FSA Comments on the Competition and Consumer Commission Singapore

Proposed Business Collaboration Guidance Note

27 August 2021

Statement of Interest

The Fair Standards Alliance (FSA) submits the following comments to the Competition and Consumer Commission Singapore (CCCS) in relation to Section 8 of the Proposed Business Collaboration Guidance Note. The FSA believes that the section dealing with technical standards could benefit from greater clarity on the licensing of standard essential patents (SEPs) and more certainty about the fact that access to a standard is ensured by licensing any company irrespective of their position in the value chain.

The FSA is a trade association that promotes the licensing of SEPs on a fair, reasonable, and non-discriminatory (FRAND) basis. 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 around the world. Annually, the aggregate turnover of FSA members is more than USD 2.4 trillion, and in aggregate our members spend on an annual basis more than USD 150 billion on R&D and innovation. Alliance members have more than 500,000 patents, including SEPs, that are either granted or pending.

Standards are important enablers for any competitive and dynamic market where innovation and interoperability go hand in hand. In order for standards to be successful and widely taken up by the market, the Alliance believes that it is important to ensure that SEP licensing occurs in a fair, balanced, and rational manner.

For further information and full list of members, please visit https://fair-standards.org/members/.

Comments

Section 8: Standardisation and Standard Terms and Conditions

FSA agrees with the observation (8.9) that standards can be pro-competitive for businesses and consumers. However, such benefits only accrue when the proper competition law principles are observed. This is particularly the case in contexts where the standard involves patented technology that grants the holder the potential to exclude others from the market.

Section 8.10 notes some of the anticompetitive effects of standardisation agreements which include: (i) foreclosure on innovation, (ii) exclusion or discrimination on use of the standards, and (iii) elimination or reduction of competition.

The CEN CENELEC Workshop Agreement CWA 95000, *Core Principles and Approaches for Licensing of Standard Essential Patents* [

SEPs] at 20 ("CWA", June 2019),[1] which has been endorsed by over 50 companies and organizations, provides further context:

> "Competition law and policy are critical aspects in understanding the purpose of voluntary [fair, reasonsonable, and non-discriminatory] FRAND commitments. The development of standards typically involves multiple parties, perhaps competitors, coming together in the context of an SDO to agree on a common technology specification. This development process necessarily includes the acceptance of certain technical contributions to the specification, and rejection of other proposed contributions. As such, this standards development activity can give rise to competition issues. Discussions in the context of standard setting, for example, can provide an opportunity for collusion to reduce or eliminate competition between otherwise competing technologies. […]
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> To prevent such abuse, competition agencies have put guidelines in place to outline measures to be taken by standards developers and adopters in order to stay clear of competition-law concerns. These guidelines specifically include measures to ensure that SEPs are not used anti-competitively by abusing the leverage gained from the elimination of technology alternatives through a standard. And in some cases, competition authorities have taken action to address violation of the FRAND promise and the anti-competitive effects that can flow therefrom, expressly noting that a SEP can confer a unique power on the owner of such patent. This power is created due to the fact that participants in the standard setting process select a single technical solution to become the standard. While such selection can ensure that products and services achieve the relevant levels of compatibility and interoperability, to the benefit of businesses and consumers, at the same time, competition that may otherwise arise among different technologies is thus eliminated.
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> Companies that make or use standard-compliant products necessarily must use the SEPs that are incorporated into those products. Therefore, because prospective licensees have no commercial alternative to implementing the standardized technology, a SEP holder's bargaining power in the context of a licensing negotiation increases dramatically. This phenomenon – where it is either impossible or inordinately costly to switch to an alternative technology – is referred to as "lock-in". As the European Commission has noted, "FRAND commitments can prevent IPR holders from making the implementation of a standard difficult by refusing to license or by requesting unfair or unreasonable fees (in other words excessive fees) after the industry has been locked-in to the standard or by charging discriminatory royalty fees."[2]
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> That is where the competition-law dimension and purpose of FRAND comes in […] FRAND obligations thus seek to curb a SEP holder's power obtained due to the inclusion of its patented technology in the standard, while not unfairly limiting its rights to seek reasonable and non-discriminatory compensation based on the value of the patented invention.

In this context, it is important to note that a participant that has made a voluntarily FRAND commitment for a SEP should be held accountable to licensing that patented technology on FRAND terms and should not be allowed to seek or enforce an injunction on it except in limited circumstances

[1] Available at: ftp://ftp.cencenelec.eu/EN/News/WS/2019/CWA_SEP/CWA95000.pdf.
[2] Communication from the Commission: Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011 O.J. C, 14.1.2011, p. 1, para. 287 ("EC Horizontal Guidelines").

to ensure fair licensing negotiations.[3] Licensing on FRAND terms also means that licenses should be made available to any party interested in seeking such a license, regardless of their role within the product supply chain. FSA has produced two position papers on the topic that provide further context.[4] The same principle has also been confirmed by the CWA, which listed as its second core licensing principle that: "A FRAND license should be made available to anybody that wants one to implement the relevant standard. Refusing to license some implementers is the antithesis of the FRAND promise. In many cases, upstream licensing can create significant efficiencies that benefit the patent holder, the licensee and the industry".[5] There are many other authoritative sources that share those views:

- In its Horizontal Guidelines,[6] the European Commission has noted that "In order to ensure effective access to the standard, the 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 (emphasis added)";
- In *Huawei v. ZTE*,[7] the European Court of Justice stated that "having regard to the fact that an undertaking to grant licenses on FRAND terms creates legitimate expectations on the part of third parties that the proprietor of the SEP will in fact grant licenses on such terms, a refusal by the proprietor of the SEP to grant a license on those terms may, in principle, constitute an abuse within the meaning of Article 102 TFEU";
- In *KFTC v. Qualcomm* (Korea 2017), the Court found that "[A]ccess to and use of cellular SEPs should be guaranteed for the modem chipset manufacturers in accordance with the purposes of standard-setting and FRAND commitments";
- In Japan, in its Guidelines for the Use of Intellectual Property under the Antimonopoly Act, the Japan Fair Trade Commission (JFTC) argues that "refusal to license or bringing an action for injunction against a party who is willing to take a license by a FRAND-encumbered Standard Essential Patent holder […] may deprive the entrepreneurs who research & develop, produce or sell the products adopting the standards of trading opportunities or impede the ability of the entrepreneurs to compete by making it difficult to research & develop, produce or sell the products adopting the standards".

FSA would therefore propose the following revisions to section 8.14, also reflecting Core Principle Two of CWA 95000.

> *Whether ~~access~~* licenses *to the standard ~~is~~* are *provided fairly – After a standard is established, ~~access~~* licences *to the standards should be provided fairly* to any licensee irrespective of its position in the value chain and rarely, if ever, seek injunctive relief*. This will help to ensure that the standards are ~~accessible and~~ not used to discriminate or exclude certain interested businesses. For example, where there are underlying patents essential to a standard, having*

[3] FSA Key Principles, "Injunctions Available Only in Limited Circumstances", https://fair-standards.org/key-principles/.
[4] See in particular the FSA Position Paper: "SEP Licenses available to all", available at http://fair-standards.org/wp-content/uploads/2020/07/160624_FSA_Position_Paper_-_SEP_licenses_available_to_all.pdf as well as the FSA Paper: "SEP licenses should be available to all companies in a supply chain that want a license for SEPs in their products – Supporting references", available at: http://fair-standards.org/wp-content/uploads/2021/03/210215_SEP-licenses-should-be-available-to-all-companies-in-a-supply-chain-that-want-a-license-for-SEPs-in-their-products.pdf
[5] CWA 95000, p. 9.
[6] EC Horizontal Guidelines, para. 285
[7] C-170/13 - *Huawei Technologies,* available at : https://curia.europa.eu/juris/document/document.jsf?text=&docid=165911&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=572907

the patent holders provide fair, reasonable and non-discriminatory ("FRAND") commitments to the standard-setting body before their patents can be considered for the standard would allow fair licensing of ~~access to~~ the standard and—if kept—mitigate concerns in relation to refusal to license or the imposition of unreasonable fees. The standardisation agreement should also not restrict members from developing alternative standards or products, which helps to provide room for competition.

Requiring SEP owners that have provided a voluntary FRAND commitment to license all third parties interested in taking a license to use the standard irrespective of their position in the value chain and without seeking injunctions except in limited circumstances should also be endorsed in the context of patent pools. We believe a further clarification should be added to reflect the principle that a patent pool administrator should comply with licensing encumbrances voluntarily agreed to by SEP holders, and that failure to do so, including by refusing to license higher in the value chain, raises competition concerns.

Conclusion

The FSA thanks the CCCS for this opportunity to provide input on Section 8 of the Proposed Business Collaboration Guidance Note. With added clarity the Proposed Business Collaboration Guidance Note will provide needed guidance on the issue of refusal to license which has real world anticompetitive effects. The FSA remains at your disposal to discuss any questions you may have.