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Nokia's Response to the Consultation CMA174con: Draft Guidance on the Application of the Chapter I Prohibition in the Competition Act 1998 to Horizontal Agreements

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Contents

About Nokia	3
Introduction	4
Scope of Part 9 of the Draft Guidance	5
A Balanced Approach	6
FRAND access and licensing – paragraphs 9.22, 9.33 and 9.44	8
FRAND Access	9
Patents do not on their own prevent access to or use of a standard – access \neq licence	9
Legal and practical issues with a "license to all" regime	10
IPR Policies	11
Legal issues	12
Licensing practices	16
More concerning issues with access and licensing – royalty-free grant-backs	19
AOM and CSA – IPR policy issues	20
Royalty-free grant-backs are not equivalent to reciprocity	21
Ex Ante Disclosure of Royalty Rates	22
Inclusion of Licensing Negotiation Groups in Part 6 of the Draft Guidance	24
Conclusion & Next Steps	26

About Nokia

At Nokia, we create technology that helps the world act together.

We are a B2B technology innovation leader in networking, bringing together the world's people, machines and devices to realise the potential of digital in every industry.

Nokia is a technology leader. With more than three decades of innovation in telecommunications and multimedia, we continue to pioneer and develop the technologies that power the smartphone industry, consumer electronics, video streaming, connected vehicles, and the wider internet of things.

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

Since 2000, Nokia has invested more than €140bn in research and development (**R&D**) since 2000, including over €4.5bn in 2022 alone (representing nearly 20% of Nokia's annual revenue).

As result of our continuous R&D investment, we have built an industry leading portfolio of Standard Essential Patents (**SEPs**) - inventions we have contributed to open industry standards, such as 3G, 4G or 5G, and which support the operation of these technical standards.

We hold SEPs for cellular communications, wireless LAN (WLAN) and multi-media technologies. We have over 20,000 patent families, of which more than 4,500 disclosed as essential for 5G. In 2022, we generated over 1,700 new patented inventions. We have also achieved the highly respected ISO 9001 certification for Nokia's high-quality patent portfolio management.

We contribute to open standards to help the industry advance and grow together, and much of our world-class patent portfolio is available to other companies through our patent licensing programmes.

We license our SEP portfolio under fair, reasonable, and non-discriminatory (**FRAND**) principles. We currently have around 200 licensees, licensed through our patent licensing programmes.

Nokia is both a major inventor and a licensee of other companies' technologies. The majority of Nokia's revenue stems from selling and supporting systems based on standardised technologies. Our dual role, as both a developer and implementer of open standards, gives Nokia a unique and even-handed perspective. We believe in a fair licensing approach that strikes a balance between the needs of those who develop and contribute technologies to standards and those who implement and use them.

For more information: <u>https://www.nokia.com</u>

Introduction

Nokia welcomes the opportunity to provide feedback to the Competition and Markets Authority (**CMA**) in respect of its Consultation¹, on draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements (the **Draft Guidance**).

We understand that, when finalised, the CMA intends for this guidance to replace the EU's Guidelines on horizontal cooperation agreements (**EU Horizontal Guidelines**) in the UK.² We note that the EU Horizontal Guidelines are themselves under review³ and that the CMA has been mindful of the EU's proposed approach in its revised EU Horizontal Guidelines but has sought to be guided by what is best for UK consumers and businesses.

Consistent with our initial input to the CMA⁴, our response focuses on Part 9 of the Draft Guidance concerning "Standardisation agreements", which the Consultation document observes: "*has been updated to provide additional guidance on a number of aspects of standardisation agreements, including guidance on agreements involving standard development organisations, the assessment of effective access to standards through the grant of licences to standard-essential IPR on fair, reasonable and nondiscriminatory terms, restrictions on participation in the development in certain standards and the assessment of disclosures of information relating to IPR*". We also address Part 6 of the Draft Guidance to the extent that it is intended that it "*may apply to joint purchasing agreements and joint negotiations in all sectors, including by groups of potential intellectual property rights (IPR) licensees*" and seeks to include "*clarification on the distinction between potentially legitimate joint purchasing arrangements and buyer cartels*".

At the outset we wish to commend the CMA for its work on the Draft Guidance. We are grateful for the CMA's efforts and attention to this important exercise.

As regards Part 9 of the Draft Guidance, it is important that this provides a useful benchmark for collaborative industry standardisation activities where IPR is involved and that they encourage clear, transparent and balanced IPR policies, recognising the important and delicate balance between (1) ensuring effective access for those wanting to use standardised technology covered by essential IPR and (2) providing FRAND compensation for SEP holders.

¹ Consultation document CMA174con.

² Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, European Commission, OJ C 11/1, 14.1.2011.

³ The European Commission published its draft revised EU Horizontal Guidelines for public consultation on 1 March 2022.

⁴ See Nokia's Response to the CMA Call for Inputs on the HBERS & Horizontal Guidelines submitted in January 2022.



Scope of Part 9 of the Draft Guidance

Paragraph 2.5 of the Consultation document is clear that: "*The Draft Guidance under consultation is aimed at helping businesses make their own assessment of common types of <u>agreements between actual and potential competitors</u>, which are referred to as <i>'horizontal agreements'*." Similarly, the Draft Guidance underlines that it "*aims to clarify how competition law applies to other common types of horizontal agreement*" and "*sets out the principles for the assessment of horizontal agreements under the Chapter I prohibition and provides an analytical framework for the most common types of horizontal agreements*".⁵ (emphasis added)

Nevertheless, Part 9 of the Draft Guidance appears to address conduct that is not properly within scope (i.e. is not limited to agreements between undertakings in horizontal relationships).

Notably, Part 9 refers to standardisation agreements involving parties in a vertical relationship.⁶ In addition, it contains a number of references to unilateral conduct and to potential abuse(s) of a dominant market position, which concern the interpretation and potential application of Chapter II. For example, when the Draft Guidance discusses patent "hold up" as a potential abuse of dominance. Footnote 355 states that "*High 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.*"⁷ Paragraph 9.27, indicates that: "*This 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.*"⁸

Part 9 concerns standardisation agreements. Accordingly, its provisions, should focus on participation in and contribution to standards, SDOs' governance and IPR policies, rather than focus on commercial matters/practices, such as SEP licensing practices/bilateral SEP licensing negotiations. To that end, footnote 371 correctly and unequivocally observes that "*Standard development organisations are not involved in the licencing [sic] negotiations or resultant agreements.*"⁹ However, the approach

⁵ See paragraphs 1.2 and 1.8.

⁶ See, in particular paragraphs 9.5 and 9.8.

⁷ See also footnotes 356 and 363, which refer to the ruling of the Court of Justice in *Huawei v. ZTE* and the Commission's decision in Case AT.39985 - Motorola. Both of those cases concern unilateral conduct which would properly fall to be considered under Chapter II.

⁸ We note also that this statement appears to presume dominance/market power, contrary to paragraph 9.11, which confirms that: "*there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power*" and that: "*The question of market power can only be assessed on a case-by-case basis.*"

⁹ For example, the goal of ETSI is to create the best possible standards and it is structured to achieve that goal. It does not look at commercial matters and, as discussed in more detail below, it does not have the competencies to determine aggregate royalty rates.

adopted in paragraph 9.22 of the revised Draft Guidance is inconsistent with this position; as is the suggestion in footnote 388 that "*standard development organisations could take an active role in disclosing the total maximum stack of royalty for the standard*". Likewise, we question whether it is appropriate for the Draft Guidance to discuss valuation methods, irrespective of whether the methods are non-exhaustive.

In the light of the above, and in order to provide clarity and legal certainty to businesses, we would invite the CMA to revise the Draft Guidance to (further) clarify that conduct involving parties in vertical relationships, unilateral conduct, and commercial matters, are outside of the scope of Part 9.

A Balanced Approach

FRAND licensing strikes a fair balance between those who develop standardised technologies and those who implement them. Standardisation works because innovators, such as Nokia, offer technologies on the basis that they will be able to receive FRAND royalties. If this fundamental concept breaks down, the risk is not only to investment in R&D, but also to the ability and incentives to participate in open standards development. Without innovator participation, standards will not improve or progress. The open standards system (where anyone can contribute, and everyone has access), which is one of the cornerstones for innovation in the UK,¹⁰ would be replaced by proprietary technology solutions from global tech giants.

Nokia is therefore pleased to see this balanced approach is now acknowledged and reflected in paragraph 9.25 of the Draft Guidance, which makes clear not only that: *"FRAND commitments are designed to ensure that essential IPR protected technology incorporated in a standard <u>is accessible to the users</u> of that standard on fair, reasonable and non-discriminatory terms and conditions.", but also that <i>"At the same time, FRAND commitments <u>allow IPR holders to monetise their technologies via FRAND royalties</u> and <u>obtain a reasonable return on their investment in R&D which by its nature is risky</u>.", which "can <u>ensure continued incentives</u> to contribute the best available technology to the standard" [emphasis added].¹¹*

Open standards mean that implementers have access to, and can use and profit from, SEPs prior to concluding a FRAND licence. Accordingly, "hold-out" is a significant issue.

 ¹⁰ This was reiterated recently in Chapter 9 of the Government's Science and Technology Framework published on 6 March 2023 – see <u>https://www.gov.uk/government/publications/uk-science-and-technology-framework</u>.
 ¹¹ Nokia also welcomes the explicit acknowledgement in paragraph 9.26 of that SEP-holders "*may require that a FRAND licence to their standard-essential IPRs be taken on a global or multi-national portfolio basis*".

In contrast to the theoretical concerns regarding hold-up,¹² evidence of (unilateral and coordinated) hold-out is well-documented.¹³

Some implementers of standardised technologies have become incentivised to hold-out from paying adequate royalties for as long as possible or to avoid altogether taking a FRAND licence. By engaging in efficient infringement, unlicensed implementers appropriate technology without contributing to the substantial R&D costs incurred by innovators years in advance of a standard being adopted. This undermines the ability and incentives of innovators (who are responsible for developing cutting-edge technologies that are openly available for integration into millions of connected products and services) to invest in critical R&D for future technologies.

This has significant consequences for innovation and competition. It also threatens the UK Government's objective to "*become a champion of the global technical standards ecosystem that underpins international governance of critical technologies*" by 2030.¹⁴

Against this background, Nokia welcomes the inclusion and express recognition of holdout in paragraph 9.10 of the revised Draft Guidance, which talks of situations where "*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 nondiscriminatory ("FRAND") royalty or using dilatory strategies (i.e. deliberately delaying licensing negotiations with the licensor) ("hold-out").*"

Coordinated hold-out¹⁵ is a clear competition issue. Unilateral hold-out can also distort competition between implementers of standardised technology. Perversely, it gives willful infringers an unfair competitive advantage vis-à-vis implementers who respect IPR and engage in good faith negotiations to accept licences on FRAND terms. In addition, hold-out is also an important factor in understanding the market dynamics - i.e. the competitive relationship between SEP holders and implementers of standardised technology - and for the assessment of market power. In practice, market power lies with the implementers.

https://ec.europa.eu/docsroom/documents/45217/attachments/1/translations/en/renditions/native.

¹² Numerous commentators have observed that there is no evidence of hold-up. For example, when considering the "Hold-Up versus Hold-Out" debate, the January 2021 Report of the Group of Experts on Licensing and Valuation of Standard Essential Patents, referred to "*theoretical papers*" on hold-up, observing that: "*These papers have been criticized for various reasons. In particular, several scholars have noted the lack of empirical evidence supporting the hold-up theory*" and that "*Some scholars have argued that the opposite risk of hold-out may constitute a more serious problem.*" See:

¹³ See, for example, 'Efficient infringement of SEPs - IP Europe'_available at: <u>https://ipeurope.org/blog/efficient-infringement-of-seps/</u> and 'Unwilling SEP Licensees: Hold-out Strategies - IP Europe'_available at: <u>https://ipeurope.org/position-papers/unwilling-sep-licensees-hold-out-strategies/</u>. See also the 4iP Council Case Summaries on hold-out_available at: <u>https://caselaw.4ipcouncil.com/search/tag/hold-out</u>.

¹⁴ See Chapter 9 of the Government's Science and Technology Framework published on 6 March 2023 cited above.

¹⁵ See, for example, 'Is the smart meter industry engaged in coordinated hold-out? - IP Europe', available at: <u>https://ipeurope.org/blog/is-the-smart-meter-industry-engaged-in-coordinated-hold-out/</u>.

Hold-out also impacts the upstream future markets for innovation because it makes recovery on R&D investments less certain and more expensive to obtain.

FRAND access and licensing – paragraphs 9.22, 9.33 and 9.44

We welcome the CMA's attempt at a more balanced approach to its Draft Guidance on access to technology covered by SEPs than that seemingly taken by the European Commission in its Horizontal Guidelines. However, unfortunately, the revisions in paragraphs 9.22 (formerly paragraph 285 of the Horizontal Guidelines), 9.33 and 9.44 are only likely to exacerbate the problems surrounding the previous wording of paragraph 285.

By providing a "safe harbour" for IPR policies which require SEP holders to license anyone who seeks a licence (a so-called "licence to all" regime), the revisions risk creating numerous issues for SEP licensing and would run contrary to SDO IPR policies, court decisions, international and patent law, and SEP licensing practices.

A "licence to all" regime would also disincentivise standardisation in highly technical and innovative technology areas in the UK, and in other regions where such an approach is taken. The risks will be long-term, most likely leading to reduced royalty returns for innovations included into a standard, and in turn reducing incentives to develop new technical standards and risking the fragmentation of standards across different regions and technologies. This would benefit only those companies and governments powerful enough to push their own solutions onto their own markets to the detriment of open, transparent global standards built on wide industry consensus. International standards allow all countries and regions to participate and develop products based on them. It is therefore in the UK's strategic interests to ensure that this system is incentivised and maintained. A "license to all" regime will only harm, not help the UK's interests and being "a champion of the global technical standards ecosystem"¹⁶.

Paragraph 9.22 states:

"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')³⁶³. <u>The FRAND</u> <u>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.</u>³⁶⁴ [...]" [emphasis added]

¹⁶ Government's Science and Technology Framework, *ibid.*

Footnote 364 states:

"This would be the most permissive approach to the offering of licences and would therefore fall outside the scope of the Chapter I prohibition. Other less permissive approaches which did not require the IPR-holder to license all comers would require selfassessment to determine whether they in practice ensure effective access to the standard."

Paragraphs 9.33 and 9.44 expand on this guidance in a similarly problematic manner.

These paragraphs presume, incorrectly, that (1) some kind of default "licence to all" approach is optimal from a competition law perspective; (2) IPR/patents prevent by default access to the implementation/use of a standard unless there is a licence in place; (3) a commitment requiring an SEP owner to offer a licence to "any third party" seeking a licence ("license to all") is sufficient on its own for an SDO to meet some kind of safe harbour; and (4) that SDOs have some role in compelling how commercial licensing should be done.

FRAND Access

Besides paragraphs 9.22, 9.33 and 9.44, the Draft Guidance, and the Horizontal Guidelines, rightly make clear that standardisation agreements (e.g. SDO IPR policies) should provide access to standardised technology and that appropriate FRAND commitments guarantee effective access to standards.

For example, the over-arching concern of the Horizontal Guidelines has been "prevention of <u>effective access to the standard</u>" (paragraph 9.5) recognising that "standardisation may lead to anti-competitive results by preventing certain undertakings from obtaining effective access to the results of the standard development process (that is to say, the specification and/or the essential IPR for implementing the standard)" (paragraph 9.9) and that "standardisation agreements which ... **provide access** to the standard on **FRAND terms** will normally not restrict competition within the meaning of Chapter I prohibition" (paragraph 9.17, see also paragraph 9.20).

The Horizontal Guidelines have rightly reflected the objective of universal access to, and broad implementation of, standards. Effective access to the standard does not require, and should not be equated with, 'access to a licence'.

Patents do not on their own prevent access to or use of a standard – access ≠ licence

Both the Draft Guidance and the Consultation document appear erroneously to equate access to or use of a standard with access to a licence. Indeed, the Consultation document states that the Draft Guidance has been updated to provide additional guidance on "*the assessment of effective access to standards through the grant of licences to standard-essential IPR on fair, reasonable and non-discriminatory terms*".

Firstly, patents are exclusionary rights, not monopolies. The right's owner is only able to seek exclusion of an infringer via a court, but to do so it must first prove infringement of the patent – and most likely defend the validity of the patent as well. Therefore patents are not by default exclusionary.

Secondly, the commitment given by a SEP owner to an SDO to ensure access to the SDO's adopted standard(s) on a FRAND basis provides further protection for implementers under both competition and contract law. As confirmed by the CJEU (*Huawei v ZTE*¹⁷) and UK Supreme Court (*Unwired Planet v Huawei*¹⁸), on the basis of Article 102 / Chapter II, a Court should not grant an injunction against a SEP infringer unless the infringer has either shown unwillingness to take a licence (e.g. it has not acted in good faith towards concluding a FRAND licence) or has refused to accept a FRAND licence offer or one determined by a court.

Therefore a patent owner cannot deny access to / use of a standard without the intervention of a court, which in the best case for the patent owner would have the infringer pay a FRAND rate for its use of the technology. In order to injunct a SEP infringer a court must: (1) determine that the patent is both infringed (i.e. essential to a standard) and valid; (2) balance the interests of the parties under the normal rules for awarding injunctions; (3) consider whether a FRAND offer has been made and if not set the terms for such a licence; and (4) make that injunction conditional on a refusal or non-acceptance by the infringer of a court determined fair, reasonable and non-discriminatory licence (see *Unwired Planet v Huawei* and *Optis v Apple*¹⁹). Even then any injunction may still be stayed if the matter is appealed, meaning that it can take two or three years for a SEP owner to obtain an injunction, and this will often have followed years of attempts at negotiating a licence with the standard's implementer.

Given this significant safety net for an implementer of a standard, a "license to all" safe harbour is simply not needed as all actors/stakeholders have access to the standard, regardless of an SDO's IPR policy, unless the above steps are met, which again would ultimately result in the infringer paying a FRAND rate assuming the patent owner's action is successful.

Legal and practical issues with a "license to all" regime

As outlined below, a "license to all" regime would cause significant legal and practical real-world problems – all of which would likely exacerbate inefficiencies in licensing and hold-out behaviour.

¹⁷ Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH, C-170/13, 16 July 2015.

¹⁸ Unwired Planet v. Huawei [2020] UKSC 37.

¹⁹ *Optis v. Apple* [2021] EWHC 2564 (Pat).

IPR Policies

Paragraph 9.33 states:

If an IPR Policy does not provide for licensing to third parties at all levels of the supply chain 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 level of the supply chain.

9.33 represents an oddity in Chapter 9. Firstly, it seeks to provide guidance on bilateral licensing, which is more appropriately the subject-matter of vertical arrangements and Chapter II. Secondly, it is inconsistent, like paragraph 9.22, with the foundational principle of "effective access" in the Guidance. Indeed 9.22 and 9.33 flip the primary principal of "effective access" on its head by creating some kind of "licence to all" default, rather than an "access for all" based one. As an aside, this paragraph also refers to an "IPR Policy". A term not used in the current Horizontal Guidelines.

Further, this new paragraph, while clearly well-intentioned to try to reconcile a "licence to all" approach with an "access for all" one, is inconsistent with how IPR policies generally operate.

There are at least several hundred different organisations globally which develop technical standards or specifications for market adoption. Each has its own IPR policy with its own terms and commitments to ensure effective access to their standards. While no one IPR policy is the same, they are often created in a similar manner. The members of the organisation, often representing a wide set of stakeholders, will come together to determine what the terms should be, including any licensing commitment(s). The significant majority of these organisations choose a FRAND based IPR licensing commitment as the means to ensure effective access to their standards. These commitments are not created or given with any assumption that licensing will actually take place. Indeed, for most of these organisations, none of their standards are subject to SEP licensing, as the SEP owners simply do not wish to expend costs tyring to license their patents.

It is also important to note that licensing commitments are rarely more than simple statements, along the lines that an owner of essential patents is willing/prepared to license them on FRAND terms. Policies rarely seek to say how such licensing is done. On the contrary, many SDO IPR policies or guides make clear that licensing is a matter outside their preview and one for commercial negotiation between the interested parties. IPR policies therefore do not seek to determine specifically who should or should not be licensed, or a level in a supply chain at which licensing should be done, or if anyone at all should be licensed. An SDO's concern, and that of its members, is therefore primarily: (1) that IPR/patents will not be used unreasonably to prevent access

to / use of its adopted standard; and (2) that if a patent owner wishes to obtain a royalty return through licensing its SEPs that the licence terms and royalties will be FRAND.

Very few policies provide any clear indication of who in a value/supply chain might be licensed. Most usually simply limit their policy licensing commitments to devices which fully implement / comply with their standards. For example, this is how ETSI's IPR policy operates, and as noted by Dr Bertram Huber, a legal expert involved in drafting ETSI's IPR Policy, that: "*ETSI has never compelled essential IPR owners to grant licenses to any company that requests one, or to grant licenses at the component level of the mobile telecommunications ecosystem*"²⁰. Indeed, he went on to note that "*the prevailing industry practice was for manufacturers of complete end-devices (e.g. handsets, infrastructure equipment) to negotiate and enter into any necessary licenses to the essential patents practiced in those end-devices*". This practice helps inform how ETSI's IPR policy is intended to operate, and others, but the policy did not seek to dictate how licensing should be done, and ETSI's is one of the clearest – as can be seen from a recent review of various SDO IPR policies²¹.

Accordingly, paragraph 9.33 is inconsistent with the majority of existing IPR policies, which do not have provisions enabling "de facto" access_to a licence. Given this there is a real risk that, through paragraph 9.33, IPR policies, which were designed with an "access for all" framework in mind, not "license to all" one, will become re-interpreted by some to favour a "license to all" interpretation. Such a change would risk running in conflict with other legal concerns, as well as practical licensing consideration, as we explain below.

Legal issues

a) Patent exhaustion

One major problem with a "license to all" concept has always been the laws of patent exhaustion. While UK law on this has not evolved to the same degree as other jurisdictions, it is clear at least from Supreme Court decisions in the USA²² and more recently Germany²³ that patent exhaustion prevents not only licensing at different levels in the same supply chain, but also even giving other types of assurance at different levels (e.g. covenants not to assert/sue).

 ²⁰ See Huber, Bertram, "Why the ETSI IPR Policy Does Not and Has Never Required Compulsory 'License to All': A Rebuttal to Karl Heinz Rosenbrock" (September 15, 2017). Available at SSRN: <u>https://ssrn.com/abstract=3038447</u>.
 ²¹ See A review of SDO IPR policies.

²² Quanta Computer, Inc v LG Electronics, Inc (No. 06-937), US Supreme Court (9 June 2008); and Impression products, Inc v Lexmark International, Inc (No. 15–1189), US Supreme Court (13 May 2017): https://www.supremecourt.gov/opinions/16pdf/15-1189 ebfj.pdf.

²³ Case number: <u>X ZR 123/20</u>, German Federal Court of Justice (24 January 2023). The FCJ has held that even a mere "covenant to sue last" can exhaust patent rights. See also this summary from a German lawyer: <u>http://www.fosspatents.com/2023/02/patent-exhaustion-can-be-trigged-by.html</u>.

The general principle of exhaustion is that if a patent owner gives its consent (e.g. a licence) to a product being put on a market that infringes its patents, it cannot usually prevent another party to whom that product has been sold from infringing its patent rights in that product. In light of recent case law, patent exhaustion seems also to prevent a patent owner providing legal assurances of access to those upstream in a supply chain, where a patent owner wishes to seek a licence further downstream in the supply chain.

This problem is exacerbated by licensing a portfolio of patents essential to a standard, as those upstream will invariably only infringe some of the patent owner's patents. Therefore even if the component supplier is licensed, other licences would be needed by downstream manufacturers for those patents not infringed by the supplier's components but only by the downstream manufacturer's products. This would mean licences covering different SEPs with different scopes and royalty provisions at different levels of the supply chain.



This is impractical and costly, and why licensing is typically done at one level in a supply chain, typically at or near the end product manufacturer level, in part, to avoid exhaustion issues. At this level most, if not all, the patent owner's SEPs will be infringed by the manufacturer – allowing for one licence covering the whole supply chain, e.g. via "have made" rights or the mere fact, as highlighted above, that access is not prevented by the absence of a licence.

Therefore, without reform of the laws of patent exhaustion, a "license to all" requirement is simply impossible to comply with for a single SEP, and impractical, costly

and inefficient for a portfolio of SEPs whose licensing would be split across multiple levels.

b) Risk of discrimination and distortion of competition

A "license to all" requirement, if followed through with, would also significantly increase the risk of discrimination and distortion of competition between competitors. Licensing at different levels of a supply chain will invariably involve licences of different scope and royalty provisions, dependant on the patents and products covered by each licence at each level in the supply chain. This situation would make the FRAND principle of nondiscrimination very difficult, if not impossible, to comply with.

The current practice of licensing at one level means that it is a relatively straightforward matter to compare the situation of similarly situated competitors and to see whether the terms offered to one would lead to discrimination or a distortion of competition of another similarly situated entity.

If anyone at any level in a supply chain were able to demand a licence, the SEP holder would be obliged not only to license that entity A, but presumably would need to seek licences from other similarly situated competitors at A's level (Y) in a supply chain. However, those same competitors may already benefit from a licence offered to their supplier at level (X) or customer at level (Z). The licence to A's competitors would therefore need to take into account licences previously offered to their suppliers (X) and/or customers (Z). This would naturally need to balance royalty payments to avoid the risk of royalty double-dipping by taking money from level Y for patents licensed at level X or Z.

While this situation might be possible to handle, if impractical and challenging, through auditing rights in a simple and stable supply chain with relatively few entities across the supply chains in a particular product market using a standard. The real-world rarely consists of such simple supply chains, but rather a cobweb of continually changing supply and distribution chains involving multiple suppliers and customers making it practically impossible to implement a "license to all" regime without risk of discriminating, royalty-stacking, and/or distorting competition. Plus, various questions would arise such as, how to deal with situations where some companies in a market are more vertically integrated than others?

As mentioned, it is not a simple matter to go to the component level to deal with this problem, as many/most end product manufacturers, including Nokia, often prefer being responsible for taking a licence. End product manufacturers are also often better placed than others to take licences to SEPs (see "Licensing Practices" section below).

Of course, in the real-world, the auditing rights needed to avoid double dipping and discrimination concerns would require access to commercially sensitive sales information – leading to another set of competition law concerns.

c) Court decisions

The issue of licensing in the supply chain has already been addressed by courts in Europe and other jurisdictions. Notably, the Mannheim Regional Court has stated that Nokia, as a patent holder, <u>has the right to choose at which level of the supply chain to enforce its patents</u> and from whom to request licences and added that <u>competition law does not restrict such a right</u>.²⁴ Specifically, the Court considered that approaching only the end-device manufacturer for a licence was a reasonable approach.

Likewise, in *Sharp v. Daimler*²⁵ the Munich Regional Court ruled that Sharp was "not obliged to grant a licence to the suppliers. It must only grant them access to the standards affected by their SEPs". The Court held that licensing at the end-product level, combined with so-called "have made" rights, provides component manufacturers legally secure access to standardised technology.²⁶

In the US, Continental (a supplier of TCU modules to OEM car companies) failed to even get legal standing for an anti-trust claim it made on the basis that it was unable to obtain a licence directly from the Avanci patent pool. This was because it failed to show any harm to it by not being licensed. In its concluding statements the US Court of Appeals of the 5th Circuit stated:

"On the face of Continental's complaint, there are no allegations that Patent Holder Defendants have sued or threatened to sue Continental for infringing their SEPs. To the extent that Continental is alleging Patent Holder Defendants have sued or threatened to sue OEMs for infringement, requiring OEMs to accept an Avanci license on non-FRAND terms, the OEMs may find it easier to establish an injury in fact [...] In sum, the district court erred in holding that Continental had Article III standing to bring its claims. Given that we lack jurisdiction, we do not reach the parties' arguments as to antitrust standing and the merits."²⁷

d) International law - Compulsory licensing

In addition to the above, the CMA should be mindful of the UK's international commitments. An imposition of a "licence to all" regime would be tantamount to a *de*

²⁷ See page 13, Case 20-11032 *Continental Automotive Systems Inc. v. Avanci LLC* (Court of Appeals for the 5th Cir., 28 February 2022) <u>https://cases.justia.com/federal/appellate-courts/ca5/20-11032/20-11032-2022-02-</u>

<u>28.pdf?ts=1646094618</u>. The Court of Appeal in this case also referred to the U.S. Court of Appeal for the Ninth Circuit in *Federal Trade Commission v. Qualcomm Inc.* 19-16122, 11 August 2020, which had observed that *"a policy of providing "de facto licenses" to component suppliers "allow[s]" Qualcomm's "competitors to practice Qualcomm's SEPs (royalty-free) before selling their chips to downstream OEMs""*.

²⁴ Judgment of the Mannheim Regional Court of 18 August 2020 in Case ID: 2 O 34/19. A summary is available at: <u>https://caselaw.4ipcouncil.com/german-court-decisions/lg-mannheim/nokia-v-daimler</u>.

²⁵ Judgment of the Munich I Regional Court of 10 September 2020 in Case ID: 7 O 8818/19. A summary is available at: <u>https://caselaw.4ipcouncil.com/german-court-decisions/lg-munich-district-court/sharp-v-daimler</u>.

²⁶ See also the *Unwired Planet v. Huawei* [2017] EWHC 711 (Pat).; the judgment of the Shenzhen Court in *Huawei Techs. Co. Ltd v. Samsung (China) Inv. Co., Ltd. et al.*, Y03 MC No. 840 (2016); *Nokia v. Daimler*, District Court (Landgericht) of Mannheim, judgment dated 18 August 2020, Case-No. 2 O 34/19; *Archos S.A. v. Koninklijke Philips N.V., NL*, District Court of The Hague, 10 February 2017, ECLI:NL:RBDHA:2017:1025.

facto compulsory licensing regime, with none of the safeguards that the UK has agreed to with the WTO.

As mentioned above, when a patent owner gives a licensing commitment it is not with an expectation that anyone can demand a licence from it. It gives the commitment with the understanding that it remains free to choose who, if anyone, it wishes to seek a licence from – typically for the purpose of obtaining a royalty for its SEPs. The implementer/infringer is simply provided protection (a defence) by the commitment that it will not be denied access from implementing the standard, unless it refuses a FRAND licence or is unwilling to take a licence.

However, the proposed text changes in paragraphs 9.22, 9.33 and 9.44 suggest, to the contrary, that anyone can demand such a licence unless an IPR policy clearly provides for access through licensing by other means, for example, at a specific level of a value chain i.e. the imposition of a compulsory licensing regime on a SEP holder, whether at all levels or just one.

Such a regime would most likely breach the UK's commitments to the WTO's Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement. Article 31 of TRIPs provides strict limitations on when such a licence can be imposed, which run contrary to how a "licence to all" regime would operate.

For example, Art 31(a) states: *"authorization of such use shall be considered on its individual merits"*. A broad sweeping "licence to all" regime runs in direct conflict with this provision as it would relate to all SEPs. While the modified CMA version of this regime is more restricted, paragraphs 9.22, 9.33 and 9.44 are still seeking to impose some degree of compulsory licensing, if only limited to one level of a supply chain.

Licensing practices

As mentioned above, for the vast majority of standards, SEP licensing simply does not occur, even though some may own SEPs covering them. This may be for a number of reasons. One is that the patent owners may see their SEPs as primarily useful only for defensive purposes, e.g. if a company seeks a licence from them then they have some bargaining power. Often it is also just not worthwhile expending time, resources and costs seeking licences, for example, because the standard has a relatively small market value and/or a patent owner simply does not have many SEPs covering it. Also, the development costs behind the standard may not have been high.

This of course is not the case in certain domains such cellular or video standards, where often a relatively few companies sink significant R&D costs into them. In the case of cellular standards, this is in the order of billions of pounds worth of R&D annually. This investment is made worthwhile because of the high expectation that the standard will be adopted widely by the market. Of course, there are no guarantees for this.

Licensing SEPs for these standards is important as it helps incentivise further R&D into the next generation of standards. It also helps address an imbalance between those who

invest in the R&D and contribute to and help develop these standards, and those who simply use the standardised technology - thereby benefitting (sometimes hugely) from the investments of others at little cost to themselves.

For the last several decades, the licensing of SEPs has become an increasingly important and common practice. Over the last decade, the law surrounding how licensing should be conducted (e.g. *Huawei v ZTE*) and what may constitute a FRAND licence, in a particular situation (e.g. *Unwired Planet v Huawei*), has become increasingly clear. During this period of time, the right to choose whom to license and when has been left to the SEP holder – in part because implementers of standards rarely, if ever seriously, seek a licence.

This practice has worked well and has led to efficient licensing practices supported by well-considered court decisions. A "licence to all" regime, however, would seriously upset these practices in a very detrimental manner. These practices typically involve licensing at one level/point in a supply chain – that level usually being at the end user device manufacturer level. Licensing at a single point avoids problems with patent exhaustion and discrimination, as noted above, which would otherwise require extensive and intrusive auditing and product tracing across multiple levels and an extremely complex licensing structure to have any hope of working.

Licensing at or towards the end user manufacturer level is also practically efficient for both the licensor and licensee. For the licensor, it avoids portfolio splitting and the need for extensive auditing and tracing of the licensed product downstream to ensure it is being used only for the licensed purpose – namely implementing the licensed standard and not some other technology. For the licensee, they get assurance that they are licensed for all SEPs relevant to their product and transparency of the royalty they are paying across their supply chain. Also, the royalty at the end user level is more likely to represent a fair and reasonable market value for the particular product and use case, i.e. the SEP holder can charge less for the use of 5G cellular connectivity included in a simple vending machine than its use in a car or smartphone. It is also easier for an end user device manufacturer, than it would be for a component supplier, to pass these IPR costs directly onto its customers, the users of the standard, who are in turn the ultimate judges of value.

Any suggestion that licensing at the end user device level restricts component suppliers' freedom to operate would be misguided. Component suppliers can freely, and do, undertake R&D, manufacture their products, sell to all their customers, and provide repair and replacement services for intermediate products on the aftermarket. Moreover, research activities are covered by exemptions in national patent laws. This means that component suppliers do not need a SEP holder's consent to use SEPs for research purposes.

In addition, component manufacturers have all the consents that they need to operate under "have made" rights. In any event, as noted above, under *Huawei v ZTE* and national case law, component suppliers have no genuine fear that a court would grant an

injunction against them: if a SEP holder does not first offer a willing implementer a licence on FRAND terms, then the second limb of the *Huawei v ZTE* test is not met. As such, licensing at the end device level cannot be equated to a denial of access to standardised technology.

Another problem that will exist with a "licence to all" regime is that it can be easily used by entities to claim someone else in another part of the value chain should take a licence instead of themselves, and perhaps even compel their supplier, through commercial pressure, to take such a license – even though such a licence may be unaffordable by the supplier, but easily affordable by its customer. We have seen first-hand this "hold out" tactic playout in the automotive sector.

For the last decade or more car manufacturers have been using cellular standards in their vehicles. The majority of them have only taken licences to these standards in the last couple of years. During the intervening period they actively avoided taking licences. One of the main reasons they claimed to do so was that their suppliers should take a licence, not themselves. When their suppliers were approached to take a licence they claimed either that their suppliers should instead take a licence or that they could not afford the offered licence. For example, Daimler, who had been using cellular standards in its vehicles since 2006, only concluded a licence with Nokia in 2021, after 5 years of being approached to take one, claiming during these years that its suppliers should instead take a licence.

Eventually this dispute and others were resolved, and now the majority of automotive companies are licensed through the Avanci patent pool, of which Nokia is a member. Nevertheless, this ping pong between supplier and customer, on the basis of "licence to all" positions, significantly delayed licensing for years and took costly and pointless litigation to resolve.

In the light of the very serious concerns expressed above with a "license to all" regime, and in order to provide legal certainty to SDOs and companies, **we would invite the CMA to clarify that the draft Guidance does not require licensing at all, multiple or any particular levels of the value chain, as long as effective access to the standard is secured for all market participants**.

We would also ask that the CMA:

1) amends paragraph 9.22, as follows (including deleting footnote 364):

"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')³⁶³. 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.³⁶⁴ [...]"

2) deletes the whole of paragraph 9.33; and

3) amends paragraph 9.44, as follows (including deleting footnote 391):

"If an IPR Policy does not provide for licensing to third parties at all levels of the supply chain, that clause falls within the scope of Chapter I prohibition (see paragraph 9.33 above), then consideration should be given to whether the IPR Policy brings about efficiencies in terms of the successful development and/or adoption by users of the standard in question (compared to a counterfactual where the IPR Policy required IPR holders to license third parties at all levels of the supply chain).³⁹¹"

More concerning issues with access and licensing – royalty-free grantbacks

The recent focus by competition authorities on an unnecessary and problematic "license to all" regime has led to many missing a concerning recent development in some private consortia IPR policies, which seek to impose conditions for access to their standards. These policies seek to compel implementers to give up their IPRs relevant to these consortia's specifications/standards on a royalty-free basis. As explained below, these types of policies are *ab initio* not FRAND. They also risk foreclosing upstream innovation and doing long-term harm to future standards development in the areas that they seek to operate.

Consortia such as the Alliance for Open Media (AOM) and Connectivity Standards Alliance (CSA, formerly Zigbee) are pushing specifications, with strong support from a number of the large digital platforms²⁸, under policies or licensing regimes where the only protection an implementer has from IPR included in them is to accept giving up their IPR/patents covering those specifications (and in the case of AOM also implementations in the related codecs) to the members of that organisation on a royalty-free basis. This is not FRAND for everyone who implements these standards.

If a member or members of the consortia own minimal IPR in the area, but an implementer or implementers of them own valuable IPR in that area then it is not reasonable for the members to give up nothing or little in return for something of value from the implementer, i.e. royalty-free access to their underlying IPR. This type of policy means that large implementer companies, especially those in dominant positions, can use their market power to push a technology onto a market - under the guise of it being a "standard" and on the claims that is royalty-free (to speed up wide market adoption). They can then compel others, who may have little choice due to commercial pressure or no alternatives following wide market adoption, to use their standard and so give up their IPR on a royalty-free basis.

Of course, while this approach may benefit the interests of the large companies who push such standards through obtaining royalty-free licences for themselves from others, if successful, it will lower incentives for companies to innovate and to create new

²⁸ <u>https://aomedia.org/membership/members/</u> and <u>https://csa-iot.org/members/</u>.

standards. Thereby increasing the control and direction of the technology by those companies.

And once the market has been fully captured by the consortia's standard, there would be no reason to innovate further by anyone. Instead, there are likely to be small, incremental improvements controlled by those few left who have any remaining expertise in the relevant technologies – as can be seen for mobile and computing operating systems today.

The nature of royalty-free licensing is that it reduces incentives to innovate. This is not necessarily a problem for certain standards where innovation is not a key to their success. But in areas where there is room for innovation and there is a market demand for it then royalty-free conditions can be a death nail to competition in technology. Normally such standards are not successful because they cannot compete with more innovative standards based on FRAND licensing. Of course, this assumes that the standard does not seek to misappropriate the innovations of others. The royalty-free grant-back, however, does just that.

This misappropriation of rights will disproportionately affect smaller companies and SMEs who may have little choice due to commercial pressures but to use the consortia's standard and give up their IPR.

Further, a third party, by not being a member of the consortia, will have had no opportunity to seek exclusion of its technology from the standard. Normally this risk is small as in most cases those who have relevant IPR will be members of the relevant SDO and typically happy to subject their IPR to FRAND commitments. And many SDOs have clear provisions to enable exclusion of third party IPR as needed. However, this is not the case for the consortia mentioned above. This means that there is a significantly increased risk for implementers that third parties will have patents relevant to the consortia's standard for which no assurances of access (e.g. licensing commitments) have been given.

AOM and CSA – IPR policy issues

To take AOM as an example, it has developed a video codec called AV1 that is based on pre-existing codecs created by Google called VP8 and VP9. AOM's members claim that they provide their IPR royalty-free. However, this is misleading. Instead, the organisation has a patent licence, whereby <u>if</u> you wish to benefit from royalty-free licensing, you have to agree to license for free your IPR relevant to both the AV1 specification <u>as well as</u> codecs developed for it.

Besides the wide scope of the grant-back licence to cover whatever implementation might be developed which follow the AV1 specification (arguably including other subject-matters), it provides no protection – FRAND or otherwise – to an implementer which

does not wish to accept the terms of AOM's Patent Licence²⁹. AOM therefore does not provide "effective access" on a FRAND basis. There is also no mechanism for a third party to exclude its IPR from the AV1 specification, and presumably even if it were to become a member (and so automatically give up its IPR on a royalty-free basis for any AOM specifications, not just AV1) it would have little success given the market adoption of AV1.

It is clear that a number of companies have patents relevant to AOM. Sisvel has a patent pool covering VP9 and AV1³⁰. Needless to say, its patent pool members are presumably not members of AOM. These companies will have expended resources developing technologies appropriated by AOM's AV1 specification – most likely originally for other video codecs such as ISO/IEC's FRAND-based HEVC or VVC specifications. The freedom for those members of the pool to license, however, is because they have not been compelled, yet, to accept AOM's terms of access. But this does not necessarily apply to others, and may not apply to them in the future should they have little choice but to use the AV1 video codec due to wide market adoption.

The CSA is another example, but relates instead to IoT specifications. Its approach is a little different to AOM in that it compels royalty-free licensing by requiring those who wish to certify their products as compliant with its specifications to give up their IPR essential to those specifications on a royalty-free basis. Due to commercial pressure from customers, Nokia has recently joined this organisation, thereby highlighting the dangers of this type of royalty-free grant-back IPR policy to force appropriation, on a non-FRAND basis, the innovations of others. For the time being we do not need to certify our products as compliant with CSA specifications, and so we can avoid the royalty-free grant-back for now, but commercial realities may change this in the future.

Royalty-free grant-backs are not equivalent to reciprocity

The royalty-free grant-back provisions in these cases should not be confused with a common practice of reciprocity. Reciprocity generally means that if an SDO member has offered its IPR on a royalty-free or FRAND basis, it is not bound to its commitment to license on that basis if an implementer of the standard is not willing to license its SEPs in return to the same standard on the same basis. The important distinction is that in the case of reciprocity-based royalty-free commitments there is a FRAND fallback, i.e. that if the implementer does not wish to reciprocate by also cross-licensing its SEPs on a royalty-free basis it is free to do so on a FRAND royalty-bearing basis. In such cases, both parties can negotiate a cross-licence on FRAND terms. This type of reciprocal royalty-free commitment given by an SDO's patent owning members can be FRAND. However, neither AOM's nor CSA's members offer this FRAND assurance as a fallback,

 ²⁹ See AOM's Patent licence, in particular clause 1.2.1 <u>https://aomedia.org/license/patent-license/</u>.
 ³⁰ <u>https://www.sisvel.com/licensing-programs/audio-and-video-coding-decoding/video-coding-platform/license-terms/av1-license-terms</u>.

and so simply seek to require an implementer to license their IPR to the consortia's members on a non-FRAND royalty-free basis.

Ex Ante Disclosure of Royalty Rates

The Draft Guidance underlines that: "*Any agreements to reduce competition by jointly fixing prices either of downstream products or of substitute IPR or technology will constitute restrictions of competition by object.*".³¹ However, amendments elsewhere in the text indicate that standard development agreements providing for the *ex ante* disclosure of a maximum accumulated royalty rate by all IPR holders would not, in principle, restrict competition within the meaning of the Chapter I prohibition.³²

As such, the Draft Guidance equates jointly fixing a royalty cap with the unilateral *ex ante* disclosure of most restrictive licensing terms. However, setting a maximum total royalty rate is different, from a competition law point of view, than the setting individual *ex ante* rates or caps. While the latter reflects price competition between rivals, the former involves coordination of pricing/price-fixing between competitors, which raises grave concerns under competition law.

This issue was addressed in a 2006 letter from Angel Tradacete Cocera of DG Competition to Karl Heinz Rosenbrock, the then Director General of ETSI.³³ According to the letter, DG Competition considered that *ex ante* price negotiation based upon unilateral royalty disclosure had the potential to promote "*competition on the basis of both technology and price*," but by contrast, the collective setting of a royalty cap "*risks negating the possible benefits of … [a] 'pure' ex ante regime*.". The letter observed that, "*whereas a 'pure' ex ante regime has the potential to bring the price down to a competitive level through competition on the basis of price … <u>a collective ex ante</u> <u>royalty cap regime … does not appear to allow for any such price competition</u>", and that, "<i>it would appear to precisely preclude any such price competition from occurring, since the price of each essential patent is fixed in advance …*" [emphasis added]

In addition, to the extent that the footnote states that "*standard development organisations could take an active role in disclosing the total maximum stack of royalty for the standard*", this is inconsistent with footnote 371 which, as noted above, correctly states that "*standard development organisations are not involved in the licensing negotiations or resultant agreements*".³⁴

³¹ See paragraph 9.13.

³² See paragraph 9.42. See also footnotes 388 and 389.

³³ See *Letter from the EC Competition DG on ETSI IPR Group Discussions*, ETSI GA/IPRR05(06)12 (22 June 2006). See also Nokia's response to the targeted questionnaire on standardisation agreements.

³⁴ As noted above, as regards the scope of Part 9 of the Draft Guidance, it is targeted at standardisation agreements and should not therefore focus commercial matters/practices. In any event, the goal of ETSI is to create the best possible standards and it is structured to achieve that goal. It does not look at commercial matters and certainly does not have the competencies to determine aggregate royalty rates. Developing those competencies would undermine the task of creating the best possible standards.

Also, determining and disclosing a total maximum royalty stack would necessarily require a 'top-down' approach to determining royalties, which runs counter to the amended text in footnote 375, which states that: "*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.*"³⁵

A further reason why it would be not appropriate to set a maximum total royalty rate is that such a rate, presumably set *ex ante*, could at best be only an approximation to the actual value that the standardised technology creates in any particular application. A determination of actual value is unlikely to be possible before the technology has been on the market and consumers and others have indicated valuation through market activities.

Similarly, the fact that royalty rates should reflect the value created in any particular application of the patented technology is another reason why it would be not appropriate to set a maximum total royalty rate. This means there are different rates for different applications, i.e. use cases. As such, there would need to be multiple maximum total royalty rates, one for each application. SDOs are not in a position to categorise such applications, many of which may not even be known until some time after a standard has been finalised by an SDO. For example, cellular technologies are increasingly used in multiple applications and may have a different value for each of them (e.g. for vending machines, IoT sensors, card payment machines, smartphones, cars etc).

The fact that companies, which merely implement the standards, substantially outnumber companies, which predominantly develop the standards at most relevant SDOs, is yet another reason why it would be not appropriate to set a maximum total royalty rate. If SDOs were to set maximum royalty rates by voting, the rates would very likely favour the short-term commercial interests of those not investing resources into developing the SDO's standards – to the long-term detriment of the SDO and its future standards development. Alternatively, if the SDOs were to set maximum royalty rates by consensus, no consensus would be reached due to the opposing interests of companies which only implement standards and those which develop (and usually also implement) standards.

In these circumstances, and in order to ensure a consistency of approach throughout the Draft Guidance, we would propose that the CMA remove the references to a maximum accumulated royalty rate and the total maximum royalty stack and revert to/reinstate the former language.

 $^{^{\}rm 35}$ See also paragraph 9.27 of the Draft Guidance.

Inclusion of Licensing Negotiation Groups in Part 6 of the Draft Guidance

We understand that the Draft Guidance "*provides an analytical framework for <u>the most</u> <u>common types of horizontal agreements</u>"³⁶ and that it "<i>aims to clarify how competition law applies to other <u>common types of horizontal agreement</u> ... and therefore to make it easier for businesses to cooperate in ways which are <u>economically desirable</u>".³⁷ In this regard, it is surprising that licensing negotiation groups (LNGs) have been included in Part 6 of the Draft Guidance, which concerns "Purchasing Agreements".*

Nokia has considerable experience of licensing SEPs directly through our licensing programmes, following bilateral negotiation. We are also a member of the Avanci patent pool. Yet, we are not aware of any LNG(s) in practice. It is therefore concerning that both the Consultation document and the Draft Guidance appear to proceed on the (mis)understanding that there are already examples of so-called LNGs in operation and that they are commonplace.³⁸

In this regard, paragraph 6.2 of the Draft Guidance states that: "*Joint purchasing arrangements <u>can be found</u> in a variety of economic sectors and involve the pooling of purchasing activities. ... Groups of potential licensees <u>may seek to jointly negotiate</u> <u>licensing agreements for standard essential patents</u> with licensors in view of incorporating that technology in their products (sometimes referred to as licensing negotiation groups)." [emphasis added]. On this basis, the Consultation document indicates that Part 6 of " the Guidance may apply to joint purchasing agreements and joint negotiations in all sectors, including by groups of potential intellectual property rights (IPR) licensees".*

Absent any examples or experience of LNGs in practice, **we believe it might be** premature, at this stage, to include LNGs in the revised Draft Guidance. In particular in circumstances where the CMA: (1) is unable to provide/include a worked "Example" of the competitive assessment of an LNG in the Draft Guidance; and (2) has expressly reserved the right to revise the Draft Guidance "*in light of future developments and evolving experience*".³⁹

³⁶ See paragraph 1.8 (emphasis added).

³⁷ See paragraph 1.2 (emphasis added).

³⁸ On the contrary, the theoretical concept of LNGs was introduced at a relatively late stage of the ongoing review of the EU Horizontal Guidelines, where they were first referenced in Section 4.2. of the <u>Staff Working Document</u> following on from a high-level and theoretical <u>proposal</u> regarding LNGs (Proposal 75) in the <u>Report from the Group of Experts on Licensing and Valuation of Standard Essential Patents 'SEPs Expert Group'</u>.

³⁹ See paragraph 1.10.

Given the competition law concerns raised by LNGs that have been identified by various stakeholders⁴⁰, including the SEPs Expert Group itself (which also highlighted a the need for anti-trust scrutiny), their inclusion in the current iteration of the Guidance risks erroneously indicating a safe harbour and giving the "greenlight" to arrangements whereby competitors could engage in anti-competitive discussions and exchanges concerning the licensing of SEPs with the sole or main aim of reducing or limiting price and facilitating a collusive outcome on the market.

This is particularly concerning where there are already examples of co-ordinated holdout by implementers of standardised technologies (discussed above), and as recognised hold-out deprives SEP holders of FRAND royalties and the ability "*to obtain a reasonable return on their investment in R&D which by its nature is risky*". FRAND royalties enable investment in further R&D and "*ensure continued incentives to contribute the best available technology to the standard*", which would be vital for the UK to "*become a champion of the global technical standards ecosystem that underpins international governance of critical technologies*".⁴¹

As regards the relevant framework to assess LNGs, the Draft Guidance does not address the competition concerns posed by LNGs – i.e. that they: (1) offer additional (coordinated) hold-out opportunities for implementers⁴²; (2) effectively operate as a buyers' cartel; and (3) enable implementers of standardised technology to engage in anti-competitive information exchange and/or collusion.

As regards an effects-based analysis of LNGs, under paragraph 6.17 this must be done "on a case-by-case basis in <u>their legal and economic context</u> with regard to their actual and likely effects on competition" and the "analysis of the restrictive effects on competition generated by a joint purchasing arrangement must cover the <u>negative</u> <u>effects on ... the purchasing market</u> or markets" [emphasis added].

However, the Draft Guidance does not draw the important distinction between joint purchasing of goods or services and SEP licensing, where the nature of open standards means that implementers have access to, use, and profit from standardised technology without first having to take a licence. In addition, the Draft Guidance does not appear to consider the significant market/buyer power of implementers is such that a joint purchasing arrangement (i.e. an LNG) is likely to give rise to considerable restrictive

⁴⁰ See, for example, <u>https://www.4ipcouncil.com/research/licensing-negotiation-groups-what-why-how</u> and <u>https://www.4ipcouncil.com/research/licensing-negotiation-groups-seps-collusive-technology-buyers-arrangements-pitfalls-and-reasonable-alternatives</u>.

⁴¹ Paragraph 6.26 recognises that jointly exercised buying power may harm investment incentives and discourage innovation, which may bring about restrictive effects on competition such as lessening of innovation efforts. Paragraph 6.27 also acknowledges the risk that a joint purchasing arrangement "*could discourage investments or innovations benefitting consumers*". However, this does not capture the impact of hold-out on the ability and incentives of SEP-holders to continue to invest in risky R&D for future technologies and to participate in open, collaborative, and consensus-driven standards development.

⁴² Notwithstanding the express recognition of hold-out in paragraph 9.10 of the Draft Guidance.

effects on competition within the meaning Chapter 1⁴³ – or that the 'FRAND context' heightens, not mitigates, the risk.

Importantly, when discussing market power, paragraph 6.24 does not appear to consider the FRAND context and, in particular, the fact that the 'non-discriminatory' aspect of the FRAND commitment could mean that, even where participants in an LNG represent 15% or less of the (properly defined) relevant market(s), in practice the terms negotiated with the LNG could have a much broader impact. This raises doubts about whether it is appropriate for the 15% market share 'safe harbour' to apply to LNGs.

As regards the potential for a "*collusive outcome*", the discussion of the "*bargaining process*" in paragraph 6.38 does not appear to take account of (1) the fact that implementers have access to standardised technology without first having to take a licence; and (2) evidence of hold-out by bad-faith implementers, including co-ordinated hold-out.

The potential interplay between the "*bargaining process*" and *Huawei v ZTE* framework is unclear. Likewise, given the significant concerns that LNGs could/would be used as a vehicle for co-ordinated hold-out, **it would be useful for the CMA to clarify that paragraph 9.10 of the Draft Guidance, which refers to hold-out as conduct** "*attributable solely to the user of the standard*", would include 'unwillingness'/conduct by an LNG and/or the word "*solely*" be deleted from the text.

Finally, given the increased hold-out risks, certain commentators have questioned whether LNGs would deliver (sufficient) efficiencies/cost-savings in practice.⁴⁴

In the light of all of the above considerations we would invite the CMA to remove the following text from the Draft Guidance: "*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).*".

Conclusion & Next Steps

Nokia hope that our input will assist the CMA in preparing its final Guidance.

We are available to answer any questions that the CMA may have on the points addressed in this response and to provide any additional information.

⁴³ At present paragraph 6.31 of the Draft Guidance states only that "*In the analysis of whether the parties to a joint purchasing arrangement have buying power, the number and intensity of links (for example, other purchasing agreements) between competitors in the purchasing market are relevant*". This does not reflect the specific factors/features that are relevant to the assessment of the buying power of a group of potential licensees of SEPs.
⁴⁴ See, for example, <u>https://www.4ipcouncil.com/research/economic-case-against-licensing-negotiation-groups-internet-things / https://academic.oup.com/antitrust/advance-article-abstract/doi/10.1093/jaenfo/jnac006/6571001.</u>