Contribution of Dolby Laboratories, Inc.

to the Competition and Markets Authority

Call for Inputs on the Retained Horizontal Block Exemption Regulations

Dolby Laboratories, Inc. ("**Dolby**") respectfully submits these comments in response to the Competition and Markets Authority's ("**CMA**") call for inputs on the retained Research and Development Block Exemption Regulations (the "**Regulations**" or "**R&D BER**") and the EU Guidelines on Horizontal Co-operation Agreements (the "**Horizontal Guidelines**") (together, the "**Call for Inputs**").

In sum, and for the reasons described more fully below, Dolby submits that the current approach of the Horizontal Guidelines and the Regulations toward standardization agreements is properly directed.

For the purposes of this contribution, Dolby limits its responses to the following questions in the Call for Inputs:

- **IA1 to IA4**: the CMA's general impact assessment questions; and
- **HGL7**: the CMA's specific questions in relation to standardization agreements.

I. Questions IA1 to IA4: Dolby's Business

Since its founding in 1965 in London, Dolby has led the way in inventing, developing and making available industry-wide innovative audio and imaging technologies. It has done so based on its expertise in analog and digital signal processing and digital compression technologies. Based on such expertise, and the annual reinvestment of nearly 20% of its revenues into research and development, Dolby has invented breakthrough compression and signal processing technologies that enable audio and video playback in cinema systems, digital television transmissions and devices, mobile devices, video services, speaker products, PCs, gaming consoles, and other commercial products and services.

Dolby participates in more than 60 organizations worldwide that develop standards related to the areas of technology in which Dolby continuously innovates. These include major open standards development organisations ("**SDOs**") such as the European Telecommunications Standards Institute ("**ETSI**") and the International Telecommunications Union ("**ITU**"). Dolby contributes its patented technologies to such organizations regularly, and Dolby broadly shares its technology – both standards essential patents ("**SEPs**") and other intellectual property. Indeed, technology development and subsequent licensing of innovation results is a core feature of Dolby's business, as it realizes a significant majority of its revenues from its licensing activities. This includes the licensing of SEPs, as well as software, trademarks, know-how, and other intellectual property. Industries worldwide have benefitted enormously from the availability of Dolby's technology for use in the development of a wide array of audio and video products and services.

Dolby's ability to continue its investment in innovation, and its contribution of the resulting technologies to standards development for industry's use, however, is dependent on its ability to legally protect its intellectual property rights ("**IPRs**"). It is likewise dependent on SDOs maintaining properly balanced IPR policies that recognize that patented technology is critical for successful standardization, and that support the dual goals of (i) incentivizing the development of new technologies and their

contribution to the standards process by ensuring innovators the opportunity to realize a return on their investments in innovation, and (ii) affording access to essential technologies that permits broad adoption of technical standards by implementers.

Therefore, a properly focused regulatory regime that supports strong IPR protection and recognizes the importance of incentives to invest in new and continually emerging technologies that are voluntarily contributed to standardization is necessary for companies such as Dolby to continue to fuel the advances of technology, innovation, and competition that have been driven by standardization. Dolby, therefore, welcomes this opportunity to contribute to the CMA's consideration of its enforcement guidance relating to standardization agreements.

In addition to the foregoing, Dolby's responses to the Call for Inputs' general impact assessment questions are set out below:

Question IA1**: **Please confirm which of the following industries you operate in

(m) Professional, scientific and technical activities

Question IA2**: **Whether you are making a submission as a business in industry, an adviser, or otherwise, please provide any observations you have on the industry or industries that you consider each of the HBERs and the relevant portions of the Horizontal Guidelines to be particularly relevant to, including how widespread relevant agreements are within each such industry.

Chapter 7 of the Horizontal Guidelines provides guidance in respect of standardization agreements in general and fair, reasonable and non-discriminatory ("**FRAND**") terms in particular.

Dolby participates in more than 60 organizations worldwide that develop standards. It regularly contributes its technologies to such organizations and licenses its technologies broadly, including SEPs.[1]

Dolby believes that the current approach of the Horizontal Guidelines and Regulations toward standardization agreements is properly directed. The existing policies and practices of SDOs are consistent with the Horizontal Guidelines and adequately address and treat issues of IPRs and correctly avoid involvement in commercial matters relating to licensing of essential IPRs on FRAND terms, which should be left to negotiations between private parties.

Question IA3: Please provide an indication of whether you are a small (<50 employees), or medium (50 to 249 employees) or large (250+ employees) business (and if the latter, give a broad indication of the number of employees you employ).

[1] For the purposes of the Call for Inputs, Dolby draws upon its experience with the following exemplary SDOs: ETSI; ITU; the Society of Motion Picture and Television Engineers ("**SMPTE**"); the Advanced Television Systems Committee ("**ATSC**"); and the DVB Project ("**DVB**").

Dolby is a large business, employing 2,289 employees in FY2020.

Question IA4: Whether you are making a submission as a business in industry, an adviser, or otherwise, please provide any observations you have on the size of business that, in your experience, typically makes use of each of the HBERs (distinguishing between the Specialisation BER and the R&D BER) and the relevant sections of the Horizontal Guidelines.

In Dolby's experience, Chapter 7 of the Horizontal Guidelines has been carefully drafted to ensure that, regardless of business size and business-model, the rights and interest of all stakeholders in the standardization process are effectively protected. Chapter 7 of the Horizontal Guidelines achieves this careful balance by supporting the dual goals of (i) incentivizing the development of new technologies and their contribution to the standards process by ensuring innovators the opportunity to realize a return on their investments in innovation, and (ii) affording access to essential technologies that permits broad adoption of technical standards by implementers.

II. QUESTION HGL7: STANDARDIZATION AGREEMENTS

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

(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?

Dolby provides its comments to Questions HGL7(a) and (b) together.

In Dolby's experience, the provisions in Chapter 7 of the Horizontal Guidelines are both clear and easy to apply. This is evident from the fact that the guidance provided by the current Horizontal Guidelines has led to thousands of successfully negotiated FRAND licenses, to the introduction of new standardized technologies at an increasingly rapid pace, and to increased competition at all levels of the value chain. It has achieved this while simultaneously striking the right balance between promoting advances in technology, innovation and competition. These achievements would not have been possible if the provisions had lacked clarity and ease of application.

In respect of FRAND in particular, the Horizontal Guidelines set out that compliance with Article 101 does not require a SDO to verify whether the licensing terms of participants fulfil the FRAND requirement:

> "*Compliance with Article 101 by the standard-setting organisation does not require the standard setting organisation to verify whether licensing terms of participants fulfil the FRAND commitment. Participants will have to assess for themselves whether the licensing*

terms and in particular the fees they charge fulfil the FRAND commitment. Therefore, when deciding whether to commit to FRAND for a particular IPR, participants will need to anticipate the implications of the FRAND commitment, notably on their ability to freely set the level of their fees."[2]

In Dolby's view, this regulatory approach, which avoids intervention in the specific commercial parameters of standardization agreements, is appropriate.

First, a positive benefit of FRAND licensing is that it balances the respective interests of innovators and implementers; affording innovators incentives to innovate and implementers the opportunity to access essential IPRs. Dolby respectfully submits that maintaining this structural balance should remain the proper focus of competition law, rather than the regulation of commercial terms that are better left as the result of market-based negotiations. Competition law is ill-suited to second-guess the commercial exchange of valuable consideration among private parties that is the foundation for arms-length bargaining.

Second, the FRAND concept allows licensors and licensees to negotiate specific terms that meet their respective business goals so long as such terms are within the parameters of FRAND. This applies to both monetary and non-monetary license terms. For example, different approaches or methodologies might be used by different SEP owners to negotiate royalty terms and all may be consistent with the FRAND concept because they reflect the market-based value of the licensed SEPs. Variations in approaches and methodologies may be entirely justifiable depending on a number of factors: e.g. is a SEP portfolio license being negotiated, or is the license for a single or a small handful of SEPs? FRAND terms may also differ because the parties might agree on how monetary consideration will be paid: a running royalty, an upfront payment, a per unit charge, or a combination of all of the foregoing. These different forms of monetary consideration allow the parties to allocate commercial risk as they deem appropriate.

Parties might also negotiate non-monetary, yet still valuable, terms consistent with FRAND. A licensor may want a cross-license to the licensee's IPR, and in exchange may be willing to compromise on other terms of the agreement. Terms relating to choice of law, audit rights, duration and renewal rights, and others also have value that might be perceived differently by different parties, yet all are properly consistent with FRAND licensing. Thus, each SEP license need not be identical in its terms to be consistent with FRAND principles so long as, in Dolby's view, similar license terms are made available to similarly situated licensees.

Third, and relatedly, more specifically defining FRAND requirements would inhibit different licensing models that suit specific purposes. No SDO, and certainly no competition enforcer, could take into account all of the relevant factors that drive different licensors' licensing strategies, nor is there any justification for imposing a one-size-fits-all approach on what could be very different business models. This task would be even more difficult, if not impossible, with respect to SEPs licensed through pools, which commonly include SEPs owned by different IPR owners, necessitating the consideration of a myriad factors in establishing a royalty rate. Here, again, reliance on market-based factors that support varied licensing models and strategies is a preferred approach.

Fourth, in Dolby's experience, generally SDOs have not adopted policies that define FRAND more stringently, and Dolby believes for good reason. If SDOs were to define FRAND terms more specifically,

[2] *Horizontal Guidelines* ¶ 288.

rather than follow the current flexible FRAND approach, those SDOs could expose themselves to potential competition law claims, especially if the specifically defined terms relate to or are construed to define FRAND "prices," or require a specific method for setting SEP license fees. In such circumstances, a SDO could be accused of acting in concert with its members, which may be competitors in horizontal relationships, to enforce agreements that affect FRAND prices. In addition, if a SDO imposed restrictions on remedies or injected itself to define commercial terms favored by only one segment of participant interests, and which diminish the value of IPRs, it could be seen as facilitating competitive harm on other segments of participant interests. And, even if such claims were not ultimately successful, the time and expense incurred by the SDO would detract from its positive standardization efforts.

In sum, FRAND negotiations should be, as they are now, left to the bilateral negotiation of licensors and licensees. Licensors and licensees should have the freedom to adopt business models and strategies that best fit their circumstances, and competition regulation is ill-suited to define commercial terms that are better left to arms-length, market-based bargaining under the jurisdiction of commercial courts. In Dolby's experience this approach has led to the successful introduction of new standardized technologies at an increasingly rapid pace, and to increased competition at all levels of the value chain. Of course, disputes have arisen concerning whether proposed license terms comport with FRAND concepts, but the fact that there have been some disputes should not be surprising given the large number of SEPs at issue, the global scope of standards use, the enormous value of the technology involved, and the number and sophistication of the parties involved. Also, when considered in the context of the thousands of successfully negotiated FRAND licenses, the number of such disputes is *de minimis*. In fact, the possibility for parties to resolve their disputes about the level of FRAND royalty rates by having recourse to the courts or arbitral tribunals is part and parcel of commercial life and is expressly recognized by the Horizontal Guidelines (paragraph 291). Dolby respectfully submits that current SDO practices relating to SEP disclosures and licensing are hugely successful, and strike the right balance between promoting advances in technology, innovation and competition. Efforts to impose specific requirements and restrictions will create uncertainty and risk unintended consequences that reduce the benefits of standardization.

The Horizontal Guidelines and Regulations relating to standardization agreements are properly drawn, strike the right balance, are easy to apply, and provide sufficient clarity. Accordingly, Dolby respectfully submits that the retained Regulations and Horizontal Guidelines meet their intended purpose as well as take account of specific features of the UK economy serving the interests of UK businesses and consumers, such that no modifications or further clarifications should be made to them.

(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.

As Dolby explained above, the current retained Regulations and Horizontal Guidelines meet their intended purpose. In particular, Dolby believes that the CMA should not amend the Horizontal Guidelines or the Regulations in any way to provide or suggest that patent holders who have assured SDOs that they will license their SEPs on FRAND terms would be required to license their SEPs at any particular level of the product distribution chain, or that SEP licensing at the end-product level is more likely to raise competition concerns than licensing at an upstream level.

A departure from the current practice, in which the choice as to whom to license is left to the discretion of market participants, would greatly damage the standard development and licensing ecosystem by, among other things, (i) upsetting long-standing licensing practices and expectations, (ii) raising licensing transactional costs, (iii) unfairly devaluating intellectual property, (iv) discouraging participation in SDOs, and (v) increasing conflict over how to apply legal doctrines such as infringement and exhaustion. All of these effects will result in additional licensing disputes and uncertainty, which will delay the adoption of standards by industry.

The determination of whom to license to has successfully been left to market participants and should continue to be a matter that licensors and licensees discuss and resolve in ways that address their particular needs in a particular situation. This historical flexibility which market participants rely on - and which forms a basis for the determinations of patent holders like Dolby to participate in SDOs - has not only enabled widespread distribution of new technologies to consumers, but has also encouraged innovation and sharing intellectual property through participation in SDOs and licensing on FRAND terms.

III. Conclusion

The current regulatory regime of the Horizontal Guidelines concerning standardization agreements strikes the right balance between promoting advances in technology, innovation and competition. In Dolby's view, the adoption of more prescriptive and less flexible regulatory requirements would risk unintended consequences that could reduce the benefits of standardization to consumers.

In particular, the retained Regulations and Horizontal Guidelines meet their intended purpose and achieve this careful balance by supporting the dual goals of (i) incentivizing the development of new technologies and their contribution to the standards process by ensuring innovators the opportunity to realize a return on their investments in innovation, and (ii) affording access to essential technologies that permits broad adoption of technical standards by implementers.

By achieving this while at the same time avoiding an improper prescriptive involvement in commercial matters relating to the licensing of essential IPRs on FRAND terms (which is properly left to negotiations between private parties), the Regulations and Horizontal Guidelines take account of the specific features of the UK economy and the UK's broader legal culture, and ultimately serve the interests of UK businesses and consumers.

Dolby respectfully requests that the CMA take the above considerations into account when conducting your review of the retained Regulations and Horizontal Guidelines and would be happy to answer any questions that you may have regarding these submissions.