

21 July 2025

Feedback of

ACT | The App Association
(Transparency Reg. # 72029513877-
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Rue Belliard 40,
1000 Brussels, Belgium

to the

European Commission

to its

Proposal for an amendment to Regulation (EU)
No. 1025/2012 on European standardisation

ACT | The App Association Feedback to the Commission proposal for a revision to Regulation (EU) No. 1025/2012 on European standardisation

I/ Introduction

ACT | The App Association welcomes the opportunity to provide its comments to the European Commission's revision to Regulation (EU) No 1025/2012 on European standardisation. Open and consensus-based standards are a key component of the European Union's (EU) strategic autonomy and technological capacity across all sectors. The App Association supports a standardisation framework that incentivises innovation, scale-up, and increased distribution of European products while reducing national-level fragmentation.

The App Association is a not-for-profit trade association located in Brussels, Belgium. Our members are entrepreneurs, innovators, and independent developers within the global app ecosystem that engage with markets across every industry. We work with and for our members to promote a policy environment that rewards and inspires innovation while providing resources that help them raise capital, create jobs, and continue to build incredible technology.

Our members rely on standardised technologies, including those developed in European Standardisation Organisations (ESOs)—CEN, CENELEC, ETSI — to grow and innovate and are committed to European leadership in innovation, competition, and transparency. Alongside the rapid adoption of mobile technologies, our members develop innovative applications and products that improve workplace productivity, accelerate academic achievement, monitor health, and support the global digital economy. Today, the ecosystem the App Association represents—which we call the app economy—is valued at approximately €95.7 billion and is responsible for more than 1.4 million jobs in the European Union (EU).¹ Many of our members create internet of things (IoT) devices. The IoT ecosystem is expected to generate €12.5 billion for the global economy by 2030, significantly contributing to economic growth and job creation within the EU.² The IoT sector relies heavily on the seamless licensing and implementation of standard-essential patents (SEPs). Unfortunately, the IoT market is 'very fragmented, competitive and cost sensitive'.³

The App Association appreciates the opportunity to provide its views on the European Standardisation Regulation. The Commission has an opportunity to respond to actual market needs and make meaningful improvements to the Regulation. Any amendment to the European Standardisation Regulation should be a further step to align the European standards ecosystem with the European goals of small business innovation across

¹ See https://actonline.org/wp-content/uploads/220912_ACT-App-EU-Report.pdf.

² See Impact assessment accompanying the proposal for a regulation of the European Parliament and of the Council on standard essential patents and amending Regulation (EU) 2017/1001, Page 10

³ Ibid, Page 14

markets.

II/ General Feedback on a revision to the Regulation (EU) No. 1025/2012 on European standardisation

Standardisation can and should be a driver of European growth, competitiveness, innovation, and resilience. The App Association supports European leadership in global standards as well as the digital transition and, thus, welcomes the European Standardisation Strategy (ESS). As a public-private initiative, the ESS allows relevant stakeholders to develop balanced and market-driven standards. Improving the agility and governance of the European standardisation system is crucial to European small business growth and job creation, and we appreciate the Commission's focus on ways to improve the existing system. A faster, more responsive, and efficient European standardisation system will indeed strengthen the Single Market and assist the EU in meeting its goals for both the green and digital transitions. However, ensuring a balanced system should remain a top priority for the Commission when considering any amendments to regulation 1025/2012.

To develop infrastructure to increase inclusivity in standards processes, as well as further steps to provide certainty in fair and open approaches to standards participation, we urge the Commission (and ESOs) to address critical barriers at each point in the standard setting process:

1. **Making the case for standards.** Small businesses are often forced to focus on their product development and day-to-day operations and need help in understanding why the standards they can contribute to and rely on are so important. ESOs already do important work in this department, and its implementation of the Commission strategy should build on those efforts to connect with small businesses across the country, and across verticals and use cases, to advance an appreciation of why participation in and use of standards are in their interest. The Commission should work with ESOs and private-sector groups to develop a pipeline and augment resources and tools to regularly provide EU stakeholders, including micro, small, and medium-sized enterprises (MSMEs), with public information about standardisation activities more quickly and efficiently. While larger companies may be more involved and educated about all stages of the standards-setting process, many small and medium-sized EU innovators face resource asymmetries that prevent them from being informed about important standardisation activities, including in the standards development process. MSMEs generally have a more difficult time tracking the standards process, including what standards are applicable to them. MSMEs require direct outreach and educational opportunities from government and private-sector groups.
2. **Augmenting awareness tools and efforts that track standard development activities.** Such activities will primarily benefit smaller entities that do not have the bandwidth or resources to track standardisation activities relevant to them. Tracking

these developments is a major challenge for small businesses, and we commit to collaborating with the Commission, ESOs, and other stakeholders to help the micro, small, and medium-sized enterprise (MSME) community together.

3. **Directly supporting small business standards development participation.** Despite being important innovators in critical and emerging technology (CET) standards, MSMEs face financial, bandwidth, and experience constraints, which prevent them from participating in the standards process. MSMEs are stunted in the standardisation process without further support. There are several ways that the Commission strategy can and should support small business participation in standards directly. First, the Commission and ESOs should provide financial resources to small EU businesses to robustly engage in standards processes relevant to them to address the resource constraints our community faces. But also, ESOs can do much to remove barriers to participation: as a leading example, because the Commission and private-sector stakeholders are more likely to participate in international standards where relevant standards meetings are accessible, the Commission should work to enable international ESOs to host standards meetings and activities in the EU by identifying what international standards are critical for EU innovation, how to support their activities in the EU, and what obstacles ESOs might face to host standards meetings and activities in the EU, including visa and other travel restrictions.
4. **Providing certainty to the standard-setting organisations the Commission accredits/oversees** by resolving uncertainties with respect to the incorporation by reference of standards into regulation, and in providing partnership and guidance on what a pro-competitive framework for standards development is, with the room for flexibility to craft policies that respond to unique needs of a given SSO's membership.⁴
5. **Mitigating well-demonstrated barriers to the use of standards**, which most acutely impacts small businesses that lack the resources of large companies with vast legal departments and budgets. Our community has, and is increasingly facing, abusive tactics by those who voluntarily infuse their patents into open standards with a promise to provide fair, reasonable, and non-discriminatory (FRAND) licenses to those patents, which are required in order to use the standard itself. As the EU government has already recognised, some of these SEP barriers are being driven by gaps and ambiguities in EU and ESO policies, while others are being exacerbated by domestic policies in important markets abroad.

In general, a patent holder has the right to exclude others, for the term of the patent and within the territory or territories the patent is issued in, from commercially making, using, distributing, importing, or selling their protected invention, unless their consent is otherwise given. However, when a patent holder volunteers their

⁴ E.g., <https://actonline.org/2021/11/15/fifty-two-small-business-members-of-act-the-app-association-affirm-their-support-for-ieee-sas-2015-patent-policy/>.

patented technology to a technical standardisation process, they are placed in an inherent gatekeeper position to the use of the standard based on their claims of essentiality (in other words, one cannot implement the standard without exercising the patent claimed as essential to it). These patent holders will therefore agree to curtail some of these rights, in an open commitment to the ESO), agreeing to make the patent available to anyone seeking to use the standard on FRAND terms in order to ensure that anyone can use the standard. Therefore, by contributing to the standardisation process, a SEP holder understands and agrees to not exclude others, including competitors, from innovating on top of a technical standard past requiring a FRAND license. As we have discussed above, the effects of SEP-related abuses are most pronounced on the small business community and without targeted action to address rampant SEP abuses across CET markets, the goals of the Commission strategy will be significantly undermined. We have attached the App Association's position paper on ***Standards, Patents, and Competition Policy to Drive Small Business Innovation*** as an appendix to these comments.⁵ We also include ***CEN/CENELEC Workshop Agreement (CWA), Core Principles and Approaches for Licensing of Standard Essential Patents***,⁶ a comprehensive discussion of the central role SEP licensing plays in the success of standards, including CET standards, and recommendations on how ESOs and government policies can and should promote competition across markets leveraging standards to promote competition and innovation.

SEP licensing abuse is a significant threat to the success of the EU's standards system; in a recent study by Charles River Associates (CRA) asking a sample of businesses about the current SEP landscape, 73 per cent of respondents stated that they would support government intervention to ensure that SEPs are being licensed on FRAND terms.⁷ Further, a recent paper conducting research on practicing entity versus non-practicing entity (NPE) opportunism in technical standards found that NPEs leverage the standards development process to abuse the market later by declaring their patents 'essential' to the standard late in the development process, which often puts into question whether their patents are truly essential or valid.⁸ The research notes that while large technology companies hold principal control of the standards development process, more than two-thirds of SEP enforcement during the study were from NPEs.⁹ This evidence only strengthens the concern for patent privateering, which holds that practicing patent holders are off-loading potentially weak or invalid patents to NPEs, to assert against unfavorable market competitors and strengthen the practicing entity's ability to

⁵ This App Association position paper is included as **Appendix 2**.

⁶ Available at <https://2020.standict.eu/sites/default/files/CWA95000.pdf>, and included as **Appendix 3**.

⁷ Buehler, Dr Benno and Zimmermann, Samuel, SEP Licensing in the United States: Understanding the impact on U.S. business: U.S. Business Survey (March 9, 2023), Charles River Associates, <https://media.crai.com/wp-content/uploads/2023/03/10163335/ACT-US-Business-Survey-Report-2023-03-09.pdf>.

⁸ Love, Brian J. and Helmers, Christian, Are Non-Practicing Entities Opportunistic? Evidence from Litigation of Standard Essential Patents (August 4, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4540908.

⁹ *Id.*

control to market. If the EU is not a strong participant in standards development, monitoring and taking steps to prevent opportunistic SEP holder behavior, its critical markets will cripple to the detriment of EU businesses and consumers. SEP abuses that undermine standards are therefore trade barriers.

The Standardisation Regulation gives a central role to the ESOs CEN, CENELEC, and ETSI, which are the only entities allowed to develop European standards in support of EU legislation. The App Association agrees with the Commission that ensuring a balanced stakeholder representation within the ESOs is of great importance and their work relies primarily on industry efforts and industry engagement is what generates standards. Thus, industry representation and meaningful inclusion in the relevant decision-making processes in ESOs are essential for the development of harmonised standards in Europe. The inclusion of private sector stakeholders increases transparency and openness in the standard development process and guarantees the technological practicability of a standard.

The App Association thus cautions against any rules that govern ESOs, as such a unilateral change of the system, risks prioritising political over technical considerations in the standard development process. The Commission and the Member States already have the power to define the content of the standardisation requests through the Committee on Standards. ETSI and its members can choose whether they will accept the request or not. National standards organisations and representatives of national governments at ETSI already approve harmonised standards through the European Standard Approval Procedure (ENAP) of national votes. Thus, giving national standardisation bodies from the EU and European Economic Area (EEA) the exclusive power to make key decisions in the approval of standardisation requests, work items, and standards in support of EU legislation will practically exclude industry stakeholders from these decisions, making the standardisation process less inclusive. Industry stakeholders provide important expertise and practical insights to standard development, and their participation ensures that standards are market-driven, voluntary, and global. Convening global industry to collaborate in Europe through ESOs like ETSI or projects like 3GPP has generated international standards, which increase Europe's competitiveness. The App Association, thus, believes that such rules will not improve the governance in the European standardisation system. Although these national bodies consist of relevant stakeholders in a Member State, they do not have the resources to carry out the additional responsibilities proposed by the Commission. All European and global contributing partners should be able to actively participate and collaborate in strategic partnerships with each other.

While we recognise the need for ESOs to develop standards at the request of the Commission and the value of the resulting standards to European consumers and the competitiveness of European enterprises, we strongly urge the Commission to avoid creating any Europe-specific standards that prioritise political considerations and compete with bottom-up developed international standards. Such Europe-specific standards may create technical barriers to trade that inhibit product interoperability and negatively impact

European competitiveness by stifling the growth of European companies, particularly of MSMEs. Isolating Europe from international standardisation comes with several risks, such as the development of lower quality or outdated standards that harm businesses and consumers alike. The number and variety of industry experts who participate in standard-setting processes is one of the biggest advantages of current standardisation as their input ensures maximum safety and security and delivers the highest quality standards for European citizens to enjoy.

Heightened inclusivity in the standardisation process is especially important for MSMEs that are too often unaware of or unable to engage in ESOs despite heavily relying on the standardised technologies those ESO processes produce. While we appreciate the Commission's intent to increase MSME participation in standardisation, we believe the proposed amendment could decrease greater participation by small businesses by giving national bodies more decision-making power. Additionally, participating through national standards organisations (NSOs) could be more expensive for MSMEs and reduce their opportunities to influence European standards. Since there are more layers of decision-making in each NSO that are based not only on technical merits, going through NSOs creates another barrier for companies that want to participate in standards work at ETSI. This change could make the process more complicated and is, therefore, less inclusive and slower, making it practically impossible for MSMEs to be represented in each NSO member of ETSI. We encourage the Commission to conduct focused outreach to new communities of startups and small businesses that would benefit from participating in European standardisation, including connected IoT technology software and hardware developer communities, and task national bodies with doing the same. The Commission should further instruct national bodies to provide additional subsidies for participation fees and expenses in any way possible. Enhanced outreach and subsidies would significantly advance the EU's priority for a vibrant and effective European standards ecosystem. Keeping the European economy connected to global standardisation efforts will allow European small businesses like our members to scale up, compete, and create jobs.

Additionally, we want to highlight the unique skills and expertise that startups and small businesses, particularly in the digital sectors, bring to the development of solutions based on open source software. The increasingly frequent interplay of open source software solutions and standards development provides the Commission with a unique opportunity to express support for the use of open source software solutions in conjunction with technical standards and specifications development.¹⁰ We encourage the Commission to take this opportunity in revising the Regulation on European standardisation to endorse using open source software along with the development of technical specifications and standards. Doing so will advance Europe's continued strong leadership in solutions based

¹⁰ The EC has stated in its 2022-issued EU Strategy on Standardisation that 'The standards of the future should move from texts to machine-readable formats, which are more user-friendly, in particular for MSMEs. The Commission will support this transition. In addition, it will call upon European standardisation organisations to integrate open-source solutions into their activities, which can provide SMEs with quick inter-operability solutions in the uptake of technological solutions.'

on open source software, the most striking example of which is the development of the World Wide Web.

The App Association urges the Commission to use this opportunity to strengthen the European standardisation system's ability to generate solutions from the bottom up via the consensus of the private sector, civil society, and technical stakeholders. ESOs should work towards harmonisation between European and global standards to advance the use of European standards globally and strengthen the European economy in the long term. To this end, we also encourage the Commission to further advance EU stakeholders' participation in international consortia and fora including, but not limited to, the International Telecommunications Union (ITU), the International Organization for Standardization (ISO), the International Electrotechnical Commission (IEC), the Organization for the Advancement of Structured Information Standards (OASIS), the World Wide Web Consortium (W3C), and IEEE. Further, we generally encourage the Commission to design its policies to complement bilateral efforts such as the EU-U.S. Trade and Technology Council's working group on technology standards cooperation, and others. The Commission should take all steps practicable to ensure that standards governance is open and accessible. Considering the Commission's plans to create a hub for EU excellence in standards as well as the appointment of a chief standardisation officer (CSO), we encourage the Commission to include industry representatives in the excellence hub's decision-making processes. While the hub and CSO could be useful to coordinate and carry out EU-wide standardisation efforts, we want to emphasise that these activities should not compete with existing ESO responsibilities, to avoid unnecessary complexities and confusion, which would further disadvantage small businesses navigating the standards ecosystem.

We also note that in launching a review process of national measures to increase inclusiveness, the Commission has an opportunity to ensure that ESOs, as well as national bodies, pay attention to harmful licensing practices that could hurt European entrepreneurship and innovation by gaming the standards system. App Association members in Europe and around the world continue to face anticompetitive behaviour from certain aggressive SEP licensors that leverage ambiguities in standards organisations' intellectual property rights (IPR) policies. For example, those SEP licensors systematically disregard their voluntary commitments to standards organisations to provide licences to any licensee on FRAND terms. They seek to exclude MSMEs from the market to extract supra-FRAND terms, often by striving to exclude products at the end of the supply chain from European markets through injunctive relief. While such well-documented and cross-sectoral abuses are currently being discussed in parallel Commission policy initiatives, it is critical to provide European standards bodies with guidance on how to address standard organisation participants' practices that discourage the use of European standards.¹¹ The

¹¹ We urge the Commission to rely on CWA 95000:2019, 'Core Principles and Approaches for Licensing of Standard Essential Patents,' available at <https://2020.standict.eu/sites/default/files/CWA95000.pdf>. This document (a) provides educational and contextual information regarding SEP licensing and the application of FRAND, (b) identifies and illustrates some of the questions that negotiating parties may encounter, and (c) sets

App Association urges the Commission to supplement this guidance by pulling back the request to withdraw the proposed regulation on standard-essential patents, which addresses important competition issues in SEP licensing disputes that holds the EU back from leading in the development standardised technology.¹² The Commission must reinforce that European standards processes and European standards themselves should be available for use by any interested stakeholder on truly FRAND terms.

Clarifying the European Standards Regulation to reflect the above will ultimately benefit the European digital industrial transition and boost the global competitiveness of EU industries, as the whole European industrial community should be able to benefit from the innovations developed for a standard. Although it might be easy to perceive the issue of SEP/FRAND licensing as limited to the telecom industry, the increasingly connected nature of every industry means that it will be an issue impacting almost every aspect of the European economy before too long.

III/ Conclusion

The App Association welcomes the opportunity to submit feedback to the European Commission's proposal for an amendment to Regulation (EU) No. 1025/2012 on European standardisation.

We believe the proposed amendment will ultimately harm the inclusivity, transparency, and openness of the European standardisation process. To benefit the European digital industrial transition and boost the global competitiveness of EU industries, the whole European industrial community should be able to participate in standardisation and benefit from the innovations developed for a standard. The amendment risks excluding important industry stakeholders, including standard implementers, threatening the timeliness and effectiveness of standard development processes in ESOs. The App Association again emphasises that the Commission should actively encourage and enable MSMEs to play a role in developing standards and ultimately achieving the European Industrial Strategy.

We thank the Commission for its consideration of our comments and look forward to future engagement and discussion on the topic of standardisation.

Sincerely,

forth some of the key behaviours and “best practices” that parties might choose to adopt to resolve any SEP licensing issues amicably and in compliance with the FRAND obligation.

¹² See Position of ACT | The App Association on the Regulation of the European Parliament and of the Council on standard essential patents and amending Regulation (EU) 2017/1001 (June 2024), https://actonline.org/wp-content/uploads/05.31.2024_ACT-Position-Paper_EU-SEP-Regulation-.pdf.

A handwritten signature in black ink, appearing to read 'Mike Sax', with a long, sweeping underline.

Mike Sax
Founder and Chairperson

Brian Scarpelli
Senior Global Policy Counsel

María Goikoetxea Gómez de Segura
EU Policy Manager

Priya Nair
Senior Intellectual Property Policy Counsel