FSA Comments to the European Commission's Targeted consultation on standardisation agreements in the Horizontal Guidelines

30 September 2021

Supplementary comments – License Availability

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).

Despite this clear guidance, there are concerns from a broad cross section of industries that licenses are not being provided, despite the fact that companies are willing to take a license on FRAND terms. The effect of this in the market is hindering the uptake of technology, harming European industry, and undermining Europe's Digital Sovereignty in key strategic sectors such as automotive and energy.

For the reasons stated below the FSA implores the Commission to address this issue with an unequivocal statement that licenses must be available to any willing licensee that wants one.

When considering the availability of licenses in the value chain, it should be noted that there is no one-size-fits-all principle regarding the level at which licensing should occur. What is critical is that licenses should be made available to anyone who is 'willing' to take a license on FRAND terms, and that such licenses should not be refused based on the potential licensee's level in the value chain. Industry will then work out at what level in the value chain it is best to license.

On its face, the FRAND commitment does not restrict licensing to any particular sub-group, but instead seeks to prevent discrimination and encourage a level playing field such that licenses should be available to all potential licensees. This is in line with the public interest aspect of standardization to promote the diffusion and promulgation of technology in the economy. A FRAND commitment is a commitment to license any potential licensee that seeks a license, irrespective of their position in the value chain.

Disrespecting this rule is not merely a contractual issue. It is also potentially a breach of EU competition rules. If a patent holder could "pick and choose" potential licensees, then it could control who does and does not succeed in the market. This is particularly concerning where the patent holder is vertically integrated in the value chain, since the patent holder is able to leverage its market power as an SEP owner to foreclose competition in the downstream market (Case C-170/13 Huawei vs ZTE, CJEU, ECLI:EU:C:2015:477 para. 52.). But even without such vertical integration, refusing licenses to suppliers higher in the value chain even though they are willing to take a license on FRAND terms significantly reduces innovation incentives.

Selective SEP licensing by entities that are not active in the downstream market might be distorting competition as suppliers may seek to focus R&D investments on the downstream licensee and have limited incentives to compete for all customers, chilling incentives to innovate. Thus, without a direct license to the relevant SEPs, companies higher in the value chain are impeded in their ability to innovate on top of the standard. Alternative models such as 'have made' rights do not alleviate this concern, because the 'have made' right ties the supplier to its customer and does not allow the supplier to sell products on the open market.

Furthermore, the narrow scope of 'have made' rights stifles innovation. For example, if a module company that develops cellular devices can sell to only one industry (e.g. automotive), or even to just one group of customers

within that industry (e.g. particular OEMs or OEMs that make particular types of cars or trucks), then in practice they can only invest in R&D that they can recoup via sales to that industry or group of customers. If that manufacturer developed innovative modules that could be used for other industries, customers, or applications, without its own SEP licence it would be precluded from selling them as licensed modules to other industries such as manufacturers of airplanes, trains or boats. In short, the SEP holder is seeking to license its SEPs based on the field of application or use case and the success of that use based in the downstream market which is contrary to Commission guidance in its 2017 Communication on SEPs, where it states that: "determining a FRAND value should require taking into account the present value added29 of the patented technology. That value should be **irrespective of the market success of the product which is unrelated to the patented technology**" (emphasis added) (EC SEP Communication, p. 7)

Certain wireless technology SEP holders insist that it is most efficient to license only downstream end-product manufacturers, for example licenses only to laptop manufacturers for video codecs, smartphone manufacturers for Bluetooth, and wireless headphone manufacturers for Qi wireless powering technology. However, business realities dictate otherwise. Mature industries characterised by complex supply chains that entail multiple levels and players have long worked out the most efficient ways to license patented – including standardised – technology, and the most appropriate value chain players to obtain necessary licences. Europe's lead R&D investor, the automotive industry, is a good example. A vehicle consists of thousands of components – most of which are subject to standards; and most of which are supplied by upstream component manufacturers; often single-sourced from a supplier specialising in a particular product or a type of product. Over many years, the industry has not considered it most efficient for OEMs to seek licences for standardised technology sourced from its upstream suppliers. Instead, vehicle manufacturers have consistently been able to source components free of third-party rights from upstream suppliers which seek and take SEP licenses.

The FSA therefore calls on the Commission to enforce the FRAND commitment and confirm 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. 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.