

Before the
Telecom Regulatory Authority of India

In re:)	Consultation Paper No. 19/2023
Consultation Paper on Encouraging R&D)	
in Telecom, Broadcasting, and IT (ICT) Sectors)	Submitted to:
)	advisorit@traf.gov.in and
)	ja.qos1@traf.gov.in

**COMMENTS OF
THE FAIR STANDARDS ALLIANCE**

The Fair Standards Alliance (FSA) appreciates the opportunity to provide its feedback in response to the Consultation Paper on Encouraging R&D in Telecom, Broadcasting, and IT (ICT) Sectors (the Consultation)¹.

FSA members significantly contribute to global innovation. Annually, the aggregate turnover of FSA members is more than \$2.6 trillion, and our members invest more than \$185 billion in R&D per year. Our members own more than 600,000 global patents, including tens of thousands of standard essential patents (SEPs), that are either granted or pending. Our membership has strongly supported standardization for decades, participating in hundreds of standardization activities around the world, including the development of connectivity standards, such as cellular and Wi-Fi. Because FSA members are both owners of SEPs and licensees, we bring a balanced perspective to these issues. A full list of FSA's membership can be found at <https://fair-standards.org/members/>.

In this comment, FSA addresses primarily Question 20 relating to mechanisms for licensing of standard essential patents. Question 20 has two sub-parts, and reads as follows:

- (a) *Is the Fair, Reasonable, and Non-Discriminatory (FRAND) mechanism for licensing of Standard Essential Patents (SEPs) functioning satisfactorily and effectively? Is there a need for any reforms in this aspect?*
- (b) *How can small innovators be protected from the predatory practices? Please support your answers with justification and best practices in India and abroad in this regard.*

In sum, FSA's response is that:

- (a) FRAND licensing is *not* functioning effectively, and there is a serious and immediate need for reforms to promote innovation, market access, and basic fairness. TRAI should encourage more active government and court oversight to deter and address SEP licensing abuses.

¹ See <https://www.traf.gov.in/consultation-paper-encouraging-rd-telecom-broadcasting-and-it-ict-sectors>.

- (b) Small innovators, in order to survive and achieve market access for their innovations, need adequate legal protections against SEP licensing abuses, including practices that deny SEP licenses to some entities, that actively seek to exclude some entities from market participation, or that seek to impose excessive licensing terms. SEP licensing abuses can be particularly harmful to small entities who usually will not have the resources needed to legally protect themselves from unfair practices relating to standardized technologies.

FRAND Licensing is not functioning effectively.

Standard essential patent licensing poses significant challenges across a variety of existing standards, including in areas like communication and networking technologies and their applications to support advanced manufacturing, connected health, internet of things-based technologies such as green technologies, and may pose the same challenges in emerging areas such as artificial intelligence and machine learning if these underlying SEP issues are not recognized and addressed.

The standards development system is open and voluntary. Once an entity agrees to participate and contribute its technology to a standard, it can become obligated to license its patents that are essential to the standard on fair, reasonable, and non-discriminatory (FRAND) terms. This FRAND commitment allows the private sector-led standardization process to promote further innovation by those who wish to integrate the standardized technology into products, and benefits consumers with interoperability and increased competition in the marketplace.

But the unfortunate reality is that, due to abuses by a small number of aggressive SEP holders who do not uphold their FRAND commitments and instead seek outsized royalties untethered to the value of their patented technologies, SEP licensing has become prone to abusive conduct that undermines standardization, reduces innovation, and limits competition.

The Indian government can support the continued success of the standardization process, including for emerging technologies, by ensuring that FRAND commitments are upheld. This means making sure that anyone who wishes to implement the standardized technology can do so – without the threat of an injunction being used as a tool to demand unfair excessive licensing fees. SEP licensing should not get in the way of the development and adoption of these technologies. The FRAND commitment exists both to allow participants in the standards development process to receive fair compensation for the essential patents they may obtain, and to allow innovators to support and innovate on top of that technology in their products for the benefit of consumers.

FSA refers TRAI in particular to the broadly-adopted industry white paper published by two European Standards Organizations (CEN-CENELEC), which addresses many of the issues and problems encountered in SEP licensing, and offers certain broadly agreed-upon solutions.²

² See <https://www.cencenelec.eu/media/CEN-CENELEC/CWAs/ICT/cwa95000.pdf>.

Small innovators are particularly harmed by SEP licensing abuses.

While SEP abuses can affect all types of companies, small-and-medium sized enterprises (SMEs) are particularly at risk. SMEs play a key role in creating new innovations, but often lack the budget or legal sophistication to adequately protect themselves from SEP abuses. As such, unfair licensing demands relating to SEPs covering standards needed to participate in the market ecosystem can uniquely impact and harm SME market participation. As detailed in the industry white paper referenced above:

A series of factors create asymmetric risks to SMEs within the standard essential patent licensing environment, and could ultimately inhibit downstream innovation:

— ***Asymmetries of resources:*** *While the same may also be true of larger companies, SMEs targeted by Patent Assertion Entities (PAEs) or abusive SEP licensing assertions are placed at significant and distinct disadvantage when defending against entities asserting SEP claims due to their relative lack of resources.*

— ***Asymmetries of commercial information:*** *SMEs have limited capacity to dedicate legal resources for understanding the complex SEP environment. A lack of transparency in market practices create doubts about prices, discrimination, patent validity or essentiality claims.*

— ***Asymmetries of technical information:*** *Many SMEs do not have the technical expertise in the technology and the standards to verify whether the alleged SEP are actual, valid SEPs – particularly where the SME is unable to share details of claims made by SEP holders with the SME’s upstream suppliers.*

— ***Asymmetries of market position:*** *SMEs are often inexperienced in determining FRAND royalty rates in different positions along the same value chain or in other IoT verticals. For SMEs the size disparities can lead to paying discriminatory royalty rates due to an inability to accurately assess their market position relative to previous licensing agreements. In many cases it might be that an SME merely incorporates a standardized component into its downstream product, and it could be more appropriate and efficient for the potential licensor to seek a license from an actor further upstream in the market that is responsible for designing and marketing the relevant technology.³*

In view of these concerns, the protection of SMEs, and their ability to enter the market with their innovations on fair terms, must become a high priority. To ensure market access and fair competition, as well as incentivize SME innovations, the Indian government should ensure that the FRAND commitment is upheld, and that SEP licensing abuses are not tolerated.

³ See <https://www.cencenelec.eu/media/CEN-CENELEC/CWAs/ICT/cwa95000.pdf>, at § 4.3.

Conclusion

FSA appreciates the opportunity to submit these comments and would be happy to further discuss any aspect of our comments if helpful.

Respectfully submitted,

Ief Daems

Chair

Fair Standards Alliance