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## Submission to the New Zealand Commerce Commission on the Draft Misuse of Market Power Guidelines

### I. Introduction

The Fair Standards Alliance (FSA) welcomes this opportunity to offer comments to the New Zealand Commerce Commission on the draft “Misuse of Market Power Guidelines”. FSA offers its comments specifically in relation to potential misuse of market power related to standard essential patents (SEPs).

The FSA is an industry organization representing 48 companies promoting the licensing of standard essential patents (SEPs) on a fair, reasonable, and non-discriminatory (FRAND) basis.<sup>1</sup> Our membership is broad and diverse, ranging from multinationals to SMEs, and coming from different levels of the value chain across a diversity of “Internet of Things” industry sectors. Our members significantly contribute to innovation around the world. Annually, the aggregate turnover of FSA members is more than 3.5 trillion NZD, and in aggregate our members spend more than 215 billion NZD on R&D and innovation. Our members have more than 500,000 patents, including SEPs, that are either granted or pending.

We hope our comments will help the New Zealand Commerce Commission better understand the dynamics of the interplay between competition law and intellectual property in the specific context of standardised technologies, and the need for robust antitrust enforcement of misuse of market power associated with SEPs.

### II. Standard Essential Patents and FRAND

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. For example, the European Commission has acknowledged that standard-setting has the

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<sup>1</sup> For a full list of FSA members please refer to the FSA website, <https://fair-standards.org/members/>

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>

As the name indicates, an SEP is a patent which is essential to a standard, i.e. the patent claims an invention that must be used to comply with that standard.. 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 substantial market power for SEPs holders, particularly for telecommunication SEPs.

As a safeguard against competition concerns, most standard setting organisations (SSOs) require SEP holders to state whether they will voluntarily agree to license their SEPs on “fair, reasonable and non-discriminatory terms” (FRAND) terms. The trade-off is simple: the SEP holder 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, innovation, and protect consumers.

In its September 2022 Digital Strategy for Aotearoa, the New Zealand government set out as its goals to ensure that its “businesses and organisations innovate and increase productivity using digital technologies and data,” and to ensure “[a]ll New Zealand businesses are born digital, and supported to adopt the digital tools that work for them.”<sup>3</sup>

The push for digitalisation using standardised technologies, like 5G, exposes New Zealand businesses to potentially anticompetitive practices of SEP holders who may leverage their substantial market power to demand extortionate royalty rates and/or exclude companies from the market. This could have adverse effects on competition and innovation in the New Zealand economy. For this reason, and to ensure that the New Zealand government can achieve its digitalisation goals, we encourage the Commerce Commission to carefully consider the role that competition law enforcement has to play in relation to the licensing of SEPs subject to a FRAND commitment.

### III. Misuse of Market Power Through Injunctions and Hold Up

The most prevalent manner in which a holder of an SEP may misuse its market power is to leverage the exclusionary right conferred by the patent to hold up implementers of a standardised technology. Through the threat of an injunction based on a SEP, a SEP-holder is able to extract royalties or other terms that it would not have otherwise been able to.

Each SEP can be considered a separate market in itself as it is necessary to comply with a standard and thus cannot be designed around, i.e. there is by definition no alternative or substitute for each such patent.<sup>4</sup>

The phenomenon of patent hold-up has long been recognised by academics, courts and regulators as a major concern arising from standardisation.<sup>5</sup> For example, the European Commission has found that when SEP holders agree to license their SEPs on FRAND terms, they limit their ability to exclude

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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.

<sup>3</sup> The Digital Strategy for Aotearoa, p. 4. <https://www.digital.govt.nz/digital-government/strategy/digital-strategy-for-aotearoa-and-action-plan/the-digital-strategy-for-aotearoa/>

<sup>4</sup> Case COMP/M.6381 - *Google/Motorola Mobility* (Google/Motorola Mobility), para. 61; *Unwired Planet International Ltd v Huawei Techs. Co. Ltd.* [2017] EWHC Case No: HP-2014-000005, para. 631; *Unwired Planet International Ltd v Huawei Techs. Co. Ltd.* [2017] EWHC 711 at 670 (“The relevant market is a market for licences under the SEPs. It is a market in which the SEP holder has 100% market share.”)

<sup>5</sup> Carl Shapiro & Mark A. Lemley, “The Role of Antitrust in Preventing Patent Holdup”, 168 *U. Pa. L. Rev.* 2019 (2020). Available at: [https://scholarship.law.upenn.edu/penn\\_law\\_review/vol168/iss7/5](https://scholarship.law.upenn.edu/penn_law_review/vol168/iss7/5).

potential licensees through injunctions. The European Commission looked at the practical relationship between the FRAND commitment that SEP holders 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 holder of a SEP (Motorola) to seek an injunction against a willing licensee (Apple).<sup>6</sup>

The same question was brought before the Court of Justice of the European Union 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.

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 of 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 .

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"),<sup>7</sup> 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 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." The Federal Circuit in *Apple v. Motorola* confirmed that the same framework also applies with regard to SEPs."<sup>8</sup> We invite the Commerce Commission to consider reflecting in the Guidelines the above US framework which has been proven successful over the years.

In addition, the Competition and Consumer Commission of Singapore notes in its guidelines on the Treatment of Intellectual Property Rights,<sup>9</sup> that "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."

Moreover, the Chinese State Administration for Markets and Regulation in its draft "Provisions on the Prohibition of the Abuse of Intellectual Property Rights to Exclude or Restrict Competition" (subject to being made final) states that an undertaking with a dominant market position may not improperly request for a court or relevant authority "to make or issue judgments, rulings, or decisions prohibiting the use of relevant intellectual property rights".<sup>10</sup>

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<sup>6</sup> Article 102 TFEU is broadly speaking the equivalent to the misuse of market power in Section 36 of the Commerce Act 1986.

<sup>7</sup> *eBay Inc. v MercExchange, L.L.C.*, 547 U.S., at 391

<sup>8</sup> *Apple Inc. v Motorola, Inc.*, 757 F.3d 1286, 1331-32 (Fed. Cir. 2014)

<sup>9</sup> CCCS Guidelines on the treatment of intellectual property rights, p.22 ([available here](#))

<sup>10</sup> Article 16, Provisions on the Prohibition of the Abuse of Intellectual Property Rights to Exclude or Restrict Competition (FSA can provide an English translation of the draft provisions upon request).

In light of the above, we encourage the Commerce Commission to make amendments to the chapter on “Types of Conduct That May Substantially Lessen Competition” to reflect the competition concerns that arise when a holder of an essential patent leverages its exclusionary rights to misuse its market power.

## Proposal

At the subsection titled “Other Conduct” we invite the Commerce Commission to add a new clause in paragraph 114 to explicitly refer to potential abuses of an intellectual property right that is essential to a standard. This section should include phrasing that makes it explicit that a) by seeking or threatening to seek an injunction against a potential licensee, absent exceptional circumstances,<sup>11</sup> or b) by seeking excessive royalties, an SEP holder may be misusing its market power under Section 36 of the Commerce Act.

## IV. Misuse of Market Power through Refusal to License

SEP holders that made a FRAND commitment must make licences available to any party seeking a FRAND licence, regardless of where in the supply chain they operate.<sup>12</sup> The principle has also been confirmed in a CEN-CENELEC Workshop Agreement, which lists 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”.<sup>13</sup> There are many other authoritative sources that share those views:

- In its Horizontal Guidelines,<sup>14</sup> 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”;
- In its “Guidance on Environmental sustainability agreements and competition law,”<sup>15</sup> the UK Competition and Markets Authority states that “if the standard-setting involves intellectual property rights (IPR), “participants [...] must also offer to licence their essential IPR to all third parties on fair, reasonable and non-discriminatory terms.”
- In *Huawei v ZTE*,<sup>16</sup> the European Court of Justice stated that “having regard to the fact that an undertaking to grant licences on FRAND terms creates legitimate expectations on the part of third parties that the proprietor of the SEP will in fact grant licences on such terms, a refusal

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<sup>11</sup> Such as those defined in *eBay Inc. v MercExchange*, see footnote 8.

<sup>12</sup> 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](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](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)

<sup>13</sup> CEN CENELEC Workshop Agreement CWA 95000, “Core Principles and Approaches for Licensing of Standard Essential Patents,” p. 9 (available [here](#))

<sup>14</sup> Horizontal Guidelines, para. 285

<sup>15</sup> Competition and Markets Authority, “Guidance on Environmental sustainability agreements and competition law” (27 January 2021), available at: <https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law>

<sup>16</sup> 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=&cc=first&part=1&cid=572907>

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”.

## Proposal

In light of the above, we encourage the Commerce Commission to make amendments to the chapter on “Types of Conduct That May Substantially Lessen Competition”. This section does not specify the relationship between refusal to supply and intellectual property rights, where refusal to supply might be misconstrued as only applying to tangible goods. We therefore think it apt to include specific reference to the refusal to supply also applying to the offering of licenses to intellectual property rights essential to a standard.

Therefore, we recommend making changes to the subsection on “Refusal to supply an input” to include specific reference to the refusal to supply (offer) a license to any third party on FRAND terms (see below). Further we encourage the Commerce Commission to include a specific example of a licensor refusing to supply (offer) a license on FRAND terms to a component manufacturer.

86 A refusal to supply can include:

86.1 A literal refusal in response to a request for supply;

86.2 A constructive refusal to supply, for example by responding with a request for supply with terms that no competitor would reasonably be willing to accept; or

86.3 Making it known that, if a request for supply was made, it would be refused (or that supply would only be made on terms that no competitor would reasonably be willing to accept).

**86.4 refusal to offer a licence on fair, reasonable and non-discriminatory terms to any third party for intellectual property rights essential to a standard.**

87 ~~Two~~ **Three** factors are likely to significantly influence whether a refusal to supply has the purpose, effect, or likely effect of substantially lessening competition:

87.1 The extent to which the input is required for competition in the relevant market. If there are sufficiently close substitute inputs, or alternative methods that do not require the input, competition is less likely to be affected by a refusal to supply. The closer the input is to essential, the more likely it is that competition will be lessened.

87.2 The extent to which there are alternative sources of competitive supply of the input, including through entry. If the input is available from other sources on similar terms, or could become available with commercially viable investment within a reasonable timeframe, competition is less likely to be affected. Where there are few or no viable alternatives for supply, it is more likely that competition will be lessened.

**87.3 Where an intellectual property right conferred from a patent deemed to be essential to a standard will be necessary to comply with a standard and there are no alternatives or substitutes for such intellectual property, a refusal to license that intellectual property right is likely to substantially lessen competition.**

## V. Conclusion

The FSA would like to thank the Commerce Commission for considering the views of the FSA and its members. We hope that our viewpoints will be considered in the review of the guidelines and remain at the disposal of the Commission for further consultation if needed.

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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.