Comments of Dolby Laboratories, Inc.
Concerning the Competition and Market Authority's
Draft Horizontal Guidance

INTRODUCTION

Dolby Laboratories, Inc. ("Dolby") respectfully submits these comments in response to the Competition and Market Authority's ("CMA") request, dated January 25, 2023, concerning the draft Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements (the "Draft Guidance"), and particularly in response to the proposed revisions to Part 9 of the Draft Guidance addressing standardization agreements.[1]

Dolby appreciates the opportunity to provide these comments and believes it is well-situated to do so given its history as a long-time participant in standardization activities and as an important innovator contributing its technology for the development of standards. Since its founding in London in 1965, Dolby has led the way in inventing, developing, and making available industry-wide innovative audio and imaging technologies. Dolby participates in many organizations in Europe and worldwide that develop standards related to the areas of technology in which Dolby continuously innovates, including major open standards organizations such as the European Telecommunications Standards Institute ("ETSI") and the International Telecommunications Union ("ITU"). Dolby contributes its patented technologies to such organizations regularly. Dolby also broadly and globally licenses its technology – including standards-essential patents ("SEPs"), software, trademarks, know-how, and other intellectual property – through a broad range of licensing practices and activities that are flexibly aligned to support Dolby's core businesses of cinema products, technology licensing, and patent licensing.

Dolby realizes a significant majority of its revenues from its global licensing activities, which depend on strong patent protections and confidence in the enforceability of its license agreements. Dolby's licensing incentives align with those of its partners because the successful commercialization of Dolby's technologies benefits both manufacturers of consumer products that embody Dolby's technologies and Dolby, which is able to realize a reasonable return on its investment in innovation. Historically, this has supported Dolby's reinvestment of nearly 20% of its annual revenue into research and development of new audio and video technologies. This investment has allowed Dolby to develop successive generations of improved technology and to continue to bring its innovations to consumers in a variety of applications.

As Dolby commented previously in response to the CMA's November 2021 call for inputs on the retained Research and Development Block Exemption Regulations, as well as to the European Commission ("Commission") in response to consultations on its draft revised Horizontal Guidelines, Dolby believes the overall approach in the current Commission Guidelines on Co-operation Agreements ("EU Guidelines")[2] is properly directed. This is

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[1] Open Consultation, Draft guidance on Horizontal Agreements (January 25, 2023), available at: https://www.gov.uk/government/consultations/draft-guidance-on-horizontal-agreements.

[2] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union ("TFEU") to horizontal co-operation agreements, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52011XC0114%2804%29. As set out in the CMA's Guidance on the functions of the CMA after the end of the Transition Period (CMA 125) at paragraph 4.36, such guidance constitutes a relevant statement of the Commission to which the CMA, concurrent regulators and UK courts must have regard after 31 December 2020.

evidenced by the tremendous success of standards development under current SEP disclosure and licensing practices, which strike an appropriate balance between the interests of SEP holders and standards implementers, which is crucial for promoting advances in technology, innovation and competition. This approach also acknowledges and supports the shared objectives of intellectual property laws and competition laws "*of promoting consumer welfare and innovation as well as an efficient allocation of resources*."[3]

Dolby thus appreciates the CMA's efforts in the Draft Guidance to provide additional clarity supporting the current approach to SEP disclosures and licensing, especially to further the goal of "*mak*[ing] *it easier for businesses to cooperate in ways which are economically desirable.*"[4] In this regard, Dolby particularly welcomes the CMA's clarification that "*effective access*" to a standard may not require licensing to third parties at all levels, and for reasons stated below should be included within the Guidance's safe harbour.[5] In addition, Dolby supports a number of the specific proposed changes that will meet this purpose, and appreciates the CMA's efforts to clarify that not all standardization conduct is properly the subject of the Chapter I prohibition because it either does not raise competition law concerns at all or is unilateral or vertical in nature.

On the other hand, certain of the proposed changes in the Draft Guidance potentially risk upsetting the careful balance of interests that underlies effective standardization. These changes, respectfully, are not necessary, are not properly supported, and may be subject to potential misinterpretation that could cause uncertainty and chill procompetitive standardization and the investment in innovation that is necessary to drive it. Additional clarification may be warranted to make clear that the proposed references to specific SEP valuation methods in Part 9 do not express preferences for certain specific valuation methodologies over the flexible, case-by-case approach that has historically and commonly been used by commercial parties and by courts and other tribunals to determine FRAND terms.

Further consideration should also be given to proposed revisions concerning disclosure of maximum accumulated royalty rates. In addition, further consideration of Part 6's treatment of joint license negotiations as a type of joint purchasing agreement is warranted because such conduct may pose significant risks of anticompetitive cartel activity, which the Draft Guidance as proposed may understate.

Furthermore, Dolby cautions against the Draft Guidance revealing a preference for a specific form of patent disclosure as such an approach would discourage SDOs and their members from adopting disclosure rules best suited to their specific circumstances and would give rise to inefficiencies.

Finally, Dolby suggests that the discussion of practices that may potentially infringe the Chapter II prohibition be eliminated, or at least minimized, as beyond the scope of the Draft Guidance.

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[3] Draft Guidance, ¶9.9.

[4] Draft Guidance, ¶1.2.

[5] Draft Guidance, ¶¶9.20, 9.33, 9.44, and footnote 364.

DISCUSSION

A. Dolby supports the clarifications in Part 9 that "*effective access*" to a standard does not require licensing to third parties at all levels, provided that de facto access to the standard is available to third parties.

Paragraph 9.22 of the Draft Guidance properly highlights that one of the important goals of FRAND licensing is "*to ensure effective access to the standard*." This broadly-stated goal provides SEP holders the freedom to determine the most efficient licensing strategies to best support their incentives to invest further in innovation and contribute those inventions to standards, including the freedom to determine the level at which they will license their SEPs.

Dolby thus welcomes the CMA's recognition in footnote 364 of its Draft Guidance that "*approaches which did not require the IPR-holder to license all comers*" could "*in practice ensure effective access to the standard*."

The CMA's pragmatic approach and its recognition of the commercial reality that effective access to the standard, rather than the grant of a license, is the requisite standard to ensure effective competition is a welcome clarification, and addresses a lack of clarity on this issue in paragraph 285 of the EU Guidelines and paragraph 482 of the Commission's draft revised EU Guidelines.[6] This approach is further illustrated in paragraph 9.33 of the Draft Guidance:

> "*An IPR Policy will not fall within the scope of the Chapter I prohibition if it ensures that de facto access to the standard is provided to third parties at each level of the supply chain*."

Likewise, Dolby welcomes the CMA's recognition in paragraph 9.44 that:

> "[I]*t may be necessary to consider whether or not an obligation to license at all levels would have a significant impact on the incentives of IPR holders to develop and contribute IPR to the standard (taking account of the principle of 'patent exhaustion').*"[7]

This practical commercial-minded approach is in line with jurisprudence in Europe and the United States. For example, in *Sharp v Daimler*, the District Court of Munich rejected the defendant's argument that a SEP holder was obligated by a licensing commitment made pursuant to the ETSI IPR Policy "*to grant a license to every willing licensee.*"[8] More specifically, the IPR holder was not required to offer licenses at the component level; it was required only to provide "*access to the standards affected by its SEPs.*"[9] The court also

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[6] Press Release, Antitrust: Commission invites comments on draft revised rules on horizontal cooperation agreements between companies (March 1, 2022), available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1371.

[7] Draft Guidance, footnote 391. *See also* Group of Experts on Licensing and Valuation of Standard Essential Patents 'SEPs Expert Group', (January 24, 2021), at Part 3.2, sub-section 3.1, pages 79-81; available at (requiring SEP holders to grant licenses to suppliers at all levels in the value chain "*would significantly increase the negotiation costs of the SEP holder. Moreover, the licences to the component makers at each level would have to be accurately defined and delineated from each other both with respect to scope and with respect to SEPs used to avoid issues as double dipping (collecting royalties twice for the same SEPs) and exhaustion. A final difficulty is that one would need to figure out the portion of the FRAND royalties that would be born* [sic] *for each of the components. The cost of enforcing this solution would be significant and, therefore, the risk of hold-out would also be high*").

[8] Judgement of the District Court of Munich of 10 September 2020, Case-No. 7 O 8818/19 *Sharp v Daimler*, at III2(c).

[9] *Id.*

confirmed that "*EU antitrust law does not force SEP holders to license at all levels*" and that a "*patent holder is in principle allowed to choose the licensing level.*"[10]

In the United States, the Court of Appeals for the Fifth Circuit held that a plaintiff-component manufacturer lacked standing to assert antitrust claims based on a SEP holder's failure to license it, where the plaintiff did not need a license to make standard compliant components.[11]

Likewise, in *FTC v. Qualcomm*, the Ninth Circuit Court of Appeals held that competition law does not generally restrict a SEP holder's ability to determine what it believes to be the most efficient licensing strategies to best support its incentives to invest further in innovation and contribute its inventions to standards, including the level at which it will license its SEPs.[12] The U.S. Federal Circuit Court of Appeals in *Commonwealth Scientific and Industrial Research Organisation v. Cisco Systems, Inc. ("CSIRO")*, also rejected the notion that licensing an upstream component manufacture is required to afford effective access to a standard.[13] In *CSIRO*, the court expressly explained that such a requirement would be "*untenable*," including because it would make reference to comparable licenses for valuation purposes effectively impossible.[14]

In the light of the above, Dolby suggests that the benefit of the safe harbor in paragraph 9.22 be extended to the case where access to SEPs is afforded, and not relegate the latter circumstance to a case-by-case effects based analysis. Any consideration of the question whether access to SEPs is actually available should be no more complex than the question whether a license has in fact been offered to all seeking one. There is therefore no reason why the former question should be subject to an effects based analysis while the latter does not.

According safe harbor treatment where access to SEPs is available would comport the Guidance with SDO practices, where licensing to all is not necessarily required. As noted by the District Court of Munich in *Sharp v Daimler*, "*the contract law in connection with the ETSI declaration does not oblige to grant a licence to every willing licensee.*"[15] Recognition that SDO IPR policies support practices consistent with applicable competition laws provides certainty and efficient standards development.

Such safe harbour treatment also reflects settled industry practice. Dolby's practice, consistent with industry practice, has generally been to license at one level, usually at the end-product level. There are efficiencies and benefits to this approach. First, end-product manufacturers often have the best information regarding the nature of the implementation of the licensed technologies, which make them the best suited parties to negotiate the royalty amount. Second, applying uniform pricing criteria across firms in the same level of the value chain ensures the application of principles of FRAND and facilitates fair pricing across the product ecosystem. Finally, licensing at one point in the value chain reduces transaction costs by avoiding inefficient redundant licensing and decreasing potential disputes.

We further note that it may be difficult to administer an effects-based analysis of the IPR policy of a standards development organization by taking note of licensing conduct that takes place outside of standard setting. The reference in paragraph 9.33 to "*'have made'*

[10] *Id*.
[11] *Continental Auto. Sys. v. Avanci, LLC*, 27 F.4th 326, 334-35 (5th Cir. 2022).
[12] *FTC v. Qualcomm Inc*., 969 F.3d 974, 1002 (9th Cir. 2020).
[13] *Commonwealth Sci. and Indus. Rsch. Org. v. Cisco Sys., Inc.*, 809 F.3d 1295, 1303-04 (Fed. Cir. 2015).
[14] *Id*.
[15] *Sharp v Daimler*, *supra*, at III2(c)(CC).

rights for upstream component suppliers," for example, is to a contractual term in license agreements whose terms are normally not specified by the IPR policy. Indeed, a FRAND SEP license is one way for parties across the value chain to obtain effective access, but not the only way.

Likewise, the judgment in *Huawei v. ZTE* and decision in *Motorola*, both cited in footnote 363, establish that third parties – such as component manufacturers – that have not been offered a FRAND license by a SEP holder already have effective access to that technology because the SEP owner cannot seek an injunction against such parties unless it has first offered them a FRAND license.

Thus, ensuring that a SDO's IPR policy that grants effective access to a standard falls within recognized safe harbors will advance such positive, procompetitive outcomes by lending legal certainty and clarity and incentivizing investment in patented technologies and its contribution to standardization.

B. Dolby supports the clarifications in Part 9 recognizing the need for flexibility and balance in stakeholder interests to facilitate efficient standards development.

1. Dolby supports the clarifications regarding standardization conduct that is not properly the subject of the Chapter I prohibition.

Proposed clarifications in Part 9 of the Draft Guidance regarding standardization conduct that is not properly the subject of the Chapter I prohibition are welcome. These proposed revisions provide clarity regarding the proper scope of the Guidance and greater legal certainty for companies engaged in procompetitive standardization conduct.

The CMA's proposed first sentence to paragraph 9.5,[16] for example, provides important clarification that not all standardization participants are competitors. Indeed, when it comes to standardization agreements involving patented technologies, the relationship between parties is most often vertical in nature where an upstream SEP holder and a downstream implementer are involved, and licensing conduct by SEP holders is typically analyzed as unilateral. It would be useful, therefore, to expressly elaborate and affirm in paragraph 9.5 that where conduct is essentially vertical in nature, or essentially unilateral, competition law risks may be minimal.

Such additional clarity would be consistent with the second sentence of paragraph 9.5, which helpfully identifies that the likelihood of competitive harm arises most when competitors are involved.[17] Paragraph 9.5 identifies the competitive risks that may arise from competitor conduct, and to be even more explicit it could further explain that such potential risks exist regardless of whether competitors are SEP holders or standards implementers.

The proposed revision of paragraph 9.8 is likewise welcome as it recognizes that a broad range of procompetitive business models exist with respect to SEP licensing. These include, as the Draft Guidance provides, "*undertakings that acquire technologies with the intention of licensing them*" with the "*incentive* […] *to maximise their royalties*." Undertakings that pursue such a model are not generally in competition with "*undertakings that solely manufacture products or offer services based on technologies developed by others and that do not hold relevant IPR*."[18] The Draft Guidance further helpfully recognizes that

[16] Draft Guidance ¶9.5 ("*Participants in standardisation are not necessarily competitors*.").
[17] Draft Guidance ¶9.5 ("*Standard development can, however, in specific circumstances where competitors are involved, give rise to restrictive effects on competition by potentially restricting price competition and limiting or controlling production, markets, innovation or technical development*.").
[18] Draft Guidance ¶9.8.

there are "*integrated undertakings that both develop technology protected by IPR and sell products for which they would need a licence,*" and that "[t]*hese undertakings have mixed incentives*."[19]

The CMA's recognition of these many different business models – each creating different incentives with respect to licensing of IPR – reinforces that competition is well-served by the ingenuity of firms and that competition law should not chill this type of innovation. Supporting myriad business models for SEP licensing also properly accommodates commercial outcomes driven by marketplace-determined commercial interests without unnecessary or disproportional regulatory intervention, an approach which Dolby believes is essential to effective standardization.

New language proposed to be added to paragraph 9.10 reinforces the Draft Guidance's support for a balanced approach in assessing potential competition law concerns arising in SEP licensing. As proposed, paragraph 9.10 would add recognition that "hold out" by implementers, and not just claimed "hold up" by SEP holders, poses a risk to efficient standards development.[20] Paragraph 9.10's discussion of "hold up" and "hold out" might be further revised, however, to make clear that such conduct may not implicate the Chapter I prohibition because it does not typically involve horizontal conduct, and to the extent any competition law concerns may arise from such conduct they may be more properly addressed under the Chapter II prohibition, if at all, or otherwise addressed as a matter of contract or patent law. Indeed, the Draft Guidance recognizes in footnote 355 to paragraph 9.10 that "hold up" conduct may qualify as an abuse of dominance under the Chapter II prohibition. Dolby further invites the CMA to consider expanding footnote 355 to include a similar recognition that "hold out" conduct as discussed in paragraph 9.10 is also properly addressed under the Chapter II prohibition.

In sum, the proposed revisions to paragraphs 9.4 to 9.11 provide helpful clarity and guidance. As discussed, however, Dolby invites the CMA to consider making further clarifications to emphasize the points already stated – i.e., that much of the conduct that occurs in connection with standardization agreements is vertical or unilateral in nature and is therefore not properly the subject of the Chapter I prohibition or of this Guidance.

2. Dolby supports clarifications that IPR Holders should be permitted to determine licensing strategies that allow reasonable return on investment in R&D.

The Draft Guidance offers welcome confirmation of the balancing that is necessary and appropriate in the valuation of SEPs so SEP holders are able to obtain a fair and reasonable return on their investment in R&D, which incentivizes further innovation and the contribution of technology to standards.

First, the CMA proposes language in paragraph 9.25 that recognizes this balance specifically, noting that FRAND commitments should "*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.*" As paragraph 9.25 further notes, this is necessary to "*ensure continued incentives to contribute the best available technology to the standard*."

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[19] *Id*.

[20] Draft Guidance ¶9.10 ("*The reverse situation may also arise if licensing negotiations are drawn out for reasons attributable solely to the user of the standard. This could include for example a refusal to pay a fair, reasonable and non-discriminatory ("FRAND") royalty or using dilatory strategies (i.e. deliberately delaying licensing negotiations with the licensor) ("hold-out").*").

Second, the CMA confirms in footnote 375 to paragraph 9.27 that the valuation methods provided as examples in the Draft Guidance "*are not exclusive and other methods reflecting the same spirit of the described methods can be used to determine FRAND rates*." Dolby welcomes the CMA's recognition that the parties are best placed to arrive to a common understanding of what are fair licensing conditions and fair rates, and that there is no one-size-fits-all solution of what FRAND is; what can be considered fair and reasonable differs from sector to sector and over time.

Third, in footnote 371 to paragraph 9.26, the Draft Guidance recognizes that "[s]*tandard development organisations are not involved in the licencing negotiations or resultant agreements.*" This is an important acknowledgement of an SDO's proper role.

Collectively, the CMA's draft language helps clarify and confirm that FRAND negotiations should be left, as they are now, to arms-length, market-based bargaining by licensors and licensees, under the control of commercial courts or arbitration tribunals.

3. Dolby supports clarification that restricted participation in standards development may be procompetitive.

Dolby supports the recognition in paragraph 9.38 of the Draft Guidance that restricted participation in standards development may be procompetitive in certain circumstances. Specifically, paragraph 9.38 explains that restricted participation may be appropriate "*if the restriction on the participants is limited in time and with a view to progressing quickly (for example at the start of the standardisation effort) and as long as at major milestones all competitors have an opportunity to be involved in order to continue the development of the standard.*" Paragraph 9.39 provides additional positive clarification by making clear that any potential negative effects from restricted participation can be mitigated by providing for "*collective representation of stakeholders (e.g. consumers)*" in the process.

Such practices benefit the standards process because they often permit reliance on subject matter expertise directed to specific technologies, allowing existing marketplace demand to be most effectively met. Dolby's experience is that such practices do not, and should not, raise competitive concerns. In each instance, contributions become subject to a SDO's consensus-based procedures and are thus subject to SDO structural safeguards that ensure due process and consideration of all participant interests. While a contribution may result from a joint collaborative effort or from a single firm that holds rights in fundamental underlying technologies, standardization will be subject to the relevant SDO's consensus-based rules and procedures such that all interested parties may participate in the development of a standard, even when it is based on the collaboration of a limited number of participants.

C. The Draft Guidance should avoid endorsement of a valuation method based on the next best alternatives *ex ante*

In the light of the CMA's stated approach in paragraph 9.27 that the Draft Guidance "*does not seek to provide an exhaustive list of appropriate methods*" to determine FRAND rates, the Draft Guidance should avoid endorsement of the specific valuation method set out in paragraph 9.27 of "*compar*[ing] *the licensing fees charged* […] *for the relevant patents in a competitive environment before the industry has developed the standard (ex-ante) with the value/royalty of the next best available alternative (ex-ante)*." Dolby is concerned that this endorses a methodology for determining FRAND royalties that – while promoted by some commentators – lacks any actual use by commercial parties, and which, to Dolby's knowledge, has not been imposed by any court. Although the discussion of FRAND methodologies "*are* *not exclusive*," describing this methodology specifically gives the appearance of elevating it above other methodologies.

Moreover, although discussed as a theoretical approach, there is good reason why a methodology to value SEPs based on an *ex ante* comparison to the next best alternative has rarely been employed in practice. In many if not most cases there is no "*next best available alternative*" technology under consideration *ex ante* in the standards development process. Rather, typically, participants contribute complementary technologies for consideration, the scope of a standard is iterated, and this determines whether a contributed technology is essential to the standard ultimately approved. It is also the case, and not unusual, that a single participant may contribute its technology and the standard is built around that technology.

Courts in Europe and the U.S. also have not embraced an *ex ante* next best alternative valuation methodology. Rather, courts have recognized that the valuation of SEPs must be case-by-case, fact-specific, and flexible,[21] and must also be based on "*the patentee's actual* [F]*RAND commitment*," which can "*vary from case to case*."[22] This is the approach not only in Europe and in the U.S., but also in China and Japan.[23]

For these reasons Dolby suggests that paragraph 9.27 should not include the additional reference to a valuation methodology based on the next best available alternative *ex ante*, and should instead reinforce that parties to a SEP licensing agreement, negotiating in good faith, are in the best position to determine the FRAND terms most appropriate to their specific situation.

D. Further refinement may be warranted of the Draft Guidance's discussion of *ex ante* disclosure of most restrictive terms and maximum accumulated royalty rates in Part 9, and of joint licensing groups in Part 6.

Paragraphs 9.13 and 9.42 address *ex ante* disclosure of most restrictive licensing terms and maximum accumulated royalty rates. Paragraph 6.2 includes licensing negotiation groups in the discussion of joint purchasing agreements.

Dolby respectfully submits that these paragraphs warrant further consideration to ensure that they do not understate competition law risks that may arise from joint competitor conduct, and so they reflect practical and commercial realities involving the subject conduct.

1. **The Draft Guidance should unambiguously establish that *ex ante* disclosure of most restrictive terms and maximum accumulated royalty rates, as well as joint license negotiating groups, may create unjustified risks of anticompetitive cartel behavior.**

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[21] *HTC Corp. v. Telefonaktiebolaget LM Ericsson*, 12 F.4th 476, 483 (5th Cir. 2021) (whether a license is FRAND depends on "*totality of the particular facts and circumstances existing during the negotiations and leading up to the license.*"); *Microsoft Corp. v. Motorola, Inc*., 795 F.3d 1024, 1040-44 (9th Cir. 2015) (recognizing need for flexibility and endorsing district court's application of Georgia-Pacific factors to hypothetical negotiation); *CSIRO* , 809 F.3d at 1302-03, 1305 ("*there may be more than one reliable method for estimating a reasonable royalty*" and "*different cases present different facts*.") *Unwired Planet v Huawei*, [2020] UKSC 33, ¶43 (trial court relied "*principally on the analysis of comparable licenses*," based on expert testimony, to determine FRAND terms, but also relied on other methods as a "cross-check").

[22] *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1226, 1231 (Fed. Cir. 2014).

[23] *Unwired Planet v Huawei*, [2017] EWHC 711, judgment dated 5 April 2017, ¶474 (adopting case-specific approach using comparable licenses adjusted based on expert testimony, and noting that courts in Japan and in China "*have approached the determination of FRAND rates using the same techniques as have been addressed in this case*.").

a. Most restrictive licensing terms and maximum accumulated royalty rates.

Paragraph 9.13 of the Draft Guidance rightly provides that any agreement to reduce competition by jointly fixing prices either of downstream products or of substitute IPR or technology will constitute restrictions of competition by object. Footnote 358 to that paragraph further notes that paragraph 9.13 "*should not prevent genuine unilateral ex ante disclosures by individual IPR holders of their most restrictive licensing terms for standard essential patents.*"

Dolby finds that this provision provides clearer guidance than the equivalent proposals in the Commission's draft revised Horizontal Guidelines at paragraph 473 and footnote 273 thereto.[24] The Commission's draft deletes the term "*unilateral*" from the corresponding provisions and retains only a reference to disclosure by "*individual IPR holders.*" In doing so, the Commission's draft give rise to the possible inference that a disclosure by an "*individual IPR holder*" may occur pursuant to an agreement among competitors compelling such disclosure, rather than be truly unilateral in nature – e.g., the conduct of an "*individual IPR holder*" could be pursuant to an agreement between standard implementers that requires *ex ante* disclosure of most restrictive terms as a condition for having technology considered for inclusion in a standard. Accordingly, in making clear that *ex ante* disclosures by individual IPR holders must be "*genuine*[ly] *unilateral*", the Draft Guidance provides greater clarity.

Similarly, footnote 358 in the Draft Guidance states that paragraph 9.13 "*does not prevent standard development organisations disclosing the total maximum stack of royalty for the standard as described in paragraph 9.42.*" This is in contrast to the Commission's draft Horizontal Guidelines which state in footnote 273 that "[t]*his paragraph should not prevent ex ante disclosures of … a maximum accumulated royalty rate by all IPR holders.*" The approach taken in the Draft Guidance suggests that it is the standard development organization – and not its participants – that announces a royalty stack, taken by summing the "genuine unilateral" disclosures by individual IPR holders. In contrast, "*maximum accumulated royalty rate by all IPR holders*" implies that it is permissible for IPR holders to collectively set this rate.

Nevertheless, the Draft Guidance uses the term "*maximum accumulated royalty rate*" in other sections. Paragraph 9.42 of the Draft Guidance in turn provides that "[s]*tandard development agreements providing for the ex ante disclosure of the most restrictive licensing terms for standard essential patents by individual IPR holders or of a maximum accumulated royalty rate by all IPR holders will not, in principle, restrict competition within the meaning of the Chapter I prohibition.*"

Dolby notes that the *ex ante* disclosure of a "*maximum accumulated royalty rate by all IPR holders*" necessarily implicates, at least potentially, competitor agreements that will have the effect of fixing royalty rates that individual SEP holders could seek. Such an effect will occur because there will have to be a mechanism to determine the maximum accumulated royalty rate permitted in connection with any particular standard, and also a mechanism that will allocate the maximum rate among all SEP holders for the particular standard based on some methodology for establishing proportionality. The Draft Guidance does not provide for any such mechanisms. Further, the Draft Guidance does not contemplate that the likely steps will involve agreements among standards implementers, who can be seen as competitors in obtaining licenses for SEPs and in producing downstream standard-compliant products. This distinguishes such joint conduct from patent pools, where a royalty for the aggregated licensed portfolio of SEPs is determined by the SEP holders in the pool – while individual SEP holders retain the freedom to set royalties for their individual portfolios bilaterally. Conversely,

[24] Commission draft revised Horizontal Guidelines, available at https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en.

implementers establishing a maximum accumulated royalty would involve the following steps: (i) jointly setting the maximum accumulated royalty available for a standard, and (ii) agreeing upon a methodology to allocate percentages to each SEP holder. Each aspect of such agreements will have the effect of setting a critical component of the "price" (i.e., the royalty rate) a SEP holder would be able to charge, and thus will be the equivalent of an agreement that jointly sets an ultimate price, conduct that the current EU Guidelines[25] and Draft Guidance[26] identify as potential restrictions by object. Although it may be feasible to use safeguards to mitigate risks associated with certain joint conduct that occurs in connection with standardization, there are no established safeguards that could mitigate the risks of joint price setting that would be implicated by agreements to establish maximum accumulated royalty rates and allocate percentages to individual SEP holders.

Accordingly, Dolby urges the CMA to reconsider including the discussion of maximum accumulated royalty rates in the Draft Guidance.

b. Joint licensing negotiations.

Dolby is likewise concerned with the proposed inclusion in paragraph 6.2, which is part of Part 6 addressing purchasing agreements generally, of "licensing negotiation groups" as an activity that may constitute a legitimate joint purchasing arrangement.[27]

Joint licensee negotiating groups, like any joint buying groups, present the risk of collective dominance which, when involving the fixing of "prices" – here royalties – or exploitative conduct, may give rise to restrictions by object or effect under the Chapter I prohibition and/or an abuse of dominance under the Chapter II prohibition.[28] Such joint licensee groups, depending on their market power, could also be seen as engaging in collective group boycotts or other exclusionary conduct that may give rise to competition law concerns.

Assessing the competitive implications of joint licensing groups negotiating terms of SEP licenses involves myriad variables. Such an assessment must consider whether joint licensee negotiating groups have sufficient procompetitive potential that outweighs the anticompetitive risks just mentioned. Dolby respectfully submits that it is doubtful that they do, and it is questionable whether risks of anticompetitive harms arising from joint licensee negotiating groups can be mitigated by rules or guidelines. For example, a mechanism would have to exist in order to assess whether a joint licensee negotiating group is collectively dominant when formed or becomes such over time. Otherwise, the risk of abusive conduct, as well as anticompetitive agreements, vis-à-vis licensors or potential participants to the joint licensee negotiating group would be heightened.

Mechanisms would also be necessary to ensure that the exercise of "buyer power" did not result in discrimination between or among joint licensee groups. It is difficult to imagine how rules or guidelines supporting such mechanisms could be enforced; neither the CMA nor SDOs are equipped to manage such ongoing commercial arrangements. Rather, a case-specific

[25] EU Guidelines ¶274.
[26] Draft Guidance ¶9.13.
[27] Draft Guidance ¶6.2 ("*Joint purchasing arrangements can be found in a variety of economic sectors and involve the pooling of purchasing activities* […] *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).*").
[28] Draft Guidance ¶6.26 ("*If the parties to the joint purchasing arrangement have a significant degree of buying power on the purchasing market, there is a risk that they may harm competition upstream, which may ultimately also cause competitive harm to consumers further downstream*.").

approach is necessary that permits joint licensee groups where it can be shown that procompetitive outcomes outweigh anticompetitive outcomes (and also accommodates those instances where an IPR owner may make a commercial decision that it is more efficient to jointly negotiate with licensees). Although there may be such circumstances where joint license negotiations are competitively justifiable, it is more likely risks of anticompetitive harm will exist.

The proposed language in paragraph 6.2 could be interpreted as an endorsement of licensing negotiation groups, which may understate the risks of anticompetitive harms, and is inconsistent with the case-by-case approach that is necessary to evaluate competitive harms and benefits of a specific arrangement based on available evidence. Dolby therefore suggests that the reference to "joint negotiation group" activities in paragraph 6.2 be deleted.

2. **Practicalities reveal that anticompetitive risks outweigh any potential justification for the provisions concerning most restrictive terms and maximum accumulated royalty rates.**

Dolby further submits that the anticipated benefits offered to justify the proposed provisions concerning most restrictive terms and maximum accumulated royalties are unlikely to be realized for practical reasons.

For example, Paragraph 9.42 of the Draft Guidance provides that *ex ante* disclosure of most restrictive terms and maximum accumulated royalty terms "*would* […] *enable the parties involved in the development of a standard to take an informed decision based on the disadvantages and advantages of different alternative technologies*." In theory this may be a potential benefit, but marketplace experience suggests it is not realistic. Developments since the time the EU Guidelines were first published suggest that *ex ante* disclosure requirement of most restrictive licensing terms would raise significant impracticalities.

With respect to most restrictive terms, such disclosure would cause patent holders to define license terms before there is any certainty whether their IPRs will be included in a standard and restrict their ability to negotiate based on market-based circumstances. Instead, IPR owners would be required to define an arbitrary cap on the value of their IPRs, distorting market pricing and thereby risking undervaluing their IPRs and undermining their ability to realize a market-based return on their inventive investments. Such an impact will be particularly hard felt if IPRs are ultimately not essential; such IPRs would be subject to an imposed royalty cap even though they would not be subject to any FRAND obligation. Consequently, the owner of such IPRs would be constrained in realizing the market-based value of its IPRs.

Different, but equally significant impracticalities exist with respect to the likelihood that *ex ante* disclosure of maximum accumulated royalty rates will better inform decisions regarding selection of technologies for a standard. As mentioned, establishing and implementing a maximum accumulated royalty rate will necessarily require mechanisms whereby competitors or potential competitors agree on the maximum royalty rate for a standard, as well as the methodology for proportionally allocating that rate. Such agreements may in fact preclude price competition if the price of each SEP is fixed as a mathematical function of a collective royalty cap and an allocation methodology that is based on the number of SEPs included in the standard. How such determinations can be made *ex ante* (if at all) is also inherently uncertain. Putting aside the risks of anticompetitive cartel-type conduct with respect to such agreements, the fact that a standard is still in a formative stage and whether a particular patented technology is essential to what will ultimately be defined as a standard, makes it impossible to objectively establish a maximum accumulated royalty rate for all SEPs (which may not be identifiable *ex ante*) or what the value of each potential SEP should be relative to the yet-to-be-defined standard. As courts have recognized, in practice, standards participants often do not – and cannot – disclose specific IPR that is essential to a standard until "*after the standard has been established and it is clear what technology is included in it*."[29]

Second, the exercise of agreeing *ex ante* upon a maximum accumulated royalty rate and an allocation methodology is even more arbitrary because it would involve imposing a singular approach for valuing specific patents relative to each other before they conceivably could be determined to be SEPs. To do so runs counter to the CMA's recognition, as highlighted in point B.2 above, that determining the value of SEPs should be case-by-case, fact-specific, and flexible.[30]

Yet, establishing maximum accumulated royalty rates and an allocation scheme *ex ante* suggests that only a "top down" approach to patent valuation would be appropriate. While some courts have relied on a "top down" approach, typically in conjunction with a comparison to comparable licenses,[31] other SEP valuation methodologies may be equally if not more appropriate depending on the circumstances of each case. This was recognized by the Supreme Court in *Unwired Planet*, which referred to the "top down" approach as only "[o]*ne possible method*."[32] The Draft Guidance at paragraph 9.27 – within the context of determining whether royalty fees are excessive or discriminatory – therefore rightly states

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[29] *Koninklijke Philips N.V. v. Asustek Computers Inc.,* Court of Appeal of The Hague, judgment dated 7 May 2019, Case No. 200.221.250/01 at 4.159 (rejecting argument that disclosure of specific patent after standard had been finalized was not "timely" under ETSI rules); *see also Optis Wireless Tech. v. Apple Inc.,* Civil Action No. 2:19-cv-00066-JRG (E.D. Tex. February 9, 2021) at 24-25 (rejecting argument that disclosure of patent after "freeze" date for release of standard was not "timely" under ETSI policy and noting that "the vast majority of ETSI participants disclose their intellectual property rights after" the freeze date).

[30] *See* Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Setting out the EU approach to Standard Essential Patents, COM (2017) 712 final (Nov. 29, 2017) ("2017 Communication") ("*the parties are best placed to arrive at a common understanding of what are fair licensing conditions and fair rates, through good faith negotiations*," and "*there is there is no one-size-fit-all solution to what FRAND is: what can be considered fair and reasonable differs from sector to sector and over time*"); *see also HTC Corp.*, 12 F.4th at 483 (whether a license is FRAND depends on "*totality of the particular facts and circumstances existing during the negotiations and leading up to the license*."); *Microsoft Corp.*, 795 F.3d at 1040-44 (recognizing need for flexibility and endorsing district court's application of Georgia-Pacific factors to hypothetical negotiation); *CSIRO*, 809 F.3d at 1302-03, 1305 ("*there may be more than one reliable method for estimating a reasonable royalty*" and "*different cases present different facts*.").

[31] *Unwired Planet v Huawei,* [2020] UKSC 37, 26 August 2020, on appeals from: [2018] EWCA Civ 2344 and [2019] EWCA Civ 38, at ¶¶42-46 (trial court relied "*principally on the analysis of comparable licenses and used the 'top down' method as a cross-check*" which involved determining what *"the total aggregate royalty burden would be for all the intellectual property*" relating to the standardized technology in the end product, and then "*shar*[ing] *out the aggregate royalty* […] *across all licensors in proportion to the value of each licensor's patent portfolio as a share* […] *of the total relevant patent portfolio essential to the standard*."); *see also TCL Commc'n Tech. Holdings, Ltd. v. Telefonaktiebolaget LM Ericsson*, No. CV 152370 JVS(DFMX), 2018 WL 4488286, at *8-9, 14 (C.D. Cal. Sept. 14, 2018) (employing a "top down" approach by identifying the aggregate royalty for all patents encompassed in a standard, and then determining a firm's portion of that aggregate based on a "*simple patent counting system which treats every patent* [incorporated in the standard] *as possessing identical value* […]" and acknowledging that "top down" approach was "*not necessarily a substitute for a market-based approach that considers comparable licenses*"), rev'd in part, vacated in part, 943 F.3d 1360 (Fed. Cir. 2019), cert. denied, 141 S. Ct. 239 (2020).

[32] *Unwired Planet v Huawei, supra* at ¶42.

that it does not seek to provide an exhaustive list of appropriate methods and that "*there are various methods available.*" Indeed, courts have used other valuation methodologies, including:

- The incremental value that the patented invention adds to the end product, determined by apportioning the value attributable to the "*'patented feature and the unpatented features,' using 'reliable and tangible evidence.'*"[33]
- Assessment of comparable licenses, as determined by experts and accounting for differences in circumstances of the contracting parties.[34]
- Application of relevant *Georgia-Pacific* factors to determine value based on a hypothetical negotiation between a patent owner and a potential licensee.[35]

For these reasons, Dolby suggests that the CMA omit reference to maximum accumulated royalty rates from the Draft Guidance altogether.

D. The Draft Guidance should not reveal a preference for a specific form of patent disclosure.

Paragraphs 9.23-9.24 of the Draft Guidance express a preference for specific information to be included in a disclosure of potential SEPs, including at least the patent or patent application number, and further suggests a duty "*to identify at the earliest practicable opportunity IPR reading on the potential standard and to update the disclosure as the standard develops.*" Paragraph 9.23 suggests further that such disclosure would enable industry to make informed choices of technologies to be included in a standard and to achieve effective access to a standard. Paragraph 9.24 states that "blanket disclosures" would be less likely to accomplish these goals, and should be sufficient only where specific information is not public.

Several issues arise from the preference reflected in paragraphs 9.23-9.24, which Dolby submits warrant reconsideration.

First, the proposed preference for disclosure of specific patent information and against blanket disclosures would discourage SDOs and their members from adopting disclosure rules best suited to their specific circumstances. As was also recognized by the Commission in its 2017 Communication, determining disclosure requirements requires a balancing of interests: "[w]*hile there are clear benefits to such increased transparency, the related burden needs to remain proportionate.*"[36] Dolby's experience from its participation in many SDOs is that IPR policies take varied approaches to achieving this balance, and each approach is calculated to provide standardization participants with useful information and effective access to essential technology, while avoiding undue costs and burdens on IPR owners that would disincentivize participation of such firms and the contribution of their IPRs to standardization.

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[33] *Ericsson,* 773 F.3d at 1226, 1231 (also noting determination must be based on "*the patentee's actual* [F]*RAND commitment*," which can "*vary from case to case.*").
[34] *Unwired Planet v Huawei, supra* at ¶43 (trial court relied "*principally on the analysis of comparable licenses*," based on expert testimony, to determine FRAND terms); *see also CSIRO*, 809 F.3d at 1305 (citing *Finjan, Inc. v. Secure Computing Corp.,* 626 F.3d 1197, 1211 (Fed. Cir. 2010)) (recognizing use of comparable licenses and also recognizing *"there may be more than one reliable method for estimating a reasonable royalty*" and "*different cases present different facts*.").
[35] *Microsoft Corp.,* 795 F.3d at 1040-44 (also recognizing need for flexibility and endorsing district court's application of *Georgia-Pacific* factors to hypothetical negotiation).
[36] 2017 Communication.

For example, ETSI's IPR policy provides in clause 4.1 that members should use reasonable endeavors to inform ETSI of essential IPRs in a timely fashion,[37] but does not require members to conduct IPR searches or to identify specific patents that are potentially essential.[38] In addition, Clause 6 of the ETSI policy, which concerns licensing declarations, permits the option of providing a general commitment to make licenses available.[39]

Similarly, the common IPR policy of ISO/IEC/ITU provides in paragraph 1 that participants should from the outset draw attention to any *known* patents and patent applications,[40] but such information is provided on a best efforts basis and there is no requirement for patent searches.[41] The policy also does not require the identification of specific claims, or of linking IPR to specific parts of the standard.[42] Participants may also use a General Patent Statement and Licensing Declaration, which provides for a blanket licensing commitment with respect to IPRs that will be essential, but without identification of specific patent information.[43]

Other organizations, such as the DVB project, have found it more efficient to avoid affirmative disclosure obligations entirely in favor of a negative disclosure model. Article 14.1 of the DVB project Memorandum of Understanding, for example, provides for the submission of a list of all IPRs, to the extent known, that will be necessarily infringed, only in the event that the patent holder will not commit to grant a license.[44] In the event that no disclosure is made, Article 14.2 specifies that participants are deemed to commit to license on FRAND terms.[45] This is similar to the model illustrated in Example 3 of paragraph 327 of the EU Guidelines, which expressly

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[37] *ETSI Intellectual Property Rights Policy* ¶ 4.1 ("*Subject to Clause 4.2 below, each MEMBER shall use its reasonable endeavours, in particular during the development of a STANDARD or TECHNICAL SPECIFICATION where it participates, to inform ETSI of ESSENTIAL IPRs in a timely fashion. In particular, a MEMBER submitting a technical proposal for a STANDARD or TECHNICAL SPECIFICATION shall, on a bona fide basis, draw the attention of ETSI to any of that MEMBER's IPR which might be ESSENTIAL if that proposal is adopted.*").

[38] *Id.* ¶¶ 4.1, 4.2.

[39] *Id.* ¶6.

[40] *Common Patent Policy for ITU-T/ITU-R/ISO/IEC* ¶ 1 ("*Therefore, any party participating in the work of ITU, ISO or IEC should, from the outset, draw the attention of the Director of ITU-TSB, the Director of ITU-BR, or the offices of the CEOs of ISO or IEC, respectively, to any known patent or to any known pending patent application, either their own or of other organizations....*"), available at: https://www.itu.int/en/ITU-T/ipr/Pages/policy.aspx.

[41] *Guidelines for Implementation of the Common Patent Policy for ITU-T/ITU-R/ISO/IEC* § 3 ("*Moreover, that information should be provided in good faith and on a best effort basis, but there is no requirement for patent searches.*"), available at: https://www.itu.int/dms_pub/itu-t/oth/04/04/T04040000010005PDFE.pdf.

[42] *Id.* § 4.1.

[43] *Id.* § II.1.

[44] *DVB Memorandum of Understanding* § 14.1 ("*Within 90 days from notification of approval of a specification by the Technical Module, each Member shall* [...] *submit to the chairman of the Steering Board a list of all the IPRs owned or controlled by the Member* [...]*, to the extent that the Member knows that such IPRs will be necessarily infringed when implementing such specification and for which it will not or has no free right to make licences available.*"), available at https://dvb.org/wp-content/uploads/2019/12/dvb_mou.pdf.

[45] *Id.* § 14.2 ("*With respect to any IPRs, owned or controlled by the Member or any of its affiliated companies,* [...] *other than those that are notified under clause 14.1 hereof, each Member hereby undertakes,* [...] *that it is willing to grant or to cause the grant of non-exclusive, non-transferable, worldwide licences on fair, reasonable and nondiscriminatory terms and conditions under any of such IPRs for use in or of equipment fully complying with such....*").

recognizes the benefits this model can provide, and the costs and inefficiencies that can result from specific disclosure requirements:

> "*IPR disclosure would be unlikely to contribute to guaranteeing effective access to the standard which in this scenario is sufficiently guaranteed by the blanket commitment to license any IPR that might read on the future standard on FRAND terms. On the contrary, an IPR disclosure obligation might in this context lead to additional costs for the participants. The absence of IPR disclosure might also, in those circumstances, lead to a quicker adoption of the standard which might be important if there are several competing standard-setting organisations*."

The discussion of Example 3 in the Draft Guidance, however, omits this language, and thus fails to recognize the full procompetitive benefits of this model.

Such approaches should not normally raise any competition law concerns because a blanket disclosure or blanket license commitment suffices to afford effective knowledge to standards participants and effective access to standards, and may also give the benefit of avoiding undue and unnecessary costs.[46] These approaches also allow SDOs to adopt disclosure policies consistent with their specific circumstances that strike the right balance between promoting investment and technological development and protecting competition. This accommodating approach also allows for what Dolby respectfully submits is the proper recognition that optimally effective and efficient standardization must be market driven. By expressing a clear preference for specific disclosure requirements, however, the proposed provisions in paragraphs 9.23-9.24 would impede the ability of SDOs to adopt disclosure requirements best suited to their specific circumstances.

Second, for a company with thousands of patents (and an equal number of applications at various stages of development), clear limitations on specific disclosure requirements are important because continuously monitoring every standard under development and how any of the patents or patent applications in a large portfolio may read on each of those standards would be a monumental, and inherently speculative, job.

In addition, more stringent timing requirements for disclosing potentially essential IPRs, such as a requirement "*to identify at the earliest practicable opportunity,*"[47] and requirements that such disclosure must be made *ex ante*, could have the opposite of the intended effect of disclosure. 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. Such broad disclosure may reduce the value 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, preemptive disclosures made to avoid potential claims.

Suggesting that specific disclosure requirements should be adopted where they do not currently exist could also favor delaying tactics in potential litigation and resulting externalities for innovators contributing their technology to standardization. Potential licensees, for example, might be more likely to assert failures by IPR owners to comply with the specific requirements for the purpose of delaying or foregoing completely good faith negotiations of

[46] EU Guidelines ¶327, Example 3; Draft Guidance, Example 3 (recognizing that when technologies potentially relevant for a standard "*are covered by many IPR*," specific disclosure requirements may impose significant costs in analyzing whether a patent is potentially essential to a future standard, without offering any countervailing benefits to the standardization process.).
[47] Draft Guidance, ¶9.23.

FRAND licenses. Alleged violations of such requirements could also be grounds for lawsuits challenging the rights of SEP owners and their ability to enforce their IPRs. Either outcome would potentially further increase costs of standards participation and disincentivize the contribution of innovative technologies to standardization.

Third, the proposed language in paragraph 9.23 suggesting a duty "*to update the disclosure as the standard develops,"* creates additional uncertainty regarding the timeliness of disclosures. Specific information regarding potential SEPs is not typically ascertainable "*as the standard develops*," and it is often impossible to determine (and thus to disclose) what specific patents will be essential to a standard until the technical specification has been finalized and "frozen."[48] Moreover, as at least one court has observed, the disclosure of specific patents does not "*have any influence on the technical decision-making process*" during standards development.[49] Thus, it is not clear when – or how – standards participants would be expected to comply with any duty to update specific disclosures "*as the standard develops*" – let alone "*at the earliest practicable opportunity*" – or what benefit such updates would provide for the further development of the standard. Nor is it clear whether the obvious costs of such a requirement could ever be justified by any benefits to standardization.

Finally, Dolby is unaware of any concrete basis for concluding that imposing the type of disclosure requirements contemplated by paragraphs 9.23-9.24 would make the standardization process more efficient or otherwise eliminate competitive distortions, if any, that exist under the current conditions. Proposed revisions to paragraph 9.34 suggest that "*the disclosure of information regarding characteristics and value-added of each IPR to a standard"* will increase "*transparency to parties involved in the development of a standard.*" However, as the Commission recognized in its 2017 Communication, the current flexible approach to patent disclosures already "*supports the technical standard setting process*."[50] It is not clear what type of information is contemplated by this language, or how any such "*value-added*" should be calculated or assessed.

For these reasons, Dolby submits that the proposed language in paragraphs 9.23-9.24 and 9.34 regarding specific patent disclosures and updates to such disclosures should not be included in the Guidance, and that the current language in Example 3 of paragraph 327 of the EU Guidelines should be included in the Draft Guidance. Dolby also suggests that the CMA consider whether additional clarifications are appropriate to emphasize the established efficiencies and procompetitive benefits provided by blanket disclosures and blanket licensing commitments.

E. The Draft Guidance should focus on providing guidance on the application of the Chapter I prohibition to horizontal agreements.

As described in paragraph 1.1 of the Draft Guidance, the purpose of the Guidance is to explain "*how the CMA applies competition law and, in particular, the Chapter I prohibition in the Competition Act 1998 (CA98) to horizontal agreements*." This is further underscored in paragraph 3.58 of the Draft Guidance, which sets out that "[t]*he assessment under the Chapter*

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[48] *Koninklijke Philips N.V. v. Asustek Computers Inc.*, *supra*, at 4.159.

[49] *Id.* at 4.158 ("*Within ETSI, the existence of technical alternatives to a specific patented technology needs to be explored only if a certain technology is unavailable (e.g., because of a refusal to grant FRAND licenses discussed in Clause 8 of the ETSI IPR Policy),*" and as a result if a "*general undertaking has already been provided*," the disclosure of specific patent information will not "*have any influence on the technical decision-making process*").

[50] 2017 Communication at 3-4 (recognizing that the "*current declaration system in SDOs supports the technical standard setting process*").

I prohibition as described in this Guidance is without prejudice to the possible parallel application of the Chapter II prohibition to horizontal agreements."

Given its purpose, it would be inappropriate for the Draft Guidance to address potential infringements of the Chapter II prohibition, as to do otherwise would result in the appearance of certain practices being perceived as inherently suspect under the Chapter II prohibition. The Draft Guidance is cognizant of this risk in its discussion of royalty fees, in respect of which it clarifies that "[h]*igh royalties can only be qualified as excessive if the conditions for an abuse of a dominant position contrary to the Chapter II prohibition are fulfilled*"[51] and that the Draft Guidance "*does not seek to provide an exhaustive list of appropriate methods to assess whether the royalty fees are excessive or discriminatory under the Chapter II prohibition.*"[52]

In keeping with that approach, Dolby urges the CMA to reconsider its reference in paragraph 9.25 of the Draft Guidance to IPR holders "*making the implementation of a standard difficult by* […] *engaging in other unfair or unreasonable practices having an equivalent effect*." Such conduct would not implicate the Chapter I prohibition since it typically involves unilateral conduct, and is therefore more properly addressed under the Chapter II prohibition, if at all.

The CMA's vague and general reference to "*unfair or unreasonable practices*" is therefore of no assistance within the context of its Draft Guidance and only serves to create uncertainty and confusion.

Furthermore, UK competition law does not prohibit "*unfair or unreasonable practices.*" It is not a standard that appears in the Competition Act 1998 or in the CMA's Guidance on the Abuse of a Dominant Position (OFT402). That "*unfair or unreasonable*" conduct is not the proper ambit of UK competition law is clear from the fact that the phrase is used solely in Part 9 of the Draft Guidance, at paragraphs 9.27, where it is used as a synonym for excessive or discriminatory royalty fees, and in paragraph 9.25, where it appears to be used in much a broader sense, covering "*unfair or unreasonable practices*" more generally. By way of comparison, in the EU Guidelines, the phrase is only used within the context of excessive or discriminatory royalty fees, with paragraph 287 noting that "*FRAND commitments can prevent IPR holders from making the implementation of a standard difficult by refusing to license or by requesting unfair or unreasonable fees (in other words excessive fees).*" It follows that, while the EU Guidelines made clear that the phrase was limited to excessive pricing contrary to Article 102 TFEU, the Draft Guidance at paragraph 9.25 is not so limited, and could be read as introducing a vague new standard into the Chapter II prohibition, prohibiting "*unfair or unreasonable practices.*" Dolby does not believe this to have been the CMA's intention.

The CMA's proposed examples of "*other unfair or unreasonable practices*" in footnote 369 of the Draft Guidance do not help clarify the ambit of the phrase, given that they are only provided as non-exhaustive examples, and in fact only serve to compound the problem. By providing examples, in the form of "*tying or bundling of non-essential IPR (or other non-essential products or services) to the standard-essential IPR*" and "*the tying or bundling of licences to essential-IPR of more than one standard, where the licensee does not require a licence to the other standards,*" the CMA draws specific attention to certain practices that may

[51] Draft Guidance footnote 355.
[52] Draft Guidance ¶9.27.

or may not be caught by the Chapter II prohibition, but provides no further guidance as to how such practices are properly analyzed under UK competition law.

Given that infringements of the Chapter II prohibition are not the subject matter of the Draft Guidance, and in the light of the above, Dolby submits that the proposed language in paragraph 9.25, in respect of "*other unfair or unreasonable practices,*" and in footnote 369, in respect of tying or bundling practices, should not be included in the final Guidance.

CONCLUSION

Dolby appreciates the opportunity to submit these comments concerning the Draft Guidance and respectfully requests that the CMA consider the modifications proposed above for incorporation in the final Guidance.

March 2023