

Standard essential patents

2023/0133(COD) - 27/04/2023 - Legislative proposal

PURPOSE: to increase transparency with regard to standard essential patent (SEP) licensing.

PROPOSED ACT: Regulation of the European Parliament and of the Council.

ROLE OF THE EUROPEAN PARLIAMENT: the European Parliament decides in accordance with the ordinary legislative procedure and on an equal footing with the Council.

BACKGROUND: standard essential patents (SEPs) are patents that protect technology that has been declared essential for the implementation of a technical standard adopted by a standard developing organisation (SDO). Such standards relate for instance to connectivity (e.g., 5G, Wi-Fi, Bluetooth, NFC) or audio/video compression and decompression standards.

To make a product that is standard-compliant, an implementer is obliged to use the relevant 'essential' patents. The monopoly granted by such specific patents is balanced by SEP holders' commitment to license these patents on fair, reasonable and non-discriminatory (FRAND) terms, allowing access to market to implementers.

For many years, the current system has suffered from a lack of transparency, predictability, and lengthy disputes and litigation. Previous measures to tackle these problems, such as self-regulation, have not proven effective.

The applicability of SEPs (particularly for connectivity standards) is going to increase with the rise of the 'Internet of Things' (IoT). Accordingly, a well-functioning system that facilitates access to technologies, while rewarding innovation, is crucial for the EU's technological sovereignty.

CONTENT: the proposal establishes rules on patents essential to a standard (SEPs).

The general objectives of this proposed initiative are to:

- ensure that end users, including small businesses and EU consumers benefit from products based on the latest standardised technologies;
- make the EU attractive for standards innovation; and
- encourage both SEP holders and implementers to innovate in the EU, make and sell products in the EU and be competitive in non-EU markets. The initiative aims to incentivise participation by European firms in the standard development process and the broad implementation of such standardised technologies, particularly in IoT industries.

The main elements of the proposal are as follows:

- the establishment of an **obligatory register** held by the EUIPO, where SEP holders record their SEPs, providing details on patent and standard. Selected SEPs are subject to a non-binding essentiality checks;
- the establishment of an **electronic database** that would contain information on, among other things, aggregate royalties, FRAND terms and conditions or any licensing programmes, as well as collective licensing programmes.

- rules on the registration of BENs;
- a procedure for assessing the essentiality checks of registered SEPS;
- SEP aggregate royalty: SEP holders will be able to notify in the register the expected maximum aggregate royalty;
- a procedure for the out-of-court settlement of disputes concerning the fairness, reasonableness and non-discrimination of conditions (FRAND determination). An expert-driven and time-limited out-of-court dispute resolution mechanism that SEP holders and implementers can benefit from when negotiating a FRAND licence;
- support measures for SMEs: free advisory services; reduced fees for SEP registration and essentiality checks and access to the SEP register;
- the creation of a '**competence centre**' within the EUIPO to manage the above elements (register, database, essentiality checks, global fees, FRAND determination and SME support services).

The proposed Regulation will apply to all standards that will be published by standards development organisation after its entry into force. However, where SEP licensing does not give rise to significant difficulties or inefficiencies affecting the functioning of the internal market, the Commission will establish standards or related implementations or use cases, for which the provisions of aggregate royalty determination procedures and the FRAND determination would not apply.

On the other hand, the proposed Regulation will in principle not apply to standards that have been published by standards development organisations before its entry into force. However, where the functioning of the internal market is severely distorted due to inefficiencies in the licensing of SEPs, the Commission will determine, within the time limits set out in the proposed Regulation, standards or related implementations or use cases to which the proposed Regulation will apply.