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Competition and Markets Authority United Kingdom

8 March 2023

Response to consultation on the UK Draft Guidance on Horizontal Agreements

Sisvel appreciates the opportunity to comment on the UK Competition and Markets Authority (CMA) draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements (UK Draft Guidance). Sisvel believes that such a broad, consultative and inclusive approach to policy making is instrumental in achieving clear, balanced and reasonable policies.

Sisvel is a patent pool administrator and a leader in fostering innovation and managing IP, with 40 years of managing successful patent portfolios related to various standards that incorporate ICT technology. Sisvel's business model is based on working with patent owners who dispose on true SEPs, which is key to ensure the success of the licensing programs that the group develops and manages (patent pools, joint licensing programs and other form of patent aggregations). Sisvel believes that managing intellectual property means supporting innovation. It is our belief that through efficient and effective patent licensing, the necessary incentives for R&D are created, fostering a self-sustaining cycle that can fund R&D activities.

The Sisvel Group is active in several SEP-related industry sectors, in both the UK and globally, including cellular communication, wireless communication, digital video technologies (e.g., digital video broadcasting), media coding (e.g., audio and video), broadband communication technologies and recommendation engines. We manage patent pools and other patent licensing programs that include SEPs owned by third parties as well as those acquired by the Group. Our SEP licensing activities ease licensing transactions and generate a return on investment for the original innovators / patent owners, thus allowing them to fund and fuel more innovation.

We note that the CMA is following closely the parallel developments in the European Union ("EU") relating to the revision of the Horizontal Cooperation Guidelines framework. We believe that this is a positive step towards aligning the UK's approach as it charts its own path to that of the EU, while having due regard to what is best for the UK consumers and businesses. We took the opportunity to participate in the European Commission's consultation in this regard, where we raised a number of concerns regarding some of the existing as well as proposed provisions in the EU Draft Horizontal Guidelines. We note that the concerns we highlighted in that context also arise in the UK Draft Guidance, particularly as it relates to the provisions on purchasing agreements and standardisation agreements.

We are worried that the CMA risks adopting provisions that could potentially disrupt the SEP licensing ecosystem by introducing concepts which not only fail to fit within the framework of



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the UK Draft Guidance, but also risk negating any positive steps made towards achieving a level playing field in SEP licensing.

We discuss our main concerns below.

1. Paragraph 9.10 - Recognition of hold-out

We would like to highlight what we believe is a very positive perspective in the UK Draft Guidance. By acknowledging that there may be situations where potential licensees may refuse to pay a FRAND royalty and/or use dilatory strategies, the UK Draft Guidance are, from inception, taking what we consider to be a pragmatic view of SEP licensing negotiations. Policy makers have for a long time focused on the perceived and essentially theoretical threat of hold-up without a commensurate acknowledgement of the more concrete danger posed by the real-world problem of hold-out which many licensors face.

Sisvel appreciates and supports the recognition by the CMA of the competition concerns arising in relation to hold-out conduct by technology implementers who are unwilling to engage in good faith negotiations with the intention of concluding a license on FRAND terms. This is a crucial step in terms of aligning the CMA's policy position with the findings of various courts that are increasingly taking note of and addressing the various strategies employed by unwilling implementers to unnecessarily draw out licensing negotiations or refusing to engage at all in any licensing negotiations.¹

The CMA should however be alive to the danger that some of the provisions proposed in the UK Draft Guidance may lead to much more harm than good, in effect negating any positive steps taken towards achieving a balanced policy perspective. Such provisions, which we highlight below, would only serve to worsen the hold-out problem.

2. Paragraph 6.2 - Licensing Negotiation Groups

One major concern is the CMA's proposal to include groups of potentially licensees jointly negotiating licensing agreements, i.e., the so-called licensing negotiation groups (LNGs) as one of the categories of joint purchasing agreements. The LNG concept has been the subject of extensive debate in Europe, given the similar proposal by the European Commission to include them in the EU Draft Horizontal Guidelines. We would like to reiterate a number of the concerns that we, as well as other stakeholders, have expressed in relation to the LNG concept.

An initial observation is that there appears to be no consideration for the particular context in which SEPs subject to a FRAND commitment apply and how these can, if at all possible,

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¹ Sisvel v Haier, Federal Court of Justice, judgments dated 24 November 2020 and 5 May 2020, Case No.KZR 35/17 and KZR 36/17, paras. 96-99 and para. 98; Nokia v Daimler, LG Mannheim 18 August 2020 - Case No. 2 O 34/19, para 159; Sharp v Daimler, District Court of Munich 10 September 2020, Case-No. 7 O 8818/19, para. 126; Sisvel v Wiko, Higher Regional Court Karlsruhe, judgment dated 9 December 2020, Case-No. 6 U 103/19, para. 299 and paras. 320 et seqq.



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be captured within the context of the UK Draft Guidance as it relates to joint purchasing agreements. For instance, it is clear when reading through the chapter 6 provisions on purchasing agreements that they are drafted from the perspective of the supply of physical/tangible products, leading to a lot of inconsistency when applied to the situation involving technology covered by patent rights as a supplied or suppliable product.

For instance, the determination of a relevant purchasing market based on substitutability cannot be applied to technology covered by SEPs because, unless there are competing standards, such technologies cannot be substituted if they are essential to the implementation of a standard.

Additionally, unlike the case with tangible goods, patent holders do not have the ability to act as gatekeepers and 'physically' restrict access to their technology. This is because the patented technology and the standards in question are publicly accessible. Implementers can use the standard/technology without investing anything into the development of the technology. In other words, while a manufacturer can choose not to buy from a particular supplier of physical goods, in the case of SEPs, there is no way for a manufacturer of standard-conforming products to avoid using the technology covered by patents essential to the implementation of that standard. Merely implementing the standard means they are infringing the SEP. It is therefore a question of determining the conditions on which a license to the patented technology will be offered, not whether access to the technology will be granted.

The only way for a patent owner to restrict access to their patented technology would be to take legal action against infringers. It is important to bear in mind that patents generally expire after 20 years, and commercial deployment of the technology covered by SEPs (after standardization and subsequent adoption of the standard in products) may only happen after the better part of the lifetime of the patent is already over. Once litigation commences, to obtain a first instance decision in court takes about 2 years on average even in highly efficient jurisdictions such as the UK. The consequence here is that anticompetitive conduct through LNGs would have a very substantial effect on the ability of patent owners to monetise their technology and achieve a return on their investments. This is even more true if the dispute will continue after the first instance proceeding, with final decision often being reached only after 7-10 years from the first filing (i.e. often after the lapse of the patent at stake).

Paragraph 6.38 of the UK Draft Guidance particularly presents a number of inconsistencies in as far as it relates to LNGs, the FRAND commitment made by SEP owners, and the concept of technology covered by SEPs as a suppliable product. It provides, inter alia, that:

When negotiating terms and conditions with suppliers, a joint purchasing arrangement may threaten suppliers to abandon negotiations or to stop purchasing temporarily unless they are offered better terms or lower prices. Such threats may be part of a bargaining process and may involve collective action by purchasers when a joint purchasing arrangement conducts the negotiations. Suppliers in a strong market



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position may use similar threats to stop negotiating or supplying products in their bargaining with purchasers. Such threats made collectively by joint purchasing groups do not usually amount to a restriction of competition by object, although they may in some cases give rise to negative effects.

A number of fundamental concerns can be identified here:

1. By providing that joint purchasing arrangements may threaten suppliers to abandon negotiations unless they are offered better terms or lower prices as part of the normal bargaining process, the UK Draft Guidance essentially give a greenlight to textbook holdout conduct. It totally fails to cater to the nuances of licensing negotiations within a FRAND context in the SEP ecosystem and the already weaker bargaining position that SEP holders have. There is unfortunately a lack of a clear definition of what constitutes FRAND from the perspective of what is expected from a willing licensee. Many technology implementers are therefore prone to abusing the system, particularly by delaying substantially and even failing to take a license to SEPs, i.e. holding-out. One major factor that encourages hold-out is the fact that implementers who are unwilling to conclude a license on FRAND terms feel safe in the knowledge that patents expire and even after the court determines that they are infringing SEPs, they would only be required to pay damages computed based on a FRAND rate, and any royalties set going forward will also be limited to FRAND. On the other hand, a SEP holder who has made a FRAND commitment is in a position where failure to adhere to FRAND could mean that they may have limited access to injunctive relief or damages in case of infringement of their SEPs.

From this perspective, the odds of concluding a license on FRAND terms in a timely manner are unfortunately stacked against the SEP holder. The system as-is is not balanced, and allowing implementers to use LNGs as a tool to easily further tilt the bargaining position would only make the problem worse.

2. It introduces uncertainty as to whether a SEP owner can actually negotiate bilaterally with individual members of a LNG, and further implies that an individual member can hide behind the veil of a joint purchasing arrangement to avoid fulfilling of their obligation to take a license. It is quite uncertain how the provisions in paragraph 6.38 interact with paragraph 6.11 provides that in a buyer cartel, purchasers coordinate their behaviour among themselves in view of their individual interaction with the supplier on the purchasing market. If a purchaser deals individually with a supplier, it should make its own purchasing decisions independently of other purchasers and without removing strategic uncertainty between itself and others or without artificially increasing transparency regarding its future behaviour on the market.

This uncertainty is also reflected in paragraph 6.41 which provides inter alia that an obligation to purchase or negotiate exclusively through the joint purchasing arrangement may, in certain cases, be indispensable to achieve the necessary degree of buying power or volume for the realisation of economies of scale. Good faith bilateral negotiations should



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certainly not be put on hold and it can be expected that individual members of a LNG will use the uncertainty to further engage in hold-out to delay as much as possible the conclusion of the necessary license agreement.

- 3. By providing that strong suppliers may use similar threats to stop negotiating or supplying products, the UK Draft Guidance fails to consider the implications of the FRAND commitment on conduct during negotiations. It is additionally totally out of touch with the concept of supply as it relates to technologies covered by patent rights.
- 4. If the purpose behind a LNG is to achieve better terms or lower prices for its individual members, there are certainly better suited mechanisms as well as guidance from courts already existing within the SEP licensing ecosystem.

With this context in mind, it is clear to see that concerns regarding hold-out are indeed amplified when one considers LNGs in the context of SEP licensing. The trade-off envisaged between lower product prices vis a vis cost savings delivered to consumers (if at all) is certainly far from beneficial in relation to the SEPs ecosystem, especially when one considers the negative impact on the incentives to innovate.

In sum, we consider the inclusion of LNGs in the UK Draft Guidance to be quite premature and detrimental to the SEP licensing ecosystem. There needs to be a deeper and structured consideration of the implications of LNGs, taking into consideration the specific context of SEP licensing and the framework within which it operates.

3. Paragraph 9.22 - Concerns regarding the level of licensing

Of particular concern as well is the recommendation in paragraph 9.22 that 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. Such a recommendation would be problematic for a number of reasons, including:

- 1. It does not align to the actual formulation of the FRAND commitment by the standards development organizations that are recognised in Europe.² Neither the ETSI IPR Policy, the joint IPR Policy of CEN-CENELEC nor the Common Patent Policy for ITU-T/ITU-R/ISO/IEC require granting of licenses to all third parties. In fact, the ETSI IPR Policy could be interpreted as recommending licensing at the end product level.³
- 2. It does not align to the guidance from courts in Europe and other jurisdictions which have rejected the contention that SEP owners are required to grant licenses to component and chip makers. If the objective as rightly identified by the CMA is to

² EUR-Lex - 52021PC0346 - EN - EUR-Lex (europa.eu)

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³ 6 ETSI IPR Policy para 6.1 further provides in relation to the FRAND license to cover inter alia MANUFACTURE, including the right to make or have made customized components and sub-systems to the licensee's own design for use in MANUFACTURE.



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facilitate access to the standard, court guidance now shows that a direct license is not necessary to facilitate access to the standard.⁴

- 3. It risks reigniting the 'license to all' discussion which has already been addressed by courts and which is not in line with the typical industry practice of licensing at the end user device level.
- 4. It incorrectly characterises the FRAND commitment, the objective of which is to enable access to the standard rather than require licenses to be granted to any third party.

The CMA already acknowledges in paragraph 9.33 that a licence to all approach is not necessary, and that indeed, other mechanisms such as have-made rights for upstream component suppliers would be sufficient to ensure the necessary access to the standard. We believe that the permissive and flexible approach reflected in paragraph 9.33 is in line with the intentions behind the FRAND mechanism and should indeed be the standard rather than the exception.

Closing comments

If the CMA is to achieve its objectives in relation to the current review of the framework for horizontal cooperation agreements particularly as it relates to incentivising innovation, we believe it is important that the concerns we have raised are addressed.

We remain available to further engage with the CMA regarding any of the concerns we have highlighted above, which are of vital importance.

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⁴ See Nokia v Daimler, LG Mannheim 18 August 2020 - Case No. 2 O 34/19; Sharp v Daimler, District Court of Munich, judgment dated 10 September 2020, Case-No. 7 O 8818/19; Regional Court Munich, 30 October 2020, docket no. 21 O 11384/19 - Conversant ./. Daimler; Judgement of the US Court of Appeal for the Ninth Circuit in Federal Trade Commission v Qualcomm Inc. 19-16122, dated 11 August 2020; Continental Automotive Systems, Inc. v. Avanci, LLC et al., Case No. 20-11032 (5th Cir. Feb. 28, 2022). See also CEN Workshop Agreement CWA 17431 (June 2019), Principles and guidance for licensing Standard Essential Patents in 5G and the Internet of Things (IoT), including the Industrial Internet available at https://www.cencenelec.eu/media/CEN-CENELEC/CWAs/ICT/cwa17431.pdf.

In *Continental v Avanci* for instance, Continental acknowledged that Avanci and its patent holders are actively licensing the SEPs to the OEMs which, according to the Court, means that they are making SEP licenses available to Continental on FRAND terms. In *Sharp v Daimler*, the Munich Court noted that Sharp was not obliged to grant a license to the suppliers. It only has to give them access to the standards affected by their SEPs. The Munich Court additionally pointed out that a product's access to the market does not necessarily require a license in favor of the supplier, but only a legal possibility of use, such as a license in the value chain, which gives the suppliers (or buyers) permission to use it (have-made rights).