

Questions for stakeholders

Stakeholder information

We would like to understand the types of stakeholders responding to this Call for Inputs, and the types of business which use the Assimilated TTBER and the Guidelines.

1. Please confirm the capacity in which you are responding to this Call for Inputs.
 - (a) If you are responding as a business:
 - (i) Please confirm whether you are primarily a licensor or a licensee of technology rights.
 - (ii) Please specify the technology right(s) to which your knowledge of and/or experience with the Assimilated TTBER and the Guidelines primarily relate.
 - (iii) Please identify the sector(s) to which your knowledge of and/or experience with the Assimilated TTBER and the Guidelines primarily relates.

Not applicable.

- (b) If you are submitting a response as an advisor or other third party:
 - (i) Please specify whether you primarily advise and/or represent licensor(s) or licensees.

The Fair Standards Alliance (FSA) is an alliance comprised of companies¹ that are both licensors and licensees. Our members include companies at different positions in the value chain. Our members participate in standards development and rank among the world's largest innovators, spending more than GBP 145 billion per year in aggregate on R&D.

- (ii) Please specify the technology right(s) to which your knowledge of and/or experience with the Assimilated TTBER and the Guidelines primarily relates.

Patent licensing agreements.

- (iii) Please confirm which sector(s) you consider are particularly relevant to the Assimilated TTBER and the Guidelines.

Technology, automotive, telecommunications, energy, broadcasting and more.

¹ FSA members include the following companies: ABAX, airties, Amazon, Apple, BMW Group, Bullitt, Bury, Cisco, Continental, Dell, Emporia, Fairphone, Ford, Google, Harman, Hitachi, Honda, HP, Hyundai, Intel, Juniper Networks, Kamstrup, Lenovo, Mercedes, Microsoft, Netflix, N&M Consultancy, Nordic Semiconductor, Sagemcom, Semtech, Sequans, Sky, Stellantis, T-Mobile, Tech Law Associates, Telit, Tesla, Thales, TomTom, Toyota, Tunstall, u-blox, Valeo, Veracity IP, Visteon, Volkswagen Group, Volvo, and Xiaomi. Further information is available at <https://fair-standards.org/>.

2. Whether you are making a submission as a business, an advisor, or otherwise, please provide any observations you have on the size of business that, in your experience, typically makes use of the Assimilated TTBER and the Guidelines.

Businesses small and large (from startup/SME to multinational) are involved in Standard Essential Patent (SEP) licensing; as relevant to the Assimilated TTBER, this concerns SEP licensing through patent pools.

Benefits and impacts on competition

The following questions seek views on whether technology transfer agreements covered by the Assimilated TTBER continue to produce benefits outweighing their potential harmful effects on competition.

3. What are the main effects (if any) on competition of technology transfer agreements covered by the Assimilated TTBER? To what extent do these agreements restrict competition? If possible, please provide examples.

This response focusses on patent pools (or “technology pools” by the phrasing of the Guidance), which are subject to independent assessment “by analogy”² to the Assimilated TTBER. Patent pools – particularly, the collective licensing of SEPs – are currently allowed to operate largely without competition law scrutiny of various key aspects of their operation, the result of which can be a restriction of competition. For example, since 2014, a number of new patent pools have emerged in new market segments for the ‘Internet of Things’ (IoT). The main concerns are about a series of behaviours from some patent pools relating to (i) evasion of FRAND obligations, (ii) refusal to license, (iii) lack of transparency, (iv) lack of or inadequate essentiality assessments, (v) duplicative royalty rates requested by pools and individual licensors; and (vi) collective litigation incentivisation clauses and (vii) lack of independence and (viii) price setting of pool rates. The Assimilated TTBER and the Guidelines in particular should be updated to account for these and other behaviours, to set clear guidance that would not restrict downstream competition.

4. Has the Assimilated TTBER contributed to promoting competition in the UK? If possible, please provide examples.

Not insofar as it concerns the licensing of SEPs: certain patent pools present a threat to competition in the UK because of unfair practices.

5. Has the Assimilated TTBER contributed to promoting economic activity that benefits consumers in the UK and would not otherwise have occurred? If possible, please provide examples.

Not in relation to patent pools and FRAND licensing; the Assimilated TTBER and the

² See e.g. paragraph [57] of the Guidance.

Guidelines are now out of date and should be updated to keep pace with market practices and behaviours in order to promote economic activity and benefit consumers in the UK.

6. If, in response to question 3, you consider that technology transfer agreements covered by the Assimilated TTBER restrict competition, to what extent:
- (a) Do any benefits identified in response to question 5 compensate consumers for any such restriction of competition?

The proper functioning of patent pools has the *potential* to promote economic activity and benefit consumers in the UK (thereby compensating for the restriction of competition); but those benefits are not being realised under the current situation where there is a lack of proper regulatory framework and enforcement.

- (b) Are these restrictions necessary in order to achieve any benefits identified in response to question 5?

No; the restrictions of competition arising from practises detailed further below go beyond what is necessary.

Benefits of a block exemption over self-assessment

We would like to understand the extent to which the Assimilated TTBER is relied upon, and the value of the Assimilated TTBER for the businesses which rely on it.

7. Are you aware of businesses having relied on the Assimilated TTBER, when entering into technology transfer agreements? If possible, please provide examples.

Yes; businesses licensing SEPs via pools.

8. In the absence of the Assimilated TTBER, operators would need to self- assess their compliance with Chapter I prohibition. For any agreements currently covered by the Assimilated TTBER:
- (a) To what extent would licensors or licensees be discouraged from entering into technology transfer agreements in the absence of the Assimilated TTBER? Please provide examples and reasons for your answer.

Parties may still enter into patent pool licences, but absent a robust legal framework that reflects current market realities and licensing practices, they would risk doing so on terms that may be abusive.

- (b) Please provide estimates for any additional costs an operator would incur, in the absence of an Assimilated TTBER, to carry out the relevant self-assessment for agreements which currently benefit from exemption. If it is

not possible to provide a quantified estimate of additional costs, please estimate the cost in terms of time and/or estimate the increased complexity of carrying out the relevant competition law self-assessment (including, for example, whether external advice might be needed).

[No comment]

Effectiveness of the Assimilated TTBER

We would like to understand if there are changes to the Assimilated TTBER which could improve its effectiveness, including to reflect any technological or business changes since its adoption in 2014.

Scope

9. In your view, has the Assimilated TTBER been effective in exempting only those technology transfer agreements for which it can be assumed with sufficient certainty that they satisfy the conditions for an exemption under section 9 of the CA98?

Not in respect of patent pools; see response to question 3.

10. In relation to the definitions of 'technology transfer agreements' and 'technology rights' in Article 1 of the Assimilated TTBER:
- (a) Are these definitions sufficiently clear to allow you to identify the categories of agreements and intellectual property rights that are covered by the Assimilated TTBER? If not, how should these definitions, in your view, be clarified or amended?
 - (b) Are there any types of intellectual property right agreements or other technology rights which, in your view, should not be covered by these definitions (for example, because they do not apply in the UK)?
 - (c) Are there any types of intellectual property right agreements or other technology rights, which are not covered by the Assimilated TTBER that, in your view, would be likely to meet the requirements for exemption from the Chapter I prohibition under section 9 of the CA98?

[No comment]

11. In relation to the definition of 'competing undertakings' in Article 1, is this sufficiently clear for the purposes of assessing a technology transfer agreement under the Assimilated TTBER? If not, how should this definition, in your view, be clarified or amended?

[No comment]

Market share thresholds

12. Article 3 of the Assimilated TTBER sets out various market share thresholds that must be met in order for technology transfer agreements to be exempted: businesses' market shares cannot exceed 20 percent when they are competing undertakings and 30 percent in each market in which they are not competing undertakings. In relation to the thresholds:
- (a) Are the market share thresholds set at an appropriate level?
 - (b) If not, would either of the market share thresholds benefit from modification? Please provide reasons for your answer.

[No comment]

13. Article 8 of the Assimilated TTBER contains rules setting out how parties are to calculate their market share(s) for the purposes market share thresholds. Are these rules sufficiently clear to allow parties to calculate their market shares? If not, how should these rules, in your view, be clarified or amended?

[No comment]

Hardcore restrictions

14. Article 4 of the Assimilated TTBER lists 'hardcore restrictions' that a technology transfer agreement must not contain if it is to be exempted. In relation to the 'hardcore restrictions':
- (a) Are the current restrictions sufficiently clear?
 - (b) Would any of the current restrictions benefit from modification?
 - (c) Are there any further restrictions that it would be appropriate to include, in addition to those already included in the Assimilated TTBER?
 - (d) Are there any restrictions that it would be appropriate to remove from the Assimilated TTBER?

[No comment]

Excluded restrictions

15. Article 5 of the Assimilated TTBER contains a list of 'excluded restrictions' that do not benefit from exemption. In terms of the 'excluded restrictions':
- (a) Is the current list sufficiently clear?
 - (b) Would any of the current excluded restrictions benefit from modification?
 - (c) Are there any further restrictions that it would be appropriate to include, in addition to those already included in the Assimilated TTBER?
 - (d) Are there any excluded restrictions that it would be appropriate to remove from the Assimilated TTBER?

[No comment]

16. The CMA is aware that the EU TTBER in 2014 amended the scope of 'excluded

restrictions' in respect of grant-back obligations and non-challenge termination clauses in licenses in comparison to the EU TTBER's 2004 predecessor. Have these changes improved the Assimilated TTBER? Please provide examples and reasons for your answer.

[No comment]

The Technology Transfer Guidelines

We are interested in understanding how effectively the Technology Transfer Guidelines are working and whether any changes to the Guidelines could improve their effectiveness.

17. The purpose of the Guidelines is to assist businesses in their assessment of technology transfer agreements. In your view:
- (a) Have the Guidelines been effective in providing legal certainty for UK businesses in their assessment of technology transfer agreements?

To some extent, but they are now out of date, unclear in places, and must be updated to keep pace with more recent market practices and behaviours.

- (b) Are there any changes that could improve the effectiveness of the Guidelines? Please provide reasons for your answer.

Yes. As the Guidelines note at [248], “*The way in which a technology pool is formed, organised and operated can reduce the risk of it having the object or effect of restricting competition...*”. Recent experience has shown that some patent pools are acting outside of the “safe harbour” and are not complying with the Guidelines, to anticompetitive effect. Further, there are anticompetitive practices emerging from patent pools that the Guidelines as drafted do not envisage. The ability of pools to flout the Guidelines has left licensees operating under significant uncertainty as to whether the conduct they are facing is a violation of UK competition law and at a significant cost for licensees and consumers.

An overarching theme among the issues identified below is transparency. In many instances it can be difficult to know whether the Guidelines are in fact being complied with, due to unavailability of information. Lack of transparency therefore provides a means of non-compliance; a requirement for greater transparency throughout the Guidelines may alleviate some of these issues.

We structure our response here as follows. **Section A** sets out examples of how patent pools can operate in anticompetitive ways. **Section B** then proposes some solutions to these problems by reference to the Guidelines as currently drafted.

Section A: Some indicative examples of pool behaviour that may restrict competition in contravention of Chapter 1 Competition Act 1998 are:

Not licensing on FRAND terms

There are two identified practices that may have anticompetitive effects. The first is where a patent pool may deny that it is bound by FRAND principles because the pool claims that it has not given any commitment to a Standard Development Organisation (SDO). This is a position

that has appeared recently in formal submissions to the UK High Court³, despite pools licensing SEPs that have each been voluntarily committed to be licensed on FRAND terms by their owners. SEP owners typically commit to transfer that FRAND undertaking to their successors in rights⁴, which makes the above refusal by a patent pool to comply with FRAND inexplicable and a clear effort to evade.

The second practice is licensing on non-FRAND or excessive terms. The basic concept of non-FRAND licensing is alluded to at Guidelines para [269] (“*Where the pool has a dominant position on the market, royalties and other licensing terms should be non-excessive and non-discriminatory and licences should be non-exclusive*”). However, through various methods patent pools can avoid scrutiny of the royalty rates they charge. This is largely about transparency (discussed further and separately below) around the rate, and the FRAND methodology by which the rate is arrived at. Here, we flag the legal and jurisdictional loopholes that patent pools are currently able to use to their advantage to avoid a court assessing the ‘fairness and reasonableness’ of a given allegedly FRAND rate. Mr. Justice Fancourt’s recent decision in *Tesla v Avanci* sets out the UK court’s reasoning for not having jurisdiction to assess the reasonableness of a global patent pool rate. In doing so, he expressed some regret that the pool rate could not be tested: “*It seems to me that Tesla has a legitimate interest and that there is justification for seeking the declaratory relief that it seeks. If no such claim can be brought, the rate set by Avanci may not be capable of effective challenge in a FRAND determination.*” Unfortunately, complex corporate and legal mechanisms can shield patent pool administrator’s practices.

In the UK, where parties are able to seek FRAND determinations in court, judges are consistently awarding rates many times below those asked for by SEP holders.⁵ Patent pools should not be exempt from this key area of assessment and transparency. Ultimately, the effect of businesses paying non-FRAND royalty rates (or indeed litigation costs to get a FRAND rate) is that the capital available to a business in legitimate areas (e.g., R&D, employment) is re-allocated. This is harmful to both the business and their innovation incentives as well as the downstream consumer of the licensee’s products.

Refusal to license

Again, this may take two forms: (i) refusal to license *in a particular way*; and (ii) refusal to license *at all*.

- i. Refusal to license in a particular way is already identified as an issue in the Guidelines at [254-255] (bundling of complements/substitutes) and at [261(d) and 264(b)] (routes to license); however, we see non-compliance. For example, offering a SEP licence only through a patent pool would be incompatible with the Guidelines. If a SEP holder chooses

³ See *Tesla v InterDigital & Avanci* [2024] EWHC 1815 (Ch), paragraph [96].

⁴ See, for example, clause 6.1bis of the ETSIO IPR Policy, here: <https://www.etsi.org/images/files/ipr/etsi-ipr-policy.pdf>

⁵ In *Optis v Apple* [2023], the court awarded a FRAND rate of just 2% of the sum demanded by Optis. In *InterDigital v Lenovo* [2023], the court found that licensees were paying a wide range of rates, and up to 10x the Court’s awarded rate (\$2.24, vs \$0.225 awarded on appeal).

to offer FRAND licences through a patent pool, it should be in addition to a possibility of a bilateral licence to any potential licensee. A SEP holder's decision not to join a patent pool or a licensee's decision not to take a licence through the patent pool therefore should not be considered as an unwillingness to grant or to take a SEP licence, respectively. Instead, we have seen instances of patent holders demanding only a pool licence during patent infringement proceedings⁶. Often refusal to license bilaterally is part of a pool's 'collective litigation' strategy.

- ii. Making licences available to all is mentioned in passing in the Guidelines – e.g., in the outline of a 'safe harbour' for patent pools at [261(e)] – though we contend that statement is not explicit enough. Licensing of FRAND-encumbered technologies should be available anywhere in the value chain. Some patent pools refuse to license the package of technologies to any party that wants to take a licence by refusing to offer licences to certain companies based on an arbitrary distinction of where the company is located in the supply chain. The FSA has published extensively on the practice of refusal to license and the detrimental effects it is having on European innovation.⁷ Evidence of a refusal to offer licences to any third parties in an attempt by SEP licensors to improperly capture value that is not related to their patented technology has also been put forward in court proceedings in the UK⁸.

The current practice of some licensors refusing to license outside of the pool is having a negative effect on innovation. Patent pools are, and must remain, only an option for licensees to consider. Each licensee is best placed to assess which licences it may need because their product(s) may only use a small section of the relevant standard. Furthermore, a licensee may already be licensed to a certain portion of standard through the purchasing of licensed components (e.g., chipsets) and thus may not need to take a pool licence.

A final point to note is that refusal to license higher up the value chain arguably constitutes a practice more restrictive than necessary to secure the benefits of the pool.

Transparency

Transparency is important for the legitimacy of pools. A lack of transparency can make it difficult to assess compliance with the Guidelines, as well as the actual effect on competition of certain behaviours. Some issues relating to transparency are set out below:

⁶ This was patent owner IP Bridge's position against Ford in its SEP litigation before the Munich Regional Court (case 7 O 9572/21); see e.g. an article reporting the case [here](#). Ford did ultimately take the Avanci pool licence after the award of an injunction in 2022.

⁷ FSA (2020), "Competitive and Industry Harms Related to Refusals to License SEPs and Other Forms of "Level Discrimination" in SEP licensing," available here: <https://fair-standards.org/2020/12/02/competitive-andindustry-harms-related-to-refusals-to-license-seps-and-other-forms-of-level-discrimination-in-sep-licensing/>; FSA (2020) "SEP licenses should be available to all companies in a supply chain that want a license for SEPs in their products – Supporting references," available here: <https://fair-standards.org/2021/02/15/sep-licenses-should-be-available-to-all-companies-in-a-supply-chain-that-want-a-license-for-seps-in-their-productssupporting-references-2/>

⁸ A position also taken by Avanci, see e.g., [63] in addition to [96], *ibid*.

- i. “Substitute” patents are being included in pools ostensibly set up to license “complementary” essential patents.
- ii. Patent pools should publicly disclose the patents licensed through the pool. Some pools already do this, however, many do not. Publicly listing the patents included in the pool gives better oversight that the pool is indeed licensing complementary patents and allows third parties to check and possibly challenge patents that should not be in the pool.
- iii. As discussed further below, patent pools should be equipped for essentiality checks, e.g. through an independent external evaluator (although other internal and external policing also may be helpful). With regards to transparency, these checks should be disclosed to potential licensees.
- iv. Patent pools should clearly list (in a distinguishable fashion) which companies are licensors and licensees. As the Guidelines already note at [269], patent pools should not discriminate between licensees and those that act as both licensors and licensees. For this reason, is it important third parties know exactly who is contributing to the pool.
- v. Patent pools should publicly disclose the royalty rate for the pool. Knowing the royalty rate allows (among other things) third parties to assess the aggregated royalty stack for the technology relative to the coverage of the pool.

Points (iv) and (v) above reflect what should be minimum-standard practice, as explained by the UK IPO’s recently published [Resource Hub on SEP licensing](#)⁹. The Resource Hub also spells out an important related aspect of rate transparency: it should be explained how the allegedly FRAND rate is calculated. That principle should apply no less for patent pools as it does for individual SEP owners, and should be included in the CMA’s guidance. Unfortunately, we see evidence of pools seeking royalty demands without providing this basic information¹⁰.

We also point the CMA the *Optis v Apple judgment*¹¹, at paragraph [507]: “it is quite clear that a certain level of information exchange between SEP Owners and Implementers is necessary in order to derive FRAND rates; and that controlling information as to stack size and rates so that a market price cannot be discerned runs the risk, in and of itself, of infringing competition law”.¹²

Essentiality Assessments

We refer to and elaborate on points (ii) and (iii) made above in the ‘Transparency’ section (the identification and assessment of SEPs). The existing Guidelines include conditions for patent pools to undertake essentiality assessments to ensure that patents licensed through the pool are complements and not substitutes. Since the last evaluation of the Guidelines, however, the number of patents being declared essential to standards has continued to grow exponentially. This is in line with the fact that technology standards are more complex, but also because

⁹ See e.g. the items that the potential licensee should expect to receive from the SEP holder, under sub-heading 4.2.

¹⁰ See a recent joint-industry letter sent to Avanci, here: <https://www.autosinnovate.org/association-update/Auto%20Association%20Letter%20to%20Avanci%20July%2011%202024.pdf>

¹¹ [2023] EWHC 1095 Ch.

¹² If the CMA wishes to read more on this, the point is expanded on in the Judge’s Judgment on Consequential Matters¹², paragraph [33]. *Optis v Apple* [2024] EWHC 197 (Ch) <https://www.bailii.org/ew/cases/EWHC/Ch/2024/197.html>

standards contributors have greater incentives to over-declare their patents as essential.

Patent pools should be properly equipped for essentiality checks, e.g. through an independent external evaluator, although other internal and external policing also may be helpful. In addition, they should allow validity checks among its licensors/patent owners. We note that among other things, it would be imperative that any such checks be performed by a truly independent party, who is an expert in the field, has knowledge of the standard, and does not have any interest in the outcome of the assessment.

Duplicative Royalties

When multiple patent pools exist for the same standard licensees may have to deal with several entities, at different rates, and for different functionally-oriented parts of the standard. Multiple patent pools for the same standard may cause the total aggregate rate for the standard to not be transparent, even if measures are taken to avoid potential double-dipping from multiple patent pools (or from patents already licensed from an individual licensor). In some instances SEPs are licensed both bilaterally between a SEP holder and a licensee, and through a pool, which leads to duplicative royalties being paid for the same SEPs.

Our members have experienced 'double dipping' of royalties and patent pools not adequately defining within their agreements provisions for duplicative royalty rates, often leaving it to the licensee to seek individual rebates from the licensors. This has been considered not FRAND by European courts¹³.

Other 'double-collection' of royalties arises where pools (and patent holders) license the same patents for the same products for similar functionalities, but charge twice for each pool because there is a related standard that is also said to use that patent. For example, there are audio and video codec pools where royalties are charged by two separate pools on the same product, based on a single patent that is claimed to be essential to complementary video standards supported by one operating system.

Collective Litigation Clauses & Litigation Pressure

There is a further concern around collective litigation provisions or mechanisms within patent pool licence agreements. Collective litigation campaigns against potential licensees have the cumulative effect of forcing the licensee to agreeing to terms that the licensors collectively or individually would not have been able to obtain absent the inclusion of their patent(s) into the standard.

Some patent pools include clauses that disincentivise licensors from entering into licensing agreements with licensees which the licence administrator deems to be an "unwilling

¹³ Konstanze Richter (2022), "Access Advance licence is non-FRAND, rules Regional Court Düsseldorf", JUVE Patent (6 January 2022), available here: <https://www.juve-patent.com/news-and-stories/cases/accessadvance-licence-is-non-frand-rules-regional-court-dusseldorf/>

licensee” e.g. due to the licensee’s request to conclude bilateral rather than a pool licence.¹⁴ Such clauses can include provisions to reimburse litigation costs incurred by patent holders that cause pool licences to be concluded through members litigating their patents included in the pool.¹⁵ These are the so called “hyena clauses” in the agreements between pools and their members patent holders. The licensor is not entitled to this compensation if the licensor enters only into a bilateral licence with the licensee. Effectively, such provisions disincentivize individual or separate licensing. For further reading, we refer the CMA to a 2022 [letter](#) from various academics to the U.S. Department of Justice which sets out in more detail the issue of collective litigation and reimbursement provisions¹⁶.

We also flag, in the context of litigation pressure, commentary from multiple UK Judges, in multiple cases, expressing dissatisfaction at SEP owners leveraging injunctions to disrupt FRAND determinations. These are not patent pools licensing SEPs, but the cases are indicative of behaviour that the CMA should have in mind when reviewing the Guidelines. For example, Mr. Justice Meade in *Panasonic v Xiaomi & Oppo*¹⁷ recorded that he was struggling “most severely”¹⁸ to understand Panasonic bringing proceedings against Xiaomi and Oppo in the UK seeking a FRAND licence determination, while simultaneously seeking injunctive relief in parallel proceedings issued in the UPC and German courts. Meade J. has since written¹⁹ to the UPC and German judges informing him of his progress, the implication being that the enforcement of an injunction will unfairly disrupt the UK court’s FRAND determination. Mr Justice Richards has since acknowledged this behaviour in *Lenovo v InterDigital*²⁰: “I respectfully agree with Meade J that patentees who seek injunctions overseas as part of a strategy to exact supra-FRAND rates should not expect that behaviour will go unnoticed when the English court exercises case management or other discretions”²¹.

We raise these SEP litigation cases to make the following point: that a SEP owner’s ability (either bilaterally, or via a patent pool) to force acceptance of a licence through litigation in the UK or in another country, can influence UK competition downstream. To this end, we draw upon the spirit of the *Huawei v ZTE* CJEU framework, that should govern SEP negotiations and the availability of injunctions, and particularly to the view of the European Commission in its recent amicus curia brief in *HMD v VoiceAge*²²:

“The purpose of the Huawei judgement is to enable efficient, meaningful and informed

¹⁴ See Redacted Internet of Things (“IoT”) Platform Master License Management Agreement, Section 4.8 available in redacted form as JX0116, Dkt. 1306 in *Federal Trade Commission v. Qualcomm*, 5:17-cv-00220-LHK

(N.D. Cal.) (hereinafter “Avanci Master License Agreement”).

¹⁵ Avanci Master License Agreement, Section 5.1.2.

¹⁶ See further here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4250512

¹⁷ [\[2023\] EWHC 2872 \(Pat\)](#), November 2023.

¹⁸ *Ibid*, [14]

¹⁹ See here: https://s3.documentcloud.org/documents/25022094/2024-07-25_ep042_letter_judiciary_of_england_and_wales_panasonic_v_xiaomi_lq_muc_21_o_9429-23_en.pdf

²⁰ [\[2024\] EWHC 596 \(Ch\)](#), March 2024.

²¹ *Ibid*, [75]

²² Text above taken from a machine translation of the brief available (in German) here: https://competition-policy.ec.europa.eu/document/download/66e0bd63-36da-4b27-9eef-70602a8c7be2_en?filename=2024_Amicus_Curiae_6U3824_22Kart_de.pdf

negotiations between the SEP holder and users of its patent without the pressure of a pending injunction application or opportunistic behaviour by the parties.”

Lack of independence of the pool, and price setting

There is a further concern around the practice of pool administrators having their own patents claimed to be essential in the pool. This creates vested and conflicting interests for the pool administrators. Pool administrators that are also SEP owners can use the pool to hide bad patents; they can also use their ownership of the pool to extract higher than FRAND rates for their patents by also taking a share of the pool administrator's income.

In some markets (e.g. video codecs) there are issues surrounding the concentration of multiple pools for related standards that are ultimately owned or controlled by one pool administrator and one SEP holder. This concentration enables those pools for related standards to corner the market, where they can then use their own pricing (in one pool) to justify the rates for other new pools where they may have an interest.

There is a yet further concern that pools and patent holders discuss pricing and price-setting for the pools, and for standards, and that some pools may act as sub-agents or consultants for each other, thus enabling the exchange of pricing information, and the setting of non-FRAND and excessive rates.

Section B: updates to section 4.4 of the Guidelines that may address the above issues are as follows.

1. Safe harbour

Additional elements, or clarifications, to be included in the “safe harbour” provision at [261] that would mitigate against anticompetitive conduct of patent pools may include:

- i. The publication of a specific FRAND methodology that includes a commitment to license on FRAND terms (as given by the individual member SEP holders);
- ii. Transparency as to patent lists, essentiality assessments, royalty rates and methodology; and
- iii. Explicit guidance on thresholds for assessing essentiality within the pool.
- iv. Independence of pools from SEP holders

2. Pool structure and conduct

Further clarifications could be made on conduct that may violate competition law with regards to the pool structure:

- i. As to ‘refusal to license’, we strongly urge the CMA to evaluate this section of the Guidelines around [254-255] and [264] with a view to clarifying that licensing from technology pools should remain optional, that the pool must offer licences to all parties who request a licence, and that licensors contributing to a pool must also offer a bilateral licence upon request.
- ii. As to essentiality assessments, we urge the CMA to evaluate whether the thresholds for assessing essentiality need to be increased for patent pools. At present the language

- used in the Guidelines at [264(a)] sets a low threshold. Where the essentiality rates for standards like 5G-NR are only 13%²³ there is a strong likelihood that a pool for this standard, absent robust essentiality assessments, will have a significant number of non-essentials or substitutes that will increase the cost of the patented technologies. The CMA ought to evaluate whether this language could be improved by setting a higher threshold for patent pool administrators to meet in light of the low essentiality rate of patents. An important element for this will be that the essentiality assessments are publicly disclosed.
- iii. As to collective licensing clauses, the Guidance could make clear that coordinated behaviour of the kind outlined above is serious cause for concern as it decreases incentives for licensors to offer licences on FRAND terms outside of the pool (which we believe is already outside the bounds of the Guidelines as set out above). We note the Guidelines' reference to the importance of neutrality and independence at [258]: in the context of experts and disputes arising out of pool licensing, and we consider that collective litigation clauses provide obstacles to such neutrality. As such, we encourage the CMA to consider this kind of behaviour in its evaluation of the Guidelines.
 - iv. As to duplicative royalties, at present the Guidelines have overlooked this issue. The Guidelines should be updated to reflect this concern, and particularly since it is not-FRAND to inadequately provide for duplicative royalties, and double collection of royalties for the same patent in the same product for related standards.

3. Terms that violate competition law

We consider that there should be clear commentary in the Guidelines that some licence terms will constitute an immediate violation of competition law. Examples may include:

- i. Above-FRAND royalty rates; and
- ii. Terms that prohibit parties from complaining about licensors' conduct to competition authorities, post-agreement.

- (c) Are there any matters not covered by the Guidelines (for example, recent developments in the market for technology transfer licensing) that should be taken into account by any future Guidelines?

[See points covered above].

- (d) Are there any matters which are covered by the Guidelines that it would be appropriate to remove?

[No comment]

18. If, in response to questions above, you have specified that the Assimilated TTBER should be modified, please explain whether the Guidelines should be changed to reflect any modifications.

Not applicable.

²³ Robert Stoll (2021), "5G SEP leadership in 2021", *Managing IP* (4 Oct. 2021), available here: <https://www.managingip.com/article/2a5d034hr8td8ozv9twqp/5g-sep-leadership-in-2021>

19. To the extent not covered by your responses to the other questions, please outline areas of the Guidelines where clarification or simplification would be useful.

[No comment].

The Assimilated TTBER and Guidelines in a UK context

At the end of the transition period, the EU TTBER was retained into UK law under the EU Withdrawal Act 2018. The Assimilated TTBER only applies in the UK. We would like to understand if changes to the Assimilated TTBER and the Guidelines are required to reflect that it only applies in the UK.

20. Are there UK-specific considerations that the CMA should take into account in its review of the Assimilated TTBER and the Guidelines? For example, are there restrictions and/or conditions included in the Assimilated TTBER that are not appropriate in a UK-only context?

Yes – see answer to the following Qu. 21.

21. If so, it would be helpful if you could indicate why those differences are needed or justified (which might, for example, be because of particular characteristics you identify in the UK market that differ from the EU market).

First, we note that the UK has gathered some experience recently with SEP licensing abuses. In the text above we have referred to numerous UK court judgments on the issue of patent pools and SEP licensing, which we suggest should be taken into account in the review of the Guidelines.

Further, we note the UK's industrial position as a net licensee, at the forefront of developing and implementing downstream IoT solutions in many sectors (automotive; health-tech; smart energy/smart metering, and more). Patent pools are (already, and are predicted to become even more) common in the IoT space. The UK therefore has a vested interest in enabling a more fair, transparent licensing environment.

Other considerations

22. Are there, in your view, any other considerations relevant to the Assimilated TTBER and the Guidelines that the CMA should take into account? Please provide any relevant evidence that you have to support your views.

In view of frequently executed Non-Disclosure Agreements (NDAs), or similar provisions such as patent peace or even non-disparagement, we suggest that the CMA could provide a mechanism for issues to be raised to it on a confidential / 'whistleblower' basis where it thinks that competition is being harmed. This is important in the context of licences that may be entered into following severe (often abusive) commercial pressures.

We also draw the CMA's attention to a recent development from the German Bundeskartellamt (Federal Cartel Office), who gave approval that a Licensing Negotiation Group (LNG) comprising certain automotive manufacturers may go ahead, on certain conditions²⁴. FSA makes no further comment at this stage but to note that they may be explored in the future on the licensee side of transactions.

Finally, we refer the CMA to a 2021 study published in the San Diego Law Review: *Glory Days: Do the Anticompetitive Risks of Standards-Essential Patent Pools Outweigh Their Procompetitive Benefits?*²⁵, which reflects various of the issues summarised in our response to Qu.17.

²⁴ See a press release from the German Bundeskartellamt, here: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2024/10_06_2024_ALNG.html

²⁵ Available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622615