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Reactions from the Fair Standards Alliance to the European Commission's Communication Regarding an Intellectual Property Action Plan

The Fair Standards Alliance (FSA) is a Europe-based association that promotes the licensing of standards essential patents (SEPs) on a fair and reasonable, and non-discriminatory (FRAND) basis on behalf of its diverse membership.¹ As representatives of European and international industry, FSA welcomes the European Commission's engagement on intellectual property issues and its goal of bringing more transparency to standard essential patent (SEP) licensing. Standards are important enablers for any competitive and dynamic market where innovation and the need for interoperability go hand in hand. In order for standards to be successful and widely taken up by the market, the Alliance believes that it is important to ensure that SEP licensing occurs in a fair, balanced, and rational manner.

Focusing on matters relating to SEPs, we offer below our considered views and reactions to the Commission's 25 November 2020 Communication *Making the most of the EU's innovative potential; An intellectual property action plan to support the EU's recovery and resilience* (the "IP Action Plan").

In summary, the FSA:

- welcomes the EC's conclusion that a fair approach to the licensing of SEPs is needed and the EC's goal to bring more transparency to SEP licensing.
- agrees that problems relating to SEP licensing continue to occur and harm the development, use and promulgation of important standardised technologies within Europe.
- is concerned that the IP Action Plan provides insufficient attention to the economic and societal harms caused by abuses of SEPs, such as the unfair application of injunctions and refusals to license all members of the value chain.
- notes that the EC's 2017 *SEP Communication* remains a viable guide for SEP licensing. Consistent with that guidance, the Commission should focus more resources on ensuring that SEP owners license their patents based on the value of their patented technical contributions

¹ Our membership is broad and diverse, ranging in size from multinationals to SMEs, and coming from different levels of the value chain across a diversity of industry sectors. Our members significantly contribute to innovation around the globe. Annually, the aggregate turnover of FSA members is more than USD 2.2 trillion, and in aggregate our members spend more than USD 150 billion on R&D and innovation. Alliance members have more than 500,000 patents, including SEPs, that are either granted or pending. For further information, including a list of FSA's 47 members, see <http://www.fair-standards.org/>.

rather than seeking to co-opt the value added by the industry's agreement to make products in one way rather than another.

- agrees that any reforms should consider the input from stakeholders. This input should be solicited from different industries, not on a sector-by-sector basis. We strongly recommend that any initiative relating to SEPs should take note of and correspond with the licensing principles developed under the auspices of CEN-CENELEC and supported by over 50 organisations, *Core Principles and Approaches for Licensing of Standard Essential Patents*.²
- believes that SEP essentiality checks could be helpful under certain circumstances. The FSA, therefore, encourages further careful consideration as to how such checks might be structured and the practical benefits to the ecosystem. We look forward to engaging with the Commission on this topic.

Background and Compliance with the 2017 SEP Communication

Standardised technologies, and in particular wireless communication standards such as 5G, provide an important foundation for digitisation of the European economy. As the IP Action Plan recognizes, wireless technologies are impacting diverse industries outside of traditional telecommunications, including automotive, health care, transportation, and IoT. Wireless standards will become central to enabling Europe's green transition, such as enabling smart energy, smart cities and smart agriculture.

But the innovative use and promulgation of standardised technologies is threatened where SEP owners unfairly seek to block market access, or unfairly price by seeking to capture the added value of standardisation or value added by downstream companies based on those companies' own ingenuity and acumen. The 2017 SEP Communication already addressed these issues, but the Commission's advice has been ignored by many SEP owners.

For example, the 2017 SEP Communication provided that "licensing terms have to bear a clear relationship to the economic value of the patented technology. That value primarily needs to focus on the technology itself and in principle should not include any element resulting from the decision to include the technology in the standard." Yet many SEP owners continue to insist on seeking licence royalties based on the value of the end-device, and thus seek compensation for additional innovation that is created by other companies further downstream.

We request that the Commission considers how it might better encourage compliance with the 2017 SEP Communication.

IP Action Plan

The IP Action Plan recognizes that SEP licensing has already been disruptive in the automotive industry. We understand that many companies in the automotive sector have sought the Commission's assistance to enforce applicable competition law to address SEP abuses involving refusals to license some members of the value chain, but as yet the Commission has not done so. We encourage the Commission to address any competition concerns through appropriate competition enforcement measures, in addition to any discussions that may be held under the auspices of the IP Action Plan.

The IP Action Plan also recognizes that SEP licensing issues are important in the "health, energy, smart manufacturing, digital and electronics ecosystems" and states that the Commission will "improve transparency and predictability in SEP licensing encouraging industry-led initiatives, in the most affected sectors." A sector-by-sector approach to SEPs, however, is not a viable one for several reasons.

² Available at: <ftp://ftp.cencenelec.eu/EN/News/WS/2019/SEP2/WS-SEP2-CWA95000-final-draft.pdf>.

First, in order to abide by the Commission’s 2017 guidance that FRAND terms must be reflective of “the [patented] technology itself,” licensing terms should not be guided by the end uses to which the technology is put.

Second, potential solutions in one sector are bound to spill over into other sectors, in effect imposing agreements from one sector on other sectors. To avoid these effects, the Commission should ensure that all relevant stakeholders are involved in any future SEP-related discussions and that a balanced licensing framework is promoted across sectors in order to best promote innovation in Europe and support fairness and predictability based on which undertakings can thrive. In addition, any initiative relating to SEPs should take into account the widely supported best practices for resolving SEP licensing issues in ways that promote the goals and interests of industry, standardisation, and consumers, as reflected in the guidance *Core Principles and Approaches for Licensing of Standard Essential Patents*, referred to above.

Finally, key issues concerning the availability of FRAND licences across the supply chain and the evaluation of the *Huawei v. ZTE* steps were recently referred to the Court of Justice of the EU (CJEU) in the *Nokia v. Daimler* case. We suggest that the Commission consider the breadth of its engagement under the IP Action Plan in light of that referral. Further, if and when submitting observations in that case, we request that the Commission 1) supports making FRAND licences available to all interested licensees, and 2) ensures that the Court’s *Huawei v. ZTE* framework is not misinterpreted as almost equivalent to the *Orange Book* standard that it was intended to replace.

Essentiality Checks

The IP Action Plan further states that it will “improve transparency and predictability in SEP licensing” through “possible reforms,” including by offering “effective transparency tools.” FSA has long advocated for increased transparency in SEP licensing transactions.³ A system for assessment of the essentiality of declared SEPs by a third-party is an interesting idea, but one that would need to be structured appropriately and further assessed to determine whether and how parties might benefit from it. We appreciate the Commission’s suggestion that it will engage further with stakeholders on its essentiality pilot study, and we hope to be part of future discussions with the Commission on this topic in order to address them in greater detail.

At the outset, however, we note that among other things, it would be imperative that any such checks be performed by a truly independent party, who is an expert in the field, has knowledge of the standard, and does not have any interest in the outcome of the assessment. Equally importantly, the potential for a SEP owner to cherry pick only its best SEPs for essentiality assessment to obtain a high essentiality rate should be avoided. Any findings of essentiality with respect to one patent should not be generalised across a patent portfolio. Further, courts should ultimately determine whether any given patent is indeed essential to a standard and whether it is infringed in a given case. An administrative essentiality determination should not change any presumptions that may arise in later patent litigation with respect to validity, enforceability, and infringement.

Market Exclusion

Finally, although not highlighted in the recent IP Action Plan, we wanted to bring to your attention our concerns with a growing number of efforts to seek market exclusion and injunctions for patents that are subject to a voluntary FRAND commitment. The Commission’s Enforcement Directive requires that remedies always remain fair, equitable, and proportional. For SEPs subject to a FRAND licensing

³ See, e.g., *FSA’s Key Principles for FRAND Licensing* (Nov. 12, 2015) (FSA “encourage[s] SEP holders to be open and transparent regarding, amongst other things, which companies in the supply chain are licensed, the FRAND royalties that are charged, how they are calculated and other licensing conditions.”), <https://fair-standards.org/wp-content/uploads/2016/08/FSA-POSITION-PAPER-June2016.pdf>.

promise, the use of market exclusion to force licensing at the SEP owner’s demanded terms and conditions is not proportional. As in the *Samsung* and *Motorola* cases, we ask that the Commission remains vigilant to utilize its competition law enforcement powers to preclude such behaviours, in line with the guidance that the CJEU has provided on the use of SEP injunctions. We encourage the Commission, as part of its engagement, to ensure the prevention of abusive injunctive relief procedures in violation of the Enforcement Directive or the CJEU’s guidance, and that Member States likewise appropriately consider these goals with regard to their national procedures and rules.

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