

IP EUROPE: FEEDBACK ON THE RETAINED HBERS & HORIZONTAL GUIDELINES

Preliminary Remarks

Engagement with the CMA

IP Europe is grateful for the opportunity to provide input to the Competition & Markets Authority (CMA) in the context of its review of the retained Horizontal Block Exemption Regulations (HBERs) and the Horizontal Guidelines.¹

IP Europe and its members look forward to providing additional feedback to the CMA during the public consultation on its draft recommendation to government early this year. In the meantime, we would welcome the opportunity to engage with the CMA further concerning the points raised in this submission by participating in any roundtables, stakeholder dialogues, and/or bilateral discussions. In any event, we hope that our initial input as set out below, which focuses on the Horizontal Guidelines (specifically Chapter 7 the Horizontal Guidelines concerning ‘standardisation agreements’²) will be useful to the CMA and other stakeholders.

We confirm that this response does not contain any confidential information.

About IP Europe

IP Europe is a coalition of innovators advocating policies that incentivize ongoing investment in the creation of new technologies and businesses.³ Our Members are research and development-intensive organisations, whose inventions are protected by intellectual property rights.⁴ From global technology leaders and research institutes creating the technologies that underpin the 5G cellular standard, to innovative SMEs which rely on their patent portfolios to grow, IP Europe gives a voice to organisations that recognise the value of IP in fostering innovation, driving growth, job creation and the emergence of new technologies, businesses and markets.

We work to ensure that the vital importance of IP to the digital and knowledge-based economy is recognized and valued.⁵ We believe that IP protection is essential for investment, resilience, global competitiveness and economic recovery.⁶ Strong intellectual property rights are crucial for delivering the innovation-led growth necessary for the UK’s future prosperity and ‘building back better’ and realizing the government’s vision to make the UK a global hub for innovation by 2035. According to the UK Innovation Strategy, the government’s policy is to / “...create the world’s most agile regulatory system, consult on the development of a pro-innovation competition regime, and continue to safeguard UK intellectual property”⁷.

Our members invest £billions year on year in the UK and elsewhere in R&D critical for developing cutting-edge technologies and contribute to open, collaborative, and consensus-driven standards development that makes these technologies available for integration into millions of an ever-

¹ The retained Horizontal Block Exemption Regulations, [Call for inputs document](#), CMA152con, 24 November 2021.

² Our contribution will also touch Chapter 5 of the Horizontal Guidelines (on purchasing agreements).

³ Additional information about IP Europe and our work is available on our website (see [Home - IP Europe \(ipeurope.org\)](#)).

⁴ For further information of our Members and Partners, see [Members & Partners - IP Europe \(ipeurope.org\)](#).

⁵ The United Kingdom has long recognised that strong intellectual property rights provide the greatest incentives to innovation. Studies estimate that industries that rely on IP have accounted for over a quarter of UK employment and almost half of GDP. See, for example, <https://www.gov.uk/government/publications/intellectual-property-office-corporate-plan-2018-2019>.

⁶ See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1009577/uk-innovation-strategy.pdf.

⁷ See <https://www.gov.uk/government/publications/uk-innovation-strategy-leading-the-future-by-creating-it>, aty page 22

increasing array of connected products and services. In the era of the Internet of Things (IoT), these technologies represent a foundation of connectivity that brings significant benefits to many companies and, in turn, consumers.⁸

The CMA Review: An Evidence-Based Assessment of the Horizontal Guidelines

In assessing whether the retained HBERs and Horizontal Guidelines meet their intended purpose (taking into account specific features of the UK economy serving the interests of UK businesses and consumers), we understand that the CMA will draw on existing relevant evidence from the European Commission's recent evaluation of the EU equivalents to the retained HBERs and the Horizontal Guidelines and build on this using feedback from the current Call for Inputs.

As regards the European Commission's ongoing review of the HBERs and the Horizontal Guidelines, IP Europe responded to the initial (6 November 2019 - 12 February 2020) consultation,⁹ as well as the recent public consultation¹⁰ and targeted questionnaire on standardisation agreements. Our comment on the Inception Impact Assessment (IIA)¹¹ addressed the 'evaluation phase'¹² of the Commission's review process. While, overall, we recognised that the Commission had made a concerted effort to reflect in its evaluation the feedback from stakeholders, including IP Europe, we observed that, despite its length, there were some important omissions from the Staff working Document (SWD) and accompanying Support Study (Support Study)¹³, notably:

- The SWD failed to acknowledge that the provisions in Chapter 7 of the Horizontal Guidelines are limited to/directed at 'standardisation agreements' and, therefore, should focus on governance and IPR policies, rather than licensing practices/bilateral licensing negotiations.
- While the Support Study acknowledged our call for the Horizontal Guidelines to address 'hold-out' and to take into consideration the potential impact of opportunistic refusals by implementers to agree on royalties vis-à-vis FRAND-abiding patent holders in order to depress prices, increase litigation and reduce incentives to invest in standard related innovations,¹⁴ the SWD failed to mention the incidence of hold-out in the SEP environment at all.¹⁵

We hope that the CMA will avoid these shortcomings and address the other issues identified in this submission, in particular revision of the text of paragraph 285 of the Horizontal Guidelines. This has

⁸ Researchers estimate that in 2019 cellular technologies were responsible for \$4.8 trillion in economic value, a majority of which is attributable to consumer benefits (\$2.7 trillion) – see [IP Research - The Value of Cellular Connectivity: From Mobile Devices to the Internet-of-Things \(IoT\) | 4iP Council](#). See also IHS Markit, The 5G Economy: How 5G Will Contribute to the Global Economy (2019) (<https://www.qualcomm.com/media/documents/files/ihs-5g-economic-impact-study-2019.pdf>), which estimates that by 2035 5G-enabled revenues from 16 industries — including manufacturing, agriculture, healthcare, and others — will total \$13.2 trillion globally.

⁹ IP Europe's contribution (response and Annex) is available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11886-Evaluation-of-EU-competition-rules-on-horizontal-agreements/public-consultation_en. See also <https://ipeurope.org/position-papers/the-horizontal-guideline-consultation-submission/> and <https://ipeurope.org/press-release/statement-on-the-public-consultation-on-evaluation-of-the-horizontal-block-exemption-regulations/>.

¹⁰ IP Europe's contribution (response and Annex[es]) is available at: [Horizontal agreements between companies – revision of EU competition rules \(europa.eu\)](#).

¹¹ See https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13059-Horizontal-agreements-between-companies-revision-of-EU-competition-rules/F2661349_en.

¹² See the [Staff Working Document and its annexes](#) summarising the results of the evaluation of the HBERs and Horizontal Guidelines (SWD) and the accompanying [Support study](#) for the evaluation of the Horizontal Block Exemption Regulations and the Horizontal Guidelines (Support Study), published on 6 May 2021.

¹³ *Ibid.*

¹⁴ See Support Study, p. 165.

¹⁵ The need for the Horizontal Guidelines to acknowledge the real and present problem of hold-out (not only the theoretical risk of hold-up) and to recognise FRAND as a two-way street is addressed in more detail below. See also <https://www.ipeurope.org/blog/hold-out-should-be-reflected-in-the-review-of-the-horizontal-guidelines/>.

been wilfully misinterpreted by certain implementers (and their industry associations) as imposing a 'licence to all' rather than an 'access for all' requirement, contrary to established industry practice and any requirements imposed by existing EU law.¹⁶ This misreading is a deliberate attempt to cause confusion, introduce friction into patent licensing, and drive down FRAND royalties.

To assist the CMA in its assessment of these important issues, we cite evidence (including research, studies, articles, policy statements/developments, and recent case law) that support our positions.

We would also like to draw attention to the fact that there is only a small number of companies (SEP-holders) making significant contributions to standards, as compared with a very large (and increasing number) of implementers that benefit from standardised technology, which has implications in terms of any assessment of responses/data by reference to number of comments.

GENERAL IMPACT ASSESSMENT QUESTIONS FOR ALL RESPONDENTS TO COMPLETE

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.

Our industry: 94110: Activities of business and employers membership organisations

Relevant industries: 61200 - Wireless telecommunications activities

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.

This response reflects the collective input of IP Europe's members, which have extensive experience with various standard setting organisations (SSOs), standard development organisations (SDOs), and similar consortia/fora and invest billions of £ each year to bring standardised wireless technology to market. As noted above, in the era of IoT, these technologies represent a foundation of connectivity which is integrated into an ever-increasing array of connected products and services.

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).

IP Europe is a small (<50 employees), member-driven, organisation that represents innovators in the standardised wireless technology space – from global technology leaders and research institutes, to innovative SMEs, our members comprise of leading contributors to the 2G, 3G, 4G and 5G cellular standards.

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.

¹⁶ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3532469

As regards Chapter 7 of the Horizontal Guidelines, it should be noted that the open system of standardisation provides an opportunity for all companies to collaborate. Open access to standardised technologies allows smaller companies the ability to achieve the scale necessary to compete with global tech giants. Anyone can contribute their technology,¹⁷ and everyone has access to the standardised technology.

HORIZONTAL GUIDELINES

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.

In terms of how coherently Chapter 7 of the Horizontal Guidelines works alongside other rules and guidance in the UK, we note that on 7 December 2021 the UK Intellectual Property Office (IPO) issued a call for views seeking to better understand how the current SEPs framework encourages innovation and promotes competition¹⁸.

In this context, the IPO's Chief Executive Tim Moss stated that: "The Innovation Strategy sets out the government's long-term plan for delivering innovation-led growth, in which SEPs play an important role. We want to ensure the UK's framework remains robust and continues to be regarded as one of the best in the world, while keeping pace with global developments and challenges around SEPs and FRAND licensing."

According to the IPO the call for views will gather a wide range of evidence on the following:

- the link between SEPs, innovation and competition and how these elements interrelate with each other
- the functioning of the market, and whether there is an imbalance between the licensor and licensee
- transparency in the SEPs ecosystem
- the efficiency of SEPs licensing, functioning of the patent framework and FRAND litigation

There is, therefore, a significant overlap of issues between the IPO initiative and the CMA review of Chapter the Horizontal Guidelines. In this regard, it would be useful to understand the extent of any proposed engagement/coordination between the CMA and IPO as these processes progress.

(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.

Licensee Negotiation Groups, Coordinated Hold-Out & Buyers' Cartels

¹⁷ This includes SMEs. Open technology standards create opportunities for SMEs to participate in IoT ecosystems - see <https://www.ipeurope.org/blog/world-ip-day-2021-how-can-policymakers-best-support-innovative-european-smes/>. For further discussion on SMEs in the innovation ecosystem see: <https://www.ipeurope.org/position-papers/enable-smes-and-the-innovation-ecosystem/qa-with-the-ceo-of-fractus-ruben-bonet/>.

¹⁸ <https://www.gov.uk/government/news/ipo-launches-call-for-views-on-standard-essential-patents-seps>

We note that Section 4.2. of the SWD refers to so-called ‘Licensee/Licensing Negotiation Groups’ (LNGs) and observes that, according to some members of the SEPs Expert Group, “*transaction costs could be further reduced if implementers were allowed to form groups to jointly negotiate licenses on behalf of their group members*”.¹⁹ We do not agree with this observation.

While the SWD notes that those members had pointed out that “*the mechanism and controls to form and operate these license control groups in compliance with the relevant competition rules would need to be developed*”, it does not refer to, or consider, the competition concerns that the SEP Expert Group identified in respect of this proposal, in particular vis-à-vis the risks of (1) buyers’ cartels; and (2) offering additional hold-out/collective-boycott options to implementers.

This is particularly concerning given (1) the examples of companies, including in the IoT space, already colluding to avoid taking licences;²⁰ and (2) the failure of the Horizontal Guidelines (and the SWD) to address ‘hold-out’, which is discussed in more detail below.

While the Commission’s recent public consultation²¹ and targeted questionnaire on standardisation agreements contained questions about the competitive assessment of LNGs (see Question 105 and Questions 48 – 53, respectively) there is very little detail on what the Commission envisaged these could/would entail but we would like to draw attention to several pitfalls, notably:

- LNGs should not be assessed as a form of/akin to a joint purchasing arrangement;
- The ‘FRAND context’ does not mitigate potential competition concerns regarding LNGs;
- LNGs are not a natural/necessary ‘counter-balance’ to patent pools;
- LNGs are not a ‘one size fits all’ solution;
- LNGs would potentially infringe competition law ‘by object’;
- Mechanisms and controls would/may be insufficient to address the potential anti-competitive effects;
- LNGs would not necessarily generate (significant) efficiencies; and
- LNGs could be inconsistent with the *Huawei v ZTE*²² framework.

The suggestion that if groups of implementers could collectively negotiate with individual or groups of SEP holders and patent pools, it may lower transaction cost is theoretical: it is unclear that such efficiencies/cost-savings would be generated in practice and similar (or greater) cost savings could be achieved through patent pools.²³ In any event, for SEP-holders, any efficiencies would depend on the timely conclusion of licences.

Discussion on this topic has been couched in terms of assisting SMEs and smaller companies (specifically IoT ‘start-ups’) lacking requisite expertise and experience in IP/SEP licensing and putting negotiations on a more equal footing. However, the discussion is not being driven by SMEs, but rather (large) automotive OEMs/car manufacturers,²⁴ which have considerable experience of IP licensing, including negotiating SEP licences.

¹⁹ See [Report from the Group of Experts on Licensing and Valuation of Standard Essential Patents ‘SEPs Expert Group’](#).

²⁰ See <https://www.ipeurope.org/blog/is-the-smart-meter-industry-engaged-in-coordinated-hold-out/>. For a further example, see [Cars or Car-tels? - KIDON IP](#).

²¹ IP Europe’s contribution (response and Annex(es)) is available at: [Horizontal agreements between companies – revision of EU competition rules \(europa.eu\)](#).

²² Case C 170/13, *Huawei Technologies Co. Ltd v. ZTE Corp* [2015] ECLI:EU:C:2015:477.

²³ See, for example, <https://www.4ipcouncil.com/research/economic-case-against-licensing-negotiation-groups-internet-things>.

²⁴ See the presentation of Dr Benno Buehler available at: <https://ec.europa.eu/docsroom/documents/45813>.

Concerns have been raised (including by members of the Commission's 'SEPs Expert Group', academics and industry commentators²⁵) that LNGs may violate competition law and would:

- Offer additional hold-out opportunities for implementers (coordinated hold-out/collective boycott) to delay or avoid the conclusion of licence agreements; and
- Effectively operate as a buyers' cartel, which would depress SEP royalties; and
- Provide the means and opportunity for implementers of standardised technology to engage in anti-competitive information exchange and/or collusion.

In stark contrast to the joint purchasing of goods or services, in the context of SEP-licensing, the nature of open standards means that implementers have access to, use, and profit from standardised technology without first having to take a licence. As discussed below, some implementers engage in 'hold-out' strategies and wilfully infringe SEPs on the basis that they will only ever be required to pay FRAND royalties.

In this regard, the 'FRAND context' heightens, not mitigates, the risk of buyers' cartels, which is already a real one in the context of standards. LNGs would be able to exercise collective monopsony power over SEP-holders to force prices below a competitive level. FRAND is a 'ceiling', not a 'floor'.

While one commentator has sought to downplay the competition concerns relating to LNGs, claiming that they are "*prima facie unlikely, especially for LNGs that cover only a small share of the relevant markets*"²⁶, the 'non-discriminatory' aspect of the FRAND-commitment means that the terms negotiated with the LNG could/would have far broader implications and render the 15% market share threshold in Chapter 5 of the Horizontal Guidelines meaningless in practice. It may be argued that the rate negotiated by the LNG should be applicable to many other market participants, regardless of the circumstances and market power that may be represented by the LNG vis-à-vis individual entities.

Patent pools, on the other hand, are the antithesis of LNG's, as they: (1) combine complementary technologies; (2) are optional and not exclusive; (3) provide a pro-competitive choice to direct/individual licences; (4) reduce transaction costs for licensees and SEP-holders; (5) set a limit on cumulative royalties to avoid 'double-dipping'; and (6) in the standards context, are bound through their members to FRAND licensing commitments. This is in contrast to LNGs which conceptually pose a significant threat to competition. Moreover, the mistaken suggestion that they are a necessary and/or natural counterbalance to patent pools demonstrates a fundamental misunderstanding of the role and nature of licensing platforms, such as Avanci, which works with industry as a whole (i.e. SEP-holders and implementers) to provide a one-stop marketplace for licensing.²⁷

By contrast also to the conventional analysis of purchasing groups in relation to goods, it is difficult to identify efficiencies from the creation of an LNG that do not already exist and which would justify the very evident distortions of competition to which an LNG would give rise to in the standards context.

²⁵ See, for example, <https://www.4ipcouncil.com/research/licensing-negotiation-groups-what-why-how/>; <https://www.4ipcouncil.com/research/licensing-negotiation-groups-seps-collusive-technology-buyers-arrangements-pitfalls-and-reasonable-alternatives/>; <https://www.4ipcouncil.com/research/economic-case-against-licensing-negotiation-groups-internet-things/>; [SEP Licensing Negotiation Groups -- Part I](#); [SEP Licensing Negotiation Groups -- Part II](#); [SEP Licensing Negotiation Groups -- Part III](#); and [FOSS Patents: EU competition chief's tough talk on cartels doesn't bode well for automotive SEP licensing negotiation groups](#). **4iP Council is holding a further webinar on the subject of LNGs (Solution in Search of a Problem: Licensing Negotiation Groups in the Internet of Things) on 19 January 2022** – see [Webex Events \(classic\)](#).

²⁶ See <https://ec.europa.eu/docsroom/documents/45813>.

²⁷ See <https://www.avanci.com/vision/>.

(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.

(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.

IP Europe's members are committed to sustainability, through their leadership in developing 5G and other innovative standardised technologies, which have an important role in creating more efficient use of resources (e.g. in energy supply/use, transport, and agriculture)²⁸. During a panel discussion at this year's Consumer Electronics Show (CES), the VP of economic strategy at Qualcomm, spoke of the transformative promise of 5G enabling a sustainable future.²⁹ Ericsson talks of *"creating a world of limitless connectivity, where mobile technology opens new possibilities to pioneer a sustainable future. With global collaboration and digital innovation, carbon emissions can be reduced by 15% by 2030. With 5G we can do even more. By working together, a better world is within our reach."*³⁰ Likewise, Nokia has stated that *"communications technology, connectivity and digitalization play a critical and increasing role in driving social, environmental and economic progress, helping the world achieve all 17 United Nations Sustainable Development Goals. Digitalization, with 5G at its heart, will enable the first sustainable industrial revolution."*³¹ InterDigital states in its 2021 Corporate Sustainability Report³² that *"With climate change a top priority for governments and operators in much of the world, the wireless industry must do its part to manage its overall energy consumption while also developing the capability to positively impact other industries."*

Competition policy can contribute to digitisation and sustainability goals in this area by enabling, rather than inhibiting, innovators to obtain returns on their R&D investments in standardised technologies. This does not require a fundamental change to the interpretation and the application of UK competition law. However, these laudable goals should not be used to harm innovation or disguise anti-competitive conduct leading to the same result, in particular through hard-core restrictions of competition,³³ by targeting companies contributing to innovative standards and undermining their ability and incentives to invest in R&D for future technologies.

For example, we have recently highlighted an example of collusion (coordinated patent hold-out) in the smart meter industry, which provides a clear illustration of our concerns and the need to consider the broader impact on sustainability across entire ecosystems/industries.³⁴

²⁸ And Orange CEO interview in Journal du Dimanche: "5G technology is much better from an environmental footprint perspective than 4G" <https://articles.cafeyn.co/0fa0ad/le-journal-du-dimanche/2021-01-10/stephane-richard-pdg-dorange-la-5g-est-un-progres-pour-lenvironnement>. "5G is a revolution that will benefit society": Stéphane Richard, CNBC <https://www.cnbc.com/video/2021/06/28/5g-is-a-revolution-that-will-benefit-society-says-orange-ceo.html>

²⁹ See https://www.rcrwireless.com/20220107/social_initiatives/5gs-green-footprint-stretches-across-railroads-waterways-and-airways-of-tomorrow-says-qualcomm-exec.

³⁰ See <https://www.ericsson.com/en/about-us/new-world-of-possibilities/pioneering-a-sustainable-future>.

³¹ See also CNBC interview with Pekka Lundmark: No green without digital, available at: <https://youtu.be/ySUSCL7yRt8>.

³² [InterDigital 2021 Corporate Sustainability Report](https://www.interdigital.com/interdigital-2021-corporate-sustainability-report)

³³ In this context, we agree with the Guidance on environmental sustainability agreements and competition law published on 27 January 2021, which provides that: "The CMA recognises that collaboration can help achieve sustainability goals. However, sustainability agreements must not be used as a cover for a business cartel or other illegal anti-competitive behaviour." See <https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law>.

³⁴ See <https://www.ipeurope.org/blog/is-the-smart-meter-industry-engaged-in-coordinated-hold-out/>.

In any event, a relaxation of the existing rules for certain businesses risks an uneven playfield and confusion, over the promotion of legal certainty for businesses.

(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 the response to Question HGL7, below.

The Horizontal Guidelines should clarify that the scope of the provisions in Chapter 7 of the Horizontal Guidelines are directed at ‘standardisation agreements’ and, therefore, the focus is on SDOs’ governance and IPR policies, rather than licensing practices/bilateral licensing negotiations, which are generally vertical in nature and to which the Chapter 1 of the Competition Act 1998 would not apply. If anything, they would be considered under Chapter II.

Removing the reference to “to all third parties” in paragraph 285 of the Horizontal Guidelines is necessary to clarify, and appropriately reflect, the nature and scope of FRAND commitments in most existing SSO/SDO IPR policies. These policies do not require licensing to all third parties, but align with the overarching goal of the HGL to ensure FRAND access to standardised technologies by all third parties. This does not necessitate licensing. Licensing should not be confused with access. The former is merely a contractual matter enabling a fair royalty return for a patent holder’s innovations, the latter is a competition matter (e.g. whether an injunction should be granted to prevent access).

(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.

For all of the reasons outlined in the response to Question HG4(b), above, we do not consider that LNGs would be sufficiently efficiency-enhancing and are unlikely to raise competition concerns. Regardless this concept should not be covered in the Horizontal Guidelines.

We consider that there is insufficient decisional practice or jurisprudence on the compatibility of LNGs with the competition rules in the context of standards/SEPs. In light of the negative consequences of inappropriate intervention, IP Europe submits that it would be premature for the CMA (or the European Commission) to attempt to give any credible guidance in this specific area.

As Barnett has observed:

Based on the economic structure of wireless technology markets, and empirical evidence from over three decades of SEP licensing, this policy intervention is likely to degrade, rather than enhance, competitive conditions in wireless communications and other 5G-enabled markets encompassed by the “Internet of Things.” In the short term, LNGs would most likely result in a redistributive (not an efficiency) effect that shifts economic value from innovators to implementers in the wireless technology supply chain without necessarily passing on cost-savings to consumers. In the medium to longer term, LNGs are liable to impose significant efficiency losses by endangering the viability of licensing-based monetization models that have funded continuous R&D investment, promoted broad dissemination of technology inputs, facilitated robust entry in device production, and enabled transformative business models across a wide range of industries. While LNGs may reduce the transaction costs of SEP

*licensing, pooling structures have a demonstrated record of having achieved the same objective in patent-intensive information technology markets at a substantially lower risk of competitive harm.*³⁵

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.

(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.

As noted above, while joint purchasing arrangements benefit from a ‘safe harbour’ where the parties have a combined market share not exceeding 15% on the purchasing market, the ‘non-discriminatory’ aspect of the FRAND-commitment means that the terms negotiated with the LNG would have broader implications and render this market share threshold meaningless in practice.

Moreover, insofar as the SWD identified stakeholders’ concerns that certain provisions of Chapter 5 of the Horizontal Guidelines lack clarity --in particular on the distinction between pro-competitive joint purchasing agreements and buyers’ cartels, and the need to consider the impact of joint purchasing arrangements on suppliers --these would also apply to LNGs.

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?

(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?

(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.

Clarification of the FRAND commitment: Revision of Paragraph 285 of the Horizontal Guidelines

The inclusion of the words “to all third parties” in paragraph 285 of the Horizontal Guidelines is a principal concern for IP Europe. As the SWD and Support Study observe, this text has given rise to “diverging views” and “while some interpreted this as condition to offer a license to all third parties irrespective of their place in the value chain, others interpreted this as only being a condition to offer a license to all third parties at one level of the value chain”.³⁶

³⁵ See, <https://www.4ipcouncil.com/research/economic-case-against-licensing-negotiation-groups-internet-things>.

³⁶ See SWD, p.55.

The language in paragraph 285 is entirely at odds with the rest of the Horizontal Guidelines which focus on ensuring access for those wanting to use standardised technology covered by essential IPR, which is also enshrined in the access-based IPR policies of SDOs such as ETSI.

The anomaly in paragraph 285 has been wilfully misinterpreted by certain implementers (and their industry associations) as imposing a ‘licence to all’ rather than an ‘access for all’ requirement, in a deliberate attempt to cause confusion, introduce friction into patent licensing, engage in hold-out to delay or avoid taking a licence, and drive-down FRAND royalties.

A recent review of the IPR Policies of various SDOs³⁷, including the IPR Policy of ETSI, concluded that:

- The policies do not require SEP-holders to offer licenses to component makers.
- All of the policies would appear to permit holders of essential IPR to adopt a policy of licensing to the end-user product manufacturer.
- Many of the policies, including ETSI’s, contain wording that could only be relevant or applicable when licensing to parties who buy in components from component makers, such as end-user product manufacturers.

These findings are consistent with earlier statements from Dr Bertram Huber, a legal expert who was heavily involved in drafting ETSI IPR Policy, that: *“the prevailing industry practice was for manufacturers of complete end-devices (e.g. handsets, infrastructure equipment) to negotiate and enter into any necessary licenses to the essential patents practiced in those end-devices”* and *“ETSI has never compelled essential IPR owners to grant licenses to any company that requests one, or to grant licenses at the component level of the mobile telecommunications ecosystem”*³⁸.

The practice of licensing at the end-product level, rather than every manufacturer and supplier in any given supply/value chain, is prevalent in the licensing solutions that have been adopted in numerous highly successful industries:

- The computer, television set, and consumer electronics industries have for several decades embraced licensing the ultimate end-user product as the general licensing approach (including dozens of patent pools in those industries involving thousands of companies as licensors and licensees).
- The telecommunications industry has also adopted end-user licensing for at least the last couple of decades, as regards SEPs.
- Likewise, a number of automotive OEMs have taken a licence either directly with SEP-holders or through the Avanci pool for 2G, 3G and 4G cellular SEPs.³⁹

³⁷ See [A review of SDO IPR Policies: Do they require component level licensing? by Richard Vary, Bird&Bird, November 16, 2020.](#)

³⁸ See Huber, Bertram, Why the ETSI IPR Policy Does Not and Has Never Required Compulsory ‘License to All’: A Rebuttal to Karl Heinz Rosenbrock (September 15, 2017). Available at SSRN: <https://ssrn.com/abstract=3038447> or <http://dx.doi.org/10.2139/ssrn.3038447>.

³⁹ In July 2021 it was announced that Daimler had entered into a royalty-bearing licence with Nokia (see [here](#)). In December 2021 it was reported that Daimler had taken a licence through Avanci (see <http://www.fosspatents.com/2021/12/daimler-takes-avanci-patent-license-all.html>). In November 2021 Avanci confirmed new patent licence agreements with Jaguar Land Rover (see [Avanci Announces new Patent License Agreement with Jaguar Land Rover](#)). In October 2021 it was reported that the Volvo Group taken a licence to the portfolio of patents Avanci offers via its 4G programme (see [Our 5G licensing rates will be ready before mass vehicle roll-out begins, says top Avanci executive | IAM \(iam-media.com\)](#)).

This practice has been recognised by courts in Europe. For example, in *Nokia v Daimler*⁴⁰ the Mannheim Regional Court stated that an SEP owner has the right to select the licensing level at which to license its patents, and that antitrust law does not restrict such a right. The Mannheim court considered that approaching only the OEM for a licence was a reasonable approach. Likewise, the Munich Regional Court ruled in *Sharp v Daimler*⁴¹ that Sharp was “not obliged to grant a license to the suppliers. It must only grant them access to the standards affected by their SEPs”.

The fact that it is their customers who tend to pay royalties pursuant to a license does not mean that component suppliers do not have effective access to the standard, however. In practice they benefit from a variety of mechanisms, notably so-called ‘have made rights’ and non-assert covenants, or simply the reality that SEP owners do not use their IP rights to prevent the manufacture or supply of components.

There are strong legal, economic, policy and logistic arguments to support single-point licensing at the end-user product level. These have been addressed in many articles, studies, academic papers, etc.⁴²

Importantly, competition law does not impose a ‘licence to all’ requirement. On the contrary, paragraph 279 to the Horizontal Guidelines clearly states that: “[t]he non-fulfilment of any or all of the principles set out in this section [Section 7.3.3. on “Restrictive effects on competition”, which included paragraph 285] will not lead to any presumption of a restriction of competition within Article 101 TFEU.” By contrast, patent exhaustion prevents holders of standard essential patents from licensing the same standard essential patents at multiple levels of the supply chain. Moreover, a ‘licence to all’ obligation would impact on fundamental rights and would run contrary to the provisions of TRIPs, specifically Article 30 which strictly limits the exceptions to the exclusive right conferred by a patent and requires that “such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner...”.

In these circumstances, as part of its review, we request that the CMA delete the reference to “all third parties” in paragraph 285 of the Horizontal Guidelines.⁴³ This would eradicate the internal inconsistency in the Horizontal Guidelines; clarify the interpretation of this provision; reflect the widespread industry practice to license at the end-user device level in a growing number of sectors; take account of a number of recent judgments from national courts in Europe and reflects the discussion in the recent SEPs Expert Group Report.⁴⁴

⁴⁰ *Nokia v Daimler*: Judgement of 18 August 2020, Regional Court Mannheim, 2 O 34/19.

⁴¹ *Sharp v Daimler*: Judgement of 10 September 2020, Regional Court Munich I, 7 O 8818/19.

⁴² See, for example, [The Value of SEPs and the Level of Licensing in AIPLA Quarterly Journal by Bowman Heiden, Jorge Padilla, and Ruud Peters. | CIP \(cip-net.com\)](#); Borghetti, Jean-Sébastien and Nikolic, Igor and Petit, Nicolas, FRAND Licensing Levels under EU Law (February 5, 2020). European Competition Journal (2021), Available at SSRN: <https://ssrn.com/abstract=3532469> or <http://dx.doi.org/10.2139/ssrn.3532469>; Revisiting the Bizarre SEP Level of Licensing Antitrust Controversy Jorge Padilla, Pekka Sääskilähti Journal of European Competition Law & Practice, Ipad050, <https://doi.org/10.1093/ieclap/Ipab050>; [Does the non-discrimination aspect of FRAND require licences to all levels of a supply chain? - IP Europe \(ipeurope.org\)](#); and [Open standards, the development of cellular connectivity, and the FRAND licensing model - IP Europe \(ipeurope.org\)](#).

⁴³ Insofar as it provides that SEP-holders “must disclose in good faith their IPR that might be essential to the implementation of the standard”, “must also offer to licence their essential IPR to all third parties on fair, reasonable and non-discriminatory terms” and that this “should be provided for in an IPR policy from the standard-setting organization” the Guidance Environmental sustainability agreements and competition law published on 27 January 2021 would also require amendment. It misrepresents how SSO/SDO IPR policies operate. Very few require good faith disclosure and/or compel licensing of IPR to all third parties. This guidance also runs contrary to industry practice.

⁴⁴ See Report from the Group of Experts on Licensing and Valuation of Standard Essential Patents ‘SEPs Expert Group’, which suggested that a single point of licensing in a supply chain could be preferable and that the price for a licence must be the same regardless of who in the supply chain pays for that licence. Ultimately, the SEP Expert Group decided not to take position as to what is the appropriate level where licensing should take place, which in our view cannot be read as supporting a license to all obligation.

Recognising the Real and Present Problem of Hold-Out & Acknowledging FRAND as a Two-Way Street

Regrettably, since the adoption of the current Horizontal Guidelines, there has been significant growth in the number of standards implementers around the globe who hold out and avoid taking an SEP licence on FRAND terms.

Implementers have an incentive to hold-out under the phenomenon of “*efficient/intelligent infringement*”, knowing that they may only ever be required to pay FRAND royalties.⁴⁵ Rarely will they be penalized for this, and often they may pay less than they otherwise should or would have (e.g. due to patents expiring).

Unlicensed implementers simply appropriate technology without contributing to the substantial R&D costs incurred by innovators, years in advance of a standard being adopted (‘free-riding’). This deprives innovators - who are responsible for developing cutting-edge technologies (that are standardised and made available for integration into millions of connected products and services) - of the fair and reasonable compensation they are due. The result is that their ability and incentives to invest in critical R&D for future technologies and to participate in open, collaborative, and consensus-driven standards development is undermined.⁴⁶

This jeopardises the UKs ambitions vis-à-vis 5G and beyond and risks undermining the UK Innovation Strategy. In any event, by threatening standardisation, hold out is harmful not only to SEP holders, but also to implementers, innovation, investment and ultimately consumers. This is a concern for established players, SMEs and start-ups alike.⁴⁷ Open standards provide an alternative to proprietary ecosystems for technology development, which are an inevitable consequence of a failure to standardise.

We respectfully invite the CMA to seize the opportunity of its review of the Horizontal Guidelines to acknowledge FRAND as a two-way street and recognise the real and present problem of hold-out, not only the theoretical risk of hold-up, thereby filling a gap in the current Horizontal Guidelines. In this context, we note that hold-out is increasingly being acknowledged in policy-making circles globally⁴⁸

⁴⁵ One implementer spoke openly about hold-out strategies and efficient/intelligent infringement at a recent conference (see [FOSS Patents: At IAM Auto IP conference, calls for patent licensing meet exhortations to hold out: more automotive SEP litigation may just be inevitable](#)).

⁴⁶ The Horizontal Guidelines (para 263) acknowledges the “*significant positive economic effects*” of collaborative industry standards, including “*encouraging the development of new and improved products or markets and improved supply conditions*”. The Guidelines further recognise that “*Standards may maintain and enhance quality, provide information and ensure interoperability and compatibility (thus increasing value for consumers)*.”

⁴⁷ Speaking at the 2021 World IP Day Webinar on Investments and Growth for Innovative SMEs, Ruben Bonet, Co-founder, President and Chief Executive Officer of Fractus highlighted concerns regarding hold-out, noting that: “*My company started in 1999 in a garage. We decided to license our technology, but this was not easy because most implementers adopted efficient infringement strategies, which are today known as “patent hold-out strategies”. What saved us from bankruptcy were our strong patents.*” See <https://www.ipeurope.org/wp-content/uploads/2021/06/IP-Europe-SME-Webinar4-3.pdf>.

⁴⁸ For example:

- The November 2017 [Communication from the Commission to the Institutions on Setting out the EU approach to Standard Essential Patents](#) observes that problems with technology users free-riding on the innovations of others may be particularly acute when players from new industrial sectors unfamiliar with the traditional ICT business need access to standardised technologies.
- The EU Parliament Resolution of 4 July 2017 on [European Standards for the 21st Century \(2016/2274\(INII\)\)](#) called on the Commission to publish biannual reports evidencing actual cases of unlicensed SEP use (i.e. infringements) lasting 18 months or more, which would provide official empirical and statistical evidence of hold-out.

and, unlike hold-up, there is no shortage of real-world evidence of hold out by implementers.⁴⁹ This would also ensure consistency with the judgment of the Court of Justice of the European Union (CJEU)⁵⁰ in *Huawei v ZTE*.⁵¹ This seminal competition law ruling, which post-dates the current Horizontal Guidelines, took a balanced approach to hold-up and hold-out. The CJEU did not frame the discussion only in terms of ‘hold-up’, even though the concept is found in paragraph 269 of the Guidelines and was expounded to the Court in both written pleadings and at the oral hearing, noting that:

*“... it is for the alleged infringer diligently to respond to that offer, in accordance with recognised commercial practices in the field and in good faith, a point which must be established on the basis of objective factors and which implies, in particular, that **there are no delaying tactics.**”⁵²*

The CJEU also stated that:

*“Should the alleged infringer not accept the offer made to it, it may rely on the abusive nature of an action for a prohibitory injunction or for the recall of products **only if** it has submitted to the proprietor of the SEP in question, **promptly** and in writing, a specific counter-offer that corresponds to FRAND terms.”⁵³*

Such an approach would also be in-keeping with the growing body of domestic case-law,⁵⁴ including the High Court’s recent judgment addressing competition arguments raised in *Optis v. Apple*.⁵⁵

It has been suggested that holdout is not an antitrust problem. This is certainly not the case for coordinated hold-out (a ‘collective boycott’ scenario). In this regard, IP Europe’s response to the Commission’s initial consultation noted:

“In 2008, DG COMP summarised the Commission’s position at the time on buyer power in a written submission to the OECD Competition Committee (“OECD Submission”). This submission explains to the OECD that “there are certain potential situations where buyer power can lead

- On 11 November 2021, the European Parliament adopted the [Report](#) of the JURI (Legal Affairs) Committee on the Commission’s November 2020 IP Action Plan, which calls on the Commission to monitor industry developments and provide more clarity on various aspects of FRAND, including designating an observatory (a competence centre) to that effect. In this report JURI reiterated the European Parliament Resolution of 2017 calling on the Commission to publish annual reports evidencing actual cases of non-compliance with FRAND including patent hold-out.
- The question of “Hold-Up versus Hold-Out” was also addressed in the [Report from the Group of Experts on Licensing and Valuation of Standard Essential Patents ‘SEPs Expert Group’](#).

⁴⁹ A recent IP Europe Paper presents a variety of hold-out strategies commonly used by implementers to delay (or avoid altogether) taking a licence. As noted above, there are even examples of groups of implementers – across entire industry sectors – adopting coordinated hold-out strategies (together with/facilitated by industry bodies).

The paper cites cases in which courts (including the UK courts), have considered and documented the use of these strategies. See <https://www.ipeurope.org/position-papers/unwilling-sep-licensees-hold-out-strategies/>. See also <https://www.ipeurope.org/blog/examples-of-hold-out-strategies/>.

⁵⁰ Under Section 60A of the Competition Act 1998 (CA98) the CMA must act with a view to securing that there is no inconsistency between the principles that they apply, and the decisions they reach, in determining a question arising under Part 1 of CA98 in relation to competition within the UK; and the principles laid down by the TFEU and the CJEU before the end of the Transition Period, and any relevant decision made by that Court before the end of the Transition Period in determining any corresponding question arising in EU law. See Guidance on the functions of the CMA after the end of the Transition Period, para. 4.20.

⁵¹ Case C 170/13, *Huawei Technologies Co. Ltd v. ZTE Corp* [2015] ECLI:EU:C:2015:477.

⁵² *Ibid*, para. 65, emphasis added.

⁵³ *Ibid*, para. 66, emphasis added.

⁵⁴ See, in particular, *Unwired Planet v. Huawei* [2017] EWHC 711 (Pat), *Unwired Planet v. Huawei* [2018] EWCA Civ 2344, *Unwired Planet v. Huawei* [2020] UKSC 37 and *TQ Delta v. Zyxel Communications* [2019] EWHC 745 (Pat).

⁵⁵ *Optis v. Apple* [2021] EWHC 2564 (Pat).

to a competition problem if it has an effect on competition on the sales market – either in terms of higher prices or loss of choice or quality (for instance if there is significant supplier exit).” It also observed that “[i]f the supply side is competitive but the demand side is oligopsonistic, then all other things equal, high buyer concentration generally results in lower purchases below the competitive level.

The text of the Guidelines, however, does not yet capture this important element of collusionary exercise of buyer (monopsony) power (except in passing in paragraph 45). That failure creates a significant substantive gap, because collusionary monopsony power can significantly distort competition. The addition of such language would help DG COMP address such scenarios where they arise, as well as improve predictability for stakeholders reading the Guidelines. It may also improve international competition policy convergence, as the U.S. Department of Justice Antitrust Division has recognised, the significant anti-competitive effects that may arise from collusionary exercise of buyer power.

It would make the most sense to close the gap by adding this element to the opening “purpose and scope” section of the Guidelines, which “sets out the principles for the assessment under Article 101. ”

In any event, even in cases of ‘unilateral hold-out’, as other commentators have observed, such a view “is too simplistic”, noting that “competition policy must maintain the balance between SEP holders and potential licensees”.⁵⁶

We agree that: “Just as courts can (and do) hear antitrust arguments, so can competition authorities hear arguments about hold-out, including buyer-power arguments. Potential hold-out strategies are also a significant factor in understanding the competitive relationship between patentee and potential infringer”.⁵⁷ Recognising hold-out is key to any competition assessment in terms of understanding the market dynamics and the economic ‘context’.

Moreover, hold-out can distort competition as between implementers of standardised technology. Perversely, it gives wilful infringers a competitive advantage vis-à-vis good faith implementers who respect IPR and take a FRAND licence.

In the light of the above, we propose a revision of Chapter 7 of the Horizontal Guidelines to include the following text below paragraph 269:

Equally, the pro-competitive benefits of IPR in standard development may be undermined by users of a standard “holding-out” from accepting terms, offered by a holder of IPR essential to a standard, which provide effective access to that standard, as set out in paragraphs 283 to 285. In such cases, it is generally not a violation of competition law for an IPR holder to prevent the user of a standard having access, for example by seeking and obtaining a court injunction, where the user is unwilling to negotiate or does not act in good faith with the aim of concluding a licence to such IPR, such as by using delaying tactics to avoid taking a licence. Hold-out can be anti-competitive, deterring innovation and participation in pro-competitive standards development and distorting competition between implementers of standardised technologies. Since competition law focuses on the competitive process as a whole, equal treatment and weight should be applied to the licensing conduct of both IPR holders and the users of the standard who may benefit from the FRAND Commitment.

⁵⁶ See <https://www.iam-media.com/frandseps/hold-out-in-europe-recent-evidence-and-its-impact>.

⁵⁷ See <https://www.iam-media.com/frandseps/hold-out-in-europe-recent-evidence-and-its-impact>.

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?

Clarifying the scope of the provisions in Chapter 7 of the Horizontal Guidelines (i.e. that they are limited to/directed at ‘standardisation agreements’ and, therefore, should focus on governance and IPR policies, rather than licensing practices/bilateral licensing negotiations); acknowledging hold-out and adopting a balanced approach to hold-up and to hold-out; and revising the text of paragraph 285 of the Horizontal Guidelines would support the FRAND licensing framework, enabling fair and adequate compensation for developers of standard-essential technologies, and making their continued investment in R&D and contribution to open standards economically viable. This would have **a significant positive** impact on IP Europe’s members and ensure a sustainable ecosystem.

Conversely, LNGs risk exacerbating the hold-out issue and depressing FRAND royalties, which would effectively leave SEP owners with inadequate returns on investments in R&D and would ultimately disincentivise companies from investing in future technologies and participating in the development and improvement of open standards. **The negative impact on IP Europe’s members, the wider ecosystem and innovation would be significant.** Moreover, the lack of any decisional practice or jurisprudence in this area, and negative consequences of inappropriate intervention, is such that it would be premature and inappropriate for the CMA to issue guidance.