental rights attaching to their patents and participate in the standards ecosystem as envisaged by FRAND and paragraphs 7 – 9 of the Commission’s Technology Transfer Guidelines.
- 3.14. The Commission noted that *ex ante* could lead to “*potentially **lower royalties paid (decreasing implementers cost)***”<sup>54</sup> and that “*it will also restrict room for exploitation by SEP holders by **setting reasonable maximum royalty rates***”.<sup>55</sup> In fact, it states that the *ex-ante* incremental value is superior to computing “*aggregate royalty after the adoption of a standard*” because, in that case, “*SEP holders would then be in a stronger*

<sup>50</sup> *HTC v Ericsson*, 407 F. Supp. 3d 631 (EDTX 2019) (affirmed on appeal); see also *Unwired Planet v Huawei*, Approved Judgment, 374, [2017] EWHC 2988 (Pat) (United Kingdom High Court of Justice Nov. 30, 2017) (affirmed on appeal). ‘Comparable Agreements and the “Top-Down” Approach to FRAND Royalties Determination’ by Haris Tsilikas, CPI, July 21, 2020, where the author states: “...increasing reliance by courts on comparable licensing agreements as a source of reliable information regarding the commercial value of SEPs. Indeed, the vast majority of judicial opinions on FRAND rates follow this approach in setting FRAND rates because of its substantial advantages in terms of judicial economy perspective and standardization policy.” <https://www.competitionpolicyinternational.com/comparable-agreements-and-the-top-down-approach-to-frand-royalties-determination/>.

<sup>51</sup> *Group of Experts on Licensing and Valuation of Standard Essential Patents, Contribution to the Debate on SEPs* at 101.

<sup>52</sup> *Impact Assessment* at 89, §A6.3 Mandatory aggregate royalty after the adoption of a standard SEP.

<sup>53</sup> *Impact Assessment* at 112, §A7.1 Cost-benefit analysis.

<sup>54</sup> *Id.*

<sup>55</sup> *Impact Assessment* at 52, §7 How do the options compare?



negotiating position vis-à-vis implementers, shifting the negotiation power to the benefit of the SEP owner”.<sup>56</sup>

3.15. Thus, in the Impact Assessment, the Commission appears to start with the baseless premise that European SEP owners are over-compensated – and then recommends a royalty rate determination to lower their compensation. Perusal of the financial statements of the companies that invest in technology development would suggest otherwise. Accepting this premise as valid is a sharp departure from the approach that the Commission has reaffirmed this year in the revised Horizontal Guidelines, which state that “*high royalty fees can only be qualified as excessive if the conditions for an abuse of a dominant position as set out in Article 102 of the Treaty and the case-law of the Court of Justice of the European Union are fulfilled*”.<sup>57</sup> With its initiative, the Commission presupposes that royalty fees for all standards are excessive without demonstrating that this is the case.

#### *Processes of aggregate rate determination*

3.16. Whereas the Commission has never previously suggested the use of experts to set such an aggregate rate, this initiative adds the novel prospect of an expert opinion. The Commission acknowledges that this is done to ensure that royalty rates are not too high, stating that:

*From the point of view of an implementer, **one risk could be that the aggregate royalty announced by the standard contributors is too high.** ... [I]n order to cater for such situations, a group composed of standard contributors and/or implementers may ask the Competence Centre for **a non-binding expert opinion on the aggregate royalty**.*<sup>58</sup>

3.17. In the Impact Assessment, the Commission similarly notes that the “*risk that aggregate royalty announced will be **too high***” will be “*mitigated by possibility to request an **expert opinion**, with resulting aggregate royalty published in the register.*”<sup>59</sup>

3.18. In sum, this initiative goes well beyond its stated goal of increasing transparency of royalty rates and vests itself and the EUIPO with authority to set rates in line with the Commission’s recommendation. In so doing, the Commission already acknowledges that its proposed measures are intended to address the “*risk that aggregate royalty announced will be too high,*” by setting “*an appropriate upper bound for the FRAND royalty.*”

---

<sup>56</sup> *Impact Assessment* at 35, §5.4. Options discarded at an early stage.

<sup>57</sup> Horizontal Guidelines at fn. 115.

<sup>58</sup> *Impact Assessment* at 45, §6.4. PO4: Aggregate royalty for SEPs.

<sup>59</sup> *Impact Assessment* at 55, Table 3: Comparison of the impacts of policy options on stakeholders.

#### 4. Suggested Process for EUIPO and the Commission to be Price Regulators

- 4.1. As noted above, it is debateable whether an aggregate royalty rate can be defined: is this total a theoretical maximum that nobody would ever pay, a typical or average figure that would be or is actually paid after caps, discounts and many patents remaining unlicensed, or something in between?
- 4.2. FRAND terms and conditions are usually established through consideration of market factors including value to customers, costs and competition among various actors. Experts and analysts closely engaged with the relevant technology, patent portfolios, markets and use cases will spend considerable time to evaluate an appropriate FRAND range for licence fees. Such evaluations are part of a larger information package that licensors consider when coming to a decision of an appropriate range of FRAND licence fees. Comparable technologies, what's in the market, step change in technology, individual sunk costs are some of the other factors that may be taken into account. Such an assessment takes time. Indeed, licence fees might only be meaningfully determined when markets develop for specific application of a standard and the added value of the technology becomes apparent.<sup>60</sup>
- 4.3. The initiative proposes that the EUIPO should hire people to undertake the work of experts, analysts, licensors and pool agents and deem what the Commission considers to be the suitable aggregate royalty payable to use the European SEPs of certain patent owners. The formula to undertake this process has not been proposed. The Commission's stated objective is to reduce or cap what can be deemed a FRAND licence fee.
- 4.4. IP Europe considers that determination of licence fees for the use of SEPs is best left to negotiating parties, and if needed reviewed or determined by the courts rather than to this initiative's proposed regulatory intervention. See also *Huawei v ZTE*. It is unclear how the initiative could lead to better, fairer or truer licence fees being derived by the Commission. The Commission itself said as much in its own previous policy statement.<sup>61</sup>
- 4.5. This initiative would require owners of voluntarily FRAND-committed European SEPs to manage one part of the portfolio differently to its 'rest of the world' portfolio – the latter of which could still be managed pursuant to the relevant SDO IPR Policy and the normal legal, regulatory and market-driven environment. As noted in the IP policy of many SDOs, this means: "*The detailed arrangements arising from patents (licensing, royalties,*

---

<sup>60</sup> Yet, under the initiative, where SEP holders shall agree on the aggregate royalty and notify the competence centre, the timeline is 120 days from publication of the standard for known implementations or from a new implementation of the standard, per Art. 15(3). For the request of non-binding opinion, the timeline is 150 days from the publication of the standard for known implementations or from the first selling of new implementation on the Union market.

<sup>61</sup> Commission Communication COM(2017) 712 final Setting out the EU approach to Standard Essential Patents, page 6. "*It should be stressed in this respect that there is no one-size-fit-all solution to what FRAND is: what can be considered fair and reasonable differs from sector to sector and over time.*"

etc.) are left to the parties concerned, as these arrangements might differ from case to case”<sup>62</sup>.

### Consequence of regulators setting prices

- 4.6. As it is proposed that there should be a non-binding expert opinion on global aggregate royalty (Art. 18(1)), there is a clear risk that the regulation will disadvantage European SEPs. This would mean that any sunk costs otherwise attributable to the development of the technology may not include investments in certain voluntary FRAND-committed SEPs. This is currently a consideration for determining the licensing fees for those EU SEPs (see e.g., paragraphs 7-9 of the Technology Transfer Guidelines).
- 4.7. The Commission’s initiative would likely create incentives to turn such valuation into a pure ‘numbers game’, i.e., pure patent counting, rather than taking into account the actual market contribution and hence value of the technology to a particular application. In this context, it appears odd that the Impact Assessment cites the U.S. decision in *TCL v Ericsson* as ‘best practice’,<sup>63</sup> when such decision was vacated. The Commission is seemingly unaware of the shortcomings of this methodology.<sup>64</sup>

## 5. Entrenchment of price regulations and further codification of delayed access to fundamental rights: the proposed FRAND determination

- 5.1. The FRAND determination measure proposed in the initiative exposes the regulated European SEP owner to multiple mandatory, non-binding FRAND determinations by any user of its IP – whether already licensed or infringing.
- 5.2. IP Europe members are already aware of alternative dispute resolution mechanisms being used around the globe, all of which respect party autonomy and confidentiality of proceedings and outcomes. Confidentiality and discretion are indispensable attributes of any kind of negotiation regarding proprietary or any other economic rights and are protected within the framework of international investment law. Full publicity and transparency in this regard do not appear compatible with the underlying logic of negotiations - namely, to secure the best possible outcome for both parties by preserving their bargaining power and ability to react to a market situation without the scrutiny of the public.
- 5.3. During licensing negotiations, ADR is known to be used as a complement to but not a substitute for access to courts. In conjunction with the proposal that the Commission be able to set non-market rates for access to regulated European SEPs, the FRAND determination measure would not only entrench artificial price caps but also create further delay to exercise legitimate patent rights and have access to European courts.
- 5.4. The independence and integrity of the proposed measures for FRAND determinations and conciliation appear to be compromised since the inception of this initiative, giving

<sup>62</sup> See Common Patent Policy for ITU-T-ITU-R-ISO-IEC.

<sup>63</sup> Impact Assessment, p. 118.

<sup>64</sup> See, for example, [https://www.twobirds.com/-/media/pdfs/iam91\\_tclvericsson.pdf](https://www.twobirds.com/-/media/pdfs/iam91_tclvericsson.pdf).

rise to delay before certain patent owners can exercise fundamental IP rights or access European courts, and setting non-market rates by the Commission. These are not legitimate reasons to interfere with fundamental rights. An administrative body should not be utilised to prevent the exercise of fundamental rights to facilitate the initiative's objectives.

## 6. The Register: information to be submitted to EUIPO

### *Scope and burden*

- 6.1. The range of information which is proposed to be held on the Register is very wide and it could be even wider if the Commission were to exercise the power to add further categories of information (under Article 4(5)). Moreover, the standards for which entries in the Register must be made for relevant SEPs remain to be determined. Currently it applies to all standards worldwide, developed by any SDO, for which EU SEPs exist. In the field of communications technologies there are about 30 SDOs, each developing their own standards, and the Empirical Study reviewed an analysis of IPR policies associated with 197 different standards<sup>65</sup>. As the Commission would have the power to add standards that were published prior to the Regulation coming into effect (Article 66), thus giving the Regulation retroactive effect, the amount of resources required for registration compliance cannot properly be assessed without knowing the outcome of the exercise of this delegated power.<sup>66</sup> This lack of transparency on the scope creates legal and economic uncertainty.

### *Far-reaching impact*

- 6.2. The notification of a standard to the EUIPO requires the active engagement of SDOs, SEP holders, and potentially implementers, many of which may not be resident in the EU. This tenuous basis for global reach is also apparent in other provisions of the initiative – for instance those requiring notification of arbitration and other ADR outcomes worldwide (Article 11 – which has an extraordinarily wide scope – runs counter to internationally recognised norms of arbitration and, if implemented, would be damaging to ADR efforts worldwide).

### *Undermining and duplication of SDO databases*

- 6.3. The proposed registration requirement that a patent owner provide details of the technical specification (and all sections) for which the patent is considered essential (Art. 4.3(c)) is not workable. By contrast ETSI only requires an illustrative specific part of the standard (e.g., section). This requirement would also interfere with the management of SDOs, many of which are outside the EU (for instance ISO and ITU-T) and would create an enormous ongoing burden on patent owners. Consideration needs to be given that

---

<sup>65</sup> Empirical Study, p15 and p.18, fn.4

<sup>66</sup> For instance, it is critical to know whether the Commission will use its delegated power (if granted) to include the published versions of the existing cellular standards (e.g., UMTS, HSDPA, HSUPA, LTE, NR, commonly referred to as 3G, 4G, 5G standards) in the scope of the Regulation. The cost of non-compliance would be clear: loss of the right to claim damages, loss of the right to earn licensing revenue, loss of the ability to protect patent assets in court, and the jurisdiction of European courts being denied by the Commission.

this initiative would require certain European SEP owners to manage one part of the portfolio differently to its 'rest of the world' portfolio – the latter of which could still be managed pursuant to the relevant SDO IPR Policy and the normal legal, regulatory and market-driven environment. It is not clear that imposing this burden and undermining the ETSI database would provide any benefit, other than creating yet another potential opportunity for unwilling licensees to hold out and frivolous disputes and litigation.

- 6.4. As noted in paragraph 2.12 above and citations therein, imposing arbitrary, highly prescriptive and unrealistic time frames for registration would also run counter to SDO IPR policy (for example ISO, ITU-T and ETSI). These IPR policies do not define or prescribe the timing requirement for making a patent declaration. Rather, the application of the IPR Policy is assessed on a case-by-case basis recognising the dynamic nature of innovation, development of registrable IP, and that there are all types of participants in an SDO).
- 6.5. There is no justified need to create a database at the EUIPO for a certain category of European SEPs that will only reflect a portion of a global SEP portfolio and overlap with the existing ETSI database. The ETSI database has been operational since 2011, and it has been continuously improved since then in consultation with its members, including many representatives from SMEs. The ETSI database has been recognised as one of the most sophisticated databases of potentially standard-essential patents in the telecommunications and other fields.<sup>67</sup>
- 6.6. Creating an overlapping database at the EUIPO may risk undermining ETSI, an organisation that has been supporting EU industry members developing technical standards. This risk needs to be better understood as it is not evaluated in the Impact Assessment.<sup>68</sup>

### *Complexity and impracticality*

- 6.7. The procedure for notification of a standard requires a determination of which technical specifications comprise a standard. For technologies that are subject to ongoing standard development this is not straightforward, as technical specifications are often relevant to more than one generation of a standard. There are many technical specifications; for instance, 3GPP hosts almost 4,000 technical specifications (Empirical Study, p.30). 5G comprises in excess of one thousand technical specifications (Empirical Study, p.35).
- 6.8. The requirement that would be placed on certain European SEP owners to notify the competence centre of known implementations of a standard would be unfair, unreasonable and unworkable.<sup>69</sup> SEP owners would not regularly have access to such

---

<sup>67</sup> See, for example, the 'Landscape Study of Potentially Essential Patents Disclosed to ETSI' at the EU Commission's website: <https://publications.jrc.ec.europa.eu/repository/handle/JRC121411>.

<sup>68</sup> See: [https://www.documentcloud.org/documents/23780757-dg-23-07\\_proposal-for-a-regulation-on-seps-etsi-views56](https://www.documentcloud.org/documents/23780757-dg-23-07_proposal-for-a-regulation-on-seps-etsi-views56).

<sup>69</sup> For example, the Wi-Fi Alliance identifies 67,663 Wi-Fi implementations from 602 different manufacturers. If we take the 25 largest companies manufacturing products that use cellular radio standards, they have each produced 17 new products per year over the last 10 years and the rate of new products is probably increasing; this would suggest at least 425 new products each year for cellular radio alone. See Empirical Study, p.14.



information. Accordingly, this would be an unfair, unreasonable and unworkable requirement to place on certain owners of European SEPs.

#### *Inappropriate and arbitrary power suggested for the competence centre*

- 6.9. It is concerning that the initiative proposes that the EUIPO be granted power to suspend a patent from a register (Article 24(4)), which would in turn render the patent unenforceable and valueless. There is no lawful basis for any public body to have jurisdiction over the existence of patent rights other than the national court of the Member State concerned.<sup>70</sup> There is no rational basis for these proposed measures.

#### *Unrealised and unrealistic objectives*

- 6.10. Even if feasible, this proposed register would be highly unlikely to achieve the objective of improving transparency. There would be a distorted database with the onus mainly absorbing significant resources of certain owners of European patents and of highly questionable value.
- 6.11. For any patents that might be registered, there would have to be a detailed scrutiny mechanism in place that ensures a qualitative and consistent approach. Otherwise, comparisons based on European FRAND-committed (fee-generating) patents will be of limited utility.

## 7. Essentiality Checking

### *Duplication*

- 7.1. IP Europe members are not opposed to essentiality checking *per se* and already submit their patents to independent experts for essentiality checking when participating in patent pools. This is aimed at ensuring complementarity of pool patents as set out in the safe harbour provisions in the Technology Transfer Guidelines. Licensors in patent pools may also participate in bilateral licensing arrangements regarding the subject technology and can efficiently make use of essentiality checks done in the pool environment.
- 7.2. It is well-known that pool agents currently rely on essentiality checks as an aid to negotiating licence agreements. They are prepared so that the pool agent does not need to involve the pool licensors in every step of a negotiation. The present efficiency gain through the use of essentiality checks could be significantly diminished if the current safe harbour provisions and worldwide arrangements are dismantled.
- 7.3. The Commission's initiative would bring about duplication of efforts. Of greater concern is that the Commission proposes that the EUIPO (with no technical competence or

---

<sup>70</sup> As noted in Section 2 above, this denial of the existence of patent rights would run contrary to Articles 17 and 47 of the EU Charter of Fundamental Rights, the EU's and Member States commitments to the WTO TRIPS Agreement, and provisions of the TFEU and TEU.

experience in determining essentiality) should perform or administer a system of essentiality checking.<sup>71</sup>

#### *Absence of methodology or process*

- 7.4. Whereas the Commission speaks of transparency, Title V of the initiative does not explain how the Commission would determine essentiality. This raises a number of questions and concerns.<sup>72</sup>
- 7.5. Importantly, when assessing the burden on certain owners of European SEPs and the proportionality of this proposed measure, it appears that the Commission has not investigated how realistic it is for SEP holders to check essentiality of their patents within the rigid time frame suggested to be imposed for registering them. Given the nature of IP and the dynamic nature of standards, any selection of European FRAND-committed (fee-generating) patents to register would have to be done on the basis of a *bona fide* belief that the patent might be essential. There can be no guarantee that it is essential.<sup>73</sup> Bearing in mind that the patent owner would be at high risk of losing rights under the rigid 6-month registration rule proposed, some might only be able to afford to register a few patents; others may be able to register many patents and not reduce their scope for enforcement and recovery of damages. It is unclear how SMEs, research organisations or other companies relying on licensing revenue would be able to afford the management of European patent portfolios (along with the ‘rest of the world’ portfolio) so as to remain engaged in standards development or maintain registration requirements.
- 7.6. However, the initiative proposes that certain owners of European SEPs are required to register essential patents. How would it be possible to comply with this requirement? Patent portfolios are dynamic, as can be standards: there is not a point in time where a bunch of FRAND-committed European SEPs will be granted and be assessed as essential. Such activities will happen over a period of years. How can this dynamic ecosystem be slotted into an arbitrary regulation which the Commission suggests only be imposed on certain owners of European SEPs?
- 7.7. In light of the above observations, it also appears that the Commission has not investigated what the ongoing review and management of global portfolios during the

---

<sup>71</sup> The initiative would also potentially replace the work of the existing experienced and credible independent experts that are currently performing essentiality checks. It is not clear or justified why the Commission proposes to be the only entity that can carry out essentiality checks on certain European SEPs, or how this will impact on or fit in with current practices and cooperation arrangements presently in place amongst other independent experts around the world. and to in its database and hence enforceability of patents.

<sup>72</sup> For example, what methodology would be used? Inexperienced as it is, how would the EUIPO be in a position to develop a methodology, train the essentiality evaluators and apply such methodology consistently? What due process would be followed? Would patent attorney privilege or confidentiality apply to communications between (i) those owners of European SEPs subject to the initiative; and (ii) the Commission or the EUIPO, particularly during the time when questions arise in relation to the SEP and a standard? It is more than just the existence of patent rights that would be at stake with this proposed essentiality check measure.

<sup>73</sup> See the IPR policy of any SDO, for example the ETSI IPR Policy at Clause 4.

life of many patents and perhaps multiple iterations of a standard entails. Nor has it investigated how active SEP owners often are for multiple standards.

- 7.8. In addition, the Commission has not explained how it would ensure consistency between essentiality checks performed by patents pools with the assessments that would be made by (or for) the EUIPO.

***The Commission ignores its own experts' advice and legal precedent on methodology***

- 7.9. On essentiality checking, it is surprising that the Commission did not follow the recommendations and findings of studies which it itself commissioned. These include the JRC study on essentiality which suggested a step by step, voluntary approach for introducing an essentiality assessment, with market acceptance being key to the procedure<sup>74</sup>. More recently, an 'Essentiality Checks Impact Assessment Study' was commissioned, which "assesses three different policy options, which were defined by the European Commission"<sup>75</sup>. The three options were: (1) check of a limited number of self-selected potential SEPs, (2) checks of all potential SEPs, and (3) checks of self-selected and randomly sampled SEPs. There is a paucity of circumstance, evidence and reason as to why the Commission was led to present these three options for consideration.

- 7.10. In any event, the Empirical Study provides detailed observation and analysis of this aspect at Sections 3.2 and 3.3 (pages 26 – 48). It concludes that "*SEP licensing thus necessarily involves a probabilistic element – companies negotiate licences for a portfolio of patents whose essentiality can never be fully known*"<sup>76</sup>. It also concludes that the estimated number of essential patents in a portfolio is only one factor relevant to a licensing negotiation amongst many.<sup>77</sup>

- 7.11. As with the earlier study, the Commission ignored the outcome of the Empirical Study. It also elected to abandon the three options on essentiality checks it had selected for consideration. Rather, the Commission has proposed a rigid regulatory measure for certain owners of European SEPs that has not been analysed.<sup>78</sup>

***Lack of info on methodology***

- 7.12. As the determination of essentiality seems core to the Commission's narrative on transparency, it is unfortunate that the details of the essentiality determination

---

<sup>74</sup> See <https://publications.jrc.ec.europa.eu/repository/handle/JRC119894>.

<sup>75</sup> At p. 7.

<sup>76</sup> Courts too have held that: "*Given the volume of Declared Patents, determining the essentiality of each of each Declared Patent to a given Standard is, practically speaking, impossible*". See *Optis v Apple* [2023] EWHC 1095 (Ch), citing *Unwired Planet v Huawei*.

<sup>77</sup> Other considerations include the value that the technology adds to the implementer's products, the share of the value of the technology attributable to the patented technology, and the price level for comparable licences in the market. See Empirical Study, at pages 25 and 43.

<sup>78</sup> On this basis, it is unclear how this (or any other of the measures set out in the initiative) accord with the Commission's Better Regulation agenda: [https://commission.europa.eu/law/law-making-process/planning-and-proposing-law/better-regulation\\_en](https://commission.europa.eu/law/law-making-process/planning-and-proposing-law/better-regulation_en).

procedure/methodology are not defined in the initiative. Indeed, these details are of critical importance to determine the impact of the regulation on the market. Without any technical competence or experience, it is difficult to understand how the Commission will determine the methodology and ensure the due process required to carry out literally tens of thousands of essentiality checks. With its lack of experience and technical competence, the Commission would not be able to ensure that its essentiality checking would produce reliable results in an effective and efficient manner, and without placing unnecessary burdens on the certain owners of European SEPs that would be targeted by this initiative.

### *Consequences*

- 7.13. Ultimately, the mere performance of proper essentiality checking does not necessarily lead to the conclusion of a licence agreement. The initiative would not change this and nor could it. While most licensing arrangements are put in place without litigation or disputes, when there is litigation, this often concerns the willingness of an infringer to take a FRAND licence. This initiative would not make an unwilling licensee willing to take a licence. On the contrary, as noted above, the initiative codifies delay and risks exacerbating hold-out.
- 7.14. The initiative claims that essentiality checks would not be legally binding, but a finding of non-essentiality by an evaluator pursuant to the proposal would result in the removal of the SEP from the register and could cause certain owners of European SEPs to lose the right to claim damages, lose the right to licensing revenues, and lose the ability to protect patent assets in court. Further, the Commission would effectively be depriving the courts of the EU Member States of competence/jurisdiction.

### *Complexity / unworkability*

- 7.15. See paragraphs 7.9 and 7.10 above. It would appear that the Commission has not considered that standards do evolve over time and that an essentiality decision can therefore have limited validity in time. Equally, although the initiative centres on the question of essentiality, the Commission does not seem to have considered how SEP licences are concluded in practice. Essentiality questions are just one of many issues discussed during licence negotiations and the value of a patent portfolio is not solely determined on the basis of a strict count of SEPs. It is therefore important to consider the cost and benefits of such essentiality checks in the broader context. Each measure set out in this initiative codifies delay and if adopted will negatively impact on the commerciality of transactions, the ability of certain European SEP owners to be appropriately compensated for their investment in risky R&D, and the sustainability of investment in innovation.<sup>79</sup>

### *Under-estimation of costs to be borne by SEP holders*

- 7.16. The Commission appears to have conducted a cursory review of potential costs associated with this initiative. In relation to essentiality checks it predicts that each one

---

<sup>79</sup> See [Open Standards and the Virtuous Innovation Cycle - IP Europe](#).

would take on average 10 hours, at a cost of EUR 5.000 per check – with this figure being “*at the lower end of the estimates*”.<sup>80</sup> If the essentiality of patents is a key element for the transparency goal, it will be difficult to guarantee that the results will be of good quality if it plans to pay less than the market rate.

## 8. Competence Centre

- 8.1. The Commission’s proposal for a regulation of SEP licensing foresees the creation of a so-called ‘*competence centre*’ to be based at the EUIPO whose experience to date lies not with patents but with trademarks and design rights.
- 8.2. Under the SEP regulation the competence centre is charged with 13 new tasks. The complexity of handling all these new tasks at once is further exacerbated by the very broad scope that the proposed regulation envisages, see section 1. Some of the core tasks of the competence centre are duplicative of existing mechanisms and thus their efficiency is not clear. In addition, the resources and timeframe that the proposal provides to the EUIPO to set up the competence centre are clearly not sufficient.
- 8.3. In a recent interview with IAM<sup>81</sup> the outgoing executive director Christian Archambeau stated that “the EUIPO will not be an ‘expert’ as such in patent issues but will work as an “administrative entity”. Apart from the choice of the name for the centre (‘competence’ rather than ‘administrative’), this raises further questions, including the effectiveness of such an administrative centre. As will be discussed further below, many of the tasks for the centre in Article 3 of the proposed regulation already exist today. As the centre appears to be an ‘administrative’ centre than a ‘competence’ centre, it is unclear what added value the centre could bring and how it would increase transparency over what exists today.

### *Many ‘new’ tasks*

- 8.4. Article 3(2) states that the competence centre “*shall support transparency and FRAND determination in relation to SEPs and shall perform [13 tasks]*”. Of these, there appear to be five core substantive tasks:
  1. Setting up and maintaining a register and database of SEPs [based on information submitted to it].
  2. Setting up and administering a system for assessment of the essentiality of SEPs.
  3. Setting up and administering the process for the FRAND determination.
  4. Administering a process for aggregate royalty determination.
  5. Providing training, support and general advice on SEPs to SMEs, and in general raising awareness of SEP licensing and FRAND.

<sup>80</sup> See Impact Assessment, page 100 (fn 291).

<sup>81</sup> <https://www.iam-media.com/article/the-euipos-role-will-be-facilitator-not-sep-deal-maker>.



- 8.5. In addition to these core tasks, the competence centre shall set up and manage rosters of evaluators and conciliators and provide training for them.
- 8.6. Other tasks shall include (i) enhancing transparency and information sharing, and (ii) conducting studies. To manage these last-mentioned tasks, the EUIPO can count on its experience of setting up information systems related to trademarks and design rights and conducting and commissioning studies.
- 8.7. The EUIPO cannot fall back on any experience or expertise regarding the other tasks of validating data on patents and on standards, carrying out essentiality checks, mediating or arbitrating FRAND related cases, determining aggregate royalties and providing training, raising awareness and sharing information on SEP licensing and FRAND (including of information on these topics from third countries).
- 8.8. The Commission's proposed SEP regulation expects the competence centre to be fully functioning within two years and has budgeted 10 FTE for its resourcing. The resources and schedule would not appear realistic given the initiative amounts to a radical change to the legal, regulatory, market-driven and global standards ecosystem.

#### *Building the register and database*

- 8.9. It is to be expected that EUIPO can build the IT architecture allowing SEP owners to register their patents and the competence centre's database to capture, store and display the data that SEP holders would be required to send to it. However, it is not clear how the competence centre will on receipt of the data on literally tens of thousands of patent families be in a position to verify and validate the data. For example, the ETSI database, which is one of the best databases of disclosed SEPs, took many years to build and improve up to the level of detail that it handles today. However, this is still considerably less information than the Commission requires the EUIPO to upload in its SEPs database, including from multiple SDOs.
- 8.10. Organising a register and database for such a broad variety of standards and industry sectors is a very big task where the complexity lies not so much in the creation and management of 'a database' but rather in the understanding of the market dynamics and organising the register and database accordingly.
- 8.11. Without proper verification of the data that is uploaded, the information contained in the database will not be of consistent quality and thus will fail to serve the transparency purpose for which it was originally created. The anticipated essentiality checks will not be able to address this problem as, amongst other things, i) the quality of these checks is questionable; and ii) not all patent families will be subject to such checks (e.g., patent families previously 'checked' by patent pools, or patent families commercialised by SMEs).

### *Administering essentiality checks*

- 8.12. Administering a system of essentiality checks requires first that the competence centre is able to recruit sufficient evaluators to conduct checks on the enormous number, tens of thousands, of patent families declared to be essential to the many standards that fall within the scope of the proposed regulation. The exact number of families that need to be checked in the first year(s) is unclear given the lack of clarity on the precise scope of the proposal.
- 8.13. However, looking at the numbers mentioned in the impact assessment, one can safely assume that there will be many thousands of patent families that need to be checked. Assuming that these would be checked in the first year (in order to have the system up and running), the competence centre faces the challenge of finding sufficient qualified and neutral evaluators to perform these evaluations taking into account that it has no experience of or any idea how to conduct an essentiality check.
- 8.14. If the essentiality assessment will be handled by external consultants, referred to as evaluators, this reliance on external experts raises questions on how the competence centre, with no actual experience or expertise, will:
- i. select and train the external experts,
  - ii. ensure coherence between the assessments made by the different experts,
  - iii. organise and manage the verification of the experts' compliance with the requirement of independence and rigour (mentioned in the proposal) and finally, indeed
  - iv. what added value the competence centre brings to justify the additional layer of administration that is created by it.
- 8.15. There are existing solutions used by different stakeholders for essentiality assessment (e.g., PA Consulting, GreyB, IPLytics, etc...). If the 'competence centre' merely relies on the same consultants / solutions, without ensuring e.g., consistency and improved quality, then its added value is not clear.

### *Organisation and oversight of FRAND determination*

- 8.16. It is proposed that the competence centre will organise and oversee the mandatory FRAND determination procedure, which according to the description in the proposal is far from clear, as further indicated elsewhere in this document. It is also not clear how this new obligation will add value over the many ADR possibilities in use today (e.g., ICC and WIPO), and new possible venues that have just been created (e.g., UPC's ADR), especially as the work will, as for the essentiality assessment above, be outsourced to external conciliators.
- 8.17. The same concerns as those mentioned before for the essentiality assessment are valid here; determining FRAND terms and conditions for the different standards that the regulation covers requires experience and expertise. As for the essentiality assessment, consistency between the different determinations, qualitative determinations and the

clear independence of those who are to lead the determination are key. Considering the budget, (lack of) expertise, timeframe and scope, it seems impossible for the competence centre to set up this task in such a manner that it will provide (and not reduce) transparency and predictability on FRAND terms and conditions.

#### *Administering aggregate royalty*

8.18. The proposal foresees the possibility for stakeholders to notify the competence centre of an aggregate (global) royalty for (the implementations of) a standard. In the case of a revision of such aggregate, the competence centre shall also be notified. Finally, the competence centre may, upon request by SEP holders and implementers, appoint a conciliator to ‘mediate the discussions for a joint submission of an aggregate royalty’ (Article 17.1) or appoint a panel of 3 conciliators to formulate a ‘non-binding’ expert opinion on a global aggregate royalty.

8.19. As with the other tasks; given the enormous scope of the regulation, the global nature of the price setting and the fact that the aggregate royalty has to be determined at a very early stage in the implementation process (i.e. 150 days after publication of the standard or the sale of the new implementation), it seems an impossible task for the competence centre to have a roster of experts able to cover all the possible applications. It is equally unclear how the competence centre will be able to ensure consistency, quality, impartiality, etc. in the processes that it outsources to external (worldwide) experts. It is highly unlikely that this procedure will provide qualitative information that will help transparency and predictability.

#### *Training, advice and information sharing*

8.20. Having somehow managed to recruit experienced, competent and neutral evaluators and conciliators, it is not clear how with a small budget, without experience or expertise and a heavy workload, the competence centre can properly train them to carry out their tasks correctly and consistently.

#### *Conclusion on the competence centre*

8.21. IP Europe is of the opinion that the combination of the lack of experience, the many new tasks, the very broad scope, the limited budget and the very short timeframe foreseen for setting up the competence centre, will make it impossible for this centre to deliver and support a rigorous, impartial and qualitative system capable of producing reliable information of consistent quality. Such a lack of rigour, quality and consistency will jeopardise the transparency and predictability objectives altogether. Indeed, transparency is not necessarily served by the mere increase of information; it is important to make sure the efforts to improve transparency also focus on the quality and relevance of the information supplied. This concern over quality, consistency, impartiality and rigour should be common to all stakeholders of the FRAND and SEP licensing ecosystem. IP Europe takes the view that the Commission would be well advised to rethink its proposal and focus on efficient and effective measures that can really be useful for SMEs; e.g., through its existing IPR helpdesk.

## 9. Conclusions

- 9.1. IP Europe appreciates the opportunity to comment on the European Commission's proposal to regulate the licensing of SEPs. While we support the European Commission industrial strategy and aims to strengthen European technology leadership and strategic autonomy and the stated aims of making SEP licensing more transparent and efficient and predictable, the Commission's initiative published on 27 April 2023 will, however, not deliver on these objectives.
- 9.2. The initiative is likely to harm the ecosystem of open innovation and standards development and impair the EU's technology sovereignty. It could, if implemented, significantly undermine incentives to invest in future critical enabling technologies, cause delay SEP licensing, and serve to exacerbate hold-out. The substantive measures set out in the proposed SEP regulation were not subject to meaningful consultation prior to publication.
- 9.3. The legal basis of the proposal is questionable in light of other provisions in the TFEU, requirements set out in the TEU and given that the market for SEPs licences is global. It is further observed that the existence of patent rights is in the domain of EU Member States, and that the proposal appears to conflict with the EU Charter of Fundamental Rights regarding the carrying on of a business, property rights and access to European courts. Also questionable is the idea of the Commission acting as a price regulator.
- 9.4. The proposed measures are disproportionate to the objectives the Commission is seeking to achieve and the initiative lacks an objective legal and evidential basis. The findings from various studies commissioned by the Commission (including the study commissioned to support the Impact Assessment for this initiative) are not reflected, in particular that (i) the level of litigation is low falling; (ii) licence fees are rarely the cause of litigation; (iii) and that litigation is necessary for unwilling licensees to negotiate in good faith.
- 9.5. Through this initiative the Commission proposes to deny the existence of patent rights and access to justice to a particular class of SEP owners in European courts unless there is 100% ongoing compliance with arbitrary and highly prescriptive regulation. In addition, the initiative will impose significant burdens on SEP owners, including requiring them to compile and submit data on tens of thousands of patents for a duplicative registration process, as well as the costs of mandatory essentiality checks administered by the EUIPO.
- 9.6. At a practical level, the idea that the EUIPO can with a limited budget, no technical competence or experience (in essentiality checking or determination of aggregate royalties and FRAND terms and conditions) in two years establish itself as a fully operational competence centre is highly unrealistic.
- 9.7. This initiative will undermine incentives to contribute to open standards development and harm technology innovators and SMEs, damaging the EU's leadership in the

development of vital global technologies, threatening the EU's competitiveness, technological sovereignty, and overall strategic autonomy.

- 9.8. We understand that the Commission will summarise all feedback received and that this will be presented to the European Parliament and Council with the aim of feeding into the legislative debate. As IP Europe has explained previously, there are relatively few companies making substantial technology contributions to open standards, compared with a very large number of implementers that benefit from standardised technologies. This disparity in numbers risks skewing feedback if the Commission were to adopt an approach that merely seeks to count views. Therefore, in order to ensure an appropriate balance of interests, we respectfully request the Commission to weigh equally the collective views of long-term contributors to the standards with those of companies who are predominantly implementers of the standards and their representatives.