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The European Commission's Regulation on Standard Essential Patents Will Support Europe's Digital and Green Transitions

The Fair Standards Alliance (FSA) is an industry organization representing more than 45 companies from diverse sectors and multiple industries. Together, members generate 2.5 trillion EUR in revenue, invest more than 180 billion EUR in R&D, and collectively own more than 600,000 patents, including tens of thousands Standard Essential Patents (SEPs).

FSA advocates for the licensing of SEPs on “fair, reasonable, and non-discriminatory” (FRAND) terms according to a set of [principles](#) designed to ensure that open standards are fair for all.

I. What are Standard Essential Patents?

Patents are considered “standard essential” if one or more of their claims reads on the technical specification of a standard, such as Wi-Fi or 5G. In practice, this means that these patents must necessarily be practiced in order to comply with the standard, which gives those who own SEPs leverage to exclude competitors or seek excessive royalties. To reduce these competition concerns, SEP holders generally commit to license their SEPs on “fair, reasonable, and non-discriminatory” (FRAND) terms so that standards are not used for anti-competitive purposes.

However, when SEP holders do not live up to their FRAND commitments, they make the system unfair, unpredictable and non-transparent.

II. The European Commission Regulation on Standard Essential Patents

The European Commission has proposed a **regulation on standard essential patents** that will make reasonable changes to the system to make it **fair, predictable and transparent**. The Commission's intervention is timely, because many thousands of companies are beginning to integrate and use connectivity standards which have for many years been the subject of disputes and controversy related to the licensing of SEPs.

Absent regulation, SEP abuse risks undermining and delaying investments into the twin green and digital transitions. The standards system should instead align the EU's innovation and industrial policies with its goal of strategic technological autonomy.

III. What are the benefits which the regulation brings?

The regulation has four mechanisms which will deliver a number of benefits:

- **The SEP Register:** information about which patents are declared essential to standards
- **Essentiality Check System:** expert opinions on which patents are likely essential
- **Aggregate Royalty Rate Expert Opinion:** more transparency into the total cost to support a standard
- **FRAND Determination Process:** assistance to help licensors and licensees reach fair outcomes

IV. Why is the SEP regulation needed?

The current system for licensing SEPs is chaotic, unpredictable, opaque and unfair. SEP holders regularly exploit information asymmetries and threaten injunctions to exclude potential licensees from the market in order to force them to agree to license terms that may not be FRAND.

SEP disputes and licensing uncertainty discourage investments into next generation technologies driving digitalisation and green technologies. Internet of Things (IoT) markets are particularly sensitive to SEP abuse. SEP licensing practices from the telecoms industry are ill-suited for IoT markets characterised by low-margin, large-volume products where a few cents on each product can mean the difference between profitability and failure.

Moreover, European industry and manufacturers are at a major disadvantage compared to foreign competitors. This regulation will also support European industries' efforts to compete and innovate internationally.

V. What modifications should be made to the regulation?

The Commission has sought to take a measured and reasonable approach in the construction of the proposed system. The regulation balances the interests of both licensors and licensees with the goal of avoiding SEP disputes and litigation by creating reliable sources of information and clear and predictable rules for licensing. The regulation would even more effectively achieve its aims with the following changes:

SEP Register

- Cover pre-existing standards that are experiencing licensing issues (like Wi-Fi, HEVC, and LTE) from day one.
- Increase transparency by maintaining information on any SEP that is removed from the register.

Essentiality Checks

- Modify Art 29(4) and Recital 27 to ensure that existing pool essentiality checks are relied upon only if they are methodologically sound.

Aggregate Royalty Expert Opinion

- Simplify the request requirements in Art 18(6) so that the process moves forward once a clear number of stakeholders have expressed interest, allowing the opinion to be leveraged in subsequent FRAND determinations.
- Ensure that both current and future users of the standard can participate in the process outlined in Art 18(5).
- Expand Art 18 to allow implementers and other interested stakeholders to provide input.

FRAND Determination Process

- Allow for the process to take place without the threat and expense of co-pending litigation by removing the possibility of "provisional injunctions of a financial nature" in Art 34(4).
- Allow for more than one conciliator to be appointed for the FRAND determination, and give them the discretion to extend the FRAND determination timeline for complex SEP negotiations.
- Make participation in the FRAND determination process non-binding, with the parties making that decision after the written report has been shared (Art 57).
- Include guidance on what "FRAND" means along the lines of the Commission's Horizontal Guidelines.

For a complete overview of FSA's comments, please see our website.

IV. Conclusion

The European Commission's regulation on standard essential patents is needed to create a fair, predictable, and transparent system for licensing. The benefits which the regulation will bring for licensors and licensees outweigh the costs. More importantly, the regulation will support the European Union's twin digital and green transitions by ensuring that companies developing the technologies to make these transitions possible are able to secure the necessary licenses on FRAND terms.