

# Kluwer Patent Blog

## FRAND Determination is Center Stage in EC Proposed Standard Essential Patents Regulation

Roya Ghafele (OxFirst) · Thursday, April 27th, 2023

The [Standard Essential Patents \(SEPs\) Regulation Proposal](#) also known as the IP Action Plan formally issued by the European Commission today suggests groundbreaking changes to the standard essential patent landscape as we know it.

The SEPs Regulation Proposal indicates the European Commission's desire to establish four major requirements for SEPs holders and implementers. These are to be administered by a new "competence centre", which is to be situated within the European Union Intellectual Property Office (EUIPO). The EUIPO is to (1) set up and maintain an electronic register and an electronic database for SEPs, (2) set up and administer a system for assessment of the essentiality of SEPs, (3) set up and administer the process for the FRAND determination and (4) administer a process for aggregate royalty determination. The proposal provides some important clarifications as to how this is to play out in practice.

SEPs holders may establish an aggregate royalty rate for the standard. This aggregate royalty rate is to be determined before the standard is adopted or – at the latest – 120 days after the standard development organization knows of a new implementation of the standard. Important to note is that such a valuation is not mandatory.

The EUIPO's competence centre can become involved if the contributors to any given standard cannot reach an agreement among themselves. In such circumstances SEPs holders can request the competence centre to assist them in reaching an aggregate royalty rate. The proposal gives six months from the appointment of the conciliators for this process to conclude.

If agreement has not been reached and an aggregate royalty rate has not been established by this time, the process is terminated. A SEP holder or implementer may also request the competence centre to deliver a "non-binding expert opinion" on a global aggregate royalty rate for the standard.

All stakeholders able to justify their participation will be allowed to make contributions to this specific IP valuation process. This means that this is the only opportunity for an implementer to be involved in the valuation of the aggregate royalty rate.

In the proposal the E.C. furthermore underlines the importance of essentiality checks. SEPs

registered will be sampled and checked for essentiality with the results of this check being published in the SEP register. Both implementers and SEPs holders will be able to request essentiality checks on up to a maximum of 100 registered SEPs annually. This offers some parity between the two sides of the SEP landscape in this regard.

If parties can't agree on a FRAND determination, they must engage in the services provided by EUIPO prior to initiating court proceedings in a Member State.

The proposal clarifies the FRAND determination process does not prejudice parties against seeking financial injunctions pending the FRAND determination, excluding seizure of property and seizure/delivery of products suspected of infringing the SEP.

Parties must indicate if they intend to (1) participate in the FRAND determination and (2) make a commitment to complying with its determination. In the event of non-participation or commitment by the responding party, the requesting party may choose to request for termination or continuation of the FRAND determination.

Should the responding party elect to participate and make the commitment to comply with the determination, the same questions are posed to the requesting party. The FRAND determination is to be made by one conciliator selected from a pool of three, in previous versions this was suggested to be made by two conciliators selected from a pool of five. So, this will reduce costs.

Perhaps the most significant change from the previously leaked draft is that the FRAND determination will concern a global SEP license, although SMEs are able to request to limit the territorial scope of the determination. It remains unclear how this FRAND determination will be made, but the focus on aggregate royalty rates for standards would indicate the competence centre might adopt a top-down approach.

The proposal released by the European Commission today will radically alter the European SEPs landscape. It is now put forward to European Parliament and European Council for adoption. It has already been controversial, and will no doubt continue to be so.

*Roya Ghafele is the Director of OxFirst and OxViews, which runs the 8th IP and Competition Forum on the 20th and 21st of June 2023.*

---

*To make sure you do not miss out on regular updates from the Kluwer Patent Blog, please [subscribe here](#).*

## **Kluwer IP Law**

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers think that the importance of legal technology will increase for next year. With Kluwer IP Law you can navigate the increasingly global practice of IP law with specialized, local and cross-border information and

tools from every preferred location. Are you, as an IP professional, ready for the future?

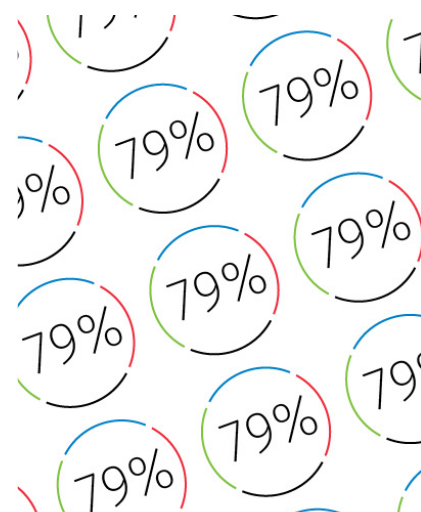
Learn how **Kluwer IP Law** can support you.

---

79% of the lawyers think that the importance of legal technology will increase for next year.

**Drive change with Kluwer IP Law.**

The master resource for Intellectual Property rights and registration.



2022 SURVEY REPORT  
The Wolters Kluwer Future Ready Lawyer  
Leading change

This entry was posted on Thursday, April 27th, 2023 at 11:43 pm and is filed under [European Union](#), [FRAND](#), [Legislation](#), [SEP](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.