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## Submission to the UK Competition and Markets Authority on the Horizontal Guidelines

### Introduction

As an industry organisation representing over 50 European and global companies, the Fair Standards Alliance (FSA) welcomes this opportunity to offer comments to the Competition and Markets Authority's (CMA) Call for Inputs on the Retained Horizontal Block Exemption Regulations – R&D and specialisation agreements (Call for Inputs). Our comments relate specifically to the Horizontal Guidelines and Chapter 7 on standardisation agreements.

The FSA is an alliance that promotes the licensing of standardised technologies, including for the development and rollout of the IoT, on a fair, reasonable, and non-discriminatory (FRAND) basis.<sup>1</sup> Our membership is broad and diverse, ranging from multinationals to SMEs, including UK companies, and coming from different levels of the value chain across a diversity of industry sectors.

Our members significantly contribute to innovation in Europe and beyond. Annually, the aggregate turnover of FSA members is more than GBP 2 trillion, and in aggregate our members spend more than GBP 110 billion on R&D and innovation. Some of our members dedicate as much as a third of their annual revenues to R&D.

Our members have more than 500,000 patents, including standard essential patents (SEPs), that are either granted or pending. Our membership has strongly supported standardisation for decades, participating in hundreds of standard activities around the world, including the development of connectivity standards, such as cellular, Wi-Fi, and USB-C.

Because many of the FSA members are both owners of SEPs and licensees we believe this allows us to bring a balanced perspective to this consultation.

We note that the CMA's review is intended to assess whether the Horizontal Guidelines serve the interests of UK businesses and consumers. In this respect, we also welcome the opportunity to participate in this Call for Inputs. That is not least because our members include British companies, ranging from small-to-medium innovative players such as the Bullitt Group – the manufacturer of award-winning rugged phones – to large businesses such as British media and telecommunications conglomerate Sky. Numerous global FSA members have chosen the UK for their European headquarters or otherwise have significant presence in the country and thus have direct experience of operating a business in the UK. Our members often face SEP licensing challenges, and most recently in the UK where Non-Practicing Entities (NPEs) in particular have been abusing the UK's legal system to

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<sup>1</sup> For further information about the FSA and its members, see <http://www.fair-standards.org/>.

seek or threaten to seek product bans against manufacturers to force them into accepting court determined global portfolio licences.

In this submission, we first briefly respond to the specific questions in the Call for Inputs ('HGL7') pertaining to standardisation agreements (please see 'Executive Summary') and subsequently elaborate further on the points outlined therein.

## Executive Summary

Standards are important enablers for any competitive and dynamic market where innovation and the need for interoperability go hand in hand. For standards to be successful and widely adopted by the market, it is crucial to ensure that SEP licensing occurs in a fair and balanced manner, which unfortunately has not been common practice.

Because standards are set by competitors coming together to choose a single set of technological solutions out of multiple options that existed prior to the agreement about the technology to be standardised, and because of the market power conferred to holders of SEPs, competition concerns may arise. Indeed, the Horizontal Guidelines note that 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.<sup>2</sup>

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 the standardised technology. This "lock-in" creates a dominant position for SEP holders, particularly for telecommunication SEPs.

As a safeguard against competition concerns, most standard setting organisations (SSOs) require SEP owners to state whether they will voluntarily agree to license their SEPs on FRAND terms. The trade-off is simple: the SEP owner benefits from having its technology recognised as part of an industry standard that is widely adopted, and in exchange it commits to license its technology on FRAND terms so that everyone can license, use, and rely on the standard. Competition authorities play a significant role in enforcing that FRAND commitment to promote market competition and innovation, including in the UK, and to protect its consumers.

### ***HGL7 (a) How easy is it to apply the provisions of the Horizontal Guidelines on standardisation agreements in practice?***

We believe that Section 7 of the Horizontal Guidelines on standardisation agreements have been helpful, providing a balanced approach and should be retained in the UK as a baseline.

### ***HGL7 (b) Do the provisions in the Horizontal Guidelines that describe the role of FRAND (fair, reasonable, and non-discriminatory) terms, and the example given of how FRAND terms could impact the analysis of a standard essential patent licence, provide sufficient clarity?***

We believe further clarifications ought to be introduced to some key principles that already exist in the Horizontal Guidelines, but which have been misinterpreted or misconstrued. Further clarifications are also warranted to consider recent developments in case law and policy that followed since the adoption of the Horizontal Guidelines in 2011.

### ***HGL7 (c) Are there any other areas of Chapter 7 of the Horizontal Guidelines on standardisation agreements which require further clarification? If so, please explain which areas are unclear and, to the extent possible, provide examples of the sort of co-operation that would benefit from this clarification.***

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<sup>2</sup> 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 Guidelines), paras 264 – 268.

We believe Chapter 7 of the Horizontal Guidelines should be further clarified on the following key areas raising competition concerns:

- SEP licence availability;
- SEP hold-up;
- SEP valuation.

**HGL8: To the extent your answers to questions HGL1 to HGL7 indicate potential changes to the HBERs or Horizontal Guidelines, or the introduction of new block exemptions, what impact would these have on your business or the businesses that you advise? Would this impact be negligible, moderate or significant?**

While the FRAND safeguards described in Chapter 7 of the Horizontal Guidelines have been helpful over the years, some SEP holders have taken advantage of the lack of clarity over some provisions to abuse their dominant position by refusing to license their SEPs to some market participants and often seeking or threatening to seek an injunction against potential licensees to force them into accepting non-FRAND terms. This has had a significant impact on entire supply chains, affecting the uptake of the IoT and locking some of the most successful industries in Europe into resource-draining litigation across multiple countries, resulting in case law discrepancies.

Therefore, clarifications to the Horizontal Guidelines could contribute to bringing back the much-desired legal certainty on questions of great economic significance that have a direct impact on the development of the digital economy. Clarifications by the CMA could be all the more impactful given that much of the litigation on SEP disputes is brought before the UK courts.

## Licence Availability

In the Horizontal Guidelines, the European Commission explains that standardisation agreements must observe certain requirements to comply with competition rules: “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 (‘FRAND commitment’).”<sup>3</sup> The Guidelines explain that this is necessary to “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.”

Both the Court of Justice of the EU (CJEU) and the European Commission have held that a FRAND commitment creates legitimate expectations for third parties that a licence to necessary SEPs would be made available to them.<sup>4</sup>

Notably, according to the ETSI Director General who oversaw the development and approval of the ETSI FRAND policy “[t]he whole idea [of the ETSI Patent Policy] was that if a FRAND promise was made, everyone was entitled to a FRAND license.”<sup>5</sup>

Most recently, the Competition and Consumer Commission of Singapore (CCCS) has stated clearly in its guidelines that “where an owner of an SEP has a dominant position in a market, its refusal to license its SEP on FRAND terms to any applicant for a licence (irrespective of its position in the value chain) may give rise to competition concerns”.<sup>6</sup>

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<sup>3</sup> Ibid., para. 285.

<sup>4</sup> Horizontal Guidelines, paras 285 and 287; C-170/13 *Huawei Technologies v ZTE Corp (Huawei v ZTE)* para 58; Case AT.39985 - *Motorola - Enforcement of GPRS standard essential patents (Motorola)*, paras 417 and 521; Case COMP/M.6381 - *Google/Motorola Mobility (Google/Motorola Mobility)*, para. 113.

<sup>5</sup> Karl Heinz Rosenbrock (ETSI’s ‘Life-long Honorary Director-General’), *Licensing At All Levels Is The Rule Under The ETSI IPR Policy* (Nov. 2017), at 7, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3064894](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3064894); see also Karl Heinz Rosenbrock, *Why the ETSI IPR Policy Requires Licensing to All* (Aug. 2017), [http://www.fair-standards.org/wp-content/uploads/2017/08/Why-the-ETSI-IPR-Policy-Requires-Licensing-to-All\\_Karl-Heinz-Rosenbrock\\_2017.pdf](http://www.fair-standards.org/wp-content/uploads/2017/08/Why-the-ETSI-IPR-Policy-Requires-Licensing-to-All_Karl-Heinz-Rosenbrock_2017.pdf).

<sup>6</sup> Competition and Consumer Commission of Singapore “Guidelines on the Treatment of Intellectual Property Rights” (31 December 2021), (CCCS Guidelines), p 22.

However, despite this clear guidance and despite their voluntary and irrevocable FRAND commitment, some SEP holders have started refusing licences on their own, and collectively, to virtually all businesses in the value chain, except of end-product manufactures.<sup>7</sup> This has caused legal uncertainty, which is stalling innovation, take-up of the IoT, and has led to extensive litigation in Europe and overseas.

In the early development of the digital cellular telephony, SEP holders granted licences to manufacturers of all types of equipment. Manufacturers in any part of the supply chain were able to obtain SEP licences. These licensees were able to offer licensed products – whether they were complete end-use products or intermediate subsystem products – to their customers.

Suppliers upstream were able to supply subsystems that comply with standards to downstream manufacturers who were able to focus on developing innovative products. This has facilitated the widespread adoption of standardised technologies.

The ability of upstream manufacturers to get a licence at the level of the component (or sub-system) enables business models where they can clear the patent landscape for their own products and potentially indemnify their customers.

If SEP holders could “pick and choose” potential licensees, they could in effect control who succeeds and who fails in the market, in other words, become gatekeepers of innovation. This is particularly concerning where SEP holders are vertically integrated, enabling them to foreclose competition in the downstream market. Restrictive SEP licensing practices by patent holders that are not active downstream might also distort competition e.g., through potential customer foreclosure.

Without a direct licence to the relevant SEPs, companies 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 of the narrow scope of such rights. Under ‘have made’ rights, an SEP licensee can have components made by a third party, however, the right to “have” components “made” does not confer a licence to that third party to manufacture for its own use or indeed for any other party than the instructing licensee. The ‘have made’ rights tie the supplier to its customer and do not allow the supplier to sell products on the open market.

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 company 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 e.g., manufacturers of airplanes, trains or boats.

The FSA therefore calls on the CMA to clarify that the FRAND safeguard inherently entails the commitment to offer a FRAND licence to all companies that seek one regardless of their position in the supply chain. The FSA also invites the CMA to state in the Horizontal Guidelines that an SSO’s IPR policy must require their members to license their SEPs to any user of the standard to fall under the safe harbour.

## Hold-Up

The Horizontal Guidelines recognise that SEP holders can “acquire control over the use of a standard” and can “hold-up users after the adoption of the standard” by “refusing to license the necessary IPR or by extracting excess rents by way of excessive royalty fees”. The Horizontal Guidelines also note

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<sup>7</sup> See e.g. *Federal Trade Comm’n v. Qualcomm, Inc.*, Findings of Fact and Conclusions of Law, Case No. 5:17-cv-00220 (N.D. Cal. May 21, 2019) The ruling reveals SEP holders granted licences to users of the standards across the value chain, including at chip level and that “following Qualcomm’s lead, other SEP licensors like Nokia and Ericsson have concluded that licensing only OEMs is more lucrative, and structured their practices accordingly.”

that if “a company is either completely prevented from obtaining access to the result of the standard, or is only granted access on prohibitive or discriminatory terms, there is a risk of an anti-competitive effect”<sup>8</sup> We encourage the CMA to maintain these important provisions.<sup>9</sup>

However, examples of practices of hold-up pressure are not limited to those two concerns. Other examples include:

- the use of injunctions (or other exclusionary remedies) for SEPs for which a FRAND commitment has been provided – a major concern we elaborate on below;
- forcing a licensee to conclude a global SEP portfolio licence under the threat of being deemed as an “unwilling licensee” and be excluded from a certain market,
- the lack of transparency in the proposed SEP licensing terms and conditions, and the refusal to provide evidence allowing potential licensees to verify whether a given offer is FRAND or not;
- the use of overly secretive NDAs, some of which do not even allow licensees to verify whether their suppliers have concluded relevant licences;
- the pressuring of a potential licensee into arbitration; or
- the refusal to enter into a direct licence with the potential licensee and, instead, requiring to license SEPs from a patent pool.

### ***Use of Injunctions***

The European Commission has found that when SEP holders agree to license their SEPs on FRAND terms, they limit their ability to exclude potential licensees through injunctions. The European Commission looked at the practical relationship between the FRAND commitment that SEP owners make to SSOs and the SEP holder’s licensing practices in 2014 and held that it was a violation of Article 102 TFEU for an owner of a SEP (Motorola) to seek an injunction against a willing licensee (Apple).<sup>10</sup>

The same question was brought before the CJEU in 2015 in *Huawei v ZTE*, and the CJEU provided the same answer. In both those cases, the respective SSO IPR policies required SEP holders to commit to license their SEPs on FRAND terms, and the SEP holders had in fact made such commitments.

As noted above, both the CJEU and the European Commission ruled that a FRAND commitment creates ‘legitimate expectations’ for third parties that a licence to necessary SEPs would be available to them. The case law by both the European Commission and the CJEU also acknowledges that the indispensable nature of SEPs and legitimate expectations that SEP holders would grant FRAND licences amounted to ‘exceptional circumstances’ that distinguish SEP licensing disputes from other cases in which an IPR holder is generally free to seek injunctive relief<sup>11</sup>.

Both the European Commission and the CJEU have thus recognised that the standardisation context and the required FRAND commitment limit a SEP holder’s freedom to license its SEPs according to any commercial strategy it might choose, regardless of whether that strategy is compliant with the FRAND commitment. Otherwise, SEP holders would be able to use the threat of exclusion through injunctions to effectively force potential licensees into accepting licensing terms that would not be FRAND.

In the US the Supreme Court went further. In *eBay Inc. v. MercExchange, L.L.C.* (“eBay”), the court determined that a party seeking an injunctive “must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to

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<sup>8</sup> Horizontal Guidelines, paras 268 -269.

<sup>9</sup> Jeffrey Wilder, Economics Director of Enforcement at the US Department of Justice Antitrust Division, has recently noted that what may sometimes be portrayed as a mere theoretical problem, “hold-up can have real world consequences” because it affects economic incentives to adopt standards. Wilder made these remarks at a speech on 2 December 2021 at the Conference on Intellectual Property and Innovation Policy for 5G and the Internet of Things organized by Center for Intellectual Property x Innovation Policy (C-IP2), as reported by Mlex.

<sup>10</sup> See *Motorola*.

<sup>11</sup> *Huawei v ZTE; Motorola* paras. 417 and 521.

compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.”<sup>12</sup> The Federal Circuit in *Apple v. Motorola* confirmed that the same framework also applies with regard to SEPs.”<sup>13</sup> We invite the CMA to consider reflecting in the Guidelines the above US framework which has been proven successful over the years.

In addition, the CCCS notes in its guidelines on the Treatment of Intellectual Property Rights, that In “it should be noted that seeking an injunction based on an alleged infringement of a SEP may give rise to competition concerns under section 47 of the Act if the SEP holder has a dominant position in a market, has given a voluntary commitment to license its SEP on FRAND terms and where the party against whom the SEP holder seeks to injunct is willing to enter into a licence agreement on such FRAND terms.”<sup>14</sup>

The Institute of Electrical and Electronics Engineers’ (IEEE) 2015 IPR policy update is an example of an SSO policy that limits the use by its members of exclusionary remedies, such as an injunction, in SEP disputes.<sup>15</sup> The US Federal Trade Commissioner Rebecca Kelly Slaughter has referred to this policy as one that “has fairly robust safeguards”. The Commissioner said it was her “strong belief that SEP holders should not be able to seek exclusionary remedies against a willing licensee.” She stressed that an “appropriate framework should not allow an SEP holder to refuse licenses to implementers of the standard or threaten exclusionary remedies in order to either extract supra-FRAND royalties or entirely thwart a competitor from practicing a standard.”<sup>16</sup>

We call on the CMA to update the Horizontal Guidelines to clarify that SEP injunctions should not be available except in limited circumstances and require SSO IPR policies to provide explicit limitations on the use of injunctions to fall within the scope of the ‘safe harbour’.

Additionally, while some parties may *voluntarily* agree to broader portfolio licensing arrangements, an SEP holder should not be permitted to *require* licensees to enter into such arrangements as a condition for obtaining a particular FRAND licence, and that it would be harmful for a national court to force licensees to accept global portfolio licences under the threat of an injunction. This is particularly relevant for the UK where in a recent decision the Supreme Court held that an SEP holder may comply with FRAND even if it only offers a single global portfolio licence.<sup>17</sup> We view such practices as inconsistent with FRAND obligations and general principles of patent and antitrust law. The FSA believes that:<sup>18</sup>

- Global SEP portfolio licences can be appropriate and effective on a voluntary basis, but coercing such licences is inconsistent with the SEP holder’s FRAND commitment and improperly dilutes the licensee’s right to pay only for those rights it wants or needs.

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<sup>12</sup> *eBay Inc. v MercExchange, L.L.C.*, 547 U.S., at 391.

<sup>13</sup> *Apple Inc. v Motorola, Inc.*, 757 F.3d 1286, 1331-32 (Fed. Cir. 2014).

<sup>14</sup> CCCS Guidelines p. 22.

<sup>15</sup> An empirical study has recently confirmed that a change in the IEEE IPR policy in 2015 – clarifying that SEP valuation should be based on the so-called ‘intrinsic value’ – did not affect SEP holder innovation and participation in standardisation. See Timothy S. Simcoe, Qing Zhang “Does Patent Monetization Promote SSO Participation?” 29 November, 2021 Simcoe, Timothy S. and Zhang, Qing, Does Patent Monetization Promote SSO Participation? (November 29, 2021). Available at SSRN: <https://ssrn.com/abstract=3973585> or <http://dx.doi.org/10.2139/ssrn.3973585>.

<sup>16</sup> Remarks of Commissioner Rebecca Kelly Slaughter “SEPs, Antitrust, and the FTC”, delivered on 29 October 2021 at the ANSI World Standards Week: Intellectual Property Rights Policy Advisory Group Meeting, available at: [https://www.ftc.gov/system/files/documents/public\\_statements/1598103/commissioner\\_slaughter\\_ansi\\_102921\\_final\\_to\\_pdf.pdf](https://www.ftc.gov/system/files/documents/public_statements/1598103/commissioner_slaughter_ansi_102921_final_to_pdf.pdf) (Commissioner Slaughter Remarks).

<sup>17</sup> *Unwired Planet International Ltd v Huawei Techs. Co. Ltd.* [2020] UKSC 37 (*Unwired Planet v Huawei*)

<sup>18</sup> The FSA position paper “Coerced Global SEP Portfolio Licences Are Not FRAND” (2020). Available at: <http://fair-standards.org/wp-content/uploads/2020/10/Coerced-Global-SEP-Portfolio-Licences-Are-Not-FRAND-1.pdf>.

- A licensee’s choice to challenge a declared SEP’s applicability or quality within an appropriate jurisdiction, or refusal to agree to an abstract promise of a global licence determined by a court in a single jurisdiction, should not make the licensee “unwilling,” and an SEP holder should not refuse to license other non-challenged SEPs on this basis.
- Forced global SEP portfolio licensing practices invert established legal burdens requiring SEP holders to establish the infringement and any royalties for their patents and defend against challenges to validity and other defences, and they chill legal challenges by prospective licensees that would otherwise curtail exploitative licensing practices and benefit consumers through increased innovation and lower prices.
- The legitimate interest of national and regional courts and regulators to shape and enforce intellectual property laws and norms within their jurisdictions is impinged by rules and practices that either deter licensees from mounting good-faith challenges to SEPs or that mandate global portfolio adjudications in a single jurisdiction under the threat of an injunction.
- The threat of an injunction and market exclusion should not be used to force licensees into global SEP portfolio licences or global portfolio adjudication where adequate monetary remedies are available and sufficient to address legitimate infringement claims.

Following the above decision of the UK Supreme Court, NPEs, which purchase patents from original patentees without the intention of themselves making any products, have brought more court cases before UK courts threatening manufacturers with UK market exclusion. Chinese courts have subsequently also shown that they would be ready to issue global portfolio licences, and multiple requests for anti-suit injunctions have been filed in multiple jurisdictions. This situation is expected to negatively impact the ability of manufacturers to operate in the UK, limiting innovation and harming UK consumers who will have limited options and may bear the cost of SEP holders’ excessive royalty demands.

The Call for Views presents an opportunity for the CMA to address this situation. We encourage the CMA to further clarify that to the extent SEP holders seek an injunction in one jurisdiction to put pressure on a licensee to conclude a global portfolio licence, this is another form of hold-up that should be prohibited by the Horizontal Guidelines. Potential licensees should continue to be able to test the merits of SEPs in the relevant jurisdictions where they have been issued and choosing to do so does not make them “unwilling”.

## FRAND Valuation

The Horizontal Guidelines recognise that in case of a dispute, “the assessment of whether fees charged for access to IPR in the standard-setting context are unfair or unreasonable should be based on whether the fees bear a reasonable relationship to the economic value of the IPR”. The European Commission recommends using an *ex ante* approach to determine the value in a competitive environment prior their inclusion in the standard.<sup>19</sup>

In its 2017 Communication, the European Commission outlined appropriate methods for determining FRAND royalties, also noting that they should “bear a clear relationship to the economic value of the patented technology” and that a FRAND royalty should not in principle include value stemming from the inclusion of the technology in the standard.<sup>20</sup>

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<sup>19</sup> Horizontal Guidelines, para. 289.

<sup>20</sup> Communication from the Commission to the Institutions on Setting out the EU approach to Standard Essential Patents COM (2017) 712 final, 29 November 2017.

We stress that it is indeed of utmost importance that SEPs are valued based on their own technical merits and scope, not based on downstream uses, and be in proportion to the value added by other inventions.

- a) This entails that FRAND royalties should not seek to include compensation for innovations or features that are not inherent in the underlying patent claim. In most cases, that means that the royalty for a SEP should be based on the value of the smallest component that substantially embodies the patented invention, with further apportionment where over-inclusive. 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 standardisation itself. Deviation from the value added by the patent claim 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.
- b) A FRAND royalty should not include the added value of standardisation, 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.

These principles have also been recognised in other jurisdictions as being critical to determining FRAND royalties. For example, the U.S. Court of Appeals for the Federal Circuit has observed that one of the threats from SEPs to “*inhibit the widespread adoption of the standard*” is patent hold-up, where “*the holder of a SEP demands excessive royalties after companies are locked into using a standard.*”<sup>21</sup>

Further, when it comes to the point on royalty stacking, royalties should take into account an overall royalty for the standard and then evaluate the patent holder’s contribution as a portion thereof.<sup>22</sup>

Standardisation agreements that are unclear on this point should not be considered to fall within the ‘safe harbour’. A good example is the IEEE’s 2015 IPR policy which provides guidance on the FRAND concept, including a list of factors to take into consideration when considering whether a proposed valuation is fair and reasonable.<sup>23</sup> The IEEE has recently concluded a call for public comment on its 2015 IPR policy. The results show that some 100 respondents wrote in support of the 2015 policy (five times the number than those who expressed opposition to the policy).

We invite the CMA to clarify that to fall within the scope of the safe harbour, an SSO IPR policy must explicitly require FRAND licensing based on the above framework that identifies the actual value of an SEP.

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<sup>21</sup> *Ericsson Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1209 (Fed. Cir. 2014).

<sup>22</sup> 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.

<sup>23</sup> Clause 6.1 of IEEE’s IPR policy states: “*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.



Clarified Horizontal Guidelines would facilitate reasonable licensing practices so that British, European and global innovative industries can focus on innovating and avoid the disruptive, litigious circumstances that have been harming the automotive industry, among others, in the recent years.

Clarified Horizontal Guidelines would encourage SSOs to craft policies to “reduce the ambiguities that fuel litigation”, including clarifying the appropriate role of injunctive relief and how a reasonable rate should be determined.<sup>24</sup>

For further background we refer to the FSA’s submissions to the European Commission on the HBERs and Horizontal Guidelines.<sup>25</sup>

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NOTE: The positions and statements presented in this paper do not necessarily reflect the detailed individual corporate positions of each member.

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<sup>24</sup> Commissioner Slaughter Remarks, p.5.

<sup>25</sup> <https://fair-standards.org/2021/10/05/fsa-comments-to-the-european-commissions-targeted-consultation-on-standardization-agreements-in-the-horizontal-guidelines/> and <https://fair-standards.org/2020/02/12/fsa-response-hber-consultation-confirmation>.