

27 November 2020

FSA Submission in Response to DG COMP’s Call for Contributions on Competition Policy supporting the Green Deal

Introduction

The Fair Standards Alliance (FSA) welcomes one of the key European Commission’s priorities – known as the “European Green Deal” – to make the EU's economy sustainable. FSA members support the Commission’s endeavour to encourage businesses from all sectors to contribute to this priority, including through:

- innovating and investing in smarter, environmentally friendly technologies;
- rolling out cleaner, cheaper and healthier forms of transport; and
- decarbonising the energy sector.

Indeed, FSA members already contribute to these goals across industries and value chains, investing over EUR 140bn into R&D to enable smart devices and ecosystems, and the development of the Internet of Things – which is one of the key facilitators to sustainability solutions.

For example, our numerous members in the automotive sector are innovating relentlessly to create ever more advanced connected vehicles that are safer, help decrease emissions and improve air quality as well as optimise energy performance.

We have members in our midst that have sustainability enshrined in their business mission: e.g. Fairphone – a social enterprise company, which develops smartphones that are designed and produced with minimal environmental impact; Tesla – an electric vehicle and clean energy company that aims to accelerate the world's transition to sustainable energy; or smart meter manufacturers Landis+Gyr and Kamstrup whose product offerings are geared toward achieving the transition of the traditional energy system into smarter, demand-driven, flexible and greener. These members are just a few representatives of the broad industry segments, including electric vehicles, smart energy, smart cities, and advanced manufacturing, that will lead to a green future and that are highly dependent on fair standards licensing.

The FSA also welcomes the Commission’s Directorate General for Competition (DG COMP) call for contributions that could help DG COMP assess how competition policy could contribute to the Green Deal within the boundaries of the existing legal framework (Call for Contributions).

As an alliance of 47 European and global companies, large and small, that aims to contribute to building a balanced framework for sustainable licensing of standard essential patents, we will focus in our contribution on “Part 2: Antitrust rules” of the Call for Contributions.

Part 2: Antitrust rules

Standardisation agreements

We very much agree with the statement in the Call for Contributions that standardisation agreements can have significant positive effects. Indeed, FSA members value standards. Many FSA members actively participate in standardisation development. And many of our members hold standard essential patents (SEPs) in relation to a variety of standardised technologies developed by different standardisation bodies around the world. Our members also innovate on top of standards to create widely used products and services.

We agree, as noted in the Call for Contributions, that safeguards are vital to ensuring that the benefits of a standard do not come with unnecessary restrictions on healthy competition. And so, we also very much agree that standards should be applied – and, by extension, licences to SEPs should be offered – “in a transparent and non-discriminatory manner <...> and be accessible to all interested companies” to avoid harm to competition.

Indeed, we note that, when outlining these important aspects of necessary safeguards related to standardisation agreements, the Call for Contributions references (in footnote 4) the “Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11/1 of 14.1.2011 (Horizontal Cooperation Guidelines), paras 280-283 and para 293.” Equally important is the Commission’s guidance on voluntary commitments by owners of SEPs to license them on fair reasonable and non-discriminatory (FRAND) terms to all third parties – also found in these Guidelines.¹

As indicated in our submission earlier this year, in response to DG COMP’s call for contributions in relation to the ongoing review of the Horizontal Cooperation Guidelines, we consider that the Guidelines, and in particular the section on standardisation agreements, have contributed to promoting competition in the EU.²

Subject to some suggestions for revisions that could provide further clarity and more legal certainty, the current language on standardisation in the Guidelines offers a balanced approach on the licensing of SEPs and provides a level-playing field for different stakeholders involved. We would like to take this opportunity to commend DG COMP once again for striking a careful balance and hope it will be preserved in the review process.

We understand that, as part of the discussion on possible competition policy initiatives contributing to the Green Deal, DG COMP may consider exempting certain agreements that pursue sustainability objectives from the application of Article 101 TFEU (i.e. ‘block-exempt’). If this avenue is being considered, to the extent that those may include standardisation agreements, we believe it imperative for DG COMP to ensure those exemptions are tailored and limited – and only when subject to very clear competition safeguards – most notably, voluntary commitment by the contributing companies to license their SEPs on FRAND basis.

Although, as mentioned above, standardisation agreements can lead to significant economic benefits, our experience has shown that licensing practices for such FRAND-encumbered SEPs

¹ See, e.g. Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11/1 of 14.1.2011 (Horizontal Cooperation Guidelines), paras 283, 285, 287.

² See FSA submission in response to DG COMP’s Consultation on the Review of the Two Horizontal Block Exemption Regulations (and (Horizontal Cooperation Guidelines): <https://fair-standards.org/2020/02/12/fsa-response-hber-consultation-confirmation/>

(particularly for wireless communication standards) have unfortunately continued to raise competition concerns around the world. We urge DG COMP not to take those concerns lightly.

Question 1

Please provide actual or theoretical examples of desirable cooperation between firms to support Green Deal objectives that could not be implemented due to EU antitrust risks. In particular, please explain the circumstances in which cooperation rather than competition between firms leads to greener outcomes (e.g. greener products or production processes).

Lack of transparency on SEP licensing terms remains a major challenge, particularly for smaller companies, such as SMEs in the IoT space.

Allowing limited exchange of information necessary to license on FRAND terms amongst competitors that use e.g. connectivity standards in their products, such as smart meters, smart solar inverters or their suppliers, could allow for more transparency and thus lead to fairer SEP licensing terms.³ This could also decrease the level of uncertainty on licensing of SEPs, particularly those reading on connectivity standards, and encourage IoT players to uptake those standardised technologies more swiftly as well as innovate in the space more confidently.

In a judgment earlier this year, in the *Unwired Planet v Huawei*, *Conversant v Huawei*, and *Conversant v ZTE*, the UK Supreme Court clarified that for SEP licence offers to qualify as FRAND, they should be a fair market price for any market participant, to reflect the true value of the SEPs to which the licence relates and without adjustment depending on the individual characteristics of a particular market participant. The Court stated that there “should be a single royalty price list available to all.”

Unfortunately, in practice, nothing close to a single price list [of SEP rates] exists. Quite the contrary: holders of SEPs, particularly those reading on connectivity standards, such as 4G, often do not provide even the most basic of details on SEPs they assert, unless a potential licensee signs onerous non-disclosure (NDA) agreements.

There are examples of companies that are being approached with the demand to take an SEP licence, while being denied any information ,e.g., which patents are allegedly infringed, which standards (or parts thereof) those allegedly infringed patents read on, what the license terms are, or indeed any other material that would allow a company to assess its situation as a potential licensee.

We have also seen examples of small European IoT and smart energy solutions companies being told that they must sign NDAs that would preclude them from discussing any aspect of SEP licensing terms with any third party, including regulators or their suppliers from which they source connectivity enabling devices such as modules or chipsets, let alone their customers or industry peers who might find themselves in a similar situation.

This lack of transparency creates for IoT players – including those that already today contribute to smarter and more sustainable energy management – lack of certainty that affects their incentives to innovate in a given technology.

³ Transparency of licensing terms was identified among key concerns in the Communication from the Commission to the Institutions on Setting out the EU approach to Standard Essential Patents <https://ec.europa.eu/docsroom/documents/26583>.

Whilst courts are slowly making it clear that at least some information on SEP licensing terms, such as claim charts and comparable licence royalty rates, must be transparently made available to all potential licensees, DG COMP could facilitate this, e.g., by mandating that certain SEP licensing terms cannot be shielded by NDAs in order not to undermine the FRAND safeguard.

Otherwise, DG COMP guidance on exchange of some SEP licensing-related information amongst licensees could also contribute to ensuring fairer licensing of patents in wireless products that enable smart devices and ecosystems. The FSA and its members would be pleased to assist DG COMP in defining which type of information could be usefully exchanged in this respect.

Question 2

Should further clarifications and comfort be given on the characteristics of agreements that serve the objectives of the Green Deal without restricting competition? If so, in which form should such clarifications be given (general policy guidelines, case-by-case assessment, communication on enforcement priorities...)?

On transparency related to SEP licensing, general policy guidance (such as Horizontal Cooperation Guidelines) might be a good way to address the challenge.
