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**Response by Cleary Gottlieb Steen & Hamilton LLP to the CMA's  
consultation on draft guidance on the application of the Chapter I  
prohibition in the Competition Act 1998 to horizontal agreements**

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March 8, 2023

CLEARY GOTTLIB STEEN & HAMILTON LLP

**Response to the CMA’s consultation on the draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements**

**I. Summary**

1. We are grateful for the opportunity to comment on the draft guidance of the UK Competition and Markets Authority (**CMA**) on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements (**Draft Guidance/new Guidance**).<sup>1</sup> We plan to comment on the section on sustainability agreements separately, now that it is publicly available. We also refer to our Response of May 9, 2022, to the CMA’s public consultation on the draft guidance to the proposed Vertical Agreements Block Exemption Order.
2. The Draft Guidance improves legal certainty, and our comments are limited to a few remaining issues. Summarized:

- **‘Ancillary’ restrictions.** We propose that the CMA supplement paragraph 3.40 with a few examples of ‘ancillary’ restrictions. Absent such examples, the discussion on the ‘ancillary’ restrictions would be limited to general principles, provide limited legal certainty.
- **Standardization agreements.** We encourage the CMA to develop a somewhat more detailed framework for guidance on assessment of licensing negotiation groups (**LNGs**) that jointly negotiate licences with holders of standard-essential patents (**SEPs**) and SEP patent pools. We propose to discuss these LNGs in the standardization section, instead of the joint purchasing section, or at least to insert a cross-reference in the standardization section.

Additionally, we recommend that the new Guidance should not require any specific form of patent disclosure in a standards development context. We also put forward a few text revisions in relation to the paragraphs dealing with the fallout of the *Huawei-ZTE* judgment (in particular relating to discriminatory licensing of SEPs).<sup>2</sup>

3. Amendments proposed along our comments are indicated in text boxes. Text additions or changes are marked in **bold**. Deletions are marked with ~~strikethrough~~.

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<sup>1</sup> These comments are submitted as a contribution to policy consultation, and do not bind the firm or its clients.

<sup>2</sup> Case C-170/13, *Huawei Technologies Co. Ltd V. ZTE Corp. And ZTE Deutschland GmbH*, ECLI:EU:C:2015:477, 2015.

## II. ‘Ancillary’ restrictions

4. In paragraph 3.40, the Draft Guidance describes the notion of ‘ancillary’ restrictions. Unlike elsewhere<sup>3</sup>, the draft does not contain examples of restrictions that fall under the definition of ‘ancillary’ restrictions.
5. The Draft Guidance would benefit from the inclusion of examples, so that businesses know from the outset which restrictions can clearly be ‘ancillary’ and which merit closer analysis. They could include:
  - exchange of information on prices and sales in the context of production agreements involving the joint distribution of the jointly produced products (paragraph 5.54);
  - exclusive supply/purchase obligation in relation to a unilateral and reciprocal specialization agreements (paragraphs 5.65-5.66);
  - exchange of technical information needed for standard setting;
  - *ex ante* disclosure of technical information and maximum royalty rate in standardization agreements (paragraph 9.42); and
  - proportionate non-compete clauses between parent companies and a joint venture undertaking.
6. The CMA can also add a cross reference to paragraph 4.10 of the Draft Sustainability Guidance, which contains a helpful example of an ancillary restriction in the context of sustainability agreements.

## III. Standardization agreements

### *(a) Licensing Negotiation Groups*

7. The Draft Guidance contains a brief mention of LNGs in paragraph 6.2, in the section concerning joint purchasing agreements. The mention of LNGs in this section may be out of place, as there are important differences that distinguish LNGs from joint purchasing agreements.
8. Joint purchasing agreements are primarily associated with the procurement of physical goods and services, while LNGs relate to the joint purchase of technology (*i.e.*, intangible assets). They are the mirror image of patent pools. The proposed safe harbour for joint purchasing agreements is subject to a market share ceiling to control for the potentially negative effects of increased market power of a joint buyer group. In contrast, LNGs that jointly negotiate licenses of SEPs for standards should not be subject to such a ceiling.

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<sup>3</sup> By way of example, please refer to Annex C of the Guidance on the CMA’s jurisdiction and procedure in merger cases, as well as paragraph 4.10 of the CMA’s Draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements (**Draft Sustainability Guidance**).

Like patent pools, such LNGs are more efficient if they aggregate as many buyers as possible. The framework of assessment of LNGs should not be based on market share thresholds, but focused on other behavioural principles discussed in more detail below.

9. In addition, the Draft Guidance allows temporary threats of joint purchasing groups to abandon negotiations unless they are offered better terms or lower prices. Under paragraph 6.38, the CMA does not consider such threats to amount to a restriction of competition by object in the context of joint purchasing agreements. When it goes to LNGs, however, such steps may in certain instances be viewed as a “hold out” tactic which may raise concerns if combined with bans on individual negotiations.
10. Given these differences, we recommend that LNGs relating to SEPs should be discussed in the section dealing with the standardization agreements, and propose to include some principles for assessment of LNGs for SEPs. We discuss in the next sections the procompetitive nature of LNGs for SEPs, articulate anticompetitive risks of such LNGs, and propose a safe harbour framework.

*(i) Pro-competitive nature of LNGs*

11. Joint negotiation for licenses to SEPs is not a restriction of competition in itself, but is generally pro-competitive as it gives rise to efficiency gains.
12. The first efficiency is reduction of transaction costs. LNGs allow for one-stop licensing of SEPs, especially if the licensors operate jointly as a pool as well. This efficiency is particularly important in sectors where both ownership of intellectual property rights is dispersed and implementation is fragmented – as is the case increasingly in new technology areas such as the Internet of Things and telecommunication. Elimination of multiple bilateral negotiations through collective action substantially reduces transaction costs.<sup>4</sup>
13. Second, cooperation through LNGs reduces the imbalance of negotiating power inherent in licensor patent pooling. In a regime where only one side is allowed to collaborate, the negotiations tend to be asymmetric and imbalanced. LNGs can reduce the existing information asymmetries that a licensor could exploit (in particular a pool, since licensors and licensor pools know the terms and conditions of all existing licenses for the standards they license, whereas licensees tend to know only their own, if any, even though they should be entitled to non-discriminatory licensing terms). By combining their information on the features and economic value of SEPs, SEP implementers can obtain a better idea of the economic value of the licence offered by SEP holders. The cost of collecting and verifying such information would be reduced.
14. Third, LNGs allow parties to overcome the collective action problem or first-mover-disadvantage that may exist where there are a large number of similarly situated implementers. SEP implementers may compete against one another, in product markets

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<sup>4</sup> Group of Experts on Licensing and Valuation of Standard Essential Patents ‘SEPs Expert Group’ - [full contribution](#) (page 170).

where SEP royalties are a potentially significant input cost.<sup>5</sup> SEP implementers are in theory entitled to a license on “fair, reasonable, and non-discriminatory” (FRAND) terms (royalty-bearing or royalty-free), to ensure a level playing field, but in practice have no adequate means to monitor or ensure non-discrimination. This concern is exacerbated by the recent judgment of the UK Supreme Court (UKSC) in *Unwired Planet v Huawei*.<sup>6</sup> The UKSC held that non-discrimination is not a separate requirement from the obligation to license on fair and reasonable terms.<sup>7</sup> So long as Unwired Planet’s rate to Huawei was not unfair and did not exceed a “single royalty price list available to all”, it could charge Huawei significantly more than Samsung. According to the UKSC, discrimination is the “norm as a matter of licensing practice.” To reduce that risk, individual SEP implementers have an incentive to delay taking a license, so as not to end up paying more than competing firms.<sup>8</sup> Thus, even if an agreement on a FRAND rate can be achieved, there is a rational, systemic incentive for SEP implementers (*i.e.*, a collective action problem) not to take an independent license. This could lead to holdout. By negotiating through an LNG, licensees can take comfort from the fact that they will all pay the same for the same products.

15. The efficiencies associated with LNGs equally benefit SEP holders. LNGs can have a positive impact on standard dissemination, as they enable SEP holders to reach a larger pool of licensees at decreased costs and with less delay, while avoiding hold-out incentives. The more licensees participate in the LNG, the greater these benefits are.
16. There is a parallel with patent pools which are free to negotiate royalties and exchange information to that end. See paragraph 268 of the EU Guidelines on technology transfer agreements (TT Guidelines), “[u]ndertakings setting up a technology pool that is compatible with Article 101 of the Treaty, **are normally free to negotiate and fix royalties for the technology package (subject to any commitment given to license on fair, reasonable and non-discriminatory terms, FRAND) and each technology's share of the royalties either before or after the standard is set. Such agreement is inherent in the establishment of the pool and cannot in itself be considered restrictive of competition.**”

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<sup>5</sup> Not all implementers compete, since both manufacturers of input parts/components, and manufacturers of end-products may participate in an LNG.

<sup>6</sup> *Unwired Planet International Ltd and another (Respondents) v. Huawei Technologies (UK) Co Ltd and another (Appellants) Huawei Technologies Co Ltd and another (Appellants) v. Conversant Wireless Licensing SARL (Respondent) ZTE Corporation and another (Appellants) v. Conversant Wireless Licensing SARL (Respondent)*, [2020] UKSC 37, at 113.

<sup>7</sup> For more detail see Dolmans, “FRAND licensing commitments – Back to first principles”, Elsevier, World Patent Information 69 (2022) 102113.

<sup>8</sup> The judgment of the Mannheim District Court in *Deutsche Telekom v ICom* (31 May 2022) exacerbates collective action concerns, because the Court rejected Deutsche Telekom’s argument that ICom violated its FRAND obligations by charging Deutsche Telekom, while not pursuing Deutsche Telekom’s competitors.

*(ii) Anticompetitive risks associated with LNGs*

17. LNGs jointly negotiating for access to SEPs are not buyer's cartels distorting competition between implementers:
  - LNG members (and other prospective licensees) are not competitors on the demand side for the right to obtain exclusive access to the SEPs, or for access on better terms than other licensees. Rather, they are all entitled to a license, and all on the same FRAND terms;
  - SEPs are non-contestable goods, meaning they are inexhaustible (as opposed to physical goods). Granting a license to one licensee does not prejudice the ability of others to get an identical license, especially since other licensees are legally entitled to a FRAND license.
18. For these reasons, cooperation between implementers of SEPs does not in itself lead to a distortion of competition on the demand side, or in downstream markets for products implementing the SEPs in question. Members of an LNG should, of course, adopt compliance guidelines to avoid inappropriate "spillover" coordination of the participants' prices or supply in downstream markets, or inappropriate information exchange. Any safe harbour for LNGs should require adequate compliance policies similar to those used for trade associations.
19. LNGs should avoid a collective boycott or a collective "holdout" to avoid a license, or to fix a maximum terms below the FRAND level, which would not give SEP holder a fair reward for their contributions to a standard (in terms of royalties, in terms of royalty-free access to technology, or otherwise) and which could reduce incentives to participate in standardization. The rules on FRAND licensing provide incentives to avoid holdouts, since LNG members involved in any collective holdout would presumably be found to be "unwilling licensees" under the *Huawei/ZTE* framework, and exposed to injunctions. Nonetheless, any safe harbour for LNGs should be subject to the condition that the parties will not jointly boycott negotiations, and members are allowed to negotiate individually.

*(iii) A safe harbour for LNGs*

20. Principles for an LNG safe harbour could be borrowed from the antitrust safeguards applied to patent pools discussed in the TT Guidelines. The principles for assessment of LNGs could include the following.
21. No market share ceiling. As a starting point, the new Guidance should acknowledge that the creation and operation of LNGs generally falls outside Chapter I prohibition, like patent pools, *irrespective of the market position of the parties*, assuming the conditions

discussed below are fulfilled. As mentioned, higher participation may be deemed efficient given the greater potential to minimize transaction costs and delays.<sup>9</sup>

22. No collective boycott; no exclusivity. The LNG agreement should explicitly state that its members are not discouraged from settling or independently negotiating a license with any SEP owner. Accordingly, the agreement to coordinate should confirm that each party is free to settle with the SEP owner at its discretion, regardless of the position taken by other members.
23. Open access. Like with patent pools, participation in an LNG should be open to all interested licensees, unless there are indications that an applicant member of a licensee group is unwilling to accept the jointly negotiated terms, insists on terms that are clearly not FRAND, or frustrates the LNG objectives to obtain a FRAND license.
24. Transparency. The existence of LNGs should be open and transparent towards licensors, and LNG members should disclose to SEP owners that they are negotiating jointly. LNG members should explain and ensure that the coordination does not go beyond what is necessary to meet the efficiency gains.
25. No downstream collusion and no sharing of sensitive competitive information. The LNG and its members should have antitrust compliance programs in place to avoid collusion (*e.g.*, agreement on pricing, on a surcharge to pass on any royalty paid to SEP holders, on market sharing, other restrictions of competition downstream, or on information exchange).<sup>10</sup> At the same time, information exchange between licensees to the extent needed for negotiations should be permissible, in principle, since license terms are supposed to be FRAND anyway.
26. Independent negotiator. One way to minimize the exchange of competitive information between LNG members to what is reasonably necessary is to have the LNG appoint an independent negotiator, who is not an employee or agent of one or more of the members. Each member would bilaterally communicate to the independent negotiator the terms and conditions that it wishes to obtain, the negotiation parameters and considerations particularly relevant to it, and the terms it is willing to accept as a fallback, and the scope of the license, including (i) the licensed products, (ii) the level in a value chain where licensee can take licences, and (iii) an upper bound for the licence consideration acceptable to the LNG members. The independent negotiator would use this information as guidance, and would not share it with other LNG members.<sup>11</sup> If the LNG does not use

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<sup>9</sup> Peters, Ruud and Nikolic, Igor and Heiden, Bowman, “*Designing SEP Licensing Negotiation Groups to Reduce Patent Holdout in 5G/IoT Markets*” (March 1, 2022) ([link](#)).

<sup>10</sup> In this context, it may be helpful that the safe harbour has a cross reference to paragraphs 8.63-8.64 of the Draft Guidance which deal with the measures that can be put in place to limit and/or control how data is used (*e.g.*, clean teams).

<sup>11</sup> See “Example 6” on page 128 of the Draft Guidance, where similar solution is found by the CMA to be unlikely to restrict competition within the meaning of Chapter I prohibition in the context of a joint purchasing agreement. Likewise, the CMA envisages the use of an independent third party to minimize risks associated with the exchange of information in paragraph 8.65 in the context of data pools.

this process, it may still be permissible, but the CMA could consider this process as a condition for a safe harbour.

27. Commitment of the LNG members. The members of an LNG should commit in principle to accept the negotiated outcome of the negotiations between the LNG and the SEP holder to the extent that they are within the parameters initially communicated to the independent negotiator, and commit to sign licence agreements with the SEP holder without delay (or to enter into subsequent bilateral negotiations without delay in case the outcome of the deal negotiated by the LNG is more burdensome than the goals originally communicated to the independent negotiator). Giving members a wider opportunity to opt out once the results of the LNG negotiations are known might incentivize those members to use the LNG as a tool to delay or hold out, and could lead to an uneven playing field.<sup>12</sup> SEP implementers who do not accept the pre-agreed conditions should expressly opt out early, and ideally before negotiations commence.
28. If the CMA prefers not to implement the framework proposed above, we believe it makes sense to at least move the sentence on LNGs from paragraph 6.2 to the section dealing with standardization (or at least to insert a cross-reference in the standardization section) and adjust it as follows:

*Groups of potential licensees may seek to jointly negotiate licensing agreements for standard essential patents with licensors in view of incorporating that technology in their products (sometimes referred to as licensing negotiation groups). **Regardless of the market shares, such licensing negotiation groups can be beneficial in the standardization context provided that adequate compliance programs apply, they meet the conditions for joint purchasing agreements other than the market share ceiling, while their members are free to negotiate individually.***

*(b) Standard Essential Patent disclosure*

29. In paragraph 9.23 and following of the Draft Guidance, the CMA proposes to introduce a requirement for specific disclosure of specific patents, to achieve the two objectives of ensuring (i) an informed choice of the technology to be included in the standard, and (ii) an effective access to the result of the standard. Blanket disclosure is accepted only as an exception. See also paragraph 9.34.
30. While we understand the desire to increase transparency, the approach proposed in paragraph 9.24 has several downsides, and is hard or impossible to achieve in practice.
31. First, the proposed approach does not reflect commercial realities, as many standard development organisations (SDOs) still rely on the blanket disclosure. Many SDOs accept a one-off upfront broad general FRAND declaration covering all of a member's

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<sup>12</sup> Peters, Ruud and Nikolic, Igor and Heiden, Bowman, "Designing SEP Licensing Negotiation Groups to Reduce Patent Holdout in 5G/IoT Markets" (March 1, 2022) ([link](#)).



essential patents to a standard as sufficient for their purposes, as this is all that is needed to ensure effective access to their standards on FRAND terms (which may be royalty-bearing or royalty-free). Specific identification of patents should be required only for exclusion of patents from FRAND licensing.

32. Second, in many cases, specific disclosures are not practical, in part because the standard development is an iterative or gradual process, and it may simply be impossible to identify SEPs before a standard is finalized. Even where theoretically possible, requiring patent landscape studies would (a) impose prohibitive costs on standards development, and (b) not provide adequate legal certainty because the scope of patent claims, and the determination whether patents are valid, essential, and infringed normally requires expensive and extensive review, or even litigation.
33. Third, the proposed preference for disclosure of specific patent information and against blanket disclosures may lead to the prospect of litigation, discouraging SEP holders from participating in the standard. Potential licensees, for example, might be tempted after the standard is finalized and locked in, to allege failures by IPR owners to comply with the specific disclosure requirements (and even allege patent ambushes) to delay or forego good faith negotiations of FRAND licenses. SEP owners may decide to drop out of standard setting if it involves disclosure demands that are in practice impossible to meet, or prohibitively expensive, and that could lead to situations where they cannot collect royalties or cannot obtain (royalty-free or royalty-bearing) cross-licenses.
34. Finally, requiring specific disclosures too early in the standard-setting process (*i.e.*, before the standard is frozen or near-frozen) can lead to over-identification of potentially relevant IPRs (*i.e.*, creating the so called “overdeclaration” issue). More stringent timing requirements for disclosing potentially essential IPRs, and requirements that such disclosure must be made *ex ante*, could be counterproductive. Such requirements would incentivize IPR owners to disclose all IPRs that may conceivably be related in any way to a standard in order to avoid later claims that the IPR owner failed to abide by SDO disclosure rules. Overdeclaration may create the impression that the standard is going to be prohibitively expensive, and broad disclosure requirements may reduce the reliability of the information available because the question whether the disclosed IPRs are even potentially essential would not be easily determined, and narrower disclosures would not be discernible from broader, pre-emptive disclosures made to avoid potential claims. Broad disclosures may thus discourage or delay standard setting, or lead SDOs to attempt to design around declared patents that may not in fact be essential, which in turn may reduce the quality, functionality, or efficiency of the standard. We accordingly suggest the following edits to paragraph 9.24:

*With respect to patents, where reasonably possible in practice and cost-efficient, the IPR disclosure associated with a commitment to license on FRAND terms should include at least the patent number or patent application number. If this information is not yet publicly available, or disclosure is not feasible or cost-efficient, then it is also sufficient if the participant declares that it is likely to have IPR claims over a particular technology without identifying specific IPR claims or applications for IPR (so-called blanket disclosure).<sup>367</sup> ~~Other than where the relevant IPR information is not yet~~*

~~publicly available, b~~ Blanket disclosure would be less likely to enable the industry to make an informed choice of technology and to ensure effective access to the standard, **but may be the only practical solution for commitments to license, and is enough to provide comfort that patents will be available on FRAND terms.** Where participants wish to exclude their patents from a standard, or wish to withhold a FRAND license, or the other hand, IPR disclosure should where possible include at least the patent number or patent application number, so that SDOs can design around the excluded patent. Participants should also be encouraged to update their disclosures at the time of adoption of a standard, in particular if there are any changes which may have an impact on the essentiality or validity of their IPRs. Since the risks with regard to effective access are not the same in the case of a standard development organisation with a royalty-free standards policy, IPR disclosure would not be relevant in that context.

(c) Royalty free & reciprocal licensing

35. In paragraph 9.8 of the Draft Guidance, the CMA mentions that SEP holders who are also implementers “might ... cross-license their own essential IPR in exchange for essential IPR held by other undertakings or use their IPR defensively.” The concept of reciprocity and cross-licensing is important in practice and should be maintained, and its implication should be reflected elsewhere in the Draft Guidance. The most significant implication relates to reciprocity. It is common practice in the industry to require reciprocity and cross-licensing on (royalty-bearing or royalty-free) FRAND terms, as a condition of SEP license.<sup>13</sup> The rationale is that if a licensor enables a licensee through FRAND licensing to enter the market for the downstream product, the licensee should reciprocate and in turn license its SEPs on the same or equivalent terms, so as to allow the licensor and others to enter the downstream market as well. Absent reciprocity, the outcome would be asymmetrical and limit competition.
36. We further invite the CMA to state more directly in the new Guidance that FRAND licensing terms include reciprocity on the same terms as the FRAND terms of the license (“symmetry”), in both the context of royalty-bearing and royalty-free licensing to prevent “hold-up”. The new Guidance could use “reciprocal and symmetrical licensing” as the appropriate term, rather than, or in addition to, “cross-licensing”. A cross-license tends to be bilateral and reflected in a single document, whereas “reciprocal and symmetrical licensing” can be universal and in separate parallel documents or even undocumented practice. Accordingly, the sentence in paragraph 9.8 should read:

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<sup>13</sup> ETSI IPR Policy, Clause 6.1, “The above undertaking may be made subject to the condition that those who seek licences agree to reciprocate.” W3C Patent Policy, Section 5.4, “a W3C Royalty-Free license... may be conditioned on a grant of a reciprocal RF license... to all Essential Claims owned or controlled by the licensee. A reciprocal license may be required to be available to all, and a reciprocal license may itself be conditioned on a further reciprocal license from all.”

*They might therefore grant reciprocity for, or cross-license, their own essential IPR on the same (symmetrical) royalty-bearing or royalty-free terms in exchange for essential IPR held by other undertakings or use their IPR defensively.*

37. Similar changes could be made elsewhere, for instance in paragraph 9.10, which we recommend should say “a refusal to ~~offer pay a~~ fair, reasonable and non-discriminatory (“FRAND”) ~~terms royalty~~”, so as not to create the impression that only royalty-bearing licenses can be FRAND. (See also, for instance, para 9.25.)
38. Licensors of patents in a royalty-free standard who license on FRAND terms should be allowed to require a reciprocal license on the same royalty-free FRAND terms. If they would have to accept royalty-bearing terms for the reciprocal license, the royalty-free standard would cease to be royalty-free, and would become royalty-bearing.<sup>14</sup> The effect would be to turn a royalty-free standard into a royalty-bearing standard, effectively reducing or eliminating competition from royalty-free standard models, depriving implementers of choice based on price/quality, conferring market power on royalty-bearing SEP owners, raising prices for SEPs and downstream products incorporating them, and reducing innovation incentives – thus preserving the status quo where incumbents may have little incentive to improve their standards – all to the detriment of users and consumers. It would effectively constitute a price cartel by excluding a “maverick” (a royalty-free standard), by imposing a royalty-bearing business model on it. This would raise prices in the same way as a horizontal agreement.<sup>15</sup>
39. In paragraph 9.25 of the Draft Guidance, the CMA mentions that “[...] FRAND commitments allow IPR holders to monetise their technologies via FRAND royalties and obtain a reasonable return on their investment in R&D which by its nature is risky. [...]”. This sentence can be misread as an assumption that “royalties” are the only way to obtain a reasonable return on investment. As the Draft Guidance explains elsewhere, there are other business models – for instance, multi-sided market models, open source development, subscription-, upselling- or advertising funded models, or R&D funded by the sale of downstream products implementing the developed technology – and “competition within and between those models is a positive aspect of a market economy” (paragraph 9.16). Specifically, “undertakings may also value their IPRs through methods other than royalties” (paragraph 9.8), and it is important for competition authorities not to limit that competition by, for instance, favouring only the royalty-based model. Accordingly, the sentence in paragraph 9.25 should be changed as follows:

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<sup>14</sup> A licensor would not accept to license on royalty-free terms if the reciprocal license were royalty-bearing and therefore a symmetrical, tilting the competitive playing field between them.

<sup>15</sup> Requiring a reciprocal license is also non-discriminatory and compliant with FRAND commitments: SEP owners who offer a royalty-free license, should be allowed to invite reciprocity. There is perfect symmetry. All licensors and licensees are treated exactly the same.

*At the same time, FRAND commitments allow IPR holders to ~~monetise their technologies via FRAND royalties and~~ obtain a reasonable return on their investment in R&D, which by its nature is risky, **through FRAND royalties, FRAND royalty-free reciprocal licensing, or other FRAND terms or practices and other business models.** This can ensure continued incentives to contribute the best available technology to the standard.*

*(d) Non-discrimination component of FRAND terms*

40. In paragraph 9.22, the CMA mentions that 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 on fair, reasonable and **non-discriminatory terms** (‘FRAND commitment’).” In paragraph 9.25, the CMA maintains that “FRAND commitments can prevent IPR holders from making the implementation of a standard difficult by [...] charging **discriminatory royalties**”. See also paragraph 9.41.
41. The concept of “non-discrimination” is an important part of a SEP holder’s commitment to license its SEPs under FRAND terms and conditions. While the CMA gives examples of “unfair or unreasonable” practices in footnote 369, the Draft Guidance does not provide guidance on the meaning of the “non-discrimination” component within the FRAND context to assist SEP holders to meet this obligation. This is important, because in *Unwired Planet v Huawei*, the UKSC held that non-discrimination is not a separate requirement from the obligation to license on fair and reasonable terms, and declined to give judicial guidance as to the meaning of non-discrimination. So long as Unwired Planet’s rate was fair and did not exceed a “single royalty price list available to all”, it could discriminate by charging Huawei more than Samsung.<sup>16</sup> According to the UKSC, discrimination is the “norm as a matter of licensing practice”.<sup>17</sup>
42. The UKSC’s approach is without precedent and is inconsistent with the wording and intention of the ETSI IPR Policy. It effectively eliminates the non-discrimination component of the FRAND framework which was introduced with competition law in mind.<sup>18</sup> The non-discrimination commitment requires the licensor to treat similarly situated parties in a similar manner. A similar requirement follows from the provisions in UK and EU law that prohibit dominant firms to engage in anti-competitive discrimination without objective justification. Thus, we invite the CMA to take this opportunity and provide guidance on the concept of “non-discrimination”, and to reiterate

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<sup>16</sup> UKSC, at 113 et seq.

<sup>17</sup> UKSC, at 124-126.

<sup>18</sup> Robert Pocknell & Dave Djavaherian, *The History of the ETSI IPR Policy: Using the Historical Record to Inform Application of the ETSI FRAND Obligation*, RUTGERS L. REV. (forthcoming, 2023); Dolmans, “FRAND licensing commitments – Back to first principles”, Elsevier, *World Patent Information* 69 (2022) 102113.

the importance of competition policy and the essential facilities doctrine as a basis for the FRAND licensing of SEPs.

43. Specifically, we propose that the CMA supplement paragraph 9.25 of the Draft Guidance (particularly, in footnote 368) as follows:<sup>19</sup>

9.25. [...] *FRAND commitments can prevent IPR holders from making the implementation of a standard difficult by [...] charging discriminatory royalties.*<sup>368</sup>

<sup>368</sup> See also judgment of 16 July 2015, *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH*, C-170/13, EU:C:2015:477, paragraph 71, according to which an action for infringement may constitute an abuse of a dominant position within the meaning of Article 102 if it is brought against a willing licensee without complying with the procedural steps set out by the Court in its Judgment. **Relatedly, in accordance with the Chapter II prohibition, SEP owners who gave a FRAND commitment should not be allowed, without objective justification, to charge higher royalties or impose more burdensome terms to subsequent licensees, thus placing them at a competitive disadvantage, or to favour their vertically integrated businesses.**

(e) *Transparency of the licensing offer by the SEP holder*

44. In paragraph 9.20 of the Draft Guidance, the CMA says that “*the standard development organisation’s rules would need to ensure effective access to the standard on FRAND terms.*<sup>361</sup>”
45. For access to be effective, implementers need to know what patents are essential after the standard is set. As discussed above, it is difficult to provide specific information before the standard is set. But identifying patents should not be difficult when the standard is locked in, implementation has happened, patents have been issued, and patents are subsequently asserted against implementations of the standard. Yet it is not uncommon for patent holders to assert SEPs and demand licenses without providing adequate information on patents infringed by the implementer, whether the patents are in fact essential, and if so, for what aspects of the standards. In accordance with the competition law principles underpinning *Huawei/ZTE*, SEP holders should provide sufficient information (including, e.g., claim charts for the SEPs on the patent list) to licensees before insisting that they make an unqualified commitment to enter into a FRAND license. We recommend to supplement footnote 361 as follows:

*For example, effective access should be granted to the specification of the standard. In particular, when an SEP holder asserts its patents against an implementer to obtain a license, the latter should receive sufficiently detailed and relevant information to determine the relevance of the asserted SEP portfolio and the SEP holder’s compliance with FRAND. The concrete requirements may vary according*

<sup>19</sup> The CMA can do so without contradicting the UKSC, because the *Unwired Planet* case left open the possibility of a separate cause of action based on competition provisions prohibiting a abuse of dominance (UKSC, above, at 124).

*to the individual case, but to assess a FRAND offer and make an appropriate counter-offer, at the very least clear explanations are necessary on the essentiality for a standard in the form of claim charts, identification of infringing products and components, the proposed royalty and the way it is calculated, and adequate information to monitor compliance with non-discrimination obligations.*

*(f) Worldwide license set by the national court*

46. In paragraph 9.29 of the Draft Guidance, the CMA clarifies that “[t]he IPR Policy may also provide for an international tribunal (alternatively, it may identify respected national IP courts or tribunals) to determine the terms of a FRAND licence on a worldwide basis in cases of dispute. In the absence of such a provision, nothing in this Guidance prejudices the possibility for parties to resolve their disputes about the level of FRAND royalties by having recourse to competent national courts or alternative methods of dispute resolution.” This is an important observation since parties tend to be much more willing to negotiate and ready to reach agreement on a balanced solution if the fall-back is someone else deciding the rate.<sup>20</sup> We therefore recommend that the statement be reinforced as follows, based on *Huawei/ZTE*, and with a view to creating incentives for parties to find a negotiated agreement:

*The IPR Policy may also provide for an international tribunal (alternatively, it may identify respected national IP courts or tribunals) to determine the terms of a FRAND licence on a worldwide basis in cases of dispute. In the absence of such a provision, nothing in this Guidance prejudices the possibility for parties to resolve their disputes about the level of FRAND royalties by having recourse to competent national courts or alternative methods of dispute resolution.<sup>378</sup> **An offer to have a national court or arbitral tribunal set the rate or (royalty-bearing or royalty-free) key terms should be seen as a rebuttable presumption of being a “willing” party for the purpose of assessment whether an injunction is available. Moreover** However, nothing in this Guidance should be taken to suggest that a licensee is unwilling to take a licence on FRAND terms on the basis that it challenges the essentiality, validity or infringement of IPR forming part of a standard in parallel with licensing negotiations, reserves the right to do so in future, or if it requires that the licence provides a mechanism to alter the royalty rates taking account of the result of such challenges.*

\* \* \*

We hope these comments are helpful. We are ready to discuss any of the points raised in this response if the CMA would consider it helpful.

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<sup>20</sup> See Dolmans, “*Enforcement of Standard Essential Patents - current bottlenecks and possible solutions*” (May 19, 2021) ([link](#)).

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