



STANDARD ESSENTIAL PATENTS (SEPS) AND FAIR, REASONABLE & NON-DISCRIMINATORY (FRAND) LICENSING

BACKGROUND

CLEPA represents over 120 of the world's most prominent suppliers for car parts, systems and modules. CLEPA members consist of 23 National trade associations and European sector associations, which represent more than three thousand companies and employ more than 5 million people while covering all products and services within the automotive supply chain. Based in Brussels, Belgium, CLEPA is recognised as the natural discussion partner by the European institutions, United Nations and fellow associations (ACEA, JAMA, MEMA, etc.).

A vehicle consists of approximately 30,000 parts, components and systems, each of which are complex and technical by nature. It is thus not surprising that the automotive industry has accumulated a wealth of experience in patents and innovation, and, in many jurisdictions, automotive companies are the top applicants for patents.¹ The automotive industry, including its supply chain, has long relied on the traditional IPR rules and laws to protect innovation and the ability to obtain licences for typical automotive technologies. European automotive companies alone invest more than €30bn in R&D per year. Our members are concerned that traditional protections for patents are being misapplied in the context of SEPs, to the detriment of European industry, consumers, and innovation. SEP holders have made a voluntary commitment to license on FRAND terms, which created a legitimate expectation of the implementers that they will grant licences on such terms - as per the requirements set out by the EU Court of Justice when enforcing SEPs. To ensure effective access to a standard, SEP owners must offer to license their essential IPR to all third parties on fair, reasonable, and non-discriminatory terms.

¹ VALEO group and PSW were, for example, the top patent applicants in France in 2016 (*INPI – Les palmarès de déposants de brevets – Avril 2017 – p.3*).

CLEPA APPROACH

CLEPA applauds the European Commission's 2017 Communication on *Setting out the EU Approach to Standard Essential Patents* (the "SEP Communication") but is concerned that this approach is not being followed to the full extent by SEP-holders or even by some European courts. In addition to this, the partly incomprehensible way in which some German courts interpret the EU Court of Justice ruling in *Huawei v. ZTE* gives cause for concern that FRAND conditions are no longer achievable for implementers via negotiation due to the superior injunctive pressure exercised by SEP-licensors. Finally, CLEPA members are also concerned that, unlike most European automotive suppliers, there have been instances of non-European companies entering the European automotive market which have pre-existing telecommunications businesses with their own large SEP-portfolios and/or governmental/administrative support from their own countries outside of Europe. Absent a legal approach that ensures SEPs are available on true FRAND terms to all parties in the value chain, a substantial competitive disadvantage may arise for CLEPA members in the delivery of products implementing telecommunications standards.

Automotive is one of the first new industries outside of traditional telecommunications to encounter SEP licensing abuses, but it will not be the last considering the growth of IoT. The automotive industry's experiences to date and proposed approaches can inform the development of advantageous SEP policies and laws to advance European interests across the digital economy.

Our approaches to SEPs, which urgently needs to be adopted by policyholders and lawmakers who aim to preserve and protect European industry, jobs, and innovation, are as follows:

- Availability and valuation of SEP licences: Any company that requests a FRAND licence for the SEPs that are used in or infringed by the company's products should be entitled to obtain a FRAND licence, provided that the licensing terms must bear a clear relationship to the economic value of the patented technology also in conjunction with all the other technologies incorporated in the company's products. This value needs to primarily focus on the technology itself and in principle should not include any element resulting from the decision to include the technology in the standard. While determining a FRAND value, the present value added by the patented technology needs to be considered, irrespective of the market success of a product that is unrelated to the patented technology. FRAND valuation should avoid royalty stacking, and parties need to take into account a reasonable aggregate rate for the standard, assessing the overall added value of the technology, e.g. technology in conjunction with all the other technologies incorporated in the company's products.
- SEP injunctions: Generally, market exclusion undermines FRAND licensing. Proportionality principles should be applied in granting SEP injunctions. If parties disagree regarding SEP licences, those disputes should be resolved by the national courts, or, if mutually agreed, via arbitration without the threat of market exclusion,

especially where there are good faith disputes, and the licensee is willing to pay an established FRAND rate.

- Bundled licensing of SEPs: Initiatives to bundle portfolios of assessed SEPs for licensing, e.g., via patent pools, should be encouraged only if those pools strictly follow FRAND licensing practices, transparent conditions, and applicable competition law rules. Pools that exclude certain market participants from their SEP licence offer, or that seek excessive royalties contrary to FRAND principles, are not acceptable, as they violate FRAND and competition law.
- Transparency: Information and frameworks on the SEP landscape need to be made more easily accessible via improved SEP databases, essentiality assessments, reasonable framework conditions for NDAs in SEP negotiations, and/or encouraging publicly available SEP licence offers. Licence conditions should be made transparent as early as possible to ensure planning security for all market participants.
- Fairness in competition: Must be addressed to ensure a level playing field for all implementers of standardised technologies.

Standards such as 4G and 5G provide an important foundation for technological development. But innovation does not end with that. Companies such as CLEPA members invest, innovate, build and market next-generation products and must be permitted to build on top of standards under transparent conditions long before going to market so they may capture the value of their own innovations. At the same time, SEP owners must be entitled to the fair value of the SEP's. With the guidance above, CLEPA innovators have the certainty and predictability they need to reliably invest in their innovations.

Industry should not be prevented from placing new and/or improved products on the market.

CLEPA urges policymakers, courts, and other stakeholders to consider these principles, to apply them in practice, and to support keeping European businesses, innovations, and consumers free from abusive SEP licensing practices.

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CLEPA

CLEPA, the European Association of Automotive Suppliers, represents over 3.000 companies supplying state-of-the-art components and innovative technologies for safe, smart and sustainable mobility.

CLEPA brings together over 120 global suppliers of car parts, systems and modules and more than 20 national trade associations and European sector associations. CLEPA is the voice of the EU automotive supplier industry linking the sector to policy makers.

- The automotive sector accounts for **30% of R&D** in the EU, making it the number one investor.
- European automotive suppliers invest over **30 billion euros** yearly in research and development.
- Automotive suppliers register over **9,000 new patents** each year.
- Automotive suppliers in Europe generate **five million** direct and indirect jobs.