

Oxford Nanopore Technologies' views on Illumina's revised remedies proposal of 19 November 2019

Illumina's revised remedies proposal of 19 November 2019, despite appearing to be a much-improved offer of a broad IP package, is an illusory offer which does little to offset the anticompetitive effects of the Proposed Merger either in the UK, or on a worldwide basis. Oxford Nanopore Technologies ('ONT') remains strongly of the view that even a broader IP remedies offer by itself would not be sufficient to offset the negative impact of the Proposed Merger, in a situation where Illumina/PacBio combined would have a market share in the UK of 90% + and worldwide of 80%+. The fact remains that with such consolidation of market power, giving Illumina a virtual monopoly in the NGS market, the merged entity will be in a stronger position than ever to foreclose entry and expansion in this market.

As an IP package, the offer has serious limitations and appears to be confined to a very restricted field of use: "*single molecule, native long read sequencing and associated sequencing chemistries*". For example, the limited field of use would potentially exclude sequencing methods requiring amplification, it would exclude sequencing of shorter lengths of DNA or RNA as well as non 'single molecule' sequencing methods. The license therefore would apply only to a small proportion of the NGS market and would exclude large areas of biological analysis that are currently being performed or could potentially be performed by scientists using ONT or other sequencing technologies. These excluded uses include, for example, cancer and infectious disease applications, which currently have – or potentially could have – real-life benefits to consumers. We attach in Annex by way of example, the implications of the limited field of use.

Further, regardless of the definition of the field of use, while an IP remedies offer may give some reprieve from litigation tactics by Illumina and PacBio (together 'the Parties'), it will not exhaust their ability to engage in these tactics in an attempt to thwart competitors. Regardless of the scope of an IP package, the Parties will retain an ability, through pipeline, new inventions, patents in related areas, or otherwise to pursue, with the benefit of a combined portfolio and resources, the anticompetitive tactics which they have used for over a decade in relation to ONT.

More importantly, the offer of licenses to ONT and other third parties will not dilute the market power of a combined Illumina/PacBio. Many competitors who are seeking to enter the UK, or the global NGS market, or to significantly expand, have their own IP and, as in the case of ONT, may have no need of access to Illumina/PacBio's stated IP portfolio to address some or all of the global NGS market; and even for those who don't, the fact remains that successful entry and expansion require a lot more than IP. It has taken ONT over a decade of R&D, significant know-how and commercial resources, and hundreds of millions in funding to achieve emerging growth in this market. An IP license from the Parties, however broad, will not by itself ensure successful entry or expansion, any time in the foreseeable future, if at all, given the challenges of this market, and the power of the merged entity which will allow it to engage in anticompetitive practices, including discounting, bundling and aggressive litigation tactics, to drive out competition. Any remedy would need to deal with the issue of the enhanced dominant position of Illumina by requiring alongside a broad IP license, divestment of part of the business of the merged entity, potentially Illumina's NovaSeq product line.