COMMENTS ON EUROPEAN COMMISSION'S DRAFT "PROPOSAL FOR REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ESTABLISHING A FRAMEWORK FOR TRANSPARENT LICENSING OF STANDARD ESSENTIAL PATENTS"

European Commission
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Attention: President von der Leyen
Executive Vice-President Vestager
Executive Vice-President Dombrovskis
Commissioner Breton

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## I. Introduction

Dear President von der Leyen, Executive Vice-Presidents Vestager & Dombrovskis & Commissioner Breton,

These comments reflect the joint and consistent policy views of former officials from U.S. Democratic and Republican administrations, who have served in various capacities in the administrations of and independent agencies under U.S. Presidents Clinton, Bush, Obama, Trump and Biden. We write to express our shared concerns regarding an apparent pivot in the European Commission's longstanding intellectual property (IP) policy that threatens European and American innovation leadership, and by extension, European and American economic success and security.

The authors[1] include former heads of the U.S. Department of Justice Antitrust Division (DOJ Antitrust), the U.S. Federal Trade Commission (FTC), the U.S. Patent and Trademark Office (USPTO), and the National Institute of Standards and Technology (NIST):

- Christine A. Varney served as the Assistant Attorney General for DOJ Antitrust under President Barack Obama from 2009-2011. She also served as a member of the FTC under President Bill Clinton from 1994-1997.
- Makan Delrahim served as the Assistant Attorney General for DOJ Antitrust under President Donald J. Trump from 2017-2021. He also served as Deputy Assistant Attorney General for DOJ Antitrust under President George W. Bush from 2003-2005, and in the Office of the United States Trade Representative under President Bill Clinton in 1994.
- David J. Kappos served as the Under Secretary of Commerce for Intellectual Property and Director of the USPTO under President Barack Obama from 2009-2013.
- Andrei Iancu served as the Under Secretary of Commerce for Intellectual Property and Director of the USPTO under President Donald J. Trump from 2018-2021. He is currently a senior adviser and co-founder of the Renewing American Innovation Project at the Center for Strategic and International Studies (CSIS).
- Walter G. Copan, Ph.D., served as the Under Secretary of Commerce for Standards and Technology and Director of NIST under President Donald J. Trump from 2017-2021. He is currently the Vice President for Research and Technology Transfer at the Colorado School of Mines in Golden, Colorado, as well as a senior adviser and co-founder of the Renewing American Innovation Project at the Center for Strategic and International Studies (CSIS).
- Noah Joshua Phillips, served as a Commissioner of the FTC under President Donald J. Trump and President Joseph R. Biden from 2018-2022.

Our leadership roles at DOJ Antitrust, the USPTO, NIST and the FTC spanning multiple administrations afford us valuable insight regarding the importance of standardization in the modern, global economy and the critical yet fragile balance that must be struck when regulating Standard-Essential Patent (SEP) licensing.

As we have said before, standardization plays a fundamental role in the development and implementation of the foundational technologies at the core of critical global infrastructure. Enforceable SEP protection enables the investments necessary to develop and contribute technology to these standards, while commitments to fair, reasonable, and non-discriminatory (FRAND) licensing terms likewise enable the investments necessary to implement these standards at scale.[2] SEP licensing involves complex incentives, highly sophisticated markets, and worldwide portfolio considerations. Balancing the interests at play in the high-stakes negotiations underlying SEP license agreements is treacherous, as even seemingly small policy

[1] The views expressed herein are personal to the authors, and do not represent the views of firms, companies, institutions, clients, or any others with whom they may be affiliated.

[2] *See generally* Justus Baron & Kirti Gupta, *Unpacking 3GPP Standards*, 27 J. OF ECON., MGMT. AND STRATEGY 433 (2018).

changes can have outsized impacts. Therefore, SEP policies should not be based on ideology or theory; instead, they should be data-driven and should consider the practical impact on industry and relevant geopolitical realities.

We have come together to express serious concern that the Commission's draft "Proposal for Regulation of the European Parliament and of the Council Establishing a Framework for Transparent Licensing of Standard Essential Patents" (Draft Regulation) would upset this balance and threaten the standards-based technology ecosystem. The Draft Regulation would unnecessarily insert the European Union Intellectual Property Office (EUIPO)—an institution that currently has no meaningful experience with patents—into one of the most complex areas of patent policy, producing delays in enforcing valid patent rights and uncertain royalty guidance that militates against the value of intellectual property rights and, in turn, European innovation.[3] The Draft Regulation would also pave the way for Europe's implementer-dependent international competitors to set binding aggregate royalty rates that severely devalue European innovation. And for what? The Draft Regulation makes various unsupported claims that its proposals are required to combat difficulties in resolving FRAND disputes but provides no evidence showing these purported harms.

If codified, or even formally proposed, the Draft Regulation would work great harm to the European and American innovation economies and permit our global competitors to continue to erode the value of our intellectual property rights. We urge the Commission to cease its foray into the complex domain of SEP licensing and refrain from ever formally introducing the Draft Regulation.

## II. The Draft Regulation Would Unnecessarily Insert an Institution with No Meaningful Patent Experience into the Core of SEP Licensing.

In June 2022, the executive director of the EUIPO said "[o]f course, we will never have the competency in patents. But national offices do have competency in patents. So through the network, we can leverage their capabilities for common projects."[4] Less than a year later, the Commission is proposing to task the EUIPO with establishing a competence centre for, among other responsibilities, "set[ting] up and administer[ing] a system for assessment of the essentiality of SEPs", "set[ting] up and administer[ing] the process for the FRAND determination" and "administer[ing] a process for aggregate royalty determination".[5] Under the Draft Regulation, an SEP owner would not be entitled to assert its SEP against an infringer in a national court or the Unified Patent Court until after the EUIPO competence centre makes its (non-binding) FRAND determination—a process that is anticipated to take around nine months.[6] The Draft Regulation thus takes SEP licensing disputes out of the hands of the institutions that actually have the requisite knowledge to resolve the complex questions posed in SEP licensing disputes and is instead forcing SEP owners to unnecessarily wait for an onerously long period of

[3] Draft Regulation at Recital 11.

[4] Trevor Little, *A year at the EUIPO: an in-depth interview with executive director Christian Archambeau*, WORLD TRADEMARK REVIEW (June 30, 2022).

[5] Draft Regulation at Art. 5.

[6] *Id.* at Art. 36.

time in the fast-moving world of technical innovation before they can enforce their valuable patents against infringers and holdouts.

This, frankly, makes no sense. The EUIPO should not be tasked with objectives completely outside its ambit when there are already institutions designed to perform those same duties—namely, the Court of Justice of the European Union and lower courts. The Draft Regulation effectively overrules these courts' good policy decisions that have put the EU in the forefront of balancing SEP innovator and implementer interests,[7] and represents a rather shocking no-confidence vote against the Unified Patent Court before it is even convened.

The Draft Regulation also appears to vastly underestimate how difficult it will be to reach consensus on the determinations tasked to the EUIPO. For example, the Draft Regulation appears to permit an unlimited number of stakeholders to participate in each aggregate royalty determination,[8] yet contemplates that the aggregate royalty determinations will be able to occur within six months from the appointment of a conciliator tasked with mediating the aggregate royalty discussions.[9]

Having all worked in large government institutions, we appreciate that unnecessary bureaucracy does not lead to efficient outcomes or innovation. Further, we all appreciate that what the Commission is seeking to task the EUIPO with is difficult. Yet the Draft Regulation assumes it can be done by an agency that will have at most two years to prepare for its new role. The Commission should ask itself why this additional complexity is necessary. To us, it is neither necessary nor advisable.

## III. The Draft Regulation Would Invite Europe's Undemocratic, Implementer-Dependent International Competitors to Devalue European Patent Rights.

In December 2022, the European Union submitted a request for the establishment of a panel under Article 64.1 of the TRIPS Agreement to examine China's policy of denying patent holders from asserting their patent rights against infringers in European courts through the use of anti-suit injunctions.[10] The European Union rightly argued that denying SEP owners access to national courts to enforce their patent rights and restricting SEP owners' ability to enter into SEP licensing arrangements violated China's obligations under Article 28 of the TRIPS Agreement.[11] Yet, the Commission is now encumbering European SEP owners' ability to access European courts through the Draft Regulation's prohibition against initiating patent infringement proceedings until after the administrative body conducts its FRAND determination.[12]

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[7] *See, e.g.*, [*Huawei v. ZTE*].

[8] Draft Regulation at Recital 18.

[9] *Id.* at Art. 19(4).

[10] Request for the Establishment of a Panel by the European Union, *China – Enforcement of intellectual property rights*, WTO Doc. WTO/DS611/5 (Dec. 7, 2022).

[11] *Id.* at 13.

[12] Draft Regulation at Art. 33.

Further, the Draft Regulation establishes and legitimizes a framework for an administrative agency to make FRAND determinations and establish maximum aggregate royalty rates for individual standards. As mentioned above, the Draft Regulation authorizes the EUIPO competence centre to make FRAND and aggregate royalty determinations.[13] While the Draft Regulation treats such recommendations as "non-binding" recommendations for parties and adjudicators to consider when negotiating and setting FRAND royalty rates,[14] there is no reason why a country that has already shown a willingness to weaponize its national patent law to benefit its implementer-dependent national economy would not use the Draft Regulation's framework to create binding FRAND determinations and aggregate royalty rates that devalue European innovation. In fact, we would expect such moves promptly upon the Commission introducing the Draft Regulation as a formal proposal.

If the Commission even formally proposes, much less proceeds in, creating and entrusting an administrative competence centre to make FRAND and aggregate royalty rate determinations, it will be opening a Pandora's box that will surely result in devalued European patent rights and decreased European innovation. With intellectual property representing one of the few areas of trade where the EU actually enjoys a significant trade surplus, it seems to us particularly self-defeating for the Commission to propose a Draft Regulation quite clearly aimed at decreasing its trade advantage.[15]

## IV. The Draft Regulation Lacks Any Empirical Support Suggesting it is Necessary.

The Draft Regulation also simply is not necessary—in many ways, it appears to be a "solution" in search of a problem. The draft impact assessment report accompanying the Draft Regulation (Draft Impact Assessment Report) suggests that the Draft Regulation will promote and protect European innovation by insulating small and medium-sized European enterprises (SMEs) from abusive SEP-related litigation that is bound to proliferate as the internet of things continues to be developed. However, the Draft Impact Assessment Report cites no significant data supporting this pronouncement; nor are we aware of meaningful supportive evidence. Instead, to support completely rewriting European policy on SEP licensing and FRAND determinations, the Draft Impact Assessment Report relies on statements such as these: "[t]he combination of [the high speed growth of the IoT market with the IoT market's fragmented nature and seemingly tight profit margins] is likely to deepen the disagreements about FRAND royalties, which is likely to cause more delays in negotiations and to increase the parties' licensing costs, potentially impacting SEP holders' revenues. This uncertainty about future revenues could impact the decisions of SEP holders to invest into R&D and may in turn have an impact on participation in

[13] *Id.* at Art. 5.

[14] *Id.* at Recital 35.

[15] EUROPEAN PATENT OFFICE AND EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE, IPR-INTENSIVE INDUSTRIES AND ECONOMIC PERFORMANCE IN THE EUROPEAN UNION: INDUSTRY-LEVEL ANALYSIS REPORT (4th ed. 2022) (noting that IPR-intensive industries accounted for most of the EU's trade with the rest of the world and generated a trade surplus, thus helping to keep the EU's external trade balance in surplus).

standardisation."[16] That is just bald speculation, and there is simply no basis for making policy on a statement that strings together "likely to . . . which is likely to . . . potentially impacting . . . could impact . . . and may in turn." The same suggestive but not probative type of language holds for many other points raised in the Draft Impact Assessment Report. In fact, if anything, the opposite speculative conclusion is the more likely: that the Draft Regulation itself will cause SEP holders to lose value and decrease investments in innovation.

Contrary to what is assumed in the Draft Impact Assessment Report, real world data shows that SEP-related litigation has decreased when normalized to account for the growth of industries implementing SEPs.[17] Further, the increased adoption of the 4G and 5G standards that the Draft Impact Assessment Report notes are critical to the internet of things actually *decreased* the aggregate royalties SEP licensors have collected on 4G LTE enabled smartphones since 2015.[18] There is no problem of systematic patent holdup for the Draft Regulation to solve.

Unfortunately, by seeking to solve a problem that does not exist, the Commission would be hurting the SMEs and the European economy it purports to be protecting. Moving forward with the Draft Regulation will devalue European patent rights. It makes no sense as a matter of trade policy for the Commission to decrease input costs for SEP infringers by devaluing European SEPs.

To avoid unintended consequences, the Commission should reevaluate the problem it seeks to solve and the knock-on effects of the solution it is proffering through the Draft Regulation. The Commission should not proceed with formally proposing the Draft Regulation.

## V. Conclusion

The points we set forth above are not all that is amiss with the Draft Regulation. We note that it does not address if and how any decisions of the competence centre would be appealed, or what would happen if a national court invalidated an SEP (thus requiring its removal from the SEP register pursuant to Article 26(1)(b) of the Draft Regulation), but such invalidation was then overturned on appeal.

Our overarching view of the Draft Regulation is that it is unnecessary and that, if it is implemented, it will inflict severe damage on European and American innovation. We strongly encourage the Commission to abandon the Draft Regulation.

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[16] Draft Impact Assessment Report at 19.

[17] *See* David Kappos & Kirti Gupta, *Smartphone Standard Essential Patents Aren't Driving Litigation*, BLOOMBERG LAW (Dec. 14, 2022) (showing that U.S. smartphone patent litigation drastically decreased during the period from 2005 to 2020 when normalized by the total dollar volume of U.S. smartphone sales and that SEPs are asserted in a small fraction of smartphone patent litigations despite the smartphone industry being heavily dependent on SEPs).

[18] Keith Mallinson, *Modest SEP royalties on smartphones have declined and licensing is stabilizing (Analyst Angle)*, RCRWIRELESSNEWS (Sept. 3, 2021) (showing a decrease in the aggregate royalty yield for major mobile SEP licensors from over 2.5% in 2013 to under 2.0% in 2020).

To the extent the Draft Regulation eventually proceeds, it should be in a much-altered form based on demonstrated data and fact. We stand ready to assist the Commission as it considers the concerns raised herein and charts the path forward for European SEP licensing policy.

Respectfully,

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