

The background features a vibrant blue gradient with abstract, flowing, multi-colored ribbons in shades of red, orange, and purple. A large white circle is positioned on the right side, framing a portion of these ribbons. The Nokia logo is in the top left corner.

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Draft EC SEP Regulation – fundamental concerns

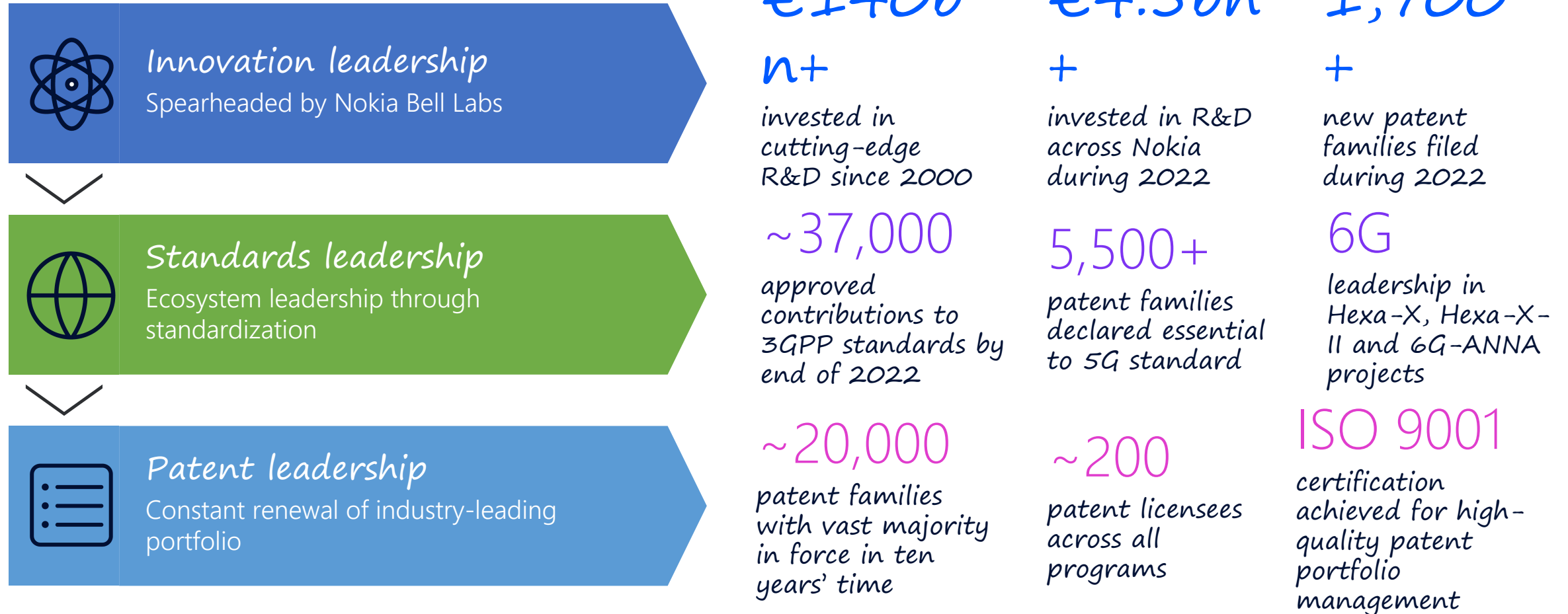
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CIIAI Antitrust Webinar

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Holistic approach to technology leadership



SEP licensing works

Virtuous Cycle

- *R&D investment decisions, made a decade or more before a new cellular standard, rely on licensing income from IPR*
- *The current legal framework for SEP licensing has provided stability and predictability – to all players in the market*
- *Most SEP licenses are concluded amicably – only in rare cases do parties rely on courts to resolve their disputes*



Legal framework for licensing standard essential patents globally

A balanced approach to SEP licensing

A fair and balanced framework for the licensing of standard essential patents (SEPs) is vital:

Nokia believes in a fair licensing approach that strikes a balance. We are both:

The pro-competitive benefits of open standards and licensing on FRAND terms and conditions are widely acknowledged:

1.
To
promote
competiti
on

A developer &
contributor to
open standards

Supports
market entry

+

2.
To drive
innovatio
n

+

An implementer
of standardized
technologies

Encourage
s
innovation

Benefits society
by increasing
consumer
choice

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European Commission Draft SEP Regulation

At a Glance

- On 27 April 2023, the European Commission published a **draft Regulation** on SEPs.
- The EC claims that it wants a fair and balanced system of SEP licensing that is transparent, predictable and efficient.
- The Regulation proposes to introduce the following:
 - **SEP register, database and essentiality checks:** Establishment of an obligatory register where SEP holders are required to notify/record their SEPs, providing details on patents and standards.
 - **SEP aggregate royalty:** SEP holders will be able to notify in the register the expected maximum aggregate royalty. Alternatively, SEP holders and/or implementers can ask a conciliator to recommend a (non-binding) aggregate royalty.
 - **FRAND determination:** A SEP holder and an implementer would have to try first to agree on a royalty during a mandatory FRAND determination conciliation prior to commencing litigation in a European court (including the Unified Patent Court).
 - **SME support measures:** Free advisory services; reduced fees for registration of SEPs and for essentiality checks and access to the SEP register; promoting more favorable FRAND terms and conditions for SMEs.
 - **A 'Competence Centre' established at EUIPO.**
- The draft Regulation is now being considered by the Council (EU Member States) and the European Parliament - many amendments by MEPs and questions from the Council.

Draft SEP Regulation has fundamental flaws

More transparent, efficient and predictable SEP licensing are shared objectives. However, *fundamental* concerns disqualify the Draft SEP Regulation as part of the solution:

- *DG GROW provided no objective empirical evidence of market failure to justify the massive regulatory intervention. According to the “SEP Transparency Impact Assessment Study” commissioned by the EC:*

Existing empirical evidence on the causal effects of current SEP licensing conditions is largely inconclusive. Empirically observable outcomes do not indicate the existence of pervasive “opt-out” from standards-related innovation as a consequence of SEP licensing conditions; i.e. it does not appear that the observed challenges in SEP licensing are sufficiently severe as to systematically discourage potential contributors from participating in standards development, or discourage potential implementers from creating products that use technology standards subject to potential SEPs.

- *Raises legal concerns: insufficient legal basis, fundamental rights (IPRs)*
- *Ignores the international context of Standardization and SEP licensing*
- *Does not address holdout – intentional delay or avoidance of concluding SEP licenses*
- *No evidence that the Draft SEP Regulation will achieve its goals, instead it will make licensing less efficient*



Draft SEP Regulation

Registration & essentiality checks

Registration requirement

- *Suspension of enforcement and the collection of license fees denies access to justice and questions the existence of patent rights*
- *Duplicates the ETSI declaration database and other existing resources*
- *Unable to keep patents for defensive purposes without registration*
- *The provision is unworkable*

Essentiality checks

- *Essentiality checks alone do not lead to increase in willingness to agree to a license*
- *Non-binding nature renders them duplicative and undermines their transparency and efficiency goals*
- *Issues of efficacy and costs as well as the legal effects*
- *The Commission has not explained why its proposal diverges from the recommendations of the JRC Pilot Study on Essentiality Checks*

Draft SEP Regulation

FRAND determination & aggregate royalty

FRAND determination

- *Suspensive effect on access to courts and litigation*
- *Significant restriction on the rights of a SEP holder*
- *Appears similar to mediation, but without usual protections*
- *Timeframe within 9 months is highly ambitious*
- *Non-binding nature does not resolve disputes, it makes more*

Aggregate royalty

- *Effectively means price regulation*
- *Competition law risk with price-setting*
- *Commission's own expert considers the aggregate royalty proposal detrimental*

Detrimental impact on successful industry

Potential Impact

- Adds *costs* and *delays* to SEP licensing
- Increases *burdens* on SEP holders
- Uncertainty may hinder *innovation*
- Potentially *undermines* international collaboration and cooperation in global standards and the open innovation ecosystem
- Does *not* address properly the needs of *SMEs*



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