

## QUALCOMM INCORPORATED'S RESPONSE TO THE PUBLIC CONSULTATION ON THE DRAFT GUIDANCE ON THE APPLICATION OF THE CHAPTER 1 PROHIBITION IN THE COMPETITION ACT 1998 TO HORIZONTAL AGREEMENTS

March 8, 2023

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### PART A: ABOUT QUALCOMM

Qualcomm Incorporated submits this response to the public consultation on the draft guidance on the application of the Chapter 1 prohibition in the Competition Act 1998 to horizontal agreements that was published on January 23, 2023. Qualcomm commends the Competition Markets Authority for engaging in this consultation and seeking stakeholder input. This response focuses primarily on issues in the draft guidance related to standardization and the licensing of standards-essential patents.

Our feedback is based on Qualcomm's considerable experience in developing and licensing foundational wireless communications technologies over the last 30-plus years as well as our lengthy and extensive participation in wireless communications Standards-Development Organisations (SDOs), including the European Telecommunications Standards Institute (ETSI) and the Third Generation Partnership Project (3GPP).

For context, Qualcomm is both a Research and Development (R&D) and a product-development company. It is an innovator and leading developer of end-to-end design of wireless communications systems, having pioneered foundational aspects of cellular standards. Since its inception in 1985, Qualcomm has spent over \$80 billion on R&D. Our continuing re-investment and leading cellular R&D apparatus will enable us to make technology breakthroughs in 6G and beyond.

Qualcomm has made considerable contributions to cellular standards, including via ETSI and the 3GPP. Many foundational technologies used in ETSI/3GPP standards have been developed based on Qualcomm's proposals and Qualcomm has contributed to numerous technical standards papers. Qualcomm's worldwide patent portfolio consists of over 140,000 patents and patent applications, of which almost 65,000 are disclosed cellular standard-essential patents and patent applications (SEPs).

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### PART B: FEEDBACK ON THE DRAFT GUIDANCE.

The CMA's Summary of Changes in Paragraph 2.19 of the Consultation Document and the accompanying table notes two sections containing changes between the CMA's Draft Guidance and the European Union's 2011 Horizontal Guidelines: the addition of a reference to agreements among "groups of potential intellectual property rights (IPR) licensees" in the part on Purchasing Agreements and several updates to the part on Standardization Agreements. We address each in turn.

#### Purchasing Agreements

The Draft Guidance adds "[g]roups of potential licensees [that] may seek to jointly negotiate licensing agreements for standards essential patents with licensors in view of incorporating that



technology in their products,” also known as “licensing negotiation groups,” as an example of a joint purchasing arrangement intended to be addressed by the part of the Draft Guidance on Purchasing Agreements. The remainder of the changes in that part are mainly directed at factors that may distinguish joint purchasing arrangements that violate the Chapter 1 Prohibition and those that do not. Many of those factors, however, do not apply or apply differently when the subject of the joint purchasing arrangement is a license to intellectual property rights rather than a good or a service. In light of the added reference to licensing negotiation groups, greater clarity on the different application of the factors discussed in the Draft Guidance to intellectual property is needed. Our specific suggestions are as follows:

Paras.	Specific Suggestion	Comment
6.8-6.12	<p>Add language:</p> <p>“In the case of intellectual property, arrangements that include negotiation over compensation for past or ongoing infringing activity are unlikely to truly concern joint purchasing. In such cases, each infringer is individually liable to the patent holder for its own infringement, and thus is obliged to individually negotiate or individually respond to infringement proceedings in court. Thus, a joint purchasing arrangement that includes negotiation over compensation for past or ongoing infringement is likely to constitute unlawful coordination of how members will behave individually towards the patent holder.”</p>	<p>The primary difference between joint purchasing arrangements for intellectual property and such arrangements for goods and services is that the members of a joint purchasing arrangement for intellectual property can unilaterally obtain the benefit of intellectual property while infringing and not paying for it, while members of a joint purchasing arrangement for goods or services cannot obtain the goods or services without some arrangement with the supplier. If there is past or ongoing infringement, then each entity engaging in such infringement has <b>individually</b> incurred legal liability to the patent holder. Thus, the Draft Guidance must recognize that a member that has infringed or is infringing a supplier’s intellectual property is “behav[ing] individually” towards that supplier in the same way as a member would be behaving individually by entering into a bilateral agreement with the supplier for a good or service.</p>
6.19	<p>Add language in paragraph or in new paragraph after 6.19 and before 6.20:</p> <p>“A license for a standards-essential patent is normally available from only the patent holder and is seldom for fixed quantities of licensed products. Therefore, joint purchasing arrangements for such licenses are likely to either involve all of the members’ use of the patents (i.e., be an exclusive purchasing obligation) or be non-binding on any of the members’ use of the patents and therefore serve as a mechanism to coordinate how members behave individually towards the patent holder.”</p>	<p>True SEPs<sup>1</sup> are, by their nature, complements and thus implementers must necessarily obtain all the rights they need from the entity that has the right to grant such rights. That is usually just the patent owner, and thus the implied suggestion that a joint purchasing arrangement is less likely to have an anti-competitive effect if it is for less than all of the members’ requirements does not apply.</p>

<sup>1</sup> The patents to which SDO IPR Policies apply often include patents that are not strictly necessary to make standards-compliant products. For example, if there are multiple ways to implement a standard but all of them are covered by patents the ETSI IPR policy considers all of the relevant patent claims “ESSENTIAL IPR”. ETSI IPR Policy § 15.6. Some standards also have optional portions such that products implementing the standard do not necessarily need to implement patents essential to those portions.

Paras.	Specific Suggestion	Comment
6.27	<p>Add language or add paragraph after 6.27 and before 6.28:</p> <p>“The risk that a joint purchasing arrangement could discourage investments or innovations benefitting consumers may also be larger for arrangements for licenses to standards-essential patents subject to a commitment to offer licenses on fair, reasonable, and non-discriminatory (“FRAND”) terms (a “FRAND commitment”). Patent holders of such patents do not have countervailing market power because such power is constrained by the FRAND commitment. Moreover, such patent holders have necessarily already incurred sunk costs in R&amp;D required to develop the patented technology.”</p>	<p>This language is necessary to distinguish SEPs from necessary goods or services that are discussed in 6.27. While access to the patented technology is undoubtedly necessary to compete in markets for downstream standards-implementing products, the patent’s market power conferred by such necessity, if any,<sup>2</sup> is already constrained by the FRAND commitment. Accordingly, such necessity cannot and should not be cited to justify a need for coordinated buyer behaviour by licensees or prospective licensees.</p>
6.38 footnote 262	<p>Add to footnote:</p> <p>“Such temporary stops should also be distinguished from agreements to engage in patent infringement or stop complying with payment obligations under existing license agreements.”</p>	<p>Temporary stops of purchases of typical goods and services impose costs on both sides – the supplier foregoes sales, but the members go without goods or services they would prefer to purchase. Collusive joint infringement is one-sided – it imposes costs only on the supplier (here, the patent holder) that is deprived of licensing revenue while the members who are infringing on the patent holder’s rights continue to practice the relevant technology (which brings in revenue only for the member/infringer) unless and until ordered to stop by a court of competent jurisdiction.</p>

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<sup>2</sup> See Draft Guidance ¶ 9.11.

Paras.	Specific Suggestion	Comment
6.40	<p>Add to paragraph or in new immediately following paragraph:</p> <p>“Joint purchasing arrangements for intellectual property are less likely to produce efficiencies beyond a marginal reduction in transaction costs. Unlike goods or services, intellectual property does not incur marginal costs per additional use. Thus, there are unlikely to be substantial opportunities for economies of scale. Moreover, a joint purchasing arrangement for SEP licensing is unlikely to result in additional innovation because the incentive to innovate is already provided by standardization and the promise of FRAND compensation.”</p>	<p>Because intellectual property has essentially no marginal cost per use, factors like reduced transportation and storage costs do not apply. And while theoretically a joint negotiation could lower transaction costs, such costs are typically a very small fraction of the value of an SEP license. The small efficiency gain by a reduction in transaction costs is very unlikely to outweigh the anticompetitive effects of a joint purchasing arrangement that restricts competition within the meaning of the Chapter 1 prohibition.</p>
6.41	<p>Add:</p> <p>“A joint purchasing arrangement for IPR licenses that includes ongoing infringement will unlikely be necessary to achieve any efficiencies, since less restrictive alternatives including agreeing to arbitrate disputed terms, contractually committing to accept a license on FRAND terms when offered, and even simply temporarily ceasing production of infringing devices will also be options.”</p>	<p>Collusive ongoing infringement, whether or not it is undertaken as part of a joint purchasing arrangement, is neither indispensable nor proportional to either reducing transaction costs or ensuring that the supplier offers to license on FRAND terms. Both can be achieved by an arbitration that resolves disputed terms and results in a license, and both would be achieved if the members commit contractually to accept a license on FRAND terms if the supplier offers them. The primary reason for collusive infringement without any binding commitment to take a license is to impose hold-out pressure on the supplier, which is anticompetitive and contrary to the goals of the IPR policies under which most open standards bodies operate.</p>

An alternative to these additions would be to remove the reference to licensing negotiation groups as an example of a joint purchasing arrangement altogether, or to note that the Draft Guidance applies to such arrangements for goods and services and such arrangements for IPR must be analysed on a case-by-case basis.

### **Standardisation Agreements**

In general, the changes in the Draft Guidance enhance clarity and appropriately reflect the developments in the UK Courts since the EU’s 2011 Horizontal Guidelines were published. We are, in particular, grateful for the efforts at greater clarity in paragraphs 9.22, 9.33, 9.44, and

footnote 364 confirming that a standardization agreement addressing inclusion of IPR need not include a compulsory license regime ("license to all") to avoid running afoul of the Chapter 1 prohibition. But placing compulsory licensing in the Draft Guidance's paragraphs 9.16 – 9.25 (the "Safe Harbour") is inappropriate. In situations where multi-level licensing would create inefficiencies that would have the effect of restricting a patent holder's access to FRAND compensation, a compulsory licensing requirement would restrict competition within the meaning of the Chapter 1 prohibition and would be unlikely to qualify for the Section 9 exemption because requiring a FRAND offer before assertion would be a less-restrictive alternative.

The current Draft Guidelines should more directly address standardisation agreements that restrict competition in upstream technology markets. The use of such agreements to fix prices for or restrict competition (notably by foreclosing rival technologies) in technology markets has grown since 2011 and the danger of such restrictions is highest in two situations: (1) where a standard occupies the field in a given industry to the extent that technology development in the field is not viable outside the standard, such as in the case of Wi-Fi and the IEEE 802.11 standard; and (2) where the standard is developed and controlled by downstream consumers of technology with combined market power, such as in the case of video codecs and the Alliance for Open Media. In each of these situations, any features of a standardization agreement that has the effect of preventing a patent holder from obtaining fair value for a license to its patents, (such as mandatory royalty-free licensing or restrictions on injunctive relief that apply even when the licensee is unwilling to accept a license of FRAND terms) or foreclosing rival technologies is likely to cause a reduction in innovation and competition and would be unlikely to fulfil the conditions for exemption under Section 9(1) CA98. In addition, because the Safe Harbour refers to FRAND terms the Draft Guidance should clarify that it is insufficient for a standardisation agreement to simply recite the words "fair, reasonable and non-discriminatory." Rather, to qualify for the Safe Harbour standardization agreements should ensure that patent holders have effective access to FRAND compensation in the same way they must ensure that implementers have effective access to the standard. The need to balance access to the standard and access to fair compensation is reflected in real-world IPR policies such as the policy in effect at the European Telecommunications Standardization Institute, as was found by the UK Supreme Court in the *Unwired Planet* decision.<sup>3</sup>

Our specific suggestions are as follows:

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<sup>3</sup> *Unwired Planet Int'l, Ltd v. Huawei Technologies (UK) Co Ltd*, [2020] UKSC 37, para. 10 (Aug. 26, 2020).

Paras.	Specific Suggestion	Comment
9.7	<p>Revise as follows:</p> <p>“Second, standards that set detailed specifications for a product or service may limit technical development and innovation. While a standard is being developed, alternative technologies can compete for inclusion in the standard. Once one technology has been chosen or developed and the standard has been set, some technologies and undertakings may face a barrier to entry and may potentially be excluded from the market. In addition, standards requiring that a particular technology is used exclusively for a standard can have the effect of hindering the development and diffusion of other technologies. Preventing the development of other technologies, by obliging the members of the standard development organization to exclusively use a particular standard, may lead to the same effect. <b>Rules that unduly restrict a patent holder’s compensation or access to remedies, notably when the standard does not face meaningful competition from other standards, are also likely to reduce incentives to innovate.</b> The risk of limitation of innovation is increased if one or more undertakings are unjustifiably excluded from the standard development process.”</p>	<p>Change to address standardization agreements that restrict competition in technology markets, as discussed above.</p>

Paras.	Specific Suggestion	Comment
9.17	Revise as follows:  "Where participation in standard development is <b>unrestricted</b> and the <b>procedure</b> for adopting the standard in question is <b>transparent</b> , standardisation agreements which contain <b>no obligation to comply</b> with the standard and <b>provide access to both the standard and compensation for any IPR used in the standard</b> on <b>FRAND terms</b> will normally not restrict competition within the meaning of the Chapter 1 prohibition."	Change to address standardization agreements that restrict competition in technology markets, as discussed above.
9.20	Revise as follows:  "Furthermore, the standard development organization's rules would need to ensure <b>effective access to both the standard and compensation for any IPR used in the standard</b> on <b>FRAND terms</b> ."	Change to address standardization agreements that restrict competition in technology markets, as discussed above.
9.21	In the case of a standard involving IPR, <b>a clear and balanced IPR policy, adapted to the particular industry</b> and the needs of the standard development organization in question, <b>both</b> increases the likelihood that the implementers of the standard will be granted effective access to the standards set out by that standard development organization <b>and increases the likelihood that IPR holders will have effective access to compensation on FRAND terms for their IPR</b> ."	Change to address standardization agreements that restrict competition in technology markets, as discussed above.

Paras.	Specific Suggestion	Comment
9.22 footnote 364	Revise the first sentence as follows:  "This would be the most permissive approach to the offering of licenses and would therefore fall outside the scope of the Chapter I prohibition <del>unless it would unduly restrict a patent holder's access to compensation on FRAND terms (e.g., if in a particular industry such a rule would result in multi-level licensing with substantial inefficiencies).</del> "	As discussed above, a compulsory licensing rule can have anticompetitive effects under some circumstances. However, where multi-level licensing inefficiencies are not present, we agree that it would be "the most permissive approach."
9.22	Delete last sentence:  <del>"It should be noted that FRAND can also cover royalty free licensing."</del>	Agreements that require mandatory royalty-free licensing should not benefit from the Safe Harbour. By definition, such agreements limit the compensation IPR holders may receive for the use of their IPR below the economic value of the IPR. While such a restriction may not always restrict competition within the meaning of the Chapter 1 prohibition (for example in the case of standards that compete with other standards), it will restrict competition in some cases, notably where a standard occupies the field in a given industry to the extent that technology development in the field is not viable outside the standard or where the standard is developed and controlled by downstream consumers of technology with combined market power. Such a requirement may also have the effect of excluding some stakeholders from the standardization process. Accordingly, any standardization agreement that requires royalty-free licensing should be subject to an effects-based analysis.

Paras.	Specific Suggestion	Comment
<p>New paragraphs after 9.24 and before 9.25</p>	<p>Add:</p> <p>9.XX In order to <b>ensure effective access</b> to compensation on <b>FRAND Terms</b>, the IPR policy must not unduly restrict an IPR holder’s remedies against an implementer unwilling to take a license on <b>FRAND terms</b> or impose other requirements that have the effect of delaying access to courts or restricting the factors to consider in determining whether terms are FRAND as compared to a hypothetical policy requiring patent holders to offer licenses on <b>FRAND Terms</b> without such requirements.”</p> <p>NOTE: If this paragraph is added, the references to paragraph 9.24 in paragraphs 9.15, 9.16 and 9.30 would need to be changed to this paragraph’s number.</p>	<p>Change to address standardization agreements that restrict competition in technology markets, as discussed above, and to ensure that SDOs do not seek to take advantage of the Safe Harbour by enacting policies that include “fair, reasonable and non-discriminatory” licensing but impose requirements that unduly restrict a patent holder’s access to compensation for the use of its technology.</p>
<p>9.27</p>	<p>Add the following sentence:</p> <p>“Standardization agreements that restrict the factors to consider or otherwise have the effect of limiting compensation to patent holders below the economic value of the IPR will necessitate a self-assessment to establish whether the agreement falls under the Chapter 1 prohibition and, if so, the conditions for exemption under Section 9(1) CA98 are fulfilled.”</p>	<p>Change to address standardization agreements that restrict competition in technology markets, as discussed above.</p>
<p>9.31</p>	<p>Add sentence:</p> <p>“Restrictive effects on competition may also arise if technology development in the field is not viable outside the standard, such as when a standard does not face meaningful competition from other standards or where the standard is developed and controlled by downstream consumers of technology with combined market power.”</p>	<p>Change to address standardization agreements that restrict competition in technology markets, as discussed above.</p>

Paras.	Specific Suggestion	Comment
9.33	<p>Revise as follows:</p> <p>"If an IPR Policy does not provide 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). A requirement that a patent holder make an implementer an offer to license on FRAND terms before asserting its patents against such implementer would ordinarily provide such access and may be appropriate for industries in which multi-level licensing would result in substantial inefficiencies. 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."</p>	<p>In discussions with other stakeholders some have expressed concern that the inclusion of "have made" rights as an example will be misused to suggest that such rights are the only way to provide de facto access. The addition provides another example, eliminates this risk, and reduces the risk of the misuse of a "license to all" requirement to deprive patent holders of effective access to FRAND compensation.</p>
9.36	<p>Revise as follows:</p> <p>"Open participation can be achieved by allowing all competitors and/or relevant stakeholders in the markets affected by the standard to take part in developing and choosing the standard and avoiding rules or restrictions that disproportionately affect only some stakeholders."</p>	<p>As noted in paragraph 9.3 "Standardisation agreements may produce their effects on four possible markets." Thus, use of the singular "market" is inappropriate. In addition, the Draft Guidance should recognize that rules that disproportionately affect some stakeholders may have the effect of foreclosing their participation (see also paragraph 9.41).</p>

Paras.	Specific Suggestion	Comment
9.41	Revise as follows:  "Any standard development agreement which clearly discriminates against any of the participating or potential members could lead to a restriction of competition. For example, if a standard development organisation <del>explicitly</del> excludes upstream only undertakings (that is, undertakings not active on the downstream product market), <del>either explicitly or through the adoption of rules with disproportionate effect on such undertakings</del> , this could lead to the exclusion of potentially better upstream technologies."	The Draft Guidance should recognize that rules that disproportionately affect some stakeholders may have the effect of foreclosing their participation (see also paragraph 9.36).
9.50	Add sentence:  "Requiring licenses to be made available on demand at all levels of the value chain in an industry in which multi-level licensing would restrict a patent holder's access to FRAND compensation would reduce incentives to innovate and would not be necessary to achieve the efficiencies identified."	Where a compulsory multi-level licensing requirement would result in substantial inefficiencies, a requirement that patent holders make a FRAND offer before asserting their patents be a less restrictive alternative to ensure access to the standard.

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Thank you for the opportunity to provide our feedback on the Draft Guidance. We look forward to further participation in the process. Should you have any questions about our feedback or if there is any further information we can provide, we are at your service.