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FSA Submission in Response to the UK Competition and Markets Authority's Public Consultation on Draft Horizontal Guidelines

As an industry organisation representing almost 50 European and global companies,[1] the Fair Standards Alliance (FSA) welcomes this opportunity to provide comments in response to the Competition and Markets Authority's public consultation on the draft guidelines on the Chapter I prohibition in the Competition Act 1998 to horizontal agreements (draft HGLs). Our comments mostly relate to Chapter 9 of the HGLs on standardisation agreements.

The FSA is an alliance that promotes the licensing of standardised technologies, including for the development and rollout of the IoT, on fair, reasonable, and non-discriminatory (FRAND) terms.[2] Our membership is broad and diverse, ranging from multinationals to SMEs and coming from different levels of the value chain across a diversity of industry sectors.

Our members generate GBP 2.15 trillion in revenue every year making up about 2.4% of the global GDP. Our membership invests over GBP 160 billion into R&D each year across a host of sectors including ICT, automotive, semiconductors, broadcasting, telecoms and smart energy solutions. Some of our members dedicate as much as a third of their annual revenues to R&D.

Our members collectively hold more than 650 000 granted patents and patent applications, including tens of thousands of standard essential patents (SEPs). Our membership has strongly supported standardisation for decades, participating in hundreds of standardisation activities around the world, including the development of connectivity standards, such as cellular, Wi-Fi, and USB-C.

Because many of the FSA members are both owners of SEPs and licensees this allows us to bring a balanced perspective to this consultation.

[1] Current members of the FSA include Aira, airties, Amazon, Apple, BMW, Bullitt, Bury, Cisco, Continental, Daimler, Dell, Denso, Deutsche Telekom, Emporia Telecom, FairPhone, Ford, Google, Harman, Hitachi, Honda, HP, Hyundai, Intel, Juniper Networks, Kamstrup, Landis+Gyr, Lenovo, Microsoft, N&M Consultancy, Nordic Semiconductor, Sagemcom, Sequans Communications, Sierra Wireless, Sky, Stellantis, Tech Law Associates, Telit Communications, Tesla, Thales, TomTom, Toyota, u-blox, Valeo, Visteon, Volkswagen, Wiko and Xiaomi.
[2] For further information about the FSA and its members, see http://www.fair-standards.org/.

Introduction

Standards are important enablers for competitive and dynamic markets where innovation and the need for interoperability go hand in hand. For standards to be successful and widely adopted by the market, it is crucial to ensure that SEPs are licensed in a fair and balanced manner, which unfortunately has not been common practice in recent years.

Competition law is central to standardisation because standards are set by companies, including competitors, coming together to choose a single set of technological solutions out of multiple options that existed prior to the agreement to standardise a specific technology, and because of the market power standards can confer to holders of SEPs that they otherwise would not have.

Once a technology standard is set and businesses have made substantial investments to rely on it, including by innovating and developing products using the standard, they become effectively "locked in" as it is virtually impossible to design around the standardised technology.

As a safeguard against competition concerns, in accordance with the draft HGLs,[3] most standard setting organisations (SSOs) require SEP holders to provide an irrevocable commitment in writing to license their SEPs on FRAND terms. The trade-off is simple: the SEP owner benefits from having its technology more broadly used as part of an industry standard that is widely adopted, and in exchange it commits to license its technology on FRAND terms so that everyone can license, use, and rely on the standard on fair market terms.

Based on various studies, there are many contributors to 5G standards. However, ownership of the largest 5G SEP portfolios is concentrated in the hands of a handful of non-UK companies (please see Annex 1). The same observation applies also regarding other SEP portfolios. Moreover, nearly all of the owners of the largest declared 5G SEP portfolios also sell products and/or provide services implementing these 5G technologies downstream – in other words, most of them are vertically integrated.

For example, as well as owning a significant portfolio of 5G SEPs: Huawei provides 5G automotive modules as well as various hardware and software solutions for 5G networks; LG Electronics is a lead player in the global market for telematics control units (TCU); ZTE supplies NB-IoT chipsets and modules and is branching into cellular vehicle-to-everything module market, etc. Without adequate regulation any one of these companies could use the market power afforded by their 5G SEPs to the detriment of commercial rivals who implement 5G technology. British industry is and will be a net licensee of standards-enabled technologies. Numerous businesses in the UK across the most innovative industry sectors will both be dependent on 5G SEP licences from companies headquartered overseas as well as compete with those same companies in downstream markets.

I. Licences enabling effective access to standards

We note with regret that the draft HGLs replace the explicit requirement maintained in the draft Revised European Commission's HGLs which states that "*the IPR policy would need to require*" that SEP holders commit "*to offer to license their essential IPR to all third parties on FRAND terms*" to a mere suggestion that "*the FRAND commitment <u>could be</u> drafted so as to require the IPR holder to offer a licence to any third party seeking a licence in order to implement the standard*."

We consider the above difference in the CMA's proposal very unfortunate as our members' experience is that the requirement to license any third party seeking a FRAND licence is hugely important for businesses across a variety of sectors to ensure innovation. In practice, only a direct FRAND licence enables effective access to a standard.

[3] Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements [DRAFT] CMA174, para. 9.22; available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1131039/HBER_Draft_guidance.pdf

Indeed, if SEP holders could "pick and choose" potential licensees and at what level of the production chain to license, they could in effect control who succeeds and who fails in the market – in other words, become gatekeepers of innovation. This is of significant concern both where SEP holders are vertically integrated, which enables them to foreclose competition in the downstream market, and where SEP holders are not active downstream where a refusal to license willing licensees can harm innovation.

We also take this opportunity to draw the CMA's attention to para 114 in the UK Supreme Court's decision in *Unwired Planet v Huawei*:

> *114. The text of clause 6.1 lends itself naturally to being read in this unitary way. The "non-discriminatory" part of the relevant phrase gives colour to the whole and provides significant guidance as to its meaning. It provides focus and narrows down the scope for argument about what might count as "fair" or "reasonable" for these purposes in a given context. It indicates that the terms and conditions on offer should be such as are generally available as a fair market price* *<u>for any market participant</u>* (emphasis added).[4]

We believe this to be a very important clarification that SEP royalties must be based on the value of the SEPs and not other factors (such as e.g. potential licensee's position in the value chain), and that licences should be made available to *any* market participant (i.e. regardless of the level of the value chain they operate at). We interpret the Supreme Court's use of language such as "any market participant" to confirm that there should be no discrimination as to which market participants can obtain SEP licences.

Furthermore, this is already the policy position of the CMA, as reflected in the *Guidance on Environmental Sustainability Agreements and Competition Law*, which states that licensors "*must also offer to licence their essential IPR to all third parties on fair, reasonable and non-discriminatory terms*. We see no basis for the CMA to change the existing policy position in this regard.

We therefore respectfully ask the CMA to amend the first two sentences in para 9.22 as follows:

> *"In order to ensure effective access to the standard, the IPR policy would need to require participants wishing to have their IPR included in the standard to provide an irrevocable commitment in writing to offer to license their essential IPR* ***to any third party**, **regardless of the level of a value chain at which they operate**, on fair, reasonable and non-discriminatory terms ('FRAND commitment').* ~~The FRAND commitment could be drafted so as to require the IPR holder to offer a licence to any third party seeking a licence in order to implement the standard~~.

Alternatively, it could also be amended as follows:

> *"In order to ensure effective access to the standard, the IPR policy would need to require participants wishing to have their IPR included in the standard to provide an irrevocable commitment in writing to offer to license their essential IPR on fair, reasonable and non-discriminatory terms ('FRAND commitment').* The FRAND commitment **would need** ~~could be drafted so as~~ to require the IPR holder to offer a licence to any third party seeking a licence in order to implement the standard, ***regardless of the level of a value chain at which they operate****.*

(a) *'Have made' rights do not confer SEP licences*

Without a direct licence to the relevant SEPs, companies are impeded in their ability to innovate on top of standards. Models that may be claimed to serve as substitutes to actual licences, such as "have made" rights, do not alleviate competition concerns because of their very narrow scope. SEP licensors claim that under "have made" rights, a downstream SEP licensee could have components made by an upstream third party which is unlicensed, even if it is willing to take and actively seeks a

[4] *Unwired Planet v Huawei* [2020] UKSC 37, para 114.

FRAND licence. However, the right to "have" components "made" does not confer a licence to that third party to manufacture for its own use or indeed for any party other than the instructing licensee, and beyond the specifications of the downstream licensee. The "have made rights" therefore tie the supplier to its customer, prevent it from freely innovating and do not allow it to sell licensed products on the open market.[5]

For example, if a module company that develops cellular devices can sell only to one industry (e.g., automotive), or even to just one group of customers within that industry (e.g., particular downstream car manufacturers or manufacturers that make particular types of cars or trucks), then in practice they will only invest in R&D that they can recoup via sales to that industry or group of customers. If that company could develop innovative modules that could be used for other industries, customers, or applications, without its own SEP licence, it would be precluded from selling them as licensed modules to e.g., manufacturers of airplanes, trains or boats.

(b) Efficient licensing

As an association representing companies of different sizes from multiple sectors and different levels of the value chain, we draw from ample and direct business experience. Our members' experience from both century-old and younger innovative IPR-intensive industries confirms that when SEP licences are made available to any licensee that wants to get a licence, businesses work out the most appropriate level in the value chain that is most efficient for a particular industry.

Some wireless technology SEP holders have argued that it is most efficient to license only downstream end-product manufacturers. However, business realities dictate otherwise. Depending on business models involved, it could be more efficient for SEPs to be licensed at the level in the supply chain where the standardised functionality is actually provided and enabled, e.g., video codecs on the camera level, OneBlue patents on the level of the BlueRay-disk player, or Bluetooth patents on chip level etc. Indeed, licensing a handful of upstream suppliers could lead to tens, hundreds or even thousands of downstream product manufacturers to be covered.

That is why the FSA has long advocated that SEP licences should not be artificially restricted by players with market power conferred by standards to one specific level of a value chain. Indeed, it is precisely the change in SEP licensing practices whereby certain SEP holders started refusing licences to market players that led to a range of negative consequences.

For example, in digital cellular telephony, SEP holders previously granted licences to manufacturers of all types of equipment.[6] Manufacturers in any part of the supply chain were able to obtain SEP licences. These licensees were then able to offer licensed products – whether they were complete end-use products or intermediate subsystem products – to their customers.

Suppliers upstream were able to supply subsystems that complied with standards to downstream manufacturers who were able to focus on developing innovative products. This facilitated the widespread adoption of standardised technologies.

One of Europe's leading R&D intensive sectors, the automotive industry, is another example. A vehicle consists of thousands of components – the vast majority of which are subject to standards. Most of the components are supplied by upstream component manufacturers, often single-sourced from a supplier specialising in a particular product or a type of product. For over a century, the industry has considered it most efficient for car OEMs to source components free of third-party rights, not to be

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[5] For further background, please see the FSA position paper "Competitive and Industry Harms Related to Refusals to License SEPs and Other Forms of "Level Discrimination" in SEP licensing".

[6] See e.g., the *Federal Trade Comm'n v Qualcomm, Inc.,* Findings of Fact and Conclusions of Law, Case No. 5:17-cv-00220 (N.D. Cal. May 21, 2019) (*FTC v Qualcomm*). Evidence referenced in the ruling reveals that SEP holders granted licences to users of the standards across the value chain, including at chip level and that "following Qualcomm's lead, other SEP licensors like Nokia and Ericsson have concluded that licensing only OEMs is more lucrative, and structured their practices accordingly."

forced to seek licences for standardised technology sourced from its upstream suppliers. Indeed, the ability of upstream manufacturers to obtain a licence enables business models where they can clear the patent landscape for their own products and indemnify their customers. It also ensures that OEMs do not overpay for SEPs over which they lack knowledge about their value and implementation, and would typically pass excessive fees to their suppliers and consumers.

We therefore respectfully ask the CMA to amend the first two sentences in para 9.33 as follows:

> *"If an IPR Policy does not provide for licensing to* ***any*** *third parties* ***regardless of the level of*** *~~at all levels of~~ the supply chain* ***at which they operate*** *then the assessment of access to the standard will need to consider whether or not de facto access to the standard at each level of the supply chain can be provided ~~(e.g. whether 'have made' rights for upstream component suppliers will be adequate in the relevant industry context).~~ 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~~* ***any*** *level of the supply chain."*

For similar reasons we also respectfully request that the CMA deletes footnote 391 to the draft HGLs.

II. Hold-up

The draft HGLs recognise that SEP holders can "acquire control over the use of a standard" and can "hold-up users after the adoption of the standard" by "refusing to license the necessary IPR or by extracting excess rents by way of discriminatory or excessive royalties". The draft HGLs also note that if "a company is either completely prevented from obtaining access to the result of the standard, or is only granted access on prohibitive or discriminatory terms, there is a risk of an anti-competitive effect".[7] We commend the CMA for maintaining these important provisions.

However, hold-up pressure is not limited to these concerns. The use or threat of injunctions (or other exclusionary remedies) based on SEPs – for which a FRAND commitment has been made – in practice leads to hold-up most often.

The European Commission's *Motorola* decision and the Court of Justice of the EU's (CJEU) ruling in *Huawei v ZTE* were important milestones in the development of law in Europe in the field of standardisation.[8] They confirmed that invoking injunctions in SEP licensing disputes can be an anticompetitive abuse of dominant position.

In *Huawei v ZTE*, the CJEU outlined a balanced list of steps which both SEP holders and potential licensees would have to take in SEP licensing disputes, and which were geared to clarify when injunctions could or could not be permissible. The outlined steps were designed to ensure that, if properly followed, an SEP holder would protect itself against a finding of abuse of dominance and conversely, that standards users would be safe from SEP-based injunctions.

However, in recent national court practice, including in the UK, this balance has been undermined, and there has been a shift towards granting injunctions in SEP licensing disputes in a manner that is not consistent with the intentions of the CJEU's *Huawei v ZTE* ruling. In particular, courts have focused on potential licensees' conduct while failing to evaluate whether SEP holders have complied with their FRAND obligations, and those courts have applied an unduly constrained definition of "willingness" for potential licensees. This has led to increasing legal uncertainty, particularly in industries such as the IoT and automotive.

[7] Draft HGLs, paras 9.9 and 9.10.

[8] Case AT.39985, *Motorola – Enforcement of GPRS Standard Essential Patents*, Commission Decision of 29 April 2014; Judgment of 16 July 2015 of the Court of Justice in Case C-170/13 *Huawei v ZTE.*

Thus, SEP-based injunctions continue to be used contrary to both the purpose and the letter of the FRAND obligation and the *Huawei v ZTE* judgment. This is of critical importance to industry. We therefore respectfully request the CMA to consider amending para. 9.10 of the draft HGLs, to read:

> *However, by virtue of its IPR, a participant holding IPR essential for implementing the standard, could, in the specific context of standard development, also acquire control over the use of a standard. When the standard constitutes a barrier to entry, the undertaking could thereby control the product or service market to which the standard relates. This in turn could allow undertakings to behave in anti-competitive ways, for example* ***by pursuing exclusionary remedies against a willing licensee,*** *by refusing to license the necessary IPR or by extracting excess rents by way of discriminatory or excessive royalties thereby preventing effective access to the standard ("hold-up").*

(a) *Hold-out*

SEP holders are entitled to FRAND royalties for SEPs that are truly essential, valid and infringed. However, it is unjustified to imply, as the last two sentences of para. 9.10 of the draft HGLs do, that hold-out is an equivalent competition concern to patent hold-up.

The main, if not only, theoretical circumstances in which patent hold-out could be a competition concern would potentially be in the framework of a collective boycott of a technology by potential downstream licensees. We are not aware of such conduct ever having occurred in the context of standardisation.

While this effect may not have been intended, as currently worded in the draft (i.e., "the reverse situation may also arise") and because it appears in the same paragraph, this provision may be misconstrued as meaning that hold-out may somehow have similar adverse effects on competition as hold-up, which is not possible without a sufficient degree of market power.

We could not agree more with the US Federal Trade Commissioner Slaughter, that while hold-out may be "purported to be a parallel problem" to hold-up, it simply "does not pose the same concerns from a competition standpoint as hold-up, which has the potential to exclude firms from implementing a standard." Commissioner Slaughter noted that hold-out, "as long as it is unilateral and not done collusively among licensees, fits squarely into the box of problems that have patent law solutions." In other words, hold-out is simply not an antitrust problem and, as such, does not belong in the Horizontal Guidelines.

Therefore, we encourage the CMA to delete the following language on hold-out from para. 9.10 of the draft HGLs:

> ~~*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").*~~

Should the CMA nevertheless wish to make a reference to hold-out in the draft HGLs, we consider it would be more appropriate to do so in a footnote and, at the very least, amend the text to clearly differentiate hold-out from hold-up.

For example, the footnote could read:

> *"~~The reverse situation may also arise if~~* ***Practices by users of the standard,*** *for reasons attributable solely to the users of the standard, such as drawing out licensing negotiations or refusal to pay a FRAND royalty fee or using dilatory strategies may be referred to as "hold-out".* ***Such practices are unlikely to raise competition concerns if conducted unilaterally by firms that do not possess significant market power.***

III. FRAND royalties

Valuation of SEPs, for which a commitment to license on FRAND terms has been made, should be based on their own technical merits and scope, and they should not for example capture the value of standardisation. We therefore commend the CMA for maintaining the language in the draft HGLs that SEP royalty fees should "bear a reasonable relationship to the economic value of the IPR".[9]

Similarly, we agree that the value of SEPs should be "irrespective of the market success of the products which is unrelated to the patented technology".[10] Indeed, SEP holders are entitled to FRAND royalties for their own patented inventions but not for innovation of others – this clarification is therefore important.

On the other hand, the suggestion that the economic value of the IPR could be based "on the present value added of the covered IPR" may be somewhat misleading. We suggest further clarifying this provision in para. 9.27 to read:

> *"The economic value of the IPR could be based on the present value added* ***over the next best alternative*** *of the covered IPR and should be irrespective of the market success of the products which is unrelated to the patented technology."*

We also welcome the clarification that "FRAND royalties" suffice for SEP holders to "monetise their technologies" and to obtain a "return on their investment in R&D".[11]

Our members invest immense resources into R&D and appreciate that there is some risk associated with such investments, but they understand that a return on investment is not guaranteed. We much agree that "reasonable" return on investment preserves incentives to innovate, provided that the "reasonable" return aligns with the ex ante economic value of the patented invention. We note that where courts have examined and adjudicated FRAND rates, they have proven to be significantly lower than what SEP holders had sought in licensing negotiations.[12] Moreover, sight should not be lost of the fact that standards have increased the market for SEP holders, providing the opportunity to benefit from significant global royalty streams that they would otherwise be unlikely to obtain. Therefore, we suggest clarifying this provision in para. 9.25 to read:

> *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~~,* ***that is commensurate with the ex ante economic value of the IPR.***

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[9] Draft HGLs, para. 9.27.
[10] Ibid.
[11] Ibid, para. 9.25.
[12] See, for example:

- *Unwired Planet v Huawei.,* [2017] EWHC 711 (Pat): Offered rate of 0.13% (4G-LTE) and 0.065% (UMTS/GSM), awarded rate 0.062% for 4G-LTE and 0.032% for UMTS/GSM handsets;
- *Realtek Semiconductor Corp. v LSI Corp*., 946 F. Supp. 2d 998 (United States District Court, N.D. California (2013)): offered rate of USD1-1.75, compared to the awarded rate of $0.0019 to $0.0033;
- *TCL Comm'n Tech. Holdings, Ltd. v Telefonaktiebolaget LM Ericsson*, No. SACV 14-341 (C.D. Cal. Dec. 21, 2017): Both FRAND offers [Option A (2.592%) and Option B (1.46%)] the Court found to be not FRAND. The Court awarded rates of 0.45% in the US and 0.314% for the rest of the world;
- In *re Innovatio IP Ventures*, LLC Patent Litig, MDL Docket No. 2303 Case No. 11 C 9308 (N.D Ill. Sep. 27, 2013): Innovatio offered rates of $3.39 per access point, $4.72 per laptop, up to $16.17 per tablet, and up to $36.90 per inventory tracking device, as compared to the Court awarded rate of $0.956 per device;
- *Ericsson Inc. v D-Link Sys., Inc*., No. 10-CV-473, 2013 WL 4046225, (E.D. Tex. Aug. 6, 2013): the Court awarded rate of 15 cents per device;
- *Microsoft v Motorola*, 2013 WL 2111217 (W.D. Wash. Apr. 25, 2013): Motorola offered a rate of 2.25% based on the price of the end product, as compared to the Court awarded rate for 802.11 SEPs of $0.03471 cents per unit;
- *Core Wireless Licensing S.A.R.L., v Apple Inc.*, Case No. 15-cv-5008 NC (United States District Court, N.D. California (2016)): Core Wireless offered a rate of $0.085, whereas the Court awarded a rate of $0.026.

If licences deemed "comparable" themselves suffer from hold-up, a royalty rate calculated on their basis will also contain a hold-up premium.[13] In *Unwired Planet v Huawei*, the Supreme Court recognised that, even though comparable licences may be useful in deciding what is FRAND, "many factors may have been in play" including hold-up.[14] Some US courts have also recognised the risk of perpetuating hold-up premia.[15]

Therefore, we suggest amending the relevant provision in para. 9.27 of draft HGLs to read:

> *"Similarly, it may be possible to compare the licensing terms in agreements of the IPR holder with other implementers of the same standard* ***where such licences are truly comparable and do not result from hold-up."***

Relatedly, we respectfully ask the CMA to amend footnote 375 to read:

> The UK Supreme Court in *Unwired Planet v Huawei* [2020] UKSC 37 endorsed the approach of the Patents Court in *Unwired Planet v Huawei* [2017] EWHC 2988 **which recognised that comparable licences may be useful in assessing whether royalties are FRAND but was also mindful of the risk that comparable licences may have been impacted by hold-up**~~relied principally on the analysis of comparable licences~~ and used the 'top down' method as a cross-check, see paragraphs 42-46 **and 170** of the judgment. However, the methods described in this part of the Guidance are not exclusive and other methods reflecting the same spirit of the described methods can be used to determine FRAND rates.

IV. Licensing on global or multi-national portfolio basis

Global SEP portfolio licences can be appropriate and effective on a voluntary basis, but coercing such licences is inconsistent with the SEP holder's FRAND commitment and improperly dilutes the licensee's right to pay only for those IPRs it needs and/or uses. In the absence of other considerations, a licensee for a particular SEP usually would not need to license patents that are not essential to a standard, invalid, unenforceable, or not infringed by the licensee. For example, a provider of cellular phones or components will likely not need to license network infrastructure SEPs which may be part of the SEP holder's overall portfolio. Likewise, a company that operates only in a particular geographic region will likely not require worldwide rights.

A licensee's choice to challenge a declared SEP's applicability or quality within an appropriate jurisdiction, or refusal to agree to an abstract promise of a global licence determined by a court in a single jurisdiction, should not make the licensee "unwilling," and an SEP holder should not refuse to license other non-challenged SEPs on this basis. If a licence to a necessary SEP is conditioned upon agreeing to licensing the rest of the SEP holder's portfolio on a global basis, the licensee may be forced to act against its self-interest and pay for technology rights it does not need or would otherwise challenge.

We note with interest the CMA's proposed addition to para 9.25 making a reference to the UK Supreme Court's decision in *Unwired Planet v Huawei*. However, we respectfully disagree with the conclusion that the proposed language appears to draw on the basis of that decision, namely that *"<u>IPR holders may require</u> that a FRAND licence to their standard-essential IPRs be taken on a global or multi-national portfolio basis*." We believe this goes beyond the findings of the Supreme Court.

[13] See e.g., Cotter, T.F., Golde, J.M., Liivak, O., Love, B., Siebrasse, N.V., Suzuki, M., Taylor D.O., "Reasonable Royalties." At p.61, 2018, eds., *Patent Remedies And Complex Products: Toward A Global Consensus* Cambridge University Press, by Biddle, B., Contreras, J.L., Love, B., and Siebrasse, N.V., forthcoming.

[14] *Unwired Planet International Ltd v Huawei Technologies Co Ltd,* EWHC 711 at para. 170 (Pat Ct. 2017).

[15] E.g., in *Microsoft v Motorola,* a pre-existing license between Motorola and VTech was not found to be a reliable indicator of a RAND royalty rate among other reasons because it was concluded under the threat of a potential infringement lawsuit.

We understand that the Supreme Court held, *inter alia* that (i) an English court has jurisdiction to grant an injunction based on a UK patent even if the potential licensee accepts a UK licence on FRAND terms set by a court, but does not agree to take a licence on a global portfolio basis; and (ii) an injunction may be a proportionate remedy for infringement of a UK patent unless the potential licensee agrees to take a licence on a global portfolio basis. We, however, disagree that the Supreme Court held that SEP holders "may require" that potential licensees to license SEPs on a global portfolio basis.

The Supreme Court's decision was based on the specific facts that were presented before it, and was informed by the English court's own interpretation of French contract law. The Supreme Court's competition analysis was limited to the ND part of FRAND and an Article 102 TFEU analysis of whether an injunction was proper under *Huawei v. ZTE.*

Notably, imposing a global licence can have anticompetitive effects. For example, global portfolio licensing of patents declared as SEPs can tie licensing of true SEPs to patents that are invalid and/or not in fact essential, thereby shielding these patents from challenge in the relevant national courts. An imposed global licence may also force the licensee into paying for patents it does not require, either because it does not need certain of the patented technology and/or does not need to be licensed in all of the jurisdictions covered.

We therefore respectfully request that the CMA delete the proposed language in para 9.25 of draft HGLs. Should the CMA consider it imperative to make a reference to the Supreme Court's decision in relation to global portfolio licensing, we urge the CMA to amend the proposed text to bring it closer to the findings of the Supreme Court. For example, para 9.25 could read:

> *In addition, the UK Supreme Court has found that* ***an English court can grant an injunction in respect of UK national patents, unless the potential licensee enters a global licence, and determine the FRAND terms of that licence****.* ***In this respect, a court may consider*** *standard practice in the relevant industry and* ***whether a global licence is*** *appropriate (such as because it avoids unreasonable delays in negotiating licences or reduces transaction costs).* ~~*IPR holders may require that a FRAND licence to their standard-essential IPRs be taken on a global or multi-national portfolio basis.*~~

V. International tribunal

We also note with interest the CMA's proposed language in para 9.29 that "*IPR Policy may 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*." We note that the CMA has referred to the UK Supreme Court's decision in *Unwired Planet v Huawei* to support this proposal.

We respectfully disagree that the Supreme Court ruled in the decision that an international or designated national tribunal is the most appropriate forum, or that such a forum definitively should be envisaged in IPR policies of standard setting organisations.

Our reading of the Supreme Court's decision suggests the court was primarily observing that ETSI's IPR policies *"do not provide for any international tribunal or forum to determine the terms of such licences"* and that *"absent such a tribunal it falls to national courts."*[16] The Supreme Court appears to have simply observed that to the extent that there are negative consequences, such as forum shopping, conflicting judgments, and anti-suit injunctions, from national courts determining global FRAND terms, SSO participants could choose to agree to a choice of forum.

We therefore respectfully request that the CMA delete the proposed language suggesting an international tribunal or a designated national tribunal as a forum for determining FRAND worldwide licences in para 9.29 of the draft HGLs.

[16] See *Unwired Planet v Huawei* [2020] UKSC 37 para 90.

V. Licensing negotiation groups

We welcome the addition to the draft HGLs that makes clear that "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)."[17] This clarification has been added in the section of the HGLs on joint purchasing agreements.

However, licensing negotiation groups (LNGs) with appropriate competition safeguards can be all the more relevant in the standardisation context where licensees are faced with SEP holders who have market power conferred on them by a standard that they would not otherwise have.

We note that such LNGs could facilitate more SEPs licences – which are in principle infinitely available because they are an intangible asset – thereby enabling a larger number of licensees to offer more products and services to their customers and enhancing consumer choice. Because of this and other differences to joint purchasing agreements, we recommend to move the addition on LNGs from the draft HGLs' section on joint purchasing agreements to the standardisation section of the draft HGLs. We would welcome further guidance from the CMA on the pro-competitive use of LNGs.

NOTE: The positions and statements presented in this paper do not necessarily reflect the detailed individual corporate positions of each member.

[17] Draft HGLs., para. 6.2.

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FSA Submission in Response to the UK Competition and Markets Authority's Public Consultation on Draft Horizontal Guidelines

Annex I

I. Introduction

Studies analysing the 5G standard essential patent (SEP) landscape vary as to their results, particularly when it comes to the order of how the largest 5G SEP portfolio holders are ranked. However, cross-referencing the various studies reveals that regardless of which company is ranked higher than the other, the same set of companies consistently rank within the top ten firms as regards the number of their declared SEPs.

It should be noted that the size of a declared patent portfolio is one measure, among many, for measuring the relative strength of a firm's leadership in 5G standardisation.[1] This analysis aims to summarise the findings of those studies that have analysed which companies hold most 5G SEPs.

II. Study Results

Below are the results of four recent 5G patent landscaping studies. We have extracted the figures of total 5G declared patents (applications and granted) on a worldwide basis to demonstrate the overall trend that there is a relatively small group of companies who hold the 5G SEPs, most of which are non-European companies.[2]

IPlytics, "Who is leading the 5G patent race? A patent landscape analysis on declared SEPs and standards contributions", (February 2021)[3]

[1] Other studies attempt to measure 5G leadership by examining standards development activity such as contributions and leadership roles within standards committees. See e.g., Ericsson; "Estimating the future 5G patent landscape" (October 2018); Strategy Analytics, "Who Are the Leading Players in 5G Standardization? An Assessment for 3GPP 5G Activities", (March, 2020).

[2] The SEP landscaping studies each use different methodologies. This may account for the variance in the results. In addition, each report analyses data over different time horizons which would also account for the discrepancy in results. The methodologies employed are included in each report, the links for which can be found in the footnotes below.

[3] https://www.iam-media.com/who-leading-the-5g-patent-race-patent-landscape-analysis-declared-seps-and-standards-contributions

- **Huawei**, 15.39% of 5G patents
- **Qualcomm**, 11.24% of 5G patents
- **ZTE**, 9.81% of 5G patents
- **Samsung Electronics**, 9.67% of 5G patents
- **Nokia**, 9.01% of 5G patents
- **LG Electronics**, 7.01% of 5G patents
- **Ericsson**, 4.35% of 5G patents
- **Sharp**, 3.65% of 5G patents
- **Oppo**, 3.47% of 5G patents
- **CATT Datang Mobile**, 3.44% of 5G patents

Clarivate Derwent, "Demystifying the 5G standard essential patent landscape with manual SEP analysis" (2021)[4]

- **Huawei**, 4845 declared patent families
- **Samsung Electronics**, 3042 declared patent families
- **Nokia**, 2243 declared patent families
- **Ericsson**, 2187 declared patent families
- **LG Electronics**, 2091 declared patent families
- **Qualcomm**, 2076 declared patent families
- Others, 10630 declared patent families

Amplified and GreyB, "Updated Findings on Essentiality of 5G declared Standard Essential Patents" (2021)[5]

- **Huawei**, 3007 declared patent families
- **Samsung Electronics**, 2317 declared patent families
- **LG Electronics**, 2147 declared patent families
- **Nokia** 2047 declared patent families
- **Ericsson**, 1678 declared patent families
- **Qualcomm**, 1125 declared patent families

[4] https://clarivate.com/blog/demystifying-the-5g-standard-essential-patent-landscape-with-manual-sep-analysis
[5] https://info.greyb.com/hubfs/Downloadable_Reports/5G%20Report%20-%201st%20Release.pdf

USPTO, ¨Patenting Activity by companies developing 5G" (February 2022)[6]
**the results below are from the graph (figure 1) which does not provide exact figures.*

- **Huawei**, 4600
- **LG Electronics**, 4100
- **Qualcomm**, 3750
- **Samsung Electronics**, 3050
- **ZTE**, 2000
- **Ericsson**, 1950
- **Nokia**, 1600

Conclusions

Cross-referencing the various 5G SEP landscaping studies reveals a consistent trend that there is a group of companies that hold the most declared 5G patents. Even if the studies reveal somewhat different rankings of those companies in their results, they demonstrate that the companies leading in 5G patenting are headquarted outside the UK. These study results suggest that the UK and its innovative businesses will be entirely net licensees of 5G SEPs.

NOTE: The positions and statements presented in this paper do not necessarily reflect the detailed individual corporate positions of each member.

[6] https://www.uspto.gov/sites/default/files/documents/USPTO-5G-PatentActivityReport-Feb2022.pdf