SEPs DECODED

SIX ESSENTIAL FAQs

1 WHY SHOULD WE CHANGE A LEGAL SYSTEM THAT CURRENTLY WORKS WELL?

The current system does not work well, at least not for standard essential patent (SEP) implementers such as vehicle manufacturers or other companies offering products or services that are part of the Internet of Things (IoT). For example, this includes many SMEs, start-ups, and producers of smart meters for water, gas, and electricity.

The European institutions have been trying to fix the current system for over ten years. The Commission first adopted several competition law decisions in cases involving *Samsung* and *Motorola* in 2014 before the European Court of Justice (ECJ) tried to lay down a framework for SEP licensing negotiations in the *Huawei/ZTE* case in 2015. In 2017, the Commission subsequently adopted a Communication outlining its approach to SEPs, in which it identified "*three main areas where the SEP licensing environment could be improved: opaque information on SEP exposure; unclear valuation of patented technologies reading on standards and the definition of FRAND; and the risk of uncertainty in enforcement of SEPs*", making recommendations to standard-setting organisations and SEP holders and implementers. Eventually, facing continued litigation, also impacting the auto sector, the Commission decided that legislation was required.

The auto sector suffers from higher costs and reduced innovation. SEP holders often refuse to provide licences to automotive suppliers, reducing their incentive to invest and hampering innovation. By offering licences to vehicle manufacturers only, SEP holders try to extract higher royalty payments that far exceed the actual value of their invention. They also threaten vehicle manufacturers who use their technologies with injunctions. As German courts tend to side with SEP holders, undermining the balancing act between SEP holders and SEP implementers as prescribed by the ECJ in *Huawei/ZTE*, vehicle manufacturers are forced to make excessive royalty payments to avoid time-consuming and costly litigation or production stoppages.

These problems risk spreading to the entire IoT. With IoT's rapid development, the problems faced by motor vehicle manufacturers risk spreading to many other sectors and companies, including SMEs and start-ups. They risk paying excessive royalties for a 5G licence to non-European companies such as Qualcomm, Huawei, Samsung, LG, etc, that hold most of the patents for this technology.

2 IS THE PROPOSED LEGISLATION GOOD OR BAD FOR EU COMPETITIVENESS AND INNOVATION?

It is good for European competitiveness and innovation.

It is important to note that this Regulation will not apply to the vast majority of patents European companies obtain for their technical inventions. Indeed, most patents are not related to standards. This implies that competing technologies can be patented, and companies that want to use these patented technologies can choose between them. Many of these patents held by automotive companies remain unaffected by the proposed Regulation.

It will apply only to a limited set of patents related to and essential for a standard. The reason why the holders of these SEPs are subject to additional rules is that as soon as a patented technology is incorporated in a widely used standard, companies that want to use the technology in question factually have no choice but to use this patented technology. Therefore, unlike the holder of an "ordinary" patent, the SEP holder is in a monopoly situation.

The SEPs at the centre of today's dete relate to wireless communications standards such as WiFi and 3G/4G/5G. The reality is that Europe is a net implementer in this area, not only because many companies use this technology for their connected products and services but also because non-European companies hold most 5G patents (China 33%, South Korea 27%, EU 17%, US 14%, Japan 9%). EU legislators should take the interests of SEP implementers at heart to boost European competitiveness.

It is noteworthy that shares of European companies, such as Nokia and Ericsson, in 5G patents are much lower than for 3G and 4G. This can be explained by a lack of innovation compared to their competitors and not as a result of the proposed Regulation.

3 WHAT IMPACT WILL THE PROPOSED LEGISLATION HAVE ON THE AUTO SECTOR?

The Regulation will have a positive impact on the auto sector.

Automotive companies will be in a better negotiating position since they will have more information about which SEPs exist (due to database registration), which patents are truly essential for a standard (due to the essentiality checks), and what the total licensing cost might be (due to the aggregate royalty determination). All this information is today in the hands of SEP holders only.

The Regulation will help European automotive suppliers to obtain a licence finally. SEP holders do not give licences to automotive suppliers today, only to vehicle manufacturers. Without a licence, they risk being sued for infringement if they use the patented technology. As a result, they refrain from participating in tenders launched by vehicle manufacturers. This creates new market opportunities for non-European competitors such as Samsung or Huawei, which have their own patents for wireless communications technology and can make cross-licence agreements with SEP holders for their automotive activities.

If EU legislators are sufficiently ambitious to oblige SEP holders to provide a licence to any willing licensee regardless of its position in the supply chain, it will enable European automotive suppliers to obtain a licence directly and compete on equal terms with their non-European competitors.

This would bring it in line with general industry practice, which is that automotive suppliers provide their components to vehicle manufacturers free of any third-party rights. Of all the licenses for SEPs required to build a vehicle, the only ones that suppliers are unable to obtain today are those related to wireless communications.

Since the price of the component in which suppliers integrate the patented technology is lower than the price of the finished vehicle, the royalty payment will likely be lower when the licence is taken by the supplier rather than by the manufacturer. If anything, this should reduce the price of the vehicle.

The EU auto industry is Europe's largest private contributor to R&D investment. A significant proportion of the almost €60 billion invested annually goes towards cellular communications such as vehicle connectivity and automation. It will, therefore, benefit from the increased transparency and more balanced procedures for SEP licensing negotiations that the Regulation introduces.

4 COULD THE PROCESSES FOR AGGREGATE ROYALTY AND FRAND DETERMINATION CAUSE VERY LONG DISPUTES WITH NEGATIVE IMPLICATIONS FOR R&D?

No, the opposite is true. Both procedures are time-limited and shorter than the average court case.

As proposed, the aggregate royalty determination process is purely voluntary and requires the involvement of SEP holders. This means the parties can decide whether to use it.

While the FRAND determination process must be followed before the SEP can be enforced, its purpose is to reduce litigation, which should be in the interest of all parties.

Both procedures should last no more than nine months. This is much shorter than the average court case, which in complex cases of this nature can take up to two years.

5 WILL THE PROPOSED LEGISLATION CREATE BUREAUCRACY, MAKING EUROPE LESS ATTRACTIVE THAN OTHER REGIONS SUCH AS CHINA?

The Regulation contains only limited information requirements. It merely requires SEP holders to register their patents and provide some basic information to the European Union Intellectual Property Office (EUIPO). This requirement applies to all SEP holders regardless of their origin.

This information will help SEP implementers to understand better which SEPs exist. Since Europe has more SEP implementers than SEP holders, this is an advantage for companies wishing to invest and innovate in Europe.

While the Regulation will require everyone to adapt to the new requirements, it will not make SEP enforcement in Europe more difficult than elsewhere. On the contrary, the proposed FRAND determination process will be faster than the use of the court system. Its purpose is to reduce litigation, which should be to the advantage of all parties.

The allegation that this would benefit China is misleading. It is made by a limited number of companies that currently exploit a legal system that is heavily tilted in their favour. The proposed Regulation only tries to restore the balance and ensure that SEP licensing negotiations can take place in a fair and even-handed manner. The European Commission aims to strengthen Europe's strategic autonomy and should not propose legislation that benefits Chinese companies to the detriment of European companies.

6 IS THE EUIPO EQUIPPED TO DEAL WITH DISPUTES ARISING FROM THE REGULATION?

There is no reason to believe that the EUIPO cannot fulfil the tasks set out in the Regulation.

Its role is mainly administrative, ie to set up and manage the SEP register and database, and to administer the new procedures (essentiality checks, aggregate royalty determination, FRAND determination) introduced by the Regulation.

The EUIPO does not need to settle disputes itself. This will be done by experts in the field of patent law. All the EUIPO must do is to identify and select these experts. It does not need to employ them. Therefore, the allegation that it specialises in trademarks and designs and is not equipped to deal with patent cases is unfounded.

The EUIPO is the European Union's intellectual property office and has been involved in the development of this Regulation. One must assume that, together with the European Commission, it made a conscious decision about its new role regarding SEP licensing and the financial and human resources required to fulfil this role.