ACT | The App Association response to the UK Competition and Markets Authority's call for input on the retained Horizontal Block Exemption Regulations

General impact assessment questions for all respondents to complete
CMA would like to get a sense of the industries and size of businesses affected by the HBERs and Horizontal Guidelines as well as the extent of any impact that might arise from their renewal/maintenance, modification, or lapse/withdrawal.

IA1: Please confirm which of the following industries you operate in, or, if you are submitting a response to this Call for Input as an adviser or other third party, which of the following industries you consider are particularly relevant to this Call for Input.

a) Agriculture, forestry and fishing;
b) Mining and quarrying;
c) Manufacturing;
d) Electricity, gas, steam and air conditioning supply;
e) Water supply, sewerage, waste management and remediation activities;
f) Construction;
g) Wholesale and retail trade, or repair of motor vehicles and motorcycles;
h) Transportation and storage;
i) Accommodation and food service activities;
j) Information and communication;
k) Financial and insurance activities; l)
Real estate activities;
m) Professional, scientific and technical activities;
n) Administrative and support service activities;
o) Public administration and defence, or compulsory social security;
p) Education;
q) Human health and social work activities;
r) Arts, entertainment and recreation;
s) Other service activities;
t) Activities of households as employees, or undifferentiated goods- and services-producing activities of households for own use;
u) Activities of extraterritorial organisations and bodies.

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.
The App Association represents small and medium-sized enterprises (SMEs) in the digital sector. Our members are innovators who develop, utilise, and innovate on top of standardised

technologies, driving the advancement of the internet of things (IoT). The block exemptions and the horizontal guidelines provide much-needed insights into regulators' expectations concerning specialisation, research, and development (R&D) and standardisation agreements, so they are crucial for all industries in which specialised, innovative businesses that implement standards operate. To us, this is particularly relevant in the technology and digital sectors.

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).
ACT | The App Association is a small business and represents micro, small, and medium-sized enterprises.

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.
Businesses of all sizes benefit from the guidance the HBERs provide. Further clarifications, however, would especially benefit small companies. SME standard implementers rely on standards to manufacture their IoT products, making the Horizontal Guidelines essential for their business activities. The Guidelines on standardisation agreements and information exchanges are especially fundamental for small business innovation in a competitive digital economy.

Questions for stakeholder feedback and input
Policy questions

S1:

1. **Has the Specialisation BER contributed to promoting competition in the UK? It would be helpful to have some examples, if possible.**
   Do not know/no opinion.

2. **Has the Specialisation BER contributed to promoting economic activity that benefits consumers in the UK and would not otherwise have occurred? It would be helpful to have some examples, if possible.**
   Do not know/no opinion.

3. **Has your business entered into specialisation agreements that have benefited from the block exemption in the Specialisation BER?**
   N/A

4. **Are there UK-specific considerations that the CMA should take into account in its review of the Specialisation BER? If so, it would be helpful if you could indicate why those differences are needed or justified (which might, for example, be because of**

particular characteristics you identify in the UK market that differ from the EU market).
Do not know/no opinion.

5. **Might any category of business, institute or body be discouraged from entering specialisation agreements under the current rules in the UK?**
Should the UK discard the Specialisation BER, small businesses like the ones the App Association represents would be increasingly discouraged from entering into specialisation agreements.

S2: In relation to the definitions included in Article 1 of the Specialisation BER:

a) **Are these sufficiently clear to allow you to identify the categories of agreement that can benefit from the Specialisation BER? If not, how should the definitions, in your view, be clarified or amended?**
Do not know/no opinion.

b) **Are there any additional categories of agreement that are not already included in the definition of 'specialisation agreement' that, in your view, would be likely to meet the requirements for exemption from the Chapter I prohibition under section 9 of the Competition Act 1998?**
Do not know/no opinion.

S3: In relation to the conditions for block exemption under Article 2 of the Specialisation BER:

a) **Are the conditions for block exemption under Article 2 sufficiently clear?**
Do not know/no opinion.

b) **If not, please explain how they should be clarified, and why this is needed.**
Do not know/no opinion.

S4: In relation to the market share threshold under Article 3 of the Specialisation BER:

a) **From your experience, does this threshold allow most specialisation agreements that would be likely to benefit from an individual exemption to be block exempted? If not, please provide examples and indicate any alternative threshold which would, in your view, achieve this aim.**
Do not know/no opinion.

b) **Are the terms on which the market share threshold shall apply (as explained in Article 5 of the Specialisation BER) sufficiently clear and do they remain appropriate? If not, please explain why, and how they should be clarified or amended.**
Do not know/no opinion.

S5: In relation to the 'hardcore' restrictions listed in Article 4 of the Specialisation BER:

a) **Is the current list of hardcore restrictions sufficiently clear? Please explain your position.**
Do not know/no opinion.

b) **Are there any further restrictions that it would be appropriate to treat as hardcore restrictions, in addition to those set out in Article 4 of the Specialisation BER?**
Do not know/no opinion.

c) **The Specialisation BER does not currently set out any 'excluded restrictions' that would not benefit from the block exemption, but instead would need to be individually assessed to establish whether they benefit from exemption. Are there any such restrictions that it would be appropriate to exclude from the benefit of the exemption?**
Do not know/no opinion.

Impact assessment questions

S6: To the extent your answers to questions S1 to S5 suggest potential changes to the Specialisation BER, what impact would these have on your business or the businesses that you advise? Would this impact be *negligible*, *moderate* or *significant*?
We believe a specific exemption for production/specialisation agreements involving SMEs would encourage the participation of SMEs in such agreements. SMEs may forge novel partnerships with other businesses in pursuing specialisation and production ventures across a range of contexts. An exemption would generally be helpful to SMEs considering specialisation agreements because they would be certain that their venture does not give rise to liabilities under the Guidelines.

S7: If the market share threshold under Article 3 of the Specialisation BER were to change, what would the impact on your business, or the businesses that you advise, be? For example, if the threshold were to be raised or lowered by 5% what would the impact be, and would it be *negligible*, *moderate* or *significant*?
Do not know/no opinion.

S8: To help us to understand the impact of any changes to, or expiry of, the Specialisation BER:

a) **Would you expect your business, or the businesses that you advise, to incur costs to *understand* the relevant legal framework and how it may impact your business (e.g., costs for legal or expert advice) in the following scenarios?**
    1. **The Specialisation BER lapses on expiry on 31 December 2022.**
    2. **The Specialisation BER is replaced from 1 January 2023 by an equivalent UK block exemption.**

    If you do consider that you would incur costs, it would help to understand whether these would be *negligible*, *moderate* or *significant*. If you are submitting a response to

this Call for Input as an adviser, we would be grateful for any observations you can share on the likely costs for your clients in each relevant industry.

Yes. SMEs would incur costs in the first scenario, in which the Specialisation BER lapses on December 31, 2022. They would no longer be able to rely on the guidance the BERs provide and may face liabilities for their business ventures.

b) Would you expect your business, or the businesses that you advise, to incur costs to *implement* the relevant legal framework (eg costs to change your current business plans) in the following scenarios?

1. **The Specialisation BER lapses on expiry on 31 December 2022.**
2. **The Specialisation BER is replaced from 1 January 2023 by an equivalent UK block exemption.**

If you do consider that you would incur costs, it would help to understand whether these would be *negligible*, *moderate* or *significant*. If you are submitting a response to this Call for Input as an adviser, we would be grateful for any observations you can share on the likely costs for your clients in each relevant industry.

If the Specialisation BER is replaced by an equivalent UK block exemption, SMEs would likely not incur significant costs to implement this regime since they have already been operating under an equivalent framework.

Questions for stakeholder feedback and input

Policy questions

R&D1: We would welcome your responses to the following questions.

a) Has the R&D BER contributed to promoting competition in the UK? It would be helpful to have some examples, if possible.
Do not know/no opinion.

b) **Has the R&D BER contributed to promoting economic activity that benefits consumers in the UK and would not otherwise have occurred? It would be helpful to have some examples, if possible**.
Do not know/no opinion.

c) Has your business entered into R&D agreements that have benefited from the block exemption in the R&D BER?
N/A

d) Are there UK-specific considerations that the CMA should take into account in its review of the R&D BER? If so, it would be helpful if you could indicate why those differences are needed or justified (which might, for example, be because of particular characteristics you identify in the UK market that differ from the EU market).
Do not know/no opinion.

e) **Are the current rules discouraging any category of business, institute or body from entering R&D agreements?**
Should the UK discard the R&D BER, small businesses like the ones the App Association represents would be increasingly discouraged from entering into R&D agreements.

R&D2: In relation to the definitions included in Article 1 of the R&D BER:

a) **Are the definitions included in Article 1 sufficiently clear to allow you to identify the categories of agreement that can benefit from the retained R&D BER? If not, how should the definitions, in your view, be clarified or amended?**
Do not know/no opinion.

b) **Are there any additional categories of agreement that are not already included in the definition of 'research and development agreement' that, in your view, would be likely to meet the requirements for exemption from the Chapter I prohibition under section 9 of the Competition Act 1998?**
Do not know/no opinion.

R&D3: In relation to the conditions for exemption in Article 3 of the R&D BER:

a. **Is the requirement for 'full access' rights to the results of the R&D covered by an agreement sufficiently clear to allow you to identify the circumstances in which agreements will benefit from the R&D BER?**
Do not know/no opinion

b. **Is the requirement for access to pre-existing know-how sufficiently clear to allow you to identify the circumstances in which agreements will benefit from the R&D BER?**
Do not know/no opinion

c. **From your perspective, should the requirement(s) of full access to the results and/or access to pre-existing know-how be maintained? Would you or those you represent benefit from any modification or removal of these requirements?**
Do not know/no opinion

d. **To what extent might the scope of the R&D BER need to be extended to adequately capture the pre-commercialisation stages of R&D, including the early stages where any prospect of commercialisation is several years away?**
Do not know/no opinion

e. **To the extent not already covered by your responses to questions 18(a) to (d), are the conditions for exemption sufficiently clear?**
Do not know/no opinion

R&D4: In relation to the market share threshold and duration of exemption under Article 4 of the R&D BER:

a) **From your experience, does the 25% market share threshold allow most R&D agreements that would be likely to benefit from an individual exemption to be block exempted? It would be helpful to have some examples, if possible.**
Do not know/no opinion.

b) **Does the current duration of the benefit of the R&D BER for non-competing companies under Article 4(1) and competing companies under Article 4 (2) of the R&D BER remain appropriate? If not, please explain why this is so and set out what would in your view be an appropriate duration.**
Do not know/no opinion.

c) **Are the terms on which the market share threshold shall apply, as explained in Article 7 of the R&D BER, sufficiently clear and do they remain appropriate? If not, please explain why and how they should be clarified or amended.**
Do not know/no opinion.

R&D5: In relation to the 'hardcore restrictions' listed in Article 5 of the R&D BER and the 'excluded restrictions' listed in Article 6 of the R&D BER:

a) **Is the current list of hardcore restrictions sufficiently clear? Please explain your position.**
Do not know/no opinion.

b) **Are there any further restrictions that it would be appropriate to treat as hardcore restrictions, in addition to those set out in Article 5 of the R&D BER?**
Do not know/no opinion.

c) **Is the current list of excluded restrictions sufficiently clear? Please explain your position.**
Do not know/no opinion.

d) **Would it be appropriate to remove or modify any of the excluded restrictions? Please explain your position.**
Do not know/no opinion.

e) **Are there any further restrictions that it would be appropriate to exclude from the benefit of the exemption, in addition to those set out in Article 6 of the R&D BER?**
Do not know/no opinion.

Impact assessment questions

R&D6: To the extent your answers to questions R&D1 to R&D5 suggest potential changes to the Specialisation BER, what impact would these have on your business or the businesses that you advise? Would this impact be *negligible*, *moderate,* or *significant*?
We believe a specific exemption for R&D agreements involving SMEs would encourage the participation of SMEs in such agreements. This exemption could be based on conditions of market shares of the parties to the agreement, revenues of the parties to the agreement, or conditions linked to the duration of the agreement. SMEs may forge novel partnerships with other businesses in pursuing R&D ventures across a range of contexts. An exemption would generally be helpful to SMEs considering R&D because they would be certain that their venture does not give rise to liabilities under the Guidelines.

R&D7: If the market share threshold under Article 4 of the R&D BER were to change, what would the impact on your business, or the businesses that you advise, be? For example, if the threshold were to be raised or lowered by 5% what would the impact be, and would it be *negligible*, *moderate* or *significant*?
Do not know/no opinion.

R&D8: To help us to understand the impact of any changes to or expiry of, the block exemption included in the R&D BER:

f) Would you expect your business to incur costs to *understand* the relevant legal framework and how it may impact your business (eg costs for legal or expert advice) in the following scenarios?
- **(i) The R&D BER lapses on expiry on 31 December 2022.**
- **(ii) The R&D BER is replaced from 1 January 2023 by an equivalent UK block exemption.**

If you do consider that you would incur costs, it would help to understand whether these would be *negligible*, *moderate* or *significant*. If you are submitting a response to this Call for Input as an adviser, we would be grateful for any observations you can share on the likely costs for your clients in each relevant industry.

Yes. SMEs would incur costs in the first scenario, in which the Specialisation BER lapses on December 31, 2022. They would no longer be able to rely on the guidance the BERs provide and may face liabilities for their business ventures.

g) Would you expect your business to incur costs to *implement* the relevant legal framework (eg costs to change your current business plans) in the following scenarios?
- **(i) The R&D BER lapses on expiry on 31 December 2022.**
- **(ii) The R&D BER is replaced from 1 January 2023 by an equivalent UK block exemption.**

If you do consider that you would incur costs, it would help to understand whether these would be *negligible*, *moderate* or *significant*. If you are submitting a response to this Call for Input as an adviser, we would be grateful for any observations you can share on the likely costs for your clients in each relevant industry.

If the Specialisation BER is replaced by an equivalent UK block exemption, SMEs would likely not incur significant costs to implement this regime since they have already been operating under an equivalent framework.

Questions for stakeholder feedback and input
Policy questions

HGL1: We would welcome your response to the following questions:

a) We are interested in understanding how coherently the retained HBERs work with the Horizontal Guidelines and alongside other rules and guidance in the UK, including other block exemptions. Are there any issues that could be usefully resolved or clarified either in revisions to the retained HBERs or additional guidance in the Horizontal Guidelines? If so please explain and, if possible, provide examples of the sort of agreements that could be impacted by these changes.

We believe that the Horizontal Guidelines have been a useful tool in addressing anti-competitive conduct in standard setting. However, more recent abusive practices that have emerged necessitate the update of the Guidelines to more clearly define the relevant requirements and to support competition and innovation, in particular regarding SMEs. We outline below some of those practices and proposed revisions to the Guidelines that could appropriate address them. See our response to questions HGL7 A), B) and C).

b) Would guidance in relation to any categories of horizontal cooperation agreement that are not covered in the Horizontal Guidelines be of benefit to UK businesses, e.g., in relation to infrastructure sharing, collective bargaining, industry alliances, industry-wide cooperation agreements, and insolvency restructuring agreements? If so, please provide evidence of this, including details of the questions that you believe this guidance should address.

Clarifications in relation to information exchanges and standardisation agreements would be beneficial to UK businesses.

c) Would guidance in relation to digital-related issues, in revised or supplemented Horizontal Guidelines be of benefit to UK businesses, e.g., in relation to data pooling, data sharing and network sharing? If so, please provide evidence of issues and details of the questions that you believe this guidance should address.

Information exchange will very likely change in terms of data sharing mechanisms, based on changes in digital market conditions. Predicting how information exchanges will evolve or look in the future is difficult.

d) **Should the CMA provide guidance in revised or supplemented Horizontal Guidelines on horizontal cooperation agreements that pursue sustainability goals? Would a dedicated chapter in the Horizontal Guidelines improve legal certainty in this area? If so, please provide evidence of this including details of the questions that you believe this guidance should address.**
Do not know/no opinion.

e) **To the extent not covered by your responses to the other questions, please outline areas of the retained HBERs or Horizontal Guidelines where clarification or simplification would be useful.**
See our responses to questions HGL 7 A), B) and C).

f) **To the extent not covered by your responses to other questions in this Call for Input, are there any categories of horizontal agreement that you believe are likely to be efficiency-enhancing and should be sufficiently unlikely to raise competition concerns that they should benefit from a block exemption, or at least be covered in the Horizontal Guidelines? If so, please explain your response by reference to the conditions set out in section 9(1) of the Competition Act 1998 and, where possible, provide relevant evidence.**
Do not know/no opinion.

HGL2: In relation to information exchange:

a) **Do the Horizontal Guidelines offer sufficient legal certainty on types of information exchange that may be considered pro-competitive?**
Yes.

b) **Do the Horizontal Guidelines account sufficiently for business models or scenarios whereby parties are at the same time in a horizontal and vertical relationship?**
Yes.

c) **Are there other wise any areas of Chapter 2 of the Horizontal Guidelines on information exchange 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.**
Do not know/no opinion.

HGL3: In relation to R&D agreements:

Are there areas of Chapter 3 of the Horizontal Guidelines on R&D 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.

SMEs may forge novel partnerships with other businesses in pursuing R&D ventures across a range of contexts. An SME exemption would generally be helpful to SMEs considering R&D

agreements because they will have certainty that their venture does not give rise to liabilities under the Guidelines.

HGL4: In relation to production agreements:
Are there areas of Chapter 4 of the Horizontal Guidelines on production 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.
SMEs may forge novel partnerships with other businesses in pursuing specialisation/production ventures across a range of contexts. Such an exemption would generally be helpful to SMEs considering production agreements because they will have certainty that their venture does not give rise to liabilities under the Guidelines.

HGL5: In relation to purchasing agreements:

a) **The Horizontal Guidelines currently state that market power is unlikely when parties to a joint purchasing agreement have a combined market share below 15% on the purchasing market or markets as well as on the selling market or markets. Does 15% remain an appropriate level for this 'safe harbour'? If not, please explain your position.**
Do not know/no opinion.

b) **Are there any other areas of Chapter 5 of the Horizontal Guidelines on purchasing 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.**
Do not know/no opinion.

HGL6: In relation to commercialisation agreements (defined in the Horizontal Guidelines as agreements which 'involve co-operation between competitors in the selling, distribution or promotion of their substitute products'):

a) **Is further guidance needed on any other category of commercialisation agreement not already covered in Chapter 6 of the Horizontal Guidelines, e.g. the assessment of joint bidding and non-indispensable consortia?**
Further guidance is necessary on data/pooling/access to data and data sharing. The scope should be extended to industrial alliances, data commercialization agreements, and platforms.

b) **The Horizontal Guidelines currently state that market power is unlikely when parties to a commercialisation agreement have a combined market share below 15%. Does 15% remain an appropriate level for this 'safe harbour'? If not, please explain why, and what you think would be a more appropriate threshold.**
Do not know/no opinion.

c) Are there otherwise any areas of Chapter 6 of the Horizontal Guidelines on commercialisation 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.
Do not know/no opinion.

HGL7: In relation to standardisation agreements (defined in the Horizontal Guidelines as agreements which 'have as their primary objective the definition of technical or quality requirements with which current or future products, production processes, services or methods may comply') and standard terms of conditions of sale or purchase elaborated by trade associations or competing companies (which are also covered by Chapter 7 of the Horizontal Guidelines):

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

Due to their limited resources, it is often difficult for SMEs to engage in standard-setting processes governed by standardisation agreements. However, SMEs heavily rely on the fair, reasonable, and non-discriminatory (FRAND) commitment that patent holders make within standardisation processes to obtain access to standardised patented technology (standard-essential patents or SEPs). Through the FRAND commitment, patent holders voluntarily agree to license any intellectual property incorporated into the applicable standard on FRAND terms in exchange for the enhanced market power accompanying standardisation. This is because '[o]nce one technology has been chosen and the standard has been set, competing technologies and companies may face a barrier to entry and may potentially be excluded from the market'.[1] But despite prior promises, some SEP holders renege on their FRAND commitments - while still reaping the benefits of standardisation - through a variety of actions that can harm competition.

These SEP holders' violations of their FRAND commitments have increased in recent years, which is particularly problematic in light of the rollout of 5G and the widespread adoption of IoT devices, all of which will require new, agreed-upon standards in order to ensure the interoperability of devices with each other and with wireless communications networks. As a result, some SEP holders are abusing their position as owners of standardised technology by acting as gatekeepers to the required technology standards and holding up potential licensees through the following:

- threatening and seeking injunctions (or other exclusionary remedies) on FRAND-encumbered SEPs against potential licensees to exclude products from a market, which can unfairly coerce licensees to accept 'disadvantageous licensing terms'[2] to which they would not otherwise agree;

[1] Horizontal Guidelines ¶ 266.

[2] EC, *Motorola - Enforcement of GPRS Standard Essential Patents*, Case AT.39985, (2014), ¶ 327.

- seeking from a court of a single jurisdiction to issue a global portfolio rate determination under the threat of an injunction; [3]
- demanding exorbitant, non-FRAND royalties that improperly attempt to capture added value by virtue of standardisation as opposed to the underlying patented technology, which can unjustly enrich SEP holders causing an artificial burden on innovation;[4]
- refusing to offer licenses to potential licensees based on their position in the supply chain, which violates the non-discrimination prong of FRAND[5] and is an inappropriate attempt to capture the largest possible royalty base even though the relevant standardised technology is often practised at the component level. Such practices tend to reduce the attractiveness of the standardised technology to the end-product manufacturer. In turn, this hinders the propagation of the standard and may deprive the end consumer of the benefit of the technology;
- requiring potential licensees to enter into overly restrictive non-disclosure agreements as a condition of entering into licensing negotiations, some of which do not even allow licensees to verify whether their suppliers have concluded relevant licenses; and
- exploiting the information asymmetry inherent in negotiations to the SEP holder's favour, which prevents licensees from assessing whether an offer complies with the SEP holder's FRAND obligation.

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?

The App Association notes that generally, the Horizontal Guidelines help provide high-level guidance on standardisation agreements. However, Section 7 of the Guidelines could be further improved to provide further detailed guidance for all stakeholders to address abusive SEP licensing practices that violate competition law, and which pose a significant threat to IoT innovation by SMEs. Some of these abusive practices are described above in our response to question HGL7 A).

[3] Recently in the UK some SEP holders, in particular, Non-Practicing Entities (NPEs) or commonly known as 'patent trolls' who purchase from other companies patents of often dubious quality and assert them aggressively against product manufacturers, have been abusing the UK's legal system by seeking court determined global portfolio licences against potential licensees under the threat of the exclusion of their products from the UK market. See the decision of the UK Supreme Court in Unwired Planet v Huawei, [2020] UKSC 37, 26 August 2020.

[4] These actions also conflict with the Horizontal Guidelines because such non-FRAND royalties do not 'bear a reasonable relationship to the economic value of the IPR.' Horizontal Guidelines ¶ 289.

[5] The Guidelines recognise this principle in stating that '[i]n 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.' ¶ 285 (emphasis added).

Therefore, further clarifying the provisions in the Guidelines is necessary because SEP abuses are made possible through the collective decision of competitors to coalesce around an industry standard. Thus, we strongly encourage the adoption of revisions to Section 7 to reflect the cross-sectoral consensus views captured in CWA 95000:2019 ('Core Principles and Approaches for Licensing of Standard-Essential Patents').[6] Specifically, the Guidelines' discussion of FRAND commitments (¶¶287-291) should incorporate the following principles, which are further described in CWA 95000:2019:

- The Guidelines should acknowledge that a SEP holder's FRAND commitment limits its ability to seek injunctive relief against willing licensees. Although the injunction analysis always depends on the specific facts of the case, injunctions should generally only be permitted in limited circumstances. Additionally, a SEP holder should not be allowed to leverage the courts of a single jurisdiction to force a licensee into a global portfolio licensing under the threat of an injunction. This is another form of hold-up that should be recognised in the Guidelines.
- The Guidelines should elaborate on SEP valuation by further explaining what it means for royalties to 'bear a reasonable relationship to the economic value of the IPR'. Guidelines ¶ 289. It is true that 'there are various methods available to make this assessment', *id.*, but certain key principles should guide the analysis, regardless of the methodology. As the EC noted in its 2017 SEP Communication, the economic value 'primarily needs to focus on the technology itself and in principle should not include any element resulting from the decision to include the technology in the standard'.[7] Additionally, an appropriate royalty rate should 'take into account a reasonable aggregate rate for the standard, assessing the overall added value of the technology'.[8] In many cases this will involve focusing on the smallest component that practices the SEP, not the end product incorporating additional technologies.
- The Guidelines correctly note that 'FRAND commitments are designed to ensure that essential IPR protected technology incorporated in a standard is accessible to the users of that standard on fair, reasonable and non-discriminatory terms and conditions'. Guidelines ¶ 287. The Guidelines should further expound on this point by making clear that SEP holders may not refuse licenses to component suppliers and other companies making devices that practice standardised technologies.[9]
- The Guidelines expressly reserve the rights of parties to use litigation to resolve disputes about FRAND royalty rates. Guidelines ¶ 291. This discussion should be expanded to note that a potential licensee has the right to challenge a patent

[6] This document, available at https://2020.standict.eu/sites/default/files/CWA95000.pdf, (a) provides educational and contextual information regarding SEP licensing and the application of FRAND, (b) identifies and illustrates some of the questions that negotiating parties may encounter, and (c) sets forth some of the key behaviours and 'best practices' that parties might choose to adopt to resolve any SEP licensing issues amicably and in compliance with the FRAND obligation. We encourage the CMA to review the document in full and provide some key highlights most applicable here.

[7] *Ibid.* at § 2.1.

[8] *Ibid.*

[9] This should also be addressed elsewhere in the Guidelines, including paragraph 283.

holder's contentions regarding essentiality, validity, and infringement while still remaining a willing licensee for purposes of an injunction analysis.

The Guidelines should further expressly stipulate that an SSO's IPR policy must include the above requirements to fall under the 'safe harbour'.

To assist the CMA the App Association has developed recommendations for specific text changes to Chapter 7, which we append to this submission.

More generally, the role of SSOs themselves is crucial in providing clarity as to disclosure and other FRAND terms, and their ability to update their patent policy to provide guidance on the meaning of the FRAND commitment should be supported. There are exemplars that the CMA could consider supporting and building on in its efforts to enhance transparency in ex-ante disclosures within SSO processes.

For example, the current version of the IEEE-SA Patent Policy addressed increasing attempts by some owners of SEPs to exploit FRAND agreements. The updates clarified the narrow set of circumstances when SEP holders can employ prohibitive orders e.g., injunctions, against someone using an IEEE-SA standard, reiterated that the FRAND commitment required SEP holders to license to all willing licensees, and provided guidance on what 'reasonable' means in the context of royalty analysis. Small businesses like our members that build IoT products that enable and rely on IEEE-SA standards to support interoperability heavily rely on the clarity the current policy provides. It has demonstrably reduced SEP licensing-related abuses, deters unnecessary and burdensome litigation, and supports ingenuity in the market.

At the time of their adoption, the 2015 Updates were supported by an overwhelming number of IEEE-SA participants and industry stakeholders. We further note that the 2015 Updates were enacted following approvals by super-majorities at multiple levels of the IEEE's governance hierarchy.

The empirical record demonstrates that the 2015 Patent Policy has facilitated unprecedented growth and success for IEEE-SA and its standards. In the years since the policy updates went into effect, ever-increasing evidence demonstrates the benefits of IEEE-SA's approach, particularly in comparison to other standards-setting organisations such as the European Telecommunications Standards Institute (ETSI):

- **Total technical contributions to IEEE-SA standards have increased since 2015:** The research firm IPLytics analysed technical contributions to the IEEE-SA before and after the policy updates and found a clear and consistent increase since the policy was adopted.[10] After two years of declining technical contributions to IEEE-SA standards in 2013 and 2014, total contributions rebounded after the new policy was

[10] IPLytics, Empirical Analysis of Technical Contributions to IEEE 802 Standards (January 2019), available at https://www.iplytics.com/wp-content/uploads/2019/01/IEEE-contribution-anaylsis_IPlytics-2019.pdf

enacted in 2015 and IEEE-SA had a record number in 2017. In the IEEE-SA 802 working groups, which are responsible for Wi-Fi standards, technical contributions continued to increase after the policy update leading to a record number in 2018. This finding led them to conclude that 'patent policy considerations have not been a significant factor in companies' decisions about whether to invest in and submit technologies to IEEE-SA 802 working groups'. Even in the most patent-heavy IEEE-SA 802 working groups, IPLytics found that contributions increased in line with total technical contributions to all 802 working groups.

- **Uncertainty and confusion in ETSI FRAND terms are responsible for 75 per cent of all SEP litigation in the past 20 years:** One of the clearest indicators of uncertainty and confusion within contracts and other legal texts is the amount of litigation that they spawn. Litigation over SEPs in digital communications standards like LTE has grown exponentially in recent years, more than quadrupling between 2009 and 2017 alone according to analysis from darts-ip.[11] Additionally, IPLytics analysed 20 years of worldwide SEP litigation, from 2001-2021, and found that more than 75 per cent of that litigation was related to 2G, 3G, 4G and 5G standards.[12] Meanwhile, just 2 per cent of SEP litigation during the same time period was related to IEEE's Wi-Fi standards.[13]
- **IEEE-SA is Delivering on its Mission and the True Goals of Standardisation:** Each standard-setting organisation picks the approach that fits its goals best. Time and time again, IEEE's approach has proven to be a better approach for delivering on the organisation's standardisation goals and the well-established role of technical interoperability standards. The goal of IEEE's standards development process, according to its Standards Development Principles, is to develop technical standards that 'enable innovation and open new market opportunities to their users by allowing interoperability of products, services, and processes; and they create ecosystems that promote economies of scale and healthy competition. These attributes are essential to help ensure that markets remain open, allowing consumers to have a choice and allowing new entrants to successfully enter markets'.[14] IEEE's Wi-Fi standards unequivocally meet these goals. The dynamic ecosystem of companies that build Wi-Fi compatible products is unparalleled. Competition at every level of the Wi-Fi technology industry is fierce, and startups can compete and thrive in the marketplace. Moreover, Wi-Fi is at the centre of IoT, and nearly every industry adopted the standard for connecting their products wirelessly to the internet. In 2020 alone, the Wi-Fi Alliance, which drives global Wi-Fi adoption and evolution through thought leadership, spectrum advocacy, and

[11] Darts-ip, NPE Litigation in the European Union: Facts and Figures (February 2018), available at https://clarivate.com/darts-ip/campaigns/npe-litigation-in-the-european-union-facts-and-figures/

[12] IPLytics, Empirical Analysis of Technical Contributions to IEEE 802 Standards (January 2019), available at https://www.iplytics.com/wp-content/uploads/2019/01/IEEE-contribution-anaylsis_IPlytics-2019.pdf

[13] Ibid.

[14] See IEEE's Standards Development Principles here: http://globalpolicy.ieee.org/wp-content/uploads/2020/08/IEEE20014.pdf

industry-wide collaboration, certified 8,752 devices from 306 companies.[15] These numbers, however, downplay the size and scope of the Wi-Fi ecosystem because a large percentage of companies that build Wi-Fi compatible products don't pursue certification through the Alliance. IEEE's requirement that SEP holders must license their patents to companies at both the product and component level allows companies with little experience in wireless networking or SEP licensing to integrate Wi-Fi into their products rapidly and seamlessly.

By contrast, the evidence is clear that the public arguments made against IEEE's updated policy are without merit. The updates have had no negative effects on participation or contributions of patented technology to IEEE-SA standards, and they helped ensure that IEEE's Standardisation Association continues to deliver on its mission.[16] IEEE-SA should put its mission and the Wi-Fi ecosystem first and reject the self-serving demands of a few patent profiteers.

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.

See our responses to questions HGL7 A) and B) above. We think that Chapter 7 of the Guidelines should be clarified to state that the declaration of IPR at the SSO should include both published and unpublished patent applications. Chapter 7 must also clarify the point of information disclosure in the standard development process. The App Association recommends disclosing IPR that might be essential for the implementation of the standard at the earliest opportunity and on an ongoing basis. SSO policies can provide guidance on ex-ante disclosures to balance with enhanced transparency and disclosures.

Impact assessment questions

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*?

The retention of BERs for specialisation and R&D would benefit the UK's SME community as described above. Further, the above-discussed updates to the Horizontal Guidelines in Chapter 7 would significantly benefit UK SMEs. Abusive practices from some SEP holders create barriers to the wider use of standardised technologies, increase the costs for companies that wish to innovate downstream and limit the choice for consumers. Clear rules for SEP licensing will

[15] Data from the Wi-Fi Alliance's Product Finder tool: https://www.wi-fi.org/product-finder

[16] 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

reduce business uncertainty and allow for informed participation, enabling downstream innovators to make knowledgeable decisions about their participation in the development, and the use of the standard under truly FRAND terms.