Sent to:
The Competition and Markets Authority
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The retained Horizontal Block Exemption Regulations – InterDigital response to Call for Inputs document

InterDigital, Inc ("**InterDigital**"), a US corporation with headquarters in Wilmington Delaware and research centres in England, France, Canada and the US, is engaged in the development of foundational wireless and video communications technologies and derives its income from the global licensing of products implementing those technologies.

For over four decades, InterDigital has been a pioneer in mobile technology and a key contributor to global wireless standards. It is also a key contributor to global video standards, conducting research in video, augmented reality, immersive content, and artificial intelligence technologies, and reinforcing that work with its acquisition of the research arm of Technicolor in June 2019. InterDigital does not manufacture devices; instead, it focusses on innovation through advanced research, often collaborating or partnering with other research-focused organisations[1] on specific projects. In particular, InterDigital is regularly selected as a research partner in collaborative projects funded by the Horizon Europe programme. Since 2000, InterDigital has invested more than 1.3 billion dollars in research and development. Those R&D efforts have resulted in critical inventions covered by a portfolio of approximately 28,000 patents and patent applications, spanning some 50 jurisdictions worldwide.

InterDigital creates the technology on which it secures patent protection: over 90% of its cellular wireless and video inventions were developed in-house by its engineers. In order to continue to fund its research and development efforts which contribute to the evolution of wireless, video and other standards, InterDigital licenses its worldwide portfolio of patents covering those advances. Large numbers of the most prominent technology companies globally, many of them also participating in standardisation of the same technologies, that are active in making wireless and other consumer electronics products implementing these standards, have recognised the strength and quality of InterDigital's patent portfolio and agreed to take licences for InterDigital's SEPs. Among its current and past licensees are companies such as Apple, Asus, Samsung, Sony, Ericsson, Google, Nokia, Panasonic, RIM/Blackberry, HTC, Huawei, LG Electronics, Pegatron, Wistron, Sanyo, NEC, Sharp, and as the most recent example, Xiaomi.

In this letter, InterDigital responds to the CMA's "Call for Inputs" document dated 24 November 2021. For ease of reference, we have set out the CMA's questions before our responses. As an innovator of such foundational technologies, InterDigital has been actively engaged in the standardisation process since the 1970's, and has a keen interest in ensuring the successful implementation of these standards in new markets, such as the Internet of Things (**"IoT"**). For that reason, InterDigital has focussed its responses to the issue of

[1] Examples of collaborations in the UK include University of Essex, Imperial College, Kings College London, University of Kent, University of Cambridge, University of Bristol and Coventry University.

standardisation and the licensing of standards essential patents ("**SEPs**") given that it has extensive experience of this activity and understanding of its role in the development and promulgation of innovation.

A1: 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.

(j) Information and communication;

(m) Professional, scientific and technical 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.

As noted above, in this response InterDigital focusses on the issue of standards, as collectively developed within standard development organisations ("**SDOs**") and where InterDigital has for many decades played an active role. For an understanding of the importance of proper and appropriate guidance/regulation in this area for innovation and general economic development, InterDigital refers the CMA to the Government's open consultation "Standard Essential Patents and Innovation: Call for views" dated 7 December 2021[2] where it states in the introduction to that consultation:

"The importance of standards is growing with the increasing globalisation of commerce, the emergence of new technologies and the need for interoperability. Technical standards are increasingly relied upon to enable users to send, receive and store ever larger quantities of data, and efficiently access, stream or store content online e.g. MPEG music files. In new markets, we have seen the requirement for digital, the Internet of Things (IoT) and Artificial Intelligence, products from different manufacturers needing to be able to seamlessly 'talk to' each other to provide value to consumers.

Standards and patents can span across multiple disciplines and sectors. In some cases, standards require the use of specific technologies protected by patents. A patent that protects technology which is essential to implementing a standard is known as a standard essential patent (SEP). Without using the methods or devices protected by these SEPs, it is difficult for a manufacturer (or "implementer" of the standard) to create standard-compliant products, such as smartphones or tablets.

Typically, SDOs will have IPR policies in place that ensure SEP holders, once their SEPs are declared as essential to the standard, provide a license to implementers of the SEP on fair, reasonable and non-discriminatory (FRAND) terms. This ensures the technical standards can be readily used by implementers of the standard.

The number of declared SEPs doubled on average every five years between the early 1990s to 2014. As of 2020, around 95,000 patents had been declared essential for the 5G standard. The Internet of Things (IoT) sector is also of growing importance, with 7.6 billion active IoT devices at the end of 2019, a figure which is predicted to grow substantially over the next 10 years."

[2] https://www.gov.uk/government/consultations/standard-essential-patents-and-innovation-call-for-views/standard-essential-patents-and-innovation-call-for-views

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).

At the end of 2021, InterDigital, Inc. and its affiliates had approximately 500 employees, more than half of whom are engineers.

Purchasing Agreements

HGL5: In relation to purchasing agreements:

(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.

InterDigital notes that the orthodox thinking in relation to joint purchasing (or collective purchasing) focuses in the main on the purchase of goods and volume efficiencies that may be created in the upstream market in terms of production; and, it is expected, such efficiencies are passed on to consumers by the joint purchasers. In such circumstances, joint purchasing is pro competitive. It is also relatively simple for competition authorities to issue a user friendly "safe harbour" where a relevant market in physical goods is relatively easy to identify and information on market shares readily available. The converse is the case with respect to markets where such production or other volume efficiencies are not possible and so the net result may be the shifting of rents from the upstream to the downstream markets due to pure bargaining power arising from the joint arrangement.

In markets where the upstream market is selling the fruits of R&D or the benefit of a creative "leap" , such a shift risks, in the long term, to stifle the incentive to innovate or create further generations of the innovation in question. Plus, such markets in question are more complex; more difficult to delineate, let alone calculate market shares and it is by no means the case that it can be assumed that the shifting of rents will be passed down to consumers, or that any efficiencies will be created. In such circumstances, it is difficult to see how the CMA can issue a credible safe harbour that would stand up to scrutiny once tested in "real life" circumstances.

By contrast to patent pools when complementary technology is the subject of the collaboration, companies in buyer groups will invariably be competitors and collaboration as between competitors will lead to enhancement of market power vis a vis the seller – and in the context of a market for the licensing of SEPs the seller is already constrained by the fair, reasonable and non-discriminatory ("**FRAND**") undertaking. This is a concern, even in the context of conventional economic consideration of buyer groups concerned with the purchase of goods, that the collusion that gives rise to undue market/bargaining power may result in the simple transfer of rents from the innovators to the implementers – but with no guarantee that any savings will be passed on to consumers (to the extent that any exist – as prices may indeed increase with increased transactional costs to the counter-factual). We note the Economic Discussion Paper commissioned by the then Office of Fair Trading "The competitive effects of buyer groups"[3] which also considered the theory of harm of "rent shifting".

In its contribution to the 2008 OECD Report on Monopsony and Buyer Power, the European Commission also explored the distributional effects that buyer power may create – notably where rents were transferred from the supplier to a buyer:

[3] The competitive effects of buyer groups by RBB Economics OFT 863.

> *"Such effects are purely distributional rather than absolute, but it may be argued that these distributional effects can lead to inefficiencies in the longer run. Lower input prices may slow the rate of innovation and the adoption of socially desirable product improvements. This would clearly be the case if such innovation and changes were not in the interests of the buyer when compared to the immediate short-term benefit. However, normally, innovations are also asked for on the sales market of the buyer and provide him with higher turnover. Therefore the company with buyer power would not have an interest in decreasing the innovative strength of its suppliers, especially if it has to be afraid of market entry of more innovative competitors outside his geographical market. Such market entry with more innovative products would not only diminish its profit, but would threaten its whole existence. So far, evidence seen by the Commission does not point to such dynamic effects but we welcome the OECD's discussion of this aspect of the subject in particular*."[4]

Standardisation Agreements

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?

For many years, InterDigital has been a contributing member of the European Telecommunications Standard Institute ("**ETSI**"), where it has very actively participated in the development of 2G, 3G, 4G, and 5G cellular standards. It is also a member of, and contributor to, many other SDOs which observe FRAND principles. InterDigital has disclosed thousands of its patents and patent applications to ETSI as potentially essential for cellular standards, and it undertakes disclosure of its potentially standard-essential patents as required by other SDOs. InterDigital thus has long and extensive experience with industry practice in licensing pursuant to SDO policies providing for owners of SEPs to be prepared to grant licences on fair, reasonable, and non-discriminatory terms.

As we explore below, in this response to the CMA's Call for Inputs document, InterDigital focuses in particular on three issues of concern to it:

a) the promulgation of inappropriate and static rules as to the ambit of FRAND terms. InterDigital refutes the notion that there is insufficient guidance as to the concept of a "FRAND" commitment and refers to its own experience in negotiating and concluding licences with willing licensees without recourse to litigation. We also refer to the case law developed in UK and EU domestic courts that has in the main found SEP owners to be

[4] OECD RoundTables: Monopsony and Buyer Power 2008 DAF/COMP (2008) 38 at page 260.

complying with *Huawei v. ZTE*[5] framework requirements; whereas the implementer did not (please see examples of case law on page 7 of this submission);

b) InterDigital is also concerned to ensure that IP rights owners can continue to license the technology that they have developed at the level of supply that the IP owners consider most efficient – which normally is the end device level. To that end, we are particularly concerned that there be a proper construction of paragraph 285 of the European Commission Horizontal Guidelines which reflects industry practice; and

c) InterDigital considers that paragraph 286 to the Horizontal Guidelines should be amended to make clear that SDOs which mandate royalty free licensing do not fall within the safe harbour, therefore require self-assessment, and are highly unlikely to meet the criteria set out in the Horizontal Guidelines insofar as they effectively exclude developers of technology who depend upon licensing income to finance such development.

(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?

InterDigital does not consider the Horizontal Guidelines or any other guidelines as adopted by the CMA to be the appropriate vehicle to prescribe what are or are not FRAND terms. This issue is the subject of negotiations as between the SEP owner and a putative licensee. As we note below, the vast majority of licences are resolved through negotiations and, exceptionally, there is recourse to litigation. The concept of FRAND terms in this area has been developed by domestic courts, with the UK courts in particular making a positive contribution.

It is InterDigital's view that a hypothetical analysis as to what FRAND should embrace sits ill in a static and prescriptive document. InterDigital considers that the evolution of what constitutes FRAND terms in this fast moving area, particularly given the introduction of 5G and the IoT, is more properly left to courts. In this context, InterDigital draws the CMA's attention to the Report of the Taskforce on Innovation, Growth and Regulatory Reform dated May 2021 which notes that "*replacing the EU model of regulation with a new UK Regulatory Framework, based on the Proportionality Principle and unlocking global UK leadership in innovative regulation, will be a major boost to both UK economic recovery and our long-term competitiveness*[6]. The Report later notes that "*If the Government wants regulation for innovation, then it needs innovation in regulation. A common law approach allows more forward-looking, judgement-based regulation without needing such complex and exhaustive rules for every situation set out in advance.*[7]*"*

InterDigital's wide and long standing experience is that it is possible to arrive at mutually agreeable FRAND terms on a negotiated basis with the majority of its licensees, and litigation occurs only on an exceptional basis. It is InterDigital's practice to offer third party arbitration at an early stage[8] if negotiations prove difficult, but in those instances implementers have almost all preferred to continue to negotiate. One may observe that this must be the case for other SEP owners – were it not so, then the incidence of litigation would be very many times greater than at present. The litigation which attracts so much attention is actually the tip of an iceberg which comprises numerous freely negotiated

[5] Case C-170/13 *Huawei v ZTE* EU:C:2015:477.
[6] The Report of the Taskforce on Innovation, Growth and Regulatory Reform dated May 2021, at page 10, https://www.gov.uk/government/publications/taskforce-on-innovation-growth-and-regulatory-reform-independent-report
[7] Ibid, paragraph 10.
[8] InterDigital Arbitration Principles: link

and concluded FRAND licences between SEP owners and manufacturers of smartphones, laptops and other devices.

Thus, InterDigital would encourage the CMA to embrace the opportunity to adopt an alternative approach to that of the EU and leave the issue of the ambit of FRAND terms to the faster and more agile approach of the common law. To the extent that the CMA wishes to retain any exploration of FRAND terms in its version of the Horizontal Guidelines, this needs to to be updated and rebalanced to take account of the more recent learning that FRAND is a principle which governs the conduct not just of the SEP owner but also of the putative licensee. This is of key importance in the operation of an efficient market for FRAND SEP licences, so that the standardisation system may continue to serve its purpose (to consumer benefit) and competing licensees with global reach can be confident of a level playing field.

It is notable that in recent cases brought before UK and EU domestic courts there have been numerous cases where the court found that the SEP owner met the framework requirements set out by the CJEU in *Huawei v. ZTE*, whereas the implementer did not. These cases do not show that there was difficulty in assessing FRAND terms, but rather that difficulties were caused by the implementer's refusal to participate in licensing negotiations in a manner consistent with the *Huawei v. ZTE* framework or to accept the FRAND terms.

Arguably these cases evidence a pattern of strategic behaviour known as "efficient infringement" or "hold-out". InterDigital has direct experience of such behaviour in its negotiations with Lenovo, which lasted for many years before InterDigital commenced UK proceedings against it, which remain to be resolved. The European Parliament has called on the European Commission to gather evidence on this topic[9] but, to InterDigital's knowledge, that exercise has not yet been commenced.

Recent cases in which EU domestic courts have concluded that the implementer failed to comply with the *Huawei v. ZTE* framework include:

a. *Pioneer v Acer* – Case No. 7 O 96/14 (Mannheim, Germany) 8 January 2016;

b. *Archos v. Philips* – Case No. C/09/505587 (The Hague, Netherlands) 8 February 2017;

c. *Fraunhofer-Gesellschaft (MPEG-LA) v ZTE* – Case No. 4a O 15/17(Düsseldorf, Germany) 9 November 2018;

d. *Tagivan (MPEG-LA) v Huawei* – Case No. 4a O 17/17 (Düsseldorf, Germany) 15 November 2018;

e. *Philips v Wiko* – Case No. C/09/511922/HA ZA 16-623 (The Hague, Netherlands) 2 July 2019;

f. *Sisvel v Wiko* – Case No. 7 O 115/16 (Manheim, Germany) 4 September 2019;

[9] The European Parliament called on the European Commission "to publish biannual reports evidencing actual cases of: (a) unlicensed SEP use (i.e. infringements) lasting for 18 months or more; and (b) issues regarding access to standards due to systematic non-compliance with FRAND commitments". See paragraphs 42 and 43 of the EP Resolution of 4 July 2017 on EU standards for 21st century (2016/2274(INI)).

g. *Sisvel v Haier* – Case No. KZR 35/17, Federal Court of Justice (Bundesgerichtshof) (Germany) 5 May 2020;

h. *HEVC (Dolby) v MAS Elektronik* – Case No. 4c O 44/18 (Düsseldorf, Germany) 7 May 2020;

i. *Nokia v Daimler* – Case No. 2 O 34/19 (Mannheim, Germany) 18 August 2020;

j. *Unwired Planet v Huawei* – Case No. [2020] UKSC 37 (London, United Kingdom) 26 August 2020;

k. *Sharp v Daimler* – Case No. 7 O 8818/19 (Munich, Germany) 10 September 2020.

l. *Conversant v Daimler*, District Court (Landgericht) of Munich 30 October 2020, Case-No. 21 O 11384/19.

These and other cases, notably the decision of the UK Supreme Court in *Unwired Planet v Huawei*, together with the CJEU's decision in *Huawei v ZTE*, have advanced the understanding of FRAND in the context of SEP licensing since the 2010 Horizontal Guidelines were issued. Any guidelines that the CMA may chose to issue should reflect that evolution in understanding, to the extent that the CMA decides to explore the concept of FRAND terms in the guidelines at all.

(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.

Paragraph 285 to the Horizontal Guidelines

Paragraph 285 to the Horizontal Guidelines provides as follows:

> *"285. In 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 <u>all</u> third parties on fair, reasonable and non-discriminatory terms ('FRAND commitment')"* (emphasis added)

The inclusion of the word *"all"* in this particular iteration of the Horizontal Guidelines is being mischievously misconstrued in some quarters in order to effectively deprive SEP holders of the ability to determine the point in the supply chain at which they license, contrary to well-established industry practice and contrary to any existing law. The reading that is being promoted would also result in an unwarranted shift in rents from innovators to implementers.

Such a removal of the freedom to contract, combined with the doctrine of exhaustion of the patent right on first sale, would deprive SEP holders of the choice as to the manner and means whereby they are able to achieve a fair return for the fruits of their research, sunk costs, innovation and successful competition against other innovators in the SDO context . Such a deprivation would be unwarranted, and unjustified as a matter of law and policy.

There is a multiplicity of actors in the innovators/standards setting space. The balance of market power between innovators and implementers has organically evolved over many years It is of concern to InterDigital that this particular misreading of paragraph 285 risks upsetting the status quo of this fair and delicate balance of proper compensation for innovators and FRAND access for implementers which will leave open the standardisation field to hostile actors who will wish to promote a nationalistic industrial policy or to simply devalue the innovation of SEP holders, which would severely affect the competitiveness of the UK market.

Companies such as InterDigital and other innovators depend solely upon revenues derived from one generation of technology to develop the next generation. If the notion of a so-called "*licence for all*" were to be adopted, the space for standards development would move away from the players who have consistently established a good example and have been key contributors in the standards setting and licensing space, which has to date been to the benefit of all stakeholders. This is clearly demonstrated by the unprecedented success of the cellular standards and the value that the universal availability of the cellular technology brings to society globally.

End User Device Licensing – "access to all"

The concept of *"access to all"* has long assured legal certainty and adequate and safe working of an intellectual property right ("**IPR**") by implementers when it comes to technical standards. It is accepted practice that FRAND terms and conditions are established by reference to the value that the licensed technology adds to the end user-device; such value being a subject of negotiation and agreement between the SEP owner and the end-user device manufacturer. The end-user device manufacturers do not have to worry about licences for the supply chain because, as a matter of practice, the licences granted for end-user devices include provisions for "have made" rights which allow sourcing and manufacture of components/products higher up in the supply chain.

As noted by authors Jean Sebastian Borghetti, Igor Nikolic and Nicholas Petit, in their paper *"FRAND Licensing Levels under EU Law"*[10], "*the current industry norm is to license SEPs on final downstream devices."* We believe that it is now commonly accepted that the value of cellular technology in a device, and therefore the appropriate royalties for that technology, should not be dependent on the level at which in the supply chain a licence is granted, but depend upon the ultimate use of that technology. It is also now accepted that there is not sufficient transaction income at the middle of the chain to enable payment of an appropriate royalty assessed at the end user level. This principle has been recognised, for instance, by the German courts[11], which held that the patent holder must, in principle, be *"given a share in the economic benefits of the technology to the saleable end product at the final stage of the value chain"*. This ensures that innovators are able to continue to develop the technology into further generations. Further, licences are usually concluded for a period of three to five years, enabling both the SEP owner and the implementer to adapt to evolving market practice and structure.

This basic licensing principle, which is common to all forms of IPR, enables the relevant IPR to be made available on appropriate terms and conditions in a manner conducive to the use of the technology in products as variable as high end sophisticated capital equipment to inexpensive

[10] *"FRAND licensing levels under EU Law"* Jean Sebastian Borghetti, Igor Nikolic and Nicholas Petit February 2020. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3532469 at page 3. Recently awarded Best 2021 Article on IP Law by Concurrences: https://awards.concurrences.com/en/awards/2021/academic-articles/

[11] DC Mannheim, judgment dated 18 Aug 2020 - 2 0 34/19, GRUR-RS 2020, 2035; DC Munich I, judgment dated 30 0ct 2020 - 21 0 3891/19; DC Dusseldorf, decision dated 26 Nov 2020 - 4c 0 17/19, GRUR-RS 2020, 32508; see also the Communication of 29 Nov 2017, COM(2017) 712 final, at p. 8

consumables. To take the instance of a smartphone, without cellular wireless technology consumers when on the move would not be able to talk on the handset, download an app, stream music, view a video, or forward photographs and videos. It would have a very different utility to a consumer. Absent cellular connectivity, there is no smartphone. By contrast, whilst cellular connectivity can add new, useful features to domestic "white goods" it is not necessary for their normal functioning.

In practice, a licence at a higher level in the value chain would generally not be workable and would lead to considerable inefficiencies for IPR owners in establishing and monitoring the ultimate deployment of the technology in question; and in establishing non-discrimination between competing prospective licensees. The suppliers in upstream do not necessarily know which end-user products their components are used in, which leads to a situation where the value of the technology (i.e. the fair and adequate royalty fee) could not be determined in line with the established practice, as explained above. Moreover, the IPR holder cannot ascertain which end products in the market are licensed (e.g. even if an upstream supplier does know the end-user products, in a competitive market nothing prevents the end-user product manufacturer from purchasing a competing component from an unlicensed supplier).

It would also cause inefficiencies for any diligent downstream manufacturers as they would necessarily have to ascertain whether multiple component manufacturers have necessary licences, and whenever they wanted to implement changes in their supply chain they would have to again ascertain the same. Obviously, monitoring the price of the IP would also be more difficult for the manufacturer as it would not be in a position to negotiate the FRAND licence itself. Also, the manufacturer would not necessarily know if the upstream supplier, which claims to be licensed, is indeed licensed or has paid for the licence, and therefore, the manufacturer does not know if its products eventually are fully licensed. Finally, the reciprocity requirement of a FRAND undertaking built into the ETSI IPR policy (i.e. reciprocity from a licensee that is also an SEP owner) could not really be ensured if licensing was mandated at a level other than the end product. It is also self-evident that SMEs would be particularly prejudiced, both at the end user and earlier levels in the supply chain as the added costs would have a greater impact on them.

No consideration of a 'licence to all' as a reading of paragraph 285 during consultation

A close consideration of the *travaux preparatoires* to the Horizontal Guidelines and previous versions of the Horizontal Guidelines reveals that so-called 'licence to all' was not considered at the time of adoption of current or past Horizontal Guidelines.

Para 166 of the 2000 Draft Horizontal Guidelines provided that: "*To avoid elimination of competition in the relevant market(s), access to the standard must be possible for third parties on fair, reasonable and non-discriminatory terms."* The word "*all*" is absent.

The final version of the 2001 Horizontal Guidelines included this wording (at para 174).

On 4 December 2008, the European Commission announced a public consultation on the functioning of the existing regime for the assessment of horizontal cooperation agreements under EU antitrust rules[12] The majority of contributions submitted to the European Commission did not address the issue of access to standards under paragraph 174 of the 2001 Guidelines.

[12] European Commission, IP/08/1887, 4 December 2008.

On 4 May 2010, the European Commission published a communication containing its draft guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements[13]. The 2010 Draft Horizontal Guidelines included a requirement at paragraph 282 that: "*The IPR policy should also require that all holders of essential IPR in technology which may be adopted as part of a standard provide an irrevocable commitment in writing to license their IPR to all third parties on fair, reasonable and non-discriminatory terms ("FRAND commitment")*".

At the same time, the European Commission announced a public consultation on the 2010 Draft Horizontal Guidelines[14]. Although the addition of (the then) paragraph 282 (now 285) was widely commented on by contributors, the requirement for holders of essential IPRs to license their IPR to *all* third parties was not addressed, save for one comment in relation to export controls.

Inclusion of the word *"all"* before "*third parties*" was therefore not supported. As noted above, no theory of harm to competition was identified to justify the inclusion, nor any decisional practice or judicial statement. Nor was it identified as having the reading it is now being given in some quarters.

The unexpected consequence is that paragraph 285 as argued would deny patent holders the legal right to choose the level where they wish to license their patents and would reverse a long established practice whereby a one stop access is afforded to all users of a patented technology along the supply chain. This also has the potential to deprive both the SEP holder and putative licensees of the efficiencies and certainties that arise from licensing the last manufacturer in a supply chain, causing severe disruption to the licensing market and legal uncertainty for the whole supply chain.

InterDigital invites the CMA, to the extent that it opts to replicate the Horizontal Guidelines, to consider the following two options to remedy this mischief:

a) maintain paragraph 285 as currently drafted. InterDigital requests that it should be made clear, as consistently maintained by the European Commission, that the Standardisation Agreements chapter of the Horizontal Guidelines establishes a 'safe harbour' only at paragraphs 280 - 286 and is not prescriptive; or

b) remove the word "*all*" in paragraph 285.

Paragraph 286 to the Horizontal Guidelines - mandatory royalty free licensing should not be within the safe harbour

In the context of the safe harbour provisions at paragraphs 280 to 286 of the Horizontal Guidelines, and in respect of disclosure of IPR at SDOs, paragraph 286 observes that:

> "*Since the risks with regard to effective access are not the same in the case of a standard-setting organisation with a royalty-free standards policy, IPR disclosure would not be relevant in that context*."

This appears to imply that it is possible for an SDO with a royalty-free standards policy to come within the safe harbour provisions. InterDigital disagrees with such an interpretation and considers that the

[13] SEC(2010) 528/2.
[14] European Commission, IP/10.489, 4 May 2010.

paragraph should be amended whereby a mandated royalty free standard would not benefit from a safe harbour.

As we note above, as a parameter required under competition law, FRAND is to be determined on a case-by-case basis, dependent on the circumstances and what is fair, reasonable and non-discriminatory as between the parties. It follows that it cannot be fixed by a policy that prescribes a single set rate, whether zero or any other rate. Royalty free terms may or may not be FRAND, depending on the circumstances. Notably, in some circumstances mandatory "royalty free" will not be FRAND, for instance where the licensor is not able to obtain a fair return for the use of its technology in other ways than through licensing.

It follows that licensors which depend upon licensing for a fair return are effectively excluded from participation in standard-setting by contributing technology in an SDO which has a mandatory "royalty free" policy. In this regard, we note that paragraph 264 to the Horizontal Guidelines identifies the scope for standard-setting activities to restrict innovation and technical development, and to foreclose innovative technologies.

Further, paragraph 266 observes that: "*the risk of limitation of innovation is increased if one or more companies are unjustifiably excluded from the standard-setting process*". Paragraph 295 addresses this in more detail; notably, it says "*The greater the likely market impact of the standard and the wider its potential fields of application, the more important it is to allow equal access to the standard-setting process*". Lastly, paragraph 297 observes that "*Any standard-setting agreement which clearly discriminates against any of the participating or potential members could lead to a restriction of competition*".

For all these reasons InterDigital considers that SDOs which mandate royalty free licensing require self-assessment, and are highly unlikely to meet the criteria set out in the Horizontal Guidelines. At the least, paragraph 286 should be amended accordingly.

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 impact to InterDigital and other innovators engaged in mobile and video technology and the IoT would be *significant* if the CMA were to adopt the proposed amendments to paragraphs 285 and 286 as it would create certainty and encourage a landscape for innovation.

It would also be *significant* for InterDigital, other innovators and implementers if the CMA were to desist from issuing static rules as to the ambit of FRAND terms, but permit a dynamic evolution of these rules to take place between contracting parties and courts.

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