

NOKIA CORPORATION

RESPONSE TO THE CMA CALL FOR INPUTS ON THE HBERS & HORIZONTAL GUIDELINES

Nokia welcomes the opportunity to provide input to the Competition & Markets Authority (CMA) on the review of the retained Horizontal Block Exemption Regulations (HBERs) and the Horizontal Guidelines.

We look forward to engaging further with the CMA as the review progresses, notably during the public consultation on the draft recommendation to government, which is expected early this year, as well as participating in any roundtables and/or bilateral discussions.

In any event, we hope that our initial input, which focuses in particular on the Horizontal Guidelines (specifically Chapter 7 the Horizontal Guidelines concerning 'standardisation agreements') set out below will assist the CMA in its assessment of these instruments and their role in the UK competition law regime going forward.

Nokia confirm that our response does not contain any confidential information.

About Nokia

See <https://www.nokia.com/about-us/>.

We create technology supported by intellectual property and long-term research, led by the award-winning Nokia Bell Labs. Adhering to the highest standards of integrity and security, we help build the capabilities needed for a more productive, sustainable and inclusive world.

Nokia has four business groups:

1. Mobile Networks;
2. Network Infrastructure;
3. Cloud and Network Services; and
4. Nokia Technologies.

Nokia Technologies is focused on disseminating Nokia's inventions across value-chains, based on licensing our valuable, world-leading Intellectual Property portfolio. At the same time, it is oriented towards sustaining Nokia's considerable R&D investments to maintain and grow our technology capabilities and solutions.

Since 2000, Nokia has invested more than €130 billion in R&D - over €4bn in 2020 alone (representing nearly 20% of Nokia's annual revenue) - and continues to make substantial investments in R&D and to generate new patented inventions. We have taken a leadership role in standards development. As a result, we now own one of the world's strongest patent portfolios of connectivity and multimedia technologies, with over 20,000 patent families (in November 2021 Nokia announced that we had reached the milestone of 4,000 patent families declared as essential to 5G standards – see [here](#)).

Many of Nokia's patents are Standard Essential Patents (SEPs) - inventions we have contributed to open industry standards, such as 3G, 4G or 5G, and which support the operation of these technical standards. Other companies can use these inventions without having to make their own substantial investment in R&D. This brings significant benefits to many companies, particularly in the era of the Internet of Things (IoT).

Nokia is both a major inventor and a licensee of other companies' technologies. The majority of Nokia's revenue stems from selling and supporting systems based on standardised technologies. We therefore believe in a fair licensing approach that strikes a balance between the needs of those who develop and contribute technologies to standards and those who implement them. This is achieved through fair, reasonable and non-discriminatory (FRAND) licensing of standard essential patents (SEP).

Through such licensing, Nokia enables others to benefit from our patented innovations and leading cellular SEP portfolio. Nokia has dedicated teams and licensing programs for four industries: [mobile devices](#), [consumer electronics](#), [automotive](#) and [Internet of Things \(IoT\)](#).

Introductory Remarks

We note that, in addition to the feedback from the current Call for Inputs, the CMA intends to draw on existing evidence from the European Commission's recent evaluation of the EU equivalents to the retained HBERs and the Horizontal Guidelines.

Nokia has contributed to the European Commission's ongoing review by responding to:

- The initial (6 November 2019 - 12 February 2020) public consultation;
- The Inception Impact Assessment (see [Feedback from: Nokia Corporation \(europa.eu\)](#)), where we also addressed the [Staff Working Document and its annexes \(SWD\)](#) and [Support study](#));
- The (13 July 2021 - 05 October 2021) public consultation (see [here](#)); and
- The targeted questionnaire on 'standardisation agreements'.

When providing feedback to the Commission, we noted that the fact that the pure implementers of standardised technologies greatly outnumber the companies that make large contributions to the standards means that responses to the consultation(s) will be statistically skewed to represent the interests of the pure implementers. We therefore highlight this to note the importance of attaching greater statistical weight to the responses of the companies which make large contributions to the standards in order to ensure an appropriate balance of interests between implementers and developers so that significant investments in standardised technologies continues. This applies equally to the CMA review process.

As the Call for Inputs observes, following the evaluation phase of its review, the Commission concluded that the HBERs and Horizontal Guidelines are still relevant, but that their effectiveness can be improved (see SWD). This is largely consistent with Nokia's experience,

as a business involved in horizontal cooperation agreements, since the current HBERs and the Horizontal Guidelines were introduced in 2010 – specifically: R&D agreements in the sense of art.1(1)(a) of the R&D BER and Chapter 3 of the Horizontal Guidelines; agreements involving information exchange in the sense of Chapter 2 of the Horizontal Guidelines; and standardisation agreements in the sense of Chapter 7 of the Horizontal Guidelines.

As regards the R&D BER, Nokia has collaborated with other industry players, academic institutions and/or SMEs on a range of R&D projects/initiatives. These take the form of bilateral agreements, with or without EU or national/regional funding, or multi-lateral agreements with multiple partners, including academia and SMEs, with or without EU or national/regional funding.

As regards standardisation agreements, as noted above, Nokia have taken a leadership role in standards development and contributed significantly to open industry standards, such as 3G, 4G or 5G.

As Nokia informed the Commission, the HBERs and Horizontal Guidelines remain relevant and are extremely useful in many areas but require updating in some areas to reflect business realities of today, especially in terms of digital and technologically advanced markets. Nokia also suggested that the examples set out in the Horizontal Guidelines should be revisited and further guidance provided especially in novel areas.

General impact assessment questions for all respondents to complete

Questions for stakeholder feedback and input

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.

- (c) Manufacturing;
- (j) Information and communication;
- (m) Professional, scientific and technical activities;
- (n) Administrative and support service activities;
- (s) Other service 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.

Chapter 7 of the Horizontal Guidelines on 'standardisation agreements' are relevant to a wide (and increasing) range of industries/sectors.

As the recent UK Intellectual Property Office (IPO) call for views (see <https://www.gov.uk/government/news/ipo-launches-call-for-views-on-standard-essential-patents-seps>) notes, the rise in the use of wireless technologies (3G, 4G and 5G) in telecommunications and the automotive industry, has seen greater interest in the licensing of patents and use of standards and that SEPs are also relevant for emerging and high-growth markets, such as IoT and AI.

Currently, Nokia has dedicated teams and SEP licensing programs for four industries: [mobile devices](#), [consumer electronics](#), [automotive](#) and [Internet of Things](#) (IoT).

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).

Large.

In FY2020, Nokia had 92 000 employees globally, 38 800 in Europe (including in the UK).

In terms of our UK operations, Nokia has offices in Bristol, Cambridge, London, and Reading. Nokia Bell Labs Cambridge has key expertise in multimodal artificial intelligence/machine learning for IoT and wearables, social computing and material science. It is a founding member of the "Research Centre for Mobile, Wearable Systems and Augmented Intelligence" with Cambridge University and has close collaborations with other UK universities, including Oxford University, UCL, Lancaster, Newcastle, and King College London.

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.

As regards Chapter 7 of the Horizontal Guidelines, by their nature, open standards provide a platform for all companies (including SMEs and 'start-ups') to collaborate on technology development. This allows smaller companies the ability to achieve the scale necessary to compete with global tech giants. Anyone can contribute their technology, and everyone has access to the standard.

RESEARCH AND DEVELOPMENT BER

Questions for stakeholder feedback and input

Policy questions

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

(a) Has the R&D BER contributed to promoting competition in the UK? It would be helpful to have some examples, if possible.

(b) Has the R&D BER contributed to promoting economic activity that benefits consumers in the UK and would not otherwise have occurred? It would be helpful to have some examples, if possible.

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

(d) Are there UK-specific considerations that the CMA should take into account in its review of the R&D BER? If so, it would be helpful if you could indicate why those differences are needed or justified (which might, for example, be because of particular characteristics you identify in the UK market that differ from the EU market).

(e) Are the current rules discouraging any category of business, institute or body from entering R&D agreements?

In our view the HBERs and the Horizontal Guidelines, including the R&D BER have contributed to promoting competition and economic activity (including in the UK), but they have contributed only to a certain extent or only in specific sectors. As noted above, we believe that they should be updated based on business realities of today, especially in terms of digital and technologically advanced markets and take account of complex market environments where traditional mechanical market share/competitor vs. non-competitor rules are not necessarily practical or useful in all cases. The R&D BER should seek to better meet the demands of highly dynamic and innovative markets related to technological and digital industries in order to boost growth and competition.

We have entered into R&D agreements in the sense of art.1(1)(a) of the R&D BER and Chapter 3 of the Horizontal Guidelines. We regularly consult these instruments for guidance in this regard. We have relied upon an exemption/exemptions under the R&D BER.

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

(a) Are the definitions included in Article 1 sufficiently clear to allow you to identify the categories of agreement that can benefit from the retained R&D BER? If not, how should the definitions, in your view, be clarified or amended?

(b) Are there any additional categories of agreement that are not already included in the definition of ‘research and development agreement’ that, in your view, would be likely to meet the requirements for exemption from the Chapter I prohibition under section 9 of the Competition Act 1998?

The concept of “relevant technology market” and “potential competitor” under Article 1 of the R&D BER is not always straightforward in complex markets and would benefit from further guidance.

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

(a) Is the requirement for ‘full access’ rights to the results of the R&D covered by an agreement sufficiently clear to allow you to identify the circumstances in which agreements will benefit from the R&D BER?

(b) Is the requirement for access to pre-existing know-how sufficiently clear to allow you to identify the circumstances in which agreements will benefit from the R&D BER?

(c) From your perspective, should the requirement(s) of full access to the results and/or access to pre-existing know-how be maintained? Would you or those you represent benefit from any modification or removal of these requirements?

(d) To what extent might the scope of the R&D BER need to be extended to adequately capture the pre-commercialisation stages of R&D, including the early stages where any prospect of commercialisation is several years away?

(e) To the extent not already covered by your responses to questions 18(a) to (d), are the conditions for exemption sufficiently clear? For example, evidence received in the EU evaluation raises the question of whether SMEs, research institutes and academic bodies may be discouraged from entering into R&D agreements under the current rules. We also would like to understand more broadly whether stakeholders consider the R&D BER strikes the correct ‘balance’ between the promotion of competition and incentives to invest in R&D activity.

“Full access” in terms of duration under Article 3.2 of the R&D BER would benefit from clarification.

In our experience as a large company, the condition of full access rights to final R&D results and the access to pre-existing know-how are an important element when such access is necessary for allowing the parties to exploit the results based on their entitlement under the R&D cooperation agreement. If these access rights would be limited, this would possibly lead to making the cooperation agreements less attractive for large companies, because it could negatively impact the exploitation potential of the results of the cooperation. The preferred solution is to specify that access rights to R&D results and pre-existing know-how are granted if needed for the exploitation of the results as provided under the R&D agreement.

A limitation of full access to final R&D results could negatively impact the conclusion of R&D cooperation agreements for larger companies whose objective is to secure the exploitation potential of the results.

As is standard practice, the know-how contributed to the cooperation can be listed in an annex to the cooperation agreement.

A party can always choose to not list any know-how. Therefore, we are of the opinion that the condition to provide access rights to pre-existing know-how if needed for the exploitation of the results as provided under the R&D agreement does not discourage the conclusion of cooperation agreements.

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

(a) From your experience, does the 25% market share threshold allow most R&D agreements that would be likely to benefit from an individual exemption to be block exempted? It would be helpful to have some examples, if possible.

(b) Does the current duration of the benefit of the R&D BER for non-competing companies under Article 4(1) and competing companies under Article 4 (2) of the R&D BER remain appropriate? If not, please explain why this is so and set out what would in your view be an appropriate duration.

(c) Are the terms on which the market share threshold shall apply, as explained in Article 7 of the R&D BER, sufficiently clear and do they remain appropriate? If not, please explain why and how they should be clarified or amended.

For competing undertakings, the market share threshold can in practice be difficult to apply, especially in industries where information on market shares or volumes is not available. In addition, R&D agreements often relate to markets that do not exist or whose boundaries are not well defined. In that context, it is exceedingly difficult to rely on market shares to determine whether the exemption applies.

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

(a) Is the current list of hardcore restrictions sufficiently clear? Please explain your position.

(b) Are there any further restrictions that it would be appropriate to treat as hardcore restrictions, in addition to those set out in Article 5 of the R&D BER?

(c) Is the current list of excluded restrictions sufficiently clear? Please explain your position.

(d) Would it be appropriate to remove or modify any of the excluded restrictions? Please explain your position.

(e) Are there any further restrictions that it would be appropriate to exclude from the benefit of the exemption, in addition to those set out in Article 6 of the R&D BER?

Impact assessment questions

R&D6: To the extent your answers to questions R&D1 to R&D5 suggest potential changes to the R&D BER, what impact would these have on your business or the businesses that you advise? Would this impact be negligible, moderate or significant?

Updating the HBERs and the Horizontal Guidelines (i) based on business realities of today, especially in terms of digital and technologically advanced markets; (ii) to take account of complex innovative market environments where traditional mechanical market share/competitor vs. non-competitor rules are not necessarily practical or useful; and (iii) to

clarify the aspects identified in our previous responses would have a moderate to significant beneficial impact in terms of providing greater legal certainty, potential (legal and other) costs savings and encouraging collaborative R&D.

Conversely, as noted above, the condition of full access rights to final R&D results and the access to pre-existing know-how are an important element for an adequate cooperation. If these access rights were to be limited, this has the potential to make cooperation agreements less attractive, because it could impact negatively the exploitation potential of the results of the cooperation. A limitation of full access to final R&D results and/or to pre-existing know-how could have a potentially significant negative impact on our ability and incentives to conclude of R&D cooperation agreements

R&D7: If the market share threshold under Article 4 of the R&D BER were to change, what would the impact on your business, or the businesses that you advise, be? For example, if the threshold were to be raised or lowered by 5% what would the impact be, and would it be negligible, moderate or significant?

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

(f) Would you expect your business to incur costs to understand the relevant legal framework and how it may impact your business (eg costs for legal or expert advice) in the following scenarios?

(i) The R&D BER lapses on expiry on 31 December 2022.

Yes. We anticipate that the costs in this scenario would be significant.

(ii) The R&D BER is replaced from 1 January 2023 by an equivalent UK block exemption.

Yes. Although we anticipate that the costs in this scenario would be more moderate (or possibly negligible) depending on the extent and nature of any changes.

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

(g) Would you expect your business to incur costs to implement the relevant legal framework (eg costs to change your current business plans) in the following scenarios?

(i) The R&D BER lapses on expiry on 31 December 2022.

Yes. We anticipate that the costs in this scenario would be significant.

(ii) The R&D BER is replaced from 1 January 2023 by an equivalent UK block exemption.

Yes. Although we anticipate that the costs in this scenario would be more moderate (or possibly negligible) depending on the extent and nature of any changes.

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

HORIZONTAL GUIDELINES

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.

The HBERs (notably the R&D BER) and the Horizontal Guidelines complement each other and HBERs would be more difficult to understand and apply without the Horizontal Guidelines. The Guidelines put the HBERs in (correct) context although, as noted above, they would benefit from being updated in terms examples cited.

The Horizontal Guidelines should be consistent with the UK's broader strategic priorities and goals across all policy areas most notably industrial policy and IPR policy, sustainability, and the digital agenda. Strong IPRs are crucial for delivering the innovation-led growth necessary for the UK's future prosperity and 'building back better' and, in the face of increasingly competitive global markets, realising the government's vision to make the UK a global hub for innovation by 2035 (see, for example, the [UK Innovation Strategy](#)).

As regards the coherency of Chapter 7 of the Horizontal Guidelines with other rules and guidance in the UK, the UK Intellectual Property Office (IPO) recently issued a call for views in order to better understand how the current Standard Essential Patents framework encourages innovation and promotes competition (see <https://www.gov.uk/government/news/ipo-launches-call-for-views-on-standard-essential-patents-seps>). In view of the potential overlap of issues between the two initiatives, where applicable, it would be helpful for the CMA to take into account and ensure alignment with the IPO's consultation and findings as regards this Chapter.

(b) Would guidance in relation to any categories of horizontal cooperation agreement that are not covered in the Horizontal Guidelines be of benefit?

See responses to HGL5 and HGL7.

(c) Would guidance in relation to digital-related issues, in revised or supplemented Horizontal Guidelines be of benefit to UK businesses, eg 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.

Sustainability & Digitalisation

At Nokia, we help build the capabilities needed for a more productive, sustainable and inclusive world through standardised technologies.

Technology holds the key to many of today's challenges and opportunities, particularly those based on common standards. We believe the technology Nokia provides in this regard enables both environmental and societal benefits to individuals, industries and society by pushing the boundaries of communication technologies. Information on our strategic approach to sustainability is available at: <https://www.nokia.com/about-us/sustainability/our-approach/> and [Sustainability | Nokia](#). See also the NBC interview with Pekka Lundmark: No green without digital ([here](#)) and Pekka Lundmark speaking about "Sustainable possibilities: Making technology work for the digital world" ([here](#)).

We believe that open collaboration brings the greatest impact in these areas. We work with a broad range of stakeholders including industry partners, engaging with policy makers, international and multi-lateral organisations, civil society and academia, to help drive forward the digital economy and society. We have worked with the World Economic Forum, contributing to a number of projects such as the report 5G Outlook Series: "Enabling Inclusive Long-term Opportunities".

Our President and CEO joined the EDISON alliance, an open-ecosystem of change-makers, coming together to drive the case for digital investment. Nokia Bell Labs' Distinguished Academic Partners Program engages with the top university and academic minds to positively transform human existence. In South Africa, working with Forge Academy we launched a fully inclusive AI laboratory. Our University donations program targets sponsorship of research into topics directly related to our business such as future 6G or AI, such as our collaboration with the Indian Institute of Science to establish a robotics lab looking at 5G and emerging technologies as a basis for developing use cases with a social relevance.

While competition policy has a role in promoting digitisation and sustainability goals, we agree with the CMA's [Guidance on environmental sustainability agreements and competition law](#) 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".

As regards standardised technologies, we license our cellular patents that have been incorporated in the 2G-5G standards on FRAND terms in accordance with the IPR policies of the relevant SDOs in a growing number of sectors/industries – thereby ensuring fair access to our technologies for all. FRAND licensing strikes a fair balance between the needs of those who develop technologies and those who implement them. It enables fair and adequate

compensation to the developers of standardised technologies, making continued R&D investments in future standards economically viable. In these circumstances, it is imperative that Chapter 7 of the Horizontal Guidelines ensure a balanced framework for the licensing of SEPs, which supports continued and sustainable contribution of technology by innovators, such as Nokia, to open standards.

In this regard, we note that the Guidance on environmental sustainability agreements and competition law includes a section on "use of a fair standard-setting process, which 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". This misrepresents how SSO/SDO IPR policies operate and is contrary to industry practice. As discussed in more detail below (see response to HGL7) competition law does not impose a 'license to all' requirement and consequently, in order to ensure a balanced approach, we propose that the reference to "to all third parties" be removed from para. 285 of the Horizontal Guidelines.

(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 responses to R&D1-5, HGL5 and HGL7.

(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.

See responses HGL5 and HGL7.

HGL2: In relation to information exchange:

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

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

(c) Are there otherwise any areas of Chapter 2 of the Horizontal Guidelines on information exchange which require further clarification? If so, please explain which areas are unclear and, to the extent possible, provide examples of the sort of co-operation that would benefit from this clarification.

HGL3: In relation to R&D agreements:

(a) Are there areas of Chapter 3 of the Horizontal Guidelines on R&D agreements which require further clarification? If so, please explain which areas are unclear and, to the

extent possible, provide examples of the sort of co-operation that would benefit from this clarification.

See the responses to R&D1-5.

HGL4: In relation to production agreements:

(a) Are there areas of Chapter 4 of the Horizontal Guidelines on production agreements which require further clarification? If so, please explain which areas are unclear and, to the extent possible, provide examples of the sort of co-operation that would benefit from this clarification.

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.

According to the SWD, the evidence gathered by the European Commission during its evaluation suggests that Chapter 5 of the Horizontal Guidelines is overall a useful instrument but does not fully meet its objective regarding the provision of legal certainty.

In particular, the evaluation identified that: (i) certain provisions of Chapter 5 of the Horizontal Guidelines lack clarity, in particular, on the distinction between joint purchasing agreements and buyer cartels, joint negotiation and joint bidding; and (ii) the Chapter 5 analysis is too focused on positive downstream effects on consumers without sufficient consideration for potential negative effects on suppliers and competitors. We agree with this assessment for the reasons set out below.

Licensing Negotiation Groups

The Commission's recent public consultation and targeted questionnaire on standardisation agreements included questions on joint negotiation of licences by potential licensees – so-called 'licensing negotiation groups' (LNGs). However, the Commission gave no indication of what this might entail. For this reason alone, we raise this concept here, although no such concept exists in the current Horizontal Guidelines.

It is difficult to consider LNGs in the abstract, however, we note that the SEPs Expert Group Report touches upon the question whether groups of implementers / potential licensees could collectively negotiate with individual or groups of SEP holders and patent pools, it may lower transaction costs, notably for SMEs and smaller companies (specifically IoT 'start-ups') lacking requisite expertise and experience in IP/SEP licensing.

The SEPs Expert Group, however, raised legitimate concerns that LNGs would offer additional hold-out opportunities for implementers (i.e. coordinated hold-out/collective boycott) to delay or avoid the conclusion of licensing agreements; and could be used as a cover for a buyers' cartel(s), which would depress SEP royalties.

Similar concerns have been raised in other fora. See, for example, <https://www.4ipcouncil.com/research/licensing-negotiation-groups-what-why-how> and <https://www.4ipcouncil.com/research/licensing-negotiation-groups-seps-collusive-technology-buyers-arrangements-pitfalls-and-reasonable-alternatives>. Unlike the situation for joint purchasing arrangements, implementers have access to and use standardised technology without first having to obtain a license – i.e. implementers are not in the same position as members of joint purchasing arrangements looking to buy products and/or services. Some implementers willfully infringe SEPs, by for example avoiding taking a licence, on the basis that they will only ever be required by a court to pay FRAND royalties.

As regards the aggregated share of the potential licensees in the relevant licensing market, we note that buyer power can arise from much smaller market shares than is usually associated with seller power. Rather than putting negotiations on a more equal footing, the collective market power of LNG members could unjustifiably drive down royalty rates below a FRAND level. It must not only be FRAND for the licensee but the licensor as well.

The 'FRAND context' heightens, not mitigates, the risks in this regard and is another relevant consideration. LNGs would be able to exercise power over SEP-holders to force prices below a competitive level. Equally, while the 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 are applicable to other similarly situated organisations/companies, which means that the terms negotiated with the LNG would be argued to have broader implications.

The implication in the Commission's questionnaires, that LNGs may be needed to counter-balance alleged market power of SEP-holders or patent pools, is misguided given the absence of evidence of actual hold-up, especially where each LNG member can rely on the FRAND commitment made by the SEP holder. Moreover, patent pools combine complementary technologies and simply represent another option for licensees to obtain licenses in a cost-effective manner (as an alternative to direct licensing). By design, and as a result of competition law requirements, pools do not restrict the ability of licensees to enter into bilateral negotiations to obtain individual licenses outside the pool, so there is no "market power" created or exercised by patent pools that needs to be countered.

In theory it is conceivable that LNGs would generate some cost savings for participating licensees and SEP-holders around the negotiating process. However, it is unclear that LNGs would deliver sufficient efficiencies in practice. Efficiencies/economies of scale would likely only arise if LNGs are mandatory/exclusive, yet this increases risk of hold-out behaviours to avoid taking a licence and would unduly restrict choice for implementers and SEP-holders; effectively precluding SEP-holders from pursuing negotiations and concluding agreements with individual implementers in order to secure royalties to be reinvested in R&D for future

standardised technologies and to support standardisation efforts. In any event, similar (or greater) cost savings could be achieved through patent pools. See, for example, <https://www.4ipcouncil.com/research/economic-case-against-licensing-negotiation-groups-internet-things>.

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

(a) Is further guidance needed on any other category of commercialisation agreement not already covered in Chapter 6 of the Horizontal Guidelines, eg the assessment of joint bidding and non-indispensable consortia?

(b) The Horizontal Guidelines currently state that market power is unlikely when parties to a commercialisation agreement have a combined market share below 15%. Does 15% remain an appropriate level for this ‘safe harbour’? If not, please explain why, and what you think would be a more appropriate threshold.

(c) Are there otherwise any areas of Chapter 6 of the Horizontal Guidelines on commercialisation agreements which require further clarification? If so, please explain which areas are unclear and, to the extent possible, provide examples of the sort of co-operation that would benefit from this clarification.

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.

Chapter 7 of the Horizontal Guidelines has provided and continues to provide a useful guide for collaborative industry standardisation activities where IPR is involved. We can expect that new standardisation entities will be created in the future that may find the Chapter useful in establishing their IPR policies. Aside from an anomaly in para. 285 (discussed below), the Horizontal Guidelines encourage clear, transparent, and balanced IPR policies, recognising the important and delicate balance between (1) ensuring access for those wanting to use

standardised technology covered by essential IPR (see e.g. paras 283-287) and (2) providing FRAND compensation for holders of essential IPR.

The Horizontal Guidelines recognise that *“nothing in these Guidelines prejudices the possibility for parties to resolve their disputes about the level of FRAND royalty rates by having recourse to the competent civil or commercial courts”* (para. 290). This remains important and relevant guidance in case disputes cannot be resolved amicably by the parties directly or through other channels. The Guidelines should continue to focus on standardisation agreements, in line with Chapter 1 of the Competition Act, and leave commercial matters outside the scope of this Chapter, such as bilateral licensing of IPR, to the courts.

While Chapter 7 of the Horizontal Guidelines is generally clear, there are a few areas that would benefit from clarification:

Scope of Chapter 7: Standardisation Agreements

Chapter 7 of the Horizontal Guidelines, targeted at ‘standardisation agreements’ and its provisions, should focus on participation in and contribution to standards, SDOs’ governance and IPR policies, rather than SEP licensing practices, including bilateral SEP licensing negotiations (see e.g. paragraph 285 of the current Horizontal Guidelines, discussed in more detail below).

Clarification of the FRAND Commitment

Recently, a number of implementers have been controversially arguing that paragraph 285 of the current Horizontal Guidelines requires SEP holders to license anyone who asks (i.e. ‘license to all’). This argument is at odds with not only long-standing industry practice but also the rest of the Horizontal Guidelines, which are premised on access to standards (i.e. ‘access for all’), as enshrined in the access-based IPR policies of SDOs, including ETSI. The inability to obtain a licence does not in itself prevent access to a market, it is merely a contractual agreement to ensure an SEP holder can obtain royalties for its patented technologies. Implementers have access to the market for standardised technologies by default, through competition law. For this reason and others, competition law does not require ‘license to all’.

Certain implementers nevertheless misconstrue and invoke the anomaly in para. 285 to deflect responsibility for taking a licence from themselves to their suppliers, as a delaying tactic and to depress FRAND royalty rates.

There are compelling legal, economic, policy and logistic arguments that support single-point licensing at the end-user product level, which have been addressed in detail in numerous publications. For example, patent exhaustion prevents holders of standard essential patents from licensing the same standard essential patents at multiple levels of the supply chain. This approach of single-point licensing at the end-user level is customary for mobile devices and

has become the established model for SEP licensing across a variety of other sectors/industries, most recently in the automotive sector.

Likewise, although the SEP Expert Group decided not to take position as to what is the appropriate level where licensing should take place, the first of the principles set out in this Group's report advocated licensing at a single level in a value chain and outlined the benefits of this approach (see [Report from the Group of Experts on Licensing and Valuation of Standard Essential Patents 'SEPs Expert Group'](#)).

Single point licensing means only one, readily identifiable entity in the supply chain needs a licence. Suppliers get access without a separate licence. By contrast, licensing anyone who asks means the entire supply chain are potential licensees, exposing suppliers to complex licensing needs, making licensing more arduous, inefficient, and costly for everyone.

Experience shows single-point licensing does not distort competition, disrupt the market, or harm consumers, but does allow access to standards for all. However, obliging SEP holders to 'license to all' would undermine incentives to invest in R&D, discourage participation in open standards, and dramatically increase the complexities and cost of licensing.

To clarify Chapter 7 of the Horizontal Guidelines and provide legal certainty, the anomaly in paragraph 285 should be addressed by deleting the text "all third parties". As noted above, the Guidance Environmental sustainability agreements and competition law published on 27 January 2021 would also require amendment.

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 proposed clarifications/minor amendments outlined in our responses to the questions in this section would provide greater legal certainty and ensure a fair balance between the needs of those who develop and contribute technologies to standards and those who implement them. This would have a significant positive impact for Nokia enabling us to continue to invest in future technologies and participate in the development and improvement of open standards.