

Europe's New SEP Regulation: All Quiet on the Patent Front?

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tl;dr

Background: The European Commission is about to unveil draft regulation that will more tightly regulate how patents are incorporated into technology standards. The Commission's [expert report](#) and [call for comments](#) suggest that it wants to create a regime of third-party checks that would verify whether inventors' patents are *truly* essential to a technology standard (i.e., "essentiality checks"). The goal ultimately is to ensure that standard-essential patents (SEPs) are adequately disclosed to would-be licensees. There are thousands of SEPs that underpin the technologies powering the digital economy, thus making it essential that firms coordinate to develop and implement these technologies.

However... It is unclear that such regulation would improve upon the status quo. While it might not be perfect, the existing approach to essentially checks has seen SEP-reliant industries provide countless technological breakthroughs. This has led industries where SEPs are particularly relevant to occupy key geostrategic positions. By contrast, imposing heavy-handed regulation risks not only that there will be harm to consumers, but the potential that the West's strategic position relative to adversarial foreign powers like China or Russia may be weakened.

KEY TAKEAWAYS

THE ROLE OF ESSENTIALITY CHECKS

Technical standards (e.g., 5G, WiFi, USB-C, etc.) often rely on hundreds—sometimes thousands—of distinct inventions that can each be covered by multiple patents.

Firms that commercialize goods incorporating these technologies need to know *which* patents are essential to those standards—thus avoiding situations where license fees are paid for technologies that are not necessary to practice a given standard.

Essentiality checks can *potentially* streamline this process, thereby limiting the over- and/or under-disclosure of SEPs. But this is a complex and costly endeavor. The benefits of achieving *perfect* disclosure of SEPs—be it via market forces or regulation—are thus unlikely to outweigh the costs.

WHO SHOULD ASSESS ESSENTIALITY?

As things stand, a patent's essentiality is determined in [various ways](#). These include the use of patent pools, self-assessments by inventors, and evaluations outsourced to third-party experts.

Whatever one thinks of that heterogeneous approach, it is [clear](#) that the SEP industry has thrived under this *laissez-faire* paradigm, and that competition among the various inventors,

implementers, and standards-development organizations (who bring inventors and implementers together) has played a useful role in optimizing these processes. Regulators should thus be wary not to upset the apple cart.

In contrast, the Commission's [expert report](#) and its [call for comments](#) both suggest that it favors a more centralized system in which government institutions, such as patent offices, would act as backstops for essentiality checks.

Such a system would not be without risks. Indeed, there is [little evidence](#) that SEP-heavy industries are underperforming. Any reform thus risks creating more friction than it removes.

WHAT ABOUT SANCTIONS?

There are fears that excessive sanctions for failing to adequately disclose essential patents could tilt the bargaining power in SEP-reliant industries toward implementers. In turn, this could undermine inventors' incentive to produce new technologies.

In recent years, courts around the world have sought to strike an appropriate balance between the interests of inventors and implementers. In doing so, they have foiled attempts by several regulators to limit the royalties that inventors can extract; to prevent them from obtaining injunctions against infringers of their patents; and to determine the level of the value chain at which royalties are to be calculated.

One concern is that the draft regulation may seek to forward those goals by assessing penalties for failing to comply with its provisions. For instance, inventors may lose the ability to bring injunctions against infringers if a third party deems their patent to be non-essential. Given the [vital role](#) that these injunctions play, such a policy would be misguided.

GEOSTRATEGIC IMPACT

Finally, overburdening firms that are active in the SEP space could erode the West's technological leadership relative to states with manufacturing-reliant economies whose political leaders routinely undermine the intellectual property rights of foreign firms.

Many SEPs, particularly those relevant to the telecommunications sector, are held by companies in the West and specifically in the United States. The lion's share of implementers, by contrast, are based in China. Policies that impose significant costs on inventors and benefit implementers may thus amount to a subsidy to Chinese firms and a tax on Western innovation.

These harmful consequences are magnified in light of China's strategic effort to shape international technology standards. With European firms systematically deterred from participating in the development of open technology standards, Chinese firms—directed by their government authorities—will gain significant control of the technologies that underpin tomorrow's digital goods and services. The consequences are potentially catastrophic.

For more on this issue, see ICLE's academic output on standard essential patents [here](#) and [here](#), and our response to the Commission's recent consultation [here](#).

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