

UK Competition & Markets Authority Consultation on Draft Guidance on Horizontal Agreements

Submission by Avanci

Avanci welcomes the opportunity to participate in the CMA's consultation on the draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements (Horizontal Agreements consultation). Avanci is concerned that the proposed inclusion of a reference to Licensing Negotiation Groups (LNGs) as an example of joint purchasing agreements risks giving unwarranted validation to LNGs, at a stage when there is no practical experience with them that would allow the CMA to take a general position.

Based on Avanci's experience with patent licensing matters, LNGs (1) would be of limited or no benefit in practice and (2) may raise material anti-trust concerns.

1 Introduction to Avanci

Avanci has specific experience and expertise in the area of negotiations for collective licensing of SEPs. Avanci is an independent company which operates the Avanci Vehicle and Avanci IoT aggregated patent licensing platforms, offering a license to standard essential patent (SEP) portfolios for cellular technologies (4G/3G/2G), for the Internet of Things (IoT) industry. Avanci offers an optional solution: licensors and licensees remain free to conclude bilateral license agreements. Avanci has been successful in bringing to market an efficient, one-stop solution for connected vehicles: the majority of cellular SEP holders and the majority of automakers participate in Avanci's licensing programme for 4G connected vehicles. Several UK-based patent owners and automakers already participate in the Avanci Vehicle platform.

Avanci is independent and is not owned or controlled by any one or more licensors or licensees. Avanci's independence allows it to engage freely with both patent owners and prospective licensees, discovering license terms that, in our independent judgement, can be widely accepted by SEP holders and product manufacturers and that reflect the circumstances and requirements of a particular industry sector. Avanci's process of gathering views on possible SEP licensing terms from diverse companies across the licensor-licensee spectrum ensures that an Avanci license provides an optional solution that is efficient, predictable and transparent, and also acceptable to a wide range of entities, ensuring uptake and eventual success of the programme. Avanci functions as an intermediary between licensors and licensees, taking the views and needs of both into account.

2 Material differences between joint purchasing of goods or services and SEP licensing

Taking a license to a standard essential patent differs in significant ways from purchasing goods or services. Most importantly, anyone implementing standardised technologies in their products is obliged to take licenses from all holders of the underlying standard essential patents, and SEP holders are obliged to offer licenses on fair, reasonable and non-discriminatory (FRAND) terms.

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¹ See <u>www.avanci.com</u>.

² On 7 March 2023, Avanci launched the Avanci Broadcast platform, which licenses patents declared essential to the ATSC 3.0 broadcast standard to makers of products which can receive ATSC 3.0 signals, including TV and set-top box manufacturers. See www.avanci.com/broadcast.

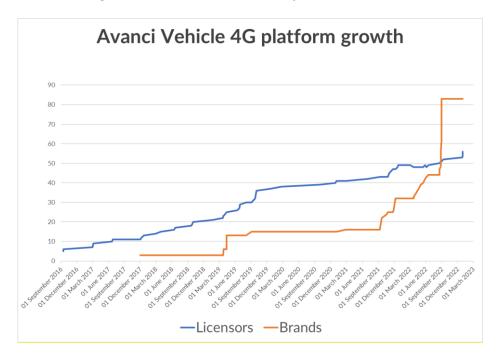


Furthermore, implementers can and do deploy standardised technologies, sometimes for several years,³ without first obtaining a license. This is not the case for any other type of product or service: sellers will not accept orders, and buyers will not receive the product or service, until an agreement is reached. In such a negotiation the positions are more balanced, neither side getting what it wants – products and/or services in return for payment – unless and until agreement is reached.

3 LNGs would offer little or no benefits in and could be detrimental to the negotiation of SEP licenses

It is doubtful that an LNG would improve the current framework for SEP licensing or provide a viable and antitrust-compliant alternative to existing independent aggregated licensing solutions. Independent aggregated licensing solutions already provide an effective mechanism in which the positions of licensors and licensees are appropriately balanced.

So far as Avanci is aware, no LNGs have successfully been formed. Without the involvement of any LNG, Avanci has now licensed the vast majority of the 3G and 4G SEPs in the world to all major European (and American, Japanese, and Korean) auto manufacturers. The introduction of an LNG would have, at a minimum, caused confusion in the marketplace because Avanci already offered an efficient aggregated licensing solution. More likely an LNG would have created an impediment to the success of Avanci's independent platform. Platforms grow by securing the participation of key participants – both licensors and licensees – one by one; individual companies evaluate the platform's licensing terms and independently decide that the aggregate licensing solution is the best approach for their company. The following timeline shows the organic growth of the Avanci platform, which was only possible due to the independent decision-making of licensors and licensees to join the platform:



Had one half of the platform (licensees that are members of the auto industry) instead participated in an LNG, it would have discouraged participation of early licensee adopters because their independent decision-making would have been coloured by the views of their competitors and ultimately replaced by group-think. Without licensees, licensors would have been less interested to participate in the licensing platform and the natural growth of licensing platforms would slow or altogether stop. Litigation would

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³ The first automobiles with 3G or 4G connectivity were sold during the 2000s. The majority of Avanci's license agreements were signed in 2022.



remain as the only option to resolve the licensing terms for a unified base of licensees, ultimately depriving the entire industry of Avanci's market-accepted aggregated licensing terms.

4 Patent licensing platforms already have well-developed guidelines to prevent anti-trust concerns

Some may argue that an aggregated patent licensing platform or pool confers an unfair advantage on the participating SEP holders whose patents are bundled together in one collective license. This argument is incorrect. There is abundant guidance for the compliant operation of aggregated patent licensing solutions (also referred to as patent pools) that has been developed over decades. These guidelines have been issued by competition authorities in various jurisdictions, including in the UK, the European Union and the United States, and are generally in alignment across jurisdictions. These well-established and long-standing competition and antitrust guidelines ensure that patent pools and licensing platforms promote, rather than hamper, competition.⁴ In particular, pools and licensing platforms are self-regulated by the market because obtaining a license from a patent pool (or platform) is purely optional. Licensees always have the option of securing a FRAND license to standardized technology directly from each individual licensor instead of a patent pool or platform. It follows that LNGs are not needed to counterbalance any purported bargaining power of SEP owners.

5 LNGs, on the other hand, could raise anti-trust concerns

Finally, because there are no similar established guidelines for LNGs, there is a real risk that LNGs would operate in violation of antitrust laws and hamper competition. A generalized endorsement of LNGs in the CMA's forthcoming revised Guidance – without clear and thorough guidelines on their operation – amplifies that risk. For example, the risks of LNGs were recognised in an SEP Expert Group report⁵ prepared for the European Commission's Directorate General for Internal Market, Industry, Entrepreneurship and SMEs (**DG GROW**). Members of the expert group raised antitrust concerns, mainly because (1) there is a risk that an LNG becomes a buyer cartel; and (2) there is a risk of collective holdout based on the combined market power of the product manufacturers who would be licensees.

The draft guidance is correct in stating that market share and other considerations need to be considered in analysing particular groupings of buyers and is mindful of the importance of maintaining a balance of forces between the buy and the sell side. It could be possible, and perhaps even likely that an LNG would seek to aggregate most or even all of the demand, taking the arrangement in any event well outside usual safe harbours of market share.

To conclude, Avanci recommends further reflection on the specific issues presented by LNGs. Avanci urges caution before the untested concept is given any perceived official support by including it in the CMA's Guidance on Horizontal Agreements.

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⁴ Aggregated patent licensing solutions offer substantial transaction cost savings for the entire SEP licensing ecosystem by removing the need for serial bilateral negotiations with dozens of SEP owners. A license to one SEP is not a substitute for a license to another as SEPs are by nature complementary; any implementer therefore is obliged to obtain FRAND licenses from all SEP owners of the implemented standard.

⁵ Group of Experts on Licensing and Valuation of Standard Essential Patents 'SEPs Expert Group', Contribution to the Debate on SEPs ("SEP Expert Group Report"), January 2021, proposal 75.