

## **Introduction**

Panasonic Holdings Corporation<sup>1</sup> (“Panasonic”) is a global organization with significant R&D and market presence in Europe and around the world. Through market participation and R&D efforts, Panasonic has accumulated more than forty years of experience with standardized technologies.<sup>2</sup>

As an innovative company, Panasonic makes valuable contributions to establishing standardized technologies. And as a leading manufacturer and provider of industry and life solutions, Panasonic advocates for the adoption of standardized technologies by providing its products and services in markets worldwide. Panasonic has and will continue to occupy the market position as both a licensor and a licensee of standardized technologies.

It has been Panasonic’s long standing corporate position to support balanced organizational, national and international policies that help foster and sustain an ecosystem for standardized technologies that is voluntary, inclusive, collaborative and consensus-based. In this context, Panasonic submits its comments to the European Commission’s (“Commission”) public consultation on the draft revised guideline on horizontal cooperation agreements (hereinafter “Draft Horizontal Guideline” or “DHG”) with specific focus on Chapters 4 and 7 of the DHG.<sup>3</sup>

## **Comments to Chapter 4: Purchasing Agreements**

Section 4.1 of the Draft Horizontal Guideline mentions that joint purchasing arrangements can allow its individual members to pool actual purchases together to leverage buying power *vis-à-vis* large suppliers. The DHG recognizes that joint purchasing arrangements can lead to lower prices, more variety or better-quality

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<sup>1</sup> Panasonic Holdings Corporation is formerly known as Panasonic Corporation. The name change corresponds to a corporate reorganization that took place on April 1, 2022.

<sup>2</sup> Panasonic has participated in more than 1200 standardization projects worldwide. Panasonic members also serve in administrative, policy and technical leadership positions, including as chairpersons, within different Standard Setting Organizations (“SSOs”).

<sup>3</sup> Panasonic also refers the Commission to its submissions in response to the Targeted Consultation on Standardization Agreement in the Horizontal Guidelines, including its Position Paper, dated September 30, 2021.

products or services for consumers.<sup>4</sup> At the same time, the DHG recognizes that buying power achieved through pooling purchases may, under certain circumstances, give rise to competitive concerns.<sup>5</sup>

Within paragraph 312, the DHG mentions, in a single sentence, that in the context of SEP licensing, joint purchasing arrangements can be realized through licensing negotiation groups (LNGs) formed by potential licensees.<sup>6</sup> The sentence about LNGs, however, exists within a larger paragraph that discusses joint purchasing arrangements in general. To that end, the discussion regarding LNGs seems out of place. The remaining portions of the DHG provide no substantive context to LNGs.

That is, while the DHG generally states that, as with pooling of actual purchases, pooling the demand for SEP licenses can have potential procompetitive effects, it provides no specific nor contextual discussion as to how LNGs would operate under the existing SEP licensing framework established by European courts. Indeed, it is difficult to comprehend how LNGs can avoid the implication of competitive concerns under Article 101<sup>7</sup> and at the same time comply with CJEU's Huawei/ZTE SEP licensing framework.<sup>8</sup>

As discussed below, due to the significant differences in the fundamental purposes and attributes between the purchases of goods/services and licensing of SEPs, it seems inappropriate to categorically analogize these two activities. Indeed, due to these differences, competitive concerns could arise quickly and frequently in the context of SEP licensing through LNGs. Panasonic urges the Commission to investigate further the viability of SEP licensing through LNGs and its potential effect on the competition in the “purchasing market” and the adverse impact it can have on the ecosystem that supports continued investment into - and innovation through - technical standards.

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<sup>4</sup> DHG, Section 4.1, paragraph 313.

<sup>5</sup> *Id.* paragraph 313.

<sup>6</sup> *Id.* paragraph 312.

<sup>7</sup> *Id.* paragraph 316.

<sup>8</sup> *Huawei v. ZTE* decision (CJEU Case C-170/13) and its guidance on license negotiations.

## 1. While Goods and Services are Unavailable Until Purchased, Unlicensed SEP Implementers Can Access Standardized Technologies and Compete in Downstream Markets Against Licensed Implementers

The concept of a joint purchase arrangement, at its core, aims to leverage the purchasing power of many to derive market efficiencies that lead to consumer benefits (*e.g.*, lower prices, increased consumer choice, etc.) That is, the driving force for a joint purchase arrangement is the desire of its members to conclude the purchase of goods or services so as to compete in the downstream selling market. Indeed, the DHG recognizes that restrictive effects on competition caused by joint purchasing arrangements are less likely to occur in the purchasing market if suppliers “sell products or services that *purchasers need to have in order to compete on the downstream selling market or markets.*”<sup>9</sup>

Licensing of SEPs differs fundamentally from the purchasing of goods and services. While the goods and services are *not available* unless and until actually purchased, the FRAND undertakings assumed by SEP holders enable implementers to gain access and derive benefits from standardized technologies *before* SEP licenses are executed.

As the DHG recognizes “a joint purchasing arrangement may... *stop purchasing temporarily* unless they are offered better terms or lower prices” and recognizes that “*temporary stops may result in the products selected by the individual members of the alliance being unavailable on the retailers’ shelves for a limited period of time,* namely until the retail alliance and the supplier have agreed on the terms and conditions of future supplies.”<sup>10</sup> In the context of SEP licensing, however, such “temporary unavailability” of products at the downstream market or markets will not occur. Unlike the purchase of goods or services, in SEP licensing, the purchaser (*i.e.*, the implementer) can continue to work the patented invention even if the negotiations are suspended.<sup>11</sup> That is, there is no incentive to conclude the negotiations even if the discussion is prolonged. Justifying the suspension of negotiations as a trading tactic for SEP licensing will impede good-faith negotiations and encourage “hold-out” behaviours. Finally, the

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<sup>9</sup> *Id.* at 332.

<sup>10</sup> *Id.* at 343.

<sup>11</sup> From the point of view of an operating business that utilizes SEPs, Panasonic also cannot imagine that a temporary removal of standard-compliant products from the downstream market pending resolution of SEP licensing discussions could be a practical commercial solution.

“temporary unavailability” of SEP compliant products would not realistically occur unless and until a SEP owner initiate time consuming and costly legal actions against individual members of the LNG at the relevant jurisdictions where IPRs exist and successfully obtain and enforce injunctive relief.

Thus, unlike purchasers of goods and services, implementers of SEPs do not have the imminent need to obtain SEP licenses “in order to compete at the downstream selling market or markets.”<sup>12</sup> The same business desire to compete in the downstream market and the urgency to conclude joint purchase arrangements for goods and services to enable downstream competition simply do not exist with respect to SEP licensing. Joint purchasing arrangements for goods and services and SEP licensing through LNGs cannot be analogously considered.

## **2. LNGs Can Restrict Competition at the “Purchasing Market” And Discourage Investments in or Innovation Through Voluntary Standard Setting Process**

The DHG recognizes that “a joint purchasing arrangement may *threaten suppliers to abandon negotiations* or to stop purchasing temporarily *unless they are offered better terms or lower prices*” and that “such threats are *typically part of a bargaining process* and *may involve collective action by purchasers when a joint purchasing arrangement conducts the negotiations*.” To that end, the DHG seems to recognize that threatening to abandon a negotiation or collective boycott of the supplier in case of a joint purchasing arrangement would be an appropriate negotiation tactic.

It may be true that this conduct may not have competitive implications with respect to purchases of goods and services. But unlike the purchasing of goods/services, SEP licensing, however, is not done with balanced bargaining positions between the SEP holders and implementers due to the availability of the standardized technology without a license. To that end, abandoning negotiations as suggested by the DHG may restrict competition in the “Purchasing Market.”

Further, in the context of SEP licensing threatening to abandon negotiations unless SEP holders offer better terms or lower prices is inconsistent with established European case

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<sup>12</sup> In fact, records show that certain unlicensed implementers of H.264 standards did unfairly compete in European and worldwide markets for years *vis-a-vis* good-faith licensees until the conclusions of the enforcement actions initiated by pool licensors in Germany.

law.<sup>13</sup> Specifically, the CJEU Huawei/ZTE framework and its interpretation and application by European courts requires SEP holders and implementers to proactively engage in good-faith SEP licensing discussions. To that end, the tactics deemed “typical” by the DHG seem inconsistent with European case law. Analogizing SEP licensing through LNGs with joint purchase arrangements for goods and services is problematic as it leads to inconsistent behaviours required by European law and can encourage “hold-out” tactics.

From the perspective of SDOs, LNGs are ill-suited means to achieve the balanced goals of FRAND: 1) to ensure that standardized technology can be widely accessed by implementers; and 2) to ensure fair compensation to technical contributors for use of relevant intellectual property rights, “IPRs,” (*i.e.*, SEPs). When LNG members are permitted to engage in “typical” negotiation tactics such as abandoning negotiations unless they are offered better terms or lower prices, the LNG would, in reality, operate as a buyer cartel that imposes purchase prices agreed upon and accepted by LNG members.<sup>14</sup> LNG members can also coordinate licensing strategies to differentiate SEP holders based on perceived litigation risks. For example, LNGs can be used to coordinate delay or refusal to proactively engage with SEP holders with lesser perceived litigation risks (*i.e.*, SEP holders that are SMEs, SEP holders with lesser litigation resources or that have other business focuses than enforcing SEPs). In doing so LNGs become a means to discriminate in the “purchasing market” and in effect enable discrimination against certain SEP holders. In the long run, this would discourage investments and participation at standard-setting activities (in particular by SMEs) and lead to the narrowing of diversities and distinctiveness both with respect to memberships and technical solutions proposed and considered.<sup>15</sup> Such a result is contrary to the aspirations of FRAND and can become disruptive to the long-term sustainability of the ecosystem that fosters the development of technical standards.

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<sup>13</sup> Panasonic notes that boycott of a product (*i.e.*, SEPs) of a supplier (*i.e.*, SEP holder) is not a practical negotiation strategy because an implementer cannot boycott the IPRs of a SEP holder without boycotting the use of the technical standard.

<sup>14</sup> DHG, Section 4.1, paragraphs 317-318.

<sup>15</sup> *Id.* at paragraphs 331-332.

### **3. Exchanges of Commercially Sensitive Information While “Necessary for the Functioning” of LNGs Invite Impermissible Anti-Competitive Effects**

Paragraph 342 of the DHG discusses whether the exchange of “commercially sensitive information” that is necessary for the functioning of the joint purchasing arrangement could have restrictive effects on competition within the meaning of Article 101. The DHG, however, does not provide specific discussions with respect to SEP licensing through LNGs nor address how LNGs shall operate consistently with the Huawei/ZTE SEP licensing framework as established by the CJEU.

While the DHG does not describe how LNGs would operate, it is presumed that LNGs would conduct SEP licensing discussions with SEP holders on behalf of its members.<sup>16</sup> Thus, it is understood that LNGs would observe the Huawei/ZTE SEP licensing framework on behalf of its members.<sup>17</sup> To accomplish that, LNGs would have to coordinate all offers and counter-offers among its members and provide them to SEP holders. Similarly, when SEP holders make offers or revised offers, the LNGs would receive these offers and coordinate among its members to see if the offer can be collectively accepted or if revised counter-offers should be made by the LNGs.

In support of the exchange of offers and counter-offers in good-faith negotiations under the Huawei/ZTE framework, SEP holders and implementers often exchange valuation information and other considerations. These may include methods and considerations for arriving at proposals they consider to be FRAND compliant. To step-in on behalf of implements to make offers and counter-offers, LNGs would need to coordinate with and among its members regarding commercially sensitive information, including royalty rate and royalty calculation methods and considerations. Thus, the exchange of such commercially sensitive information appears to be “necessary for the functioning” of the LNG.<sup>18</sup> At the same time, the exchange of commercially sensitive information also seems to fall within the definition of anti-competitive buyer cartel behaviour as defined within paragraph 316 of the DHG. For example, paragraph 316 of the DHG defines buyer cartels to include “agreement or concerted practices between two or more

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<sup>16</sup> See e.g., Contribution to the Debate on SEPs, Group of Experts on Licensing and Valuation of Standard Essential Patents ‘SEPs Expert Group’ (E03600), January 2021, page 169.

<sup>17</sup> *Id.* (noting that “LNGs have to conduct their licensing negotiations in line with the *Huawei v. ZTE* framework to reduce the risk of “hold-out” and of being considered an unwilling licensee (group).”)

<sup>18</sup> DHG, at 342.

purchasers aimed at (a) coordinating those purchasers' individual competitive behaviour on the market or influencing the relevant parameters of competition through practices such as... the fixing or coordination of purchase price... and (b) influencing those purchasers' individual negotiations with or individual purchases from suppliers, for example through coordination on the purchasers' price negotiation strategies or exchanges on the status of such negotiation with suppliers.”

Thus, under the DHG, it remains unclear as to how the operation of LNGs could consistently satisfy the requirements set forth in the Huawei/ZTE negotiation framework and concerns over restrictions of competition.

Based on at least the reasons above, SEP licensing through LNGs should not be analogously compared with joint purchase arrangements. SEP licensing through LNGs can be used to delay or derail SEP licensing negotiations, enable collective price-fixing by implementers, allow implementers to unilaterally demand non-FRAND terms and conditions for SEPs or to collectively boycott licensing discussions with SEP holders.

Panasonic would like to ask that the Commission to conduct a further review to consider whether given the distinctive characteristic of: a) goods/services and SEPs; and b) the nature of commercial discussions for purchasing goods/services and SEP licensing, LNGs can be analogously compared to joint purchase arrangements. Further, Panasonic asks the Commission to consider that given the information exchanged in SEP licensing discussions, whether the potential anticompetitive implications of SEP licensing through LNGs can out-weight any alleged efficiency or pro-competitive effectiveness. Finally, Panasonic asks the Commission to consider whether restrictive effects by LNGs can adversely impact the “purchasing market” to discourage further innovation and participation in the standard-setting process. Specifically, whether LNGs could have discriminatory effects against certain SEP holders (*e.g.*, SMEs) to discourage or preclude them from further participation in the standard-setting process and how that would adversely impact the long-term sustainability of the standard setting ecosystem as a whole.

## **Comments to Chapter 7: Standardization Agreements**

The DHG contains attributes that can be supported by SEP holders and implementers. For example, SEP holders can appreciate the Commission's recognition that market power should be assessed on a case-by-case basis and that there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power.<sup>19</sup> The DHG's recognition that various valuation approaches are available for SEPs also provides SEP holders and implementers with the necessary tools and flexibility to pursue good-faith bilateral licensing discussions. Finally, the Commission's recognition that "hold-out" and "hold-up" behaviours may exist reflects market reality.<sup>20</sup>

While there are many positive aspects in the DHG, there remain some uncertainty and misunderstandings as discussed below.

### **Paragraph 481**

Panasonic understands the importance of balanced IPR policies at SDOs. At the same time, Panasonic is unable to understand what constitutes "a clear and balanced IPR policy" as envisioned by the DHG. To the extent that "clear" carries the meaning of "absolute clarity" or "very detailed and tailored mandates," Panasonic objects to the draft language because such requirements would lead to unworkable situations for the SDOs and could dissuade technical contributors from participation in the standard-setting process. In the long run, it could damage Europe's presence and leadership position in terms of SDOs and within the overall context of the ecosystem that supports the development and deployment of standardized technologies.

As a long-time participant in SDOs around the world, Panasonic has advocated for balanced policies that enable FRAND aspirations of standard-setting and the well-being of the ecosystem that supports the development and deployment of standardized technologies. Standard setting is a voluntary and collaborative process that enables technical contributions from all kinds of proprietors (*e.g.*, individuals, universities, research centres and corporations). They all contribute, discuss and analyse technical

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<sup>19</sup> *Id.* at 471.

<sup>20</sup> *Id.* at 470.



proposals to create the best technical solutions to address industry or market needs. This collaborative process has been made possible by allowing inclusiveness through recognition of shared aspirations and a collective assumption of responsibilities to the process (*i.e.*, the commitment to FRAND by both technical contributors and users of standardized technologies alike).

Individuals and corporations come from different economic, cultural and national backgrounds. Naturally, while all participating technical contributors can agree on common aspirations, not all participants can agree on each and every detail. To that end SDO IPR policies have been designed to capture common aspirations that can be agreed to on a consensus while leaving the details (*e.g.*, FRAND licensing terms and conditions) to good-faith resolutions among interested parties, either bilaterally, through patent pools or other commercially acceptable arrangements. Indeed, the Commission has recognized that there is no one-size-fits-all solution to what is FRAND and the DHG should not mandate very detailed IPR policies that would restrain interested parties from considering reasonable case-by-case solutions.

#### **Paragraph 482**

As an active participant in SDOs, Panasonic appreciates the Commission's clarification that the goal of the IPR policies at SDOs aims to ensure access to the standardized technologies developed.<sup>21</sup> Panasonic, however, believes that paragraph 482 of the DHG can be improved by deleting the words "to all third parties."

Contrary to the statement of paragraph 482, effective access to standardized technologies does not require a mandate for "license to all." Indeed, under a FRAND undertaking being based on "access for all", SEP holders and SDOs already provide and can continue to provide access to standardized technologies, and implementers can and already gain access to and derive benefits from standardized technologies prior to taking SEP licenses.<sup>22</sup>

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<sup>21</sup> See *e.g.*, *Id.* 466, 470, 477.

<sup>22</sup> In the context of H.264 technology, unlicensed implementers competed for years (and in some cases for more than a decade) against good-faith licensees in all relevant markets, including Europe. The "access for all" FRAND undertaking of ITU-T/ITU-R/ISO/IEC, in no way, impedes access to that technical standard by anyone, including unlicensed implementers.

Mandating “license to all” creates confusion in the market and renders SEP licensing unmanageable. First, from a contractual point of view, FRAND undertakings by SEP holders at SDOs are defined with respect to a standard compliant product. And only a product that fully implements the standard can qualify as a standard compliant product.<sup>23</sup> Thus, mandating SDOs to adopt IPR policies that incorporate “license to all” is analogue to forcibly rewriting an existing contract and change its underlying premise. Such practice would not be consistent with existing contract law.

Second, mandating “license to all” would impose further complications to render SEP licensing unmanageable. To enable licensing at all levels a SEP holder would have to separate the SEP portfolio into different pieces of IPRs (and potentially on a claim-by-claim basis) and offer only a relevant portion of the portfolio to an implementer at a particular implementation level. Such practice can become unmanageable for both implementers and SEP holders. For an implementer, such a licensing practice secures less than the complete freedom to utilize the portfolio of a SEP holder. To that end, licensing needs would remain for its downstream customers. For a SEP holder, such a license practice would require it to monitor both downstream implementation and the supply chain. Things can be further complicated if a downstream customer sources goods from more than one supplier in the supply chain. To the extent that SEP licensing becomes more complicated by the introduction of the requirement to offer licenses at each and every level of implementation, the burden on SEP holders would increase, and such an increased burden may translate to an increase in the overall royalty for a SEP portfolio.

Third, the requirement for “license to all” creates the difficulty for SEP holders and good-faith implementers to understand and monitor licensing situations in the downstream market. In particular, SEP holders and good-faith implementers of standardized technologies have an interest in maintaining a levelled playing field at the downstream market. A good-faith implementer, for example, would be particularly interested in ensuring that it is not put at a competitive disadvantage vis-à-vis its direct competitors. That is, to ensure that its competitors have licensed the same SEPs subject to comparable licensing terms and conditions (including royalty) as it did. Requiring

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<sup>23</sup> See e.g., ETSI Directives Version 43, May 20, 2021, sections 6.1, 15.4 and 15.8, pages 41, 46-47 (Defining availability of licenses on FRAND terms and condition for MANUFACTURE and EQUIPMENT where MANUFACTURE means production of EQUIPMENT, and EQUIPMENT means any system or device fully conforming to a standard)

“license to all” would unduly complicate (or even eliminate) SEP holders’ and good-faith implementers’ ability to ensure that the non-discriminatory (“ND”) aspect of FRAND is maintained.

For at least the reasons given above, Panasonic respectfully submits that the “to all third parties” language be deleted from paragraph 482 of the DHG.

### **Paragraph 483**

Paragraph 483 of the DHG noted that an IPR policy needs to require specific disclosures, rather than blanket declarations, to enable “the industry to make an informed choice of technology to be included in the standard” and to assist “in achieving the goal of effective access to the standard.”<sup>24</sup> While specific disclosures do provide SEP holders and implementers with valuable information, Panasonic believes that blanket declarations alone are sufficient to accomplish the stated purpose above. For example, if a technical contributor is not willing to provide a blanket declaration to license its IPRs under FRAND terms and conditions, industry participants in the standard-setting process could actively avoid proposed technical solutions from that contributor. In contrast, if technical contributors are willing to provide blanket declarations to license IPRs under FRAND terms and conditions, access to the technical standard under FRAND is already assured. To that end, Panasonic believes that blanket declarations provide the level of assurance that the Commission wants to achieve.<sup>25</sup>

The merit of a blanket declaration should not be overlooked or dismissed as the DHG appears to have done. In particular, a blanket declaration allow SDOs to ensure early and complete assurance to FRAND undertakings with respect to existing and potential IPRs of its technical contributors.<sup>26</sup> In contrast, clerical errors may occur with regard to specific disclosures leading to IPRs not being disclosed. A blanket declaration is particularly helpful for large corporations or research institutes where research teams exist in parallel that work independently on standardized and non-standardized technical

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<sup>24</sup> DHG, paragraphs 483.

<sup>25</sup> It is important to also recognize that IPRs of third parties who do not participate in the standard-setting process may still read on developed technical standards. Neither blanket declarations nor specific disclosures by the SDO members would enable participants to standard-setting activities or the industry as a whole to anticipate such potentially blocking IPRs.

<sup>26</sup> A blanket declaration also serves as an effective means to address the potential “patent ambush” issue as discussed in footnote 279 of the DHG.

solutions in the same technical field. In that case, a blanket declaration would provide a FRAND undertaking to all potential IPRs that belong to the organization regardless of whether specific disclosures were made by the research team that participated in the standard-setting process. Finally, requiring specific disclosures too early in the standard-setting process (*i.e.*, before the standard is frozen or near-frozen) can lead to over-identification of potentially relevant IPRs (*i.e.*, creating the so called “over declaration” issue). Thus, the utilization and timing of blanket declarations and specific disclosures should be closely considered so as to not distract activities at the SDOs while providing useful information in a meaningful context to the relevant stakeholders.

The DHG notes that IPR disclosures would not be relevant for a standard developed under a royalty-free policy. Panasonic notes that even a royalty-free policy may give rise to real-world anti-competitive effects. That is, while a non-royalty bearing license requires no monetary compensation for its use, such a license can nevertheless still leverage market power and impose terms and conditions on its licensees that restrain competition in effect.

#### **Paragraph 492**

As a part of the discussion regarding different types of IPR disclosure models, paragraph 492 notes that “[s]tandard development agreements providing for the disclosure of information regarding characteristics and value-added of each IPR to a standard and, thereby, increasing transparency to parties involved in the development of a standard will not, in principle, restrict competition within the meaning of Article 101(1).” While such disclosure practice at the SDO may not restrict competition, it would necessarily impose severe and undue burden on technical contributors. Indeed, such a requirement would distract SDO participants from focusing on the primary activities at the SDOs, to develop the best technical standard to satisfy industry needs.

#### **Paragraphs 485-488, 500 (Valuation Issues)**

Panasonic appreciates the Commission’s recognition that competition law does not require SDOs to verify whether licensing terms of participants fulfil the FRAND commitment.<sup>27</sup> Indeed, relevant SDO IPR policies leave SEP holders and implementers

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<sup>27</sup> DHG, at 485.

to determine appropriate royalties under FRAND through good-faith bilateral discussions. Panasonic further appreciates the Commission's recognition that there are various methods available for the assessment of FRAND.<sup>28</sup> This is consistent with the approach advocated by the Japanese government.<sup>29</sup>

Panasonic agrees with the Commission's conclusion that, in practice, more than one method is often used to account for shortcomings of a particular method and to cross-check the result. The DHG, however, appears to have placed particular analysis on "*ex ante* disclosure" of royalty rates such as *ex ante* disclosure of the most restrictive licensing terms or maximum accumulated royalty rate.<sup>30</sup> While the conditions for *ex ante* disclosures may exist for some standards, the conditions for *ex ante* disclosures do not always exist. Further, even if the conditions do exist for *ex ante* disclosures, *ex ante* disclosures often do not have the ability to accurately predict or have the flexibility to adapt to changing market conditions.

*Ex ante* disclosures have limitations and shortcomings. First, *ex ante* disclosures do not reflect the licensing costs associated with IPRs of non-members. Second, not all SDO members might make *ex ante* disclosures as it is not mandatory. Even if *ex ante* disclosures were mandatory, SEP holders should not be limited in their own valuation by *ex ante* disclosures of other SDO members. Third, while *ex ante* disclosures can be made, it is likely that not all SEP holders can agree to such a valuation on an *ex ante* basis. To that end, forcing the positions set forth in the *ex ante* disclosures of non-supporting SEP holders may be unfair. Fourth, an *ex ante* disclosures may not reflect the actual licensing conditions that materialize in the market. For example, market conditions (e.g., emergence of competition technologies) may require SEP holders to reconsider the valuation disclosed *ex ante*. Fifth, a valuation disclosed *ex ante* can be higher than what the market can assume, relying on such a disclosed value could inhibit, rather than enable adoption. Finally, a valuation disclosed *ex ante* may be unable to capture later-developed application verticals. Thus, the effectiveness of an *ex ante* valuation may be diminished when standardized technologies are adopted beyond their traditional use case.

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<sup>28</sup> *Id.* at 486.

<sup>29</sup> JAPAN PATENT OFFICE, *Guide to Licensing Negotiations Involving Standard Essential Patents* (June 5, 2018), available at [https://www.jpo.go.jp/e/support/general/sep\\_portal/document/index/guide-seps-en.pdf](https://www.jpo.go.jp/e/support/general/sep_portal/document/index/guide-seps-en.pdf) (identifying a number of accepted valuation methods for SEPs)

<sup>30</sup> DHG, at 500.

Finally, Panasonic understands that *ex ante* disclosures are in principle acceptable under competition law. At the same time, encouraging *ex ante* disclosures can lead to a misunderstanding that the Commission encourages the process of technology selection to be informed by license terms and conditions (*i.e.*, not based on the technical merits of the proposals). Such a technology selection process could result in less efficient technical standards and introduce commercial aspects into the standardization process at the SDOs. Either of such results would be detrimental to the functioning and purpose of SDOs and threaten the long-term sustainability of the standards ecosystem. The technology selection process should be based on the technical merits of the proposed technical solutions only. To the extent that associated IPRs do exist with the selected technologies, the FRAND undertaking (assured by a blanket declaration) is sufficient to ensure the accessibility to the developed technical standard.

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