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Fair Standards Alliance Statement re

U.S. Department of Justice Business Review Letter on Avanci's 5G Patent Pool

The U.S. Department of Justice's (DOJ) Antitrust Division issued a business review letter on 28 July 2020 concerning Avanci's platform for licensing "Fifth Generation" (5G) telecommunications technology in the automotive industry.¹ In this non-precedential letter that does not bind U.S. or other national courts or regulatory agencies, the DOJ states that it does not intend to initiate enforcement action against the proposed 5G automotive licensing program.

The Fair Standards Alliance (FSA) acknowledges that patent pools licensing standard essential patents (SEPs) can have notable benefits for businesses, but only in so far as the pools comply with and are bound by their members' commitments to license SEPs on fair, reasonable and non-discriminatory (FRAND) terms. Patent pools that aggregate rights of several SEP holders and act as their licensing agents must adhere to rigorous safeguards, including those foreseen by competition law.

It is unfortunate that the DOJ failed to acknowledge in the business review letter (the letter) that refusing SEP licenses to willing licensees solely because of where in the value chain they operate violates a FRAND commitment and may raise significant competition concerns. The basic principle that FRAND licenses should be available to anyone in the supply chain has been acknowledged by courts and competition enforcers in numerous jurisdictions.² By not

¹ Business review letter ("BRL"), available at: <https://www.justice.gov/atr/page/file/1298626/download>.

² For further details and examples, please see the FSA position paper "SEP Licenses available to all", available at: <https://fair-standards.org/wp-content/uploads/2020/07/160624-FSA-Position-Paper-SEP-licenses-available-to-all.pdf>, as well as the FSA position paper "SEP licenses should be available to all companies in a supply chain that want a license for SEPs in their products – Supporting references", available at: <https://fair-standards.org/wp-content/uploads/2020/06/200605-FSA-Position-Paper-Supporting-Legal-and-Policy-References-Licence-to-All.pdf>. It is also noteworthy to highlight the recent intervention by the German Federal Cartel Office (Bundeskartellamt) in the litigation between Nokia and Daimler, requesting issues concerning the availability of licenses to be referred for a preliminary reference to the European Court of Justice. FSA, like the German Federal Cartel Office in its intervention, questions the competitive aims of a SEP holder that seeks an

endorsing this principle, the DOJ appears to set itself apart from numerous international authorities, and to dismiss longstanding industry practices.

Even though DOJ claims to have solicited input from a range of stakeholders, including potential licensors and licensees,³ the assessment of the platform's effects apparently only seeks to defend the views and interests of a SEP licensor monetization perspective, without regard to broader innovation incentives, or the interests of stakeholders that seek to promote the adoption of standards to the benefit of all businesses and consumers.

In the following sections, we discuss the scope of the letter and key concerns:

- The DOJ's position is non-precedential and was issued in conflict with its own procedures. The scope of the letter is limited in certain respects: the it does not address the content of the FRAND commitment itself, but rather antitrust implications of the proposed collective licensing arrangement.
- As applied to the conduct proposed by the pool, the positions taken in the letter threaten to jeopardize the development of the IoT and 5G, standardization, and a competitive level playing field. These consequences would be even more grave if others were to choose to follow the approach set out in the letter, and if the DOJ were to follow it in reviewing future transactions.
- Several of the positions expressed in the letter are wrong as a matter of competition law. The letter also is not empirically grounded but rather appears to rely on inaccurate assumptions and representations.⁴

1. *The letter is non-binding, was issued in conflict with its own procedures, and is limited in scope.*

U.S. DOJ Antitrust Division business review letters are not binding. If a private party requests the Antitrust Division to review its proposed business conduct, the Antitrust Division may respond with a letter stating its intentions at the time as to whether it would enforce antitrust laws against the described conduct.⁵ A business review letter "shall in no way be taken to indicate the Department's views on the legal or factual issues that may be raised before the regulatory agency, or in an appeal from the regulatory agency's decision."⁶ Even the Antitrust Division itself can still bring whatever proceedings that it "subsequently comes to believe it required by the public interest."⁷ A business review letter does not bind the future conduct of the Antitrust Division, any of the U.S. courts, or any party.

The issuance of this letter was also contrary to the Antitrust Division's own procedures. The Antitrust Division's regulations only authorize the issuance of business review letters with

injunction against end-product manufacturers, while nevertheless having refused a full SEP license to companies that are willing to take a license upstream in the same production chain. FSA's press release on the topic is available at: <https://fair-standards.org/2020/07/17/fsa-welcomes-bundeskartellamts-call-for-referral-of-sep-legal-questions-to-the-cjeu/>.

³ BRL, page 1.

⁴ "Competition law" in this document refers both to both the laws of the U.S. and other major jurisdictions.

⁵ 28 C.F.R. §§ 50.6 (7)(a) and (9), available at: <https://www.justice.gov/atr/28-cfr-section-506-antitrust-division-business-review-procedure>.

⁶ 28 C.F.R. §§ 50.6 (7(a)), *Id.*

⁷ 28 C.F.R. § 50.6(9), *Id.*

respect to “*proposed business conduct*” – *not existing conduct*.⁸ Although the letter nominally states that it applies to a proposed 5G pool, the DOJ repeatedly refers to the pool administrator’s existing 4G patent pool to support its conclusions. The DOJ should not have issued a business review letter addressing the proposed 5G pool based on the administrator’s *existing conduct*.

Finally, the letter expressly has a limited scope. The letter does not address the content of the FRAND commitment, but rather antitrust implications of the collective practices of the proposed pool.⁹ For example, as discussed in greater detail below, the letter simply relies on representations made by the proposed patent pool administrator and its licensors that the proposed patent pool’s current rates for 4G are FRAND, and that its 5G rates will also be FRAND, and the letter does not determine whether those statements are correct.¹⁰

2. The business review letter’s position threatens IoT and 5G, as well as standards development and competition

Despite the limited scope of the letter, we believe it threatens to have a substantial negative impact on connected vehicle development and other areas of the IoT development. We disagree with the unsupported conclusion in the letter that the limitation of the proposed pool’s field of use to connected vehicles—and not other components in the supply chain—“*does not necessarily make the Platform anticompetitive*” without further examination of the actual effects on competition and consumers.¹¹ If the DOJ’s unsubstantiated approach were adopted more broadly, it would lead to loss of innovation incentives and competitiveness not only for connected vehicles but for the IoT development more generally.

Selective SEP licensing behavior of the type described in the proposed pool creates security and sole-source supply chain vulnerabilities by limiting the number of companies that can access the necessary standards and offer licensed components and products. Every sale of a supplier’s product would be incomplete, potentially subject to injunction and unknown royalties, and would leave their customers (ill-equipped in understanding the technology or intellectual property market) to negotiate a license by themselves. This has significant consequences for competitive supply markets and causes distrust in a technology that could otherwise bring tremendous benefits to consumers around the globe. If suppliers are not able to receive a full license for their components and products but depend on “have made rights” on a customer-by-customer basis, competition in the supply markets for such components and products would be substantially limited, as discussed in greater detail below.

In addition, the ability of patent pool SEP licensors to decide to whom they will license, and whom they will refuse to license, is contrary to the commitment that they make to license their SEPs on FRAND terms when their patented contributions were incorporated into a standard. That commitment should be respected, either when ownership of the relevant SEPs is

⁸ 28 C.F.R. § 50.6 (emphasis added), *id.*

⁹ BRL, page 20.

¹⁰ *Id.*

¹¹ BRL, page 18.

transferred to a pool administrator, or when the administrator acts as an agent for the respective SEP owners.

Breaching the FRAND commitment or seeking to avoid FRAND compliance will undermine confidence in standards setting activities, as companies hesitate to start developing products and services for which they may face significant legal and litigation exposure when they become successful. These costs will limit the adoption of a standard and reduce incentives for companies to engage in standards developing activities. The letter encourages business practices that are antithetical to competition and discourages innovation needed for 5G and other connected technologies.

3. DOJ's position is wrong as a matter of competition law and is not empirically grounded.

The analysis in the letter is also incorrect as a matter of competition law. In general, patent pools that facilitate the dissemination and use of technology can promote competition, faster technology uptake, and innovation that benefit consumers. But it is critical that patent pools, which are a form of collective licensing, adhere to rigorous safeguards to avoid harming competition.

In the letter, however, the DOJ permits the pool to refuse to grant licenses to component manufacturers to produce components, irrespective as to whether its licensors grant bilateral licenses independently from the pool. The DOJ was wrong to conclude that the *joint* conduct of a refusal by pool members to license willing component manufacturers (including competitors of members of the pool) does not harm competition. Where pool members refuse to license component manufacturers bilaterally as well, such conduct can hinder innovation in IoT technologies by reducing the number of companies that will be able to use the necessary standards for developing innovative new components, conclude license agreements, and offer licensed components to the market.¹²

Key problems with the DOJ's analysis include the following:

- (1) *Have-made rights are not a substitute for a license.* The letter assumes that component manufacturers do not need licenses to manufacture components because "have-made rights" are adequate. But have-made rights typically only cover components that are based on the designs of the "Original Equipment Manufacturer" (OEM) who commissions the component manufacturer to make the component - not the component manufacturer's own designs. In an automotive supply chain, there are often several tiers of component suppliers, starting with a semiconductor supplier, and then continuing to other suppliers who incorporate those components into larger and larger multi-component products that are eventually incorporated into a car by the

¹² In its Position Paper on "Patent pools and licensing platforms on SEP licensing", FSA argues that: "A FRAND license (whether for a single SEP or a portfolio) may be offered by the SEP holder through a patent pool, but offering a SEP license solely through a patent pool would be incompatible with competition law in most countries. Rather, if a SEP holder chooses to offer FRAND licenses through a patent pool, it should be in addition to offering to negotiate a bilateral FRAND license to any potential licensee asking for such license" (available at: https://fair-standards.org/wp-content/uploads/2019/11/191104_FSA_Position_Patent_Pools.pdf).

OEM. Relying on have-made rights fragments the market at the component level, raising costs for component manufacturers by destroying their economies of scale. Component manufacturers also remain exposed to infringement lawsuits on products of their own design sold to third parties, further reducing manufacturing efficiencies as well as incentives to create new products and seek out new customers;¹³

- (2) *Bilateral direct licenses are often not available.* The authors of the letter assume that “if suppliers want a direct license so that they can supply vehicle manufacturers that are not Avanci licensees or make other connected products, they can bilaterally negotiate with licensors outside the Platform”.¹⁴ But the FSA notes that various litigations are ongoing because component manufacturers in the automotive industry are not able to secure 4G licenses from SEP holders who participate in an existing 4G pool. Even the letter itself recognizes that “the Department understands that many cellular SEP holders choose to license at the end-device level”.¹⁵ This is a material contradiction in the DOJ’s analysis;
- (3) *SEP owners should not be permitted through joint conduct to demand higher royalties than they could attain individually.* The DOJ states in the letter that joint end-device licensing allows SEP licensors “to recoup more of the value of the intellectual property they created”,¹⁶ If so, SEP licensors may be using concerted action to obtain higher royalties than each could get individually when compensated for the value of its inventions. Approval of such conduct does not appear to be in line with recognized competition law principles that seek to prevent SEP owners who have provided a FRAND commitment from abusing the market power they may have obtained when their patented technical contributions were included as part of a standard. It also goes beyond strict principles of patent law. While a patent owner should be rewarded for the inventions that it protected, SEP holders should not be permitted to extend the scope of the patent protection to the detriment of other innovators.
- (4) *A pool should not be permitted to discriminate when the FRAND commitment requires licenses to any willing licensee.* The letter also seems to set itself apart from competition decisions that have concluded that refusals to license component manufacturers by individual SEP licensors can harm competition.¹⁷ If such conduct is

¹³ Furthermore, licensors can harm competition by coercing manufacturers that rely on have-made rights (through litigation or threat of litigation) to take a second license (in addition to the licenses taken by their OEM customers) or agree to a covenant not to sue, in effect paying double royalties or other compensation such as granting back IP rights to the licensor. Having to take these licenses makes it difficult for the component manufacturers to compete and stay in business. Where the licensor competes with the component manufacturer in the same market, the licensor’s incentive to seek such licenses may be to exclude its competitors from that market. In the wireless sector, such second licenses or covenants not to sue are part of the reason component manufacturers have gone out of business.

¹⁴ BRL, page 19.

¹⁵ BRL, page 19.

¹⁶ BRL, page 20.

¹⁷ See for example, *Qualcomm v. Korean Fair Trade Commission*, 2017 Nu 48 (Dec. 4, 2019, Seoul High Court). For further examples, see in particular the FSA Position Paper “SEP licenses should be available to all companies in a supply chain that want a license for SEPs in their products – Supporting references”, referred to above.

considered to be anti-competitive or contradict the FRAND commitment, then a patent pool that is acting as an agent for the respective SEP owners should not be able to engage in such conduct either. The patent pool should certainly not include mechanisms that seek to limit individual licensors' incentives to conclude such licenses.

- (5) *The pool should be more transparent on the licensed patents.* We agree with the statement in the letter encouraging transparency as a goal.¹⁸ FSA has always argued for increased transparency, including for the availability of licensing terms and conditions in patent pools. See, in particular, the FSA Position Paper on patents pools in which it is recommended that (i) *"the patent pool should be transparent as to the license(s) offered by publishing the information about the relevant SEPs and proposed licensing terms and conditions in a timely manner"*; and that *"patent pools should disclose the patents in the pool, and also cite the relevant standard sections and SEP patent claims, e.g., publish claim charts, to facilitate validation"*.¹⁹

But in its current pools, the pool administrator referred in the letter does not provide a list of patents that are subject to its licensing program, and instead merely states that all SEPs are included for a certain generation of mobile connectivity, e.g., 2G, 3G, and 4G. From the license viewpoint, this arrangement is a 'black box' deal where potential licensees cannot fully understand how much they would be paying for which patent. It would indeed be helpful if transparency was provided for patents recognized by the pool as "Evaluated by the pool as Essential Patents".

Beyond the aspects of the b letter on the availability of licenses in the value chain, the letter was issued based on what appear to be factual misunderstandings or assumptions based on the pool administrator's representations that are not empirically grounded. If any of these representations prove to be wrong, then DOJ's analysis and assurances regarding its enforcement intentions may not hold.

- The letter relies upon an assumption that the proposed pool intends its 5G rates to be FRAND, stating that *"[t]he essential cellular SEPs licensed here are subject to FRAND commitments"* and that *"Avanci represents that its current rates for the 4G Platform are FRAND and reflect input from both licensors and licensees, and that Avanci intends its 5G rates also to be FRAND"*.²⁰ A critical question is therefore whether the rate for a pool are or will be FRAND, and as the DOJ advised, *"[e]ach standards-essential patent holder will have to decide whether the Avanci [pool] comports with its own FRAND commitments"*.²¹ One could question how it is possible to come to the conclusion that a proposed licensing behavior does not raise competition concerns without having

¹⁸ The letter states that [Page 18, 2nd par]: *"The Platform's flat per-vehicle royalty rate based on the type of connectivity in the vehicle will be publicly available. The rates will not change as new essential patents are added to the Licensing Program. This transparency streamlines negotiation and helps to reduce transaction costs."*

¹⁹ See FSA Position Paper on patent pools, *supra* n. 9; see also CEN CENELEC Workshop Agreement 95000, "Core Principles and Approaches for Licensing of Standard Essential Patents", available at: ftp://ftp.cencenelec.eu/EN/News/WS/2019/CWA_SEP/CWA95000.pdf.

²⁰ BRL, page 20, para 3.

²¹ BRL, page 20.

made an assessment (even preliminary) as to whether proposed rates are fair, reasonable and non-discriminatory.²²

- While referring to Avanci as a “one-stop-shop”, the letter discusses a study indicating that Avanci has aggregated approximately 46% of declared SEPs for the 4G standard, and approximately 50% for 3G standards. The same study estimated that if Avanci’s 4G licensors join Avanci’s 5G platform, the platform’s share of declarations to the 5G standard would be approximately 43%.²³ Even if these numbers were correct,²⁴ this would still not result in a single source of SEP licensing for connected vehicles. While patent pools may provide some efficiencies, the Platform is far from a “one-stop shop” for 5G SEP licensors.
- The DOJ acknowledges that the strength of declared essential 5G patents can be “questionable”. In fact, studies show that as much as 85% of declared SEP’s are either invalid or not essential.²⁵ Yet, the letter allows declared essential patents that have not been evaluated to be in the pool.²⁶ This inclusion likely reduces challenges to the essentiality, validity, and enforceability of such patents, and creates the risk that SEP owners’ SEP portfolios remain artificially inflated. It also disadvantages small and medium companies that drive innovation and competition in connected vehicle technologies, but do not have the financial resources to undertake patent analyses, license negotiations, or engage in protracted patent litigation.
- While the letter makes several statements on the following points, it remains to be seen whether for SEP pools in practice, there is (i) genuine independence of evaluators, as well as (ii) less fragmentation and more transparency due to the licensing platform.

Conclusion

At the FSA, we appreciate that, where FRAND principles are followed, patent pools can have advantages, such as potentially reduced transaction costs and more clarity on cumulative licensing rates. However, SEP pools at the very least should:

- not discriminate against any entity that practices the standard and seeks a license;
- grant licenses on FRAND terms to those companies that want a license, regardless of their position in the supply chain;

²² In terms of valuation, the FSA Position Paper on patent pools (referred to above) has argued that: “The patent pool royalty rate for all its SEPs must clearly be FRAND in the aggregate. Since the royalty rate may have a material impact on the markets for licensed products considering the substantial market power from a patent pool’s aggregation of SEPs from different licensors, patent pools should be scrutinized by competition law authorities for compliance with this FRAND requirement. Upon request, the patent pool agent should provide a clear explanation as to why the royalty structure is believed to be fair, reasonable and non-discriminatory and how the rate has been calculated”.

²³ BRL, page 3.

²⁴ There have been papers questioning such figures. See for example:

https://www.bardehle.com/fileadmin/Webdata/contentdocuments/broschures/Patent_Papiertiger.pdf

²⁵ Please see the following link for a study conducted in Germany:

https://www.bardehle.com/fileadmin/Webdata/contentdocuments/broschures/Patent_Papiertiger.pdf

²⁶ BRL, page 15.

- not force companies to take licenses to patents that they do not need.
- ensure that royalty rates:
 - take into account the value of SEPs in the patent pool’s portfolio as part of the entire SEP landscape relevant to the standard;
 - reflect the value of the patented inventions included in the pool – and not the added value of standardization or innovations not covered by the SEPs;
 - be transparent about license(s) offered by the pool, e.g. publish information about the specific SEPs included, proposed licensing terms and conditions, and the basis therefore, in a timely manner.²⁷

Several elements critical to conclude that a patent pool does not raise competition concerns appear to be missing in the assessment of the letter, in contrast to previous business review assessments of other patent pools. These deficiencies may undermine innovation incentives and discourage broad adoption of standardized technologies to the benefit of businesses and consumers. Moreover, the “*product*” provided by the proposed platform does not take into account the requirements and interests of its potential customers, and therefore the prospect of its market success is questionable.

About the Fair Standards Alliance (FSA)

[FSA](#) is an alliance of 47 European and global companies, large and small, that advocates fairer licensing of standardized technology in the development and rollout of the IoT. FSA members significantly contribute to global innovation and the economy worldwide. Annually, the aggregate turnover of FSA members is more than EUR 2 trillion, and in aggregate our members spend more than EUR 140 billion on R&D and innovation. Alliance members have more than 500,000 patents, including SEPs, that are either granted or pending.

NOTE: The positions and statements presented in this paper do not necessarily reflect the detailed individual corporate positions of each member.

²⁷ *Id.*