

# Standard essential patents (SEPs) in the EU – a way forward from the withdrawn SEP Regulation proposal?

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## ABSTRACT

Standard essential patents (SEPs) are squarely placed at the intersection of intellectual property, standardisation, and competition law. They are vital for the development and deployment of technologies such as 5G, 6G, and the Internet of Things. In April 2023, the European Commission proposed an SEP Regulation aimed at increasing transparency, ensuring fair licensing on FRAND terms, and reducing disputes. However, the proposal faced criticism for potential burdens, limited institutional capacity, and risks to EU competitiveness. In late 2024, the incoming Commission announced the withdrawal of the initiative, leaving open whether a new proposal or alternative approach will follow. This article explores the legal, economic, and policy implications of SEPs in the EU after the withdrawal. It reviews the existing EU competition law framework, key case law such as *Huawei v. ZTE*, and enforcement practice against Samsung and Motorola. It also assesses expert group recommendations and recent reports by Letta and Draghi, which highlight the importance of connectivity, digital sovereignty, and innovation. The article argues that future EU policy should favour market-based solutions – such as patent pools, voluntary dispute resolution, and greater transparency – over heavy-handed regulation. Strengthening FRAND enforcement, supporting SMEs, and investing in R&D are proposed as more balanced ways forward.

## 1. BACKGROUND

On 27 April 2023, the European Commission introduced a proposal for a Regulation of the European Parliament and of the Council on standard essential patents and amending Regulation (EU) 2017/1001 (COM(2023) 232 final, the SEP Regulation). The overall objectives of the proposed initiative were to 1) ensure that end users, including small businesses and EU consumers benefit from products based on the latest standardised technologies; 2) make the EU attractive for standards innovation; and 3) 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. According to the proposal, it also aimed to incentivise participation by European firms in the standard development process and the broad implementation of such standardised technologies, particularly in Internet of Things (IoT) industries. It sought to 1) make available detailed information on SEPs and existing fair, reasonable, and non-discriminatory (FRAND) terms and conditions to facilitate licensing negotiations; 2) raise awareness of SEP licensing in the value chain; and 3) pro-

vide for an alternative dispute resolution mechanism for setting FRAND terms and conditions.<sup>1</sup>

The current Commission for 2024–2029, which started its work on 1 December 2024, decided however to withdraw the proposal in its 2025 work programme, because it did not anticipate an agreement among the legislators. Following the withdrawal, the Commission announced it will evaluate whether to present a new proposal or select a different approach.<sup>2</sup>

Commission's Executive Vice-President for Tech Sovereignty, Security and Democracy, *Henna Virkkunen*, had warned during her European Parliament plenary hearing that the proposed regulation could harm Europe's competitiveness – especially in developing 5G and 6G technologies, where standard essential patents play a crucial

<sup>1</sup> Commission, 'Proposal for a regulation of the European Parliament and of the Council on standard essential patents and amending Regulation (EU) 2017/1001' COM(2023) 232 final, 27 April 2023.

<sup>2</sup> European Commission, 'Annexes to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: Commission work programme 2025 – Moving forward together: A Bolder, Simpler, Faster Union' COM(2025) 45 final, 11 February 2025. See also Commission, 'Von der Leyen Commission 2024–2029' <[https://commission.europa.eu/about/commission-2024-2029\\_en](https://commission.europa.eu/about/commission-2024-2029_en)> accessed 23.6.2025.

role.<sup>3</sup> According to President of the Commission *Ursula von der Leyen's* Mission letter to *Virkkunen*, Europe must exploit its strengths to maintain or attain leadership in strategic technologies, to establish essential assets for technological sovereignty and resilience, and to foster commercialisation of deep tech innovation.<sup>4</sup>

On von der Leyen's Mission letter to Commission's Executive Vice-President for Prosperity and Industrial Strategy, *Stéphane Séjourné*, the President of Commission urges the Commissioner to ensure that Commission's intellectual property policy continues to reward innovation and creativity and step up enforcement of the current rules.<sup>5</sup> In answer to a question from the European Parliament Committee on Legal Affairs asking clarification on that Mission letter sentence, *Séjourné* argued that a reliable and transparent framework for SEP licensing would make the EU a more attractive destination for licensors and licensees. He emphasized the need to address licensing frictions in markets critical to the Union's competitiveness, particularly as the IoT era emerges and the global balance of SEP ownership shifts.<sup>6</sup>

Recent policy initiatives from the European Commission and prominent figures have also highlighted the urgent need to safeguard European competitiveness and attract investments. The EU member states are immensely different when it comes to technological capabilities and competencies, including telecommunication and digitalisation, and fragmented internal market might disincentivise innovation.

Former Prime Minister of Italy *Enrico Letta* was tasked to elaborate a High-Level Report on the future of the Single Market in September 2023. In his report, Letta emphasized that Europe should support digital innovation to reduce reliance on third-country digital services and better meet European citizens' preferences. He mentioned that technologies like 5G, future 6G, IoT, web 3.0, edge-cloud computing, and artificial intelligence would create new economic opportunities. In the next 5 to 10 years, trends like electrification, the green transition, resilient supply chains, and automation efficiency will grow and according to *Letta*, key to these changes are 5G/6G connectivity, artificial intelligence, and cloud solutions. *Letta*

stated that Europe should utilise the advantages of a unified telecommunications market and focus on promoting investments to address its connectivity investment gap. *Letta* also emphasised the importance of coherent policy decisions at the European level, particularly regarding the regulatory framework underpinning the 5G development. The European Union stands at a pivotal moment regarding the regulation and advancement of technologies that are fundamental to the digital and telecommunications landscape. He argued that Europe's strategic interest lies in maintaining its leadership in 5G development and standardisation.<sup>7</sup>

*Mario Draghi*, former European Central Bank President, was also asked by the European Commission to draft a report on his vision for Europe's future competitiveness. In his report, *Draghi* underscored that Europe lags behind its 5G deployment targets and invests significantly less per capita in telecommunications networks than operators in the United States.<sup>8</sup> He also proposed that the EU should deregulate new investments in fiber, 5G standalone, and IoT, while ensuring competition is maintained to allow customers a choice at the retail level.<sup>9</sup>

But how legal and regulatory frameworks affect competition, innovation, and market dynamics in the EU?

## 2. SEP FRAMEWORK

SEPs emerge from patent law and economics of standardisation. Patents grant exclusive rights to inventors, while standardisation ensures interoperability and compatibility across different technologies. This intersection creates both opportunities and challenges in terms of innovation incentives and competitive market dynamics

Patent protection aims to promote innovation by providing inventors with temporary monopolies to their inventions. However, in the context of technical standards, these monopolies can become bottlenecks that limit market competition and technological development. Consequently, competition authorities and standard-setting organisations (SSOs) have established FRAND licensing frameworks. These frameworks are important for balancing the interests of patent holders and the need for broad use of standardised technologies. The licensing of SEPs under FRAND terms aims to prevent anticompetitive practices such as patent hold-up,

<sup>3</sup> Florian Mueller, 'Mission letters, parliamentary speech suggest new EU Commission may withdraw or overhaul SEP Regulation proposal' (ip fray, 17 September 2024) <<https://ipfray.com/mission-letters-parliamentary-speech-suggest-new-eu-commission-may-withdraw-or-overhaul-sep-regulation-proposal/>> accessed 23.6.2025.

<sup>4</sup> Commission, 'Mission letter – Henna Virkkunen, Executive Vice-President-designate for Tech Sovereignty, Security and Democracy' 6 <[https://commission.europa.eu/document/3b537594-9264-4249-a912-5b102b7b49a3\\_en](https://commission.europa.eu/document/3b537594-9264-4249-a912-5b102b7b49a3_en)> accessed 23.6.2025.

<sup>5</sup> Commission, 'Mission letter – Stéphane Séjourné, Executive Vice-President-designate for Prosperity and Industrial Strategy' 7 <[https://commission.europa.eu/document/6ef52679-19b9-4a8d-b7b2-cb99e-b384eca\\_en](https://commission.europa.eu/document/6ef52679-19b9-4a8d-b7b2-cb99e-b384eca_en)> accessed 23.6.2025. See also Inbar Preiss, 'Comment: Séjourné, Virkkunen to tackle patent and copyright enforcement as IP policy ranks high in next EU Commission' (MLex, 19 September 2024) <<https://www.mlex.com/mlex/articles/2112625>> accessed 23.6.2025.

<sup>6</sup> Parliament, 'Questionnaire to the Commissioner-Designate Stéphane Séjourné, Executive Vice-President for Prosperity and Industrial Strategy' 21–22 <[https://hearings.elections.europa.eu/documents/sejourne/sejourne\\_writtenquestionsandanswers\\_en.pdf](https://hearings.elections.europa.eu/documents/sejourne/sejourne_writtenquestionsandanswers_en.pdf)> accessed 23.6.2025.

<sup>7</sup> Enrico Letta, 'Much more than a Market. Speed, security, solidarity – Empowering the Single Market to deliver a sustainable future and prosperity for all EU Citizens' (European Union, April 2024) 57 <<https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf>> accessed 23.6.2025.

<sup>8</sup> Mario Draghi, 'The future of European competitiveness – A competitiveness strategy for Europe (Part A)' (Commission, 9 September 2024) 31 <[https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead\\_en](https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en)> accessed 23.6.2025.

<sup>9</sup> Mario Draghi, 'The future of European competitiveness – In-depth analysis and recommendations (Part B)' (Commission, 9 September 2024) 76 <[https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead\\_en](https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en)> accessed 23.6.2025.

where SEP holders request excessive royalties, and patent holdout, where implementers fail to engage in good faith negotiations.

Competition law, particularly within the EU, aims to prevent the abuse of dominant market positions. This involves limiting SEP holders' use of injunctions to gain leverage in licensing negotiations and ensuring that licensing terms are fair and transparent. The landmark case C-170/13, EU:C:2015:477, *Huawei v. ZTE* provided guidelines for negotiating FRAND licenses and emphasised the responsibilities of both SEP holders and implementers.<sup>10</sup>

## 2.1 The European Commission and SEPs

The European Commission published its Strategy on Standardisation in 2022.<sup>11</sup> Standards are seen as fundamental to the EU single market and according to the Strategy, Europe's competitiveness, technological sovereignty, reduction of dependencies, and protection of EU values will rely on the success of European stakeholders in international standardisation. However, the strategic importance of standards has not been fully acknowledged, affecting the EU's role in standards-setting. European standardisation faces global competition, requiring agility and strategic focus to maintain EU leadership. Therefore, the Strategy requires EU to promote a more strategic approach to international standardisation activities.<sup>12</sup> A High-Level Forum will be established to set priorities and coordinate European interests in standardisation. Additionally, the Commission will review existing standards and set up an EU excellence hub on standards to coordinate expertise and monitor international activities. The revision of the Standardisation Regulation also included in the Strategy.<sup>13</sup>

The Commission also plays a crucial role in enforcing competition law in the EU. Formerly known as Article 81 of the EC Treaty (TEC), Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) prohibits all agreements, decisions and practices between undertakings and concerted practices which may affect trade between EU member states, and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. Article 101(3) TFEU provides an exception that allows undertakings to defend against a violation of Article 101(1). Anti-competitive agreements under Article 101(1) are valid and

enforceable if they meet the conditions of Article 101(3).<sup>14</sup> Article 102 TFEU, formerly Article 82 TEC, states that any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between member states.<sup>15</sup>

Competition law and in particular 101 TFEU may apply to the terms of standardisation agreements, whereas 102 TFEU deals also with issues such as access to proprietary standard and refusal to license IPRs related to standards.<sup>16</sup> Enforcement in the EU has focused on determining whether, and under what circumstances, seeking an injunction for a SEP against an alleged patent infringer constitutes an abuse of dominant position under Article 102 TFEU.<sup>17</sup>

## 2.2 Commission on Samsung and Motorola Mobility

During the so-called smartphone patent wars in the first half of the 2010s,<sup>18</sup> the Commission initiated investigations against Samsung<sup>19</sup> and Motorola Mobility<sup>20</sup>. Both cases involved a dispute over SEPs related to mobile technology and the inquiries examined whether seeking injunctive relief for FRAND-encumbered SEPs constituted an abuse of a dominant market position, especially in cases where the alleged infringer (in both cases, Apple) was a willing potential licensee.<sup>21</sup>

Samsung had started to seek injunctions against Apple based on its SEPs related to European Telecommunications Standards Institute's (ETSI) UMTS standard, a key industry standard for 3G mobile and wireless communications at the time.<sup>22</sup> Similarly, Motorola sought injunc-

<sup>10</sup> C-170/13, *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH*.

<sup>11</sup> Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – An EU Strategy on Standardisation: Setting global standards in support of a resilient, green and digital EU single market' COM(2022) 31 final.

<sup>12</sup> Giuseppe Colangelo, 'The politicization of IP protection: the case of standard essential patents' (SSRN, 6 December 2024) 15–17 <<https://ssrn.com/abstract=5046250>> accessed 23.6.2025.

<sup>13</sup> COM(2022) 31 final (n 50) 4.

<sup>14</sup> Pierre Arhel, 'Enforcement of Competition Law in Relation to Intellectual Property in the European Union' in Robert D. Anderson, Nuno Pires de Carvalho, and Antony Taubman (eds) *Competition Policy and Intellectual Property in Today's Global Economy* (Cambridge University Press, 2023) 754.

<sup>15</sup> Treaty on the Functioning of the European Union (TFEU) [2012] OJ C 326/4.

<sup>16</sup> Eliza G. Petrtsi, 'The Case of Unilateral Patent Ambush Under EC Competition Rules' (2005) *World Competition* 28(1) 25–29–35.

<sup>17</sup> Dieter Paemen, 'Spotlight: standard-essential patents in European Union' [Lexology, 12 July 2023] <<https://www.lexology.com/library/detail.aspx?g=663af740-78d9-4573-94ca-e2fafd98b650>> accessed 23.6.2025.

<sup>18</sup> Michael Fröhlich, 'The smartphone patent wars saga: availability of injunctive relief for standard essential patents' (2014) *Journal of Intellectual Property Law & Practice*, Volume 9, Issue 2 156. See also Claudia Tapia and Spyros Makris, 'Negotiating SEP licenses in Europe after *Huawei v ZTE*: guidance from national courts' (4iP Council 2018) <<https://www.4ipcouncil.com/research/negotiating-sep-licenses-europe-after-huawei-v-zte-guidance>> accessed 23.6.2025.

<sup>19</sup> Samsung (Case AT.39939) Commission decision C(2014) 2891 final.

<sup>20</sup> Motorola (Case AT.39985) Commission decision C(2014) 2892 final.

<sup>21</sup> Stefano Barazza, 'Standard Essential Patents and FRAND Licensing: The Evolution of the European Approach' in Hayleigh Boshier and Eleonora Rosati (eds), *Developments and Directions in Intellectual Property Law: 20 Years of The IPKat* (Oxford Academic 2023) 505.

<sup>22</sup> Commission, 'Antitrust: Commission accepts legally binding commitments by Samsung Electronics on standard essential patent injunctions' <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_14\\_490](https://ec.europa.eu/commission/presscorner/detail/en/ip_14_490)> accessed 23.6.2025.

tion against Apple based on its SEP relating to ETSI's GPRS standard, part of the GSM standard relating to 2G.<sup>23</sup>

In both cases, the Commission affirmed that the standard-setting process and the FRAND commitment could be considered exceptional circumstances, which characterise the exercise of an exclusive right as abusive conduct. The Commission clarified that "the mere fact of holding IPR does not constitute an objective justification for the seeking and enforcement of an injunction by a SEP holder against a potential licensee that is not unwilling to enter into a licence agreement on FRAND terms and conditions".<sup>24</sup>

The Commission initially found that Samsung's use of injunctions against Apple based on its UMTS SEPs constituted an abuse of its dominant position, aligning with the Union's international obligations under the TRIPS Agreement<sup>25</sup>. Similarly, Motorola's use of injunctions against Apple in Germany based on its Cudak GPRS SEP also constituted an abuse of its dominant position.<sup>26</sup>

The Commission also concluded that its finding would, whilst taking into account the public interest in maintaining effective competition, fully respect the requirement that a fair balance must be struck between the fundamental rights and freedoms at stake, namely the rights linked to intellectual property enshrined in Article 17(2) of the Charter, the right of access to a tribunal enshrined in Article 47 of the Charter; and the freedom to conduct a business, enshrined in Article 16 of the Charter.<sup>27</sup> Same balance was also struck in the Motorola finding.<sup>28</sup>

To address the Commission's concerns, Samsung committed to refrain from seeking any injunctions within the European Economic Area (EEA) for a period of five years based on any of its SEPs, both current and future, pertaining to technologies utilised in smartphones and tablets. This commitment applied to any company that agreed to adhere to a specified framework for licensing these SEPs, including a twelve-month negotiation period, and if no agreement is reached, allowing for the determination of FRAND terms by a court at the request of either party, or by an arbitrator if both parties consent.<sup>29</sup>

Regarding Motorola, a prohibition decision was taken. No fines were imposed on either company for their anti-competitive behaviour.<sup>30</sup>

## 2.3 Huawei v. ZTE (C-170/13) and its surge waves

Inevitably, similar questions and conflicts between the right holder seeking injunctive relief to enforce their exclusive rights, and the potential licensee and user of the technology needing access, were brought before the Court of Justice of the European Union (CJEU) for examination. The groundbreaking decision in the *Huawei v. ZTE (C-170/13)* reaffirmed that seeking an injunction for SEPs subject to a FRAND commitment may constitute an abuse of a dominant position if the proceedings are brought without notice or prior consultation with the alleged infringer.<sup>31</sup>

Request for preliminary ruling from Düsseldorf District Court was prompted by differences in approaches between the Commission in Samsung and Motorola Mobility and the German courts based on an older *Orange-Book-Standard* case from the Federal Court of Justice<sup>32</sup> to the use of antitrust to curtail SEP holder's recourse to injunctive relief.<sup>33</sup>

In this case, Huawei had a patent that was notified to ETSI as essential to the Long Term Evolution (LTE) standard. Concurrently with the notification, Huawei undertook to grant licences to third parties on FRAND terms.<sup>34</sup> ZTE utilised the patented technology and when license negotiations were unsuccessful, Huawei sought to apply for an injunction.<sup>35</sup> Düsseldorf District Court noted that different approaches exist to determine whether Huawei's request for a prohibitory injunction against ZTE is an abuse of dominance, ending up asking the CJEU for preliminary ruling on 1) whether the mere willingness of the infringer to negotiate is enough to presume abuse of a dominant position, or if the infringer must submit an acceptable, unconditional offer to conclude a licensing agreement; 2) if willingness to negotiate is sufficient, what specific qualitative and time requirements does Article 102 TFEU impose on this willingness; 3) if an acceptable offer is required, what specific qualitative and time requirements does Article 102 TFEU impose on this offer and can the offer be conditional on the use or validity of the SEP; 4) if the infringer must fulfil obligations arising from the anticipated licensing agreement, what specific requirements does Article 102 TFEU impose on these acts of fulfilment and must the infringer account for past use and pay royalties, and can these be secured by a deposit; and finally 5) whether the conditions for presuming abuse of a dominant position also apply to other claims arising from patent infringement, such as rendering of accounts, recall of products, or damages.<sup>36</sup>

<sup>23</sup> Commission, 'Antitrust: Commission finds that Motorola Mobility infringed EU competition rules by misusing standard essential patents' <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_14\\_489](https://ec.europa.eu/commission/presscorner/detail/en/ip_14_489)> accessed 23.6.2025.

<sup>24</sup> Samsung [n 19] [66] and Motorola [n 78] [423].

<sup>25</sup> Samsung [n 19] [71].

<sup>26</sup> Motorola [n 20] [499].

<sup>27</sup> Samsung [n 19] [72].

<sup>28</sup> Motorola [n 20] [500].

<sup>29</sup> Samsung [n 19] [76–78].

<sup>30</sup> Barazza [n 21] 506.

<sup>31</sup> EU:C:2015:477 [n 10] [60].

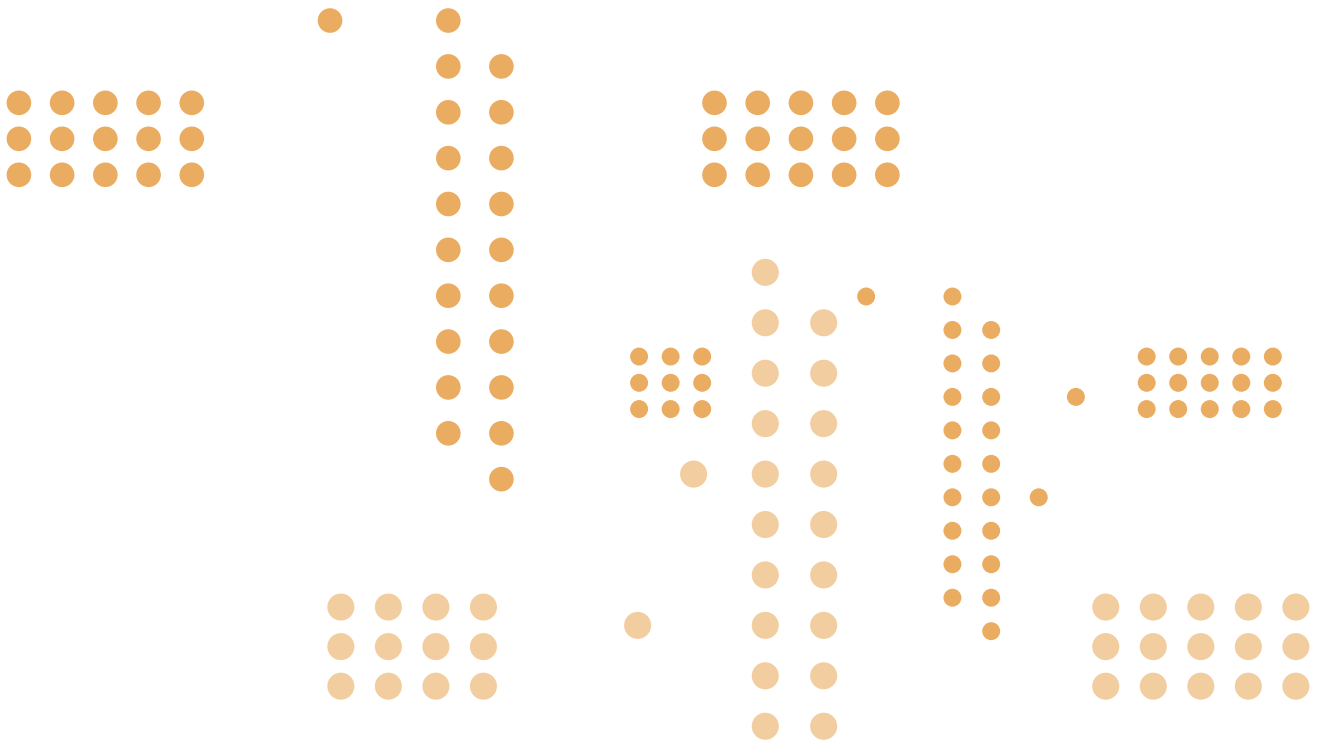
<sup>32</sup> *Orange-Book-Standard* [2009] Bundesgerichtshof KZR 39/06.

<sup>33</sup> Miranda Cole, 'Article 102 TFEU and Standard-Essential Patents Licensing' [Global Competition Law Centre at College of Europe, 2 February 2016] 5 <[https://www.coleurope.eu/sites/default/files/uploads/page/slides\\_cole.pdf](https://www.coleurope.eu/sites/default/files/uploads/page/slides_cole.pdf)> accessed 23.6.2025.

<sup>34</sup> EU:C:2015:477 [n 10] [22].

<sup>35</sup> *Ibid.* [26, 27].

<sup>36</sup> *Ibid.* [28–39].



The CJEU stated that it must strike a balance between maintaining free competition and the requirement to safeguard IPR and right to effective judicial protection. As the questions posed by the Düsseldorf District Court related only to the existence of an abuse, and the existence of a dominant position had not been contested, the analysis had to be confined to the former. The CJEU ruled that to avoid an injunction or product recall being seen as abusive, the SEP owner must meet conditions ensuring a fair balance of interests.<sup>37</sup>

According to the decision, the SEP holder does not abuse its dominant position as long as, prior to bringing an action for infringement seeking an injunction prohibiting the infringement of its patent or seeking the recall of products for the manufacture of which that patent has been used, the patent holder has, first, alerted the alleged infringer of the infringement complained about by designating that patent and specifying the way in which it has been infringed, and, secondly, after the alleged infringer has expressed its willingness to conclude a licensing agreement on FRAND terms, presented to that infringer a specific, written offer for a licence on such terms, specifying, in particular, the royalty and the way in which it is to be calculated. This also required that the alleged infringer has continued to use the patent in question or has not diligently responded to the right holder's offer. According to the CJEU, Article 102 TFEU does not prohibit bringing an action for infringement against the alleged infringer or seeking damages.<sup>38</sup>

Advocate-General *Wathelet* examined the questions more thoroughly in his opinion.<sup>39</sup> In his conclusion, he addressed the different perspectives in a balanced manner. He acknowledged that the patent owner's position is weakened by the FRAND license obligation. Therefore, he emphasised the importance of the right holder retaining the right to seek injunctive relief and access to courts.<sup>40</sup> On the other hand, the potential licensee needs to use the patent to compete. According to the Advocate-General, the potential licensee can begin using the patent and later seek a license.<sup>41</sup> The speed and complexity of the telecoms market support this point in this case. The right holder should notify the potential licensee about the alleged infringement, unless the potential infringer is already aware of the patent and the infringement, and make a licensing offer that includes all terms.<sup>42</sup> The potential licensee is not required to accept the proposal but must respond in a detailed and serious manner and make a counterproposal. A response aimed merely at delaying would avoid concluding that seeking injunctive relief constitutes an abuse of a dominant position.<sup>43</sup>

If no negotiations are started or if they are not completed successfully, the potential licensee can request that a court or an arbitral tribunal establish FRAND conditions. The right holder can then ask for a bank guarantee

<sup>37</sup> EU:C:2015:477 (n 10) [42–43, 55].

<sup>38</sup> *Ibid.* [77].

<sup>39</sup> Opinion of Advocate General *Wathelet* in C-170/13, *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH* EU:C:2014:2391.

<sup>40</sup> *Ibid.* [77].

<sup>41</sup> *Ibid.* [82].

<sup>42</sup> *Ibid.* [84–85].

<sup>43</sup> *Ibid.* [88].

to cover the ongoing alleged infringement.<sup>44</sup> The potential licensee retains the right to later challenge the validity of the patent or argue that the patent is not essential for the standard.<sup>45</sup> Conversely, the right holder can seek access to the books of the potential licensee without abusing its dominant position and can also institute a claim for damages regarding past infringing activities without this constituting an abuse of its dominant position.<sup>46</sup>

The approach aims to facilitate the conclusion of a FRAND license while reserving the right to seek injunctive relief when infringement is evident, such as when the alleged infringer is aware of the issue and does not attempt to obtain a license or makes no serious effort to agree on a FRAND license.<sup>47</sup> Determining when the latter situation occurs may however present a challenge.<sup>48</sup>

In summary, when evaluating the validity of a request for an injunction due to infringement of a SEP or the corresponding defence, national courts must consider the following actions taken by the parties; 1) whether the SEP holder notified the implementer of the infringement, including details of the infringed patents; 2) whether the implementer has demonstrated diligence in expressing its willingness to conclude a FRAND licence; 3) whether the SEP holder subsequently made a written FRAND offer for a licence, specifying the royalty rate and the method of its calculation; 4) whether the implementer responded diligently, either accepting the offer or making a prompt written FRAND counter-offer; and 5) if the SEP holder rejected the counter-offer, whether the implementer provided appropriate security and rendered accounts. While the CJEU clarified European legislation and established a general framework for good faith negotiations, it refrained from detailing the scope of every obligation imposed on the parties. The CJEU thus enabled national courts in EU member states to apply the *Huawei v. ZTE* framework according to the specific facts presented in each case.<sup>49</sup>

Following the *Huawei v. ZTE* case, SEP holders have adjusted their strategy in patent litigation against alleged infringers. They are now more likely to file claims for damages and render accounts instead of immediately seeking injunctive relief.<sup>50</sup>

There have however also been some German cases with injunction<sup>51</sup>. For example, in applying the *Huawei v. ZTE* test, the Regional Court in Düsseldorf issued an injunction in the case of *St Lawrence Communications v. Voda-*

*fone*.<sup>52</sup> The court determined that the infringer's counteroffers did not meet the requirements for the defense established in *Huawei v. ZTE* because some lacked a specific royalty rate, some were submitted late, some were set too low, some had undue territorial restrictions, and they did not comply with accounting and security provision requirements.<sup>53</sup>

### 3. BALANCING INNOVATION AND COMPETITION

Patents enable inventors to recoup the fixed costs of their research investments by providing them with a temporary period of market power.<sup>54</sup> Strong patent protection is essential for incentivising innovation, as patents lower transaction costs and support subsequent innovations.<sup>55</sup> However, excessive royalty rates or unfair licensing terms can deter innovation by increasing costs for implementers.<sup>56</sup>

The primary objectives of competition law are to promote welfare and ensure efficiency by maintaining a free and fair competition.<sup>57</sup> As there are no specific EU or national rules on SEPs, EU competition law plays a crucial role in addressing these issues. The 2023 Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements<sup>58</sup>, *Huawei v. ZTE* ruling<sup>59</sup>, and the IPRED Directive<sup>60</sup> provide guidance on how to balance innovation incentives with competition.

The Commission has emphasised the importance of balancing patent protection with the need for widespread technology dissemination already in its 2017 approach to SEPs. It highlighted the economic potential of digital technologies and the IoT, stressing the need for clear and efficient SEP licensing to foster innovation and economic growth in the EU.<sup>61</sup> The European Union must bal-

<sup>44</sup> EU:C:2014:2391 (n 39) [93, 98].

<sup>45</sup> Ibid. [94, 96].

<sup>46</sup> Ibid. [101–102]. See also Paul Torremans, *Holyoak and Torremans Intellectual Property Law* (9th edn, OUP 2019) 133–134.

<sup>47</sup> EU:C:2014:2391 (n 39) [103].

<sup>48</sup> Torremans (n 46) 133–134.

<sup>49</sup> Tapia and Makris (n 18).

<sup>50</sup> Cole (n 33) 11.

<sup>51</sup> Chrysoula Pentheroudakis and Justus A. Baron, 'Licensing Terms of Standard Essential Patents: A Comprehensive Analysis of Cases' (2017) JRC Science for Policy Report EUR 28302 EN 68–72.

<sup>52</sup> *Saint Lawrence v. Vodafone* [2016] Landgericht Düsseldorf, No. 4a O 73/14.

<sup>53</sup> Willard K. Tom and J. Clayton Everett, 'Competition Policy, Intellectual Property and Network Industries: Post-1995 Enforcement Experience in the US and EU' in Robert D. Anderson, Nuno Pires de Carvalho, and Antony Taubman (eds) *Competition Policy and Intellectual Property in Today's Global Economy* (Cambridge University Press, 2023).

<sup>54</sup> Heidi L. Williams, 'How Do Patents Affect Research Investments?' (2017) *Annual Review of Economics* 9(1).

<sup>55</sup> Justus Baron, Tim Pohlmann, and Knut Blind 'Essential patents and standard dynamics' (2016) *Research Policy* 45(9) 1769.

<sup>56</sup> Mark A. Lemley and Carl Shapiro, 'Reply: Patent Holdup and Royalty Stacking' (2007) 85 *Texas Law Review* 2163, Stanford Law and Economics Olin Working Paper No. 345.

<sup>57</sup> Cassey Lee, 'The Objectives of Competition Law' (2015) ERIA Discussion Paper Series 54.

<sup>58</sup> Commission, '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' [2023] OJ C 259/1.

<sup>59</sup> EU:C:2015:477 (n 10).

<sup>60</sup> Directive 2004/48/EC of 29.4.2004 on the enforcement of intellectual property rights [2004] OJ L 195/16.

<sup>61</sup> Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee

ance the need to incentivise innovation with the need to ensure fair competition in the context of SEPs.

FRAND licensing commitments are important in balancing the interests of SEP holders and implementers. They aim to license SEPs on fair and reasonable terms, preventing SEP holders from setting excessive royalties or unfair licensing terms. This also prevents market distortions and reduced consumer welfare. Additionally, FRAND commitments ensure non-discriminatory access to SEPs, promoting competition and market entry by preventing SEP holders from preferring certain implementers over others.<sup>62</sup>

The enforcement of FRAND commitments is crucial for maintaining the balance between innovation incentives and competition. Courts and regulatory bodies play a key role in ensuring that SEP holders adhere to their FRAND commitments.

Each SSO establishes its own terms for a FRAND commitment, which may be expressed as an offer to negotiate a license on fair and reasonable terms. It is not a commitment to negotiate a contract at a fixed rate. For example, Section 6.1 of ETSI's IPR policy states that when essential IPR is disclosed, ETSI will request – but not require – the IPR owner to commit in writing that it is willing to grant irrevocable licenses on FRAND terms and conditions, thus waiving its right to refuse to offer a license to those seeking one.<sup>63</sup>

*Epstein et al.* highlight that bilateral licensing, with its inherent flexibility under FRAND obligations, allows parties to negotiate outcomes efficiently based on their interests, priorities, and resources.<sup>64</sup> *Geradin* views the abstract – and thus flexible – notions of fairness and reasonableness strength rather than a weakness. The vague FRAND terms in most SSOs' IPR policies are a beneficial feature, enabling contracts without addressing all future contingencies, which would be impractical or too costly.<sup>65</sup>

Most FRAND cases in European courts involve SEP holders seeking injunctive relief under Article 102 TFEU while patent infringement and validity proceedings are ongoing, either together or separately due to systems like Germany's bifurcation. Because FRAND and patent disputes may run concurrently, damage claims in European

FRAND cases are rare, and courts often defer judgment while validity is challenged.<sup>66</sup>

The CJEU ruling in *Huawei v. ZTE* has promoted greater alignment among European national jurisdictions by stressing the importance of good faith in negotiations towards an actual result beyond the initial offer of the licensee. As a result, injunctions are no longer granted automatically without further consideration of the parties' conduct and their relevant bargaining power. The economic analysis of FRAND licensing underscores the crucial role of injunctions in mitigating potential harm arising from bargaining failures and patent hold-ups. Concurrently, the jurisprudence of the CJEU and national courts across Europe increasingly employ the award of injunctive relief against unwilling licensees to reinforce bilateral negotiations as the primary forum for determining FRAND licensing terms.<sup>67</sup>

## 4. A WAY FORWARD?

In response to concerns regarding inefficiencies in SEP licensing potentially negatively impacting the development of emerging 5G and IoT markets, the European Commission established an Expert Group on Licensing and Valuation of Standards Essential Patents (SEP Expert Group). Expert Group members such as *Justus Baron*, *Damien Geradin*, *Bowman Heiden*, *Fabian Hoffmann*, *Jorge Padilla*, and *Ruud Peters* have also written individually on the subject. The members were tasked to seek a balanced strategy that enhances Europe's industrial standing in the development of new standardised technologies, including 5G and 6G, as well as the deployment of the IoT across its numerous applications in various sectors. The group produced a report containing 79 proposals aimed at improving the SEP licensing market.<sup>68</sup> I will introduce some of these with my personal policy recommendations.

### 4.1 Strengthen enforcement mechanisms

Europe might need to strengthen the enforcement mechanisms for FRAND commitments to ensure that SEP holders adhere to fair and reasonable licensing terms. Commission's Executive Vice-President for Prosperity and Industrial Strategy, *Stéphane Séjourné* has already been tasked to step up enforcement of the current rules.<sup>69</sup>

*Colangelo* has also emphasised the need for a balanced approach to SEP enforcement that supports innovation

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and the Committee of the Regions – Setting out the EU approach to Standard Essential Patents' COM(2017) 712 final.

<sup>62</sup> Chryssoula Pentheroudakis and Justus A. Baron, 'Licensing Terms of Standard Essential Patents: A Comprehensive Analysis of Cases' (2017) JRC Science for Policy Report EUR 28302 EN 68–72.

<sup>63</sup> ETSI, 'Rules of Procedure Annex 6: ETSI Intellectual Property Rights Policy' [ETSI, 29–30 November 2022] <<https://www.etsi.org/images/files/IPR/etsi-ipr-policy.pdf>> accessed 23.6.2025.

<sup>64</sup> Richard A. Epstein, F. Scott Kieff, and Daniel F. Spulber, 'The FTC, IP, and SSOs: Government Hold-Up Replacing Private Coordination' (2011) *Journal of Competition Law & Economics*, March 2012, Stanford Law and Economics Olin Working Paper No. 414, GWU Legal Studies Research Paper No. 578, GWU Law School Public Law Research Paper No. 578, NYU Law and Economics Research Paper No. 11-26, U of Chicago Law & Economics, Olin Working Paper No. 568, Northwestern Law & Econ Research Paper No. 11-23 12–13.

<sup>65</sup> Damien Geradin, 'The Meaning of "Fair and Reasonable" in the Context of Third-Party Determination of FRAND Terms' (2014) *George Mason Law Review* 21:4 11–12.

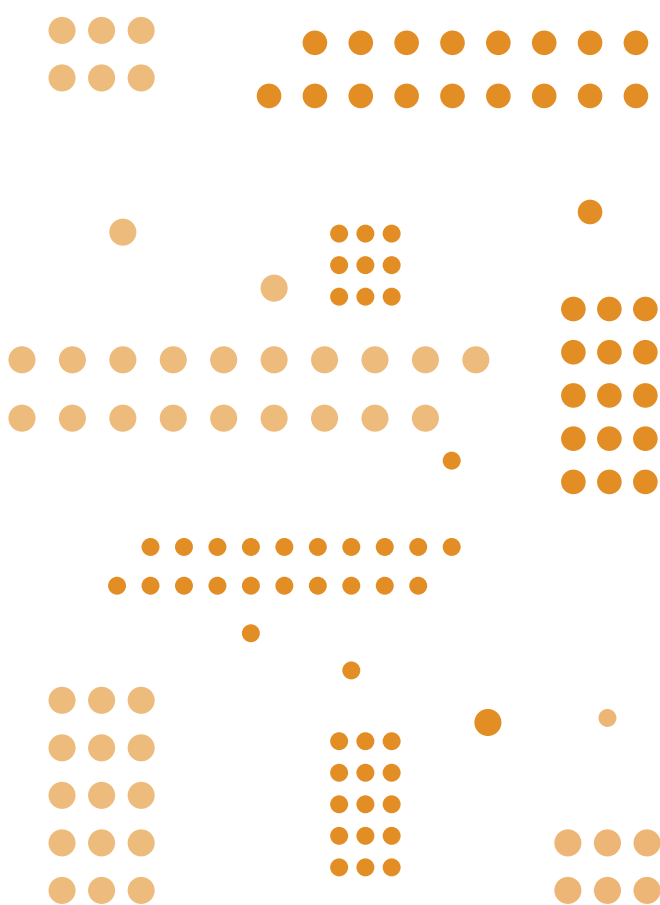
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<sup>66</sup> JRC Science for Policy Report EUR 28302 EN (n 51) 155.

<sup>67</sup> JRC Science for Policy Report EUR 28302 EN (n 51) 123.

<sup>68</sup> Commission, 'Group of Experts on Licensing and Valuation of Standard Essential Patents 'SEPs Expert Group' – full contribution' E03600.

<sup>69</sup> Commission, 'Mission letter – Stéphane Séjourné, Executive Vice-President-designate for Prosperity and Industrial Strategy' (n 5) 7.



and technological leadership while addressing geopolitical challenges.<sup>70</sup>

The SEPs Expert Group proposed creating independent expert boards to assess FRAND offers or determine a FRAND royalty when requested by a court or negotiating parties.<sup>71</sup> As the Commission's proposal for SEP Regulation failed with its approach, a more balanced and voluntary dispute resolution mechanism could work better.<sup>72</sup> This could be achieved through the establishment of arbitration panels or mediation services, there is no need for a robust regulatory oversight. There should however be some evaluation mechanisms in place as well.

#### 4.2 Develop guidelines

Another recommendation is to develop clear and comprehensive guidelines on FRAND licensing to provide clarity to both SEP holders and implementers. These guidelines should outline the principles of fair and reasonable licensing terms and the conditions under which SEP holders can seek injunctions.

Example of clear guidelines would be the guidelines for the horizontal and vertical coordination meetings the SEPs Expert Group has proposed EU to formulate in similar way that the Commission and the US Department of Justice have already formulated for patent pools.<sup>73</sup>

There has even been demands for SSOs to provide guidelines on the factors for determining FRAND, specifically regarding *ex ante* patent and licence values. SSOs could also archive and publish such information.<sup>74</sup>

Farrell, Hayes, Shapiro, and Sullivan suggested that SSOs could limit patent hold-up by requiring participants to disclose patents during the standard-setting process, but even if hold-up or royalty stacking isn't seen as a real issue, more transparency is still needed.<sup>75</sup> According to *Erixon* and *Bauer*, improving market transparency and reducing non-transparent practices are essential for minimising legal risks and transaction costs.<sup>76</sup>

As *Huawei v. ZTE* left some ambiguity to the FRAND licensing disputes, the importance of transparency and information has grown. First, transparency should be increased in standardisation procedures by requiring right holders to demonstrate the essentiality and validity of their rights from the beginning. Additionally, patent owners should be required to disclose the conditions of pre-existing licensing agreements.<sup>77</sup>

The SEPs Expert Group proposed a confidential repository for SEP licensing agreements to be used by courts, competition authorities, public arbitration boards, or trusted persons to enhance transparency. Additionally, EU could improve SEP databases, introduce independent essentiality checks, and incentivise SEP holders to provide detailed information.<sup>78</sup> SSOs could also offer platforms for additional information regarding declared SEPs.<sup>79</sup>

#### 4.3 Promote collaboration

According to the JRC Science for Policy Report, the development of 5G requires SSOs to collaborate closely. Global standard setting and market-driven policies will be key to driving innovation. The involvement of societal groups and vertical industry players, such as transportation and energy, will challenge standard-setting governance and enhance 5G infrastructure for vertical markets.<sup>80</sup>

*Ruud Peters* has written on SEP licensing both with *Fabian Hoffmann* and *Nikolaus Thumm* and with *Igor Nikolic* and *Bowman Heiden*. In their article on smoother SEP licensing ecosystem for IoT, *Peters, Hoffman*, and *Thumm* argue that if current licensing practices in the telecom sector are replicated in the various IoT verticals, the number of SEP litigations will increase. In the end-to-end licensing process, they identify the following five

<sup>70</sup> Colangelo (n 12) 1, 11, 22.

<sup>71</sup> Commission, E03600 (n 68) 145.

<sup>72</sup> COM(2023) 232 final (n 1).

<sup>73</sup> Commission, E03600 (n 68) 89.

<sup>74</sup> Tim W Dornis, 'Standard-Essential Patents and FRAND Licensing – At the Crossroads of Economic Theory and Legal Practice' (2020) *Journal of European Competition Law & Practice* 11(10) 30.

<sup>75</sup> Joseph Farrell and others 'Standard Setting, Patents, and Hold-Up' (2007) 74 *Antitrust Law Journal* No. 3 608 624.

<sup>76</sup> Fredrik Erixon and Matthias Bauer, 'Standard Essential Patents and the Quest for Faster Diffusion of Technology' *ECIPE Policy Brief* No. 2/2017 4.

<sup>77</sup> Dornis (n 74) 30.

<sup>78</sup> Commission, E03600 (n 68) 10.

<sup>79</sup> *Ibid.* 129.

<sup>80</sup> JRC Science for Policy Report EUR 28302 EN (n 51) 166.

elements as primary reasons for disputes and litigation in SEP licensing negotiations; 1) insufficient SEP transparency; 2) low confidence in the validity of SEPs; 3) difficulty in assessing a reasonable aggregate royalty; 4) lack of incentives to seek licenses; and 5) concerns about an uneven playing field. They also propose solutions for each of them.<sup>81</sup>

Studies suggest that only 20–47% of patents declared essential to the 2G, 3G, and 4G standards are necessary for practicing the standard.<sup>82</sup> According to Peters, Hoffman, and Thumm, only an estimated 25–40% of the patents in ETSI database of declared SEPs are actually essential, creating insufficient SEP transparency.<sup>83</sup> To combat this, they propose independent essentiality checks to improve transparency and reduce litigation. They also point out that 5G standard comprises a baseline component (New Radio/Network Core-NR/NC) and additional components for the different use cases related to different IoT verticals, which would spread out essentiality checks over time.<sup>84</sup>

It is recommended to assess SEP validity before licensing negotiations, so out-of-court challenge procedures could expedite validity assessments. Additionally, essentiality checks, comparable licenses, and market transparency could be used to estimate aggregate royalties. They also proposed to analyse and publish aggregate royalty rates to address the fears of unequal royalty rates among competitors and ensure fairness.<sup>85</sup>

Regarding the lack of incentives to seek licenses, the steps outlined in *Huawei v. ZTE* motivate both the SEP licensors with genuine SEPs to publicly disclose their licensing terms and conditions before, or as soon as possible after, the market for relevant standard-compliant products begins to develop, and the implementers to actively pursue licenses from such licensors prior to commercialisation. Additionally, publishing terms could encourage proactive licensing by implementers.<sup>86</sup>

To conclude, these practical solutions could promote a more efficient SEP licensing ecosystem, where SEP licensors and implementers would have greater incentives to negotiate license agreements, rather than to litigate over their differences.<sup>87</sup>

In another paper on SEP licensing negotiation groups (LNGs), *Peters*, along with *Igor Nikolic* and *Bowman*

*Heiden*, proposed that utilising a combination of legal, economic, and managerial tools could enable LNGs to achieve various objectives. These tools include 1) establishing proper guidelines to create a safe harbour, allowing LNGs to function without breaching antitrust laws; 2) implementing appropriate governance for internal operations; and 3) adhering to the *Huawei v. ZTE* negotiation framework for SEP licensing. Consequently, through deliberate institutional design, LNGs could generate the necessary incentives to enhance SEP licensing efficiencies by reducing transaction costs for both licensees and licensors. Additionally, LNGs could ensure a fair competitive environment among similarly situated implementers who, as direct competitors, are logically reluctant to obtain a license until all parties are licensed.<sup>88</sup>

#### 4.4 Promote innovation and R&D investment

Innovation and research and development (R&D) investment are essential for the development of new technologies. Incentives for firms to invest in R&D, such as research grants, could help sustain innovation while promoting competition.

The well-established method for licensing patents is through negotiation between licensor and licensee, with most licenses being agreed upon in this manner. To enhance this approach and support global value chains based on technology standards, the EU could invest in R&D, education, and upskilling in business, digitalisation, and intellectual property. Rather than introducing regulation that may affect EU innovation, the Commission could encourage public and private investment in innovation and expand initiatives like IP4SME, which assists SMEs in understanding intellectual property.<sup>89</sup>

Both large organisations and SMEs in the EU face challenges concerning skills shortages and administrative burdens. Other jurisdictions, including major EU trading partners like the United States and the United Kingdom, have conducted comprehensive government reviews and based on the evidence, they determined that exceptional regulation of SEPs or price setting is unnecessary, as it may impact innovation. Instead, they focused on investing in key areas of innovation and targeted upskilling initiatives.<sup>90</sup>

<sup>81</sup> Ruud Peters, Fabian Hoffmann, and Nikolaus Thumm, 'How to Create a Smoother SEP Licensing Eco-system for IoT' in Jonathan M. Barnett and Sean M. O'Connor (eds), *5G and Beyond: Intellectual Property and Competition Policy in the Internet of Things* (Cambridge University Press, 2023).

<sup>82</sup> Tim Pohlmann, 'AI may be the solution to skyrocketing numbers of SEP declarations' (IAM, 21 July 2021) <<https://www.iam-media.com/article/ai-may-be-the-solution-skyrocketing-numbers-of-sep-declarations>> accessed 23.6.2025. Essentiality samplings in *Unwired Planet v. Huawei* [2017] EWHC 711 and *TCL v. Ericsson* [2019] 943 F.3d 1360.

<sup>83</sup> Peters, Hoffmann, and Thumm (n 81). See also SEPs Expert Group (E03600) (n 68) 35.

<sup>84</sup> Peters, Hoffmann, and Thumm (n 81).

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> Ruud Peters, Igor Nikolic, and Bowman Heiden, 'Designing SEP Licensing Negotiation Groups to Reduce Patent Holdout in 5G/IoT Markets' in Jonathan M. Barnett and Sean M. O'Connor (eds), *5G and Beyond: Intellectual Property and Competition Policy in the Internet of Things* (Cambridge University Press, 2023).

<sup>89</sup> Peters, Nikolic, and Heiden (n 88).

<sup>90</sup> Elisabeth Opie and Keith Mallinson, 'To boost the EU's global competitiveness, we must change course on industrial and innovation policy' (The Parliament Magazine 25 September 2024) <<https://www.theparliamentmagazine.eu/partner/article/to-boost-the-eus-global-competitiveness-we-must-change-course-on-industrial-and-innovation-policy>> accessed 23.6.2025.

#### 4.5 Encourage market entry and competition

Market entry and competition are crucial for promoting innovation and preventing market distortions. Lower barriers for entry ensure new competitors and opportunities for SMEs.

Patent pools can lower transaction costs for both licensors and implementers and may also decrease the overall royalty rate for the total number of SEPs used in products licensed by the pool.<sup>91</sup> Because of this, the SEP Expert group have proposed SSOs to stimulate the formation patent pools already during the standardisation process.<sup>92</sup> This would obviously require that SSOs do not become involved in the pool setting process themselves, but fostering the formation of pools during the process would expedite the patent pools becoming operational as quickly as possible.<sup>93</sup>

Before patent pools become operational, it could be also possible to establish collective licensing mechanisms or agencies to, upon request by an implementer, grant licenses under all European SEPs for a standard, for which at least two SEP holders have been identified.<sup>94</sup>

Forming patent pools encompassing a large number of standards may be beneficial for products that utilise numerous standards, such as IoT. SEP holders could create these pools of pools for clusters of standards related to similar technologies or functionalities used in a product.<sup>95</sup>

As SMEs may lack experience with the complexities of FRAND licensing and have limited resources to manage these challenges effectively, providing support for SMEs should also encourage market entry and competition.<sup>96</sup> This could be achieved through targeted funding, regulatory support, and access to SSOs.

#### 5. A NEW SEP PROPOSAL OR A DIFFERENT APPROACH?

The SEP Regulation proposal Commission eventually withdrew was originally applauded by so called big tech companies, such as Apple, Google, Meta, Cisco, Intel, and other SEP implementers, such as automotive industry. At the same time SEP holders such as Nokia and Ericsson, were hoping for it to fail. The proposed SEP Regulation would have brought uncertainty to the sector and there were several practical challenges, such as sufficient expertise for the new Competence Centre at the EUIPO.

European Parliament President Roberta Metsola stated that the Parliament's Conference of Presidents would support the Commission's 2025 work programme, including the withdrawal. The Commission is anticipated to adopt

its final 2025 work programme by August, following the positions provided by EU member states.<sup>97</sup> After that, the Commission needs to decide whether to present a new proposal or select a different approach.

SEP implementers often have concerns about wireless standards due to litigation over the past 20 years. However, litigation is less common in other standardised areas with lower financial stakes and the use of collective licensing solutions like patent pools. The risks of hold-up emphasised by SEP implementers have been addressed, though imperfectly, in *Huawei v. ZTE*. Remaining issues are mainly in Germany, and less burdensome solutions are more proportionate than complete revision of the EU SEP framework.

The European Patent Office published a study on standard essential patents (SEPs) in May 2025 that questions some of the key assumptions behind the withdrawn SEP Regulation proposal.<sup>98</sup> First of all, the EPO states that although there are challenges in SEP licensing, they do not appear severe enough to systematically discourage potential contributors from engaging in standard development or deter implementers from developing products based on standards involving potential SEPs.<sup>99</sup> This undermines the rationale for regulatory intervention premised on a market failure. Additionally, EPO summarizes that SEP licensing negotiations can be complex because, among other things, views may diverge on technical issues such as the determination of essentiality, validity or infringement of asserted SEPs, or because the parties may disagree on what constitute FRAND terms and conditions.<sup>100</sup> This suggests that disputes arise primarily from the technical and legal complexity of SEPs, not necessarily from allegedly abusive behaviour by patent holders, which the Commission's proposal targeted. EPO also highlights multiple overlapping governance tools (e.g. court precedents, SSO policies, EU communications) that already provide guidance for the licensing of SEPs, raising questions about the need for a central regulator.<sup>101</sup> Moreover, the Unified Patent Court has rapidly established itself as a key forum for resolving SEP-related patent disputes in the EU, already delivering on goals such as legal certainty and harmonisation that the Commission's proposal aimed to achieve.<sup>102</sup> And finally, the positive correlation between citations of SSO documents and SEP declarations suggest that the new linkage between patents and SSO

<sup>91</sup> Commission, E03600 (n 68) 15.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> Commission, E03600 (n 68) 15.

<sup>95</sup> Ibid. 16.

<sup>96</sup> Ibid. 42.

<sup>97</sup> Anupriya Datta, 'Top MEPs torn on shelving new laws as Metsola sends conflicting letters to Commission' (Euractiv, 17 June 2025) <<https://www.euractiv.com/section/politics/news/top-meps-torn-on-shelving-new-laws-as-metsola-sends-conflicting-letters-to-commission/>> accessed 23.6.2025.

<sup>98</sup> European Patent Office, 'Standards and the European patent system – Insights from a new EPO dataset linking patents and standards, with early perspectives into SEP litigation under the Unified Patent Court' (EPO, May 2025) <<https://link.epo.org/web/publications/studies/en-epo-study-standards-and-the-european-patent-system.pdf>> accessed 23.6.2025.

<sup>99</sup> EPO (n 97) 19.

<sup>100</sup> Ibid. 9.

<sup>101</sup> Ibid. 18.

<sup>102</sup> Ibid. 15.

documents could serve as a useful indicator for assessing potential essentiality.<sup>103</sup> This directly challenges the need for a centralised essentiality-checking body. Data-driven methods and empirical evidence may offer more scalable, objective, and decentralised alternatives.

The EU should focus on promoting innovation within standardised industries and licensing arrangements that facilitate the implementation of standardised technologies across various sectors. It is essential to maintain a fair balance between the interests of SEP holders and implementers, as both are crucial and complementary components of the standardisation ecosystem. Achieving these priorities is best accomplished through market-based solutions such as patent pools and other collective licensing mechanisms.

Other policy recommendations include strengthening the enforcement mechanisms for FRAND commitments, introducing balanced and voluntary dispute resolution mechanisms, developing clear and comprehensive guidelines on FRAND licensing, promoting transparency, encouraging public and private investment in innovation, and investing in key areas of innovation and targeted upskilling initiatives. This would also serve the Commission goal to simplify the EU's regulatory landscape.<sup>104</sup>



### Asko Metsola

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<sup>103</sup> Ibid. 14.

<sup>104</sup> COM(2025) 45 final (n 2).

