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Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on standard essential patents and amending Regulation (EU) 2017/1001**

(Text with EEA relevance)

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**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on standard essential patents and amending Regulation (EU) 2017/1001**

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee<sup>1</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) On 25 November 2020, the Commission published its intellectual property action plan<sup>2</sup>, where it announced its goals of promoting transparency and predictability in licensing of standard essential patents (SEPs), including by improving the SEP licensing system, for the benefit of Union industry and consumers, and in particular small and medium-sized enterprises (SMEs)<sup>3</sup>. The action plan was supported by Council Conclusions of 18 June 2021<sup>4</sup> and by the European Parliament in its Resolution<sup>5</sup>.
- (2) This Regulation aims at improving the licensing of SEPs, by addressing the causes of inefficient licensing such as insufficient transparency with regard to SEPs, fair, reasonable and non-discriminatory (FRAND) terms and conditions and licensing in the value chain, and limited use of dispute resolution procedures for resolving FRAND disputes. All these together reduce the overall fairness and efficiency of the system and result in excess administrative and transactional costs. By improving the licensing of SEPs, the Regulation aims 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. Therefore, this Regulation pursues objectives that are complementary to, but different from that of protecting undistorted

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<sup>1</sup> OJ C [...], [...], p. [...]

<sup>2</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Making the most of the EU's innovative potential An intellectual property action plan to support the EU's recovery and resilience of 25 November 2020, COM(2020) 760 final.

<sup>3</sup> OJ L 124 of 20.05.2003, p. 36.

<sup>4</sup> Council conclusions on intellectual property policy, as approved by the Council (Economic and Financial Affairs) at its meeting on 18 June 2021.

<sup>5</sup> European Parliament resolution of 11 November 2021 on an intellectual property action plan to support the EU's recovery and resilience (2021/2007(INI)).

competition, guaranteed by Articles 101 and 102 TFEU. This Regulation should also be without prejudice to national competition rules.

- (3) SEPs are patents that protect technology that is incorporated in a standard. SEPs are ‘essential’ in the sense that implementation of the standard requires use of the inventions covered by SEPs. The success of a standard depends on its wide implementation and as such every stakeholder should be allowed to use a standard. To ensure wide implementation and accessibility of standards, standard development organisations demand the SEP holders that participate in standard development to commit to license those patents on FRAND terms and conditions to implementers that chose to use the standard. The FRAND commitment is a voluntary contractual commitment given by the SEP holder for the benefit of third parties, and it should be respected as such also by subsequent SEP holders. This Regulation should apply to patents that are essential to a standard that has been published by a standard development organisation, to which the SEP holder has made a commitment to license its SEPs on fair, reasonable and non-discriminatory (FRAND) terms and conditions and that is not subject to a royalty-free intellectual property policy, after the entry into force of this Regulation.
- (4) Whereas transparency in SEP licensing should stimulate a balanced investment environment, along entire Single Market value chains, in particular for emerging technology use cases underpinning Union objectives of green, digital and resilient growth, the Regulation should also apply to standards or parts thereof, published before its entry into force where inefficiencies in the licensing of the relevant SEPs severely distort the functioning of the internal market. This is particularly relevant for market failures hindering investment in the Single Market, the roll-out of innovative technologies or the development of nascent technologies and emerging use cases. Therefore, taking into account those criteria, the Commission should determine by a delegated act the standards or parts thereof that have been published before the entry into force of this Regulation and the relevant use cases, for which SEPs can be registered.
- (5) Because a FRAND commitment should be made for any SEP declared to any standard intended for repeated and continuous application, the meaning of standards should be broader than in Regulation (EU) No 1025/2012 of the European Parliament and of the Council<sup>6</sup>.
- (6) Licensing on FRAND terms and conditions includes licensing royalty-free. Given that most issues arise with royalty-bearing licensing policies, this Regulation does not apply to royalty-free licensing.
- (7) In view of the global character of SEP licensing, references to aggregate royalty and FRAND determination may refer to global aggregate royalties and global FRAND determinations, or as otherwise agreed by the notifying stakeholders or the parties to the proceedings.
- (8) In the Union, standard setting and the application of competition law rules related to FRAND obligation to standard essential patents are guided by the Horizontal

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<sup>6</sup> Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council (OJ L 316, 14.11.2012, p. 12.)

Guidelines<sup>7</sup> and the Court of Justice judgment of 16 July 2015 in case C-170/13, *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH*<sup>8</sup>. The Court of Justice recognised the right of a SEP holder to seek to enforce its patents in national courts subject to certain conditions that must be fulfilled to prevent an abuse of dominant position by the SEP holder when seeking an injunction. Since a patent confers on its holder the exclusive right to prevent any third party from using the invention without the holder's consent only in the jurisdiction for which it is issued, the patent disputes are governed by national patent laws and civil proceedings and/or enforcement laws harmonised by Directive 2004/48/EC of the European Parliament and of the Council<sup>9</sup>.

- (9) As there are specific procedures for assessing the validity and the infringement of patents, this Regulation should not affect such procedures.
- (10) Any reference to a competent court of a Member State in this Regulation includes the Unified Patent Court where the conditions are met.
- (11) To facilitate the implementation of this regulation, the European Union Intellectual Property Office (EUIPO) should perform the relevant tasks by means of a competence centre. The EUIPO has extensive experience with managing databases, electronic registers and alternative dispute settlement mechanisms, which are key aspects of the functions assigned under this Regulation. It is necessary to equip the competence centre with necessary human and financial resources to fulfil its tasks.
- (12) The competence centre should set up and administer an electronic register and an electronic database containing detailed information on SEPs in force in one or more Member States, including essentiality check results, opinions, reports, available case-law from jurisdictions across the globe, rules relating to SEPs in third countries, and results of studies specific to SEPs. In order to raise awareness and facilitate SEP licensing for SMEs, the competence centre should offer assistance to SMEs. The setting up and administering a system for essentiality checks and processes for aggregate royalty determination and FRAND determination by the competence centre should include actions improving the system and the processes on a continuous basis, including through the use of new technologies. In line with this objective, the competence centre should establish training procedures for evaluators of essentiality and conciliators for providing opinions on aggregate royalty as well as on FRAND determination and should encourage consistency in their practices.
- (13) The competence centre should be the subject of Union rules on access to documents and data protection. Its tasks should be designed to increase transparency by making existing information relevant to SEPs available to all stakeholders in a centralised and systematic way. Therefore, a balance would have to be made between the free public access to basic information and the need to finance the functioning of the competence centre. In order to cover the maintenance costs a registration fee should be requested to access detailed information contained in the database, such as results of any essentiality checks and non-confidential FRAND determination reports.

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<sup>7</sup> 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, OJ C 11, 14.01.2011, pp. 1 (currently under review)

<sup>8</sup> Judgment of the Court of Justice of 16 July 2015, *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH*, C-170/13, ECLI:EU:C:2015:477

<sup>9</sup> DIRECTIVE 2004/48/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004, p. 45.)

- (14) Knowledge of the potential total royalty for all SEPs covering a standard (aggregate royalty) applicable to the implementations of that standard is important for the assessment of the royalty amount for a product, which plays a significant role for the manufacturer's cost determinations. It also helps SEP holder to plan expected return on investment. The publication of the expected aggregate royalty and the standard licensing terms and conditions for a particular standard would facilitate SEP licensing and reduce the cost of SEP licensing. Thus, it is necessary to make public the information on total royalty rates (aggregate royalty) and the standard FRAND terms and conditions of licensing.
- (15) SEP holders should have the opportunity to first inform the competence centre of the publication of the standard or the aggregate royalty which they have agreed upon among themselves. If there is no agreement on an aggregate royalty among SEP holders, certain SEP holders may request the competence centre to appoint a conciliator to assist the SEP holders willing to participate in the process in determining an aggregate royalty for the SEPs covering the relevant standard. In this case, the role of the conciliator would be to facilitate the decision-making by the participating SEP holders without making any recommendation for an aggregate royalty. Finally, it is important to ensure that there is a third independent party, an expert, that could recommend an aggregate royalty. Therefore, SEP holders and/or implementers should be able to request the competence centre for an expert opinion on an aggregate royalty. When such a request is made, the competence centre should appoint a panel of conciliators and administer a process in which all interested stakeholders are invited to participate. After receiving information from all of the participants, the panel should provide a non-binding expert opinion for an aggregate royalty. The expert opinion on the aggregate royalty should contain a non-confidential analysis of the expected impact of the aggregate royalty on the SEP holders and the stakeholders in the value chain. Important in this respect would be to consider factors such as, efficiency of SEP licensing, including insights from any customary rules or practices for licensing of intellectual property in the value chain and cross-licensing, and impact on incentives to innovate of SEP holders and different stakeholders in the value chain.
- (16) In line with the general principles and objectives of transparency, participation and access to European standardisation, the centralised register should make information regarding the number of SEPs applicable to a standard, the ownership of relevant SEPs, and the parts of the standard covered by the SEPs publicly available. The register and the database will contain information on relevant standards, products, processes, services and systems, which implement the standard, SEPs in force in the EU, standard SEP licensing FRAND terms and conditions or any licensing programmes, collective licensing programmes and essentiality. For SEP holders the register will create transparency with regard to the relevant SEPs, their share of all SEPs declared to the standard and the features of the standard covered by the patents. SEP holders will be in a better position to understand how their portfolios compare with other SEP holders' portfolios. This is important not only for negotiations with implementers but also for the purpose of cross-licensing with other SEP holders. For implementers, the register will provide a trusted source of information on the SEPs, including with regard to the SEP holders from whom the implementer may need to obtain a licence. Making such information available in the register will also help shorten the length of technical discussions during the first stage of the SEP licensing negotiations.

- (17) Once a standard has been notified or an aggregate royalty is specified, whichever is made first, the competence centre will open the registration of SEPs by holders of SEPs in force in one or more Member States.
- (18) In order to ensure transparency of about SEPs, it is appropriate to require from SEP holders to register their patents which are essential to the standard for which the registration is open. SEP holders should register their SEPs within 6 months following the opening of the registration by the competence centre or the grant of the relevant SEPs, whichever is first. In case of timely registration, SEPs holders should be able to collect royalties and claim damages for uses and infringements that happened before the registration.
- (19) SEP holders may register after the indicated time limit. However, in that case, SEP holders should not be able to collect royalties and claim damages for the period of delay.
- New recital:** Clauses in licensing agreement that set a royalty for a large number of patents – present or future – should not be affected by the invalidity, non-essentiality, or unenforceability of a small number of those patents when they do not affect the overall amount and enforceability of the royalty or other clauses in such agreements.
- (20) SEP holders should ensure that their SEP registration(s) are updated. Updates should be registered within 6 months for relevant status changes, including ownership, invalidation findings or other applicable changes resulting from contractual commitments or public authorities' decisions. Failure to update the registration may lead to the suspension of the registration of the SEP from the register.
- (21) A SEP holder may also request the modification of a SEP registration. An interested stakeholder may also request the modification of a SEP registration, if it can demonstrate that the registration is inaccurate based on a definitive decision by a public authority. A SEP can only be removed from the register at the request of the SEP holder, if the patent is expired, was invalidated or found non-essential by a final decision or ruling of a competent court of a Member State or found non-essential under this Regulation.
- (22) To further ensure the quality of the register and avoid over-registration, essentiality checks should also be conducted randomly by independent evaluators selected according to objective criteria to be determined by the Commission. Only one SEP from the same patent family should be checked for essentiality.
- (23) These essentiality checks should be conducted on a sampling from SEP portfolios to ensure that the sample is capable of producing statistically valid results. The results of the sampled essentiality checks should determine the ratio of positively checked SEPs from all the SEPs registered by each SEP holder. The essentiality rate should be updated annually.
- (24) SEP holders or implementers may also designate annually up to 100 registered SEPs for essentiality checks. If the pre-selected SEPs are confirmed essential, the SEP holders may use this information in negotiations and as evidence in courts, without prejudicing the right of an implementer to challenge the essentiality of a registered SEP in court. The selected SEPs would have no bearing on the sampling process as the sample should be selected from all registered SEPs of each SEP holder. If a preselected SEP and a SEP selected for the sample set are the same, only one essentiality check should be done. Essentiality checks should not be repeated on SEPs from the same patent family.
- (25) Any assessment of essentiality of SEPs conducted by an independent entity prior to the entry into force of the Regulation, for example through patent pools, as well as

essentiality determinations by judicial authorities should be indicated in the register. Those SEPs should not be re-checked for essentiality after the relevant evidence supporting the information in the register is provided to the competence centre.

- (26) The evaluators should work independently in accordance with the rules of procedure and Code of Conduct to be determined by the Commission. The SEP holder would be able request a peer evaluation before the issuance of a reasoned opinion. Unless a SEP is the subject of a peer review, there would be no further review of the essentiality check results. The results of the peer evaluation should serve to improve the essentiality check process, to identify and remedy shortcomings and improve consistency.
- (27) The competence centre would publish the results of the essentiality checks, whether positive or negative, in the register and the database. The results of the essentiality checks would not be legally binding. Thus, any subsequent disputes with regard to essentiality would have to be addressed in the relevant court. The results from the essentiality checks, whether requested by a SEP holder or based on a sample, may, however, be used for the purpose of demonstrating essentiality of those SEPs in negotiations, in patent pools and in court.
- (28) It is necessary to ensure that the registration and ensuing obligations provided for in this Regulation are not circumvented by removing a SEP from the register. When an evaluator finds a claimed SEP non-essential, only the SEP holder can request its removal from the register and only after the annual sampling process has been completed and the proportion of true SEPs from the sample has been established and published.
- (29) The purpose of the FRAND commitment is to facilitate adoption and use of the standard by making SEPs available to implementers on fair and reasonable terms and to provide the SEP holder a fair and reasonable return for its innovation. Thus, the ultimate goal of enforcement actions by SEP holders or actions brought by implementers based on a SEP holder's refusal to license is to conclude a FRAND licence agreement. Therefore, the main objective of the Regulation is to facilitate the negotiations and out of court dispute resolution that can benefit both parties. Thus, ensuring access to swift, fair and cost-efficient ways of resolving disputes on FRAND terms and conditions should benefit SEP holders and implementers alike. As such, a properly functioning out-of-court dispute resolution mechanism to determine FRAND terms (FRAND determination) may offer significant benefits for all parties. A party may request a FRAND determination in order to demonstrate that its offer is FRAND or to provide a security, when they engage in good faith.
- (30) The FRAND determination should simplify and speed up negotiations concerning FRAND terms and reduce costs. The EUIPO should administer the procedure. The competence centre should create a roster of conciliators that satisfy established competence and independence criteria, as well as a repository of non-confidential reports (the confidential version of the reports will be accessible only by the parties and the conciliators). The conciliators should be neutral persons with extensive experience in dispute resolution and substantial understanding of the economics of licensing on FRAND terms and conditions.
- (31) The FRAND determination would be a mandatory step before a SEP holder would be able to initiate patent infringement proceedings or an implementer could request a determination or assessment of FRAND terms and conditions concerning a SEP before a competent court of a Member State.

- (32) Each party may choose whether it wishes to engage in the procedure and commit to comply with its outcome. Where a party does not reply to the FRAND determination request or does not commit to comply with the outcome of the FRAND determination, the other party should be able to request either the termination or the unilateral continuation of the FRAND determination. Such a party should not be exposed to litigation during the time of the FRAND determination. At the same time, the FRAND determination should be an effective procedure for the parties to reach agreement before litigation or to obtain a determination to be used in further proceedings. Therefore, the party or parties that commit to complying with the outcome of the FRAND determination and duly engage in the procedure should be able to benefit from its completion.

**New recital:** The obligation to initiate FRAND determination should not be detrimental to the effective protection of the parties' rights. In that respect, the party that commits to comply with the outcome of the FRAND determination while the other party fails to do so should be entitled to initiate proceedings before the competent national court pending the FRAND determination. In addition, either party should be able to request a provisional injunction of a financial nature before the competent court. In a situation where a FRAND commitment has been given by the relevant SEP holder, provisional injunctions of an adequate and proportionate financial nature should provide the necessary judicial protection to the SEP holder who has agreed to license its SEP on FRAND terms, while the implementer should be able to contest the level of FRAND royalties or raise a defence of lack of essentiality or of invalidity of the SEP. In those national systems that require the initiation of the proceedings on the merits of the case as a condition to request the interim measures of a financial nature, it should be possible to initiate such proceedings, but the parties should request that the case be suspended during the FRAND determination. When determining what level of the provisional injunction of financial nature is to be deemed adequate in a given case, account should be taken, inter alia, of the economic capacity of the applicant and the potential effects for the effectiveness of the measures applied for, in particular for SMEs, also in order to prevent the abusive use of such measures. It should also be clarified that once the FRAND determination is terminated, the whole range of measures, including provisional, precautionary and corrective measures, should be available to parties.

- (33) When the parties enter into the FRAND determination, they should select a conciliator for the FRAND determination from the roster. In case of disagreement, the competence centre would select the conciliator. The FRAND determination should be concluded within 9 months. This time would be necessary for a procedure that ensures that the rights of the parties are respected and at the same time is sufficiently swift to avoid delays in concluding licences. Parties may settle at any time during the process, which results in the termination of the FRAND determination.
- (34) Upon appointment, the conciliation centre should refer the FRAND determination to the conciliator, who should examine whether the request contains the necessary information, and communicate the schedule of procedure to the parties or the party requesting the continuations of the FRAND determination.
- (35) The conciliator should examine the parties' submissions and suggestions for the determination of FRAND terms and conditions, and consider the relevant negotiation steps, among other relevant circumstances. The conciliator, upon its own initiative or the request of a party, should be able to require the parties to submit evidence it deems necessary for the fulfilment of its task. It should also be able to examine publicly available information and the competence centre's register and reports of other FRAND

determinations, as well as non-confidential documents and information produced by or submitted to the competence centre.

- (36) If a party fails to engage in the FRAND determination after the conciliator has been appointed, the other party may request the termination or may request that the conciliator issues a recommendation for a FRAND determination on the basis of the information it was able to assess.
- (37) If a party initiates a procedure in a jurisdiction outside the Union resulting in legally binding and enforceable decisions regarding the same standard that is subject to FRAND determination and its implementation, or including SEPs from the same patent family as SEPs subject to FRAND determination and involving one or more of the parties to the FRAND determination as a party; before or during of the FRAND determination by a party, the conciliator, or where he/she has not been appointed has not been established, the competence centre, should be able to terminate the procedure upon the request of the other party.
- (38) At the conclusion of the procedure, the conciliator should make a proposal recommending FRAND terms and conditions. Either party should have the option to accept or reject the proposal. If the parties do not settle and/or do not accept its proposal, the conciliator should draft a report of the FRAND determination. The report would have a confidential and a non-confidential version. The non-confidential version of the report should contain the proposal for FRAND terms and conditions and the methodology used and should be provided to the competence centre for publication in order to inform any subsequent FRAND determination between the parties and other stakeholders involved in similar negotiations. The report would thus have a dual purpose to encourage the parties to settle and to provide transparency as to the process and the recommended FRAND terms in cases of disagreement.
- (39) The Regulation respects the intellectual property rights of patent owners (Article 17(2) of EU Charter of Fundamental Rights), although it includes a restriction on the ability to enforce a SEP that has not been registered within a certain time-limit and introduces a requirement to conduct a FRAND determination before enforcing individual SEPs. The limitation on the exercise of intellectual property rights is allowed under the EU Charter, provided that the proportionality principle is respected. According to settled case-law, fundamental rights can be restricted provided that those restrictions correspond to objectives of general interest pursued by the Union and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference which infringes the very essence of the rights guaranteed<sup>10</sup>. In that respect, this Regulation is in the public interest in that it provides a uniform, open and predictable information and outcome on SEPs for the benefit of SEP holder, implementers and end users, at Union level. It aims at dissemination of technology for the mutual advantage of the SEP holders and implementers. Furthermore, the rules concerning the FRAND determination are temporary thus limited and aimed at improving and streamlining the process but are not ultimately binding.<sup>11</sup>

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<sup>10</sup> Judgment of the Court of Justice of 13 December 1979, *Hauer v. Land Rheinland-Pfalz*, C-44/79, EU:C:1979:290, para. 32; judgment of the Court of Justice of 11 July 1989, *Hermann Schröder HS Kraftfutter GmbH & Co. KG v. Hauptzollamt Gronau*, C-256/87, EU:C:1999:332, para. 15, and judgment of the Court of Justice of 13 July 1989, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, C-5/88, EU:C:1989:321, paras. 17 and 18.

<sup>11</sup> The conciliation procedure follows the conditions for mandatory recourse to alternative dispute settlement procedures as a condition for the admissibility of an action before the courts, as outlined in the CJEU judgments; Joint Cases C-317/08 to C-320/08 *Alassini and Others* of 18 March 2010, and Case C-75/16

- (40) The FRAND determination is also consistent with the right to an effective remedy and to access to justice as laid down in Article 47 of the Charter of Fundamental Rights of the European Union as the implementer and the SEP holder fully retain that right. In case of failure to register within the prescribed time limit, the exclusion of the right to effective enforcement is limited and necessary and meets objectives of general interest. As confirmed by the CJEU<sup>12</sup>, the provision of a mandatory dispute resolution as a precondition to access to competent courts of Member States is deemed to be compatible with the principle of effective judicial protection. The FRAND determination follows the conditions for mandatory dispute resolution outlined in the CJEU judgments, taking into account the particular characteristics of SEP licensing.
- (42) When determining the aggregate royalties and making FRAND determinations the conciliators should take into account in particular any Union acquis and judgments of the Court of Justice pertaining to SEPs as well as guidance issued under this Regulation, the Horizontal Guidelines<sup>13</sup> and the Commission’s 2017 Communication ‘Setting out the EU approach to Standard Essential Patents’.<sup>14</sup> Furthermore, the conciliators should consider any expert opinion on the aggregate royalty or in the absence thereof, should request information from the parties before it makes its final proposals well as guidance issued under this Regulation, as well as guidance issued under this Regulation.
- (43) SEP licensing may cause friction in the value chains that have so far not been exposed to SEPs. It is, therefore, important that the competence centre raises awareness concerning SEP licensing in the value chain through any of the tools at its disposal. Other factors would include the ability of upstream manufacturers to pass the cost of a SEP licence downstream and any potential impact of existing indemnification clauses within a value chain.
- (44) SMEs may be involved in SEP licensing both as SEP holders and implementers. While there are currently a few SME SEP holders, the efficiencies produced with this Regulation are likely to facilitate the licensing of their SEP. Additional conditions are necessary to relieve the cost burden on such SMEs such as reduced administration fees and potentially reduced fees for essentiality checks and conciliation in addition to free support and trainings. The SEPs of micro and small enterprises should not be the subject of sampling for essentiality check, but they should be able to propose SEPs for essentiality checks if they wish to. SME implementers should likewise benefit from reduced access fees and free support and trainings. Finally, SEP holders should be encouraged to incentivise licensing by SMEs through low volume discounts or exemptions from FRAND royalties.

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Menini and Rampanelli v. Banco Popolare Società Cooperativa of 14 June 2017, taking into account the specificities of SEP licensing.

<sup>12</sup> judgment of the Court of Justice of 18 March 2010, Rosalba Alassini v Telecom Italia SpA (C-317/08), Filomena Califano v Wind SpA (C-318/08), Lucia Anna Giorgia Iacono v Telecom Italia SpA (C-319/08) and Multiservice Srl v Telecom Italia SpA (C-320/08), Joined cases C-317/08, C-318/08, C-319/08 and C-320/08, EU:C:2010:146, and judgment of the Court of Justice of 14 June 2017, Livio Menini and Maria Antonia Rampanelli v Banco Popolare – Società Cooperativa, C-75/16, EU:C:2017:457

<sup>13</sup> 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, OJ C 11, 14.01.2011, pp. 1 (currently under review)

<sup>14</sup> Communication on Setting out the EU approach to Standard Essential Patents, COM(2017)712 final, 29.11.2017.

- (45) In order to supplement certain non-essential elements of this Regulation, the power to adopt acts, in accordance with Article 290 of the Treaty on the Functioning of the European Union, should be delegated to the Commission in respect of the items to be entered in the register or in respect of determining the relevant existing standards. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making<sup>15</sup>. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.
- (46) In order to ensure uniform conditions for the implementation of the relevant provisions of this Regulation, implementing powers should be conferred on the Commission to adopt the detailed requirements for the selection of evaluators and conciliators, as well as adopt the rules of procedure and Code of Conduct for evaluators and conciliators. The Commission should also adopt the technical rules for the selection of a sample of SEPs for essentiality checks and the methodology for the conduct of such essentiality checks by evaluators and peer evaluators. The Commission should also determine any administrative fees for its services in relation to the tasks under this Regulation and fees for the services evaluators, experts and conciliators, derogations thereof and payment methods and adapt them as necessary. The Commission should also determine the standards or parts thereof that have been published before the entry into force of this Regulation, for which SEPs can be registered. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council.<sup>16</sup>
- (47) Regulation (EU) 2017/1001 of the European Parliament and of the Council<sup>17</sup> should be amended to empower EUIPO to take on the tasks under this Regulation. The functions of the Executive Director should also be expanded to include the powers conferred on him under this Regulation. Furthermore, the EUIPO's arbitration and mediation centre should be empowered to set up processes such as the aggregate royalty determination and the FRAND determination.
- (48)
- (50) The European Data Protection Supervisor was consulted in accordance with Article 42(1) of Regulation (EU) 2018/1725 of the European Parliament and of the Council.<sup>18</sup>
- (51) As EUIPO, the Commission and stakeholders should be given time to prepare for the implementation and application of this Regulation, its application should be deferred.
- (52) Since the objectives of this Regulation to increase transparency with regard to SEP licensing and to provide an efficient mechanism to resolve disagreements on FRAND

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<sup>15</sup> OJ L 123, 12.5.2016, p. 1.

<sup>16</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13.)

<sup>17</sup> Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ L 154, 16.6.2017, p. 1.)

<sup>18</sup> Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39.) and we got it first (no Politico)

terms and conditions cannot be sufficiently achieved by the Member States because of multiplication of costs but can rather, by reason of efficiencies and scale, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

HAVE ADOPTED THIS REGULATION:

## **Title I** **General Provisions**

### *Article 1*

#### **Subject matter and scope**

1. This Regulation establishes the following rules on patents essential to a standard ('SEPs'):
  - (a) rules providing for enhanced transparency with regard to information necessary for SEP licensing;
  - (b) rules on the registration of SEPs;
  - (c) a procedure to evaluate the essentiality of registered SEPs;
  - (d) a procedure for the amicable settlement of disputes related to fair, reasonable and non-discriminatory nature of terms and conditions ('FRAND determination');
  - (e) competences for the EUIPO for the fulfilment of the tasks set out in this Regulation.
2. This Regulation applies to patents that are essential to a standard that has been published by a standard development organisation, to which the SEP holder has made a commitment to license its SEPs on fair, reasonable and non-discriminatory (FRAND) terms and conditions and that is not subject to a royalty-free intellectual property policy,
  - (a) after the entry into force of this Regulation;
  - (b) before the entry into force of this Regulation, in accordance with Article 66.
3. This Regulation does not apply to claims of invalidity or claims of infringement unrelated to the implementation of a standard notified under this Regulation.
4. This Regulation applies to holders of SEP in force in one or more Member States.
5. This Regulation is without prejudice to the application of Articles 101 and 102 TFEU or to the application of corresponding national competition law rules.

### *Article 2*

#### **Definitions**

For the purposes of this Regulation, the following definitions shall apply:

- (1) 'standard essential patent' or 'SEP' means any patent that is essential to a standard;

- (2) ‘essential to a standard’ means that the patent contains at least one claim for which it is not possible on technical grounds to make or use an implementation or method which complies with a standard, including options therein, without infringing the patent under the current state of the art and normal technical practice;
- (3) ‘standard’ means a technical specification, adopted by a standard development organisation, for repeated or continuous application, with which compliance is not compulsory;
- (4) ‘technical specification’ means a document that prescribes technical requirements to be fulfilled by a product, process, service or system as defined in Article 2 of Regulation (EU) No 1025/2012 of the European Parliament and of the Council<sup>19</sup>;
- (5) ‘standard development organisation’ means any standardising body that is not a private industrial association developing proprietary technical specifications, that develops technical or quality requirements or recommendations for products, production processes, services or methods;
- (6) ‘SEP holder’ means an owner of a SEP or a person holding an exclusive licence for a SEP in one of more Member States;
- (7) ‘implementer’ means a natural or legal person that implements, or intends to implement, a standard in a product, process, service or system;
- (8) ‘FRAND terms and conditions’ means fair, reasonable and non-discriminatory terms and conditions of licensing SEPs;
- (9) ‘FRAND determination’ means a structured procedure for the determination of the FRAND terms and conditions of a SEP licence;
- (10) ‘aggregate royalty’ means the maximum amount of royalty for all patents essential to a standard;
- (11) ‘patent pool’ means an entity created by an agreement between two or more SEP holders to license one or more of their patents to one another or to third parties;
- (12) ‘peer evaluation’ means a process for the re-examination of the preliminary results of essentiality checks by evaluators other than those that carried out the original essentiality check;
- (13) ‘claim chart’ means a presentation of correspondence between the elements (features) of one patent claim and at least one requirement of a standard or recommendation of a standard;
- (14) ‘requirement of a standard’ means expression, in the content of a document, that conveys objectively verifiable criteria to be fulfilled and from which no deviation is permitted if conformance with the document is to be claimed;

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<sup>19</sup> Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council (OJ L 316, 14.11.2012, p. 12.).

- (15) ‘recommendation of a standard’ means expression, in the content of a document, that conveys a suggested possible choice or course of action deemed to be particularly suitable without necessarily mentioning or excluding others;
- (16) ‘patent family’ means a collection of patent documents that cover the same invention and whose members have the same priorities;
- (17) ‘stakeholder’ means any person that can demonstrate a legitimate interest in SEPs, including a SEP holder, an implementer, an agent for a SEP holder or an implementer, or an association representing the interests of SEP holders and implementers;
- (18) ‘competence centre’ means the EUIPO administrative units that fulfil the tasks entrusted to EUIPO under this Regulation.

## **Title II**

### **Competence centre**

#### *Article 3*

#### **Tasks of the competence centre**

1. The tasks under this Regulation shall be performed by a competence centre established within the EUIPO with the necessary human and financial resources.
2. The competence centre shall support transparency and FRAND determination in relation to SEPs and shall perform the following tasks:
  - (a) set up and maintain an electronic register and an electronic database for SEPs;
  - (b) set up and manage rosters of evaluators and conciliators;
  - (c) set up and administer a system for assessment of the essentiality of SEPs;
  - (d) set up and administer the process for the FRAND determination;
  - (e) provide training to evaluators and conciliators;
  - (f) administer a process for aggregate royalty determination;
  - (g) enhance transparency and information sharing through:
    - (i) publishing the results and reasoned opinions of the essentiality checks and non-confidential reports of the FRAND determinations;
    - (ii) enabling access to case-law (including alternative dispute resolution) on SEPs, including from third country jurisdictions;
    - (iii) compiling non-confidential information on FRAND determination methodologies and FRAND royalties;
    - (iv) enabling access to SEP-related rules of third countries;
  - (h) provide training, support and general advice on SEPs to SMEs;
  - (i) conduct studies and any other necessary activities to support the objectives of this Regulation;
  - (j) raise awareness about SEP licensing, including SEP licensing in the value chain.
3. Using the powers conferred by Article 157 of Regulation (EU) 2017/1001, the Executive Director of the EUIPO shall adopt the internal administrative instructions

and shall publish the notices that are necessary for the fulfilment of all the tasks entrusted to the competence centre by this Regulation.

## **Title III**

### **Information on SEP made available through the competence centre**

#### **Chapter 1**

#### **General Provisions**

##### *Article 4*

##### **Register of standard essential patents**

1. A Union register for SEPs ('the register') is established.
2. The register shall be maintained in electronic format by the competence centre.
3. The register shall contain the following entries:
  - (a) information on relevant standards;
  - (b) registered SEPs identification, including the country of registration and patent number;
  - (c) the standard version, the technical specification and the specific sections of the technical specification for which the patent is considered essential;
  - (d) reference to the terms of the SEP holder's FRAND licensing commitment to the standard development organisation;
  - (e) name, address and contact details of the SEP holder;
  - (f) if the SEP holder is part of a group of companies, the name, address and contact details of the parent company;
  - (g) name, address and contact details of the SEP holder's legal representatives in the Union, where relevant;
  - (h) the existence of any public standard terms and conditions, including SEP holder's royalty and discount policies;
  - (i) the existence of any public standard terms and conditions for SEP licensing to SMEs;
  - (j) availability for licensing through patent pools, where applicable;
  - (k) contact details for licensing, including licensing entity;
  - (l) the date of registration of the SEP in the register and the registration number.
4. The register shall also contain the following entries, each accompanied by the date of recording of such entry:
  - (a) changes in the contact details of entries referred to in paragraph (3), points (e), (f), (g) and (k);
  - (b) the grant or transfer of a licence through patent pools, where applicable pursuant to Article 9;

- (c) information on whether an essentiality check or peer evaluation have been performed and reference to the result;
  - (d) information on whether the SEP is expired or invalidated by a final judgment of a competent court of a Member State;
  - (e) particulars regarding proceedings and decisions on SEPs pursuant to Article 10;
  - (f) date of publication of information pursuant to Article 19(1) in conjunction with Article 14(7), Article 15(4) and Article 18(11);
  - (g) the date of suspension of the SEP from the Register pursuant to Article 22;
  - (h) corrections of the SEP, pursuant to Article 23;
  - (i) the date of removal of the SEP from the register pursuant to Article 25 and the grounds for removal;
  - (j) the correction to or removal from the register of the item referred to in points (b), (e) and (f).
5. The Commission is empowered to adopt delegated acts in accordance with Article 67, amending paragraphs (3) and (4) to determine items other than those referred to in paragraphs (3) and (4) that are to be entered in the Register for the purposes of this Regulation.
  6. The competence centre shall collect, organise, make public and store the items referred to in paragraphs (3) and (4), including any personal data for the purposes of this Regulation.
  7. The competence centre shall keep the register easily accessible for public inspection. The data shall be considered to be of public interest and may be accessed by any third party free of charge.

#### *Article 5*

#### **Electronic database**

1. The competence centre shall establish and maintain an electronic database for SEPs.
2. The following information in the database shall be accessible to any third party subject to the registration with the competence centre:
  - (a) patent bibliographic data on the claimed SEP or SEP, including priority date, family members, grant date and expiration date;
  - (b) public standard terms and conditions, including SEP holder's royalty and discount policies pursuant to Article 7, first paragraph, point (b), if available;
  - (c) public standard terms and conditions for SEP licensing to SMEs pursuant to Article 62(1), if available;
  - (d) information regarding known products, processes, services or systems and implementations pursuant to Article 7, first paragraph, point (b);
  - (e) information pertaining to essentiality pursuant to Article 8;
  - (f) non-confidential information on FRAND determinations pursuant to Article 11;
  - (g) information on aggregate royalties pursuant to Articles 15, 16 and 17;
  - (h) expert opinions referred to in Article 18;

- (i) non-confidential reports of the conciliators pursuant to Article 57;
  - (j) SEPs selected for essentiality checks pursuant to Article 29, the reasoned opinions or the final reasoned opinions pursuant to Article 33;
  - (k) the date and the grounds for removal of the SEP from the database pursuant to Article 25;
  - (l) information on SEP related rules in third countries pursuant to Article 12;
  - (m) case-law and reports pursuant to Article 13(3) and (5);
  - (n) awareness raising and training materials.
3. Access to the information pursuant to paragraph (2), points (f), (h), (i), (j) and (k) may be subject to the payment of a fee.
  4. However, public authorities, including courts, shall have full access to the information in the database referred to in paragraph (2) free of charge subject to registration with the competence centre.

### *Article 6*

#### **Common provisions on the register and the database**

1. When a party requests that data and documents of the database be kept confidential, that party shall provide a non-confidential version of the information submitted in confidence in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. The competence centre may disclose that non-confidential version.
2. The competence centre shall keep the files of any procedure relating to the registration of the SEP. The Executive Director of the EUIPO shall determine the form in which those files shall be kept and made available. The competence centre shall keep the files for 10 years after the removal of the registration of the SEP. Upon request, personal data may be removed from the register or the database after 18 months from the expiry of the SEP or removal of the SEP from the register.
3. The competence centre may correct any information contained in the register or the database pursuant to Article 23.
4. The SEP holder and its legal representative in the Union shall be notified of any change in the register or the database when that change concern a particular SEP.
5. Upon request, the competence centre shall issue registration certificates or certified copies of the data and documents in the register or the database. The registration certificates and certified copies may be subject to the payment of a fee.
6. The Commission shall determine the conditions of access to the database, including the fees for such access, or for registration certificates and certified copies from the database or the register, by means of an implementing act. The implementing act shall be adopted in accordance with the examination procedure referred to in Article 68(2).

### *Article 7*

#### **Identification of implementations of a standard and related SEP licensing terms and conditions**

A SEP holder shall provide to the competence centre the following information:

- (a) information as regards the products, processes, services or systems in which the subject-matter of the SEP may be incorporated or to which it is intended to be applied, for all existing or potential implementations of a standard, to the extent such information is known to the SEP holder.
- (b) where available, its standard terms and conditions for SEP licensing, including its royalty and discount policies, within 7 months from the opening of the registration for the relevant standard and implementation by the competence centre.

#### *Article 8*

#### **Information pertaining to essentiality**

A SEP holder shall provide to the competence centre the following information to be included in the database and referenced in the register:

- (a) a final decision on essentiality for a registered SEP made by a competent court of a Member State within 6 months from the publication of such decision.
- (b) any essentiality check prior to [OJ: please insert the date = 24 months from entry into force of this regulation] by an independent evaluator in the context of a pool, identifying the SEP registration number, the identity of the patent pool and its administrator, and the evaluator.

#### *Article 9*

#### **Information to be provided by patent pools**

Patent pools shall publish on their websites at least the following information and inform the competence centre thereof:

- (a) standards subject to collective licensing;
- (b) the administrative entity's shareholders or ownership structure;
- (c) process for evaluating SEPs;
- (d) roster of evaluators having residence in the Union;
- (e) list of evaluated SEPs and list of SEPs being licensed;
- (f) illustrative cross-references to the standard;
- (g) list of products, services and processes that may be licensed through the patent pool or the entity;
- (h) royalties and discount policy per product category;
- (i) standard licence agreement per product category;
- (j) list of licensors in each product category;
- (k) list of licensees for each product category.

#### *Article 10*

#### **Information on decisions on SEPs**

1. Competent courts of Member States shall notify the competence centre within 6 months from the adoption of a judgment concerning SEPs on:

- (a) injunctions;
  - (b) infringement proceedings;
  - (c) essentiality and validity;
  - (d) abuse of dominance;
  - (e) determination of FRAND terms and conditions.
2. Any person may inform the competence centre about any judicial proceeding or alternative dispute resolution proceeding concerning a SEP.

#### *Article 11*

##### **Information on FRAND determinations**

1. Persons involved in alternative dispute resolution proceedings concerning SEPs in force in a Member State shall disclose to the competence centre within 6 months from the termination of the procedure the standards and the implementations concerned, the methodology used for the calculation of FRAND terms and conditions, information on the name of the parties, and on specific licensing rates determined.
2. No confidential information shall be disclosed by the competence centre without the prior consent of the affected party.

#### *Article 12*

##### **Information on SEP related rules in third countries**

1. The competence centre shall collect and publish in the database information on any SEP related rules in any third country.
2. Any person may provide the competence centre with such information as well as information on updates, corrections and public consultations. The competence centre shall publish that information in the database.

#### *Article 13*

##### **Enhancing transparency and information sharing**

1. The competence centre shall store in the database all the data provided by stakeholders, as well as opinions and reports of evaluators and conciliators.
2. The collection, storage and processing of such data shall serve the purposes of:
  - (a) administering the registrations of SEPs, essentiality checks and conciliation proceedings pursuant to this Regulation;
  - (b) accessing the information necessary for conducting those proceedings more easily and efficiently;
  - (c) communicating with the parties to the proceedings;
  - (d) producing reports and statistics enabling the competence centre to improve its operations and the functioning of the registration of SEPs and the proceedings under this Regulation.

3. The competence centre shall include in the database case-law from competent courts of Member States, from third country jurisdictions and alternative dispute resolution bodies.
4. The competence centre shall collect all information on FRAND terms and conditions, including any discounts, which have been made public by SEP holders, disclosed to it pursuant to Article 11 and included in the FRAND determination reports and shall make such disclosures accessible to public authorities in the Union, including competent courts of Member States, subject to a written request. Confidential documents shall be accompanied by a non-confidential version of the information submitted in confidence in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.
5. The competence centre shall publish in the database an annual report on methodologies for FRAND determinations based on information from court and arbitration decisions and statistical information on licences and licensed products from the FRAND determinations.
6. Upon a reasoned request by a stakeholder, any confidential information shall be redacted in a non-confidential format before the competence centre publishes or transmits such information.

## **Chapter 2**

### **Notification of a standard and an aggregate royalty**

#### *Article 14*

##### **Notification of a standard to the competence centre**

1. Holders of a patent in force in one or more Member States which is essential to a standard for which FRAND commitments have been made shall notify to the competence centre, where possible through the standard development organisation or through a joint notification, the following information:
  - (a) the commercial name of a standard;
  - (b) the list of relevant technical specifications that define the standard;
  - (c) the date of the publication of the latest technical specification;
  - (d) implementations of the standard known to the SEP holders making the notification.
2. Such notification shall be made within 30 days of the publication of the latest technical specification.
3. In the absence of the notification under paragraph (1), any holder of a SEP in force in one or more Member State shall notify individually, no later than 90 days from the publication of the latest technical specification, to the competence centre the information referred to in paragraph (1).
4. In the absence of notification under paragraph (1) or under paragraph (3) any implementer may notify, to the competence centre the information referred to in paragraph (1).
5. The competence centre shall also notify the relevant standard development organisation of the publication. In case of notification pursuant to paragraphs (3) and

(4), it shall also notify, where possible, known SEP holders individually or request confirmation from the standard development organisation that it has duly notified the SEP holders.

6. The competence centre shall publish on the EUIPO website the notifications made pursuant to paragraphs (1), (3) and (4) for comments by stakeholders. Stakeholders may submit their comments to the competence centre within 30 days from the publication of the list.
7. After expiry of the time limit referred to in paragraph (6) the competence centre shall consider all comments received including all relevant technical specifications and implementations and publish the information pursuant to paragraph (1).

#### *Article 15*

##### **Notification of an aggregate royalty to the competence centre**

1. Holders of SEPs in force in one or more Member States for which FRAND commitments have been made may jointly notify the competence centre about an aggregate royalty for the SEPs covering a standard.
2. The notification made in accordance with paragraph (1) shall contain the information on the following:
  - (a) the commercial name of the standard;
  - (b) the list of technical specifications that define the standard;
  - (c) the names of the SEP holders making the notification referred to in paragraph (1);
  - (d) the estimated percentage the SEP holders referred to in paragraph (1) represent from all SEP holders;
  - (e) the estimated percentage of SEPs they own collectively from all SEPs for the standard;
  - (f) the implementations known to the SEP holders referred to in point (c);
  - (g) the global aggregate royalty, unless the notifying parties specify that the aggregate royalty is not global;
  - (h) any period for which the aggregate royalty referred to in paragraph (1) is valid.
3. The notification referred to in paragraph (1) shall be made at the latest 120 days after:
  - (a) the publication of a standard by the standard development organisation for implementations known to the SEP holders referred to in paragraph (2), point (c); or
  - (b) a new implementation of the standard becomes known to them.
4. The competence centre shall publish in the database the information provided under paragraph (2).

#### *Article 16*

##### **Revision of aggregate royalty**

1. In case of revision of the aggregate royalty, the SEP holders shall notify the competence centre about the revised aggregate royalty and the reasons for the revision.

2. The competence centre shall publish in the database the initial aggregate royalty, the revised aggregate royalty and the reasons for the revision in the register.

#### *Article 17*

##### **Process for facilitating agreements on aggregate royalty determinations**

1. Holders of SEPs in force in one or more Member States representing at least 20 % of all SEPs of a standard may request the competence centre to appoint a conciliator from the roster of conciliators to mediate the discussions for a joint submission of an aggregate royalty.
2. Such a request shall be made no later than 90 days following the publication of the standard or no later than 120 days following the first sale of new implementation on the Union market for implementations not known at the time of publication of the standard.
3. The request shall contain the following information:
  - (a) the commercial name of the standard;
  - (b) the date of publication of the latest technical specification or the date of the first sale of new implementation on the Union market;
  - (c) the implementations known to the SEP holders referred to in paragraph (1);
  - (d) the names and contact details of the SEP holders supporting the request;
  - (e) the estimated percentage of SEPs they own individually and collectively from all potential SEPs claimed for the standard.
4. The competence centre shall notify the SEP holders referred to in paragraph (3), point (d) and request them to express their interest in participating in the process and to provide their estimated percentage of SEPs from all SEPs for the standard.
5. The competence centre shall appoint a conciliator from the roster of conciliators and inform all SEP holders that expressed interest to participate in the process.
6. SEP holders that submit to the conciliator confidential information shall provide a non-confidential version of the information submitted in confidence in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.
7. Where the SEP holders fail to make a joint notification within 6 months from the appointment of the conciliator, the conciliator shall terminate the process.
8. If the contributors agree on a joint notification, the procedure set out in Article 15(1), (2) and (4) shall apply.

#### *Article 18*

##### **Non-binding expert opinion on aggregate royalty**

1. A SEP holder or an implementer may request the competence centre for a non-binding expert opinion on a global aggregate royalty.
2. The request referred to in paragraph (1) shall be made no later than 150 days after:
  - (a) the publication of the relevant standard for known implementations; or
  - (b) new implementations are first sold on the Union market.

3. That request shall include:
  - (a) commercial name of the standard;
  - (b) list of relevant technical specifications that define the standard;
  - (c) list of relevant products, processes, services or systems or implementations;
  - (d) list of known stakeholders and contact details.
4. The competence centre shall notify the relevant standard development organisation and all known stakeholders of the request. It shall publish the request on EUIPO's website and invite stakeholders to express interest in participating in the process within 30 days from the day when the request was published.
5. Any stakeholder may request to participate in the process after explaining the basis of its interest. SEP holders shall provide their estimated percentage of those SEPs of all SEPs for a standard. Implementers shall provide information on any relevant implementations of the standard, including any relevant market share in the Union.
6. If the requests for participation include SEP holders representing collectively at least an estimated 20% of all SEPs for the standard, and implementers holding collectively at least 10% relevant market share in the Union or at least 10 SMEs, the competence centre shall appoint a panel of three conciliators selected from the roster of conciliators with the appropriate background from the relevant field of technology.
7. Stakeholders that submit to the panel confidential information shall provide a non-confidential version of the information submitted in confidence in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.
8. Following the appointment, the panel shall request the participating SEP holders to, within one month:
  - (a) propose an aggregate royalty, including the information referred to in Article 15(2), or
  - (b) submit justification on the impossibility to propose an aggregate royalty due to technological, economic, or other considerations.
9. The panel shall duly consider the submissions provided for in paragraph 8 and decide:
  - (a) to suspend the procedure for the expert opinion on aggregate royalty for an initial period of no longer than 6 months, which can be further extended on the basis of a duly justified request by one of the participating SEP holders, or
  - (b) to provide the expert opinion.
9. The panel shall provide the expert opinion within 8 months of the end of the suspension period pursuant to paragraph 8(a) or of the decision referred to in paragraph 8(b). The opinion shall be supported by at least two of the three conciliators.
10. The expert opinion shall include a summary of the information provided in the request, the information referred to in Article 15(2), the names of the conciliators, the procedure, the reasons for the opinion on the aggregate royalty and the underlying methodology. The reasons for any divergent views shall be specified in an annex to the expert opinion.

11. The expert opinion shall include an analysis of the value chain concerned and the potential impact of the aggregate royalty on the innovation incentives of both SEP holders and stakeholders in the value chain where licensing is to take place.
12. The competence centre shall publish the expert opinion and notify the participants of that publication.

## **Chapter 3**

### **Registration of SEPs**

#### *Article 19*

##### **Administration of the register of standard essential patents**

1. The competence centre shall create an entry in the register for a standard for which FRAND commitments have been made within 60 days from the earliest of the following events:
  - (a) publication by the competence centre of the standard and related information pursuant to Article 14(7);
  - (b) publication by the competence centre of an aggregate royalty and related information pursuant to Article 15(4) and Article 18(11).
2. The competence centre shall publish a notice on the EUIPO website informing stakeholders that an entry in the register has been made and refer to the publications referred to in paragraph (1). The competence centre shall notify known SEP holders individually by electronic means and the relevant standard development organisation of the notice in this paragraph.

#### *Article 20*

##### **Registration of standard essential patents**

1. Upon request of a SEP holder the competence centre shall register any patent in force in one or more Member States and falling within the scope of this Regulation that is essential for a standard, for which the competence centre has published a notice pursuant to Article 19(2).
2. For a SEP to be included in the register, at least one patent claim shall correspond with at least one requirement or recommendation to the standard, identified by standard name, version (and/or release) and sub-clause.
3. The request for registration shall be made within 6 months from the publication of the notice pursuant to Article 19(2). In case the SEP is only granted by a national or European patent office after the publication of the notice pursuant to Article 19(2), the request for registration shall be made within 6 months from the grant of the SEP by the relevant patent office.
4. The request shall include the information set out in Article 4(3) and Article 5(2), points (a), (b), (d) and (e).
5. A SEP holder shall update the information in the register and database to reflect relevant changes in relation to its registered SEP by notifying the competence centre within 6 months from the change occurring.

10. The request for registration will only be accepted following the payment of the registration fee by the SEP holder. The Commission shall determine the registration fee in the implementing act issued based on Art. 63(5). The registration fee shall include, in case of medium and large enterprises, the expected costs and fees of the essentiality check for SEPs selected pursuant to Article 29(1).

#### *Article 21*

##### **Date of registration**

1. The date of registration shall be the date on which the competence centre has received a registration request pursuant to Article 20(2), (4) and (5) .
2. The competence centre shall publish the registered SEPs in the register within 7 working days from the date of registration.

#### *Article 22*

##### **Examination of the conditions of registration**

1. A sample of SEP registrations shall be checked annually for completeness and correctness.
2. The EUIPO shall adopt a methodology for selecting a sample of SEP registrations for checks.
3. Where the registration does not contain the information in accordance with Articles 4 and 5 or contains incomplete or inaccurate information, the competence centre shall request the SEP holder to provide the complete and accurate information within the set time limit of no less than 2 months.
4. If the SEP holder fails to provide the correct and complete information, the registration shall be suspended from the register, until such time as the incompleteness or inaccuracy is remedied.
5. A SEP holder whose SEP has been suspended from the register pursuant to paragraph (4) and considers that the finding of the competence centre is incorrect may apply before the Boards of Appeal of the EUIPO for a decision on the matter. The application shall be made within 2 months from the suspension. The Boards of Appeal of the EUIPO may reject the application or request the competence centre to correct its finding and inform the requesting person.
6. Any completing or correcting information on a SEP pursuant to this article shall be made free of charge.

#### *Article 23*

##### **Correction of an entry in the register or information in the database**

1. A SEP holder may request a correction of its SEP registration or of the information contained in the database by filing an appropriate request to the competence centre, except as provided for in paragraph (2).
2. Any third party may request the competence centre to correct a SEP registration or information contained in the database. The request shall contain the following information:

- (a) the name and contact details of the requesting person;
  - (b) the registration number of the registered SEP;
  - (c) the reasons for the request;
  - (d) evidence from an independent source supporting the request.
3. The competence centre shall notify the request to the SEP holder and invite the SEP holder to correct the entry in the register or the information submitted for the database, where relevant within a time limit no less than 2 months.
  4. The competence centre shall notify the SEP holder and invite the SEP holder to correct the entry in the register or the information submitted for the database, where relevant within a time limit no less than 2 months, when the competence centre is informed by a competent court of a Member State pursuant to Article 10(1) or a patent office or any third party of:
    - (a) the expiry of a registered SEP
    - (b) the invalidation of a registered SEP by a competent authority; or
    - (c) a final judgment that the registered SEP is not essential to the relevant standard.
  5. If the SEP holder fails to correct the entry in the register or the information submitted for the database within the given time limit, the registration shall be suspended from the register, until such time as the incompleteness or inaccuracy is remedied.
  6. A SEP holder whose SEP has been suspended from the register pursuant to paragraph (5) and considers that the finding of the competence centre is incorrect may apply before the Boards of Appeal of the EUIPO for a decision on the matter. The application shall be made within 2 months from the suspension. The Boards of Appeal of the EUIPO may reject the application or request the competence centre to correct its finding and inform the requesting person.
  7. The treatment of requests for correction pursuant to This article by the competence centre shall be suspended from the selection of the SEP for essentiality check pursuant to Article 29 until the publication of the result of the essentiality check in the register and the database pursuant to Article 33(1).
  8. The competence centre may correct any linguistic errors or errors of transcription and manifest oversights or technical errors attributable to it in the register and in the database of its own motion.
  9. Any corrections pursuant to this article shall be made free of charge.

#### *Article 24*

##### **Effects of absence of registration or suspension of registration of SEPs**

1. A SEP that is not registered within the time-limit set out in Article 20(3) may not be enforced in relation to the implementation of the standard for which a registration is required in a competent court of a Member State, from the time-limit set out in Article 20(3) until its registration in the register.
2. A SEP holder that has not registered its SEPs within the time-limit set out in Article 20(3) shall not be entitled to receive royalties or seek damages for infringement of such SEPs in relation to the implementation of the standard for which registration is required, from the time-limit set out in Article 20(3) until its registration in the register.

3. Paragraphs (1) and (2) are without prejudice to provisions included in contracts setting a royalty for a broad portfolio of patents, present or future, stipulating that the invalidity, non-essentiality or unenforceability of a limited number thereof shall not affect the overall amount and enforceability of the royalty or other terms and conditions of the contract.
4. Paragraphs (1) and (2) apply also in case the registration of a SEP is suspended, during the suspension period pursuant to Article 22(4) or 23(5), except where the Boards of Appeal request the competence centre to correct its findings in accordance with Article 22(5) and 23(6).
5. A competent court of a Member State requested to decide on any issue related to a SEP in force in one or more Member States, shall verify whether the SEP is registered as part of the decision on admissibility of the action.

#### *Article 25*

#### **Removing a SEP from the register and the database**

1. A SEP holder may request the removal of its registered SEP from the register and the database, on the following grounds:
  - (a) expiry of the patent;
  - (b) invalidation of the patent by a competent authority;
  - (c) final judgment of a competent court of a Member State that the registered patent is not essential to the relevant standard;
  - (d) as a consequence of a negative result from the essentiality check pursuant to Article 31(5) and Article 33(1).
2. Such a request may be made at any time, except from the selection of the SEP for essentiality check pursuant to Article 29 until the publication of the result of the essentiality check in the register and database pursuant to Article 33(1).
3. The competence centre shall remove the SEP from the register and the database.

### **Title IV Evaluators and Conciliators**

#### *Article 26*

#### **Evaluators and conciliators**

1. An evaluator shall conduct essentiality checks.
2. A conciliator shall conduct the following tasks:
  - (a) mediate among parties in establishing an aggregate royalty;
  - (b) provide a non-binding opinion on an aggregate royalty;
  - (c) serve in a FRAND determination.
3. The evaluators and conciliators shall adhere to a code of conduct.
4. The competence centre shall appoint [10] evaluators from the roster of evaluators as peer evaluators for a period of [three] years.

5. By [OJ: please insert the date = 18 months from entry into force of this regulation], the Commission shall by means of an implementing act adopted in accordance with the examination procedure referred to in , lay down the practical and operational arrangements concerning:
- (a) the requirements for evaluators or conciliators, including a Code of Conduct;
  - (b) the procedures pursuant to Articles 17, 18, 31 and 32 and Title VI.

#### *Article 27*

### **The selection procedure**

1. The competence centre shall conduct a procedure of selecting candidates based on the requirements established in the implementing act referred to in Article 26(5).
2. The competence centre shall establish a roster of suitable candidates for evaluators or conciliators. There may be different rosters of evaluators and conciliators depending on the technical area of their specialisation or expertise.
3. Where the competence centre has not yet established roster of candidates evaluators or conciliators at the moment of the first registrations or FRAND determination, the competence centre shall invite ad hoc renowned experts who satisfy the requirements set out in the implementing act referred to in Article 26(5).
4. The competence centre shall regularly review the rosters that a sufficient number of qualified candidates is maintained.

## **Title V**

### **Essentiality checks of standard essential patents**

#### *Article 28*

### **General requirement for essentiality checks**

1. The competence centre shall administer a system of essentiality checks, ensuring that they are conducted in an objective and impartial manner and that confidentiality of the information obtained is safeguarded
2. The essentiality check shall be conducted by an evaluator selected pursuant to Article 27. Evaluators shall conduct essentiality checks of registered SEPs for the standard for which they are registered.
3. Essentiality checks shall not be done on more than one SEP from the respective patent family.
4. The lack of an essentiality check or an ongoing essentiality check shall not preclude licensing negotiations or any court or administrative procedure in relation to a registered SEP.
5. The evaluator shall summarise the result of the essentiality check and the reasons for it in a reasoned opinion, or, in case of peer evaluation, in a final reasoned opinion, which shall not be legally binding.
6. The result of the essentiality check conducted and the reasoned opinion of the evaluator or the final reasoned opinion of the peer evaluator may be used as evidence before stakeholders, patent pools, public authorities, courts or arbitrators.

### Administration of essentiality checks

1. The competence centre shall select annually a sample of registered SEPs from different patent families from each SEP holder and with regard to each specific standard in the register for essentiality checks. Registered SEPs of micro and small enterprises shall be excluded from the annual sampling process. The checks shall be conducted based on a methodology that ensures the establishment of a fair and statistically valid selection that can produce sufficiently accurate results about the essentiality rate in all registered SEPs of a SEP holder with regard to each specific standard in the register. By [OJ: please insert the date = 18 months from entry into force of this regulation] the Commission shall, by means of an implementing act, determine the detailed methodology. That implementing act shall be adopted in accordance with the examination procedure referred to in Article 68(2).
2. The competence centre shall notify the SEP holders about the SEPs selected for essentiality checks. Within the time limit established by the competence centre, the SEP holders may submit within the same time period a claim chart with a maximum amount of five correspondences between the SEP and the relevant standard, any additional technical information that may facilitate the essentiality check and translations of the patent requested by the competence centre.
3. The competence centre shall publish the list of SEPs selected for essentiality check.
4. If a SEP selected for essentiality check was already the subject of a previous or ongoing essentiality check pursuant to This title or of an essentiality decision or check referred to in Article 8, no additional essentiality check shall be done. The result from the previous essentiality check or decision shall be used for the determination of the percentage of sampled per SEP holder and per specific registered standard that has passed successfully the essentiality check.
5. Each SEP holder may voluntarily propose annually up to 100 registered SEPs from different patent families to be checked for essentiality with regard to each specific standard for which SEP registration was made.
6. Any implementer may voluntarily propose annually up to 100 registered SEPs from different patent families to be checked for essentiality with regard to each specific standard for which SEP registrations have been made.
7. The competence centre shall allocate the SEPs for essentiality check to evaluators based on the roster of evaluators established pursuant to Article 27 and shall provide access to the evaluator access to the complete documentation provided by the SEP holder.
8. The competence centre shall ensure that the identity of the evaluator remain undisclosed to the SEP holders during the examination of the essentiality pursuant to Article 31 or during the peer evaluation pursuant to Article 32. All the communication between the SEP holder and the evaluator shall pass through the competence centre.
9. In case of failure to respect formal requirements pursuant to Article 28, other procedural requirements or the code of conduct, the competence centre may, at the request of any stakeholder submitted within one month from the publication of the reasoned opinion or final reasoned opinion or on its own initiative, review the examination and decide to:

a) maintain, or

b) revoke

the results of examination of the essentiality of a registered SEP or of the peer evaluation.

In case of 9 (b) the competence centre shall appoint a new evaluator or peer evaluator to conduct a new examination of the essentiality check pursuant to Article 31 or new peer evaluation pursuant to Article 32.

10. The party that requests the review of the examination of the essentiality check or peer evaluation and re-appointment of the evaluator and considers that the finding of the competence centre is incorrect may apply before the Boards of Appeal of the EUIPO for a decision on the matter. The application shall be made within 2 months from the finding of the competence centre. The Boards of Appeal of the may reject the application or request the competence centre to appoint a new evaluator and inform the requesting person and, where relevant, the SEP holder

#### *Article 30*

##### **Observations by stakeholders**

1. Within 90 days following the publication of the list of registered SEPs selected for sampling, any stakeholder may submit to the competence centre written observations concerning the essentiality of the selected SEPs.
2. The observations referred to in paragraph (1) shall be communicated to the SEP holder who may comment on them within the time limit established by the competence centre.
3. The competence centre shall provide the observations and the responses by the SEP holder to the evaluator following the expiry of the set time limits.

#### *Article 31*

##### **Examination of the essentiality of a registered SEP**

1. The examination of essentiality shall be conducted following procedure that ensures sufficient time, rigorousness and high-quality.
2. The evaluator may invite the SEP holder concerned to file observations, within a period to be fixed by the evaluator.
3. Where an evaluator has reasons to believe that the SEP may not be essential to the standard, the competence centre shall inform the SEP holder of any such reasons and specify a period within which the SEP holder may submit its observations, or submit an amended claim chart.
4. The evaluator shall duly consider any information provided by the SEP holder.
5. The evaluator shall issue his reasoned opinion to the competence centre within 6 months from its appointment. The reasoned opinion shall include the name of the SEP holder and of the evaluator, the SEP subject to the essentiality check, the relevant standard, a summary of the examination procedure, the result of the essentiality check and the reasons on which that result is based.

6. The competence centre shall notify the reasoned opinion to the SEP holder.

#### *Article 32*

##### **Peer evaluation**

1. Where the competence centre has informed the SEP holder pursuant to Article 31(3), the SEP holder may request peer evaluation before the expiry of the period to submit its observations pursuant to Article 31(3).
2. If the SEP holder requests a peer evaluation, the competence centre shall appoint a peer evaluator.
3. The peer evaluator shall duly consider all the information submitted by the SEP holder, the reasons of the initial evaluator why the SEP may not be essential to the standard and any amended claim chart or additional observations provided by the SEP holder.
4. In case the peer evaluation confirmed the preliminary conclusions of the evaluator that the evaluated SEP may not be essential to the standard for which it was registered, the peer evaluator shall inform the competence centre and provide the reasons for this opinion. The competence centre shall inform the SEP holder and invite the SEP holder to submit its observations.
5. The peer evaluator shall duly consider the observations of the SEP holder and issue a final reasoned opinion to the competence centre within 3 months from its appointment. The final reasoned opinion shall include the name of the SEP holder, of the evaluator and of the peer evaluator, the SEP subject to the essentiality check, the relevant standard, a summary of the examination and peer evaluation procedure, the preliminary conclusion of the evaluator, the result of the peer evaluation and the reasons on which that result is based.
6. The competence centre shall notify the final reasoned opinion to the SEP holder.
7. The results of the peer evaluation shall serve to improve the essentiality check process and ensure consistency.

#### *Article 33*

##### **Publication of the results of the essentiality checks**

1. The competence centre shall enter the result of the essentiality check or of the peer evaluation in the register and the reasoned opinion and final reasoned opinion in the database. The result of the essentiality check under this Regulation shall be valid for all SEPs from the same patent family.
2. The competence centre shall publish in the register the percentage of sampled SEPs per SEP holder and per specific registered standard that passed successfully the essentiality test.
3. Where the publication of the results contains an error attributable to the competence centre, the competence centre shall of its own motion or at the request of the SEP holder registrant correct the error and publish the correction.

## **Title VI**

### **FRAND determination**

#### *Article 34*

##### **Initiation of the FRAND determination**

1. The FRAND determination in respect of a standard and implementation for which an entry in the register has been created, shall be initiated by any of the following persons:
  - (a) SEP holder, prior to any initiation of a SEP infringement claim before a competent court of a Member State;
  - (b) an implementer of a SEP prior to any request for the determination or assessment of FRAND terms and conditions of a SEP licence before a competent court of a Member State.
2. The party requesting the FRAND determination shall be referred to as the ‘requesting party’, any party responding to the request as the ‘responding party’, and both shall be referred to as the ‘parties’ for the purposes of FRAND determination.
3. The FRAND determination may be initiated by a party or entered into by the parties to resolve disputes related to FRAND terms and conditions voluntarily.
4. The obligation to initiate FRAND determination pursuant to paragraph 1 prior to the court proceedings is without prejudice to the possibility for either party to request, pending the FRAND determination, the competent court of a Member State to issue a provisional injunction of a financial nature against the alleged infringer. The provisional injunction shall exclude the seizure of property of the alleged infringer and the seizure or delivery up of the products suspected of infringing a SEP.

Where national law provides that the provisional injunction of a financial nature can only be requested where a case is pending on the merits, either party may bring a case on the merits before the competent court of a Member State for that purpose. However, the parties shall request the competent court of a Member State to suspend the proceedings on the merits for the duration of the FRAND determination.

In deciding whether to grant the provisional injunction, the competent court of a Member States shall consider that a procedure for FRAND determination is ongoing.
5. Once the FRAND determination is terminated, the whole range of measures, including provisional, precautionary and corrective measures, shall be available to parties.

#### *Article 35*

##### **Rules of procedure**

The FRAND determination shall be governed by Article 34 to Article 58, as further implemented pursuant to Article 26(5).

## Article 36

### Content of the request to initiate a FRAND determination

1. The FRAND determination shall be initiated by a written request to the competence centre that shall contain the following information:
  - (a) the name and contact information of the requesting party;
  - (b) the name and address of the responding party;
  - (c) the registration numbers of the relevant SEPs in the register;
  - (d) the commercial name of the standard and the name of the standard developing organisation.
  - (e) a summary of the licensing negotiations to date, if applicable;
  - (f) references to any other FRAND determination, if applicable.
2. Where the request to initiate a FRAND determination is made by a SEP holder, in addition to the information listed in paragraph (1), it shall contain the following information:
  - (a) claim charts mapping patent claims to the standard of selected registered SEPs;
  - (b) proof of essentiality checks, if available.
3. The request to initiate a FRAND determination may include a proposal for a FRAND determination.

## Article 37

### Duration of the FRAND determination

1. Unless otherwise agreed by the parties, the period from the date of the submission of the response by the responding party in accordance with Article 38(2) or from the date of the submission of the request to continue the FRAND determination in accordance with Article 38(5), as applicable, until the date of the termination of the procedure shall not exceed 9 months.
2. The period for the time barring of claims before a competent court of a Member State shall be suspended for the duration of the FRAND determination.

## Article 38

### Notification of the FRAND determination request and response

1. The competence centre shall notify the request to the responding party within 7 days and shall inform the requesting party thereof.
2. The responding party shall notify the competence centre within 15 days from the receipt of the notification of the request for FRAND determination from the competence centre in accordance with paragraph (1). The response shall indicate whether the responding party agrees to the FRAND determination, whether it commits to comply with its outcome.
3. Where the responding party does not reply within the time limit laid down in paragraph (2) or informs the competence centre of its decision not to participate in the FRAND determination, or not to commit to comply with the outcome, the following shall apply:

- (a) the competence centre shall notify the requesting party thereof and invite it to indicate within seven days whether it requests the continuation of the FRAND determination and whether it commits to comply with the outcome of the FRAND determination;
  - (b) where the requesting party requests the continuation of the FRAND determination and commits to its outcome, the FRAND determination shall continue, but Article 34(1) shall not apply to the court proceedings for the requesting party in relation to the same subject matter.
  - (c) where the requesting party fails to request, within the time limit referred to in subparagraph (a), the continuation of the FRAND determination, the competence centre shall terminate the FRAND determination.
4. Where the responding party agrees to the FRAND determination and commits to comply with its outcome pursuant to paragraph (2), including where such commitment is contingent upon the commitment of the requesting party to comply with the outcome of the FRAND determination, the following shall apply:
- (a) the competence centre shall notify the requesting party thereof and request to inform the competence centre within seven days whether it also commits to comply with the outcome of the FRAND determination. In case of acceptance of the commitment by the requesting party, the FRAND determination shall continue and the outcome shall be binding for both parties;
  - (b) where the requesting party does not reply within the time limit referred to in subparagraph (a) or informs the competence centre of its decision not to commit to comply with outcome of the FRAND determination, the competence centre shall notify the responding party and invite it to indicate within seven days whether it requests the continuation of the FRAND determination.
  - (c) where the responding party requests the continuation of the FRAND determination, the FRAND determination shall continue, but Article 34(1) shall not apply to the court proceedings for by the responding party in relation to the same subject matter;
  - (d) where the responding party fails to request, within the time-limit referred to in subparagraph (a), the continuation of the FRAND determination, the competence centre shall terminate the FRAND determination.
5. Where either party commits to comply with the outcome of the FRAND determination, while the other party fails to do so within the applicable time limits, the competence centre shall adopt a notice of commitment to the FRAND determination and notify the parties within 5 days from the expiry of the time-limit to provide the commitment. The notice of commitment shall include the names of the parties, the subject-matter of the FRAND determination, a summary of the procedure and information on the commitment provided or on the failure to provide commitment for each party.
6. The FRAND determination shall concern a global SEP licence, unless otherwise specified by the parties in case both parties agree to the FRAND determination or by the party that requested the continuation of the FRAND determination. SMEs that are parties to the FRAND determination may request to limit the territorial scope of the FRAND determination.

#### *Article 39*

#### **Selection of conciliators**

1. Following the reply to the FRAND determination by the responding party in accordance with Article 38(2), or the request to continue in accordance with Article 38(5), the competence centre shall propose at least 3 candidates for the FRAND determination from the roster of conciliators referred to Article 27(2). The parties or party shall select one of the proposed candidates as a conciliator for the FRAND determination.
2. If the parties do not agree on a conciliator, the competence centre shall select one candidate from the roster of conciliators referred to in Article 27(2).

#### *Article 40*

##### **Appointment of conciliators**

1. The selected candidate shall communicate to the competence centre the acceptance to take up the task of a conciliator for the FRAND determination, which shall notify the communication of acceptance to the parties.
2. The day following the notification of the acceptance to the parties, the conciliator is appointed, and the competence centre shall refer the case to him/her.

#### *Article 41*

##### **Replacement of conciliators**

If during the FRAND determination a conciliator is unable to participate, withdraws or needs to be replaced because he or she does not comply with the requirements as provided for in Article 26, the procedure provided for in Article 39 shall apply. The time period referred to in Article 37 shall be extended for the time necessary for the appointment of the new conciliator for the FRAND determination.

#### *Article 42*

##### **Preparation of the proceedings**

1. After the case is referred to the conciliator in accordance with Article 40(2), he/she shall examine whether the request contains the information required under Article 36 in accordance with the Rules of procedure.
2. He/she shall communicate to the parties or the party requesting the continuation of the FRAND determination the conduct as well as the schedule of procedure.

#### *Article 43*

##### **Written procedure**

The conciliator shall invite each party to file written submissions setting out its arguments concerning the determination of the applicable FRAND terms and conditions, including supporting documentation and evidence, and set appropriate time limits.

#### *Article 44*

##### **Objection to the FRAND determination**

1. A party may submit an objection stating that the conciliator is unable to make a FRAND determination on legal grounds, such as a previous binding

FRAND determination or agreement between the parties, no later than in the first written submission. The other party shall be given opportunity to submit its observations.

2. The conciliator shall decide on the objection and either reject it as unfounded before considering the merits of the case or join it to the examination of the merits of the FRAND determination. If the conciliator overrules the objection or joins it to the examination of the merits of the determination of FRAND terms and conditions, it shall resume consideration of the determination of FRAND terms and conditions.
3. If the conciliator decides that the objection is founded, it shall terminate the FRAND determination and shall draw up a report stating the reasons of the decision.

#### *Article 45*

#### **Conduct of the FRAND determination**

1. The conciliator shall assist the parties in an independent and impartial manner in their endeavour to reach a determination of FRAND terms and conditions.
2. The conciliator may invite the parties or the party requesting the continuation of the FRAND determination to meet with him/her or may communicate with him/her orally or in writing.
3. The parties or the party requesting the continuation of the FRAND determination shall cooperate in good faith with the conciliator and, in particular, shall attend the meetings, comply with his/her requests to submit all relevant documents, information and explanations as well as use the means at their disposal to enable the conciliator to hear witnesses and experts whom the conciliator might call.
4. The responding party may join the FRAND determination at any moment before its termination.
5. At any stage of the procedure upon request by both parties, or the party requesting the continuation of the FRAND determination, as applicable, the conciliator shall terminate the FRAND determination.

#### *Article 46*

#### **Failure of a party to engage**

1. If a party:
  - (a) fails to comply with any request of the conciliator, Rules of procedure or schedule of procedure referred to in Article 42(2),
  - (b) withdraws its commitment to comply with the outcome of the FRAND determination as set out in Art. 38, or
  - (c) in any other way fails to comply with a requirement relating to the FRAND determination,the conciliator shall inform both parties thereof.
2. Having received the notification of the conciliator, the complying party may ask the conciliator to take one of the following actions:

- (a) make a proposal for a FRAND determination in accordance with Article 55 based on the information available to it, attaching such weight as it considers fit to any evidence submitted to it,
  - (b) terminate the procedure.
3. If the party requesting the continuation of the FRAND determination fails to comply with any request of the conciliator or in any other way fails to comply with a requirement relating to the FRAND determination, the conciliator shall terminate the procedure.

#### *Article 47*

#### **Parallel proceedings in a third country**

1. For the purposes of this article a parallel proceeding means a proceeding that satisfies the following conditions:
  - (a) any procedure before a court, tribunal, an administrative or state authority of a third country taking legally binding and enforceable decisions on patent assertion, injunction, infringement, abuse of a dominant market position or a determination of FRAND terms and conditions;
  - (b) concerning a licensing dispute regarding the same standard and implementation and a patent which in substance has the same claims as the SEPs that is subject to the FRAND determination;
  - (c) involving one or more of the parties to the FRAND determination as a party.
2. Where a parallel proceeding has been initiated before or during the FRAND determination by a party, the conciliator, or where he/she has not been appointed, the competence centre, shall terminate the FRAND determination upon the request of any other party.

#### *Article 48*

#### **Evidence**

1. Without prejudice to the protection of confidentiality in accordance with Article 54(3) at any time during the FRAND determination, at the request of a party or on its own motion, the conciliator may request the production of documents or other evidence.
2. The conciliator may examine publicly available information and the competence centre's register and confidential and non-confidential reports of other FRAND determinations, as well as non-confidential documents and information produced by or submitted to the competence centre.

#### *Article 49*

#### **Witnesses and experts**

The conciliator may hear witnesses and experts requested by either party provided that the evidence is necessary for the FRAND determination and that there is time to consider such evidence.

## *Article 50*

### **Proposal for a determination of FRAND terms and conditions**

1. At any time during the FRAND determination, the conciliator or a party on its own motion or by invitation of the conciliator may submit proposals for a determination of FRAND terms and conditions
2. If the requesting party has submitted a written proposal for FRAND terms and conditions in its written submission, the responding party shall be given opportunity to comment on it and/or submit a written counter-proposal in its reply.
3. When submitting suggestions for FRAND terms and conditions, the conciliator shall take into account the impact of the determination FRAND terms and conditions on the value chain and on the incentives to innovation of both the SEP holder and the stakeholders in the relevant value chain. To that end, the conciliator may rely on the expert opinion referred to in Article 18 or, in case of absence of such an opinion request additional information and hear experts or stakeholders.

## *Article 51*

### **Recommendation of a determination of FRAND terms and conditions by the conciliator**

The conciliator shall notify the parties a written recommendation of a determination of FRAND terms and conditions at the latest 5 months before the time limit referred to in Article 37.

## *Article 52*

### **Submission of reasoned proposals for determination of FRAND terms and conditions by the parties**

Following the notification of the written recommendation of FRAND terms and conditions by the conciliator, either party shall submit a detailed and reasoned proposal for a determination of FRAND terms and conditions. If a party has already submitted a proposal for the determination of FRAND terms and conditions, revised versions shall be submitted, if necessary, taking into account the recommendation of the conciliator.

## *Article 53*

### **Oral procedure**

If the conciliator considers it necessary or if a party so requests, an oral hearing shall be held within 20 days after the submission of reasoned proposals for determination of FRAND terms and conditions.

## *Article 54*

### **Disclosure of information**

1. When the conciliator receives information for the purposes of FRAND determination from a party, it shall disclose it to the other party so that the other party has the opportunity to present any explanation.
2. A party may request the conciliator that specific information in a submitted document is kept confidential.

3. When a party requests the information in a document it had submitted to be kept confidential, the conciliator shall not disclose that information to the other party. The party invoking confidentiality shall also provide a non-confidential version of the information submitted in confidence in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. This non-confidential version shall be disclosed to the other party.

#### *Article 55*

#### **Reasoned proposal for a determination of FRAND terms and conditions by the conciliator**

1. At the latest 45 days before the end of the time limit referred to in Article 37, the conciliator shall submit a reasoned proposal for a determination of FRAND terms and conditions to the parties or, as applicable, the party requesting the continuation of the FRAND determination.
2. Either party may submit observations to the proposal and suggest amendments to the proposal by the conciliator, who may reformulate its proposal to take into account the observations submitted by the parties and shall inform the parties or the party requesting the continuation of the FRAND determination, as applicable, of such reformulation.

#### *Article 56*

#### **Termination of the FRAND determination and notice of termination**

1. In addition to the termination of the FRAND determination for reasons provided for Article 38(4), Article 44(3), Article 45(5), Article 46(2), point (b), Article 46(3) and Article 47(2), the FRAND determination shall be terminated in any of the following ways:
  - (a) a settlement agreement is signed by the parties;
  - (b) a written declaration is signed by the parties accepting the reasoned proposal for a determination of FRAND terms and conditions by the conciliator referred to in Article 55;
  - (c) a written declaration is made by a party not to accept the reasoned proposal of a determination of FRAND terms and conditions by the conciliator referred to in Article 55;
  - (d) a party has not submitted a reply to the reasoned proposal of a determination of FRAND terms and conditions by the conciliator referred to in Article 55.
2. In case of termination of the FRAND determination, the competence centre shall adopt a notice of termination of the FRAND determination and notify the parties within 5 days from termination. The notice of termination shall include the names of the parties and the conciliator, the subject-matter of the FRAND determination, a summary of the procedure and the reasons for its termination.
3. The notice of termination notified to the SEP owner shall be considered to constitute a document within the meaning of Article 6(3) point (c) of Regulation (EU) No 608/2013 with regard to any request for a customs action against goods suspected to infringing its SEP.

4. A competent court of a Member State, asked to decide on determination of FRAND terms and conditions, including in abuse of dominance cases among private parties, or SEP infringement claim concerning a SEP in force in one or more Member States subject to the FRAND determination shall not proceed with the examination of the merits of that claim, unless it has been served with a notice of termination of the FRAND determination, or, in the cases foreseen in Article 38(3)(b) and Article 38(4)(c), with a notice of commitment pursuant to Article 38(5).

In the cases foreseen in Article 38(3)(b) and in Article 38(4)(c), Article 34(5) shall apply *mutatis mutandis* in the proceedings before a competent court of a Member State.

#### *Article 57*

##### **Report**

1. The conciliator shall provide the parties with a written report following the termination of the FRAND determination in cases listed in Article 56(1), point (c) and Article 56(1), point (d).
2. The report shall include the following:
  - (a) the names of the parties;
  - (b) a confidential assessment of the FRAND determination;
  - (c) confidential summary of the main issues of disagreement;
  - (d) a non-confidential methodology and the assessment of the determination of FRAND terms and conditions by the conciliator.
3. The confidential report shall be available only to the parties and to the competence centre. The competence centre shall publish the non-confidential report in the database.
4. Either party to the FRAND determination may file the report in any proceedings before a competent court of a Member State against the other party to the FRAND determination, notwithstanding any procedural bar.

#### *Article 58*

##### **Confidentiality**

1. Except the methodology and the assessment of the FRAND determination by the conciliator referred to in Article 57(2), point (d), the competence centre shall keep confidential the determination of FRAND terms and conditions, any proposals for determination of FRAND terms and conditions submitted during the procedure and any documentary or other evidence disclosed during the FRAND determination which is not publicly available, unless otherwise provided by the parties.
2. Notwithstanding paragraph (1), the competence centre may include information concerning the FRAND determination in any aggregate statistical data that it publishes concerning its activities, provided that such information does not allow identification the parties or the particular circumstances of the dispute to be identified.

## **Title VII**

### **Procedural rules**

#### *Article 59*

##### **Communications to and notifications from the competence centre**

1. The communication to and notifications from the competence centre shall be conducted in principle by electronic means.
2. The Executive Director of the EUIPO shall determine to what extent and under which technical conditions communications and notifications referred to in paragraph (1) are to be submitted electronically.

#### *Article 60*

##### **Time limits**

1. Time limits shall be laid down in terms of full years, months, weeks or days. Calculation shall start on the day following the day on which the relevant event occurred.
2. The Executive Director of the EUIPO shall determine, before the commencement of each calendar year, the days on which the EUIPO is not open for receipt of documents or on which ordinary post is not delivered in the locality in which the EUIPO is located.
3. The Executive Director of the EUIPO shall determine the duration of the period of interruption in the case of a general interruption in the delivery of post in the Member State where the EUIPO is located or, in the case of an actual interruption of the EUIPO's connection to admitted electronic means of communication.
4. In cases of exceptional occurrences making the communication between the parties to the proceedings and the competence centre very cumbersome, the Executive Director of the EUIPO may extend all time limits that would otherwise expire on or after the date of commencement of such an occurrence, as determined by the Executive Director in relation to the following subjects:
  - (a) parties to the proceedings having their residence or registered office in the region concerned;
  - (b) representatives or assistants with a place of business in the region concerned, appointed by the parties.
5. When determining the length of extension referred to in the second subparagraph, the Executive Director of the EUIPO shall take into account the end date of the exceptional occurrence. If the occurrence referred to in the second subparagraph affects the seat of the EUIPO, the determination of the Executive Director of the EUIPO shall specify that it applies in respect of all parties to the proceedings.

## **Title VIII**

### **Micro, Small and Medium-size Enterprises**

#### *Article 61*

##### **Training, advice and support**

1. The competence centre shall offer training and support on SEP related matters for micro, small and medium-size enterprises free of charge.
2. The competence centre may commission studies, if it considers it necessary, to assist micro, small and medium-size enterprises on SEP related matters.
3. The costs of the services referred to in paragraph [\(1\)](#) and paragraph [\(2\)](#) shall be borne by the EUIPO.

#### *Article 62*

#### **FRAND terms for micro, small and medium-sized enterprises**

1. When negotiating a SEP licence with micro, small and medium-sized enterprises, SEP holders shall consider offering to them FRAND terms and conditions that are more favourable than the FRAND terms and conditions they offer to enterprises that are not micro, small and medium-sized for the same standard and implementations.
2. If a SEP holder offers more favourable FRAND terms and conditions to micro, small and medium-sized enterprises, or concludes a SEP licence that includes more favourable terms and conditions, pursuant to paragraph [\(1\)](#), such FRAND terms and conditions shall not be considered in a FRAND determination, unless the FRAND determination is conducted solely with regard to FRAND terms and conditions for another micro, small or medium-sized enterprise.
3. SEP holders shall also consider discounts or royalty-free licensing for low sales volumes irrespective of the size of the implementer taking the licence. Such discounts or royalty-free licensing shall be fair, reasonable and non-discriminatory and shall be available in the electronic database as set out in Article 5(2), point [\(b\)](#).

### **Title IX Fees and Charges**

#### *Article 63*

#### **Fees and charges**

1. The competence centre may charge administrative fees for the services it renders under this Regulation.
2. Fees may be charged at least in respect of the following matters:
  - (a) for the conciliators facilitating agreements on aggregate royalty determinations in accordance with Article [17](#);
  - (b) for the expert opinion on aggregate royalty in accordance with Article [18](#);
  - (c) for the essentiality check carried out by the evaluator in accordance with Article [31](#) and by the peer evaluator in accordance with Article [32](#);
  - (d) for the conciliators for the FRAND determination in accordance with Title [VI](#).
3. Where the competence centre charges fees in accordance with paragraph 2, the fees shall be borne as follows:
  - (a) the fees referred to in paragraph (2), point [\(a\)](#) by the SEP holders that participated in the process based on their estimated percentage of SEPs from all SEPs for the standard;

- (b) the fees referred to in paragraph (2), point (b) equally by the parties that participated in the procedure of the expert opinion on aggregate royalty, unless they agree otherwise, or the panel suggests a different apportionment based on the size of the parties determined on the basis of their turnover;
  - (c) the fees referred to in paragraph (2), point (c) by the SEP holder that requested an essentiality check pursuant to Article 29(5) or peer evaluation pursuant to Article 32(1) and the implementer that requested an essentiality check pursuant to Article 29(6);
  - (d) the fees referred to in paragraph (2), point (d) equally by the parties, unless they agree otherwise, or the conciliator suggests a different apportionment based on the level of participation of the parties in the FRAND determination.
4. The level of the fees shall be reasonable and shall correspond to the costs of the services. It shall take into account the situation of micro, small and medium-sized enterprises.
  5. By [OJ: please insert the date = 18 months from entry into force of this Regulation], the Commission shall adopt an implementing act determining the amounts of the fees referred to in Article 63, the arrangement concerning the payment methods related to the rules set out in paragraph (3) and paragraph (4) of this Article. The implementing act shall be adopted in accordance with the examination procedure referred to in Article 68(2).

#### *Article 64*

##### **Payment of fees**

1. Fees shall be paid to the EUIPO. All payments shall be made in euro. The Executive Director of the EUIPO may establish which specific payment methods may be used.
2. If the amounts requested are not paid in full within 10 days after the date of the request, the competence centre may notify the defaulting party and give it the opportunity to make the required payment within [5] days. It shall submit a copy of the request to the other party, in case of an aggregate royalty or FRAND determination.
3. The date on which the payment shall be considered to have been made to the EUIPO shall be the date on which the amount of the payment or of the transfer is actually entered in a bank account held by EUIPO.
4. If any part of the required payment remains outstanding after the deadline in paragraph (2), the competence centre may suspend access to the database of the defaulting party, until payment is made.

#### *Article 65*

##### **Financial provisions**

1. The expenses incurred by the EUIPO or the evaluators or conciliators selected by the EUIPO pursuant to Articles 26 and 27 in carrying out the tasks conferred to it in accordance with this Regulation shall be covered by the administrative fees to be paid to the EUIPO by the users of the services of the competence centre.
2. Regarding costs incurred by the EUIPO for activities entrusted to it by this Regulation which are not covered by the fees under this Regulation, the EUIPO shall finance those activities from its own budgetary means.

# Title X

## Final Provisions

### *Article 66*

#### **Opening registration for an existing standard**

1. Until [OJ: please insert the date = 28 months from the entry into force of this regulation] holders of SEPs essential to a standard published before the entry into force of this Regulation ('existing standards'), for which FRAND commitments have been made, may notify the competence centre pursuant to Articles 14, 15 and 17 of any of the existing standards or parts thereof that will be determined in the implementing act in accordance with paragraph (4). The procedures, notification and publication requirements set out in this Regulation apply *mutatis mutandis*.
2. Until [OJ: please insert the date = 28 months from entry into force of this regulation] implementers of a standard, standard published before the entry into force of this Regulation, for which FRAND commitments have been made may notify pursuant to Article 14(4) the competence centre of any of the existing standards or parts thereof, that will be determined in the implementing act in accordance with paragraph (4). The procedures, notification and publication requirements set out in this Regulation apply *mutatis mutandis*.
3. Until [OJ: please insert the date = 30 months from entry into force of this regulation] a SEP holder or an implementer may request an expert opinion pursuant to Article 18 regarding SEPs essential to an existing standard or parts thereof, that will be determined in the implementing act in accordance with paragraph (4). The requirements and procedures set out in Article 18 apply *mutatis mutandis*.
4. Where the functioning of the internal market is severely distorted due to inefficiencies in the licensing of SEPs, the Commission shall, after an appropriate consultation process, by means of a delegated act pursuant to Article 67, determine which of the existing standards, parts thereof or relevant use cases can be notified in accordance with paragraph (1) or paragraph (2), or for which an expert opinion can be requested in accordance with paragraph (3). The delegated act shall also determine which procedures, notification and publication requirements set out in this Regulation apply to those existing standards. The delegated act shall be adopted within [OJ: please insert the date = 18 months from entry into force of this regulation].
5. This article shall apply without prejudice to any acts concluded and rights acquired by [OJ: please insert the date = 28 months from entry into force of this regulation].

### *Article 67*

#### **Exercise of delegation of power**

1. The power to adopt the delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The power to adopt a delegated act referred to in Article 4(5) shall be conferred on the Commission for an indeterminate period of time from the date of entry into force of this Regulation.

3. The delegation of power referred to in Article 4(5) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
4. Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making.
5. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
6. A delegated act adopted pursuant to Article 4(5) shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of 2 months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by 2 months at the initiative of the European Parliament or of the Council.

#### *Article 68*

##### **Committee procedure**

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

#### *Article 69*

##### **Commission guidance**

The Commission may issue guidance under this Regulation on matters covered by its scope, excluding matters related to the interpretation of Article 101 and Article 102 TFEU.

#### *Article 70*

##### **Evaluation**

1. By [OJ: please insert the date = 5 years from entry into force of this regulation] the Commission shall evaluate the effectiveness and efficiency of the SEP registration and the essentiality check system.
2. By [OJ: please insert the date = 8 years from entry into force of this regulation], and every five years thereafter, the Commission shall evaluate the implementation of this Regulation. The evaluation shall assess the operation of this Regulation, in particular the impact, effectiveness and efficiency of the competence centre and its working methods.
3. When preparing the evaluation reports referred to in paragraphs (1) and (2), the Commission shall consult the EUIPO and stakeholders.
4. The Commission shall submit the evaluation reports referred to in paragraphs (1) and (2) together with its conclusions drawn based on those reports to the European

Parliament, to the Council, to the European Economic and Social Committee and to the Management Board of the EUIPO.

#### *Article 71*

### **Amendments to Regulation (EU) 2017/1001**

Regulation (EU) 2017/1001 is amended as follows:

(1) Article 151(1) is amended as follows:

(a) the following point is inserted:

‘(ba) administration, promotion and support of the tasks conferred on it, performed by a competence centre, under Regulation (EU) No ... of the European Parliament and of the Council+\* ;

\* Regulation (EU) .../... of the European Parliament and of the Council of ... on standard essential patents (OJ ...).’;

(b) paragraph 3 is replaced by the following:

‘3. The Office may provide alternative dispute resolution services, including mediation, conciliation, arbitration, determination of royalties and FRAND determination.’;

(2) in Article 157(4), the following point is added:

’(p) exercising the powers conferred on him or her under Regulation (EU) ...++.’;

(3) Article 170 is amended as follows:

(a) the title is replaced by the following:

‘Alternative Dispute Resolution Centre’;

(b) paragraphs 1 and 2 are replaced by the following

‘1. For the purposes of Article 151(3), the Office may establish an Alternative Dispute Resolution Centre (‘the Centre’).

2. Any natural or legal person may use the services of the Centre for settling disputes relating to intellectual property rights’;

(c) paragraph 15 is replaced by the following:

‘15. The Office may cooperate with other recognised national or international bodies providing alternative dispute resolution services.’;

(d) the following paragraph is added:

‘16. Articles 18, 19 and Articles 34 to 58 of Regulation ...++ shall apply to the Centre in all proceedings relating to standard essential patents.’.

[+ OJ: Please insert in the text the number of this Regulation and insert the number, date and OJ reference of this Regulation in the footnote.]

[++ OJ: Please insert in the text the number of this Regulation.]

#### *Article 72*

### **Entry into force and application**

1. This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.
2. It shall apply from ... [OP: please insert the date = 24 months after the date of entry into force of this Regulation].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the European Parliament*  
*The President*  
[...]

*For the Council*  
*The President*  
[...]