Avenue des Arts 56 - 1000 Brussels - Belgium
T. +32 46 020 1811
information@fair-standards.org
www.fair-standards.org

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The FSA Submission to the European Commission's Public Consultation on Draft Horizontal Guidelines

As an industry organisation representing almost 50 European and global companies,[1] the Fair Standards Alliance (FSA) welcomes this opportunity to provide comments in response to the European Commission's (Commission) public consultation on the draft revised Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (Draft Horizontal Guidelines). Our comments mostly relate to Chapter 7 of the Draft Horizontal Guidelines on standardisation agreements.

The FSA is an alliance that promotes the licensing of standardised technologies, including for the development and rollout of the IoT, on a fair, reasonable, and non-discriminatory (FRAND) basis.[2] Our membership is broad and diverse, ranging from multinationals to SMEs and coming from different levels of the value chain across a diversity of industry sectors.

Our members significantly contribute to innovation in Europe and beyond. Annually, the aggregate turnover of FSA members is more than EUR 2 trillion, and in aggregate our members invest more than EUR 130 billion on R&D globally on an annual basis. Some of our members dedicate as much as a third of their annual revenues to R&D.

Our members have more than 500,000 patents, including standard essential patents (SEPs), that are either granted or pending. Our membership has strongly supported standardisation for decades, participating in hundreds of standardisation activities around the world, including the development of connectivity standards, such as cellular, Wi-Fi, and USB-C.

Because many of the FSA members are both owners of SEPs and licensees this allows us to bring balanced perspectives to this consultation.

[1] Current members of the FSA include Aira, airties, Amazon, Apple, BMW, Bullitt, Bury, Cisco, Continental, Crosscall, Daimler, Dell, Denso, Deutsche Telekom, Emporia Telecom, FairPhone, Ford, Google, Gramm, Lins & Partner, Harman, Hitachi, Honda, HP, Hyundai, Intel, Juniper Networks, Kamstrup, Landis+Gyr, Lenovo, Microsoft, N&M Consultancy, Nordic Semiconductor, Sagemcom, Sequans Communications, Sierra Wireless, Sky, Tech Law Associates, Telit Communications, Tesla, Thales, Titan Automotive Solutions, TomTom, Toyota, u-blox, Valeo, Visteon, Volkswagen, and Xiaomi.
[2] For further information about the FSA and its members, see http://www.fair-standards.org/.

Introduction

Standards are important enablers for competitive and dynamic markets where innovation and the need for interoperability go hand in hand. For standards to be successful and widely adopted by the market, it is crucial to ensure that SEPs are licensed in a fair and balanced manner, which unfortunately has not been common practice in recent years.

Competition law is central to standardisation because standards are set by companies, including competitors, coming together to choose a single set of technological solutions out of multiple options that existed prior to the agreement about the technology to be standardised, and because of the market power standards can confer to holders of SEPs that they otherwise would not have.

Both the Commission's case practice and the Court of Justice of the EU's (CJEU) *Huawei v ZTE* judgment[3] have confirmed the competition context in which standardisation takes place. Moreover, the Horizontal Guidelines stress that standard setting has the potential to reduce price competition, foreclose innovative technologies, and exclude or discriminate against certain companies by preventing effective access to the standard.[4]

Once a technology standard is set and businesses have made substantial investments to rely on it, innovating and developing products using the standard, they become effectively "locked in" as it is virtually impossible to design around the standardised technology.

As a safeguard against competition concerns, in accordance with the Horizontal Guidelines,[5] most standard developing organisations (SDOs) require SEP holders to provide an irrevocable commitment in writing to license their SEPs on FRAND terms. The trade-off is simple: the SEP owner benefits from having its technology recognised as part of an industry standard that is widely adopted, and in exchange it commits to license its technology on FRAND terms so that everyone can license, use, and rely on the standard.

I. Licences to 'all third parties'

We take note that the Draft Horizontal Guidelines maintain the requirement that SEP holders must commit "*to offer to license their essential IPR to all third parties on FRAND terms*". As a preliminary remark, and as footnote 278 of the Draft Horizontal Guidelines indicates, this requirement was recognised by the CJEU in paragraph 53 of *Huawei v ZTE*. This states that "*having regard to the fact that an undertaking to grant licences on FRAND terms creates legitimate expectations on the part of third parties that the proprietor of the SEP will in fact grant licences on such terms, a refusal by the proprietor of the SEP to grant a licence on those terms may, in principle, constitute an abuse within the meaning of Article 102 TFEU.*" There is no limitation in the Court's reference to "third parties" and given the significance of this, we consider it important that the Horizontal Guidelines state that the CJEU has confirmed the nature of the legal requirement. Beyond this, for the reasons outlined below, it is critical that the Draft Horizontal Guidelines both maintain and give practical meaning to the requirement.

(a) Importance of requirement

This requirement to license any third party seeking a licence is hugely important for businesses across a variety of sectors to ensure innovation. Indeed, if SEP holders could "pick and choose" potential licensees and at what level of the production chain to license, they could in effect control who succeeds and who fails in the market – in other words, become gatekeepers of innovation. This is of significant

[3] Judgment of 16 July 2015, Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH, C-170/13, EU:C:2015:477 (*Huawei v ZTE*)
[4] Draft Horizontal Guidelines para. 466.
[5] Ibid. para. 477.

concern both where SEP holders are vertically integrated, which enables them to foreclose competition in the downstream market, and where SEP holders are not active downstream where a refusal to license willing licensees can harm innovation.

Without a direct licence to the relevant SEPs, companies are impeded in their ability to innovate on top of standards. Models that may be claimed to serve as substitutes to actual licences, such as "have made" rights, do not alleviate competition concerns because of the narrow scope of such rights. Under "have made" rights, a downstream SEP licensee can have components made by an upstream third party which is unlicensed, even if it is willing to take and actively seeks a licence. However, the right to "have" components "made" does not confer a licence to that third party to manufacture for its own use or indeed for any other party than the instructing licensee, and beyond the specifications of the downstream licensee. The "have made" rights therefore tie the supplier to its customer, prevent it from freely innovating and do not allow it to sell licensed products on the open market.[6]

For example, if a module company that develops cellular devices can sell only to one industry (e.g., automotive), or even to just one group of customers within that industry (e.g., particular downstream car manufacturers or manufacturers that make particular types of cars or trucks), then in practice they will only invest in R&D that they can recoup via sales to that industry or group of customers. If that company could develop innovative modules that could be used for other industries, customers, or applications, without its own SEP licence, it would be precluded from selling them as licensed modules to e.g., manufacturers of airplanes, trains or boats.

(b) Efficient licensing

As an association representing companies of different sizes from multiple sectors and different levels of the value chain, we draw from ample and direct business experience. Our members' experience from both century-old and younger innovative IPR-intensive industries confirms that when SEP licences are made available to any willing licensee, as required by competition law, businesses are able to practically work out the most appropriate level in the value chain that is most effective for a particular industry.

Some wireless technology SEP holders have argued that it is most efficient to license only downstream end-product manufacturers. However, business realities should dictate otherwise. It is most efficient for SEPs to be licensed at the level in the supply chain where the standardised functionality is actually provided and enabled, e.g., video codecs on the camera level, OneBlue patents on the level of the BlueRay-disk player, or Bluetooth patents on chip level etc. Indeed, why would it not be more efficient to license a handful upstream suppliers if that allows tens, hundreds or even thousands of downstream product manufacturers to be covered?

That is why the FSA has long advocated that SEP licences should not be artificially restricted by players with market power conferred by standards to one specific level of a value chain. Indeed, it is precisely the change in SEP licensing practices whereby certain SEP holders started refusing licences to market players that led to a range of negative consequences.

For example, in digital cellular telephony, SEP holders previously granted licences to manufacturers of all types of equipment.[7] Manufacturers in any part of the supply chain were able to obtain SEP licences. These licensees were then able to offer licensed products – whether they were complete end-use products or intermediate subsystem products – to their customers.

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[6] For further background, please see the FSA position paper "Competitive and Industry Harms Related to Refusals to License SEPs and Other Forms of "Level Discrimination" in SEP licensing".

[7] See e.g., the *Federal Trade Comm'n v Qualcomm, Inc.,* Findings of Fact and Conclusions of Law, Case No. 5:17-cv-00220 (N.D. Cal. May 21, 2019) (*FTC v Qualcomm*). Evidence referenced in the ruling reveals that SEP holders granted licences to users of the standards across the value chain, including at chip level and that "following Qualcomm's lead, other SEP licensors like Nokia and Ericsson have concluded that licensing only OEMs is more lucrative, and structured their practices accordingly."

Suppliers upstream were able to supply subsystems that complied with standards to downstream manufacturers who were able to focus on developing innovative products. This facilitated the widespread adoption of standardised technologies.

One of Europe's leading R&D intensive sectors, the automotive industry, is another example. A vehicle consists of thousands of components – the vast majority of which are subject to standards. =Most of the components are supplied by upstream component manufacturers, often single-sourced from a supplier specialising in a particular product or a type of product. For more than a hundred years, the industry has considered it most efficient for car OEMs to source components free of third-party rights, not to be forced to seek licences for standardised technology sourced from its upstream suppliers. Indeed, the ability of upstream manufacturers to obtain a licence enables business models where they can clear the patent landscape for their own products and indemnify their customers.

(c) Preventing misinterpretations

Despite the clear language in both the CJEU ruling and the Commission's own decisional practice[8], as well as in the Horizontal Guidelines, and despite their voluntary and irrevocable FRAND commitment, some SEP holders have in recent years been refusing to license both on their own, and collectively, to virtually all businesses in the value chain, except those at the downstream end-product level. This non-FRAND licensing strategy has caused legal uncertainty, which is stalling innovation, take-up of the IoT, and has led to extensive litigation in Europe and overseas, draining resources that could be used for R&D to bring to consumers new or improved products and services.

In this regard, we are concerned to see the Commission's recent response[9] to a parliamentary question[10], which could be seen as inconsistent with both EU decisional practice and the Commission's own guidance.

In *Huawei v ZTE*, the CJEU confirmed that a SEP holder may 'in principle' abuse a dominant position by seeking an injunction against a willing licensee. Whilst the judgment outlined a framework which gives guidance to how both SEP holders and implementers should act in the SEP licensing context, the purpose of the preliminary reference was to specify whether and when SEP-based injunctions could be an abuse of a dominant position. It is therefore surprising that the above-mentioned response seems to imply that the purpose of the preliminary reference was to "ensure[s] that any holder of EU SEPs can get injunctions before national courts in the EU."

Moreover, the response goes as far as to suggest that SEP holders can "get injunctions" … "against any implementer of the SEPs, including car manufacturers," which seems to imply that SEP holders can ignore the requirement to license any third party and instead oblige an end-product manufacturer to take a licence under threat of injunction, having refused to license willing component manufacturers upstream that have sought a licence.

In light of the above, we urge the Commission to make an additional clarification in para. 482 of the Draft Horizontal Guidelines to read:

> *"In order to ensure effective access to the standard, the IPR policy would need to require participants wishing to have their IPR included in the standard to provide an irrevocable commitment in writing to offer to license their essential IPR to all third parties, **regardless of the level of a value chain at which they operate**, on fair, reasonable and non-discriminatory terms ('FRAND commitment')."*

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[8] Case AT.39985 – Motorola – Enforcement of GPRS standard essential patents (*Motorola*), paras 417 and 521; Case COMP/M.6381 – Google/Motorola Mobility (*Google/Motorola Mobility)*, para. 113.

[9] Response by Executive Vice-President Dombrovskis on behalf of the European Commission on 4 April 2022 to a parliamentary question available at: https://www.europarl.europa.eu/doceo/document/E-9-2022-000559-ASW_EN.html

[10] Parliamentary question of 8 February 2022 on "Licencing, protection of intellectual property rights, connected cars and a level playing field for EU companies in foreign markets" available at https://www.europarl.europa.eu/doceo/document/E-9-2022-000559_EN.html

In addition, we consider that the Horizontal Guidelines should clearly state that no SEP-based injunctions can be granted against a manufacturer downstream if a licensee upstream has expressed a willingness to take a licence. Without such language, we consider that the purpose of the *Huawei v ZTE* ruling could be undermined.

II. Hold-up

The Draft Horizontal Guidelines recognise that SEP holders can "acquire control over the use of a standard" and can "hold-up users after the adoption of the standard" by "refusing to license the necessary IPR or by extracting excess rents by way of excessive royalty fees". The Draft Horizontal Guidelines also note that if "a company is either completely prevented from obtaining access to the result of the standard, or is only granted access on prohibitive or discriminatory terms, there is a risk of an anti-competitive effect"[11] We commend the Commission for maintaining these important provisions.[12]

However, examples of practices of hold-up pressure are not limited to those two concerns. Other examples include:

- the use of injunctions (or other exclusionary remedies) for SEPs for which a FRAND commitment has been pledged – a major concern we elaborate on below;
- obliging a licensee to conclude a global SEP portfolio licence under threat of being deemed an "unwilling licensee" and thereby being excluded from a certain market,
- the lack of transparency in the proposed SEP licensing terms and conditions, and the refusal to provide evidence allowing potential licensees to verify whether a given offer is FRAND or not;
- the use of overly secretive NDAs, some of which do not even allow licensees to verify whether their suppliers have concluded relevant licences; or
- refusals to grant a direct licence to a potential licensee and, instead, obliging the licensee to license SEPs from a patent pool.

(a) Injunctions in SEP disputes should be rare

The Commission has historically been the global pioneer in recognising that standardisation can cause significant competition problems. As regards SEP-based injunctions, both through its case-practice referred to above and its court intervention in the *Huawei v ZTE* case, the Commission was at the very forefront of the drive to ensure that the threat of SEP-based injunctions could not be used by SEP holders as illegitimate leverage to obtain unjustified royalties or other unfavourable terms. The Commission and the CJEU acknowledged that the indispensable nature of SEPs and legitimate expectations that SEP holders would grant FRAND licences amounted to "exceptional circumstances" that distinguish SEP licensing disputes from other cases in which an IPR holder is generally free to seek injunctive relief.[13]

Both the Commission and the CJEU have thus recognised that the FRAND commitment in the standardisation context limits an SEP holder's freedom to license its SEPs according to any commercial strategy it might choose. Otherwise, SEP holders would be able to use the threat of exclusion through injunctions to effectively force potential licensees to accept licensing terms that may not be FRAND.

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[11] Draft Horizontal Guidelines, para. 470.

[12] Jeffrey Wilder, Economics Director of Enforcement at the US Department of Justice Antitrust Division, has recently noted that what may sometimes be portrayed as a mere theoretical problem, "hold-up can have real world consequences" because it affects economic incentives to adopt standards. Wilder made these remarks at a speech on 2 December 2021 at the Conference on Intellectual Property and Innovation Policy for 5G and the Internet of Things organised by Center for Intellectual Property x Innovation Policy (C-IP2), as reported by Mlex.

[13] *Huawei v ZTE; Motorola* paras. 417 and 521.

In the US, patent law limits the ability of SEP licensors to get injunctive relief by having voluntarily agreed to license of FRAND terms. Therefore, monetary compensation for infringement, rather than exclusion is usually the appropriate remedy under *eBay Inc. v. MercExchange, L.L.C.*, where the Supreme Court determined that a party seeking an injunction "must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction."[14] The Federal Circuit confirmed that the same framework also applies to SEP licensing.[15]

The Institute of Electrical and Electronics Engineers' (IEEE) 2015 IPR policy update[16] is an example of an SDO policy that limits the use by its members of exclusionary remedies, such as an injunction, in SEP disputes. The US Federal Trade Commissioner Rebecca Kelly Slaughter has referred to this policy as one that "has fairly robust safeguards". The Commissioner said it was her "strong belief that SEP holders should not be able to seek exclusionary remedies against a willing licensee;" and that an "appropriate framework should not allow an SEP holder to refuse licenses to implementers of the standard or threaten exclusionary remedies in order to either extract supra-FRAND royalties or entirely thwart a competitor from practicing a standard." [17]

The Competition and Consumer Commission of Singapore (CCCS) has stated in its recently revised guidelines that "seeking an injunction based on an alleged infringement of a SEP may give rise to competition concerns under section 47 of the Act if the SEP holder has a dominant position in a market, has given a voluntary commitment to license its SEP on FRAND terms and where the party against whom the SEP holder seeks to injunct is willing to enter into a licence agreement on such FRAND terms." [18]

Against this background, we consider that SEP-based injunctions continue to be illegitimately used contrary to both the purpose and the letter of the *Huawei v ZTE* judgment, in large part due to the misapplication of the judgment by certain national courts. This is of critical importance to industry. We therefore consider it important to include a reference to the issue in para. 470 of the Draft Horizontal Guidelines, such that they would read:

> *Intellectual property laws and competition laws share the same objectives of promoting consumer welfare and innovation as well as an efficient allocation of resources. IPR promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes. IPR are therefore in general pro-competitive. However, by virtue of its IPR, a participant holding IPR essential for implementing the standard, could, in the specific context of standard development, also acquire control over the use of a standard. When the standard constitutes a barrier to entry, the undertaking could thereby control the product or service market to which the standard relates. This in turn could allow undertakings to behave in anti-competitive ways, for*

[14] *eBay Inc. v MercExchange, L.L.C.,* 547 U.S., para. 391.

[15] *Apple Inc. v Motorola, Inc.,* 757 F.3d 1286, 1331-32 (Fed. Cir. 2014).

[16] An empirical study has recently confirmed that a change in the IEEE IPR policy in 2015 – clarifying that SEP valuation should be based on the so-called 'intrinsic value' – did not affect SEP holder innovation and participation in standardisation. See Timothy S. Simcoe, Qing Zhang "Does Patent Monetization Promote SSO Participation? 29 November, 2021 Simcoe, Timothy S. and Zhang, Qing, Does Patent Monetization Promote SSO Participation? (November 29, 2021). Available at SSRN: https://ssrn.com/abstract=3973585 or http://dx.doi.org/10.2139/ssrn.3973585.

[17] Remarks of Commissioner Rebecca Kelly Slaughter "SEPs, Antitrust, and the FTC", delivered on 29 October 2021 at the ANSI World Standards Week: Intellectual Property Rights Policy Advisory Group Meeting, available at: https://www.ftc.gov/system/files/documents/public_statements/1598103/commissioner_slaughter_ansi_102921_final_to_pdf.pdf (Commissioner Slaughter Remarks).

[18] Competition and Consumer Commission of Singapore "Guidelines on the Treatment of Intellectual Property Rights" (31 December 2021), (CCCS Guidelines), p 22.

example ***by pursuing exclusionary remedies against a willing licensee,*** *or by refusing to license the necessary IPR or extracting excess rents by way of discriminatory or excessive royalty fees thereby preventing effective access to the standard ("hold-up").*

(b) Hold-out

SEP holders are entitled to FRAND royalties for SEPs that are both valid and infringed. Whilst patent hold-out can be a legitimate patent policy concern, to imply, as the last two sentences of para. 470 of the Draft Horizontal Guidelines do, that it is an equivalent competition issue to patent hold-up is unjustified.

The main, if not only circumstances, in which patent hold-out could be a *competition issue* pursuant to Article 101 TFEU would potentially be in the framework of a collective boycott of a technology by potential downstream licensees.

It is therefore highly surprising to see the language on "hold-out" added to para. 470 of Draft Horizontal Guidelines. While this may not have been intended, as currently worded in the draft (i.e., "the reverse situation may also arise") and because it appears in the same paragraph, this provision may be misconstrued as meaning that hold-out may somehow have similar adverse effects on competition as hold-up, which is obviously not possible without a sufficient degree of market power.

We could not agree more with the FTC Commissioner Slaughter, that while hold-out may be "purported to be a parallel problem" to hold-up, it simply "does not pose the same concerns from a competition standpoint as hold-up, which has the potential to exclude firms from implementing a standard." Commissioner Slaughter noted that hold-out, "as long as it is unilateral and not done collusively among licensees, fits squarely into the box of problems that have patent law solutions." In other words, hold-out is simply not an antitrust problem and, as such, does not belong in the Horizontal Guidelines.

Therefore, we encourage the Commission to delete the following language on hold-out from para. 470 of the Draft Horizontal Guidelines: ~~"The reverse situation may also arise if licensing negotiations are drawn out for reasons attributable solely to the user of the standard. This could include for example a refusal to pay a FRAND royalty fee or using dilatory strategies ("hold-out")."~~

Should the Commission nevertheless wish to make a reference to hold-out in the Horizontal Guidelines, we consider it would be more appropriate to do so in a footnote and, at the very least, amended to clearly differentiate hold-out from hold-up.

For example, the footnote could read:

"~~The reverse situation may also arise if~~ ***Practices by users of the standard,*** *for reasons attributable solely to the users of the standard, such as drawing out licensing negotiations or refusal to pay a FRAND royalty fee or using dilatory strategies may be referred to as "hold-out".* ***Such practices are unlikely to raise competition concerns if conducted unilaterally by firms that do not possess significant market power.***

III. FRAND royalties

The FSA has long advocated that valuation of SEPs, for which a commitment to license on FRAND terms has been made, should be based on their own technical merits and scope. We therefore commend the Commission for maintaining the language in the Draft Horizontal Guidelines that SEP royalty fees should "bear a reasonable relationship to the economic value of the IPR".[19]

[19] Draft Horizontal Guidelines, para. 486.

Similarly, we agree that the value of SEPs should be "irrespective of the market success of the products which is unrelated to the patented technology".[20] Indeed, SEP holders are entitled to FRAND royalties for their own patented inventions but not for innovation of others – this clarification is therefore important.

On the other hand, the suggestion that the economic value of the IPR could be based "on the present value added of the covered IPR" may be somewhat misleading. We suggest further clarifying this provision in para. 486 to read:

> *"The economic value of the IPR could be based on the present value added* ***over the next best alternative*** *of the covered IPR and should be irrespective of the market success of the products which is unrelated to the patented technology."*

We also welcome the Commission's proposed clarification that "FRAND royalties" suffice for SEP holders to "monetise their technologies" and to obtain a "return on their investment in R&D".[21]

Our members invest immense resources into R&D and appreciate that there is some risk associated with such investments, but they understand that a return on investment is not guaranteed. We much agree that "reasonable" return on investment preserves incentives to innovate, provided that the "reasonable" return aligns with the ex ante economic value of the patented invention. We note that where courts have examined and adjudicated FRAND rates, they have proven to be significantly lower than what SEP holders had sought in licensing negotiations.[22] Moreover, sight should not be lost of the fact that standards have increased the market for SEP holders, providing the opportunity to benefit from significant global royalty streams that they would otherwise be unlikely to obtain. Therefore, we suggest clarifying this provision in para. 486 to read:

> *At the same time, FRAND commitments allow IPR holders to monetise their technologies via FRAND royalties and obtain a ~~reasonable~~ return on their investment in R&D ~~which by its nature is risky~~,* ***that is commensurate with the ex ante economic value of the IPR.***

We note the Commission's proposal to include additional methods to assess the value of IPR essential to a standard. We take the opportunity to caution about the so-called "comparable licences" method.[23]

If licences deemed "comparable" themselves suffer from hold-up, a royalty rate calculated on their basis will also contain a hold-up premium.[24] In *Unwired Planet v Huawei*, the court recognised that,

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[20] Ibid.

[21] Ibid, para. 484.

[22] See, for example:

- *Unwired Planet v Huawei.,* [2017] EWHC 711 (Pat): Offered rate of 0.13% (4G-LTE) and 0.065% (UMTS/GSM), awarded rate 0.062% for 4G-LTE and 0.032% for UMTS/GSM handsets;
- *Realtek Semiconductor Corp. v LSI Corp*., 946 F. Supp. 2d 998 (United States District Court, N.D. California (2013)): offered rate of USD1-1.75, compared to the awarded rate of $0.0019 to $0.0033;
- *TCL Comm'n Tech. Holdings, Ltd. v Telefonaktiebolaget LM Ericsson*, No. SACV 14-341 (C.D. Cal. Dec. 21, 2017): Both FRAND offers [Option A (2.592%) and Option B (1.46%)] the Court found to be not FRAND. The Court awarded rates of 0.45% in the US and 0.314% for the rest of the world;
- In *re Innovatio IP Ventures*, LLC Patent Litig, MDL Docket No. 2303 Case No. 11 C 9308 (N.D Ill. Sep. 27, 2013): Innovatio offered rates of $3.39 per access point, $4.72 per laptop, up to $16.17 per tablet, and up to $36.90 per inventory tracking device, as compared to the Court awarded rate of $0.956 per device;
- *Ericsson Inc. v D-Link Sys., Inc*., No. 10-CV-473, 2013 WL 4046225, (E.D. Tex. Aug. 6, 2013): the Court awarded rate of 15 cents per device;
- *Microsoft v Motorola*, 2013 WL 2111217 (W.D. Wash. Apr. 25, 2013): Motorola offered a rate of 2.25% based on the price of the end product, as compared to the Court awarded rate for 802.11 SEPs of $0.03471 cents per unit;
- *Core Wireless Licensing S.A.R.L., v Apple Inc.*, Case No. 15-cv-5008 NC (United States District Court, N.D. California (2016)): Core Wireless offered a rate of $0.085, whereas the Court awarded a rate of $0.026.

[23] Draft Horizontal Guidelines, para. 487.

[24] See e.g., Cotter, T.F., Golde, J.M., Liivak, O., Love, B., Siebrasse, N.V., Suzuki, M., Taylor D.O., "Reasonable Royalties." At p.61, 2018, eds., *Patent Remedies And Complex Products: Toward A Global Consensus* Cambridge University Press, by Biddle, B., Contreras, J.L., Love, B., and Siebrasse, N.V., forthcoming.

even though comparable licences may be useful in deciding what is FRAND, "many factors may have been in play" including hold-up.[25] Some US courts have also recognised the risk of perpetuating hold-up premia.[26]

Therefore, we suggest amending the relevant provision in para. 487 of Draft Horizontal Guidelines to read:

> *"Similarly, it may be possible to compare the licensing terms in agreements of the IPR holder with other implementers of the same standard* ***where such licences are truly comparable and do not result from hold-up."***

The FSA does advocate for increased transparency in licensing negotiations with respect to SEPs subject to FRAND terms. Transparency at all stages – from before a patent is selected to be included in a standard by an SSO, to when, whether, and how the patented technology is included in the adopted standard, to the eventual licensing of declared SEPs and accompanying negotiations – is important to ensuring a robust and vibrant SEP ecosystem.

In this respect, we encourage the Commission to clarify in the Horizontal Guidelines that the good faith transparency obligation on SEP holders extends to being honest about comparable licensing terms. Indeed, it could potentially be discriminatory to charge different rates to different companies for the same SEPs and for the same or similar products.

We note that the Commission has proposed a clarification relating to ex ante disclosures of most restrictive licensing terms.[27] While we would certainly wish to see more "transparency of the potential costs for implementing a standard", we encourage the Commission to provide additional guidance on how an SDO could "take an active role in disclosing total maximum stack of royalty for the standard" without its participants infringing EU competition law.

In relation to good faith disclosures at SDOs, we note that the Commission inserted new language in para. 483. SDOs may allow patent holders to submit specific disclosures that identify particular patents (and patent applications), and/or general or "blanket" disclosures that do not identify patents but instead require a patent holder to license any patent it owns that turns out to be essential to support the relevant standard.

Generally speaking, making specific licensing declarations to provide transparency makes sense and has a net positive impact in some environments although it may have net negative impacts in other environments (which may, hence, more appropriately opt for blanket or negative disclosure obligations). Imposing specific licensing declarations for royalty free standards, for example, could, depending on the context, discourage innovation, slow down the development of those standards and potentially harm industry adoption. Likewise, in certain contexts blanket declaration shall suffice. One must bear in mind that there is no one-size-fits-all in terms of policies to be applied to SDOs, and that the choice of specific or general declarations should be maintained in the appropriate circumstances.

IV. Licensing negotiation groups

We welcome the addition to the Draft Horizontal Guidelines that makes clear that "Groups of potential licensees can also jointly negotiate licence agreements for standard essential patents with licensors in view of incorporating that technology in their products (sometimes referred to as licensing negotiation groups)."[28]

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[25] *Unwired Planet International Ltd v Huawei Technologies Co Ltd,* EWHC 711 at para. 170 (Pat Ct. 2017).
[26] E.g., in *Microsoft v Motorola,* a pre-existing license between Motorola and VTech was not found to be a reliable indicator of a RAND royalty rate among other reasons because it was concluded under the threat of a potential infringement lawsuit.
[27] Draft Horizontal Guidelines, footnote 297 referenced in para. 500.
[28] Ibid., para. 312.

This clarification has been added in the section of the Horizontal Guidelines on joint purchasing agreements. To increase awareness, we recommend that it also be referenced in the standardisation section of the draft guidelines.

Joint purchasing agreements with appropriate competition safeguards can be all the more relevant in the standardisation context where licensees are faced with SEP holders who have market power conferred on them by a standard that they would not otherwise have.

We note that licensing negotiation groups (LNGs) with appropriate competition safeguards could facilitate more SEPs licences – which are in principle infinitely available because they are an intangible asset – thereby enabling a larger number of licensees to offer more products and services to their customers and enhancing consumer choice. We would welcome further guidance from the Commission on the pro-competitive use of LNGs.