Cabinet of Ms Eléonore Simonet
Minister for the Middle Classes, the Self-Employed and SMEs
Mr Rudy Volders, Chief of Cabinet

Brussels, 10 July 2025

Dear Mr Volders,

It was a pleasure speaking with you last Tuesday. As discussed during our conversation, European SME innovation cannot survive without the solutions outlined in the proposed Standard Essential Patent (SEP) SEP Regulation. The proposed Regulation addresses the current imbalances and lack of transparency in the SEP licensing landscape. With limited resources, small and medium-sized enterprises (SMEs), startups and scaleups, face exceptional challenges to attain fair, reasonable, and non-discriminatory (FRAND) licenses from a handful of SEP holders that routinely abuse their monopolistic position within a standard, in spite of their voluntary commitment to provide licenses to all willing innovators on FRAND terms.

As SEP discussions take place in the Council and within your Ministry or with SEP holders, it is important to consider the myths about SEPs and the proposed Regulation that distract from the importance of this legal framework for European innovation and economic growth writ large.

Myth 1: We need more evidence of the existing issues.

We acknowledge the crucial role of well thought-out regulations and evidence-based interventions. In the context of SEPs, it is clear and evident that the current SEP licensing landscape is distorted to favour abusive SEP holders. The Commission's unwavering commitment to addressing these challenges spans over three decades, marked by a series of meticulous steps towards rectification. The proposed SEP Regulation stands as another step towards fortifying existing European legal frameworks.

It is essential to recognise that standardisation, while fostering efficiencies and cost reductions, inherently introduces an artificial market distortion, creating a power imbalance that favours SEP holders. While we wholeheartedly support the positive aspects of standardisation, it is crucial to acknowledge that standardisation limits options by excluding other competing patents, resulting in a monopolistic position for SEP holders within the standard. Consequently, SEP holders control access for innovators seeking to incorporate standards into their products.

With great power comes great responsibility**.** We are strong advocates for international standardisation as long as there are strong frameworks in place to ensure that such artificial market distortions do not cause negative effects to innovation and SMEs. In return for guaranteed international licenses to SEP holders (in the case of successful international standards), they volunteer to follow special rules that make sure they do not abuse their market power. Standards-development organisations (SDOs) generally require SEP holders to commit to licensing their SEPs on FRAND terms. This aims to prevent SEP holders from charging excessive and abusive prices for their SEP licenses. However, this commitment is ineffective without proper market transparency around SEP licensing terms and prices supported by guidance and strong enforcement.

The Commission demonstrated in detail the existing distortions in SEP licensing in its impact assessment[1] accompanying its proposed SEP Regulation. On pages 66-70, the Regulation explored in

[1] SWD(2023)124 - 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, paragraph 499

depth the unique challenges faced by SMEs. Moreover, UK Courts have found that SEP holders routinely overcharge SMEs, in the landmark court case *InterDigital v. Lenovo*, and others.

Myth 2: The Regulation does not benefit Europe

It is crucial to recognise that the majority of SEP holders operate beyond EU borders. The proposed SEP Regulation would greatly benefit thousands of European innovators. According to the Commission's impact assessment, EU companies made up only 15 per cent SEP ownership shares in 2021. In contrast to such ownership, the Commission found that approximately 3,800 companies implement standards subject to FRAND commitments in the EU. Such firms employ around 2.2 million people and have a combined turnover amounting to approximately 600 billion EUR.[2]

Supporting European SEP holders should not come at the expense of the broader economy that forms the backbone of the EU's innovation ecosystem. Many of tomorrow's global technology leaders are today's startups and small businesses. If we are serious about fostering European champions, we must support the SMEs that are striving to scale their solutions and compete globally. Moreover, we must not forget the strategic significance of the European internet of things (IoT) sector, a vital pillar of the EU's Digital Strategy. Ensuring fair access to SEP licenses is crucial for allowing this sector to thrive and drive digital transformation across the continent.

Furthermore, fears about foreign companies (especially Chinese firms) exploiting lower EU licensing rates are unfounded and dangerously backward. In fact, Chinese-based companies are among the most active global patentors, and Asia-based businesses now hold the majority of SEPs. The ability of these businesses to charge high rates, bar EU competitors from the market through injunction, or even prevent EU-based SMEs from even taking a license is the more likely outcome. They are well situated to ignore FRAND and profit from the opacity and imbalance in the SEP market. While refusing to adhere to FRAND terms, these foreign companies are extracting disproportionate licensing fees from European licensees, effectively funneling value out of the EU economy. The Regulation, by restoring fairness and transparency, is in fact a step toward protecting European businesses from this ongoing capital outflow.

By ensuring truly FRAND licensing of SEPs, the proposed EU SEP Regulation emerges as a catalyst for fostering growth and innovation, positioning the EU as a global leader in the evolving landscape of technology standardisation. The proposed EU SEP Regulation is in line with EU's competitiveness mandate as it would allow European innovators to get licenses in a much more transparent way.

Myth 3: SMEs are not affected

This myth is unfounded. Many SMEs are directly impacted by SEP licensing, particularly those operating in innovative sectors such as IoT. These businesses, often small startups and scaleups, integrate technologies that are covered by SEPs into their product, making SEP licensing a necessity not an option.

In line with this, the claim that SEP holders only pursue large corporations and leave SMEs alone is misleading. There are documented cases where SEP holders have targeted SMEs directly. For example, in the dispute between InterDigital and Lenovo, the UK court found that 'third and most importantly of all, the sizes of the volume discounts said to be used by InterDigital plainly discriminate against smaller licensees, which is exactly what FRAND is supposed to avoid'.[3] In the European Commission's

[2] SWD(2023)124 - 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 8.
[3] https://actonline.org/2023/05/18/landmark-court-case-in-uk-highlights-sep-abuses-of-smes/

impact assessment, one "SME reported, 'we received multiple SEP licensing requests. Some SEP holders have litigated (one litigation cost amounted to tens of thousands of Euros, more than the few thousand Euro value of the license it concerned). We have taken several licenses, but we know we have unfairly paid much more than others'.[4]

Unfortunately, data is limited for many reasons. SMEs do not have resources to engage in litigation. The lack of public court cases involving SMEs is not proof of absence of a problem, but it is proof of a broken system. The reality is that most SMEs simply cannot afford the cost of prolonged legal battles over SEP licensing. For them, litigation poses an existential threat. The mere threat of injunctions can coerce small companies into settling for non-FRAND (fair, reasonable, and non-discriminatory) licensing terms or abandoning their products altogether. Additionally, non-disclosure agreements (NDAs) prevent licensees from evaluating whether similarly situated entities were offered comparable licenses, making the whole licensing landscape opaque and making it difficult for SMEs to secure investments, especially from risk-averse European investors. The European Commission's impact assessment also stated that '82% of SMEs in the targeted survey stated that they do not have resources to negotiate with SEP holders or engage in court proceedings'.[5]

In summary, SMEs are adversely affected by the current licensing landscape.

Myth 4: The Regulation is intrusive and will have negative effects

As stated before, markets are currently distorted, and the Regulation aims to fix this. The Regulation is modest, and it simply reinforces the SEP licensing rules which are already in place. The Regulation codifies established principles, such as the obligation to license on FRAND terms, the rules established by the *Huawei v. ZTE* judgment on injunctions, and the European Commission's 2017 guidance on SEP licensing practices. Rather than introducing new obligations from scratch, the Regulation provides the necessary enforcement tools and transparency mechanisms to make these existing commitments more effective and predictable.

The Regulation, if enacted, will foster a healthier environment for innovation across the EU. By promoting fairness and transparency in SEP licensing, it lowers the barriers for SMEs and startups to participate in standard-based markets. In sectors like IoT, where small device manufacturers must license numerous SEPs to compete, the current lack of transparency creates legal and financial uncertainty. This Regulation provides a clearer, more predictable framework that will allow innovators to move forward without fear of coercive licensing tactics or abrupt injunctions.

It is entirely legitimate that SEP holders are compensated for their research and development (R&D) investments, but this compensation must remain aligned with their FRAND commitments. Fair remuneration ensures a healthy return on investment and supports continued innovation. Crucially, a transparent and predictable licensing system will increase revenue opportunities for SEP holders. With better trust in the system, more SMEs are likely to adopt standards and license SEPs, resulting in broader diffusion and greater licensing activity across markets.

Another concern voiced is that the Regulation may discourage patent holders from contributing to standardisation. This is unfounded. Being included in a widely adopted standard grants the patent holder massive commercial benefits: near-guaranteed global licensing opportunities and a temporary

[4] SWD(2023)124 - 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 17.
[5] SWD(2023)124 - 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 16.

monopoly over the patented technology within the standard. This privileged position means all companies wishing to implement the standard must license that specific SEP, without competitors. In fact, SEP holders regularly compete to have their patents included in standards precisely because of these lucrative advantages. That incentive remains untouched by the Regulation.

Innovation and standardisation will remain valuable and well-compensated endeavours. However, if the motivation to join a standard is rooted in the ability to abuse a monopolistic position, through excessive pricing or aggressive legal threat, then that is precisely the behaviour the Regulation seeks to curb. SEP holders acting in good faith, abiding by FRAND principles, and engaging in responsible licensing should not feel threatened by this legislation. Only those relying on opaque and exploitative practices stand to be challenged.

Finally, some critics have claimed that aggregate royalty determinations equate to governmental price setting. This is a distortion. The purpose of aggregate royalty assessments is to ensure that the total cost of licensing all SEPs for a given standard remains within reasonable, FRAND-aligned limits. These measures do not impose arbitrary price caps; rather, they seek to prevent individual SEP holders from leveraging their position to extract monopolistic rents that far exceed fair market value. In this way, aggregate assessments are a tool for fairness and market integrity, not an instrument of top-down pricing.

Myth 5: The Regulation infringes on European fundamental rights

As discussions around the SEP Regulation have evolved, some critics, while conceding that SEP licensing markets are problematic, have shifted their focus to specific legal objections. In particular, they argue that elements of the Regulation infringe on European fundamental rights, especially those related to patent protection and access to justice. As Enrico Bonadio quotes in his article: 'Article 17(2) protects rights and not the system. It is not an immunity from legislative change'.[6] However, these arguments do not withstand scrutiny when placed in the context of established EU legal principles and case law.

One of the most commonly raised objections is that the Regulation infringes on patent rights, which are protected under EU fundamental rights frameworks. However, like all fundamental rights, patent rights are not absolute. The Charter of Fundamental Rights of the European Union allows for limitations on rights where they are justified, proportionate, and necessary to meet objectives of general interest, including ensuring fair competition and protecting innovation ecosystems. This principle is well established in EU jurisprudence and legal scholarship. Furthermore, EU competition law has a long track record of recognising that intellectual property rights can be restricted in cases where they are exercised in an abusive manner, particularly when used to reinforce or exploit a dominant market position. Several decisions by the European Commission and the Court of Justice of the European Union (CJEU) have upheld the idea that IP rights must be balanced with competition policy objectives. For example, in *Magill* the CJEU confirmed the earlier conclusion of the General Court (GC) that the refusal by the relevant organisations in the UK and Ireland to grant licenses to third parties to reproduce their copyright television schedules was abusive, as the exceptional circumstances set out in *Volvo v. Veng* had been met.[7] The court took a step further in *Bonner*, where it held that the test for absence of any potential substitute is only met where there is no viable alternative that can be objectively sustained on the market.[8] The SEP Regulation follows this same legal logic.

[6] https://www.politico.eu/sponsored-content/proposed-sep-regulation-is-a-boost-for-eu-innovation/
[7] Cases C-241 and C-242/91 RTE and ITP v Commission, judgement of 6 April 1995.
[8] Case C-7/97 Oscar Bonner Gmbh & Co v Mediaprint Zeitungs und Zeitschriftenverlag GmbH, judgment of 26 November 1998.

Another legal concern raised is that the Regulation would violate a SEP holder's fundamental right to be heard by restricting access to injunctions. However, this misrepresents both the content and intent of the proposal. The Regulation does not remove access to the courts. Rather, it introduces a temporary and proportionate stay on injunction proceedings, typically lasting up to nine months, to allow for an independent FRAND determination process to be completed. This ensures that potential abuses of injunction power do not unfairly harm implementers before fair licensing terms are properly established.

Such a pause is minimal when weighed against the potential damage caused by an abusive injunction, especially for SMEs and startups, where exclusion from the market even for a short time can result in catastrophic financial consequences. The *Huawei v. ZTE* decision already introduced important limitations on the automatic use of injunctions in the context of SEPs. The Regulation merely builds on this foundation and strengthens its application, particularly in jurisdictions like Germany, where courts have been criticised for circumventing these limitations. Notably, *Huawei v. ZTE* explicitly encourages out-of-court FRAND resolution mechanisms such as mediation or arbitration before judicial enforcement is pursued.

Critics also argue that FRAND determinations could simply run in parallel with enforcement proceedings, rather than delaying them. But this overlooks the reality of how disruptive injunctions can be, especially to SME implementers. Once an injunction is granted, a product may be forced off the market—resulting in the loss of customers, reputation, and revenues. For many small companies, whose business may depend on a single product, such an outcome could be fatal.

All in all, SMEs really need the SEP Regulation and would greatly appreciate the Belgian government's support. We hope the information provided has been helpful in clarifying both the challenges faced by SMEs and the need of the Regulation.

I remain available to answer any questions or provide further input as needed.

Thank you again for your time.

Sincerely,

Mike Sax
Founder and Chairperson
ACT | The App Association

https://www.slaughterandmay.com/media/segfnrr3/the-eu-competition-rules-on-intellectual-property-licensing.pdf