ECIS European Committee
for Interoperable Systems

9 May 2022

EU CALL FOR EVIDENCE

NEW FRAMEWORK FOR STANDARD ESSENTIAL PATENTS

1. BACKGROUND ON ECIS

The European Committee for Interoperable Systems ("**ECIS**") is an international, non-profit association of information technology companies founded in 1989 which endeavours to promote a favourable environment for interoperable ICT solutions. For three decades ECIS has actively represented its members on issues relating to interoperability and competition before European, international and national fora, including the EU institutions and WIPO. ECIS' members include both large and small information and communications technology hardware and software providers, including IBM, McAfee, Opera, Oracle, and Red Hat. For further information, please see ECIS' website at www.ecis.eu.

2. FEEDBACK ON THE CALL FOR EVIDENCE REGARDING A NEW FRAMEWORK FOR STANDARD ESSENTIAL PATENTS

ECIS wishes to share its expertise which reflect our mission for over thirty years to ensure and improve the interoperability of ICT systems and thus oppose the lock-in effect that software and IT systems have effected through history. The avoidance of lock-in effects is important in order to avoid unnecessary socio-economic costs to Europe by not providing users and contributors with sufficient choice. We note with concern, the apparent lens through which innovation is seemingly still understood by some policy makers. By way of example, the first paragraph of the EU's consultation document includes a confusing reference whereby innovation is promoted by virtue of providing *exclusive* rights. As such, by omission, the risk arises that the alternative - of not using exclusive or exclusionary rights - is understood as being antithetical to driving innovation in Europe.

The role of open standards and open-source software to maximise socio-economic potential across Europe has never been so important. For instance, our collective wish to bounce back quickly post-COVID, embracing world class technology and solutions in full compliance with EU values and regulatory requirements to tackle major challenges from climate change to transforming public services (health, welfare, eGovernment) for European citizens. Nevertheless, ECIS posits that there remains, despite the open source definition's establishment over 20 years ago and Open Source Initiative's ("**OSI**") steadfast stewardship, a misunderstanding of open source licensing. By way of example, the consultation appears to still entertain the notion of Fair, Reasonable and Non-Discriminatory ("**FRAND**") as a panacea, whilst it fundamentally conflicts with those core freedoms enshrined with open-source licensing and wider governance which afford innovators the freedom to share, re-use and innovate without any further negotiation or restriction. Moreover, there is insufficient recognition of (i) the role of implementation-led Standard Essential Patents' ("**SEPs**") use of restriction free – and thus more aligned with Open Source – licensing and, (ii) users and contributors into such technology collaboration (*e.g.*, OASIS, W3C).

Similarly, ECIS believes the consultation needs to more strongly embrace and recognise the role of open standards and related open protocols and Application Programming Interfaces ("**APIs**") - being developed by international Standards Developing Organisations ("**SDOs**") which are both conventional and fora/consortia. Such open standards and protocols are key to creating and scaling the next generation of internet-based data domains in Europe. Whilst a standard might well be a means for innovation, it is not the only way, nor does it necessarily need to require licensing on restricted terms (as evident with requirements-led SEPs), which is unwelcome in open source projects. ECIS stresses the need for the EU to ensure a more concerted and consistent effort to balance and articulate both of these approaches which are not mutually exclusive to one another.

Furthermore, in software, patent fear, uncertainty and doubt has in the past often been used to cast doubt on open source, but even still today by some technology providers. However, ECIS believes that an increasingly complementary path to innovation is to use an open-source business model to develop software solutions and standards, ensuring that the underpinning standard is not encumbered by restrictive patents and thus free to use and further improve by the 50 million strong (and growing) open source community.

ECIS recommends that the overall ecosystem of standardisation – and in particular of ICT standardisation – be considered. FRAND is only one possible approach towards the interplay of Intellectual Property Rights ("**IPRs**") and standardisation, and for including SEPs into standards. Other organisations, *e.g.* some leading global fora in the area of ICT standardisation, decided for Royalty Free policies considering aspects like the availability of software interoperability standards for innovation and for implementation in Open Source. Some organisations have options where a suitable IPR policy option can be chosen for a technical committee or for a specific standard. Therefore, any regulation by the Commission should not

favour FRAND policies over royalty free policies. In addition, the Commission should ensure that companies are able to engage in development of open (Royalty Free) standardisation, if they choose to do so. The Commission should also ensure that balanced and fair by-laws are adopted by SDOs that prevent powerful companies from dominating these organisations and preventing the development of open standards.

ECIS looks forward to discussing further our concerns and the ways in which we can continue to support the Commission to create a fair and level playing field for Europe to build and scale world class technologies.