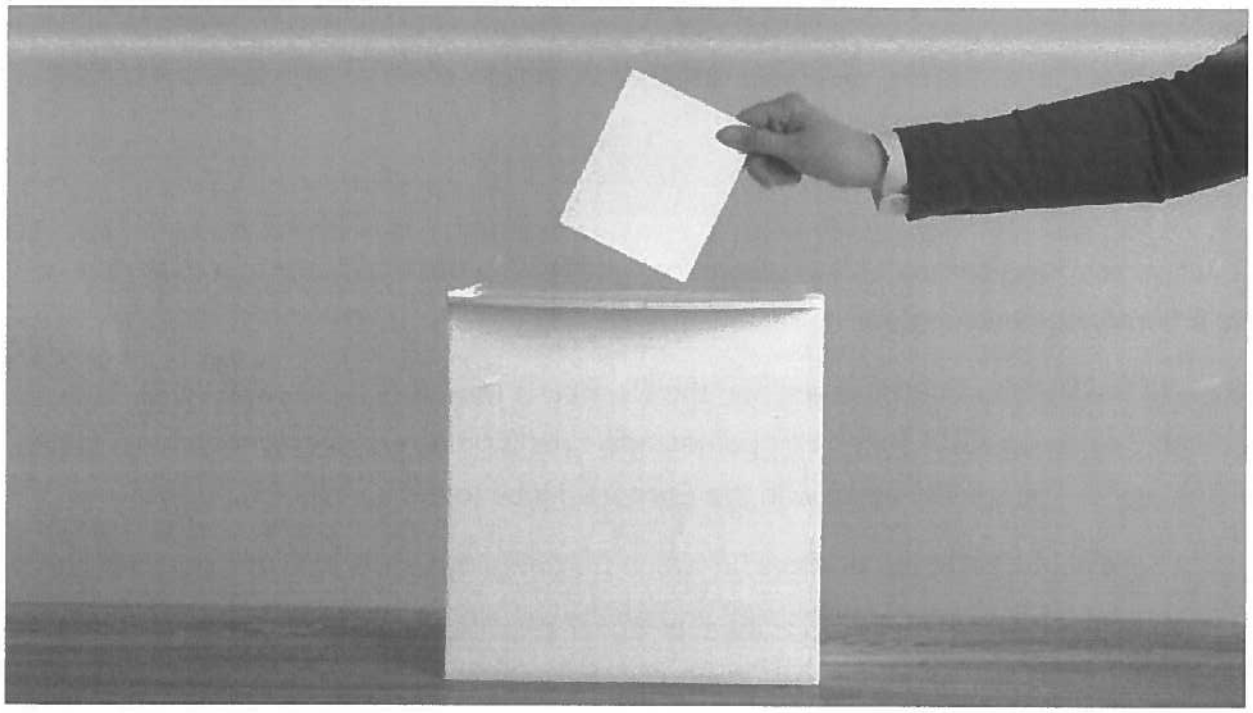
WORLD INTELLECTUAL PROPERTY REVIEW
wipr

Reaction: Do abstentions in EU Committee vote on SEPs put regulations in jeopardy?

25-01-2024

Sarah Speight



New Africa / Shutterstock.com

A vote adopting new rules is sending shockwaves through the tech patent industry—but a high number of abstentions shows that 'the debate is not over', finds Sarah Speight.

In a majority vote yesterday, January 24, the EU's Legal Affairs Committee (JURI) adopted its position on the controversial new rules to support standard-essential patents (SEPs).

The aim, according to JURI, is to "encourage SEP holders and implementers to innovate in the EU and create products based on the latest standardised technologies that will benefit businesses and consumers".

MEPs also agreed to establish an EUIPO competence centre, which would give the office "new powers to help reduce litigations and increase transparency".

But, perhaps predictably given the groundswell of opposition to the rules, the vote has been met with widespread consternation by industry and patent attorneys alike. In fact, there were strong calls from critics this week to ditch the amendments to what they call "fundamentally flawed" regulation.

Abstentions

Among the concerns is the fact that out of 23 members, 10 abstained—in other words, a silent "no", according to some commentators.

But JURI rapporteur Marion Walsmann said after the vote that the new rules "will bring much-needed transparency to an opaque system, make negotiations fairer and more efficient, and strengthen European technological sovereignty."

She claimed that in 5G, almost 85% of the patents are in fact non-essential.

"The new essentiality test will stop the occurrence of over-declaration and strengthen EU SEP holders´ position in global markets," she continued. "SEP holders will also benefit from an increased number of licences, faster agreements, more predictable returns, and a reduced risk of litigation."

Meanwhile, SEP implementers, "85% of which are small and medium-sized enterprises, will benefit from legal and financial predictability," she added.

"Major act of self-harm"

In a statement, patent licensing company Sisvel said the vote moves the EU closer to a major act of self-harm and is a "worrying development".

The firm added that if the European Parliament and the Council of Ministers agree with JURI, "the huge sums that highly innovative EU-based companies now spend on developing foundational global connectivity technology will be at risk, along with the European jobs that this R&D supports.

"What's more, the entire standardisation process, in which Europe plays such a pivotal role, will come into question. The impact on device interoperability and on the development of exciting new industry sectors in Europe, such as the IoT [Internet of Things], would be devastating."

IP Europe—which represents both SEP licensors and implementers such as Dolby, Nokia, and Qualcomm—believes that the vote threatens to undermine and diminish European technology leadership.

The coalition urges the European Parliament to take time over its decision when it comes to the plenary vote—something that is "especially important", it stresses, since MEPs have tabled more than 1,000 amendments to the proposed regulation.

IP Europe added that MEPs should take input from experts (such as the European Patent Office (EPO), the European Telecommunications Standards Institute (ETSI) and the Unified Patent Court (UPC).

To delve deeper into what the vote means, *WIPR* gathered more thoughts from industry leaders and patent attorneys.

Juliet Hibbert, of counsel, Bird & Bird: "The draft regulation shatters the very foundation of a patent…I expected the Committee to acknowledge and challenge this fundamental change to patent rights..."

"The draft SEP regulation as voted on by JURI still says that a SEP holder would be unable to start infringement proceedings in the EU if the SEP involved was not registered with the EUIPO, and if a FRAND [fair, reasonable and non-discriminatory] determination by the EUIPO has not been started.

"These are curtailments in the EU of the fundamental right of a patent owner, which gives the owner of the patent the right to stop others from carrying out the invention claimed. This is the very foundation of a patent, wherever in the world it exists.

"The draft regulation shatters this foundation. I expected the Committee for Legal Affairs to acknowledge and challenge this fundamental change to patent rights, but JURI suggested no amendments to the articles which dealt with these fundamental changes, and 10 of the 23 thought it better to abstain than vote—I can only wonder at that.

"We wait to see if this gets its reading before Parliament next month as expected and if so whether it gets Parliament's approval. However, even if it does, there are strong indications that the Council may not be as accommodating of this draft regulation, as more than 250 questions have been submitted by the Council to the Commission."

Patrick McCutcheon, managing director, IP Europe: "...the fact that all the political groups were divided is indicative that the European Parliament debate is not yet over."

"Yesterday was a red letter day but with an outcome that we were expecting.

"Those who abstained were politely saying they disagree. I understand that to be the case of the EPP [European People's Party] members—they didn't want to openly oppose the rapporteur.

"I understand that there is a division in the EPP and that they will be meeting subsequent to the vote to work out what their position for plenary is.

"We live to fight another day. I don't want to speculate on how the plenary vote will go, but the fact that all the political groups were divided is indicative that the European Parliament debate is not yet over.

"There is little point in discussing the merits and demerits of the compromise amendments, because collectively, they don't change the proposal. And that's the problem—we would have expected a legal affairs committee to look a little closer at things like compliance with access to justice, proportionality and compliance with the Charter on fundamental rights and international trade rules.

"If adopted, such a regulation would undermine the EU's complaint against China at the WTO, regarding anti-suit injunctions; [and] it undermines the recently launched UPC, which the Commission was championing for decades."

Tom Foster, patent litigation partner, Taylor Wessing: "...the vote may increase calls to take this off the table, until there's been a chance to have a more considered discussion about the

nature of the reforms."

"The vote is largely reflective of the divisive feedback that the proposals received so far. In that sense, it's probably not surprising and reflects that even within JURI, opinion seems to be divided.

"My understanding is that abstaining is equivalent to saying no. While procedurally, this is another step forward, will it in fact sow the seeds of doubt when this goes to the plenary parliament for a full vote, and then to the EU Council? It certainly doesn't seem to have been adopted with a lot of general enthusiasm.

"I think there's definitely still the chance of a turnaround. If anything, the vote may increase calls to take this off the table, until there's been a chance to have a more considered discussion about the nature of the reforms.

"My view is that the proposed regulations are particularly burdensome on SEP holders and would cause significant disruption to the licensing industry in the EU without sufficient explanation of why that's necessary."

Mattia Fogliacco, president, Sisvel: "...it is puzzling that the JURI MEPs have chosen to favour the interests of non-European big tech companies..."

"In an election year especially, it is puzzling that the JURI MEPs have chosen to favour the interests of non-European big tech companies—ones that European policy makers [are] frequently [accused] of avoiding paying their fair share of tax in Europe, while creating additional costs for companies based in and committed to the EU.

"We urge all MEPs to think very carefully before going any further with this damaging legislation. Sacrificing European technology leadership and security, imposing extra financial burdens on world class European businesses, and putting many well-paid European jobs in peril is not something that should be done lightly."

James Holland, managing associate, Mishcon de Reya: "...the 10 abstentions may provide an indication of how complex an issue this is to solve."

"This development will be welcomed by the many (including UK judges) who have criticised the dysfunctional state of the current system for determining SEP/FRAND disputes.

"However, there is still a long road to travel before any system takes shape—both in terms of the legal process, but also the significant hurdles to equip the EUIPO with the necessary resources.

"[These resources include] not only to create the proposed SEP Licensing Assistance Hub, but also to verify which patents are really essential to a particular standard.

"Although the Legal Affairs Committee adopted the new rules with no votes against, the 10 abstentions may provide an indication of how complex an issue this is to solve.

"The press release [from JURI] focuses on the emphasis on small and medium-sized enterprises and start-ups. These companies have not historically been parties to the expensive and time-consuming

litigation which has been the subject of criticism.

"It therefore remains to be seen whether the SEP Licensing Assistance Hub will be of benefit to them —particularly if it creates another regime that SMEs are required to learn, despite their limited resources."

Collette Rawnsley, head of IP policy, Nokia and chair of IP Europe: "...in the absence of empirical evidence justifying regulatory intervention, we believe the proposed regulation should be reconsidered."

"We support the Commission's objectives to provide greater transparency, efficiency and predictability to the licensing of SEPs, but we do not believe the draft SEP regulation or the European Parliament's proposed amendments will deliver on these goals.

"We agree with the Commission that standardisation is a key contributor to industrial innovation and competitiveness. Unfortunately, rather than make the EU attractive for standards innovation, this initiative threatens to undermine incentives for European firms to participate in open collaborative standards development.

"In fact, we believe it will be an 'own goal' for Europe. In these circumstances, and in the absence of empirical evidence justifying regulatory intervention, we believe the proposed regulation should be reconsidered."

X

Sign up for the newsletter

Receive daily emails from WIPR