

# Targeted consultation on standardisation agreements in the Horizontal Guidelines

Fields marked with \* are mandatory.

## Introduction

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**Chapter 7 of the Communication from the Commission - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements** (Horizontal Guidelines) provides general principles on the **competitive assessment of standardisation agreements**.

The Commission is currently reviewing the Horizontal Guidelines, as part of the broader review of the horizontal block exemption regulations on R&D and specialisation agreements that expire at the end of 2022.

The following questions concern **standardisation agreements**.

No statements, definitions, or questions in this consultation may be interpreted as an official position of the Commission. All definitions provided in this document are strictly for the purposes of this public consultation and are without prejudice to definitions the Commission may use under current or future EU law or in decisions.

### **Submission of your contribution**

You are invited to reply to this targeted consultation by answering the questionnaire online. You may reply to the questionnaire in any official EU language. To facilitate the analysis of your replies, we would kindly ask you to keep your answers concise and to the point. You may include documents and URLs for relevant online content in your replies.

For your information, you have the option of saving your questionnaire as a 'draft' and finalising your response later. In order to do this you have to click on 'Save as Draft' and save the new link that you will receive from the EUSurvey tool on your computer. Please note that without this new link you will not be able to access the draft again.

The responses to this consultation will be analysed and an (anonymous) summary of the main

points will be made public on DG Competition's [dedicated page on the horizontal review](#).

In case of questions, you can contact us via the following functional mailbox: [COMP-HBERS-REVIEW@ec.europa.eu](mailto:COMP-HBERS-REVIEW@ec.europa.eu).

In case of technical problems, please contact the Commission's [CENTRAL HELPDESK](#).

## Deadline for your replies

Please reply by **30 September 2021**.

## About your organisation

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\* 1 Name of your organisation

Fair Standards Alliance

\* 2 Name and contact details (email and phone number) of contact person.

Alexander Prenter, Senior Policy Officer Fair Standards Alliance  
alex@fair-standards.org  
+32 491 07 08 50

3 Describe briefly your organisation.

The FSA is a Europe-based association that promotes the licensing of standard essential patents on a fair, reasonable, and non-discriminatory (FRAND) basis. FSA currently includes 50 members. Our membership is broad and diverse, ranging 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 in the EU and beyond. Annually, the aggregate turnover of FSA members is more than EUR 2.1 trillion, and in aggregate our members spend more than EUR 130 billion on R&D and innovation. Alliance members have more than 500,000 patents, including SEPs, that are either granted or pending.

4 Please indicate your type of company or organisation

Micro enterprises: (i) staff headcount is less than 10 and (ii) turnover does not exceed EUR 2 million or the balance sheet total does not exceed EUR 2 million

Small-sized enterprises: (i) staff headcount is less than 50 and (ii) turnover does not exceed EUR 10 million or the balance sheet total does not exceed EUR 10 million

Medium-sized enterprises: (i) staff headcount is less 250 and (ii) turnover does not exceed EUR 50 million or the balance sheet total does not exceed EUR 43 million

- Micro enterprise
- Small enterprise
- Medium-sized enterprise
- Association of SMEs

- Large enterprise
- Other

5 Please provide the following information about your organisation

|  | Brief answer   |
|--|--|
| Industry sector(s) in which your organisation is active  | Telecom, consumer electronics, internet of things, energy, semiconductors, automotive, broadcasting, |
| Product(s) manufactured/produced by your organisation  | NA   |
| Service(s) provided by your organisation   | Trade association  |
| Manufacturing/production facilities of your organization and their location (number and country) | NA   |
| Revenues of FY2020   | NA   |
| Revenues of FY2019   | NA   |
| Number of employees in your organisation in FY2020   | 0  |
| Number of employees in your organisation in FY2019   | 0  |

6 Describe your role in the development of standards. Provide the names of the standard setting organisations ("SSOs") that you engaged in during the last ten years. For the purposes of this consultation, SSOs cover both the formal, open standardisation bodies and the private independent bodies, alliances, partnerships or initiatives whose purpose is to develop and adopt industry standards.

As an alliance, the FSA does not participate in the development of standards, but its members do. FSA members partake in the development of hundreds of standards at national and international level, and in a wide variety of industry sectors.

For further background information on several SSOs, see e.g., Rudi Bekkers, Christian Catalini, Arianna Martinelli, Cesare Righi, & Timothy Simcoe, Disclosure Rules and Declared Essential Patents (Mar. 16, 2017), Table 1, available at <http://people.bu.edu/tsimcoe/documents/working/dSEP7.pdf>

See also: Gil Ohana & C. Bradford Biddle, The Disclosure of Patents and Licensing Terms in Standards Development, in THE CAMBRIDGE HANDBOOK OF TECHNICAL STANDARDIZATION LAW (Jorge L. Contreras, ed.) (2018), p. 254

## IPR disclosure requirements

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The [Horizontal Guidelines](#) provide that standardisation agreements which are normally not restrictive of competition would need to require a good faith disclosure, by participants, of their IPR that might be essential for the implementation of the standard under development. The Horizontal Guidelines further provide that it would be 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).

The questions in this section cover both disclosure requirements currently foreseen in the Horizontal Guidelines (for general IPR claims) as well as disclosure requirements as regards specific IPR, specific IPR claims, specific applications to IP protection offices for IPR protection, etc.

For the purposes of this consultation, standard setting organisations ("SSOs") cover both the formal, open standardisation bodies and the private independent bodies, alliances, partnerships or initiatives whose purpose is to develop and adopt industry standards.

7 Do you have experience with standard setting organisations ("SSOs") which require (for instance in their Intellectual Property Rights ('IPR') policy) that participants disclose their IPR that might be essential for the implementation of the standard under development by **identifying specific IPR (patent) claims**?

- Yes
- No
- No opinion / no experience

8 Please provide here the list of such SSOs and the excerpts of the relevant IPR disclosure policy.

As mentioned in response to Question 6 above, FSA members take part in the development of hundreds of standards at national and international level, and in a wide variety of industry sectors. Some of these bodies will require participants to disclose that they own IPR that might be essential for the implementation of the standards under development, some by identifying specific IPR patent claims through specific disclosure mechanisms. Most will require only a declaration on the existence of such IPR through a more general (blanket) disclosure mechanism. We include some examples below of SDOs that have adopted specific disclosure policies:

#### ETSI

Clause 4.1 of the IPR Policy: “Subject to Clause 4.2 below, each MEMBER shall use its reasonable endeavours, in particular during the development of a STANDARD or TECHNICAL SPECIFICATION where it participates, to inform ETSI of ESSENTIAL IPRs in a timely fashion. In particular, a MEMBER submitting a technical proposal for a STANDARD or TECHNICAL SPECIFICATION shall, on a bona fide basis, draw the attention of ETSI to any of that MEMBER's IPR which might be ESSENTIAL if that proposal is adopted”.

Connectivity Standards Alliance (formerly Zigbee):

“3.3 (a) Mandatory Disclosure by Working Group Representatives – Prior to Expiration of Necessary Claims Review Period. If during the development of the Working Specification but no later than the expiration of the Necessary Claims Review Period, a Working Group Representative of a Working Group Member has actual, personal knowledge of Necessary Claims of the Working Group Member at any time that a Specification is being developed in such Working Group, the Working Group Representative shall promptly submit a written Necessary Claims notice (“Necessary Claims Notice”) in accordance with Section 3.4 unless the Working Group Member agrees to license the Necessary Claims under the RANDz license obligation set forth in Section 3.2(a).” (emphasis added)

#### LoRa

“6.1 Disclosure. Where patent disclosure is required under this IPR Policy, the following minimum disclosure efforts shall be undertaken and the following minimum information shall be provided in order to comply with the various disclosure requirements: With respect to issued and published pending patent applications, the disclosure must include (a) the identity of the patent right holder and/or applicant; (b) the patent number or application number of the patent rights; and (c) the actual claims of patent within the filed or issued patent which may be Essential IPR. With respect to unpublished pending patent applications, no disclosure is mandatory but disclosure regarding the existence of the application which may contain the Essential IPR is encouraged.” (emphasis added)

#### CEN CENELEC

Statement and Licensing Declaration for CEN and CENELEC Deliverable

Licensing declaration:

The patent or other IPR holder believes that it holds granted and/or pending applications for intellectual property rights such as Patents, utility models or semiconductor topographies, the use of which would be essential to implement the above document and hereby declares, in accordance with the Common Patent Policy adopted by CEN and CENELEC, that (check one box only):

3. The patent (or other IPR) holder is unwilling to grant licences in accordance with provisions of either 1 or 2

above.

In this case, the following information is requested by GEN and GENELEC as part of this declaration:

- a. Granted patent number, patent application number (if pending), or registration number;
- b. An indication of which portions of the above document are affected;
- c. A description of the claims covering the above document.

VITA

## 10.2 Disclosure of Patents

### 10.2.1 Disclosure Obligations

Each working group member (“WG Member”) shall disclose to the working group (“WG”) in writing the existence of all patents and patent applications owned, controlled, or licensed by the VITA member company (“VITA Member Company”) the WG Member represents, which are known by the WG Member and which the WG Member believes contain claims that may become essential to the draft VSO specification (“Draft VSO Specification”) of the WG in existence at the time, after the WG Member has made a good faith and reasonable inquiry into the patents and patent applications the VITA Member Company (or its Affiliates) owns, controls or licenses. An “essential” claim for this purpose means any claim the use of which is necessary to create a compliant implementation and for which there is no technically and commercially feasible non-infringing alternative. The WG Member must provide, on behalf of the VITA Member Company, all patent disclosure information to VSO by completing a “Declaration of VITA Member Company” (“Declaration”), which is set forth in Appendix 6.

## 9 Explain which impact such requirement has had on:

|  | Very negative         | Negative              | Neutral                          | Positive              | Very positive         | No opinion                       |
|--|-----------------------|-----------------------|----------------------------------|-----------------------|-----------------------|----------------------------------|
| Access to the standard being developed               | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            |
| The licensing of the essential IPR                   | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            |
| Any costs/burden for your organisation               | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Benefits for your organisation                       | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| The standard development /setting process in general | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            |
| Your respective industry /market (s)                 | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            |
| Other elements                                       | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            |

## 10 Please explain your choices. If you chose "Other elements", describe those here.

It is nearly impossible to respond to these questions without specifying the specific SDO, the particular industry or technology ecosystem it operates in, and the details of the respective IPR regime. Generally speaking, making specific licensing declarations to provide transparency makes sense and has a net

positive impact in some environments although it may have net negative impacts in other environments (which may, hence, more appropriately opt for blanket or negative disclosure obligations). Imposing specific licensing declarations for royalty free standards, for example, could, depending on the context, discourage innovation, slow down the development of those standards and potentially harm industry adoption. Likewise, in certain contexts blanket declaration shall suffice. One must bear in mind that there is no one-size-fits-all in terms of policies to be applied to SDOs, and that the choice of specific or general declarations should be maintained in the appropriate circumstances.

Where, however, specific licensing declarations are provided, those declarations should include as much details as reasonably available at the time of the declaration, to enhance quality of the declaration and thereby overall transparency.

We are stating “no opinion” as to “Any costs/burden for your organization” and as to “Benefits for your organization” because the nature of these impacts plays out differently for different industry participants. For example, licensing disclosures in most cases (with the exception of CEN and CENELEC) do not shed light on which parts of a standard might be covered by particular patents. Further, the information available in SSO declaration databases may be outdated—especially as patent ownership change. For example, patent holders may disclose patents that relate to portions of a draft standard that are ultimately removed from the final or are altered to a degree that makes the contribution as to which a declaration was made irrelevant. This outcome is exacerbated when the process for agreeing to a final standard takes years, and there is no review of declarations from early in the standardization process.

To further improve transparency and information quality in situations where individual SEPs are declared, SSOs could consider whether to:

- Require SEP owners to identify the part of the standard on which the patent reads as part of its declaration;
- Structure their databases to work with national and EPO patent databases to pull and record information on changes in patent ownership; and
- Allow declarants to update declarations after the standard is set and periodically during the life cycle of the standard.

For a fuller understanding of disclosure requirement in the context of licensing standard essential patents subject to a FRAND commitment please refer to our position paper “Transparency Issues with Standard Essential Patents” (<https://fair-standards.org/2021/08/02/transparency-issues-with-standard-essential-patents/>)

The FSA has long advocated for increased transparency with respect to SEPs on FRAND terms. Transparency at all stages—from before a patent is selected to be included in a standard by a SSO, to when, whether, and how the patented technology is included in the adopted standard, to the eventual licensing of declared SEPs and accompanying negotiations —is important to ensuring a robust and vibrant SEP ecosystem.

For technology to be included in a standard, some SSOs require or encourage patent-holders to (1) disclose the existence of any patents (or patent applications) that are or may become essential, and (2) commit to licensing those patents on FRAND terms. The mechanics of these undertakings, what the disclosure specifically entails, and the language of the FRAND commitment vary according to the applicable intellectual property rights policy of each SSO.

As indicated, there is no one-size fits all model when it comes to disclosure. But different disclosure rules have different impacts on transparency, both during the standardization process and potentially later during

licensing negotiations. Most SSOs encourage early disclosure, although a few SSOs impose explicit deadlines.

13 Do you have experience with SSOs which require (for instance in their IPR policy) that participants disclose their IPR that might be essential for the implementation of the standard under development by **identifying applications to the IPR protection offices for their IPR?**

- Yes
- No
- No opinion / no experience

14 Please provide here the list of such SSOs and the excerpts of the relevant IPR disclosure policy.

As mentioned in response to Question 6 above, FSA members take part in the development of hundreds of standards at national and international level, and in a wide variety of industry sectors. Some of these bodies will require participants to disclose applications for IPR protection as well. We include some examples below:

ETSI

Annex 6, Article 4

4: "Subject to Clause 4.2 below, each MEMBER shall use its reasonable endeavours, in particular during the development of a STANDARD or TECHNICAL SPECIFICATION where it participates, to inform ETSI of ESSENTIAL IPRs in a timely fashion. In particular, a MEMBER submitting a technical proposal for a STANDARD or TECHNICAL SPECIFICATION shall, on a bona fide basis, draw the attention of ETSI to any of that MEMBER's IPR which might be ESSENTIAL if that proposal is adopted."

Refer to definitions of ESSENTIAL and IPR at Articles 15.6 and 15.7 respectively.

CSA (formerly Zigbee):

3.4 Necessary Claims Notice Requirements

(b) Information Required. Except as set forth in Section 3.3, each Necessary Claims Notice shall include at least the following information:

(i) information for each Necessary Claim, including:

- (A) For issued patents, the country or countries in which the patents were issued, and the patent numbers;
- (B) For published patent applications, the country or countries in which the patent application; and
- (C) For unpublished patent applications, the country or countries in which the patent applications were filed, the serial number of the patent applications, and the date of filing of the patent applications;

CEN-GENELEC

CEN-GENELEC GUIDE 8 (Edition 2, 2019-05)

3 Essential patent disclosure

Any party participating in the work of CEN and GENELEC is requested, from the outset and at the best of her/his knowledge, to draw attention to any known patent or to any known pending application on patent, either

their own or of other organisations that, according to her/his own judgment, may be considered as an essential patent for the deliverable.

#### Statement and Licensing Declaration for CEN and CENELEC Deliverable

Licensing declaration:

The patent or other IPR holder believes that it holds granted and/or pending applications for intellectual property rights such as Patents, utility models or semiconductor topographies, the use of which would be essential to implement the above document and hereby declares, in accordance with the Common Patent Policy adopted by CEN and CENELEC, that (check one box only):

3. The patent (or other IPR) holder is unwilling to grant licences in accordance with provisions of either 1 or 2 above.

In this case, the following information is requested by CEN and CENELEC as part of this declaration:

- a. Granted patent number, patent application number (if pending), or registration number;
- b. An indication of which portions of the above document are affected;
- c. A description of the claims covering the above document.

#### IEC/ITU/ISO Point IPR Policy

Therefore, any party participating in the work of ITU, ISO or IEC should, from the outset, draw the attention of the Director of ITU-TSB, the Director of ITU-BR, or the offices of the CEOs of ISO or IEC, respectively, to any known patent or to any known pending patent application, either their own or of other organizations, although ITU, ISO or IEC are unable to verify the validity of any such information.

#### VITA

#### 10.2 Disclosure of Patents

##### 10.2.1 Disclosure Obligations

Each working group member (“WG Member”) shall disclose to the working group (“WG”) in writing the existence of all patents and patent applications owned, controlled, or licensed by the VITA member company (“VITA Member Company”) the WG Member represents, which are known by the WG Member and which the WG Member believes contain claims that may become essential to the draft VSO specification (“Draft VSO Specification”) of the WG in existence at the time, after the WG Member has made a good faith and reasonable inquiry into the patents and patent applications the VITA Member Company (or its Affiliates) owns, controls or licenses. An “essential” claim for this purpose means any claim the use of which is necessary to create a compliant implementation and for which there is no technically and commercially feasible non-infringing alternative. The WG Member must provide, on behalf of the VITA Member Company, all patent disclosure information to VSO by completing a “Declaration of VITA Member Company” (“Declaration”), which is set forth in Appendix 6.

15 Explain which impact such requirement has had on:

|  | Very negative         | Negative              | Neutral               | Positive                         | Very positive         | No opinion            |
|--|-----------------------|-----------------------|-----------------------|----------------------------------|-----------------------|-----------------------|
| Access to the standard being developed | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> |

|  |                       |                       |                       |                                  |                       |                                  |
|--|-----------------------|-----------------------|-----------------------|----------------------------------|-----------------------|----------------------------------|
| The licensing of the essential IPR                   | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/>            |
| Any costs/burden for your organisation               | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            | <input type="radio"/> | <input checked="" type="radio"/> |
| Benefits for your organisation                       | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            | <input type="radio"/> | <input checked="" type="radio"/> |
| The standard development /setting process in general | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/>            |
| Your respective industry /market (s)                 | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/>            |
| Other elements                                       | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            | <input type="radio"/> | <input type="radio"/>            |

16 Please explain your choices. If you chose "Other elements", describe those here.

As mentioned in response to Question 10 above, making specific licensing declarations to provide transparency makes sense and has a net positive impact in some environments, but not all SSOs require specific patent declarations to be made – and there are good reasons why that should not be required. Where specific patent applications are required, such disclosures should also include notification of the existence of patent applications (published, unpublished and provisionals)– to the extent at least that the declarant has good reasons to believe at the time of the declaration that the application reads on the (draft) standard. Such requirement would further improve transparency, and provide additional visibility to the engineers working on the standards development about which companies have declared patents to be essential to the standard. If it proves later that the application is not granted, or the patent does not read on the final standard, then the declarant should be able to update the declaration database to reflect that change.

19 Do you have experience with SSOs which require (for instance in their IPR policy) that participants disclose their IPR that might be essential for the implementation of the standard under development by **linking their specific IPR claims to the relevant sections of the standard?**

- Yes
- No
- No opinion / no experience

20 Please provide here the list of such SSOs and the excerpts of the relevant IPR disclosure policy.

As mentioned above, FSA members have significant experience and invest large amounts of R&D into standards development. At least those SSOs that require specific patent declarations may also have patent policies that encourage [or oblige] declarants to declare the relevant specific section to of the standard. We include some examples below:

CEN-CENELEC:

3. The patent (or other IPR) holder is unwilling to grant licences in accordance with provisions of either 1 or 2 above.

In this case, the following information is requested by CEN and CENELEC as part of this declaration:

- a. Granted patent number, patent application number (if pending), or registration number;
- b. An indication of which portions of the above document are affected;
- c. A description of the claims covering the above document.

ETSI:

“IPR Information Statement Annex [...] STANDARD, TECHNICAL SPECIFICATION or ETSI Work Item [...] Illustrative Specific part of the standard (e.g. Section)”

CSA (formerly Zigbee):

3.4 Necessary Claims Notice Requirements.

(ii) for each Necessary Claim, identification of the subsection of the Specification to which the Necessary Claim relates;

For more information, please consult Timothy S. Simcoe & Allan L. Shampine, Economics of Patents and Standardization: Network Effects, Hold-up, Hold-out, Stacking, in THE CAMBRIDGE HANDBOOK OF TECHNICAL STANDARDIZATION LAW (Jorge L. Contreras, ed.) (2018), p. 112

21 Explain which impact such requirement has had on:

|  | Very negative         | Negative              | Neutral               | Positive                         | Very positive                    | No opinion                       |
|--|-----------------------|-----------------------|-----------------------|----------------------------------|----------------------------------|----------------------------------|
| Access to the standard being developed               | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/>            | <input type="radio"/>            |
| The licensing of the essential IPR                   | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            | <input checked="" type="radio"/> | <input type="radio"/>            |
| Any costs/burden for your organisation               | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            | <input type="radio"/>            | <input checked="" type="radio"/> |
| Benefits for your organisation                       | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            | <input type="radio"/>            | <input checked="" type="radio"/> |
| The standard development /setting process in general | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/>            | <input type="radio"/>            |
| Your respective industry /market (s)                 | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/>            | <input type="radio"/>            |

|                |                       |                       |                       |                       |                       |                       |
|----------------|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| Other elements | <input type="radio"/> |
|----------------|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|

22 Please explain your choices. If you chose "Other elements", please describe those here.

With the understanding that identifying individual patents makes sense in some standards development areas and that such administrative burdens may be inefficient in other bodies we propose the following: Where SSOs require specific patent declarations, and to the extent that the declarant has the information available at the time of its declaration, declarants should also declare the specific section of the standard on which the patent (or patent application) reads. Providing such information provides additional transparency. It allows companies participating in the standard development process to have a better understanding of which part of the standard might be encumbered by patents. It also provides additional transparency in the licensing process when potential licensees need to assess later in the process which patents read against the specific version of the standard and which patents read only on optional sections of the standard. It assists potential licensees to respond to a FRAND offer in a timely manner and facilitates its assessment of the offer it may receive. Furthermore, if the declarant has reasons to believe that its patent reads against a specific version of the standard, there is no reason why such information should not be provided. And if its belief changes afterwards, the declarant should be encouraged to update its disclosure. It should also be noted that, during the last few years, a significant portion of declarations at ETSI have provided the "illustrative specific part of the standard" information (see our response to Question 20 above). We see no reason why SSOs (such as ETSI, which require specific patent declarations to be filed) would not mandate declarants to provide such information when available.

25 Do you have experience with SSOs which require (for instance in their IPR policy) that participants disclose ex ante the **most restrictive licensing terms**, including the maximum royalty rates such participants would charge?

- Yes
- No
- No opinion/not applicable

26 Please provide here the list of such SSOs and the excerpts of the relevant IPR disclosure policy.

FSA members have significant experience with SSOs and have knowledge of one SSO requiring ex ante disclosures of most restrictive licensing terms that we are aware of is VITA.

VITA

VSO Policies and Procedures.

#### 10.3.2 Declaration

Each WG Member must complete and execute a Declaration (Appendix 6) on behalf of its VITA Member Company. Each WG Member must declare the maximum royalty rate for all patent claims that the VITA Member Company he or she represents (or its Affiliates) owns or controls and that may become essential to implement the Draft VSO Specification.

FSA members have experience other SSOs which ENCOURAGE, or otherwise offer the ability for participants to disclose ex ante the most restrictive licensing terms. We an example below:

IEEE

### 6. Patents

#### 6.1 Definitions

"Reasonable Rate" shall mean appropriate compensation to the patent holder for the practice of an Essential Patent Claim excluding the value, if any, resulting from the inclusion of that Essential Patent Claim's technology in the IEEE Standard. In addition, determination of such Reasonable Rates should include, but need not be limited to, the consideration of:

- The value that the functionality of the claimed invention or inventive feature within the Essential Patent Claim contributes to the value of the relevant functionality of the smallest saleable Compliant Implementation that practices the Essential Patent Claim.
- The value that the Essential Patent Claim contributes to the smallest saleable Compliant Implementation that practices that claim, in light of the value contributed by all Essential Patent Claims for the same IEEE Standard practiced in that Compliant Implementation.
- Existing licenses covering use of the Essential Patent Claim, where such licenses were not obtained under the explicit or implicit threat of a Prohibitive Order, and where the circumstances and resulting licenses are otherwise sufficiently comparable to the circumstances of the contemplated license.

#### 6.2 Policy

At its sole option, the Submitter may provide with its Letter of Assurance any of the following: (i) a not-to-exceed license fee or rate commitment, (ii) a sample license agreement, or (iii) one or more material licensing terms.

27 Please describe here your experience.

Where most restrictive licensing terms are voluntarily disclosed by SEP holders, this may provide for additional transparency and predictability on FRAND licensing terms. SSO facilitation of such voluntary disclosure, such as for example in the IEEE Patent Policy, can help to support fair competition, innovation and promulgation of IEEE standards. It fosters clarity in the marketplace and could reduce disputes. Keeping such disclosure voluntary fairly balances the interests of SEP holders and users of IEEE standards. However, this should not be taken to mean that the disclosure of ex ante most restrictive licensing terms is useful or needed in every standards setting context. As stated in answers above, this will depend on the specific SSO. Furthermore, it should also be born in mind that not every SEP owner will seek to monetize its SEPs. One should bear in mind that no disproportionate burdens are imposed on such IP owners, and that the lack of providing an ex ante rate is not interpreted such that the SEP owner could not monetize its patents if it chooses to do so.

28 Explain which impact such requirement has had on:

|  | Very negative         | Negative              | Neutral                          | Positive              | Very positive         | No opinion                       |
|--|-----------------------|-----------------------|----------------------------------|-----------------------|-----------------------|----------------------------------|
| Access to the standard being developed               | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| The licensing of the essential IPR                   | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Any costs/burden for your organisation               | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Benefits for your organisation                       | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| The standard development /setting process in general | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Your respective industry /market (s)                 | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Other elements                                       | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            |

29 Please explain your choices. If you chose "Other elements", please describe those here.

As explained in response to Question 27 above, voluntary ex ante disclosure of licensing terms may be a means to create additional transparency and predictability on FRAND licensing terms in some circumstances. In those circumstances, it makes sense to facilitate such voluntary disclosure. For example, in the IEEE-SA Patent Policy, it can help to support fair competition, innovation and promulgation of IEEE standards. It fosters clarity in the marketplace and could reduce disputes. As a voluntary facility, it fairly balances the interests of SEP holders and users of IEEE standards. However, this should not be taken to mean that the disclosure of ex ante most restrictive licensing terms is useful or needed in every standards setting context. As previously noted, this will depend on the specific SSO.

32 Based on your experience, at what moment in time during the development of a standard **does the obligation arise to disclose IPR that might be essential** for the implementation of the standard under development?

Please select the applicable option for each of the identified types of disclosure requirements listed below:

"General disclosure" of IPR or IPR claims refers to blanket disclosure requirements without the identification of specific IPR or IPR claims.

|  | Ongoing disclosure requirement      | Only at the start of the standardisation process | At the end of the process (before adoption of the standard) | Updating requirement     | After the adoption of the standard | No opinion /no experience           |
|--|-------------------------------------|--|---|--------------------------|------------------------------------|-------------------------------------|
| <b>General disclosure of IPR</b> likely reading <b>on the standard</b> being developed                         | <input checked="" type="checkbox"/> | <input type="checkbox"/>                         | <input type="checkbox"/>                                    | <input type="checkbox"/> | <input type="checkbox"/>           | <input type="checkbox"/>            |
| <b>General disclosure of IPR claims</b> likely reading on <b>the standard</b> being developed                  | <input checked="" type="checkbox"/> | <input type="checkbox"/>                         | <input type="checkbox"/>                                    | <input type="checkbox"/> | <input type="checkbox"/>           | <input type="checkbox"/>            |
| <b>General disclosure of IPR claims</b> likely reading on <b>specific sections</b> of the standard             | <input checked="" type="checkbox"/> | <input type="checkbox"/>                         | <input type="checkbox"/>                                    | <input type="checkbox"/> | <input type="checkbox"/>           | <input type="checkbox"/>            |
| Disclosure of <b>specific IPR claims</b> likely reading on <b>the standard</b> being developed                 | <input checked="" type="checkbox"/> | <input type="checkbox"/>                         | <input type="checkbox"/>                                    | <input type="checkbox"/> | <input type="checkbox"/>           | <input type="checkbox"/>            |
| Disclosure of <b>specific IPR claims</b> likely reading on <b>specific sections</b> of the standard            | <input checked="" type="checkbox"/> | <input type="checkbox"/>                         | <input type="checkbox"/>                                    | <input type="checkbox"/> | <input type="checkbox"/>           | <input type="checkbox"/>            |
| Disclosure of <b>specific IPR claims</b> linked to a <b>particular technology</b> incorporated in the standard | <input checked="" type="checkbox"/> | <input type="checkbox"/>                         | <input type="checkbox"/>                                    | <input type="checkbox"/> | <input type="checkbox"/>           | <input type="checkbox"/>            |
| Disclosure of <b>most restrictive licensing terms</b> , including maximum royalties                            | <input type="checkbox"/>            | <input type="checkbox"/>                         | <input type="checkbox"/>                                    | <input type="checkbox"/> | <input type="checkbox"/>           | <input checked="" type="checkbox"/> |

33 Based on your experience, **at what point** of the standard development process **should there be an obligation to disclose IPR** that might be essential for the implementation of the standard under development in order to ensure effective access to the standard?

Please select the applicable option for each of the identified types of disclosure requirements listed below:

"General disclosure" of IPR or IPR claims refers to blanket disclosure requirements without the identification of specific IPR or IPR claims.

|  | Ongoing disclosure requirement      | Only at the start of the standardisation process | At the end of the process (before adoption of the standard) | Updating of any declaration | After the adoption of the standard | No opinion /no experience           |
|--|-------------------------------------|--|---|-----------------------------|------------------------------------|-------------------------------------|
| <b>General disclosure of IPR</b> likely reading on <b>the standard</b> being developed                         | <input checked="" type="checkbox"/> | <input type="checkbox"/>                         | <input type="checkbox"/>                                    | <input type="checkbox"/>    | <input type="checkbox"/>           | <input type="checkbox"/>            |
| <b>General disclosure of IPR claims</b> likely reading on <b>the standard</b> being developed                  | <input checked="" type="checkbox"/> | <input type="checkbox"/>                         | <input type="checkbox"/>                                    | <input type="checkbox"/>    | <input type="checkbox"/>           | <input type="checkbox"/>            |
| <b>General disclosure of IPR claims</b> likely reading on <b>specific sections</b> of the standard             | <input checked="" type="checkbox"/> | <input type="checkbox"/>                         | <input type="checkbox"/>                                    | <input type="checkbox"/>    | <input type="checkbox"/>           | <input type="checkbox"/>            |
| <b>Disclosure of specific IPR claims</b> likely reading on <b>the standard</b> being developed                 | <input checked="" type="checkbox"/> | <input type="checkbox"/>                         | <input type="checkbox"/>                                    | <input type="checkbox"/>    | <input type="checkbox"/>           | <input type="checkbox"/>            |
| <b>Disclosure of specific IPR claims</b> likely reading on <b>specific sections</b> of the standard            | <input checked="" type="checkbox"/> | <input type="checkbox"/>                         | <input type="checkbox"/>                                    | <input type="checkbox"/>    | <input type="checkbox"/>           | <input type="checkbox"/>            |
| <b>Disclosure of specific IPR claims</b> linked to a <b>particular technology</b> incorporated in the standard | <input checked="" type="checkbox"/> | <input type="checkbox"/>                         | <input type="checkbox"/>                                    | <input type="checkbox"/>    | <input type="checkbox"/>           | <input type="checkbox"/>            |
| <b>Disclosure of most restrictive licensing terms</b> , including maximum royalties                            | <input type="checkbox"/>            | <input type="checkbox"/>                         | <input type="checkbox"/>                                    | <input type="checkbox"/>    | <input type="checkbox"/>           | <input checked="" type="checkbox"/> |

34 Please explain your choices.

General and specific declarations should occur as soon as patent holders have the belief that their patents read on the standard that is being developed. SSOs should encourage SEP owners to make those declarations early on in the standards development process.

SSOs that adopt specific patent declaration policies should also encourage or oblige declarants to update their declarations as the standard develops and/or the belief that a patent may be essential to the given standard changes. Those updates can occur at different stages over time and could include 'when the standard is finally adopted'. However, any rules should avoid being prescriptive or preventing SSOs from requiring declarants to update their declarations on a more regular basis.

As far as the ex ante disclosure of most restrictive terms is concerned, that disclosure should be encouraged (subject to the caveats referred to in response to Questions 27 and 31 above), to happen again as early on in the process as reasonably possible. In practice, such disclosure is likely only to occur once the standard is relatively stable.

35 Please describe any experience or knowledge you may have of SSO's policies which include **any other requirements** than the ones identified in the previous questions and that are aimed at ensuring effective access to the standard being developed. This may include for instance requirements to verify whether a patent is valid, the expiration date of the patent, information about the owner of a patent or the change of patent ownership, voluntary disclosure of claim charts or information on whether a patent is being litigated, etc.

Some SSOs, such as the MoCa IPR Policy Section 5.1.1. ([https://www.essentialpatentblog.com/wp-content/uploads/sites/64/2013/05/MOCA-IPR-Policy-Approved-1\\_24\\_11.pdf](https://www.essentialpatentblog.com/wp-content/uploads/sites/64/2013/05/MOCA-IPR-Policy-Approved-1_24_11.pdf)), have specific terms that restrict the ability to seek injunctive relief against other members who seek a license on FRAND terms. Such provisions facilitate access to the standard by allowing licensing discussion to occur free from the threat of an injunction which can prejudice the outcome of the negotiations.

Also the IEEE IPR policy provides a non-exhaustive list of factors to be taken into consideration for the determination of reasonable royalty rates (see our response to Question 26 above which includes the relevant IEEE provisions).

Furthermore, IEEE's policy at 6.2 (see below) has provisions which limits the availability of injunctive relief. The restriction on injunctive relief supports access to the standard by ensuring that anyone wishing to implement the standard is able to do so, and where monetary compensation is due, that negotiations for a license are free from the threat that an injunction has on those negotiations. These provisions have been very helpful in providing additional transparency and been broadly supported by industry – as can be seen from the great success that IEEE standards development has recorded since the adoption of the updated IPR policy.

#### IEEE IPR Policy

##### 6.1 Definitions

"Prohibitive Order" shall mean an interim or permanent injunction, exclusion order, or similar adjudicative directive that limits or prevents making, having made, using, selling, offering to sell, or importing a Compliant Implementation.

##### 6.2 Policy

The licensing assurance shall be either:

- a) A general disclaimer to the effect that the Submitter without conditions will not enforce any present or future Essential Patent Claims against any person or entity making, having made, using, selling, offering to sell, or importing any Compliant Implementation that practices the Essential Patent Claims for use in conforming with the IEEE Standard; or,
- b) A statement that the Submitter will make available a license for Essential Patent Claims to an unrestricted number of Applicants on a worldwide basis without compensation or under Reasonable Rates, with other reasonable terms and conditions that are demonstrably free of any unfair discrimination to make, have made, use, sell, offer to sell, or import any Compliant Implementation that practices the Essential Patent Claims for use in conforming with the IEEE Standard. An Accepted LOA that contains such a statement signifies that reasonable terms and conditions, including without compensation or under Reasonable Rates, are sufficient compensation for a license to use those Essential Patent Claims and precludes seeking, or seeking to enforce, a Prohibitive Order except as provided in this policy.

36 Based on your experience or knowledge, which of the following requirements as regards the **good faith disclosure** by the participants of their IPR that might be essential for the implementation of the standard under development would you consider most effective for ensuring effective access to a standard :

|  | Not effective         | Somewhat effective    | Neutral                          | Effective                        | Very effective        | No opinion /no experience        |
|--|-----------------------|-----------------------|----------------------------------|----------------------------------|-----------------------|----------------------------------|
| General disclosure of IPR likely reading on the standard being developed                         | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/>            | <input type="radio"/> | <input type="radio"/>            |
| General disclosure of IPR claims likely reading on the standard being developed                  | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/>            | <input type="radio"/> | <input type="radio"/>            |
| General disclosure of IPR claims likely reading on specific sections of the standard             | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/>            | <input type="radio"/> | <input type="radio"/>            |
| Disclosure of specific IPR claims likely reading on the standard being developed                 | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/>            | <input type="radio"/> | <input type="radio"/>            |
| Disclosure of specific IPR claims likely reading on specific sections of the standard            | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/>            | <input type="radio"/> | <input type="radio"/>            |
| Disclosure of specific IPR claims linked to a particular technology incorporated in the standard | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/>            | <input type="radio"/> | <input type="radio"/>            |
| Disclosure of most restrictive licensing terms, including maximum royalties                      | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            | <input type="radio"/>            | <input type="radio"/> | <input checked="" type="radio"/> |
| Requiring an update, if the patent has been invalidated or confirmed valid by a national court   | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/>            |
| Information about the expiration date of a patent  | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/>            |
| Information about the owner of a patent/change in patent ownership                               | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/>            |
| Voluntary disclosure of claim charts   | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/>            |
| Information on whether a SEP is being litigated  | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            | <input type="radio"/>            | <input type="radio"/> | <input checked="" type="radio"/> |
| Information on whether the essentiality has been confirmed by an independent third party         | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            | <input type="radio"/>            | <input type="radio"/> | <input checked="" type="radio"/> |

|  |                       |                                  |                       |                       |                       |                                  |
|--|-----------------------|----------------------------------|-----------------------|-----------------------|-----------------------|----------------------------------|
| Information on whether there is a licensing programme for a particular SEP<br>(either through a pool or bilateral) | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            |
| Other  | <input type="radio"/> | <input type="radio"/>            | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |

37 Please explain your choices. If you chose "Other" please explain.

FSA would query the premise of the question 36 on what “effective access to a standard” entails, since the only true means of ensuring effective access to the standard is to confirm that licenses are available to any company that wishes to implement the standard (see answer to question 65).. Disclosure requirements have less of an impact on effective access to the standard, than making sure that licenses are available, since regardless of the disclosure requirements since a refusal to license denies any effective access to the standard. This approach allows standards to be developed in a competitive environment where SSOs are free to set and choose the IPR policy which suits their industry or sector while also making sure that the standard is available to all. The restrictive effects of standardization are most acutely felt when access to the standard is denied via a refusal to license the essential patented technology.

Notwithstanding this general point, as mentioned above, there is no one-size-fits-all when it comes to the most optimal disclosure obligations for SSOs. For some SSOs, general declarations make perfect sense, while others require specific declarations to provide the much needed additional clarity. We therefore have responded ‘neutral’ to the questions in the first three rows.

For the following rows, we have responded to the questions based on the assumption that the questions are limited to SSOs with an IPR policy that require specific declarations in the first place. Our response should in no way be construed that specific disclosures should be encouraged for any standards body – rather to the contrary. See in particular our response to Question 10 above.

As regards, whether an SEP is litigated may not be useful since such information will be quickly outdated. However it would be useful if the outcome of litigation, such as a finding of invalidity or non-essentiality, were to be reported and updated accordingly.

We have selected “no opinion” for “information on whether the essentiality has been confirmed by an independent third party” because the FSA believes the present characterization of the question is not sufficiently specific, because it is unclear what “independent third party” would entail.. The FSA believes that essentiality checks can be useful when the institutional design of these checks is done in an unbiased manner and subject to review by a court of law.

Further, we would like to clarify that the selection of “somewhat effective” for “information on whether there is a licensing programme for a particular SEP (either through a pool or bilateral)” is predicated on the fact the provision of this information does not entail anything further, and especially that it does not change the burden of proof in court proceedings.

For a full list of types of information which the FSA believes should be included in SEP licensing negotiations and which could be adapted to the disclosure and declaration context please see CWA 95000 “Core Principles and Approaches to Licensing Standard Essential Patents” <https://2020.standict.eu/sites/default/files/CWA95000.pdf>.

## Participation rules/working methods for standard setting organisations

One condition identified in the Horizontal Guidelines for finding that a standardisation agreement would normally not be restrictive of competition, is that participation in the standard setting is unrestricted.

The Horizontal Guidelines also provide that a standardisation agreement would not be likely to lead to any restrictive effects of competition if it would not have been possible to adopt the standard in the absence of a limitation on the number of participants.

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.

38 Please describe your **experience with SSOs which allow that the standard is developed in a restricted group**.

Please provide in particular the following information: (i) describe the limitation that were considered, (ii) explain how the companies participating in the development were selected, (iii) explain in which way the limitation on the number of participants contributed to the adoption of the standard and (iv) explain how /whether the other stakeholders were kept informed on the work in progress and/or consulted on the work in progress.

As mentioned above, for the purposes of this consultation, SSOs cover both the formal, open standardisation bodies and the private independent bodies, alliances, partnerships or initiatives whose purpose is to develop and adopt industry standards.

As mentioned above, for the purposes of this consultation, SSOs cover both the formal, open standardisation bodies and the private independent bodies, alliances, partnerships or initiatives whose purpose is to develop and adopt industry standards.

when it comes to 'restricted participation' within standards setting, the current framing of this issue in the existing Horizontal Guidelines is balanced and accurate. We therefore strongly encourage the Commission to maintain this well balanced approach, and do not see a specific need to introduce changes.

In practice, SSOs may restrict participation in some way. For example, the ISO/IEC directives include the following statement on participation in Working Groups:

- A working group comprises a restricted number of experts individually appointed by the P-members, A-liaisons of the parent committee and C-liaison organizations, brought together to deal with the
- specific task allocated to the working group.

Generally, SSOs may restrict or have additional requirements for participating in the drafting stages of technical work under working groups (to ensure agreement to working group "rules" and relevant expertise, improve efficiency for consensus and progress of work etc.), however, typically the approval process is handled at the "higher level" committees/groups that are open to all qualified voting members – this applies to ISO/IEC committees and most industry standards orgs.

If there are specific concerns that the Commission has in mind, or sees reasons to change the current approach, we would be happy to learn about those reasons and explore those in greater detail with the Commission.

39 Please explain (i) whether the number of participants was restricted for the incipient phases of the development or throughout the process, (ii) whether the interests of other stakeholders that were not a part

of such restricted group were represented in the development of the standard during the entire process (and if so, how).

No opinion

40 Based on your experience, which **impact did such restricted participation have** on the following elements:

|  | Very negative         | Negative              | Neutral                          | Positive              | Very positive         | No opinion            |
|--|-----------------------|-----------------------|----------------------------------|-----------------------|-----------------------|-----------------------|
| Access to the standard                               | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Any costs/burden for your organisation               | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Benefits for your organisation                       | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| The standard development /setting process in general | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Your respective industry /market (s)                 | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Other  | <input type="radio"/> | <input type="radio"/> | <input type="radio"/>            | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

41 Please explain your choices. If you chose "Other", explain which elements these would be.

Please refer to our answer to question 38. The impact of restricted participation on those various specific aspects again depends on the specific setting in an SSO and can hardly be generalized. The present version of the Horizontal Guidelines appropriately addresses the issue.

42 Are you aware of any standard development efforts for which it would not have been possible to adopt the standard in the absence of a limitation on the number of participants?

- Yes
- No
- No opinion

44 Are you aware of any standard development efforts for which the unrestricted participation policy hampered or delayed the standard development process?

- Yes
- No
- Not applicable

45 Please explain.

46 Are you aware of SSOs which ensure that stakeholders are kept informed and consulted on the work in progress without at the same time allowing for unrestricted participation in the standardisation efforts?

- Yes
- No
- Not applicable

47 Please explain.

## Joint negotiation of licenses by potential licensees

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48 Have you negotiated the licensing of standards essential patents (SEPs) with potential licensees that were part of a group (for example a licensing negotiation group)?

- Yes, as owner of a SEP
- Yes, as potential licensee of a SEP
- Yes, on behalf of an owner of a SEP
- Yes, on behalf of a potential licensee of a SEP
- No
- No opinion/not applicable

49 In your experience with joint negotiations of licenses for SEPs by potential licensees (for instance in the form of a licensing negotiation group), were the potential licensees competitors or potential competitors to each other?

- Yes
- Yes, but only some of them
- No
- I do not know
- No experience

51 Was there a separate entity (for example a licensing negotiation group in the form of a joint venture, a company in which the potential licensees hold shares, an independent third party entrusted to pursue the negotiations, a contractual arrangement, or other looser forms of cooperation) in charge of the negotiation for the potential licensees?

- Yes
- No
- Not applicable

53 Which aspects of the licensing were negotiated jointly with the group and which ones separately?

|  | Jointly               | Separately            | Not applicable        |
|--|-----------------------|-----------------------|-----------------------|
| Royalty rate/fee   | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Aggregate royalty for the whole stack of SEPs and apportionment principle(s) | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

|  |                       |                       |                       |
|--|-----------------------|-----------------------|-----------------------|
| Certain element(s) of the royalty rate/fee | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Licensed IP                                | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Scope of the licence (or product scope)    | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Geographic scope of the licence            | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Essentiality checks for the SEPs           | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| Other                                      | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

54 Please explain your reply. In particular, if you chose 'other', please specify which aspects were negotiated jointly and which ones were negotiated separately.

55 Based on your experience or knowledge, which of the following elements should play a role in qualifying joint licensing negotiations by potential licensees of standard essential patents either as a restriction of competition by object or as a restriction of competition by effect (several choices are possible)?

|  | <b>Relevant</b> for qualification as <b>by object</b> restriction | <b>Not relevant</b> for qualification as <b>by object</b> restriction | <b>Relevant</b> for qualification as restriction <b>by effect</b> | <b>Not relevant</b> for qualification as restriction <b>by effect</b> | No experience /no opinion |
|--|---|---|---|---|---------------------------|
| Potential licensees are competing downstream   | <input type="checkbox"/>  | <input type="checkbox"/>  | <input type="checkbox"/>  | <input type="checkbox"/>  | <input type="checkbox"/>  |
| Degree of integration on the potential licensee side (e.g. separate licensing negotiation group) | <input type="checkbox"/>  | <input type="checkbox"/>  | <input type="checkbox"/>  | <input type="checkbox"/>  | <input type="checkbox"/>  |
| Aggregated share of the potential licensees in total demand in the licensing market              | <input type="checkbox"/>  | <input type="checkbox"/>  | <input type="checkbox"/>  | <input type="checkbox"/>  | <input type="checkbox"/>  |
| Degree of concentration of licensors in the licensing market                                     | <input type="checkbox"/>  | <input type="checkbox"/>  | <input type="checkbox"/>  | <input type="checkbox"/>  | <input type="checkbox"/>  |
| Aggregated market share of the potential licensees in the (downstream) selling markets           | <input type="checkbox"/>  | <input type="checkbox"/>  | <input type="checkbox"/>  | <input type="checkbox"/>  | <input type="checkbox"/>  |
| The licensee cooperation is secret towards licensors   | <input type="checkbox"/>  | <input type="checkbox"/>  | <input type="checkbox"/>  | <input type="checkbox"/>  | <input type="checkbox"/>  |
| Other  | <input type="checkbox"/>  | <input type="checkbox"/>  | <input type="checkbox"/>  | <input type="checkbox"/>  | <input type="checkbox"/>  |

56 Please explain your choices for the elements that would play a role in qualifying such agreements as a restriction of competition by object or by effect.

The FSA takes note of this topic on Licensing Negotiation Groups and is happy to engage with Commission to explore further how these groups could help benefit the standards ecosystem.

57 Based on your experience or knowledge, what would be **potential pro-competitive benefits** of agreements between potential licensees of standards essential patents (SEPs) on the following elements (several options are possible)?

|  | <b>No pro-competitive benefits</b> | <b>Insignificant pro-competitive benefits</b> | <b>Some pro-competitive benefits</b> | <b>Significant pro-competitive benefits</b> | No experience /no opinion |
|--|------------------------------------|---|--------------------------------------|---|---------------------------|
| Prices for consumers   | <input type="checkbox"/>           | <input type="checkbox"/>                      | <input type="checkbox"/>             | <input type="checkbox"/>                    | <input type="checkbox"/>  |
| Royalty fees for SEPs owners                                   | <input type="checkbox"/>           | <input type="checkbox"/>                      | <input type="checkbox"/>             | <input type="checkbox"/>                    | <input type="checkbox"/>  |
| Royalty fees for the licensees party to the licensing group    | <input type="checkbox"/>           | <input type="checkbox"/>                      | <input type="checkbox"/>             | <input type="checkbox"/>                    | <input type="checkbox"/>  |
| Royalty fees for licensees not party to the licensing group    | <input type="checkbox"/>           | <input type="checkbox"/>                      | <input type="checkbox"/>             | <input type="checkbox"/>                    | <input type="checkbox"/>  |
| Choice/quality of products for consumers                       | <input type="checkbox"/>           | <input type="checkbox"/>                      | <input type="checkbox"/>             | <input type="checkbox"/>                    | <input type="checkbox"/>  |
| Choice/quality for SEPs owners                                 | <input type="checkbox"/>           | <input type="checkbox"/>                      | <input type="checkbox"/>             | <input type="checkbox"/>                    | <input type="checkbox"/>  |
| Choice/quality for licensees, party to the licensing group     | <input type="checkbox"/>           | <input type="checkbox"/>                      | <input type="checkbox"/>             | <input type="checkbox"/>                    | <input type="checkbox"/>  |
| Choice/quality for licensees, not party to the licensing group | <input type="checkbox"/>           | <input type="checkbox"/>                      | <input type="checkbox"/>             | <input type="checkbox"/>                    | <input type="checkbox"/>  |
| Innovation for consumers                                       | <input type="checkbox"/>           | <input type="checkbox"/>                      | <input type="checkbox"/>             | <input type="checkbox"/>                    | <input type="checkbox"/>  |
| Innovation for SEPs owners                                     | <input type="checkbox"/>           | <input type="checkbox"/>                      | <input type="checkbox"/>             | <input type="checkbox"/>                    | <input type="checkbox"/>  |
| Innovation for licensees, party to the licensing group         | <input type="checkbox"/>           | <input type="checkbox"/>                      | <input type="checkbox"/>             | <input type="checkbox"/>                    | <input type="checkbox"/>  |
| Innovation for licensees, not party to the licensing group     | <input type="checkbox"/>           | <input type="checkbox"/>                      | <input type="checkbox"/>             | <input type="checkbox"/>                    | <input type="checkbox"/>  |
| Other  | <input type="checkbox"/>           | <input type="checkbox"/>                      | <input type="checkbox"/>             | <input type="checkbox"/>                    | <input type="checkbox"/>  |

58 Based on your experience or knowledge, what would be potential **anti-competitive effects** of agreements between potential licensees of standards essential patents (SEPs) on the following elements (several options are possible)?

|  | <b>No anti-competitive effects</b> | <b>Insignificant anti-competitive effects</b> | <b>Some anti-competitive effects</b> | <b>Significant anti-competitive effects</b> | No experience /no opinion |
|--|------------------------------------|---|--------------------------------------|---|---------------------------|
| Prices for consumers   | <input type="checkbox"/>           | <input type="checkbox"/>                      | <input type="checkbox"/>             | <input type="checkbox"/>                    | <input type="checkbox"/>  |
| Royalty fees for SEPs owners                                   | <input type="checkbox"/>           | <input type="checkbox"/>                      | <input type="checkbox"/>             | <input type="checkbox"/>                    | <input type="checkbox"/>  |
| Royalty fees for the licensees party to the licensing group    | <input type="checkbox"/>           | <input type="checkbox"/>                      | <input type="checkbox"/>             | <input type="checkbox"/>                    | <input type="checkbox"/>  |
| Royalty fees for licensees not party to the licensing group    | <input type="checkbox"/>           | <input type="checkbox"/>                      | <input type="checkbox"/>             | <input type="checkbox"/>                    | <input type="checkbox"/>  |
| Choice/quality of products for consumers                       | <input type="checkbox"/>           | <input type="checkbox"/>                      | <input type="checkbox"/>             | <input type="checkbox"/>                    | <input type="checkbox"/>  |
| Choice/quality for SEPs owners                                 | <input type="checkbox"/>           | <input type="checkbox"/>                      | <input type="checkbox"/>             | <input type="checkbox"/>                    | <input type="checkbox"/>  |
| Choice/quality for licensees, party to the licensing group     | <input type="checkbox"/>           | <input type="checkbox"/>                      | <input type="checkbox"/>             | <input type="checkbox"/>                    | <input type="checkbox"/>  |
| Choice/quality for licensees, not party to the licensing group | <input type="checkbox"/>           | <input type="checkbox"/>                      | <input type="checkbox"/>             | <input type="checkbox"/>                    | <input type="checkbox"/>  |
| Innovation for consumers                                       | <input type="checkbox"/>           | <input type="checkbox"/>                      | <input type="checkbox"/>             | <input type="checkbox"/>                    | <input type="checkbox"/>  |
| Innovation for SEPs owners                                     | <input type="checkbox"/>           | <input type="checkbox"/>                      | <input type="checkbox"/>             | <input type="checkbox"/>                    | <input type="checkbox"/>  |
| Innovation for licensees, party to the licensing group         | <input type="checkbox"/>           | <input type="checkbox"/>                      | <input type="checkbox"/>             | <input type="checkbox"/>                    | <input type="checkbox"/>  |
| Innovation for licensees, not party to the licensing group     | <input type="checkbox"/>           | <input type="checkbox"/>                      | <input type="checkbox"/>             | <input type="checkbox"/>                    | <input type="checkbox"/>  |
| Other  | <input type="checkbox"/>           | <input type="checkbox"/>                      | <input type="checkbox"/>             | <input type="checkbox"/>                    | <input type="checkbox"/>  |

59 Please explain your choices for both the **pro-competitive benefits** and the **anti-competitive effects**. If you chose "other" please explain which elements you mean.

The FSA takes note of this topic on Licensing Negotiation Groups and is happy to engage with Commission to explore further how these groups could help benefit the standards ecosystem.

## FRAND

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60 Do you have experience with SSOs that give guidance on the FRAND concept?

- Yes
- No
- Not applicable

61 Please provide the name of the SSOs and explain how you assess this guidance.

The Institute of Electrical and Electronics Engineers (IEEE) 2015 IPR Policy provides good guidance on the FRAND concept. The policy includes a list of factors to take into consideration when considering whether a proposed valuation is fair and reasonable, and elaborates on the availability of injunctive relief.

Under IEEE 6.1 Definitions the defines a “reasonable rate” as “mean appropriate compensation to the patent holder for the practice of an Essential Patent Claim excluding the value, if any, resulting from the inclusion of that Essential Patent Claim’s technology in the IEEE Standard. In addition, determination of such Reasonable Rates should include, but need not be limited to, the consideration of

- o The value that the functionality of the claimed invention or inventive feature within the Essential Patent Claim contributes to the value of the relevant functionality of the smallest saleable Compliant Implementation that practices the Essential Patent Claim
- o The value that the Essential Patent Claim contributes to the smallest saleable Compliant Implementation that practices that claim, in light of the value contributed by all Essential Patent Claims for the same IEEE Standard practiced in that Compliant Implementation.
- o Existing licenses covering use of the Essential Patent Claim, where such licenses were not obtained under the explicit or implicit threat of a Prohibitive Order, and where the circumstances and resulting licenses are otherwise sufficiently comparable to the circumstances of the contemplated license.

In the experience of FSA members, the 2015 IPR Policy is the clearest guidance to date provided by an SSO which has led to greater business certainty and continued support for standards development at IEEE. Even though there have been persistent efforts by a small group of companies to undermine the IEEE policy, standards development within IEEE has flourished since the adoption of the new IPR policy. (For an independent study, see IPlytics (2019) “Empirical Analysis of Technical Contributions to IEEE 802 Standards” [https://www.iplytics.com/wp-content/uploads/2019/01/IEEE-contribution-anaylsis\\_IPlytics-2019.pdf](https://www.iplytics.com/wp-content/uploads/2019/01/IEEE-contribution-anaylsis_IPlytics-2019.pdf))

By contrast, in light of the prolific amount of litigation that arises as a result of vague contractual terms stemming from some SSO IPR policies, SSOs that are developing standards that are most prone to litigation may wish to consider improvements to their IPR policies to clarify the meaning of the FRAND commitment that SEP owners voluntarily provide when declaring their patents essential to a given standard.

The lack of clarity stemming from some IPR policies creates business uncertainty, ultimately hindering access to the standard as many small firms are effectively dissuaded from utilizing the standard, in essence reserving use of the standard to large companies. Without direction from those SSOs on the specific meaning of FRAND, the commitment becomes devoid of meaning and opens the way for SEP holders to potentially engage in hold up practices, the very activity which the FRAND commitment is intended to avoid.

62 Which valuation methods have you used in your licensing negotiations for proposing a FRAND license? How would you assess these methods?

As for valuation methods and principles, from the outset, the FSA would like to reiterate that while specific licensing terms and values must always be determined on a case-by-case basis in view of the parties' particular facts and circumstances, there are some clear methodological approaches for FRAND valuation that have been recognised by the European Commission as well as courts. For reference to valuation methods and principles broadly supported by industry, please refer to CWA 95000 "Core Principles and Approaches to Licensing Standard Essential Patents" <https://2020.standict.eu/sites/default/files/CWA95000.pdf>.

First, SEPs should be valued based on their own technical merits and scope, not based on downstream values or uses. As such, FRAND royalties should reflect the value of the patented invention, and only the value of the patented invention. This entails that FRAND royalties should not seek to include compensation for innovations or features that are not claimed nor inherent in the underlying invention. Deviation from the value added by the invention 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.

Second, a FRAND royalty should take into account 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. 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. 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.

Third, 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. Fourth, 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.

Fifth, a FRAND royalty should take into account the patent holder's contribution as a portion thereof. Doing so will avoid the problem of "royalty stacking," which has the potential to negatively affect licensing and valuation of SEPs. Some of the issues related to royalty stacking may also be addressed through transparency requirements on the part of SEP holders (see below).

As explained in FSA's response to the prior consultation (as submitted on 12 February 2020), we 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 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.

63 Should SSOs facilitate their members to agree on a maximum total royalty rate to get access to all SEPs? Please elaborate.

As mentioned above, there is no one-size-fits-all when it comes to standard development and SSOs. Therefore, to the extent that the question seeks an opinion on whether facilitation of agreement on a maximum total royalty rate would be advisable for all SSOs, our answer would be “no”.

Based on their specific circumstances, individual SSOs may wish to consider facilitating voluntary discussions among SEP holders on establishing a maximum total royalty rate (as done for example at DVB) where SSO participants feel this could be useful for industry and/or the wider adoption of the standard. As explained in response to 27 above, it should be born in mind that not every SEP owner will always seek to monetize its SEPs. Therefore, participation in such discussions should remain voluntary and their results should not bind SEP holders that choose to not participate.

One concern with mandating maximum total royalty rates set by SSOs is the method of doing so. without third party review and competition law guardrails. Where top down analysis has taken place to assess the maximum total royalty rate, this was done by a neutral third party in a court of law, and not by the SSO or the SSO participants themselves. In fact, when left to do so through mechanisms like collective licensing pools, the contributors have tended to grossly overestimate the value of the aggregate royalty rate. Another related concern is that those seeking to aggressively monetise their patents will inflate the value of their contributions to the standard and deflate the value of others’ contributions

With that said, to most effectively address harms such as royalty stacking and patent hold up, the principles listed in question 62 would do much to remedy the situation in a fair and balanced manner. This includes, in particular, the principles addressing appropriate valuation methods and the recognition that licensing negotiations should take place without the shadow of an injunction threat looming over the negotiation process, should therefore, be available only in limited circumstances. A FRAND SEP holder must not threaten, seek or enforce an injunction (or similar de facto exclusion processes) except in exceptional circumstances and only where FRAND compensation cannot be addressed via adjudication, e.g. lack of jurisdiction or bankruptcy. Parties should seek to negotiate FRAND terms without any unfair “hold up” leverage associated with injunctions or other de facto market exclusion processes.

## Other comments

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64 Please feel free to upload a concise document, such as a position paper, explaining your views in more detail or including additional information and data. The document is an optional complement and serves as additional background reading to better understand your position.

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**/FSA\_Supplementary\_Comments\_to\_the\_Specialised\_Questionnaire\_on\_the\_Horizontal\_Guidelines.pdf**

65 Do you have any further comments on this initiative on aspects not covered by the previous questions?

While the FSA believes the Commission's Questionnaire focuses on a number of important topics, we would also like to raise the additional topic of where in the licensing value chain a license should be available. The existing language included in the Horizontal Guidelines offers strong support for the notion that "in order to ensure effective access to the standard, the [SDO's] Intellectual Property Rights (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')" (Horizontal Guidelines, para. 285).

Please refer to the attached supplementary paper for a full statement of the FSA's position on this issue. In summary, the FSA calls on the Commission to enforce the FRAND commitment and further clarify in the revised Guidelines on Horizontal Cooperation Agreements that licenses should be made available to anyone willing to take a license on FRAND terms to use the standard, irrespective of its position in the value chain. Clear guidance from the Commission on this point will have a positive effect in the market by creating greater legal certainty for companies seeking to invest in the development and implementation of standardised technologies. Ensuring that all users of a standard are able to get a license means that companies are able to compete on a level playing field, which is particularly relevant when companies operating a single point in the value chain need to compete with vertically integrated companies operating at various levels of the value chain. As explained in FSA's response to the prior consultation (submitted on 12 February 2000), and as referred to above, we urge the Commission to update the section of standardization agreements normally not restrictive of competition to state that 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 provide for licenses to be available to any licensee (irrespective of its position in the value chain) may raise competition law concerns and not satisfy the efficiencies test under Art 101(3) TFEU.

66 Please indicate whether the Commission services may contact you for further details on the information submitted, if required.

- Yes  
 No

**THANK YOU FOR YOUR COOPERATION**

## Contact

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