Fair Standards Alliance

Review of the Horizontal BER and Guidelines

Input to the Section on Standardization Agreements in the Guidelines (12 February 2020)

In the following overview, the Fair Standard Alliance (FSA) shares its comments to some of the specific paragraphs of the Guidelines that relate to 'standardization agreements'.

Current Text	FSA Comments and Suggestions
7.3. Assessment under Article 101(1)	
7.3.1. Main competition concerns	
263. Standardisation agreements usually produce **significant positive economic effects** (102), for example by promoting economic interpenetration on the internal market and encouraging the development of new and improved products or markets and improved supply conditions. Standards thus normally increase competition and lower output and sales costs, benefiting economies as a whole. Standards may maintain and enhance quality, provide information and ensure interoperability and compatibility (thus increasing value for consumers).	- FSA supports this statement, and agrees with the significant positive economic effects that standardization may bring. It is therefore important to ensure a balanced approach to SEP licensing, that recognizes the efforts that go into standards development as well as the development of products and services that implement those technologies and bring innovation to business and consumers. The recognition of standards development should however not equal a guaranteed return on investment, as such terms would encourage inefficient investments. Instead, SEP holders who have provided a voluntary commitment to license on FRAND terms and who hold valid infringed patents should be compensated on FRAND terms.
264. Standard-setting can, however, in specific circumstances, also give rise to **restrictive effects on competition** by potentially restricting price competition and limiting or controlling production, markets, innovation or technical development. This can occur through three main channels, namely reduction in price competition, foreclosure of innovative technologies and exclusion of, or discrimination against, certain companies by prevention of effective access to the standard. 265. ***First***, if companies were to engage in anti-competitive discussions in the context of standard-setting, this could reduce or eliminate price competition in the markets concerned, thereby facilitating a collusive outcome on the market (103). 266. ***Second***, standards that set detailed technical specifications for a product or service may limit technical development and innovation. While a standard is being developed, alternative technologies can compete for inclusion in the standard. Once one technology has been chosen and the standard has been set, competing technologies and companies may face a barrier to entry and may potentially be excluded from the market. In addition, standards requiring that a particular technology is used exclusively for a standard or preventing the development of other technologies by obliging the members of the standard-setting organisation to exclusively use a particular standard, may lead to the same effect. The risk of limitation of innovation is increased if one or more companies are unjustifiably excluded from the standard-setting process.	- While recognizing its positive effects, FSA agrees that standard-setting can also give rise to restrictive effects on competition. It is therefore important to recognize the contexts within which the FRAND commitment has been construed, and the role for competition law in ensuring such negative effects do not arise. Competition authorities should feel empowered to enforce the FRAND commitments to avoid these negative effects from occurring on the market. - The alliance recognizes the concerns that are highlighted in these sections, and considers these to be only some of many of the concerns that our members and the broader industry face when engaged in SEP licensing. As elaborated further below, we see in particular concerns around the availability of licensing throughout the value chain, and the valuation of FRAND. In fact, we consider these SEP licensing concerns to be hindering the uptake and development of IoT in Europe – and therefore second the concerns that were raised by nearly 30 companies in a letter to the European Commission President von der Leyen, Vice-President Vestager and Commissioner Breton requesting the Commission to defend and strengthen Europe's IoT innovation incentives (see below in response to paragraphs 283-285).

Current Text	FSA Comments and Suggestions
267. In the context of standards involving intellectual property rights ('IPR') (104), **three main groups of companies** with different interests in standard-setting can be distinguished in the abstract (105). ***First***, there are upstream-only companies that solely develop and market technologies. Their only source of income is licensing revenue and their incentive is to maximise their royalties. ***Secondly***, there are downstream-only companies that solely manufacture products or offer services based on technologies developed by others and do not hold relevant IPR. Royalties represent a cost for them, and not a source of revenue, and their incentive is to reduce or avoid royalties. ***Finally***, there are vertically integrated companies that both develop technology and sell products. They have mixed incentives. On the one hand, they can draw licensing revenue from their IPR. On the other hand, they may have to pay royalties to other companies holding IPR essential to the standard. They might therefore cross-license their own essential IPR in exchange for essential IPR held by other companies. 268. ***Third***, standardisation may lead to anti-competitive results by preventing certain companies from obtaining effective access to the results of the standard-setting process (that is to say, the specification and/or the essential IPR for implementing the standard). 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. A system where potentially relevant IPR is disclosed up-front may increase the likelihood of effective access being granted to the standard since it allows the participants to identify which technologies are covered by IPR and which are not. This enables the participants to both factor in the potential effect on the final price of the result of the standard (for example choosing a technology without IPR is likely to have a positive effect on the final price) and to verify with the IPR holder whether they would be willing to license if their technology is included in the standard. [FN 104: In the context of this chapter IPR in particular refers to patent(s) (excluding non-published patent applications). However, in case any other type of IPR in practice gives the IPR holder control over the use of the standard the same principles should be applied]	- In addition, some SEP owners have used tactics to prevent companies from verifying whether the terms and conditions that are being offered are FRAND – through the use of overly restrictive Non-Disclosure Agreements or other confidentiality obligations, or by imposing mandatory arbitration clauses (by which one party attempts to imposes conditions in the arbitration process, while keeping the outcome secret to the outside world). Also, the use of licensing platforms that do not respect FRAND obligations or consider themselves not to be bound by FRAND commitments provided by their contributors is a growing concern and is contrary to stated intent in many (including ETSI[1]) bylaws. SEP owners should not be able to set up licensing mechanisms that would alter their commitment to licensing on FRAND terms. - The terms in paragraph 264 (and paragraph 268) referring to companies being prevented "effective access" to the standard should be confirmed and further clarified to refer to companies being denied "licenses" on FRAND terms. For further details, please see our comments in relation to paragraphs 283-285 below. - As far as the references to the standards development processes are concerned that are referred to in paragraphs 265 and 266, we would like to point out that we disagree with some of the findings that the European Commission's Policy Report "Making the Rules, The Governance of Standards Development Organizations and their Policies on Intellectual Property Rights" makes. We have misgivings about the report's recommendation that the Commission, together with other public authorities, produce "clear guidance on the appropriate procedural principles for SDO policy developments." Except through the enforcement of European competition laws and the guidance provided via the BER/HGL, we do not see a current need for such additional rules. As the report elsewhere explains, existing law—to include competition, procurement, and trade law and direct regulation—already provides sufficient guidance on SDO procedural principles for policy development or otherwise. As long as these existing legal requirements are met, a diversity of SDO policies provides important benefits for the standards ecosystem. A diversity of policies also provides benefits for the development of new standards, as groups compete to attract members and participation. - In relation to paragraph 267, the identification of the different types of companies involved should be clarified: - For example, the reference to companies that "solely develop and market technologies" should be clarified to make it clear that there have been a growing number of companies that do not 'develop' technologies, but acquire them with the sole purpose to aggressively seek to monetize them. Such companies are often also referred to as Non-Practicing Entities (NPEs) or

[1] Form ETSI IPR Policy 6.1bis states that: "FRAND licensing undertakings made pursuant to Clause 6 shall be interpreted as encumbrances that bind all successors-in-interest … The undertaking shall be interpreted as binding on successors-in-interest regardless of whether such provisions are included in the relevant transfer documents."

Current Text	FSA Comments and Suggestions
	'patent trolls'. Often such entities issue claims for compensation that far go beyond what would be fair and reasonable. It then depends on the resources available to the target whether those claims will be contested – resources that could be spent on R&D and job creation, other than court litigation. - The proposition that some companies solely manufacture products based on technologies developed by others is wrong. Many companies both implement as well as develop IPRs. - Also, the perception that downstream companies' incentives is to "reduce or avoid royalties" is incorrect. While we cannot exclude that there are companies that may have such incentive, our experience shows that the large majority of companies implementing standards technology are willing to pay royalties for SEPs, if such request is commensurate to the SEP owner's commitment to license on fair and reasonable terms. What seems to be missing in this statement is the incentive of the broader industry (including both standards developers and technology implementers) to promote technology and innovation. Standards developers have many motivations including in some cases the incentive to receive fair and reasonable royalties in order to promote the adoption of the standards. Their compensation comes from the broad set of companies that adopt the standard, and the resulting increase in the volume of licenses. Seeking rents that aim to tax innovation by others will harm the overall incentive to promote the adoption of standardized technologies – to the detriment of European consumers. - Finally, the reference to vertically integrated companies should be clarified in two ways. First, many vertically integrated companies use their IPR portfolio defensively. That means that they do not necessarily draw licensing revenue from their IPRs, but use their IPRs defensively in case they are at the receiving end of licensing claims, or for the purpose of seeking cross-licenses. These companies are most interested in growing the market, a strategy consistent with adoption of the standard and consumer benefit through competition. In fact, we consider that this is probably the largest category of companies. Second, vertically integrated companies can raise additional competition concerns when they not only develop technology, but also supply both components and products that incorporate such components. Those companies could use their position at the IPR front to prevent competition at the component-level by refusing to license on FRAND terms to competing component manufacturers. - Paragraph 268 seems to ignore the fact that many standards bodies adopt standards for which SEP owners have given the commitment to license on a *royalty-free* basis. While FSA does not take position on any model, it must be recognized that there are a number of SDOs that have adopted royalty-free licensing models and have been highly successful in doing so. FRAND licensing is not the only means based on which SDOs can make standards innovation thrive. The concept that "choosing a technology without IPR is likely to have a positive effect on the final price" is therefore misguided, in the sense that (i) some technology may be available royalty-free; and (ii) the final price of a product may not be the

Current Text	FSA Comments and Suggestions
	only determinant as to whether a company is successful – in the sense that while royalties may potentially have an impact on the final price, the product may not be successful if it does not interoperate with other technologies or products. Companies recognize such benefits as well. - Footnote 104 should be updated to clarify that patents can include patent applications, including non-published patent applications. Such applications should not be excluded, because they can provide early indications as to which companies may have important stakes in the standard that is being developed and such applications would be envisioned to become Standards Essential Patents when a patent is issued.
269. Intellectual property laws and competition laws share the same objectives (106) of **promoting innovation and enhancing consumer welfare**. 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-setting, also acquire control over the use of a standard. When the standard constitutes a barrier to entry, the company could thereby control the product or service market to which the standard relates. This in turn could allow companies to behave in anti-competitive ways, for example by **'holding-up' users** after the adoption of the standard either by refusing to license the necessary IPR or by extracting excess rents by way of excessive (107) royalty fees thereby preventing effective access to the standard. However, even if the establishment of a standard can create or increase the market power of IPR holders possessing IPR essential to the standard, there is no presumption that holding or exercising IPR essential to a standard equates to **the possession or exercise of market power**. The question of market power can only be assessed on a case by case basis.	- We strongly support the opening statement indicating that IP laws and competition laws share the same objective in terms of promoting innovation and enhancing consumer welfare. As mentioned above, due to the potentially restrictive effects that standardization development may have, competition laws play a critical role in the ensuring a balanced framework for SEP licensing to the benefit of European consumers and innovation. Therefore, in order to create a balanced ecosystem and ensure the continued promotion of innovation and growth in the EU, the FRAND commitment that is provided by SEP owners in the standardization context must be respected. Non-compliance with the FRAND commitment should be considered a violation of competition rules, that should be enforced by competition authorities. We propose that the guidelines remain very clear on this point, and emphasize the relevance of the applicable competition law considerations. - The reference to 'refusing to license the necessary IPR' should be clarified to include references to refusals to license the necessary IPR *at any level in the value chain*. See below for further details in response to paragraphs 283-285. - Finally, we strongly support the concern the Commission raises in this section around standard essential patent licensing 'hold-up'. Concerns around refusals to license or seeking to extract excessive rents are very much top-of-mind, and examples in this regard are plentiful. See for example the complaints that have been brought before DG COMP, as well as the letter that 27 corporations sent to the Commission President von der Leyen, Vice-President Vestager and Commissioner Breton requesting the Commission to defend and strengthen Europe's IoT innovation incentives (see below in response to paragraphs 283-285). This being said, examples of hold-up should not be limited to those two concerns. Additional examples may be (i) the lack of transparency in terms of the proposed FRAND licensing terms and conditions, and the refusal to provide evidence to allow potential licensees to verify whether a given offer is FRAND or not; (ii) the use of overly secretive NDAs, some of which do not even allow licensees to verify whether their suppliers have concluded relevant licenses; (iii) the use of injunctions (or other exclusionary remedies) for SEPs for which a FRAND commitment has been provided; (iv) the mandating of arbitration; or (v) the use of patent pools or other licensing platforms to seek to circumvent the FRAND commitments that have been provided by the SEP owner. For further

Current Text	FSA Comments and Suggestions
	details and additional examples, see in particular to the CEN-CENELEC Workshop Agreement CWA95000, referenced at https://fair-standards.org/cwa_/.
7.3.3. Restrictive effects on competition	
Standardisation agreements **Agreements normally not restrictive of competition** 277. Standardisation agreements which do not restrict competition by object must be analysed **in their legal and economic context** with regard to their actual and likely effect on competition. In the absence of market power (110), a standardisation agreement is not capable of producing restrictive effects on competition. Therefore, restrictive effects are most unlikely in a situation where there is effective competition between a number of voluntary standards. 278. For those standard-setting agreements which risk creating market power, paragraphs 280 to 286 set out **the conditions under which such agreements would normally fall outside the scope of Article 101(1)**. 279. The non-fulfilment of any or all of the principles set out in this section will not lead to any presumption of a restriction of competition within Article 101(1). However, it will necessitate **a self-assessment** to establish whether the agreement falls under Article 101(1) and, if so, if the conditions of Article 101(3) are fulfilled. In this context, it is recognised that there exist different models for standard-setting and that competition within and between those models is a positive aspect of a market economy. Therefore, standard-setting organisations remain entirely free to put in place rules and procedures that do not violate competition rules whilst being different to those described in paragraphs 280 to 286. 280. Where participation in standard-setting is unrestricted and the procedure for adopting the standard in question is transparent, standardisation agreements which contain no obligation to comply (111) with the standard and provide access to the standard on fair, reasonable and non-discriminatory terms will normally not restrict competition within the meaning of Article 101(1). 281. In particular, to ensure unrestricted participation the rules of the standard-setting organisation would need to guarantee that all competitors in the market or markets affected by the standard can participate in the process leading to the selection of the standard. The standard-setting organisations would also need to have objective and non-discriminatory procedures for allocating voting rights as well as, if relevant, objective criteria for selecting the technology to be included in the standard. 282. With respect to transparency, the relevant standard-setting organisation would need to have procedures which allow stakeholders to effectively inform themselves of upcoming, on-going and finalised standardisation work in good time at each stage of the development of the standard.	- It will be important to maintain the arguments in paragraph 279 that "standard-setting organisations remain entirely free to put in place rules and procedures that do not violate competition rules whilst being different to those described in paragraphs 280 to 286". As mentioned above in relation to the European Commission's report on SDO governance, we consider it would not be appropriate for the Commission, together with other public authorities, to produce "clear guidance on the appropriate procedural principles for SDO policy developments" – given that existing law and guidelines, to include competition, procurement, and trade law and direct regulation, already provides sufficient guidance on SDO procedural principles for policy development or otherwise. As long as these existing legal requirements are met, a diversity of SDO policies provides important benefits for the standards ecosystem. A diversity of policies also provides benefits for the development of new standards, as groups compete to attract members and participation - As referred to above, we agree with the concept that "where participation in standard-setting is unrestricted and the procedure for adopting the standard in question is transparent, standardisation agreements which contain no obligation to comply with the standard and provide access to the standard on fair, reasonable and non-discriminatory terms will normally not restrict competition within the meaning of Article 101(1)." We do consider that the reference to 'providing access' should be clarified to refer to 'providing licenses' to the standard on FRAND terms.
283. Furthermore, the standard-setting organisation's rules would need to ensure **effective access to the standard on fair, reasonable and non discriminatory terms** (112). 284. In the case of a standard involving IPR, a clear and balanced IPR policy (113), adapted to the particular industry and the needs of the standard-setting organisation in question, increases the	- Recent history has shown that the language regarding effective "access" to the standard has been misinterpreted by some SEP owners, which has resulted in licenses having been refused to companies that were willing to take a license on FRAND terms for the sole reason that they were higher in the supply chain. Therefore, in order to continue to encourage innovation and support the growth of IoT, it is critical that the new guidelines confirm and further clarify the obligation on SEP owners that have

Current Text	FSA Comments and Suggestions
likelihood that the implementers of the standard will be granted effective access to the standards elaborated by that standard-setting organisation. 285. 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 on fair, reasonable and non-discriminatory terms ('FRAND commitment')** (114). That commitment should be given prior to the adoption of the standard. At the same time, the IPR policy should allow IPR holders to exclude specified technology from the standard-setting process and thereby from the commitment to offer to license, providing that exclusion takes place at an early stage in the development of the standard. To ensure the effectiveness of the FRAND commitment, there would also need to be a requirement on all participating IPR holders who provide such a commitment to ensure that any company to which the IPR owner transfers its IPR (including the right to license that IPR) is bound by that commitment, for example through a contractual clause between buyer and seller.	provided a FRAND commitment to license to all third parties on FRAND terms, "irrespective of their place in the value chain": During the early development of the digital cellular telephony market, this obligation to license throughout the value chain was well observed. SEP holders established licenses with manufacturers of all types of equipment when requested. Manufacturers in all parts of the product supply chain were able to obtain SEP licenses. These licensees were then able to offer licensed products, whether they were complete end-use products or intermediate subsystem products, to their customers. This allowed the establishment of an ecosystem whereby some manufacturers were able to supply subsystems that implement the standards to downstream manufacturers, thus freeing the downstream manufacturers from dealing with the complexities of the standards based technologies. The downstream manufacturers were then able to focus their efforts on the innovations that they add in the implementation of the final product. This system eased the widespread adoption of the standard technologies, a primary goal of the SSO. From a business perspective, it is important for end-product manufacturers to be able to use licensed subsystems. For example, in the area of IoT, companies use wireless communications subsystems supplied by manufacturers that are well versed in the continual development of the wireless connectivity standards. From a practicality and efficiency perspective, it would make obvious sense for the patent owner to talk to the implementer of the technology, the subsystem manufacturer, which is in a better position to judge whether the alleged patent assertion is justified or not. Furthermore, since end-product companies are not well equipped to assess whether a patent is indeed a SEP, they rely on the subsystem manufacturers to provide indemnification against patent assertions on technologies implemented in the subsystems. Not being able to take a license make it difficult for suppliers to provide such indemnification. Unfortunately, this effective and efficient ecosystem is being challenged. Some SEP holders are now refusing to license subsystem manufacturers. Some argue that the value of SEPs are demonstrated in their use in the final product and therefore the SEP holders should be able to collect royalties on the final product. Others claim that the SEPs cover functionality that requires cooperating components outside these subsystems and therefore royalties should not be collected at the subsystem level. However, the main driver for this change appears to be their belief of some SEP holders that they can extract higher royalty payments from the end-product manufacturer than from the subsystem manufacturer. But when the standard is implemented higher in the value chain, licensing only at the end-device level results in a tax on downstream innovation. It may also artificially expand the scope of the patent, from a legal perspective, and seek to grant protection beyond the

Current Text	FSA Comments and Suggestions
	claimed invention when indeed the claims in the patent are not written to a specific application. Furthermore, the claim of some SEP holders that the patented technology is not fully implemented in the subsystem, and therefore that royalties should be calculated on the end-product, is also false. In order for a subsystem to be useful and efficient to an end product manufacturer, most, if not all, of the standardized technology relevant to the end product must be implemented in the subsystem. In the case of cellular data communications, the wireless data module (one common subsystem example) implements almost all of the wireless data SEPs associated with a mobile end product. While a small subset of SEPs may claim functionality implemented outside the wireless data module, it is inappropriate to refuse to license wireless data module subsystem manufacturers for those patents that are fully implemented within the module. So, in conclusion, subsystem manufacturers fulfill a useful and important role in the deployment of standardised technologies. This ecosystem has traditionally been served by the ability of subsystem manufacturers to procure licenses to SEPs and sell licensed subsystems. The introduction of SEP holders' refusal to license subsystem manufacturers is a discriminatory practice that does not comport with their FRAND obligation. Furthermore, these discriminatory practices harm the efficient market mechanism that has helped propagate the standardised technology, a technology created by multiple industry participants to benefit both industry and end consumers. For further details, see the FSA's position paper on "SEP Licenses available to all", at https://fair-standards.org/wp-content/uploads/2016/09/160624_FSA_Position_Paper_-_SEP_licenses_available_to_all.pdf - The practice of some SEP owners to selectively grant licenses only to certain companies at the end-device level in the value chain, and refuse to license any of their suppliers, prevents companies across the IoT and related innovative technology industries from planning investments in R&D and production of innovative products to the benefit of European businesses and consumers. This concern has been amplified by the industry letter to Commissioner-President von der Leyen, Vice-President Vestager and Commissioner Breton signed by nearly 30 companies, indicating that "[t]he continued refusal of some SEP patent owners to license SEPs to companies higher in the value chain across IOT and related industries (connected vehicles, intelligent power grids, connected home industry, smart metering) increasingly undermines the competitiveness of these important highly innovative industries, and is already harming technological innovation in Europe". It continues to state that: "The practice of some SEP owners to grant licenses only to certain companies, and not all in industrial supply chains, prevents companies across the IOT and related innovative technology industries from planning investments in research and development and production of innovative products to the benefit of European

Current Text	FSA Comments and Suggestions
	businesses and consumers. Upstream suppliers become dependent on purchase orders and pricing demands of the downstream companies chosen by SEP owners to be the ‘single point of license’ which thereby control access to markets. This practice stifles innovation, discourages new market entry, and ties suppliers to established customers. As a result, European businesses and consumers may pay higher prices than they would pay in a more competitive market. Condoning SEP license practices that overvalue the contribution of SEPs to innovation diminishes the potential for those who innovate on top of, or alongside standards, to reap returns on their innovation. This not only directly affects our companies but undermines the competitiveness of European industry at large. Such practices present a direct and immediate threat to innovation, and the success of leading European technology companies, at a time when Europe is focused on being a pioneer in digital technologies that are key to the future of IOT and its industries”.[2] - Also, the CEN-CENELEC Workshop Agreement, supported by more than 55 organizations listed as ‘Core Licensing Principle’ #2 that: “A FRAND license should be made available to anybody that wants one to implement the relevant standard. Refusing to license some implementers is the antithesis of the FRAND promise. In many cases, upstream licensing can create significant efficiencies that benefit the patent holder, the licensee and the industry”. For further details, see https://fair-standards.org/cwa_/. - There are many other authoritative sources that share those views: - In *Huawei/ZTE*,[3] the European Court of Justice stated 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”; - In the 2013 *Nokia-Microsoft* merger decision,[4] the European Commission (DG COMP) indicated that FRAND commitments essentially oblige SEP holders: (i) to make the patent in question available to all interested third parties; (ii) not to discriminate between different licensees; and (iii) to offer a license to the patents on fair and reasonable terms (para 192); - In *KFTC v. Qualcomm* (Korea 2017), the Court found that “[A]ccess to and use of cellular SEPs should be guaranteed for the modem chipset manufacturers in accordance with the purposes of standard-setting and FRAND commitments”;

[2] The original letter is available (behind paywall) at https://www.mlex.com/Corporate/DetailView.aspx?cid=1150958&siteid=167&rdir=1. The letter was also covered by the Financial Times, under the header: “Apple, Cisco, Daimler and BMW complain to Brussels over patents”, available at https://www.ft.com/content/46e0e4c0-20ea-11ea-92da-f0c92e957a96.
[3] See http://curia.europa.eu/juris/document/document.jsf;jsessionid=82CE7E334848FD0E0146EA5585132980?text=&docid=165911&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4770597.
[4] See https://ec.europa.eu/competition/mergers/cases/decisions/m7047_687_2.pdf.

Current Text	FSA Comments and Suggestions
	- In its Guidelines for the Use of Intellectual Property under the Antimonopoly Act,[5] the Japan Fair Trade Commission (JFTC) argues that “refusal to license or bringing an action for injunction against a party who is willing to take a license by a FRAND-encumbered Standard Essential Patent holder […] may deprive the entrepreneurs who research & develop, produce or sell the products adopting the standards of trading opportunities or impede the ability of the entrepreneurs to compete by making it difficult to research & develop, produce or sell the products adopting the standards”. - In *FTC v. Qualcomm*,[6] Judge Koh concluded that “the Court agrees with the FTC that as a matter of law, the TIA and ATIS IPR policies both require Qualcomm to license its SEPs to modem chip suppliers”. - Based on the above, we consider that *only* FRAND-based standardization agreements that require any party that requests a license be offered a license on FRAND terms irrespective of its place in the value chain can fall within the scope of the ‘safe harbor’. FRAND-based standardization agreements that do not recognize the requirement to license anyone willing to take a FRAND license irrespective of its place in the value chain should be looked at critically, as they may raise competition law concerns and are unlikely to satisfy the efficiencies-test under Art 101(3) TFEU. - Furthermore, the section of standardization agreements normally not restrictive of competition should also elaborate on the applicable valuation principles, to show that SEPs should be valued based on their own technical merits and scope, not based on downstream values or uses, and be in proportion to the value added by other inventions. Standardization agreements that are unclear on this point should not be considered to fall within the ‘safe harbor’. In fact, FRAND-based standardization agreements that do not recognize these valuation requirements may raise competition law concerns and not satisfy the efficiencies test under Art 101(3) TFEU. See our comments to paragraphs 289-291 below.
286. Moreover, the IPR policy would need to require **good faith disclosure**, by participants, of their IPR that might be essential for the implementation of the standard under development. This would enable the industry to make an informed choice of technology and thereby assist in achieving the goal of effective access to the standard. Such a disclosure obligation could be based on ongoing disclosure as the standard develops and on reasonable endeavours to identify IPR reading on the potential standard (115). It is also sufficient if the participant declares that it is likely to have IPR claims over a particular technology (without identifying specific IPR claims or applications for IPR). Since the risks with regard to effective access are not the same in the case of a standard-setting	- We agree that the requirement for a good faith disclosure process remains critical. In addition, we consider that in order to allow companies (including European SMEs) to make reasonable determinations around FRAND valuation, SEP owners must give potential licensees sufficient access to information and data. One of the six core licensing principles listed by the CEN-CENELEC Workshop Agreement, supported by more than 55 organizations, states that: “Neither party to a FRAND negotiation should seek to force the other party into overbroad secrecy arrangements”. It further explains that “when a licensor seeks to initiate a negotiation, a licensor should be prepared to provide a base level of information regarding the SEPs to requesting licensees without an NDA. This base level of information would include information to enable the putative licensee (and its supply chain) to

[55] See https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/IPGL_Frand.pdf.
[6] https://www.ftc.gov/system/files/documents/cases/2018_11_06_order_granting_ftc_motion_for_partial_summary_judgment_dkt_931.pdf.

Current Text	FSA Comments and Suggestions
organisation with a royalty-free standards policy, IPR disclosure would not be relevant in that context.	understand the SEPs, a sufficiently detailed specification (e.g., claim charts) describing how the patents are allegedly infringed by the products implementing the standard, and other relevant information needed by the licensee to evaluate claims of infringement, validity and essentiality. Additional examples of materials that should be available without NDA obligations are provided in Annex B to this CWA" (page 13). - Finally, we agree with the proposal that the disclosure requirements may differ based on the IPR policy adopted by the SDO. Indeed, as mentioned in the current guidelines, SDOs that adopt royalty-free licensing policies may not need to require such levels of disclosure. The guidelines should continue to recognize the important innovation efforts that are ongoing within SDOs that adopt royalty-free licensing policies.
FRAND Commitments 287. FRAND commitments are designed to ensure that essential IPR protected technology incorporated in a standard is accessible to the users of that standard on fair, reasonable and non-discriminatory terms and conditions. In particular, FRAND commitments can prevent IPR holders from making the implementation of a standard difficult by refusing to license or by requesting unfair or unreasonable fees (in other words excessive fees) after the industry has been locked-in to the standard or by charging discriminatory royalty fees. 288. Compliance with Article 101 by the standard-setting organisation does not require the standard-setting organisation to verify whether licensing terms of participants fulfil the FRAND commitment. Participants will have to assess for themselves whether the licensing terms and in particular the fees they charge fulfil the FRAND commitment. Therefore, when deciding whether to commit to FRAND for a particular IPR, participants will need to anticipate the implications of the FRAND commitment, notably on their ability to freely set the level of their fees.	- As mentioned above, we agree with the significant detrimental consequences for innovation more broadly if FRAND commitments are not being respected. We have elaborated on the concerns around refusals to license above, and also support the concerns around unfair and unreasonable licensing fees. These practices do not only raise concerns for companies that seek to implement the standardized technology, but for all European businesses and consumers that could gain and grow their business based on the benefit that standardization can bring. - We agree with the statement that SDOs are not required to verify whether licensing terms of participants fulfil the FRAND commitment, and should not intervene in setting the applicable level of licensing fees. However, they should encourage compliance with FRAND rules and elaborate as much as possible about what such compliance entails – in line with European legislation and case law. SDOs that have tried to bring such clarifications should be supported. Furthermore, as referred to above in relation to paragraph 286, in order to verify whether offered terms and conditions are FRAND, SEP owners should be encouraged to be transparent and provide the information that is required in order to allow for such verification.
289. In case of a dispute, the assessment of whether fees charged for access to IPR in the standard-setting context are unfair or unreasonable should be based on **whether the fees bear a reasonable relationship to the economic value of the IPR** (116). In general, there are various methods available to make this assessment. In principle, cost-based methods are not well adapted to this context because of the difficulty in assessing the costs attributable to the development of a particular patent or groups of patents. Instead, it may be possible to compare the licensing fees charged by the company in question for the relevant patents in a competitive environment before the industry has been locked into the standard (ex ante) with those charged after the industry has been locked in (ex post). This assumes that the comparison can be made in a consistent and reliable manner (117). 290. Another method could be to obtain an independent expert assessment of the objective centrality and essentiality to the standard at issue of the relevant IPR portfolio. In an appropriate case, it may	- In terms of the valuation of patents for which a FRAND commitment has been provided, we consider it to be critical to highlight that such valuation should occur on the basis of their own technical merits and scope, not based on downstream values or uses, and be in proportion to the value added by other inventions. We therefore support the reference in the current guidelines, highlighting the concept that the fees need to bear "a reasonable relationship to the economic value of the IPR", and that the economic value of the IPR should be based on the product or component in which the IPR is incorporated – not on any downstream uses of that product or component. Doing otherwise risks creating a tax on downstream innovation. As mentioned above, we therefore propose that the section of standardization agreements normally not restrictive of competition should further elaborate on the applicable valuation principles, to take these principles into account. Standardization agreements that are unclear on this point should not be considered to fall within the 'safe harbor'. In fact, FRAND-based

Current Text	FSA Comments and Suggestions
also be possible to refer to ex ante disclosures of licensing terms in the context of a specific standard-setting process. This also assumes that the comparison can be made in a consistent and reliable manner. The royalty rates charged for the same IPR in other comparable standards may also provide an indication for FRAND royalty rates. These guidelines do not seek to provide an exhaustive list of appropriate methods to assess whether the royalty fees are excessive. 291. However, it should be emphasised that nothing in these Guidelines prejudices the possibility for parties to resolve their disputes about the level of FRAND royalty rates by having recourse to the competent civil or commercial courts.	standardization agreements that do not recognized these valuation requirements may raise competition law concerns and not satisfy the efficiencies test under Art 101(3) TFEU. - The CEN-CENELEC Workshop Agreement – which was supported by over 50 organizations active in this industry – elaborates on the key valuation principles, as follows: - Parties may agree to royalty approaches or alternative methodologies for convenience, or in some cases due to lack of experience, due to unfair leverage (such as based on concerns over potential use of injunctions), or for other reasons. However, the fact that parties agree to specific terms in a given situation does not mean that those terms are necessarily FRAND-compliant. A number of courts have found that previously-signed SEP licenses were not, in fact, FRAND-compliant. - As a general principle discernable from the relevant authorities, FRAND royalties should reflect the value of the patented invention, and only the value of the patented invention. - As another general principle discernable from the relevant authorities, a FRAND royalty should be calculated based on the proportionate value the claimed patented invention brings to the smallest component entering the stream of commerce that substantially implements the relevant part of the standard. Normally, the smallest component that enters into commerce would be a component that can later be integrated in higher level products. Once established, that value should remain constant regardless of the complexity of the end product (e.g., due to addition of others' additional inventions and technologies in the end product) – because the patent holder is not entitled to the value created by the inventions or technologies of others. i. This entails that FRAND royalties should not seek to include compensation for innovations or features that are not inherent in the underlying patent claim. In other words, the royalty for a SEP should be based on the value of the smallest component that substantially embodies the patented invention, with further apportionment where over-inclusive. By focusing on the value of the smallest component that substantially embodies the SEP, parties can ensure that royalties reflect the value of the SEP, rather than the value of other innovation, or the value of standardization itself. ▪ Deviation from the value added by the patent claim is a fundamental problem inherent in so-called "use-case based licensing" of SEPs. Such practices seek to calculate a royalty based not only on the value of the patented invention, but also on all of the other innovation that goes into an end-user product. ▪ In this way, use-case based licensing necessarily seeks to collect a royalty on not only the standardized innovation, but on other value-added features reflected in the product's price. Such approaches can unfairly leverage the market power of a SEP to extract a royalty on the innovation of others.

Current Text	FSA Comments and Suggestions
	ii. As another general principle discernable from the relevant authorities, a FRAND royalty should not exceed the ex ante cost of designing around the claimed invention. This consideration is a "tool" some have used to determine the fair and reasonable cost of the claimed invention. iii. As another general principle discernable from the relevant authorities, a FRAND royalty should not include the added value of standardization, and should be determined on an ex-ante basis (prior to the inclusion in the standard). In this way, FRAND royalties can seek to exclude the incremental value associated with the "lock-in" of the patented technology into the standard. - Proportional Share of SEPs: FRAND royalties should reflect the SEP owner's proportional share of all patents essential to a particular standardized technology. This does not imply that rates must always reflect a strict patent counting proportionality, although this is often a good first-order approximation. The rate may be adjusted upward or downward based on licensor establishing other legitimate factors that should be considered in setting the royalty rate. i. Negotiating parties should recognize and consider that, based on studies promulgated by the European Commission (as cited below in Section 5.3 of the CWA), between 50% and 90% of all declared SEPs are not essential, valid SEPs. ii. No potential licensee is obligated to take a license to every patent that is claimed by a patent holder to be a SEP where there is a dispute as to whether it is essential, valid or infringed. A company that chooses not to take a portfolio license based on good-faith disagreements about whether certain patents are indeed applicable to it is not thereby "unwilling". - Cumulative, aggregate royalty rate for the standard: To determine whether a royalty rate proposal is consistent with FRAND principles, the rate should be viewed in the context of a cumulative, aggregate royalty rate for the standard (including backward compatibility for prior versions of the standard, to the extent such prior versions are implemented). - Use-case Based Licensing of SEPs: Use-case based licensing of SEPs is generally inconsistent with such FRAND licensing principles. Use-case based licensing inextricably ties the value of the standardized technology with the other technology/innovation reflected in an end-user product, even though such technology/innovation is outside the scope of the relevant SEPs. Consequently, the use-case based licensing model is inconsistent with the FRAND approach of calculating a royalty associated solely with the value of the standardized technology. - Non-discriminatory behavior: i. A key purpose of the FRAND licensing concept can be to help maintain a "level playing field" for competition among different implementers of the standard. Charging some companies (or category of companies) discriminatory royalties can undermine their

Current Text	FSA Comments and Suggestions
	ability to compete. While multiple factors may be considered in a given bi-lateral licensing negotiation, the approach for determining the FRAND rate should not utilize differing approaches causing discrimination affecting some SEP licensing deals. ii. Any company that seeks a SEP license to implement the standardized technology in their product should be entitled to a license. Refusal to grant a SEP license to a requesting licensee is discriminatory in nature and is, therefore, inconsistent with FRAND licensing principles. iii. Discrimination among licensees is a violation of FRAND licensing principles. This is not to say that every license will be identical. Whether a company is "similarly situated" to another company may potentially be helpful in assessing whether discrimination is present, but it is incorrect to suggest that discrimination is permitted as long as a company is not "similarly situated" to another. For example, it would not be appropriate for a small new market entrant to face discriminatory licensing demands as compared to larger, existing competitors, as such approaches would restrict competition and market entry. - We support the idea in the guidelines that cost-based assessments may not always be accurate. Allowing costs of innovation to be the relevant metric would risk encouraging inefficient innovation. - We also support the possibility for parties to resolve disputes through litigation in court, or potentially through mediation. However, arbitration or mediation should *only* be possible when both parties agree; neither party should be forced into arbitration. We refer for further details to FSA's position paper on "Facilitating the Fair and Balanced Settlement of Disputes on SEPs", available at https://fair-standards.org/wp-content/uploads/2017/02/170213-FSA-Position-Paper-Facilitating-the-Fair-and-Balanced-Settlement-of-Disputed-on-SEPs.pdf. The paper lays out the following key principles around the settlement of disputes: - The fair and balanced settlement of disputes regarding SEP licensing on FRAND terms outside of litigation must provide for voluntary participation, neutral rules, decision-makers who consider the merits under the traditional rules concerning the burden of proof, and some degree of transparency to the public. - A party should not be considered "unwilling" to reach an agreement or to enter into mediation or arbitration proceedings because it does not agree to the proposed procedural rules governing such mediation or arbitration, or to a proposed mediator or arbitration tribunal. - Where a judicial decision is taken finding an infringement of a SEP, the judiciary should always consider the requirements of fairness, equity and proportionality before issuing an injunction against an infringer.

Current Text	FSA Comments and Suggestions
Effects based assessment for standardisation agreements 292. The assessment of each standardisation agreement must take into account **the likely effects** of the standard on the markets concerned. The following considerations apply to all standardisation agreements that depart from the principles as set out in paragraphs 280 to 286. 293. Whether standardisation agreements may give rise to restrictive effects on competition may depend on whether the members of a standard-setting organisation remain free to develop alternative standards or products that do not comply with the agreed standard (118). For example, if the standard-setting agreement binds the members to only produce products in compliance with the standard, the risk of a likely negative effect on competition is significantly increased and could in certain circumstances give rise to a restriction of competition by object (119). In the same vein, standards only covering minor aspects or parts of the end-product are less likely to lead to competition concerns than more comprehensive standards. 294. The assessment whether the agreement restricts competition will also focus on **access to the standard**. Where the result of a standard (that is to say, the specification of how to comply with the standard and, if relevant, the essential IPR for implementing the standard) is not at all accessible, or only accessible on discriminatory terms, for members or third parties (that is to say, non-members of the relevant standard-setting organisation) this may discriminate or foreclose or segment markets according to their geographic scope of application and thereby is likely to restrict competition. However, in the case of several competing standards or in the case of effective competition between the standardised solution and non-standardised solution, a limitation of access may not produce restrictive effects on competition. 295. If participation in the standard-setting process is open in the sense that it allows all competitors (and/or stakeholders) in the market affected by the standard to take part in choosing and elaborating the standard, this will lower the risks of a likely restrictive effect on competition by not excluding certain companies from the ability to influence the choice and elaboration of the standard (120). The greater the likely market impact of the standard and the wider its potential fields of application, the more important it is to allow equal access to the standard-setting process. However, if the facts at hand show that there is competition between several such standards and standard-setting organisations (and it is not necessary that the whole industry applies the same standards) there may be no restrictive effects on competition. Also, if in the absence of a limitation on the number of participants it would not have been possible to adopt the standard, the agreement would not be likely to lead to any restrictive effect on competition under Article 101(1) (121). In certain situations the potential negative effects of restricted participation may be removed or at least lessened by ensuring that stakeholders are kept informed and consulted on the work in progress (122). The more transparent the procedure for adopting the standard, the more likely it is that the adopted standard will take into account the interests of all stakeholders. 296. To assess the effects of a standard-setting agreement, the market shares of the goods or services based on the standard should be taken into account. It might not always be possible to assess with any certainty at an early stage whether the standard will in practice be adopted by a large part of the industry or whether it will only be a standard used by a marginal part of the relevant industry.	- In relation to the statement in paragraph 293, indicating that "standards only covering minor aspects or parts of the end-product are less likely to lead to competition concerns than more comprehensive standards", we like to point out that from a legal perspective, for injunction requests for example, it currently makes little difference whether the SEP only covers a small aspect of the end-product or is part of a more comprehensive standard. Any SEP owner, irrespective of the importance of its SEP, can seek to raise infringement claims and potentially launch injunctions requests. This is the reason why we consider the proportionality principles for injunctions to be critical, so that courts can indeed verify to what extent the injunction request is proportional to the potential consequences of a granted injunction. However, whether the SEP is part of a smaller or more comprehensive standards makes only little difference from the company that is targeted with such requests and needs to face the potential consequences of a granted injunction request. - As mentioned above, the reference in paragraph 294 should be clarified to not only refer to 'access' to the standard, but to the actual granting of licenses. - We also very much like to support the statement in paragraph 295 that "standard-setting agreements providing for ex ante disclosures of most restrictive licensing terms, will not, in principle, restrict competition within the meaning of Article 101(1)". Such disclosure may help to bring further transparency in the FRAND licensing rate determination process, and provide visibility to businesses in terms of the potential costs of developing standard-compliant products. We therefore do consider it important to maintain this provision in the new guidelines.

Current Text	FSA Comments and Suggestions
In many cases the relevant market shares of the companies having participated in developing the standard could be used as a proxy for estimating the likely market share of the standard (since the companies participating in setting the standard would in most cases have an interest in implementing the standard) (123). However, as the effectiveness of standardisation agreements is often proportional to the share of the industry involved in setting and/or applying the standard, high market shares held by the parties in the market or markets affected by the standard will not necessarily lead to the conclusion that the standard is likely to give rise to restrictive effects on competition. 297. Any standard-setting agreement which clearly discriminates against any of the participating or potential members could lead to a restriction of competition. For example, if a standard-setting organisation explicitly excludes upstream only companies (that is to say, companies not active on the downstream production market), this could lead to an exclusion of potentially better technologies. 298. As regards standard-setting agreements with different types of IPR disclosure models from the ones described in paragraph 286, it would have to be assessed on a case by case basis whether the disclosure model in question (for example a disclosure model not requiring but only encouraging IPR disclosure) guarantees effective access to the standard. In other words, it needs to be assessed whether, in the specific context, an informed choice between technologies and associated IPR is in practice not prevented by the IPR disclosure model. 299. Finally, standard-setting agreements providing for ex ante disclosures of most restrictive licensing terms, will not, in principle, restrict competition within the meaning of Article 101(1). In that regard, it is important that parties involved in the selection of a standard be fully informed not only as to the available technical options and the associated IPR, but also as to the likely cost of that IPR. Therefore, should a standard-setting organisation's IPR policy choose to provide for IPR holders to individually disclose their most restrictive licensing terms, including the maximum royalty rates they would charge, prior to the adoption of the standard, this will normally not lead to a restriction of competition within the meaning of Article 101(1) (124). Such unilateral ex ante disclosures of most restrictive licensing terms would be one way to enable the standard-setting organisation to take an informed decision based on the disadvantages and advantages of different alternative technologies, not only from a technical perspective but also from a pricing perspective.	
7.4. Assessment under Article 101(3)	
7.4.4. No elimination of competition	
324. Whether a standardisation agreement affords the parties the possibility of eliminating competition depends on the various sources of competition in the market, the level of competitive constraint that they impose on the parties and the impact of the agreement on that competitive constraint. While market shares are relevant for that analysis, the magnitude of remaining sources of actual competition cannot be assessed exclusively on the basis of market share except in cases where a standard becomes a de facto industry standard (131). In the latter case competition may be eliminated if third parties are foreclosed from effective access to the standard. …	- As highlighted above, we consider that standardization agreements that do not specify that licenses should be made available to anyone who asks for a license, irrespective of its position in the value chain, may result in the elimination of competition. Foreclosure should therefore not only be measured based on 'access' to the licensed technology, but also based on the actual licensing of the technology. Standardization agreements that do not include such provisions should not be able to rely on an efficiency defense under Art 101(3) TFEU.

NOTE: The positions and statements presented in this paper are those of the Fair Standards Alliance, and do not necessarily reflect the detailed individual corporate positions of each member.

About the Fair Standards Alliance

The FSA is an alliance of European and global companies, large and small, that advocates for fairer licensing of standardized technology in the development and rollout of the Internet of Things (IoT). Our 47 members include SMEs, global and European companies that are active in a variety of different industry sectors, throughout the value chain.

The FSA groups a number of the world's largest innovators that contribute to the EU economy by employing more than one million people in the EU alone. It includes companies that spend billions of Euros annually on R&D, developing technologies, participating in standards development and licensing Standard Essential Patents to others.

The FSA wants to help build a balanced framework for the licensing of standard essential patents on fair, reasonable, and non-discriminatory (FRAND) terms. These FRAND commitments accomplish two goals: firstly, implementers of a standard can feel secure that they can get licenses on fair and reasonable terms, and secondly, the SEP holders can receive appropriate remuneration for their patented inventions.

For further information, please visit https://fair-standards.org/.