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The European Commission's draft SEP regulation: A slippery slope or a renewed hope?

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Abstract

Standards have long been considered the building blocks of innovation, and central to the standardization process are patents that protect the underlying technologies essential to a standard, also known as standard essential patents (SEPs). Since the beginning of the 90s, licensing of SEPs has attracted a significant amount of discussion involving not just the industry and academia but also courts and competition agencies. While the latter have, time and again, come up with guidelines on SEP licensing, there continue to be questions asked in terms of a global solution to disputes concerning SEPs and the determination of fair, reasonable, and non-discriminatory (FRAND) rates. It is to that effect that the European Commission (EC) recently published its Draft SEP Regulation, intending to bring transparency and predictability to SEP licensing. The Draft Regulation drew instant reaction from both licensors and licensees across the information and communications technology (ICT) sector. Commentators and academics joined in, with quite a few being critical of the proposed regulation. Against the above backdrop, the present paper seeks to evaluate the Draft SEP Regulation proposed by the EC and further analyze the challenges likely to be posed concerning the implementation of the Draft Regulation. In doing so, it addresses the broader question as to whether the interventionist approach adopted by the EC through the Draft Regulation is likely to help European innovators and aid SEP licensing in Europe? The said question becomes even more relevant, given the recent release of

Antimonopoly Guidelines for SEPs by China's State Administration for Market Regulation (SAMR).

KEYWORDS
FRAND, licensing, regulation, SEP, standards

1 | INTRODUCTION

Since the beginning of the 90s, licensing of standard essential patents (SEPs) has attracted a significant amount of discussion involving not just the industry and academia but also courts and competition agencies. While the latter have, time and again, come up with guidelines on SEP licensing,[1] there continue to be questions asked in terms of a global solution to disputes concerning SEPs and the determination of fair, reasonable, and non-discriminatory (FRAND) rates. It is to that effect that the European Commission (EC) recently published its Draft SEP Regulation, intending to bring transparency and predictability to SEP licensing.[2]

It was for the first time in March 2023 that a draft of the EC's Regulation on SEPs, along with a draft Impact Assessment Report got unofficially leaked, instantly becoming a hot topic in the global intellectual property (IP) circuit.[3] Although the final proposal was due to be released by the Commission on April 27, the leaked version drew instant reaction from both, licensors and licensees across the information and communications technology (ICT) sector.[4] Commentators and academics too joined in, with quite a few being critical of the proposed regulation,[5] and some labelling the same as flawed at multiple levels.[6] There were, therefore, speculations that considering the patent holders' reaction to the draft Regulation, the Commission might carry out certain modifications in the official proposal.[7] That, however, wasn't entirely the case come April, at least as far as their implications were concerned. Although the official draft Regulation, when released by the Commission, did house a few modifications and amendments,[8] the basic concept of the draft was much the same as the leaked version.[9] More importantly, the Proposal aimed at facilitating the licensing of SEPs on FRAND terms, by increasing transparency and reducing information asymmetry between SEP holders and implementers.[10] Furthermore, to achieve the said aim, the Proposal introduces a system whereby the European Union Intellectual Property Office (EUIPO) will not just have the power vis-à-vis the registration of SEPs and determination of FRAND royalty rates, but also carry out essentiality checks.[11] This has led to the Commission's decision being questioned, for the EUIPO, traditionally speaking, has administered community trademarks and designs but doesn't hold any expertise in the domain of patents, much less SEPs.[12] Moreover, given the size of the EU market and the number of European patents, the SEP registry is likely to affect litigation not just in the EU but also in the United States.[13]

Against the above backdrop, the present paper seeks to evaluate the Draft SEP Regulation proposed by the EC and assess the challenges likely to be posed concerning the implementation of the Draft Regulation. In doing so, it addresses the broader question as to whether the interventionist approach adopted by the EC through the Draft Regulation is likely to help European innovators and aid SEP licensing in Europe? The said question becomes even more relevant, given the recent release of Antimonopoly Guidelines for SEPs by China's State Administration for Market Regulation (SAMR).[14] How do the two instruments fare when compared with each other and is there something that the EC could borrow from their Chinese counterparts?

2 | THE NEED FOR REGULATORY INTERVENTION

Standards have long been considered the building blocks of innovation, and central to the standardization process are patents that protect the underlying technologies essential to a standard, also known as SEPs. Most standard-setting organizations (SSOs) require their members holding patents relevant to a standard, to commit to granting

patent licenses to all implementers of the given standard, on FRAND terms.[15] However, if a patent holder refuses to make or honour such a commitment, it may lead to the patented technology being excluded from the standard.[16] What is also possible is that an implementer refuses to accept the FRAND terms offered by the patent holder, yet proceeds to use the patented technology sans a license. In either of the two instances, the standoff between patent holders and implementers, on FRAND terms, is likely to stifle the standard-setting process.

Taking note of the above and acknowledging the need for a balanced approach to SEP licensing, the EC, in 2017, came out with a Communication titled "Setting out the EU approach to Standard Essential Patents,"[17] as a part of its wider initiative on Digital Single Market. The EC specifically identified patent "hold-up"[18] and patent "hold-out"[19] as two opposing yet plaguing issues undermining confidence in collaborative standard-setting being carried out at SSOs.[20] The said approach received the backing of the European Council via the Council Conclusions in 2018.[21] Thereafter, the same year, the Commission, to put its objectives into effect, set up an expert group on SEPs.[22] The main task of the expert group was, firstly, to render advice to the Commission on economic, legal, and technical aspects of SEP licensing; and secondly, to assist the Commission in framing policy measures that ensure a "balanced framework for smooth, efficient and effective licensing of SEPs.[23] This was followed by the publication of the IP action plan in 2020, further reiterating the Commission's goal of bringing transparency and predictability to SEP licensing, for the benefit of the European industry and consumers.[24] It is worth mentioning that the action plan highlighted an increase in the number of SEP licensing disputes in the automotive sector, while also flagging the potential for similar disputes ensuing in other IoT sectors.[25] Eventually, after much deliberation and feedback through public consultation,[26] the EC published the Draft SEP Regulation on April 27, 2023.

The various events that transpired between 2017 and 2023 seem to have convinced the Commission that there was a need to upend the system for SEP licensing in the EU, especially given the advent of IoT. Furthermore, the Commission also felt it important to entrust the EUIPO with a more prominent role in overseeing the licensing of SEPs and determination of FRAND royalties, through the instrumentality of a Competence Centre.[27] The primary objectives of the Proposal, as highlighted by the EC are: (i) ensuring that small businesses and consumers in the EU stand to benefit from products compliant with the latest standardized technologies, (ii) making the EU an attractive jurisdiction for standards innovation, and (iii) encouraging the SEP holders and implementers to carry out innovation in the EU, indulge in the making and selling of products in the EU, and compete in non-EU markets.[28] What further explains the Commission's decision to enact a regulatory proposal is the landmark ruling of the Court of Justice of the European Union (CJEU) in *Huawei* v. *ZTE*,[29] wherein the top European Court emphasized the importance of good faith in bilateral FRAND licensing negotiations.[30] In doing so, the Court laid down a step-by-step licensing negotiation framework, aimed at striking a balance between the conflicting interests of SEP holders and implementers.[31] However, despite the existence of the Huawei-ZTE framework, disputes involving essentiality, invalidity, and infringement have continued to surface in the EU (especially in the automotive sector) raising question marks about the sufficiency of the prevailing guidance vis-à-vis SEP licensing.[32] In light of the above, one could argue that the Draft SEP Regulation positions itself in the foreground, with the Huawei-ZTE framework likely to complement the former in streamlining European standardization and licensing of SEPs.[33] The question, however, remains as to whether that would be the logical consequence if the Draft Regulation becomes a law in its present form. Before one begins to answer this question, it is important to analyze the core aspects of the Draft Regulation.

3 | BREAKING DOWN THE DRAFT REGULATION

An off-shoot of the IP Action Plan, the Draft SEP Regulation proposed by the EC, at the very outset, creates a new system for the registration of SEPs and determination of reasonable royalties.[34] At the heart of this system lies the EUIPO and a Competence Centre established under its aegis, with the primary objective of enhancing transparency in SEP licensing.[35] The present analysis of the Draft SEP Regulation is essentially divided into three parts; while the first part deals with the creation of a SEP register and the subsequent registration of SEPs, the second part deals

with the administration of essentiality checks.[36] The third and final part focuses on the procedure for the determination of FRAND rates for SEPs.[37]

3.1 | Registration of SEPs

To bring transparency to SEP licensing, the Competence Centre shall, under the Draft Regulation, set up and maintain an electronic register and database to store detailed information on SEPs, vis-à-vis essentiality checks, reports, opinions, and case laws from not just the EU but across the globe.[38] Starting with SEP registration, Article 4 of the Draft Regulation provides for the establishment of an EU-wide register for SEPs, which shall include all the necessary information about relevant standards and the SEPs so registered, including the details of the SEP holders.[39]

SEP holders shall be required to register their patents with the Competence Centre, within 6 months of the opening of registration for the relevant standard by the Centre or the grant of the relevant SEPs, whichever is earlier.[40] In the absence of such registration, SEP holders cannot claim royalties and damages for infringements that occurred before the registration.[41] As for the information to be furnished, the patent holder shall be required to provide comprehensive details regarding the patent, the standard, and the terms of the license. This includes not only information concerning products, processes, services, and systems implementing the standard, but also the FRAND declaration, the standard terms and conditions (including royalties and discount policies), and any prior decision on or evaluation of the essentiality of the declared patents by a competent court of any EU member state or the UPC.[42] Furthermore, it shall be the SEP holders' responsibility to inform the Competence Centre regarding all updates and corrections in the information furnished by them.[43] Failure to provide the correct and complete information shall result in suspension of the SEP holder's patent registration from the register until the said incompleteness or inaccuracy is fixed.[44]

While the EC might be approaching the aspect of registration of SEPs with the right intention (i.e., to bring about transparency), it is unlikely to be of much help to European small and medium enterprises (SMEs); the main reason being the costs involved in the registration. With the SMEs also expected to bear the registration costs of SEPs in case of ownership, it is worth noting that only 9% of SMEs in the EU own patents when compared with over 55% of large companies.[45] Of the various reasons responsible for this low percentage of patent holders among SMEs, one of the reasons is the high cost involved in the filing of patent applications. Add to it the registration costs associated with SEPs, and it doesn't paint a rosy picture for SMEs from a financial standpoint and is therefore unlikely to help small innovators in the EU.

3.2 | Essentiality checks

The other key element of the SEP register involves essentiality checks being carried out on patents declared as essential by SEP holders.[46] The said checks shall be conducted by evaluators to be appointed by the Competence Centre.[47] It shall further be the responsibility of the Competence Centre to ensure objectivity and impartiality in conducting essentiality checks, and maintaining confidentiality vis-à-vis the information so obtained.[48] As for the SEPs likely to undergo essentiality checks, the Draft Regulation states that for any given patent family, checks shall not be carried out on more than one SEP. [49] To administer the checks, a sample of registered SEPs from across different patent families for each SEP holder shall be selected by the Competence Centre. The given sampling process, however, shall not apply to registered SEPs of micro and small enterprises.[50] The annual cap on the number of registered SEPs that may be proposed for essentiality checks by either SEP holders or implementers has been fixed at 100.[51]

In case a SEP is found not to be essential to a given standard by an evaluator, the Competence Centre shall inform the SEP holder about reasons for the same and lay down the period for the submission of observations by

the SEP holder.[52] The evaluator is obligated to communicate to the Competence Centre a reasoned opinion on the essentiality of the selected patent, which shall apply to the entire patent family and shall be published in the register as well as added to the database.[53] The Competence Centre shall also publish in the register the total percentage of sampled SEPs per SEP holder and per a given standard that successfully passed the essentiality check.[54] It could be argued that although the essentiality check results may not be binding, it remains to be seen whether the result of such checks would hold value as independent expert assessments in FRAND disputes between SEP holders and implementers.[55] The larger argument, however, seems to be against the nature and effect of these essentiality checks, since the Draft Regulation is silent on court rulings vis-à-vis the interpretation of patent claims in different EU member states.[56] The way SEPs are poised to undergo essentiality checks under the aegis of the Competence Centre does not seem to factor in the validity of the patents, implying thereby, that all SEPs subjected to essentiality checks are to be considered valid. An obvious question in such a scenario would be—how to reconcile the fact of a major proportion of SEPs declared invalid by one or more national courts within the EU, with their successfully clearing the essentiality checks? Furthermore, there is, as things stand, no clarity on the methodology likely to be adopted by the evaluators in carrying out essentiality checks, as also the reliability of the checks. Concerns surrounding the latter are really morphed concerns regarding the availability of a sufficient number of evaluators qualified to conduct such checks.

3.3 | Determination of FRAND rates and aggregate royalties

The most important aspect and perhaps at the core of the Draft Regulation, lies the determination of FRAND terms and conditions.[57] To begin with, the FRAND determination in respect of a given standard shall be initiated either by a SEP holder or an implementer, before the initiation of a patent infringement claim or a request for the assessment of FRAND terms and conditions respectively before a competent court in any of the member states.[58] During the pendency of the FRAND determination process, the parties shall be precluded from resorting to litigation, a period which may last up to a maximum of 9 months.[59] The only exception shall be seeking a preliminary injunction of a financial nature against the alleged infringer, without there being any seizure of physical property or infringing products.[60]

The Competence Centre is yet again, poised to play a central role in the determination of FRAND terms and conditions and act as a bridge between the two parties through the appointment of conciliators. The Competence Centre is empowered to continue with the FRAND determination despite the absence of consent on the part of one of the parties.[61] Towards that end, the conciliator may, given its relevance and the time available, consider witness and expert testimonies to set FRAND terms and conditions.[62] It is important to note that the FRAND determination shall apply to a global SEP license unless specified otherwise by the parties,[63] however, it shall not have a binding effect, unless both parties agree to the same. Another aspect that deserves attention is that of parallel proceedings in a third country. The Draft Regulation specifies, that if parallel proceedings concerning the same standard and a patent which, in substance, has the same claims as the SEP that is subjected to the FRAND determination, are initiated before a court or any other authority in a third country, the process for the determination of FRAND shall be terminated at the instance of the opposite party.[64]

When it comes to implementers, FRAND royalties concerning SEPs owned by a single SEP holder cannot be seen in isolation. The total royalty burden likely to be borne by implementers for the implementation of a standard plays an important role in the assessment of manufacturers' costs; a facet that has found a place under the Draft Regulation in the form of aggregate royalty determination.[65] SEP holders owning FRAND-encumbered SEPs in one or more member states may jointly notify the Competence Centre regarding the aggregate royalties for the SEPs reading on the standard.[66] All the important information such as the percentage of the SEP holders making the notification, the percentage of SEPs owned by them of all the SEPs relevant to the standard, as well as revisions to the aggregate royalties, if any, shall be published by the Competence Centre in the database.[67] Furthermore, the

Competence Centre may, to facilitate the submission of an aggregate royalty, appoint a conciliator from a pool of conciliators, provided the appointment request is submitted by SEP holders holding at least 20 percent of all SEPs relevant to the standard.[68] Lastly, the Draft Regulation also lays down the procedure whereby SEP holders and implementers have the option to seek a nonbinding expert opinion on a global aggregate royalty.[69] Depending on the percentage of SEP holders or implementers participating in the process, the Competence Centre shall appoint a single conciliator or a panel of three conciliators, to produce an expert opinion on the aggregate royalty rate.[70]

Looking at the provisions concerning FRAND determination, an instant observation one can make is about the bureaucracy and multi-layer complexity in availing the services of the Competence Centre and the conciliators. What should have been a rather simple procedure seems anything but simple. What is also surprising is that the EC took the decision to come out with the Draft Regulation at a time when there was yet to be a single FRAND ruling by the newly established Unified Patent Court (UPC), thereby undercutting the value of the specialized patent court. It is worth noting that the UPC recently handed down its first FRAND judgment in the SEP dispute between Panasonic and Oppo, despite the parties having already settled the matter.[71] However, the ruling becomes important in the larger context of the impending SEP Regulation due to the FRAND part of the judgment and how arguably, the judges felt the need to give a detailed opinion on FRAND rate-setting.[72] This only goes to show that the UPC could finally prove to be the specialized court which is able to harmonize the CJEU's decision in *Huawei* v. *ZTE* and the European Commission's approach to FRAND licensing and apply it effectively. Where would that leave the Draft Regulation then? Are the concerns surrounding its implementation legitimate?

4 | CONCERNS SURROUNDING THE DRAFT REGULATION

When it comes to licensing of SEPs, the EU has, of late, witnessed a surge in the number of SEP disputes, which have not just been limited to the national courts but have also, at times, required the intervention of the top European court—the Court of Justice of the European Union (CJEU). While it may have proved to be a costly exercise for some of the SEP holders and implementers, it certainly has helped in developing rules and procedures through a body of case law, driving forward standardization and SEP licensing.[73] It, therefore, came as a surprise that the EC found the need to introduce reforms to the existing SEP licensing framework. Consequently, as predicted, the Regulation has become the subject of severe criticism at the hands of several stakeholders, with submissions made to the EC not just from within but also outside the EU, highlighting the widespread ramifications likely to result from the adoption of the Regulation.[74]

4.1 | Insufficient evidence of market failure

One of the primary objectives of the Draft Regulation is to address the lack of transparency and fairness in SEP licensing and subsequently prevent market failure. However, several academics and industry stakeholders have claimed that the evidence available does not point towards the existence of a market failure in the SEP licensing sector which would justify regulatory intervention by the EC.[75] Rather, it is quite the opposite—in a study commissioned by the EC on the empirical assessment of potential challenges in the licensing of SEPs, it was stated that the empirical evidence concerning the causal effects of the existing licensing framework is inconclusive.[76] More specifically, there isn't enough evidence to support the notion that potential patent owners and implementers have been discouraged from participating in standard-setting, given the present challenges in SEP licensing.[77] An important case in point is the telecommunications sector; a sector that has witnessed massive growth over the last three decades, whether it be a decline in consumer prices, new entrants in the market, or a rise in indirect network effects.[78] What is worth noting though, is the fact that the telecom industry has undergone major changes organically, without any major intervention by the EC. Therefore, if the soft approach adopted by the Commission

since the 1990s has kept Europe at the center of global standard-setting, there is very little reason to believe that a change like an EC-controlled SEP Regulation is necessitated.

4.2 | Competency of the EUIPO and availability of evaluators

Another major concern regarding the Draft Regulation stems from the establishment of a Competence Centre under the aegis of the EUIPO—an office that has, so far, been largely responsible for issuing trademarks and design rights and has little or no experience in dealing with patent rights.[79] This fact was recently also acknowledged by the Executive Director of the EUIPO when he said, "Of course, we will never have the competency in patents. However national offices do have competency in patents. So through the network, we can leverage their capabilities for common projects."[80] Therefore, entrusting the EUIPO with the responsibility of administering essentiality checks and determining FRAND rates, which are arguably two of the most complex aspects of patent policy, could delay the enforcement of patent rights and ultimately affect European innovation.[81] Moreover, there is no dire need for the EUIPO to be roped in when there already are present courts and the European Patent Office (EPO); the former being specifically designed to perform the said tasks, such as the CJEU, the national courts, and the newly-established Unified Patent Court.[82]

What is also questionable is the availability and competency of a sufficient number of evaluators. With the kind of tasks that are envisaged, evaluators are required to be qualified and experienced in the specific areas of technology being standardized.[83] According to the EC, the total number of qualified experts in the EU is estimated around 1500; this includes around 800 patent examiners and 650 patent attorneys.[84] However, with each SEP holder and implementer allowed to propose up to 100 registered SEPs from different families annually for essentiality checks, the number of evaluators required to carry out the checks may exceed the number of patent attorneys and examiners. Furthermore, while patent examiners are busy working full-time at patent offices, patent attorneys are also likely to be engaged with other clients. In such a scenario, if there are high volumes of essentiality checks required to be carried out, the Commission might lower the eligibility requirements for the appointment of evaluators, questioning the very reliability of the system.[85] There might also be issues involving a conflict of interest since the patent attorneys in question are likely to have represented some of the SEP holders and implementers.[86] A more logical way of approaching the given situation would have been to avail the services of the EPO, which houses a significant number of patent examiners who are specialists in standards such as 3G/4G/5G.[87] The EPO also maintains patent databases containing over five million standard documents, while its Register offers free access to all relevant global patent data, fully updated,[88] making the EPO a more suitable EU body as opposed to the EUIPO. The author has previously argued that the EPO can play an important role by collaborating with SSOs to keep the patent databases at SSOs up to date vis-à-vis all patent-related information,[89] especially when a significant part of the patent declarations comprises pending patent applications.

4.3 | Questions surrounding FRAND determination

FRAND determination, without a doubt, remains the most debated aspect of the Draft Regulation, and there are multiple reasons for the same. The Regulation mandates a FRAND determination process as a pre-condition for instituting a patent infringement suit before a court.[90] According to Sir Robin Jacob, a former Lord Justice of Appeal for the Court of Appeal for England and Wales, the mandatory determination of FRAND before the initiation of court proceedings by SEP holders is representative of "a significant curb on access to justice."[91] More importantly, the timeline stated for the said process is 9 months, which in a country like Germany, is usually the time taken by a first-instance court to deliver a judgment in a FRAND case.[92] Additionally, with the establishment of the UPC, the usual timeframe for a decision is likely to be around twelve months, as stated under the Court's Rules of

Procedure.[93] It could be argued that there is no better conclusion to a FRAND licensing dispute than a binding court decision. However, if implementers are given the right to initiate a nonbinding FRAND determination process despite the absence of consent of the SEP holders, it could undermine the licensing negotiations between the parties and increase the risk of patent holdout.[94] Implementers looking to indulge in holdout tactics are likely to be encouraged by the process, for they could delay taking a license until after the FRAND determination, and challenge the same, depriving SEP holders of licensing revenue. What this may also do is, dilute to a certain extent, the sanctity of the CJEU's *Huawei-ZTE* licensing negotiation framework, with the SEP holders expected to discharge a major chunk of the obligations, unlike the balanced approach enshrined by the CJEU in its landmark decision.[95]

It is no secret that holdout by implementers has been a matter of great concern for SEP holders, with the same having been flagged by German courts quite recently.[96] The EC though, seems to have paid little attention to the same; something that was also evident from the comments made by the then Commissioner Thierry Breton.[97] Rather, the Draft Regulation, in the words of Breton, is aimed at targeting patent holdup and the so-called de facto monopolies conferred on SEP holders.[98] In such a scenario, the neutrality of the Proposal becomes highly questionable, as observed from the comments made by several third parties.[99]

4.4 | Competition concerns surrounding aggregate royalty rate determination

The participation of implementers in providing nonbinding expert opinions on aggregate royalty rates has come under the scanner due to the possible anti-competitive aspect of a buyers' cartel. The Draft Regulation provides implementers the opportunity to participate in the conciliation process for the determination of aggregate royalties.[100] Since implementers have an interest in low aggregate royalty rates, it is argued that they may join hands and make joint submissions to conciliators, with the intention of devaluing SEPs.[101] To meet the said purpose, they could exchange information of a commercially sensitive nature and decide on a mutually agreeable maximum aggregate royalties they would be willing to pay.[102] Doing so would be tantamount to price fixation and a buyers' cartel. Given the size of the implementers, even without coordination, they could submit their preferred maximum royalty rate to bring down the royalty rates.[103] Such a concerted action on the part of implementers might have a sizeable influence on the conciliators acting as experts,[104] and deprive SEP holders of adequate royalties, ultimately affecting innovation in the EU. On the flip side, there are also no safeguards preventing the exchange of commercially sensitive information by SEP holders in notifying their aggregate royalty demands,[105] which is likely to keep antitrust agencies firmly glued to the process.

5 | THE CHINESE ANTIMONOPOLY GUIDELINES FOR SEPs: A COMPARATIVE MODEL

If there is one country that has been spoken about the maximum in connection with the EC's Draft SEP Regulation, it is China. China is quickly emerging as a global leader in the domain of wireless communication standards, and it has been argued that the Draft Regulation, if adopted in its present form, is likely to further strengthen the South Asian giant.[106] It is no co-incidence that merely weeks after the EC released the Draft SEP Regulation, China's State Administration for Market Regulation (SAMR) quietly released the Draft Antimonopoly Guidelines in the field of SEPs, aimed at providing a comprehensive framework for regulating the licensing of SEPs and safeguarding consumer and societal interests.[107] While the draft was opened for public comments in June 2023, the final set of guidelines was released in November 2024,[108] much before its European counterpart becomes a law.

While it is true that of late, China has been adopting policies that limit royalties to be paid by Chinese implementers to foreign SEP holders,[109] however, the Chinese approach to SEP licensing, when compared with the EU, has been much less intrusive. Whether it was the 2018 Guangdong Guidelines[110] or the 2024 Antimonopoly

Guidelines for SEPs (hereinafter referred to as the "SAMR Guidelines"),[111] China has adopted or at least tried to adopt a balanced approach to SEP licensing, while also safeguarding the interests of Chinese implementers. It also worth noting that the term used has always been "Guidelines" and not "Regulation," meaning thereby that the Chinese administration and the courts did not feel the need to bring in a law to regulate SEP licensing and a set of Guidelines (being revised from time to time) was considered more appropriate. In other words, the SAMR Guidelines are not binding but rather provide a general guidance on competition behaviour vis-à-vis SEP licensing.[112]

Some of the key aspects of the SAMR Guidelines are as follows—

5.1 | Ex-ante preventive regulations

One thing that has stood out from the very beginning with respect to SAMR Guidelines is the openness of the Chinese authorities to be receptive to the global best practices concerning standard-setting and the licensing of SEPs. Unlike the EC's Draft Regulation, the SAMR Guidelines provide for an ex-ante procedure for relevant stakeholders including SEP holders, SSOs and patent pools, regarding the possible anti-competitive risks attached to the proposed SEP-related actions.[113] The said procedure is akin to the Business Review Procedure available with the Antitrust Division of the US Department of Justice.[114] Here too, similar to the Business Review Letter (BRL), the antitrust authorities could issue a letter expressing their intentions vis-à-vis the proposed SEP-related conduct and allow the parties to modify or change their practices ex-ante to bring them in line with the Chinese antimonopoly law. It may be argued that the said ex-ante regulatory approach is more conducive to reducing SEP disputes as opposed to the EC allowing recourse to ex-post remedies in a restrictive manner (discussed under 3.3 above).

5.2 | Good practices in reference to disclosure and licensing of SEPs

The SAMR Guidelines introduce a series of "good practices" in relation to disclosure, licensing, and good faith negotiations, to assess the conduct of SEP holders. Keeping the SSO IPR policies as sacrosanct, SEP holders are expected to disclose all patents relevant to the standard during the standard-setting process. While the SAMR Guidelines do not mention the consequences for a lack of compliance with the above, the language does make it clear that failure to make an accurate disclosure followed by patent assertion would be an important consideration in assessing its anti-competitive impact.[115] It is worth noting that the intention behind the said Article, similar to the EC's Draft Regulation, is to promote transparency and accuracy in SEP disclosure. The SAMR Guidelines, however, are silent on the aspect of essentiality checks.

With reference to FRAND, the SAMR Guidelines specify that SEP holders are required to make commitments to grant licenses for the use of their patents on FRAND terms, in accordance with the SSO IPR policies.[116] They further state that in case of patent transfer, the FRAND licensing commitments given by the original owner shall also be binding on the new owner, thereby, safeguarding the interests of the implementers. The SAMR Guidelines also make it clear that in case of violation of a FRAND commitment by an SEP holder, the same would be considered as an important factor in evaluating abusive conduct by the SEP holder, such as charging exorbitant rates or refusing to license without justifiable reasons.[117] There is, though, no mention of any Competence Centre or the appointment of any kind of conciliators for the determination of FRAND rates, as seen in the case of the EC's Draft Regulation. The determination of FRAND rate has been left to be negotiated between the SEP holders and implementers, in line with the industry practice and the IPR policies of most SSOs, including that of ETSI, which was quite vocal in its criticism of the EC's Draft Regulation.

5.3 | Assessment of FRAND royalty rates

To assess whether the SEP holders have complied with their FRAND obligations or abused their position of dominance in extracting supra-competitive royalties, the SAMR Guidelines lay down various parameters, such as: (1) whether the SEP holders have complied with the good practices as discusses under 5.2 above; (2) whether the licensing fee is considerably higher than the one charged for comparable licenses; (3) whether the SEP holder included within the FRAND rate, fee for patents which had expired or were invalid; (4) whether the SEP holder adjusted the FRAND rate, based on a change in the number, quality or value of SEPs; and lastly (5) whether SEP holders charged double licensing fees through nonpracticing entities.[118] Instead of bringing in conciliators for the determination of FRAND rates, the SAMR seems to have focused on specifying the factors responsible for assessing the fair, reasonable and non-discriminatory aspects of FRAND. It is worth noting that unlike the EC, the SAMR's approach to public comments has been much more open, evidence of which can be seen in the removal of R&D costs from the determination of FRAND rate, which did form a part of the original draft of 2023.[119] It also reflects the sensitivity of SAMR towards market realities.

5.4 | Good faith negotiations and availability of injunctive relief

One of the key aspects of the SAMR Guidelines is their detailed focus on good faith negotiations between the SEP holders and implementers. Whether or not there has been an abuse of dominant position by the SEP holder is to be construed from their conduct during the licensing negotiations. The SAMR Guidelines, in laying down the procedural requirements, seem to largely follow the CJEU's licensing negotiation framework in Huawei-ZTE. The obligation to commence the licensing negotiations is that of the SEP holder, who not only has to make a clear licensing offer but also provide a list of SEPs, claim charts and specify the royalty calculation method. This shall be followed by the implementer responding without any delay, and in case of a rejection, make a counteroffer on FRAND terms. The onus to prove that they participated in the licensing negotiations in good faith shall squarely be on the SEP holders and implementers.[120] The SAMR Guidelines specify that the said good faith duty shall not preclude the implementers from challenging the essentiality or validity of the patents during the licensing negotiations.[121] Furthermore, the right of the SEP holder to seek injunctive relief is also dependent on compliance with their duty to negotiate in good faith (as discussed above).[122] The SAMR Guidelines, however, also make it clear that the SEP holders shall not use injunctive relief to coerce the implementers into paying exorbitant royalties.[123]

What really stands out is the fact that the said guidelines, despite having been issued by Chinese authorities, seem to follow the CJEU's Huawei-ZTE negotiation framework in its letter and spirit more than the EC itself. And this is not the first time this has happened, for even the 2018 Guangdong Guidelines were largely inspired by the same ruling, which only goes on to show how balanced the approach of the CJEU was in the given case.

6 | WHAT NEXT FOR THE EU'S TECHNOLOGICAL LEADERSHIP?

The regulatory regime that the EC intends to usher in through the SEP Regulation poses a major threat to the EU's status as a central hub for innovation. If one were to look at the standards that have come through the ranks in the EU since the early 90s, what is quite evident is the fact that licensing practices involving SEPs have rather been self-regulated and market-driven, with minimal intervention by the Commission. The Draft Regulation, at best, points towards an experimental system with a far greater agency intervention in matters likely to have a knock-on effect on incentives for innovation. Compare it with the SAMR Guidelines and what you have is a far less intrusive and burdensome approach; one which is relatively more conducive to regulating and bringing transparency to SEP licensing.

It is no secret that technology contributors need incentives to invest in R&D to generate SEPs, however, with incentives being limited and additional costs being imposed on SEP holders, European innovation might take a hit.[124] What is even more concerning is the possible impact of the Draft Regulation on European SMEs. It has been argued that if the Draft Legislation were to become a law in its present form, it might trigger a transfer of royalty obligations from high wealth non-European corporations to low wealth European SMEs.[125] In other words, royalties for SEPs which were so far being paid by large non-EU companies would now likely be paid by European SMEs.[126] As a foreseeable consequence, the small and medium enterprises (SMEs) get driven out of the innovation ecosystem.[127] On a larger level, licensing revenues from 2G, 3G, and 4G standards worth over €18 billion per year are likely to be ceded by Europe to other jurisdictions,[128] with China expected to be the biggest beneficiary.[129] This is quite the opposite of what the recently released Draghi Report also envisages in highlighting the importance of incentivizing and commercializing European innovation.[130]

But China's success in the wireless telecommunications space cannot be attributed to EU's actions as stated above. Rather, it is China's own policies including the various SEP-related Guidelines issued from time to time, that have spearheaded its growth over the last decade. The SAMR Guidelines yet again highlight what has consistently been the Chinese authorities' approach to regulating the license of SEPs and preventing harm to competition. The key lies in balancing the rights of SEP holders and implementers, and on a close comparison of the two documents, the SAMR Guidelines are far ahead of the EC's Draft Regulation in achieving the same. A part of the reason is the willingness on the part of Chinese authorities to adopt what is right for standard-setting and licensing of SEPs, whether it be a judicial ruling, a set of guidelines or an advisory opinion. A case in point—on the one hand, you have authorities such as the SAMR which is developing guidelines around the CJEU's Huawei-ZTE ruling, and on the other you have EU member states like Germany where the courts continue to avoid complying with the said Ruling and the negotiation framework laid therein. The difference is in the approach, and the sooner the EU realizes the same, the better it would be for the future of European Innovation.

7 | CONCLUSION

Ever since the Draft Regulation was released on April 27, 2023, there has been a polarized opinion on the overall effect it is likely to cause. While the Regulation has received a fair share of criticism from SEP holders and patent pools, implementers have largely approved of the same.[131] In the lead-up to the European Parliament's Legal Affairs Committee (JURI) vote on the Regulation, there was a significant amount of lobbying from both sets of stakeholders[132] that eventually saw the Committee vote in favor of the adoption of the same with minor changes.[133] Despite the JURI's approval, those opposed to the Commission's plan of overhauling the EU's framework for SEPs continued to voice their criticism of the Regulation,[134] However, with the European Parliament now having given its assent to the proposed regulation, the Regulation has moved one step closer to becoming a law.[135]

As things stand, the Draft Regulation is set for a spell on the sidelines, as legislative proposals in the EU require the negotiation and approval of EU member states, with the states voting based on a qualified majority as opposed to unanimity, meaning thereby, that the Draft Regulation is likely to undergo potentially significant modifications.[136] What should most definitely be considered during the final stage is the need to stay true to the European philosophy; one that gave EU the massive head start in the technology sector during the 90s and 2000s. One could argue that the European SEP Regulation is a knee jerk reaction to the Chinese courts' rapidly granting anti-suit injunctions in SEP cases involving Chinese parties, however, what lawmakers in the EU are forgetting is the fact that the Regulation is likely to further accentuate foreign litigation. In other words, a delay in the initiation of litigation on account of the procedural limitations under the Draft Regulation would result in parties starting litigation outside of Europe, with China being a major destination. How then could the EU benefit from the same?

Though it is highly unlikely that the Draft Regulation would undergo major changes or come to resemble the SAMR Guidelines once finalized, what is extremely important is the fact that some of the provisions imposing

limitations on the SEP holders, such as being able to approach the court or undergoing mandatory FRAND determination must be revisited. There is no doubt that the EC sensed an opportunity to regulate and monitor SEP licensing, however, the choice of means doesn't match up to the market realities. FRAND licenses are being negotiated, and disputes are getting resolved; what was required in the EU too was a set of definite guidelines which would seemingly aid the parties further, perhaps not an intrusive piece of legislation. Hopefully, the final round of negotiations vis-à-vis the Draft Regulation do factor in the above and usher in fairness and transparency that serves to balance the interests of innovators and implementers in the EU.

DATA AVAILABILITY STATEMENT

Data sharing is not applicable to this article as no data sets were generated or analysed during the current study.

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ENDNOTES

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[11] Josef Drexl, Dietmar Harhoff, Beatriz Conde Gallego, and Peter R Slowinski, 'Position Statement of the Max Planck Institute for Innovation and Competition of 6 February 2024 on the Commission's Proposal for a Regulation of the European Parliament and of the Council on Standard Essential Patents' (2024) 73(7) GRUR International 647.

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[18] Patent hold-up refers to a situation wherein patent holders exploit their essential patents to extract excessive royalties or favorable licensing conditions from potential licensees, often under the threat of injunctive relief.

[19] Patent hold-out refers to a situation wherein potential licensees delay or avoid indulging in licensing negotiations, with the intention of seeking favourable licensing terms.

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[37] COM (2023) 232 final, Art. [34-58].

[38] COM (2023) 232 final, Art. [4, 5, 13].

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[41] COM (2023) 232 final, Art. [24].

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