

8 March 2023

Feedback of

ACT | The App Association 5-11 Mortimer Street,

London W1T 3HS

to

the Competition and Markets Authority

on its

Guidance on the application of the Chapter 1 Prohibition to horizontal agreements (Draft Guidance)

<u>ACT | The App Association Feedback to the Competition and Markets Authority Guidance</u> on the application of the Chapter 1 Prohibition to horizontal agreements (Draft Guidance)

I/ Introduction and statement of interest

The App Association is a global policy trade association for the small business technology developer community. Our members are entrepreneurs, innovators, and independent developers within the global app ecosystem that engage with verticals across every industry. We work with and for our members to promote a policy environment that rewards and inspires innovation while providing resources that help them raise capital, create jobs, and continue to build incredible technology. We support the United Kingdom's leadership in competition policy and a regulatory environment that promotes innovation and job growth. Today, the ecosystem the App Association represents—which we call the app economy—is valued at approximately £736.20 billion globally and is responsible for creating countless jobs across the United Kingdom. Alongside the world's rapid embrace of mobile technology, our members have been developing innovative hardware and software solutions that power the growth of the internet of things (IoT) across modalities and segments of the economy.

The App Association welcomes this opportunity to offer its feedback on the Competition and Market Authority (CMA) Guidance on the application of the Chapter 1 Prohibition to horizontal agreements (Draft Guidance). The Draft Guidance and the CMA's ongoing review of anticompetitive abuses in the UK's internal market, affects the ability for all App Association members to innovate in a reliable ecosystem. Our members drive the United Kingdom's small business innovator community forward through developing, utilising, and innovating on top of standardised technologies. These small business innovators rely on standards to manufacture their products across IoT consumer and enterprise use cases, which makes the Guidance essential for their business activities. The Guidance represents a key means of providing much-needed insight into the CMA's expectations concerning standardisation agreements, and, therefore, the development and role of standardization agreements and information exchanges, fundamental for small business competition in the UK and global digital economy. In this submission, the App Association thus limits its comments to the provisions of the Draft Guidance.

II/ General comments on the revised Guidance

The App Association welcomes the CMA's approach to replace the European Commission's Guidelines on Horizontal Cooperation Agreements with the new guidance specific to the United Kingdom, particularly considering the rise of IoT and the increasing number of sectors using standards for data transport, interoperability, and emerging technology capabilities (e.g. artificial intelligence) to deliver new efficiencies to the market. Updates to CMA's guidance will provide much-needed insights into regulators' expectations concerning specialisation, research and development (R&D), and standardisation agreements, which is and will be crucial for all industries in which specialised, innovative businesses that implement standards operate. Modernised guidance and block exemptions are particularly helpful in the technology and digital sectors, but also for businesses in all sectors and of all sizes. Further clarifications, however, are necessary and would especially benefit small companies, particularly with respect to standardisation agreements and information exchanges fundamental to innovation in a competitive digital economy.

The App Association notes that businesses of all sizes benefit from the guidance the HBERs provide. Further clarifications, however, would especially benefit small companies. SME standard implementers rely on standards to manufacture their IoT products, making the

ACT

CMA's guidelines essential for their business activities. CMA's Guidelines on standardisation agreements and information exchanges are especially fundamental for small business innovation in a competitive digital economy.

Further, because standards and SEP licensing already touch numerous sectors past the 'telecommunications' sector (most recently, the automotive sector). The App Association recommends that CMA carefully consider trends in anticompetitive SEP licensing abuses. For example, certain SEP holders are increasingly insisting that they can arbitrarily decide which companies receive a licence, in some cases outright refusing willing licencees request for a FRAND licence despite the SEP holders' clear promise to provide licenses on FRAND terms. This trend, among others we have elaborated on in related submissions to the European Commission,¹ is particularly concerning for small business IoT product developers residing throughout value chains, who often lack the experience and resources to engage in complex SEP licensing negotiations (much less take on lengthy and expensive litigation) and, therefore, rely on standards organisations' policies, who in turn rely useful instruments like the competition guidance for clarity and direction.

The App Association has participated in consultations with countries around the globe, including the European Union, to review competition guidances pertaining to the technology standardisation process. Generally, competition guidances addressing standardisation and SEP licensing are increasingly unclear and in need of updates. The App Association emphasises the importance of providing clarity about the SEP licensing ecosystem for all stakeholders. The App Association notes that, in response to the growing problem of standardisation and SEP licensing abuses now affecting a range of sectors and market segments, a broad cross-section of stakeholders, including the App Association, has come together through the CEN/CENELEC Workshop Agreement construct to develop CWA 95000, Core Principles and Approaches for Licensing of Standard Essential Patents.² CWA 95000 (1) provides educational and contextual information regarding SEP licensing and the application of FRAND. (2) identifies and illustrates some of the questions that negotiating parties may encounter, (3) lists agreed upon core principles and recognised harms that should be addressed in patent policies for technical standards, and (4) sets forth some of the key behaviours and 'best practices' that parties might choose to adopt to resolve any SEP licensing issues amicably and in compliance with the FRAND obligation. CWA 95000 is best positioned to promote the goals and interests of industry, standardisation and, ultimately, consumers. We strongly urge the CMA to align its understanding of competitive standards development, participation, and implementation procedures with the best practices and core FRAND principles provided in CWA 95000.

Updated horizontal competition guidance for the UK warrants updates as changes in the market occur to foster competition in the marketplace by ensuring that standardised technology, and the SEPs within such standards, can be used by any innovator on fair, reasonable, and non-discriminatory (FRAND) terms (consistent with the promise to license on FRAND terms that all SEP holders make when they volunteer patented technology to a standardisation process).

¹ See our previous contributions from 2019: https://ec.europa.eu/info/law/better-regulation/have-yoursay/initiatives/11886- EU-competition-rules-on-horizontal-agreements-between-companiesevaluation/F473574_en; and from 2021: https://ec.europa.eu/info/law/better-regulation/have-yoursay/initiatives/13058-Horizontal-agreements-between-companies- revision-of-EU-competitionrules/F2661351_en

² CEN Workshop Agreement (CWA) 95000 (Core Principles and Approaches for Licensing of Standard Essential Patents) available at https://2020.standict.eu/sites/default/files/CWA95000.pdf.



III/ Specific comments on the Draft Guidance

The App Association is pleased to see that the CMA upholds the FRAND commitment as an important enabler of innovation and, therefore, an important factor in determining if a standardisation agreement is anticompetitive. However, evolving abusive and anticompetitive practices by SEP holders necessitate new clarifications in the Guidance as to when a standardisation agreement that does not adhere to the FRAND commitment is preventing, distorting, or restricting competition.

As standardised technologies enter new verticals across the markets within the United Kingdom and more sectors adopt and implement such technologies, the App Association has already seen a step-change in market conditions. The rise of IoT across industries and sectors presents new opportunities and challenges for competition authorities. The App Association especially welcomes the mention of the need for greater legal clarity. Considering that some courts have been misapplying the FRAND framework (e.g., in *Huawei v. ZTE*) it is imperative for the CMA to clarify the meaning of the FRAND commitment in standardisation agreements as they relate to UK competition laws. CMA is strongly encouraged to ensure that SDOs avoid anticompetitive effects through their policies.

To advance the interests of the CMA to improve the production or distribution of goods or services and in promoting technical or economic progress, the CMA must ensure fair competition within the internal market of the United Kingdom. Specifically, we believe that guidance addressing the anticompetitive effects of breaches of FRAND commitments can increase market access for new entrants and competition among companies, supporting innovation in the market. Clarifications on the meaning of FRAND commitments addressed in standardisation agreements are beneficial to both SEP holders, those who utilise standards to innovate, and the consumer and enterprise end-users of technology. The negative effects of abusive licensing of SEPs are particularly harmful to the App Association's members, including small businesses located throughout the UK that both hold SEPs as well as those that use standards in their products.

In accordance with our comments to the specific provision below, we strongly encourage the CMA's Guidance on standardisation agreements to reflect the following principles as objectively defining the FRAND commitment:

- A holder of a SEP that has provided a voluntary FRAND commitment must license that SEP on fair, reasonable, and non-discriminatory terms to all companies, organisations, and individuals who implement, or wish to implement, the standard, irrespective of their position in the value chain.
- Injunctions and other exclusionary remedies should not be sought by FRANDencumbered SEP holders or allowed except in rare circumstances, such as when a potential licensee is demonstrably unreasonable. Further, licensors and licensees should always be entitled to assert claims and defences.
- If a FRAND-encumbered SEP is transferred, the FRAND commitment follows the SEP in that and all subsequent transfers.
- SEP holders cannot require those needing a licence to take or grant licences to a FRAND-encumbered SEP that is invalid, unenforceable, or not infringed; or a patent that is not essential to the standard.
- A reasonable rate for a valid, infringed, and enforceable FRAND-encumbered SEP should be based on several factors, including the value of the actual patented invention apart from its inclusion in the standard. Arbitrary pricing approaches based



on downstream innovations unconnected to the SEP itself are incompatible with the FRAND commitment.

• Patent pools present the opportunity for FRAND-encumbered SEP licensing efficiencies when the pool fully adheres to the FRAND commitment attached to all the SEPs it is licensing.

V/ Comments on specific provisions

Below, the App Association provides specific recommendations on the following provisions within the CMA's draft guidelines:

- 1. Section 1.54
- 2. Section 9.8
- 3. Section 9.10
- 4. Section 9.11
- 5. Section 9.17
- 6. Section 9.20
- 7. Section 9.22
- 8. Section 9.24
- 9. Section 9.25
- 10. Section 9.27
- 11. Section 9.28
- 12. Section 9.29
- 13. Section 9.32
- 14. Section 9.33

Section 1.54:

Section 1.54 discusses that the evaluation of a standardisation agreement's potential constraint on competition must include factors beyond market share except in cases where a standard becomes a *de facto* industry standard. The App Association believes that effective access to a standard includes access to FRAND licences for SEPs. Further, we believe the CMA should resolve any potential ambiguity as to the meaning of 'access' to the standard. Access to a standard is not possible without licenses to essential patents in the standard, yet certain SEP holders continue to deny licenses to willing licensees while using wordplay and gamesmanship to insist they nonetheless are providing 'access'. This practice not only exposes willing licensees to claims of patent infringement but also potentially exposes the distributors and customers of these denied willing licensees to such claims. This is a mischaracterisation of the FRAND commitment that gives the patent holder direct control over the customers of the denied willing licensee (who may also be a direct competitor of the SEP holder). The CMA can address this issue by specifically noting that access means 'through the availability of essential patent licenses' to SEPs on FRAND terms to all interested third parties.

Section 9.8:

Section 9.8 differentiates among companies that have different interests and incentives in standard developments involving intellectual property rights. Under this section, the CMA recognises upstream-only undertakings, which solely develop and market technology, including companies that acquire and license technologies. While we appreciate that this



section recognises the fact that undertakings that acquire technologies with the intention of licensing them (patent assertion entities, or PAEs) exist, we believe them to be separate entities from upstream-only undertakings. It is important to recognise the fact that PAEs have been amassing asserting SEPs against implementers, which has a significant negative impact on the functioning of the internal market, innovation, and competition. Numerous App Association members have had to face attacks from aggressive PAEs using a portfolio of purportedly valid patents essential to critical technology standards, costing hundreds of thousands in legal fees to fend off spurious attacks and wasting valuable resources that would otherwise be invested in new jobs and R&D. In other cases, subsequent to signing an initial license with one patent holder, non-practicing patent assertion entities (PAEs) have come seeking licenses, in some cases for the same SEPs which have already been licensed. SMEs, in particular, are significantly burdened by the abusive and frivolous patent infringement suits initiated by PAEs, which is largely sustained through third-party litigation funding (TPLF) by anonymous investors. The availability of anonymous investment sources enables bad actors to flood adjudicating bodies with potentially illegitimate claims. For this reason, the App Association believes it is important for the CMA to demarcate a separate category for PAEs that anticompetitively seek to monetise their portfolios of spurious patents. As it stands, this section is incompatible with comparable provisions in the European Commission's Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (revised Horizontal Guidelines). The revised Horizontal Guidelines acknowledged PAEs as distinct from other groups of undertakings interested in standards development after seeing a 19 per cent increase in PAE activity since the prior revision of the Horizontal Guidelines.³

Section 9.10:

Section 9.10 identifies the anti-competitive effects of excluding implementers from the necessary SEPs or the extraction of excessive royalty fees through patent hold-up. The App Association is encouraged by the CMA's addition of the wording 'hold-up' to the draft text. SEP hold-up is a competition issue due to the inherent market power a SEP holder has. The existence of SEP holders' tendency to 'hold-up' willing licensees to obtain supra-FRAND terms in SEP licensing negotiations through such abusive practices is now welldocumented.⁴ We believe that this paragraph could further be improved to reflect that standard-setting practices inherently risk anticompetitive effects that FRAND commitments must mitigate, and that disregarding a FRAND commitment (when other factors are also present) runs the risk of violating the UK competition laws. The paragraph could also better reflect the changing nature of the economy and the fact that new industries are implementing telecommunications standards in products to make them 'smart' (for example, a healthcare device measuring various health indicators functions using standardised connectivity capabilities). Additionally, a SEP holder should not be allowed to leverage the courts of a single jurisdiction to force a licensee into global portfolio licensing under the threat of an injunction. This is another form of hold-up that the Guidance should recognise.

In addition, the App Association strongly opposes the CMA's proposed introduction of the term 'hold-out' to this section as an issue of competition concern, defining it as a refusal to pay a FRAND royalty fee or using dilatory strategies by implementers. SEP holders' claims

³ Darts IP, 'NPE Litigation in the European Union' (2018) (Darts IP Report) available at: <u>https://www.darts-ip.com/npe-litigation-in-the-european-union-facts-and-figures-2/</u>.

⁴ E.g. Brian J. Love, Yassine Lefouili, & Christian Helmers, Do Standard-Essential Patent Owners Behave Opportunistically? Evidence from U.S. District Court Dockets, Working Paper (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3727085.



of SEP 'hold-out' by licensees, unlike SEP hold-out, are empirically unproven.⁵ Further, we caution the CMA to avoid characterising unproven claims of 'hold-out' as somehow equivalent to well-demonstrated abusive SEP hold-up behaviours since SEP licensees cannot exercise market power as a SEP holder does.⁶ We, thus, urge the CMA to delete this added text. Further, no prospective licensee should be faulted or categorised as 'unwilling' because they exercise their right to fully challenge a patent's validity, essentiality, or alleged infringement.

Restrictions on the ability to develop or use standards by any party, whether they participated in its development or not, are antithetical to open standards, and the CMA's guidance should ensure that such standards can be implemented by all market participants through standardisation agreements. We urge the CMA to align its guidance with the consensus best practices described in the CWA 95000, which will benefit both SEP holders, SEP licensees, and others using or impacted by standards. For example, the CMA should clarify that a refusal to license to, or bringing an injunction against, a party who is willing to take a FRAND licence is an abuse of dominance by virtue of the market power gained by the SEP holder through allowing their technologies to be included in the standard by their decision to make a FRAND commitment on the SEP. The CMA can and should also lend its support to appropriate behaviours for licensees by clarifying that standardisation agreements must ensure that a prospective licensee's challenge to the validity, essentiality, or infringement of the SEP(s) should not be grounds for labelling a licensee as unwilling if that licensee undertakes negotiations in good faith considering standard business practices and does not constitute hold-out.

Section 9.11:

⁵ E.g. Brian J. Love & Christian Helmers, An Empirical Test of Patent Hold-Out Theory: Evidence from Litigation of Standard Essential Patents, Working Paper (2021), available at https://papers.ssrn.cooutm/sol3/papers.cfm?abstract_id=3950060.

⁶ SEPs, Antitrust, and the FTC: Remarks of Commissioner Rebecca Kelly Slaughter As Prepared for Delivery (2021)

https://www.ftc.gov/system/files/documents/public_statements/1598103/commissioner_slaughter_ansi _102921_final_to_pd f.pdf



Section 9.11 states that there is no presumption that an essential IPR holder possesses or exercises market power when a standard is created. The App Association cautions the CMA against making such broad characterisations. In the case of royalty-bearing standards, essential patent holders inherently gain a heightened market power due to their gatekeeping role to a necessary technical standard. In these cases, the essential patent holders objectively possess higher market power than other innovators who build on the relevant technical standard. While the exercise of market power in this scenario should not be presumed, there is enough evidence to show that such abuses happen, as we have mentioned in these comments. Therefore, it is imperative that the CMA review the possession and exercise of market power by essential IPR holders in the standardisation context on a case-by-case basis. Footnote 355 to this section could also be improved to reflect that standard-setting practices inherently risk anticompetitive effects that must be mitigated through FRAND commitments made to SEPs in a standard, and that disregarding a FRAND commitment (when other factors are also present) runs the risk of violating the UK competition laws. As the CJEU explained in Huawei v. ZTE, a voluntary contractual commitment to license on FRAND terms may constitute an abuse of a dominant position.

Section 9.17:

Section 9.17 defines unrestricted access in standard development and is part of the safe harbour provisions (9.16-9.24) that define when a standardisation falls outside the scope of the Chapter 1 Prohibition, and, therefore, does is not seen as preventing, restricting, or distorting competition. As in section 1.54, we believe the CMA should resolve any potential ambiguity as to the meaning of 'access' to the standard, which includes through the availability of licences to essential patents in the standard. Anticompetitive abuses incurred within the standardisation process are enabled by a SEP holder's ability to exploit the lack of clarity in an IPR policy. The CMA should evaluate each section of the Draft Provision, with this understanding in mind.

Section 9.20:

Section 9.20 defines another safe harbour provision that requires standard development organisations (SDOs) to ensure effective access to a standard on FRAND terms in order to fall outside the Chapter 1 Prohibition. This section should specify that SDO rules should ensure licensing to any willing licensee, no matter where they are in the value chain. The role of SDOs themselves is crucial in providing clarity as to disclosure and other FRAND terms, and their ability to update their patent policy to provide guidance on the meaning of the FRAND commitment should be supported.

There are exemplars that the CMA could consider supporting and building on in its efforts to enhance transparency in *ex-ante* disclosures within SDO processes. While we disagree with the adoption of 2023 patent policy updates to the IEEE Standards Association (IEEE-SA) that limited the clarity on prohibitive orders and the reasonable royalties, the App Association notes its support for the underlying principles of IEEE-SA patent policy.⁷ The 2023 IEEE-SA patent policy updates (2023 Updates) were adopted in spite of an overwhelming response from standard participants (over 100 organizations from around the world) to maintain the 2015 Updates without modification.⁸ This scenario provides a good example of how the standardisation process can be abused by a minority of large SEP holders. Small

dialog/call_for_comments/PatCom_report_to_IEEE_SA_BoG_151121_1350.pdf.

⁷ See https://standards.ieee.org/news/ieee-announces-decision-on-its-standards-related-patent-policy/.

⁸ Respondents to the IEEE-SA consultation supporting the 2015 updates without modification ranged from large to small, from industries including automotive, broadcast, tech, and others. *See* https://grouper.ieee.org/groups/pp-



businesses like our members that build IoT products enable and rely on IEEE-SA standards to support interoperability. Prior to 2023, the IEEE-SA patent policy demonstrably reduced SEP licensing-related abuses, deterred unnecessary and burdensome litigation, and supported ingenuity in the market.

At the time of their adoption, the 2015 Updates were supported by an overwhelming number of IEEE-SA participants and industry stakeholders. We further note that the 2015 Updates were enacted following approvals by super-majorities at multiple levels of IEEE's governance hierarchy.

The empirical record demonstrates that the 2015 Patent Policy has facilitated unprecedented growth and success for IEEE-SA and its standards. In the years since the 2015 policy updates went into effect, ever-increasing evidence demonstrated the benefits of IEEE-SA's approach, particularly in comparison to other standard-setting organisations such as the European Telecommunications Standards Institute (ETSI):

- Total technical contributions to IEEE-SA standards have increased since 2015: The research firm IPLytics analysed technical contributions to IEEE-SA standards before and after the policy updates and found a clear and consistent increase since the policy was adopted.⁹ After two years of declining technical contributions to IEEE-SA standards in 2013 and 2014, total contributions rebounded after the new policy was enacted in 2015 and IEEE-SA had a record number in 2017. In the IEEE-SA 802 working groups, which are responsible for Wi-Fi standards, technical contributions continued to increase after the policy update leading to a record number in 2018. This finding led them to conclude that 'patent policy considerations have not been a significant factor in companies' decisions about whether to invest in and submit technologies to IEEE-SA 802 working groups'. Even in the most patent-heavy IEEE-SA 802 working groups, IPLytics found that contributions increased in line with total technical contributions to all 802 working groups.
- Uncertainty and confusion in ETSI FRAND terms are responsible for 75 percent of all SEP litigation in the past 20 years. One of the clearest indicators of uncertainty and confusion within contracts and other legal texts is the amount of litigation that they spawn. Litigation over SEPs in digital communications standards like LTE has grown exponentially in recent years, more than quadrupling between 2009 and 2017 alone according to analysis from darts-ip.¹⁰ Additionally, IPLytics analysed 20 years of worldwide SEP litigation, from 2001 to 2021, and found that more than 75 per cent of that litigation was related to 2G, 3G, 4G, and 5G standards.¹¹ Meanwhile, just 2 per cent of SEP litigation during the same time period was related to IEEE's Wi-Fi standards.¹²
- IEEE-SA has been delivering on its mission and the true goals of standardisation: Each standard-setting organisation picks the approach that fits its goals best. Time and time again, IEEE's approach has proven to be a better approach for delivering on the organisation's standardisation goals and the well-established role of technical interoperability standards. The goal of IEEE's standards development process,

⁹ IPLytics, Empirical Analysis of Technical Contributions to IEEE 802 Standards (January 2019), available at https://www.iplytics.com/wp-content/uploads/2019/01/IEEE-contribution-anaylsis_IPlytics-2019.pdf

 ¹⁰ Darts-ip, NPE Litigation in the European Union: Facts and Figures (February 2018), available at https://clarivate.com/darts- ip/campaigns/npe-litigation-in-the-european-union-facts-and-figures/.
¹¹ IPLytics, Empirical Analysis of Technical Contributions to IEEE 802 Standards (January 2019), available at https://www.iplytics.com/wp-content/uploads/2019/01/IEEE-contribution-anaylsis_IPlytics-2019.pdf

¹² Ibid.



according to its Standards Development Principles, is to develop technical standards that 'enable innovation and open new market opportunities to their users by allowing interoperability of products, services, and processes; and they create ecosystems that promote economies of scale and healthy competition. These attributes are essential to help ensure that markets remain open, allowing consumers to have a choice and allowing new entrants to successfully enter markets'.¹³ IEEE's Wi-Fi standards unequivocally meet these goals. The dynamic ecosystem of companies that build Wi-Fi compatible products is unparalleled. Competition at every level of the Wi-Fi technology industry is fierce, and startups can compete and thrive in the marketplace. Moreover, Wi-Fi is at the centre of IoT, and nearly every industry adopted the standard for connecting their products wirelessly to the internet. In 2020 alone, the Wi-Fi Alliance, which drives global Wi-Fi adoption and evolution through thought leadership, spectrum advocacy, and industry-wide collaboration, certified 8,752 devices from 306 companies.¹⁴ These numbers, however, downplay the size and scope of the Wi-Fi ecosystem because a large percentage of companies that build Wi-Fi compatible products don't pursue certification through the Alliance. IEEE's requirement that SEP holders must license their patents to companies at both the product and component level allows companies with little experience in wireless networking or SEP licensing to integrate Wi-Fi into their products rapidly and seamlessly.

While the 2023 IEEE-SA patent policy updates have regrettably removed some clarity from its provisions, its foundation is maintained and still provides a positive effect on participation or contributions of patented technology to IEEE-SA standards. We will continue to advocate for IEEE-SA to put its mission and the Wi-Fi ecosystem first and reject the self-serving demands of a few patent profiteers. As such, we urge the CMA to state in the Draft Guidance that SDOs' rules need to ensure licensing access to any willing licensee, no matter where they are in the value chain.

Section 9.22:

Section 9.22 is a safe harbour provision that details that a standardisation agreement that provides for the transfer of the FRAND commitment in order to ensure effective access to a standard and fall outside the scope of a Chapter 1 Prohibition. The App Association recommends that the CMA specify patent pools being among the entities that are bound to the FRAND commitment. We believe that the CMA's position on transfers and the FRAND commitment must be clear, since we continue to experience gamesmanship by SEP holders and their patent pools that the Guidelines should address. While patent pools, theoretically, can introduce efficiencies into the SEP licensing ecosystem assuming they align their practices with the FRAND behaviours that the pool's patents are committed to, there are also strong arguments to the opposite effect, i.e. that patent pools raise competition concerns.^{15 16} For example, the App Association has observed that Avanci denies that it is required to license 'the pooled technologies (...) to all potential licensees on FRAND terms'.¹⁷ A cross-reference to the Communication on technology transfer agreements would

¹³ See IEEE's Standards Development Principles here: http://globalpolicy.ieee.org/wp-content/uploads/2020/08/IEEE20014.pdf

¹⁴ Data from the Wi-Fi Alliance's Product Finder tool: https://www.wi-fi.org/product-finder

¹⁵ E.g. Section 2.3 of Communication COM (2017) 712, 'Setting out the EU Approach to Standard Essential Patents'.

¹⁶ Jurata, Jay and Luken, Emily 'Glory Days: Do the Anticompetitive Risks of Standards-Essential Patent Pools Outweigh Their Procompetitive Benefits?' San Diego Law Review, Vol. 58, No. 2, 2021 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622615

¹⁷ Continental Automotive Systems, Inc. v Avanci, LLC, ND Cal (2019), Case 5:19-cv-02520.



be useful clarification on this point as the application of the FRAND commitment following the transfer from one patent holder to another applies equally to patent pools. Clarification is necessary here, in particular, because patent pools do not own the patents, with the patent pool administrator instead acting as an agent on behalf of the patent holder contributing to the pool. While we, and the vast majority of the ecosystem, believe that pools are subject to the FRAND commitments made on SEPs the pool is licensing, some pools continue to deny this reality. The CMA should make clear that any company, including patent pools, to which the IPR owner transfers (parts of) its IPR (including the right to license that IPR) is bound by that commitment without exception. We encourage the CMA to acknowledge both that patent pools can provide efficiencies to the SEP licensing process along and that abuse by SEP pools will amplify the harmful and anticompetitive effects of SEP licensor abuses.

Section 9.24:

Section 9.24 is the final safe harbour in the Draft Guidance and speaks to proper disclosure that provides effective access to a standard, placing a standardisation agreement outside the scope of the Chapter 1 Prohibition. We believe that this section should follow more closely to provision 483 in the European Commission's revised Horizontal Guidelines. While this section is similar to provision 483 of the revised Horizontal Guidelines, the lacks the clarity that provision 483 includes, which incorporates purposes for such disclosure. We also believe that this section should specify that licensors should provide licensees with base level information on SEPs without requiring them to enter into over-bearing non-disclosure agreements (NDAs).

Section 9.25:

Section 9.25 details the importance of the FRAND commitment for access to a standard. We echo our previous statements that effective access requires access to SEP licences to any willing licensee on FRAND terms, regardless of where they are in the value chain. This section also states that the UK Supreme Court has found that where doing so is in accordance with standard practice in the relevant industry and appropriate, IPR holders may require that a FRAND licence to their standard-essential IPRs be taken on a global or multinational portfolio basis. While we understand that CMA must adhere to precedent set by the UK Supreme Court, we caution the CMA to consider their analysis of when an IPR holder may license their FRAND-encumbered SEP licence on a global or multi-national portfolio basis. SEP holders may seek to avoid meeting their burden of proof in court by placing contractual restrictions on willing licensees, or by using injunctions as a tool to force licensees to accept portfolio licenses which are of dubious quality. There have been also recent cases where SEP holders used judgments from a national court to force willing licensees, under the threat of injunction, to accept global portfolio licenses that included patents of multiple foreign jurisdictions whose essentiality, validity, or infringement could not be tested. These are abusive tactics that need to be remedied in order to avoid charging of excessive royalties and to allow all parties to seek remedies from the relevant courts.

UK small business innovators do not have the resources or experience required to deal with abusive SEP holders that systematically engage in expensive litigation tactics to attain supra-FRAND terms. As a result, they face potentially financially debilitating litigation with no predictable outcome or are forced to accept excessive royalty demands made by the SEP holders (very often, under an NDA). In the worst case, the SME may have to change their product or abandon their business plan altogether, if they cannot afford the litigation or the supra-FRAND SEP licences. Patent licensing abuses pose a major threat to any industry that relies on standards in its innovation cycle, which in turn poses a threat to consumers who benefit from innovation in that industry.



As a practical matter, the decision in *Unwired Planet v. Huawei* was based on contract law, which may not be compatible with competition considerations. The CMA should ensure that its evaluation of a FRAND licence offered on a global or multi-national portfolio basis recognises this fact.

We also comment on footnote 369 as part of this section. Although some users of the standard may wish to acquire a licence that covers both essential and non-essential IPR, a portfolio licence offer of both essential and non-essential IPR should never be a condition for acquiring a SEP licence, and such a practice should constitute potential anticompetitive tying/patent bundling. Therefore, a license offer on FRAND terms should not require the licensing of a portfolio of non-essential IPR. Moreover, a licensor, if requested, should offer a licence of individual essential IPR that only covers the standards or major optional functions which the licensee implements. Requiring a licence of essential IPR to other standards which the licensee does not practice would have the effect of restricting competition.

Section 9.27:

Section 9.27 introduces that the assessment of whether fees charged for access to IPR are within the FRAND commitment should be based on whether the fees bear a reasonable relationship to the economic value of the IPR. We appreciate the CMA's foundational understanding of what is considered a reasonable royalty fee; however, we believe that the CMA should include more consideration into what defines the economic value of the IPR. The App Association is of the view that the smallest saleable patent practicing unit (SSPPU) methodology is the most reliable methodology for objectively assessing a FRAND royalty.¹⁸ The methodology protects against a number of potential anticompetitive harms inherent within standard setting and licensing of patented technology, namely royalty stacking, discrimination between licensees, and the accurate valuation of the patents prior to inclusion within the standard. This methodology also goes hand-in-glove with the fact that licenses are required to be offered to all levels of the supply chain. Too frequently patent holders' licensing offers use royalty methodologies that are, at best, decided on an *ad hoc* basis, meaning there is no objective criteria by which the patent holder arrived at the stated royalty rate. In doing so, certain patent holders inflate the value of their standard-essential patent portfolio and capture value from the inclusion of the patent in the standard and also value from downstream innovation entirely unrelated to the patented technology.

It is further important that SDOs' IPR Policies reflect these FRAND valuation principles considering that decisions about whether to contribute and to include patented technologies in the standard are taken at this level. Finally, the App Association emphasises that the current state of the patent landscape means that SMEs today face a SEP landscape with many thousands of patents covering the standards they wish to use in their products. The smallest saleable patent practicing unit methodology ensures that SME pay a fair price for the use of these technologies. The comparable licensing methodology can be a useful reference tool in certain circumstances. Industry experience reports however that some patent holders deliberately obscure the terms of the licences they have offered to other licensees on the grounds that confidentiality requirements restrict their ability to reveal details. The App Association considers these excuses to be often dubious. Even when the comparable licenses are shared, the patent holder has often signed an additional and separate rebate agreement that lowers the effective royalty rate which a licensee is paying. Thus, although on paper the licensing offer is comparable to those offered to other licensees, in reality the offer is much

¹⁸ ACT | The App Association, *The Pricing and Valuation of Standard-Essential Patents* (April 2020), *available at* <u>https://actonline.org/wp-content/uploads/act-position-paper-the-pricing-and-valuation-of-standard-essential-patents-042320.pdf</u>.



higher. Thus, comparable licensing is only effective when appropriate transparency safeguards and best practices are implemented by patent holders.

Section 9.28:

Section 9.28 endorses independent expert assessments but does not further define or clarify 'independent'. Expert assessment can be helpful; however, some safeguards need to be put in place to ensure that the results are impartial and that such assessment does not shift the burden of proof or prevent the parties from bringing the relevant matters before the courts that have jurisdiction. Comparable licences can provide helpful efficiencies in the licensing process, but only when they are reasonably comparable. Furthermore, comparable licenses should never be presumed to be FRAND. Our members experience SEP holders offering licences as 'comparable' that are wildly different and have no relation to the negotiation at hand, and which would never survive a proportionality examination by a court. We believe the conclusions of such an assessment need to be impartial, and its outcome shall not be binding to the parties, create a presumption regarding essentiality, validity or infringement or shift any burden of proof and shall allow the parties to seek recourse before courts. We encourage the CMA to further revise section 9.28 accordingly.

Section 9.29:

Section 9.29 provides considerations for the dispute resolution of a FRAND licence, particularly through international tribunal or alternative dispute resolution. In general, SDOs do not want to bear the liability involved in adjudicating licensing disputes, which is why such matters are often left to the licensing parties (and courts). Theoretically, a SDO could provide an independent international tribunal to play a role in determining global FRAND royalties, however such a tribunal must be voluntary and resolve important issues including:

1. A funding mechanism that reflects fairness and objectivity.

2. An acceptable and enforceable standard of decision making for panelists.

3. Ensuring that panelists are neutral and objective in their decisions, particularly in light of the specialized nature of SEP/FRAND issues.

4. Agreement by all countries that an international tribunal should be empowered to set SEP licensing rates for their countries despite their national court and patent systems (which often have differing standards for validity, infringement, the ability to compel discovery and/or disclosure, and remedies).

5. Tribunal procedure rules that would allow for novel arguments to be made, allow for both parties to fully present their cases, and that provide sufficient time for evidence collection (which arbitrations often do not).

6. Allowing for appeals to be lodged on panel decisions.

7. Accessibility to (and eased navigability of) such a tribunal construct for small businesses, which will not have resources available to larger companies.

8. Resolution as to who would accomplish enforcement of tribunal decisions. Without answers to the above questions, an independent international body cannot effectively play a role in determining global FRAND royalties.



We also note that we believe alternative dispute resolution (ADR) (e.g. mediation or arbitration) before litigation takes place is a voluntary option. Unless a court orders mediation, or under other exceptionally rare circumstances, ADR should not be mandatory, and parties should not have to participate if they choose not to. Accordingly, a party's decision not to enter ADR should not be a determining factor to consider it 'unwilling' to license. The App Association encourages the CMA to clarify that a licensee should not be considered unwilling for not entering arbitration.

In cases where both parties voluntarily agree to ADR, the parties have the flexibility to design the process as they see fit. However, without an express and voluntary waiver of particular rules or rights, we believe parties should follow traditional substantive and procedural rules, and burdens of proof, even in ADR. Similarly, if the ADR concerns FRAND-encumbered SEPs, the ADR should apply FRAND principles, and parties should structure it in a way that achieves a FRAND result. ADR may appeal to some, and we believe that it could be a consideration in SEP licensing agreements under the above premises. We also note that most ADR decisions are confidential, and, therefore, cannot contribute to a broader understanding of FRAND behavioural norms. Again, we emphasise that the parties shall respect the jurisdictions of courts that issue judgements regarding the validity, infringement, and essentiality of the IPR issued in their territories, and that they should not use national judgements as a tool to introduce global portfolio licenses.

Section 9.32:

This section refers to access to FRAND licences. As noted in our comments to previous sections, effective access to standards is enabled through licensing SEPs on FRAND terms to willing licenses at all levels of the value chain. We believe that the CMA should be thorough in ensuring that all provisions detailing access to SEP licenses follow this understanding.

Section 9.33:

Section 9.33 refers to 'have made' rights, which has been rejected as an insufficient means of access to a standard by many jurisdictions, including the European Union. 'Have made' rights are not a substitute for FRAND licensing terms and its inclusion in an IPR policy substantiates discriminatory practices of essential IPR holders to solely license to end-product manufacturers, in efforts to inflate the value of their SEP portfolio and capture value from the inclusion of the patent in the standard and value from downstream innovation entirely unrelated to the patented technology. In addition, our members have indicated that that they heavily rely on their suppliers to negotiate SEP licenses, since downstream manufacturers may not have the experience and resources to do so. App Association members consistently indicate that they rely on their suppliers efforts and indemnities to address SEP licensing liabilities.

VI/ Conclusion

The App Association welcomes the CMA's positive revisions to the Draft Guidance. While the App Association believes that the Draft Guidance helps provide guidance on standardisation agreements (e.g. by clarifying that 'FRAND commitments can prevent IPR holders from making the implementation of a standard difficult by refusing to license or by requesting unfair or unreasonable fees (in other words excessive fees) after the industry has been locked-in to the standard or by charging discriminatory royalty fees'), the general coherence and utility of UK competition law would be furthered by the Draft Guidance providing additional needed clarity in the Chapter 1 Prohibition concerning SEP licensing to



address abusive SEP licensing practices that violate UK competition law, and which pose a significant threat to UK IoT innovation by SMEs. In this context, we again strongly encourage revisions to the Chapter 1 Prohibition that aligns with the cross-sectoral consensus views captured in CWA 95000.

We appreciate the opportunity to provide our community views to the Competition and Markets Authority Draft Guidance on the Chapter 1 Prohibition. We look forward to continuing our engagement with the CMA to provide for an equitable and thriving internal market in the United Kingdom.

Mike Sax Founder and Chairperson

Brian Scarpelli Senior Global Policy Counsel

Priya Nair Intellectual Property Policy Counsel

IVII/ Annex: Suggested text revisions

Below are the sections of the Draft Guidance with suggested text edits and justification based on feedback from members to improve their clarity on the evaluation of standard essential patents (SEPs) and FRAND licensing in the context of standardisation agreements. The selected paragraphs are the pertinent sections of the Draft Guidance that could benefit from added clarity and is not a complete or exhaustive analysis of the entire Draft Guidance text.

Paragraphs¹⁹

1.54 – No elimination of competition

Whether a standardisation agreement affords the parties the possibility of eliminating competition depends on the various sources of competition in the market, the level of competitive constraint that they impose on the parties and the impact of the agreement on that competitive constraint. While market shares are relevant for that analysis, the magnitude of remaining sources of actual competition cannot be assessed exclusively on the basis of market share except in cases where a standard becomes a de facto industry standard. In the latter case, competition may be eliminated if third parties are foreclosed from effective access to the standard (including access to FRAND licenses for essential patents in the standard).

¹⁹ The titles accompanying the paragraph numbers do not appear in the Draft Guidance and are only indicative of the subject matter to which the paragraph relates.



Justification: We make the suggested revision in this section to resolve potential ambiguity as to the meaning of effective "access" to a standard and to curb the ability for SEP holders to disguise anticompetitive tactics against willing licenses with seemingly FRAND practices. Such anticompetitive tactics not only expose willing licensees to harmful patent infringement claims, but also subject customers and upstream distributors to the same liability.

9.8 – Standard-setting participants and stakeholders

In the context of standards involving intellectual property rights ('IPR'), three four main groups of undertakings with different interests in standard development are typically involved. Firstly, there are upstream-only undertakings that solely develop and market technologies. This category can also include undertakings that acquire technologies with the intention of licensing them. Secondly, there are companies that acquire and monetise patents without having developed the technology themselves (sometimes referred to as Patent Assertion Entities [PAEs]). For both of these actors, **T**their only source of income is the licensing revenue and their incentive is to maximise their royalties. Secondly, Thirdly, there are downstream-only undertakings that solely manufacture products or offer services based on technologies developed by others and that do not hold relevant IPR. Royalties represent a cost for them, and not a source of revenue, and their incentive is to reduce royalties license the relevant IPR on fair, reasonable, and non-discriminatory terms. Finally, there are integrated undertakings that both develop technology protected by IPR and sell products for which they would need a licence. These undertakings have mixed incentives. On the one hand, they could draw licensing revenue from their own IPR. On the other hand, they may have to pay royalties to other undertakings holding IPR essential to the standard relevant for their own products. They might therefore cross-license their own essential IPR in exchange for essential IPR held by other undertakings or use their IPR defensively. In addition, undertakings may also value their IPRs through methods other than royalties. In practice, many undertakings use a mix of these business models.

Justification: The suggested revisions to this section allow the CMA to intentionally distinguish PAEs from other groups of undertaking interested in standard development. PAEs initiate a majority of the abusive and unjustifiable patent infringement suits around the world and often win a small percentage of their cases. However, the pressure impending litigation forces many innovators into settlement before litigation to avoid significant depletion of financial resources. Yet, these companies still suffer operational setbacks. If a PAE succeeds in an infringement suit, most small innovators cannot afford to seek an appeal even if they believe the court has made a mistake. For this reason, the App Association believes it is important for the CMA to demarcate a separate category for PAEs who seek to profit off the standardisation process rather than use it to innovate and compete in the market.

9.10 - Possible effects of standard-setting on competition

However, by virtue of its IPR, a participant holding IPR essential for implementing the standard, could, in the specific context of standard development, also acquire control over the use of a standard. When the standard constitutes a barrier to entry, the undertaking could thereby control the product or service market to which the standard relates. This in turn could allow undertakings to behave in anti-competitive ways, for example by refusing to license the necessary IPR or by extracting excess rents by way of discriminatory or excessive royalties thereby preventing effective access to the standard ("patent hold-up"). The reverse situation may also arise if licensing negotiations are drawn out for reasons attributable solely to the user of the standard. This could include for example a refusal to pay a fair, reasonable and



non-discriminatory ("FRAND") royalty or using dilatory strategies (i.e. deliberately delaying licensing negotiations with the licensor) ("hold-out"). Nothing in this Guidance should be taken to suggest that a licensee is unwilling on the basis that it challenges the essentiality, validity or infringement of IPR forming part of a standard in parallel with licensing negotiations, reserves the right to do so in future, or if it requires that the licence provides a mechanism to alter the royalty rates taking account of the result of such challenges.

Justification: We urge the CMA to clarify the term 'hold-up' by modifying it to 'patent hold-up'. In addition, we urge the CMA to delete language in this section referring to 'hold-out' and incorporate the additional clarifying text above. The suggested text included in section 9.10 provides necessary clarification as to anticompetitive abuses that have occurred within the SEP licensing negotiation context and which should not be allowable through a standarisation agreement. SEP holders' claims of SEP 'hold-out' by licensees is simply an unproven theory as opposed to well-documented patent 'hold-up.' Therefore, we strongly urge the CMA to remove any language referring the 'hold-out.' The additional text that we include detailing the rights of a willing licensee is consistent with language in section 9.29.

9.11 - Possible effects of standard-setting on competition

However, even if the establishment of a standard can create or increase the market power of IPR holders possessing IPR essential to the standard, there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power. The question of whether exercising IPR essential to a standard equates to the possession or exercise of market power can only be assessed on a case-by-case basis.[FN 355]

[Footnote 355]

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. See for example judgment of 14 February 1978, United Brands, Case 27/76, EU:C:1978:22 and the discussion in Pfizer and Flynn v CMA [2020] EWCA Civ 339. This includes also the charging of excessive fees that are not FRAND on the basis of the contractual FRAND commitments of a licensor that is in a dominant position.

Justification: We provide the following suggested revisions to this section to limit a broad characterisation from misguiding an analysis of anticompetition with the standardisation context. The evaluation of market power of an essential IPR holder is best evaluated as applied to each individual case. We also include text that highlights the FRAND commitment and its role in alleviating anticompetitive effects in the standardisation process.

9.17 – FRAND

Where participation in standard development is unrestricted and the procedure for adopting the standard in question is transparent, standardisation agreements which contain no obligation to comply with the standard and provide access, including through the availability of standard-essential patent licenses, to the standard on FRAND terms will normally not restrict competition within the meaning of the Chapter I prohibition.

Justification: We make the suggested revisions to this provision in line with our previous justification for revisions to section 1.54 regarding alleged ambiguities as to the meaning of "access." The CMA can address this issue in section 9.17 by



specifically noting that access includes "through availability of essential patent licenses."

9.20 – Access on FRAND terms

Furthermore, the standard development organisation's rules would need to ensure effective access to the standard through SEP licenses to any willing licensee on FRAND terms. This will mean, in effect, license availability for all willing licensees wishing to practice the standard regardless of where in the supply chain they are situated. Holders of essential IPR should not discriminate between willing licensees, particularly with respect to their location in a given supply chain."

Justification: The changes proposed above are consistent with provision 9.44 in the Draft Guidance that provides efficiencies are achieved when a standardisation agreement IPR policy provides for licensing to third parties at all levels of the supply chain. Further, a clarification of what access on FRAND terms means in the context of standard setting would be significantly beneficial for SMEs who rely on their suppliers to provide them products which they can use or sell without concerns of being accused of patent infringement of a technology they know nothing about. Our members report that some holders of essential patents refuse to offer licenses to companies who supply them with the hardware for their products despite the plain meaning of the FRAND commitment the SEP holders made on the SEP(s) at issue. The CMA should make clear that FRAND access simply means that FRAND licenses must be made available upon request to any willing licensee, without exception.

9.22 – Transfer of FRAND commitment

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 nondiscriminatory terms ('FRAND commitment'). The FRAND commitment could be drafted so as to require the IPR holder to offer a licence to any third party seeking a licence in order to implement the standard. The FRAND commitment should be given prior to the adoption of the standard. At the same time, the IPR policy should allow IPR holders to exclude specified technology from the standard development process and thereby from the commitment to offer to license, providing that exclusion takes place at an early stage in the development of the standard. To ensure the effectiveness of the FRAND commitment, there would also need to be a requirement on all participating IPR holders who provide such a commitment to ensure that any undertaking, including patent pools, to which the IPR owner transfers its IPR (including the right to license that IPR) is bound by that commitment, for example through a contractual clause between buyer and seller. In particular, the FRAND commitment should be upheld by undertakings licensing on behalf of SEP holders in patent. It should be noted that FRAND can also cover royalty-free licensing.

Justification: The suggested revisions to this section are in line with our belief that the CMA's position on transfers and the FRAND commitment should be clear and should include that the application of the FRAND commitment following the transfer of one patent holder to another applies equally to patent pools. Specifically, in the context of patent pools, the CMA should make clear that any company, including patent pools, to which the IPR owner transfers its IPR (including the right to license that IPR) is bound by that commitment without exception. We were discourage to see that the Draft Guidance did not give any reference to this important consideration.

9.24 – Disclosure



Moreover, the IPR policy would need to require good faith disclosure, by participants, of their IPR that might be essential for the implementation of the standard under development. This is relevant for (i) enabling the industry to make an informed choice of technology to be included in a standard and (ii) assisting in achieving the goal of effective access to the standard. Such a disclosure obligation could be based on reasonable endeavours to identify IPR reading on the potential standard and to update the disclosure as the standard develops. With respect to patents, the IPR disclosure should include at least the patent number or patent application number. If this information is not yet publicly available, then it is also sufficient if the participant declares that it is likely to have IPR claims over a particular technology without identifying specific IPR claims or applications for IPR (so-called blanket disclosure).367 Other than where the relevant IPR information is not yet publicly available. blanket disclosure would be less likely to enable the industry to make an informed choice of technology and to ensure effective access to the standard. Participants should also be encouraged to update their disclosures at the time of adoption of a standard, in particular if there are any changes which may have an impact on the essentiality or validity of their IPRs. Since the risks with regard to effective access are not the same in the case of a standard development 18ubject18tion with a royalty-free standards policy, IPR disclosure would not be relevant in that context. Neither party to a FRAND negotiation should seek to force the other party into overbroad secrecy arrangements.

Justification: We provide the suggested edits to parallel provision 483 in the European Commission's revised Horizontal Guidelines, which we believe provides a good understanding of proper disclosure by a SEP holder. We also suggest an additional statement on restricting secrecy agreements. When a licensor seeks to initiate a negotiation, a licensor should be prepared to provide a base level of information regarding the SEPs to requesting licensees without an NDA. This base level of information would include information to enable the putative licensee (and its supply chain) to understand the SEPs, a sufficiently detailed specification (e.g., claim charts) describing how the patents are allegedly infringed by the products implementing the standard, and other relevant information needed by the licensee to evaluate claims of infringement, validity and essentiality.

9.25 – FRAND commitment requires licenses

FRAND commitments are designed to ensure that essential IPR protected technology incorporated in a standard is accessible to-the all users of that standard on fair, reasonable and non-discriminatory terms and conditions. In particular, FRAND commitments can prevent IPR holders from making the implementation of a standard difficult by refusing to license or by requesting unfair or unreasonable fees (in other words excessive fees) after the industry has been locked-in to the standard or by charging discriminatory royalties, or by engaging in other unfair or unreasonable practices having an equivalent effect. [FN 369] At the same time, FRAND commitments allow IPR holders to monetise their technologies via FRAND royalties and obtain a reasonable return on their investment in R&D which by its nature is risky. This can ensure continued incentives to contribute the best available technology to the standard. In addition, the UK Supreme Court has found that, where doing so is in accordance with standard practice in the relevant industry and appropriate (such as because it avoids unreasonable delays in negotiating licences or reduces transaction costs), IPR holders may require that a FRAND licence to their standard-essential IPRs be taken on a global or multinational portfolio basis.

Justification: this proposed change will add clarity to provisions in the Draft Guidance providing that efficiencies are achieved when a standardisation agreement IPR policy provides for licensing to third parties at all levels of the supply chain on fair, reasonable, and non-discriminatory terms and conditions. The lack of clarity, as it stands, creates



uncertainty in the market and is leading to situations where certain patent holders only offer to grant licenses to certain companies, and not all in industrial supply chains. The effect inhibits innovation in the IoT and does not allow companies to plan investment in research and development.

[Footnote 369] – Portfolio Licensing and Patent Bundling

An example might be the unfair or unreasonable tying or bundling of non-essential IPR (or other non-essential products or services) to the standard-essential IPR. A portfolio license offer of both essential and non-essential IPR should never be a condition for acquiring a SEP license. Therefore, a license offer on FRAND terms should not require the licensing of a portfolio of non-essential IPR. Another example might be the tying or bundling of licences to essential-IPR of more than one standard, where the licensee does not require a licence to the other standards. Requiring a license of essential IPR to other standards which the licensee does not practice would have the effect of restricting competition. For further discussion of tying and bundling, see para. 221-225 of the Technology Transfer Guidelines and para. 10.152—10.160 of CMA166 Vertical Agreements Block Exemption Order – CMA Guidance.

Justification: patent bundling and forced portfolio licensing are critical issues for SMEs who often develop devices less complex than larger corporations who have the extensive resources to develop highly complex devices. Furthermore, the circulation of their products is generally limited to a few jurisdictions, usually within the United Kingdom. Thus, an offer to license a portfolio of patents entirely unrelated to their product is tantamount to asking someone to pay for nothing. The inclusion of suggested revisions to this footnote on forced bundling and portfolio licensing would also bring the Draft Guidance in line with European Commission Communication 2017/712 section 3.3 which states "SEP holders may offer more patents, including non-SEPs, but cannot require a licensee to accept a licence for these other patents as well."

9.27 – Calculating a FRAND royalty

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. Nevertheless, in the event of a dispute, the assessment of whether fees charged for access to IPR in the standard development context are unfair, or unreasonable, or discriminatory should be based on whether the fees bear a reasonable relationship to the economic value of the IPR. The economic value of the IPR could be based on the present value added of the covered IPR and should be irrespective of the market success of the products which is unrelated to the patented technology. In general, there are various methods available for the assessment, and in practice, more than one method is often used to account for shortcomings of a particular method and to cross-check the result. But such valuations should avoid deleterious royalty stacking effects and will ensure compliance with competition laws and the efficiencies-test under section 9(1) by basing value on the patented invention itself, and not value attributable to other parties' contributions to a standard or on actual or hypothetical later uses of a standardized technology downstream. The smallest saleable patent practicing unit methodology is the most reliable way to value the patented technology itself. IPR policies shall recognise these principles of FRAND valuation. Policies or practices that facilitate or contribute to excessive royalties can be harmful for competition and innovation. It may be possible to compare the licensing fees charged by the undertaking in question for the relevant patents in a competitive environment before the industry has developed the standard (ex-ante)



with the value/royalty of the next best available alternative (ex-ante) or with the value/royalty charged after the industry has been locked in (ex post). This assumes that the comparison can be made in a consistent and reliable manner. Licensors should also provide information on the other comparable license agreements (including rebate agreements) they have entered into with others so that potential licensees can properly assess whether the license offer is fair reasonable and non-discriminatory."

Justification: The suggested revisions highlights our view that the smallest saleable patent practicing unit (SSPPU) methodology is the most reliable methodology for objectively assessing a FRAND royalty and protecting against potential anticompetitive harms inherent within standard setting and licensing of patented technology. The SSPPU methodology is the most effective way to ensure that SMEs are20ubjectt only to reasonable royalty rates.

9.28 – Calculating a FRAND royalty

An independent expert assessment could also be obtained to assess objectively how central and essential the relevant IPR is to the standard at issue. The conclusions of such assessment need to be impartial, and its outcome shall not be binding to the parties, create a presumption regarding essentiality, validity or infringement or shift any burden of proof and shall allow the parties to seek recourse before courts. In an appropriate case, it may also be possible to refer to ex ante disclosures of licensing terms, including the individual or aggregate royalties for relevant IPR, in the context of a specific standard development process. Similarly, it may be possible to compare the licensing terms in agreements of the IPR holder with other implementers of the same standard. The reasonable royalty rates charged for the same IPR in other sufficiently comparable standards may also provide an indication for FRAND royalty rates. These methods assume that the comparison can be made in a consistent and reliable manner and are not the result of undue exercise of market power. Another method consists in determining, first, an appropriate overall value for all relevant IPR and, second, the portion attributable to a particular IPR holder.

Justification: The suggested revisions to this section have been made to ensure that the term 'independent' is sufficiently defined within the context of expert assessment. We made further edits to ensure that the understanding of a 'comparable' license is clear.

9.29 – Dispute resolution of a FRAND license

The IPR Policy may also provide for an international tribunal (alternatively, it may identify respected national IP courts or tribunals) to determine the terms of a FRAND licence on a worldwide basis in cases of dispute. In the absence of such a provision, nothing in this Guidance prejudices the possibility for parties to resolve their disputes about the level of FRAND royalties by having recourse to competent national courts or voluntary alternative methods of dispute resolution. Moreover, nothing in this Guidance should be taken to suggest that a licensee is unwilling to take a licence on FRAND terms on the basis that it challenges the essentiality, validity or infringement of IPR forming part of a standard in parallel with licensing negotiations, reserves the right to do so in future, or if it requires that the licence provides a mechanism to alter the royalty rates taking account of the result of such challenges. Further, the parties shall respect the jurisdiction of courts to issue such judgment.

Justification: The suggested edits to this provision provide important considerations for dispute resolution of a FRAND license. While a SDO could provide an independent international tribunal to play a role in determining global FRAND royalties, such a



process would not be equitable without resolving matters of equity, which we define in our specific comments to this section. Without the considerations that we outline, an international tribunal allow for anticompetitive abuses. We also provide an edit clarifying that alternative dispute resolution (ADR) (e.g., mediation or arbitration) before litigation takes place should be a voluntary option. Unless a court orders mediation, or under other exceptionally rare circumstances, ADR should not be mandatory, and parties should not have to participate if they choose not to.

9.32 – Access to FRAND license

The assessment whether the agreement restricts competition will also focus on access to the standard (i.e. access to FRAND licenses for essential patents in the standard). Where the result of a standard (that is to say, the specification of how to comply with the standard and, if relevant, the essential IPR for implementing the standard) is not at all accessible for all members or third parties (that is, non-members of the relevant standard development organisation) this may foreclose or segment markets and is thereby likely to restrict competition. Refusing to offer a license to members or third parties on FRAND terms should be considered as potentially restricting competition. Competition is likewise likely to be restricted where the result of a standard is only accessible on discriminatory or excessive terms for members or third parties. However, in the case of several competing standards or in the case of effective competition between the standardised solution and non-standardised solution, a limitation of access may not produce restrictive effects on competition.

Justification: the suggested changes here are in line with the previous statements in our justifications regarding the requirement to offer licenses to all willing potential licensees; and are consistent with provisions in the Draft Guidance providing that efficiencies are achieved when a standardisation agreement IPR policy provides for licensing to third parties at all levels of the supply chain.

9.33 – Access to FRAND license

If aAn IPR Policy does not should 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.

Justification: The suggested edits to this provision seek to clarify that providing for 'have made' rights to ensure pro-competition does not work in practice.

28 March 2023

Steven Preece Competition and Markets Authority The Cabot 25 Cabot Square London E14 4QZ United Kingdom

Re: Enabling small business growth and job creation through strong, effective, and clear competition guidance for standardisation agreements

Dear Steven

We, the members of ACT | The App Association, are small and medium-sized enterprises (SMEs) that create new and innovative technologies across various sectors in the economy of the United Kingdom (UK). As business and technology leaders in the UK, we have a vested interest in ensuring new legal and policy landscapes continue to support SMEs engaging in the digital economy, including and especially issues related to standards and the internet of things (IoT).

We write to the Competition and Markets Authority (CMA) concerning the consultation regarding the CMA's draft guidance on the application of the Chapter 1 prohibition in the Competition Act 1998 to horizontal agreements (Draft Guidance). The importance of competition law is crucial in promoting a robust UK app ecosystem and ensuring a balanced framework for standardisation agreements and licensing standard-essential patents (SEPs).

SMEs rely on standards for interoperability – this means we need to ensure there is fair, reasonable, and non-discriminatory (FRAND) licensing. As SMEs build new complex products across the IoT ecosystem, we will need to count on being able to license SEPs on FRAND terms.

Through the FRAND commitment, patent holders voluntarily agree to license any intellectual property incorporated into the applicable standard on FRAND terms in exchange for the enhanced market power they gain via holding patents essential to the use of a widely-adopted standard. The FRAND commitment, when adhered to, ensures that after an industry has been locked into a standard, SEP holders do not abuse their market power and harm competition.

Unfortunately, despite prior promises, some SEP holders continue to pull back on their FRAND commitments and exploit ambiguities within the FRAND construct through a variety of actions that damage competition. This means a SEP holder may use their market power to simply refuse to license to a competitor, locking an innovator out from using a standard.

The Draft Guidance focuses on evaluating when agreements between competitors prevent, restrict, or distort competition. It is important for the CMA to clarify when standardisation agreements encourage a pro-competitive framework for the licensing of SEPs, and when such agreements that do not adhere to the FRAND commitment are anticompetitive. The final iteration of the CMA's Horizontal Guidance should play a central role in advancing a healthy and fair standards ecosystem and further prevent SEP licensing abuses. Such abuses dramatically

undermine innovation across several UK industries, ultimately harming UK businesses, in particular our community, and consumers.

While we appreciate the CMA's inclusion and characterisation of the FRAND commitment in the Draft Guidance, further clarifying the provisions in the Draft Guidance is necessary to combat well-documented SEP abuses. We strongly encourage the Horizontal Guidance to reflect the following principles as objectively defining the FRAND commitment:

- A holder of a SEP that has provided a voluntary FRAND commitment must license that SEP on fair, reasonable, and non-discriminatory terms to all companies, organizations, and individuals who implement, or wish to implement, the standard – irrespective of their position in the value chain.
- Injunctions and other exclusionary remedies should not be sought by FRANDencumbered SEP holders or allowed except in rare circumstances, such as when a potential licensee is demonstrably unreasonable. Further, licensors and licensees should always be entitled to assert claims and defences.
- If a FRAND-encumbered SEP is transferred, the FRAND commitment follows the SEP in that and all subsequent transfers.
- SEP holders cannot require those needing a license to take or grant licenses to a FRAND-encumbered SEP that is invalid, unenforceable, or not infringed; or a patent that is not essential to the standard.
- A reasonable rate for a valid, infringed, and enforceable FRAND-encumbered SEP should be based on several factors, including the value of the actual patented invention apart from its inclusion in the standard. Arbitrary pricing approaches based on downstream innovations unconnected to the SEP itself are incompatible with the FRAND commitment.
- Patent pools present the opportunity for FRAND-encumbered SEP licensing efficiencies when the pool fully adheres to the FRAND commitment attached to all the SEPs it is licensing.

We believe that aligning the CMA Draft Guidance for standardisation agreements with the principles above is critical for enabling the UK's vital SME innovator community, which continues to face challenges with complex legal issues and liabilities related to standards and SEP licensing. CMA's timely updates to the UK's Horizontal Guidance are a vital opportunity for partnership with the SME community at a critical time for the UK's innovation ecosystem.

Thank you for your consideration of our small business perspective on this important consultation.

Sincerely,

Actisense Phil Whitehurst – Chief Executive Officer

Cubik Innovation

Paul Mullen – Founder and Managing Director

Cyclopic

Alan Rallings – Founder and Chief Executive Officer

FC Laboratories Ltd Matthew Norbury – Founder and Chief Executive Officer

Footfalls and Heartbeats Simon McMaster – Chief Scientific Officer

Layers Studio James Hanson – Managing Director

Manulytica William Fish – Founder and Managing Director

Nebula Labs Limited Dylan McKee - Co-founder & Chief Executive Officer

Smartia Asim Majid – Co-Founder and Chief Commercial Officer