FSA Comments to the European Commission's Preliminary Report - Sector Inquiry into Consumer Internet of Things

1 September 2021

I. Introduction

As an industry organization representing over 49 companies across different Internet of Things (IoT) industry sectors, the Fair Standards Alliance (FSA) welcomes this opportunity to offer comments to the European Commission's **Preliminary Report Sector Inquiry into Consumer Internet of Things**.[1] We hope our comments will help the Commission better understand the consumer IoT sector, its competitive landscape, developing trends and potential competition issues particularly as these relate to the topic of licensing Standard Essential Patents (SEPs).

The FSA is a Europe-based association that promotes the licensing of standard essential patents 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 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.[2]

Indeed, as our comments will lay bare, the consumer IoT sector faces a number of challenges due to inefficiencies and anticompetitive practices in the licensing of SEPs. These challenges include:

- Refusals to offer licenses on FRAND terms to willing licensees;
- Royalty demands that exceed a fair and reasonable amount; and,
- Secrecy obligations and a lack of transparency in licensing negotiations exacerbating disputes between licensors and licensees.

Together these issues are hindering competition in the internal market, and eventually could delay the uptake of IoT technology to the detriment of European consumers and the promotion of the twin Green and Digital transitions. The FSA therefore welcomes the Commission's engagement and encourages the Commission to investigate these matters further.

II. Importance of the Internet of Things

At the foundation of the Internet of Things ecosystem are a series of technical standards which enable devices of all kinds to interact with one another. Standardization involving patents is common across

[1] Staff Working Document [SWD(2021) 144 final] 'Preliminary Report - Sector Inquiry Into Consumer Internet Of Things,' ("IoT Sector Inquiry Preliminary Report").

[2] FSA includes the following members: Aira Inc., airties, Apple, BMW, Bullitt, Bury, Cisco, Continental, Crosscall, Daimler, Dell, Denso, Deutsche Telekom, dTOOR Inc., Emporia, Fairphone, Ford, Google, Gramm, Lins & Partner, Harman, Hitachi, Honda, HP, Hyundai, Intel, Juniper, kamstrup, Landis+Gyr, Lenovo, Microsoft, Molex, N&M Consultancy, Nordic Semiconductor, Sagemcom, Sequans, Sierra Wireless, Sky, Tech Law Associates, Telit, Tesla, Thales, Titan, Tomtom, Toyota, U-Blox, Valeo, Visteon, Volkswagen, Wiko. For further information about FSA, please see http://www.fair-standards.org/.

a broad variety of industries. However, the adoption of communication standards has significantly expanded into new areas the last few years with the emergence of the Internet of Things. Examples of sectors include the automotive industry, smart energy, smart homes, e-health, manufacturing, asset tracking, agriculture, etc. Many more are to be added to the list in the years to come.

The FSA supports many of the conclusions found in the preliminary report with regards to concerns related to standard setting. These factors have the potential to limit the full potential of standardisation in the consumer IoT sector.

The preliminary report notes concerns in the lack of transparency of IPR obligations relating to the implementation of a given technology acting as a barrier to a quicker and broader development of standards in the consumer IoT sector.[3] FSA agrees with those concerns, and would note that the lack of clarity in terms of the obligations that are inherent to a FRAND commitment results in a number of abusive practices. These practices are blocking the uptake of consumer IoT technologies by a larger number of companies across the European Union.

The enforcement of SEPs by Non-Practicing Entities is another factor identified by respondents that may negatively affect stakeholders' willingness to rely on standardised technologies. This factor highlights the more general problem of enforcement of SEPs in pursuit of hold up strategies used to extract royalty payments that exceed a fair and reasonable compensation.

III. Principles of Standardisation and FRAND

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

Because standards are set by groups of competitors coming together to choose a single set of technological solutions and the owners of those standards technologies may gain significant market power, standards may lead to competition concerns. Indeed, as the Commission notes in its Horizontal Cooperation Guidelines, standard setting has the potential to reduce price competition, foreclose innovative technologies, and exclude or discriminate against certain companies by preventing effective access to the standard.[4] Once a technology standard is set and businesses have made substantial investments to rely on it, innovating and developing products using the standard, they become effectively "locked in" as it is virtually impossible to design around standardised technology. This "lock-in" creates a dominant position for SEPs holders, particularly for telecommunication SEPs.

To that end, it is fundamental that competition law agencies continue to enforce FRAND commitments, where violations of those FRAND commitments give rise to anticompetitive harms. In light of the

[3] IoT Sector Inquiry Preliminary Report, para. 405. The report also highlights differences between IPR policies of Standards Development Organizations (SDOs) as potential cause for concern. The FSA does not believe concerns related to the differences between SDO IPR policies necessarily create the lack of transparency that is causing concerns in the industry. While it is true that SDOs have different IPR policies, all policies must be subject to competition and antitrust standards. The FSA would also underline that SDOs are free to develop their IPR policies in their own way, so long as they abide by the relevant antitrust rules. Furthermore, differences between royalty-free or FRAND based models, for example, allow for competition amongst standards which has positive effects in the market.

[4] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11/1 of 14.1.2011 ("Horizontal Cooperation Guidelines"). para. 264-268, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52011XC0114%2804%29

burgeoning consumer IoT, this is all the more pressing since many new industries will seek to implement connectivity standards in their products for the benefit of consumers.

Highlighted below are a number of key licensing principles that the FSA believes should be in place to promote a balanced licensing framework for SEPs, which will facilitate the development and use of standards for the consumer IoT. These principles will help address the concerns raised above, to facilitate standard setting, by making the process more transparent both before the standard is set, and afterwards when the standard is adopted in the market. Having been developed under the auspices of a CEN CENELEC Workshop Agreement (CWA95000), these principles are supported and signed on to by some 50 organizations:[5]

- 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.
- 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.
- SEPs should be valued based on their own technical merits and scope, not based on downstream values or uses. In many cases this will involve focusing on the smallest component that directly or indirectly infringes the SEP, not the end product incorporating additional technologies. As noted by the European Commission, SEP valuations "should not include any element resulting from the decision to include the technology in the standard." Moreover, "[i]n defining a FRAND value, parties need to take account of a reasonable aggregate rate for the standard."
- While in some cases parties may mutually and voluntarily agree to a portfolio license (even including some patents subject to disagreements), no party should withhold a FRAND license to patents that are agreed to be essential based on disagreements regarding other patents within a portfolio. This approach can allow parties to identify areas of agreement within a patent portfolio despite other areas of disagreement. For patents that are not agreed upon, no party should be forced to take a portfolio license, and if there is a dispute over some patents, a SEP holder must meet its burdens of proof on the merits (e.g., to establish that the alleged SEP is infringed and requires payment, and to establish the FRAND rate).
- Neither party to a FRAND negotiation should seek to force the other party into overbroad secrecy arrangements. Some information, such as patent lists, claim charts identifying relevant products, FRAND licensing terms, aspects of prior licensing history and the like are important to the evaluation of potential FRAND terms, and public availability of those materials can support the public interest in consistent and fair application of FRAND. A patent holder should not seek to exploit its information advantage regarding the patents or prior licenses to interfere with the potential licensee's ability to effectively negotiate.
- FRAND obligations remain undisturbed despite patent transfers, and patent sales transactions should include express language to that effect. Patent transfers likewise should not alter value sought or obtained for particular patents. Where SEP portfolios are broken up, the total royalties charged for the broken-up parts (and the remaining part of the portfolio) should not

[5] Core Principles and Approaches for Licensing of SEPs, CEN-CENELEC CWA 95000, (June 2019), available at https://2020.standict.eu/sites/default/files/CWA95000.pdf.

exceed the royalties that would have been found to be FRAND had the portfolio been retained by a single owner, or that were charged by the original owner. And patent transfers should not be used to defeat a potential licensee's royalty "offset" or similar reciprocity rights.

We will elaborate on these principles further below.

IV. Licensing in the Value Chain

In the Horizontal Cooperation Guidelines, the Commission explains that standardisation agreements should comprise certain requirements to comply with competition rules.[6] In particular, "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')".[7] The Commission explains that this is necessary because "FRAND commitments can prevent IPR holders from making the implementation of a standard difficult by refusing to license [...] after the industry has been locked-in to the standard."[8]

Despite this clear guidance, as the preliminary report accurately notes, there are concerns from respondents on the appropriate level of licensing which is hindering the uptake of standardised technology in the IoT.[9] The source of this concern relates most specifically to the practice adopted by some SEP owners to license SEPs selectively to some potential licensees, while refusing licenses to others despite their willingness to attain a license on FRAND terms.

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.[10] 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.

[6] Horizontal Cooperation Guidelines, para. 263-269
[7] Ibid., para. 285.
[8] Ibid., para. 287.
[9] IoT Sector Inquiry Preliminary Report, para. 411.
[10] Case C-170/13 Huawei vs ZTE, CJEU, ECLI:EU:C:2015:477 para. 52.

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 only to 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.

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.

Unfortunately, in the last number of years certain patents holders have claimed a right to refuse licenses to companies who are otherwise willing to take a license. This practice is having a negative effect in the market, delaying the uptake of IoT and hindering innovation and development to the detriment of consumers in the Union.

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. 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. The added legal certainty on this issue would also improve upon the lack of transparency of IPR obligations relating to the implementation of a given technology, as raised by the Commission in its preliminary report (see above).

V. Valuation and Licensing Principles

As for FRAND valuation principles, as the report notes, there are concerns on the diverging interpretations of FRAND licensing terms.[11] 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.[12]

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.[13] 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).

[11] IoT Sector Inquiry Preliminary Report, para. 411.
[12] CWA 95000, para 3.4.
[13] From a US perspective, see in particular: Memorandum of Findings of Fact and Conclusions of Law, *TCL Comm'n Tech. Holdings, Ltd. v. Telefonaktiebolaget LM Ericsson*, No. SACV 14-341 (C.D. Cal. Dec. 21, 2017); In re. Innovatio IP Ventures, 2013 WL 5593609.

VI. Patent Pools

As the preliminary report notes, "for some standards, there are up to hundreds of patent owners to deal with. Entering into licensing negotiations with all these owners requires considerable resources and time that smaller structures may not be able to afford."[14] For this reason, patent pools can play a significant role as an efficient licensing platform for SEP licenses, if indeed they abide by the FRAND rules that the owners of the respective patents have voluntarily committed to.[15] If a SEP holder chooses to offer FRAND licenses through a patent pool, this offer should be only an additional option to negotiating and granting a bilateral SEP FRAND license to any licensee asking for such a license.

a) For patent pools licensing FRAND-encumbered SEPs, the pool is subject to the same requirements and obligations to license under FRAND terms and conditions as exist for SEP licensors licensing directly. A SEP owner should not avoid or circumvent, or seek to avoid or circumvent, its obligations to license on FRAND terms by licensing through a pool.

b) Where a patent pool administrator is acting as a sub-licensor or licensing agent for multiple SEP licensors, the pool administrator and the pool's SEP licensors should work with the potential pool licensee to determine what licenses may already exist with the putative pool licensee's direct or indirect suppliers and its customers and then adjust the royalty obligation accordingly. Thus, to avoid double dipping, a patent pool administrator and SEP licensors participating in the pool should be transparent about any licenses granted to suppliers or customers in the supply chain of a multi-component product, and pool pricing should reflect appropriate reductions for such prior licenses where applicable.

c) For reasons including transparency and public interest, patent pools are encouraged to publish all of their license terms, including royalty rates and other terms and conditions. To minimize the potential for hold-up and royalty stacking, patent pools should be open and transparent about the rates they seek to charge for their SEPs, what patents are being licensed, and their basis for believing that the patents are actual, valid SEPs. They should provide a base level of information without requiring the prospective licensee to sign a non-disclosure agreement (NDA).

d) SEP licensors should aim to minimize the number of pools licensing patents for a particular standard in order to achieve the greatest efficiency for licensors and licensees alike and promote innovation of products supporting a standard.

VII. Transparency

The FSA has long advocated for increased transparency in licensing negotiations with respect to SEPs subject to a commitment to license on FRAND terms.[16] Transparency at all stages—from before a patent is selected to be included in a standard by a standard-development organization (SDO), to when, whether, and how the patented technology is included in the adopted standard, to the eventual

[14] IoT Sector Inquiry Preliminary Report, para. 403.
[15] FSA, (November 2019) 'Patent Pools And Licensing Platforms In Sep Licensing', available at https://fair-standards.org/2019/11/06/patent-pools-and-licensing-platforms-in-sep-licensing-2/.
[16] FSA Key Principles (#3) (June 2016), available at https://fair-standards.org/wp-content/uploads/2016/08/FSA-POSITION-PAPER-June2016.pdf; FSA (February 2017) 'Transparency FRAND: The use (and misuse) of confidentiality obligations in FRAND licensing negotiations', available at https://fair-standards.org/2017/02/13/transparency-frand-the-use-and-misuse-of-confidentiality-obligations-in-frand-licensing-negotiations/.

licensing of declared SEPs and accompanying negotiations —is important to ensuring a robust and vibrant SEP ecosystem.

As the report notes, "difficulties in identifying the actual licensing obligations and costs relating to the implementation of a given technology in a new smart device or application are reported to increase the barriers for new entry."[17] These difficulties cut to the core of transparency issues of which the FSA distinguishes at least two types of transparency: (i) transparency of SDO declarations, and (ii) transparency in the context of licensing negotiations.

Overall, FSA believes that:

- SDOs should adequately document licensing commitments relevant to potential standards essential patents to facilitate technical decisions about the content of the standard and should encourage updating relevant information where appropriate.
- Third-party essentiality assessments could be helpful if carefully structured to be truly independent and avoid bias or any unintentional harm. Current industry driven efforts can be useful tools to learn more about the benefits, challenges, and potential of essentiality assessments before the Commission decides on a course of action.
- SEP-holders should provide key information to potential licensees during licensing negotiations without insisting on burdensome secrecy obligations.

Transparency of Declarations

SDOs do not independently corroborate whether declared SEPs are in fact essential to a final standard; instead, the patent holder self-declares its licensing commitment and depending on the environment many of the declared patents may eventually be found to be non-essential. Many different factors can affect whether a declared SEP is truly essential.[18] Such factors may include unknowns about how the standard will evolve before finalization. Other factors include changes during the patent prosecution process, whether the patent is valid, the introduction of newer patented and unpatented technology, and how these factors change over the life of the standard and its subsequent revisions. A patent holder may over-declare based on its interpretation of the SDO rules or maybe even out of a desire to inflate the importance of their patent portfolio in licensing negotiations. Thus, a declared "SEP" may not actually be essential to a standard. Such a determination can only be made definitively by a court.

The problem is particularly acute when a SEP holder does not declare a claim until after the standard on which the SEP is predicated has been adopted and later the SEP holder demands higher or "excess" royalties in the knowledge that implementers may not be able to design out the standard from their product or service without large expense.[19] Additionally, once a standard has been adopted, SEP holders can then attempt to leverage this enhanced bargaining power over innovative companies making devices that incorporate standardized technology. These problems are known as "hold-up". A related problem is the issue of "royalty stacking" mentioned above – when a standard implicates so many patents that, in the aggregate, royalties demanded by SEP-holders "stack" on top of each other.

Another concern when identifying the actual licensing obligations and costs relating to the implementation of a given technology is the fragmentation of portfolios following the transfer of SEPs, especially to Non-Practising Entities which aggressively seek to monetise their patent portfolios by

[17] IoT Sector Inquiry Preliminary Report, para. 406,
[18] FSA (August, 2021) "Transparency Issues with Standards Essential Patents" available at https://fair-standards.org/wp-content/uploads/2021/08/210802_FSA_Position_Paper_on_Transparency.pdf
[19] FSA (June, 2021)"Timely licensing for SEPs – how to avoid opportunities for hold-up and royalty stacking", available at https://fair-standards.org/wp-content/uploads/2021/06/FSA_Position_Paper_on_Timely_Licensing_for_SEPs.pdf.

obtaining more for the SEPs than should have been paid to the original patent holder. In this context, it's critical that SEP obligations transfer when the patent is transferred to another entity (including to patent pools and other licensing agents).

SDO databases that collate information on patent licensing commitments essential to the standard are often discussed in this context as a source of information that can help stakeholders understand and estimate their potential exposure. However, there are a number of issues with this approach. First, it should be noted that there are specific reasons why some SDOs hold such database, and others not. It may not make sense, or be reasonable, for all SDOs to maintain a database of specific declarations. Further, 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.[20] Additionally, for those SDOs that maintain a detailed declarations database, the information available is often outdated—especially as patent ownership changes, as the Commission correctly observed in its 2017 Communication on SEPs.[21] 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."[22] 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.[23]

To further improve transparency and information quality where individual SEPs are declared, SDOs should be encouraged to consider whether to:

- Require SEP owners to identify the part of the standard on which the patent reads as part of its declaration;[24]
- Where relevant, 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.

Transparency in Licensing Negotiations

Another key component of transparency is the exchange of information between SEP-holders and potential licensees during licensing negotiations. Those negotiations are characterized by an information asymmetry that SEP-holders can exploit to their own advantage, particularly when it comes to large portfolios: SEP-holders possess information potential licensees need to assess (1) whether a license is needed from a technical perspective, and (2) whether the terms offered comply with the SEP-holder's FRAND obligation. It includes, among other things, information about the size

[20] 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] EC 2017 SEP Communication, p. 3.

[22] Ohana & 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. 248.

[23] COM(2017) 712 final "Setting out the Eu Approach to Standard Essential Patents, (29.11.2017), p. 4.

[24] *See, e.g.,* CEN-CENELEC Guide 8, Annex 2- Statement and Licensing Declaration for CEN and CENELEC Deliverable at 13 (requiring identification of the relevant clause(s) of the standard), ftp://ftp.cencenelec.eu/EN/EuropeanStandardization/Guides/8_CENCLCGuide8.pdf; ETSI Rules of Procedures, IPR Information Statement Annex, at 48 (3 September., 2020) (apparently permitting, but not requiring identification of relevant parts of the standard in column labeled "Illustrative Specific part of the standard (e.g. section)"), https://www.etsi.org/images/files/IPR/etsi-ipr-policy.pdf.

and strength of their portfolio, the number of other licensees for the same standard and/or portfolio (if any), and the terms and conditions of those other licenses.

But rather than openly sharing that information with potential licensees, some patent holders routinely impose excessive secrecy obligations to obscure information about their portfolio strength and licensing practices, requiring potential licensees to enter into restrictive non-disclosure agreements (NDAs) to access basic information necessary to facilitate FRAND licensing. At the same time, SEP-holders often represent to potential licensees that other companies have accepted the terms of the proposed license; but the potential licensee has no way of verifying if that is true precisely because of the NDA imposed by the SEP-holder.[25]

To be clear, there is nothing objectionable about parties in licensing negotiations *voluntarily* agreeing to appropriate confidentiality limitations in an NDA. However, due to the information asymmetries inherent in SEP licensing, any such NDAs must not be the product of coercion and instead truly reflect the mutual desire of both parties to maintain confidentiality. Monetizing SEP-holders should not effectively force potential licensees to accept secrecy as a condition of obtaining a license on FRAND terms.[26]

Instead of demanding that potential licensees enter into restrictive NDAs, monetizing SEP-holders should be open and transparent about what patents are being licensed, their basis for representing the patents are valid SEPs, the royalty rates sought, and whether other licensees have entered into licenses for the same portfolio.[27]

Specifically, SEP-holders should provide a base level of information to enable the putative licensee (and its supply chain) to understand the SEPs, a sufficiently detailed explanation (e.g., claim charts) describing how the patents are allegedly infringed by the products implementing the standard, and other relevant information needed by the licensee to evaluate claims of infringement, validity and essentiality. Additional examples of materials that should be available without NDA obligations are provided in Annex B of *Core Principles and Approaches for Licensing of Standard Essential Patents*, which was developed under the auspices of CEN-CENELEC and supported by over 50 organizations.[28] Such information includes:

- A listing of patents;
- Identification of sections of the standard where each alleged SEP is practiced;
- Claim charts;
- The basis and methodology upon which the offer was calculated;
- Historical rate and licensing information;
- Details of litigation; and
- Information regarding prior licenses to suppliers or customers.[29]

Patent pools acting as an agent for multiple SEP-holders should also disclose the same information on both the pool-level and the level of the individual members.

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[25] See FSA Key Principles for FRAND Licensing (November 2015), available at https://fair-standards.org/wp-content/uploads/2016/08/FSA-POSITION-PAPER-June2016.pdf.

[26] FSA (November 2017), 'Transparently FRAND: The Use (and Misuse) of Confidentiality Obligations in FRAND Licensing Negotiations, available at https://fair-standards.org/wp-content/uploads/2020/07/170213_FSA-Position-PaperTransparency-FRAND-1.pdf.

[27] FSA (June 2021) 'Timely licensing for SEPs – how to avoid opportunities for hold-up and royalty stacking', available at https://fair-standards.org/wp-content/uploads/2021/06/FSA_Position_Paper_on_Timely_Licensing_for_SEPs.pdf.

[28] CWA 95000, pp. 48-51, available at https://2020.standict.eu/sites/default/files/CWA95000.pdf.

[29] Unless any of this information is made publicly available through an SSO's adoption of the transparent disclosures and essentiality analyses recommended in this submission.

VIII. Participation in Standard Setting Bodies

FSA takes note of some stakeholders raising concerns with "tensions between SDOs/major independent alliances, potential contributors and/or licensees."[30] These tensions are said to exist "as a result of (i) the exclusion by some SDOs/major independent alliances of contributions where the contributor would not commit to a royalty-free licensing, and (ii) the requirement of FRAND commitment for the developed standard, where the actual terms of such commitment are subject to diverging interpretations."

Regarding point (i), the FSA emphasizes that participation in standards setting is voluntary, and that companies are not forced to participate. The voluntary nature of standard setting leads to a diversity of industry standards development that includes both FRAND and Royalty Free models. The choice of which model is used is entirely within the purview of each standard setting organisation or alliance, and once a particular model is agreed upon it should be appreciated that SDO's routinely accept or reject contributions for any number of reasons (technical, business, licensing commitments, etc.). The availability of different licensing models allows for a competitive standards environment that answers to the specific needs of each industry and type of standard which it develops. Ultimately this has net positive effects for consumers who are free to choose products which implement technology standards as demanded, as opposed to a single standard set and foisted upon the rest of the market. In short, those who wish to develop a standard with a royalty free model should be free to do so, just as those who wish to develop a standard with a FRAND model should be free to do so. Again, as standards participation is voluntary, participants are always free to start their own competing standard development or industry alliance with interested stakeholders and use the model they wish.

So long as the standards setting process itself abides by competition law requirement then standards setting organisations and alliances should be free to determine, based on their internal rules, the IPR policy which they deem is suitable for the particular standard.

Regarding point (ii), the FSA agrees that the lack of clarity around the specific terms of a FRAND obligation can be confusing. The valuation, licensing, and transparency principles previously mentioned are designed to address this issue. At least one significant standards body has adopted many of these clarifying principles in its IPR Policy,[31] and that IPR Policy has withstood scrutiny from other competition authorities.[32]

The Zigbee Alliance (now the Connectivity Standards Alliance) was identified as having an IPR policy that applies to SEPs for non-Zigbee standards that relate to the Zigbee specifications. Changes were made to the CSA IPR Policy in 2020 (and carried over to the current version) which speak to the licensing obligations for specifications developed by other SDO's.[33] Accordingly, to the extent that there may have been any tension between the CSA's IPR obligations and those defined by other standards bodies whose standards were incorporated into CSA specifications, such tension has been addressed in the current IPR policy with the increased participation of IoT community participants.

[30] IoT Sector Inquiry Preliminary Report para 407, p. 108.
[31] IEEE SA Standards Board Bylaws, https://standards.ieee.org/about/policies/bylaws/sect6-7.html
[32] U.S. Department of Justice, Antitrust Division, Response to Institute of Electrical and Electronics Engineers, Incorporated, https://www.justice.gov/atr/response-institute-electrical-and-electronics-engineers-incorporated
[33] See the definition of Necessary Claims subsection (v) of the Zigbee Alliance Intellectual Property Rights Policy, available at https://zigbeealliance.org/wp-content/uploads/2021/04/Zigbee-Alliance-IPR-Policy-6.2-Final-7-April-2021-1.pdf

IX. Conclusion

The FSA thanks the Commission for the opportunity to share comments on the European Commission's **Preliminary Report Sector Inquiry into Consumer Internet of Things**. As the IoT continues to proliferate, the FSA believes this report is the right occasion to better understand the dynamics of the consumer IoT sector. As the FSA's comments make clear, the licensing of SEPs is an area of concern. Without acute antitrust scrutiny, abusive licencing practices can lead to anticompetitive effects in the market. The FSA hopes that the Commission takes on board its comments moving forward and we remain at the disposal of the Commission should it require further comments or feedback.