

EARTO's Views on the EC Communication on Standard Essential Patents

22 December 2017

The European Commission has recently released a [Communication](#) on "Setting out an EU Approach for Standard Essential Patents (SEPs)" in the EU. In the frame of the discussions on such Communication, EARTO had provided [inputs to the debate](#).

The 350 Research and Technology Organisations (RTOs) members of EARTO play an important role in the innovation ecosystem, covering all scientific fields, from basic research to new products and services development. RTOs are non-profit organisations with public missions to support society. They closely cooperate with industries, large and small, as well as a wide array of public actors. In this context, RTOs hold a high number of patents and are very active in Standard Setting Organisations (SSO), as they consider technical standards of paramount importance to the European innovation ecosystem.

With the publication of this Communication on Standard Essential Patents, EARTO experts thank the European Commission for the extensive work done on this Communication and for the balanced approach taken on this sensitive subject, key for our European competitiveness.

In addition, EARTO wish to point out areas that will need clarifications in future work to avoid giving room for misinterpretations that could be detrimental to our European Research & Innovation (R&I) ecosystem. This short paper aims at highlighting the issues that will need to be treated with care in the future.

1. Risks linked to 'smallest marketable component' or 'license to all' approach

The Communication did not express any preference for either the "*license for all*" or the "*usage-based licensing*" scheme, thereby favouring neither the business interests of technology implementers nor those of technology innovators. EARTO welcomes this neutral stance by the Commission. It leaves optimal freedom to market-driven pricing mechanisms. As acknowledged by the Communication, specific markets may require specific licensing schemes.

However, the Communication also includes the following sentence, which leaves room for interpretation: "*That value should be irrespective of the market success of the product which is unrelated to the value of the patented technology*". EARTO is concerned that the above sentence might be misconstrued and open the door to the counterproductive "license to all" scheme, with all the associated risks for the R&I ecosystem in Europe and more generally for European competitiveness.

In its previous paper, EARTO detailed some of the risks associated with the "license to all" scheme as follows:

- Price erosion of SEPs leads to a decreased cost-benefits ratio and such scheme may easily demotivate innovators, especially SMEs and research organisations like RTOs. This will in turn lead to a decrease in their participation in technical standardisation, with SME participation being already low as it is, and to a decrease in patent filings that could become essential to standards.
- Disruption of the current efficient technology transfer schemes from RTOs to industry. Our current technology transfer schemes distinguish between implementers, equipment manufacturers and components manufacturers, optimising specific market conditions. Imposing a "one price fits all" approach would impair this pricing mechanism. EARTO expects that this would have a downturn effect on technology transfer in Europe. In a context where EU RD&I policy aims to tackle Europe's scale up problems, this would be clearly counterproductive.

In addition, one of the role of IP is its ability to structure R&I partnerships between organisations by materialising and assessing (at least part of) the intellectual contributions to and the results of a partnership. Thereby, it structures and secures flows of knowledge exchanged between partners. During the standardisation process, research projects are carried out to develop and formulate the technical specifications of the standard. In this context, the above-cited risks linked to the "licence for all" scheme (lowering the royalties from SEPs which leads to a decrease of patent filing), could lead to less structured and coordinated research programs during standard development. In turn, those programmes might therefore cost more and be less efficient. This could considerably lower the return on R&I investments from Member States and the EU Framework Programmes. Going even a step further, diminishing R&I investments' returns in today's context where evaluation of impact becomes more critical would most

probably lead to significant cuts in future R&I programmes, leading to a stagnancy in technological development in Europe.

Finally, the above quoted sentence left in the published Communication goes more generally against international best practices for determining licensing fees, whatever the context. The best international practice is to determine the licensing fees from the specific market concerned, royalties being a part of the margin that the industrial operator will create by exploiting the license.

2. Risk of complexity of the standardisation process slowing the production of standards

The Communication contains some other dispositions that may complicate the standard-setting process, slow it down and further demotivate participants. This includes for example the Communication's proposal for essentiality checks:

- *"There is therefore a need for a higher degree of scrutiny on essentiality claims. This would require scrutiny being performed by an independent party with technical capabilities and market recognition, at the right point in time".*
- *"Depending on the outcome of this project, an independent European body could be tasked to proceed with SEP essentiality assessment".*
- *"In addition, a recent study undertaken for the Commission suggests that SDOs may consider introducing (modest) fees for confirming SEP declarations after standard release and patent grants, to incentive SEP holders to revise and maintain only relevant declarations"*

Not only would these dispositions slow down and complicate the standardisation process but would also further discourage and become a disincentive for SEP owners other than major companies to participate in technical standardisation. Indeed, the high involvement and ex-ante investment (time, money, resources) of those organisations in the standardisation process and in the internal and external costs of SEP filing (fees,...), which add to high ex-ante costs for R&D&I, need to be acknowledged and honoured by a fair return-on-investment. This especially holds true for SMEs and RTOs.

Globally, there is here a contradiction with EC's aim to motivate researchers to participate in standardisation and with [EC's 2008 recommendation](#) on the management of intellectual property in knowledge transfer activities and Code of Practice for universities and other public research organisations.

3. Risks linked to an imbalanced approach to Open Source Software (OSS) for standardisation

EARTO believes that the Communication does not address the open source issue in a balanced neutral way. EARTO is concerned that this would have unexpected detrimental results for our European R&I ecosystem. Indeed, the European Commission's Communication includes the following wording:

- *"The Commission supports open source solutions".*
- *"The Commission will work with stakeholders, open source communities and SDOs for successful interaction between open source and standardisation, by means of studies and analyses".*

EARTO members recognise the perspective that Open Source Software (OSS) might be of interest in some very selected fields, e.g. in eGovernment where data interchange is of paramount importance. However, EARTO members firmly believe that OSS is not suitable as a generic replacement for the existing IP-based standardisation processes as conducted by Standard Setting Organisations. This choice should be left to the stakeholders in the respective markets, wherever and whenever possible.

In this respect, EARTO wishes to make the following observations:

- EARTO members are not against the Open Source (OS) business model *per se*. In fact, most RTOs do publish certain code in Open Source and contribute to OSS projects. However, they consider OSS to be just one of the many instruments they need to achieve their innovation goals and societal impact. The technology landscape is always comprised of different IP (eg copyright, patents, trademarks, trade secrets) and is accessible through different models (eg proprietary, open source, mixed models).
- Before anything else, Open Source is primarily a business model for the exploitation of software. In digital fields, a standard is often a technical specification and not a software *per se*. Therefore, there is no reason to impose the business model of the means to govern a technical specification.
- In supporting OS licences as the preferred licensing model for software involved in digital standards, the EC Communication is therefore too restrictive in its analysis. This could hamper the development of the Digital Single Market by hampering innovation in Europe done by 1) the software industry itself (i.e. software publishing) as well as by 2) the RTOs' performing software/digital activities for/with the digital industry.

- In addition, there are some technical standards that cannot be described in plain language, but are themselves formulated as software, often as commented (C) source code. These are in fact “essential copyrights”. It is no more than logical to treat these “essential copyrights” in the same way as SEP’s. Being part of a standard, such sources should be published but not *per se* be available for free of charge use.
- Open Source in standardisation can have some similarities with “license to all”, especially OSS involving restrictive Open Source licences having a “viral effect” like the GPL (General Public License). Such licenses have the effect of contaminating proprietary code used in combination therewith. Furthermore, for similar reasons they tend to be exclusive and cannot be easily be combined with code under other OS-licenses. Therefore, these GPL - like licenses, may in fact hamper innovation. They also may disturb existing value chains, and therefore RTOs licensing schemes.

In this context, EARTO and its Working Group Legal Experts remain ready to participate in the studies and analyses proposed by the European Commission in its Communication for possible OSS implication in standardisation.

Finally, EARTO stresses that this Communication does not sufficiently consider the recent shift of US Federal Competition Policy towards Standard Setting Organisations (SSOs) in favour of IP holders¹.

EARTO and its Legal Experts remain ready to provide additional input on this topic and are available for further discussion with EU institutions to ensure a sustainable European regulatory framework for IPRs, SEPs and essential copyrights, which is crucial for technology transfer in the R&I Ecosystem and key to boost innovation-led growth in Europe.

EARTO - European Association of Research and Technology Organisations

Founded in 1999, EARTO promotes Research and Technology Organisations and represents their interest in Europe. EARTO network counts over 350 RTOs in more than 20 countries. EARTO members represent 150.000 highly-skilled researchers and engineers managing a wide range of innovation infrastructures.

RTOs - Research and Technology Organisations

From the lab to your everyday life. RTOs innovate to improve your health and well-being, your safety and security, your mobility and connectivity. RTOs’ technologies cover all scientific fields. Their work ranges from basic research to new products and services development. RTOs are non-profit organisations with public missions to support society. To do so, they closely cooperate with industries, large and small, as well as a wide array of public actors.

EARTO Working Group Legal Experts: *is composed of 25 corporate legal advisers working within our membership. Established in autumn 2013, this Working Group has also worked on the revision of the state aid rules & the GBER. Our experts also contributed to the setting-up of the DESCA Consortium Agreement model for Horizon 2020. More recently they were at the origin of the EARTO Paper on Open X, the EARTO Background Note on the US Federal Agencies Data Sharing Policies, and the EARTO Position Paper on the European Licencing Framework for Standard Essential Patents.*

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¹ [Speech of Makan Delrahim](#), US Assistant Attorney General and Department of Justice antitrust chief at USC Gould School of Law’s Centre for Transnational Law and Business Conference on 10 November 2017. See [EARTO Background Note – Shift US Competition Policy towards SSOs - Final.pdf](#)