IP Europe's Response to the CMA's Call for Inputs for the Technology Transfer Block Exemption Regulation and the Technology Transfer Guidelines

06 September 2024

Introduction

IP Europe is a coalition of research and development-intensive organisations whose inventions are protected by intellectual property rights. IP Europe's goal is to promote the vital importance of intellectual property rights to the European digital and knowledge-based economy and to ensure that EU policies support a world-leading innovation ecosystem. IP Europe is a member-driven organisation representing key innovators in the standardised technology space.

IP Europe welcomes the opportunity to contribute to the Competition and Markets Authority's (CMA) call for inputs on the Assimilated Technology Transfer Block Exemption Regulation (Assimilated TTBER) and the Technology Transfer Guidelines (TTG or Guidelines) that will be used to formulate the CMA's recommendation whether to replace the Assimilated TTBER and the TTG on their expiry on 30 April 2026.

We are looking forward to proactively engaging with the CMA on this matter in any future consultations and/or stakeholder meetings.

IP Europe confirms that our response does not contain any confidential information

Responses to questions in the call for inputs

Below we provide answers to some of the questions that are in common to IP Europe members.

Q1: Please confirm the capacity in which you are responding to this Call for Inputs. 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.

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.
(ii) Please specify the technology right(s) to which your knowledge of and/or experience with the Assimilated TTBER and the Guidelines primarily relates.
(iii) Please confirm which sector(s) you consider are particularly relevant to the Assimilated TTBER and the Guidelines

IP Europe represents organisations that invest heavily in R&D, including collaborative R&D, and share the resultant technology in open and collaborative standards development, providing access to all who wish to incorporate these technologies in their products. IP Europe members are both licensors and licensees of technologies. Our members are operating in the wider information and communications sector. In particular, examples of goods and services that our members have experience with include wireless technology patents, video and audio codecs and telecommunications equipment.

Q2: 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.

In our experience, companies of all sizes use and consult the Assimilated TTBER and the Guidelines when they license technology rights.

Q3-Q6:
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.
4. Has the Assimilated TTBER contributed to promoting competition in the UK? If possible, please provide examples.
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.
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?
(b) Are these restrictions necessary in order to achieve any benefits identified in response to question 5?

Our comments are focused on the use of international technical standards. They support an ecosystem of open, collaborative, and sustainable innovation. For many years this open innovation ecosystem has been efficiently accommodating an ever-increasing volume of licensing, enhancing wide dissemination of technologies, and serving as an engine of further innovation both upstream and downstream. The rapid development of the mobile device market is evidence of the success of the open international standardisation ecosystem. For example, over a billion smartphones are produced every year since 2013.[1] In 2023, there were 8.6 billion SIM connections and mobile technologies and services generated 5.4% of global GDP or $5.7

[1] Smartphone shipments worldwide 2009-2023 | Statista.

trillion of economic value added to the global economy.[2] The continuous improvement of technology and the development of other products are also testaments to this success.

As open technical standards constitute a major success in enabling markets to develop and grow internationally, a balanced, clear, and predictable regulatory framework is necessary to facilitate this specialisation and open innovation ecosystem. Together with the CMA's Guidance on Horizontal Agreements, the Assimilated TTBER and the TTG, in their present form, provide a very useful framework. This framework facilitates the participation of smaller firms, firms that specialise in technology development, and universities and other research organisations that are not active in downstream product markets. We also note that the UK courts, in cases related to standard-essential patents (SEPs), have recognised that SEP owners need to be appropriately rewarded for their R&D activities and participating in the standardisation process. [3]

The overall view of IP Europe members is that the current Assimilated TTBER and accompanying Guidelines generally work well and do not require major revisions. The open innovation ecosystem requires a balanced, clear, and predictable regulatory framework that is business-model neutral and does not favour or target particular business models of specific firms or types of firms.

While the regulatory framework and technology licensing market are generally working, licensors have experienced an escalation in hold-out behaviour by certain implementers over recent years.[4] Standardised technology is often used without first taking a licence, and some users prefer to litigate (even globally) rather than take a licence to a third-party IP. This recalcitrance and deployment of delaying hold-out tactics undermines the ability of IP Europe's members to continue to (re-)invest millions of pounds annually in R&D necessary to develop the standardised technology further.

Another consideration in any review of the Assimilated TTBER is that licensing takes different forms, and these reflect the industrial structure and business models which vary according to business sectors and technologies. In some cases, such as patents which read on to standards, technology is shared subject to royalty payments based on fair, reasonable and non-discriminatory ("FRAND") terms. These are designed to ensure both wide dissemination of the technology and a return on investment by the licensor who developed the technology and are needed where the cost of developing the technology is significant and - but for the possibility to be (adequately) compensated for the investment made (often many years in advance) - there would an under-investment in the technology development or a reluctance to share it in open standards development.

If the incentives to invest in R&D (which includes investment in openly accessible standards) were lost, the open ecosystem which produces the most rapid, fundamental, efficient, and competitive innovation would no longer be viable and would be replaced with closed innovation comprising silos of technology with lock-in and a lack of interoperability. With less pressure to innovate to compete, a fall in innovation activity both up and downstream could follow. Not only would such

[2] The Mobile Economy 2024 (gsmaintelligence.com).
[3] *Unwired Planet v Huawei* [2018] EWCA Civ 2344.
[4] We use the term 'hold-out' to refer to situations where potential licensees knowingly delay or avoid the conclusion of licensing agreements in order to evade paying royalties or pressuring SEP holders to license on below-FRAND rates. Hold-out has been recognized by the CMA in Horizontal Guidelines, para 9.10. In addition, there is a growing body of case law from courts in the UK and across Europe highlighting the variety of hold-strategies.

closed innovation reduce the overall level of innovation, but it would also militate against the entry of new and ongoing participation of smaller players and non-introduction of their technologies to the market if they must rely on big tech firms, which operate gated platforms, to allow them access, and potentially only on very onerous terms

Q7 & Q8:
7 Are you aware of businesses having relied on the Assimilated TTBER, when entering into technology transfer agreements? If possible, please provide examples.

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 (b) provide examples and reasons for your answer.**
> **(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).**

IP Europe members regularly consult the Assimilated TTBER and the TTG when they enter into technology transfer agreements as licensors or licensees.

In the absence of the Assimilated TTBER and the TTG, there would be uncertainty about whether an agreement is compatible with UK competition rules. This would require more extensive legal advice and other management costs. As an industry association, IP Europe is not in a position to quantify the costs that individual members might incur.

Q17: 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?**
> **(b) Are there any changes that could improve the effectiveness of the Guidelines? Please provide reasons for your answer**
> **(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?**
> **(d) Are there any matters which are covered by the Guidelines that it would be appropriate to remove?**

We consider the TTG to be useful in providing legal certainty for UK businesses in their assessment of technology transfer agreements. We suggest below some changes that may improve the effectiveness of the Guidelines (Q17 (b) as well as a matter that we strongly believe should not be included in the next revision of the Guidelines (Q17 (c)).

Patent Pools

In particular, our members find the section on patent pools in the TTG very helpful. Patent pools are generally pro-competitive and efficiency-enhancing, as they reduce transaction costs for

licensees and licensors and may represent a one-stop shop for licensing. They also increase choice by representing an alternative to bilateral licensing. Patent pools are required to aggregate complementary – and not substitute – technologies, thus alleviating competition law risk. The existing safe harbour provisions address this very point and have provided legal certainty and opportunities for patent pools to form.[5] We have seen that patent pools are independent of both licensors and licensees and have been gaining traction as a licensing option in both the automotive sector and some IoT verticals.

In the review of the TTG, we urge the CMA to keep a pro-innovation stance and not include provisions that may make it harder for pools to form and operate. Calls for more stringent provisions on pools may backfire. If it is harder for pools to operate, companies may revert to bilateral licensing only, losing the efficiencies of patent pool alternatives.

As a recommendation, IP Europe suggests that the CMA excludes the word "all" from paragraph 261 point (e), ("*the pooled technologies are licensed out to all potential licensees on FRAND terms*"). It is important to distinguish between the existing obligation of SEP holders to provide *access* to the standard ("access to all") against the practice of licensing at multiple levels of the supply chain ("licence to all"). SEP holders currently provide access to the standard by licensing at a single point in the supply chain, generally at the end-device level, and the success and general acceptance of this practice demonstrates its efficiency.

For example, the commercial practice of licensing at a single point at the end-use product level improves efficiency in licensing negotiations and reduces transaction costs and complexities involved in negotiating and executing multiple licences at multiple points in the supply chain.[6] From a legal perspective, the patent exhaustion doctrine prevents holders of standard essential patents from licensing the same SEPs at multiple levels of the supply chain. Additionally, the single-point licensing practice supports a competitive market landscape by ensuring that all players, including small and medium enterprises (SMEs), can access critical patented technologies on FRAND terms. This model also reduces the risk of litigation and promotes innovation by allowing SEP holders to be adequately compensated for their contributions where the full value of the technology can be more accurately assessed, encouraging them to continue investing in research and development. The UKIPO recognised that licensing normally occurs at only one point in the supply chain to avoid competition law concerns, which is usually determined by the SEP holder.[7] Courts in other jurisdictions that examined this matter held that competition law does not impose a duty to license SEPs to all companies in the production chain.[8]

We would encourage the CMA to consider in the review of the TTG to make it clear that patent owners and pool administrators should decide at which level in the product chain licenses will be available, taking into consideration pro-competitive efficiencies and the standardised technology in question. Such an approach would be aligned with the guidance provided by the UKIPO.

[5] Technology Transfer Guidelines, para 261.
[6] Access_for_all_infographic-4iPcouncil.pdf.
[7] Standard Essential Patent licensing - GOV.UK (www.gov.uk).
[8] *FTC v Qualcomm*, No. 19-16122 (9th Cir. 2020); *Continental v Avanci*, No. 20-11032 (5th Cir. 2022); *Nokia v Daimler,* 2 O 34/19 Mannheim Regional Court (18 August 2020).

Licensing Negotiation Groups

Some stakeholders have advocated for the inclusion of the so-called Licensing Negotiation Groups ('LNGs') in the scope of the Guidelines, for the purposes of joint negotiations of standard essential patent ('SEP') licences. According to these stakeholders, LNGs would operate as 'counter parts' of patent pools, as covered by Section 4.4. of the Guidelines.

The inclusion of LNGs was considered during the revision of the UK CMA Horizontal Guidelines and, ultimately, rightly excluded from the final version.[9] As pointed out by IP Europe back then, LNGs raise a number of competition concerns, further discussed below, and there is a need for careful scrutiny from competition authorities.

Specifically, in relation to question 17 (c), we believe LNGs should not be included in the revised TTG for the following reasons.

First, the inclusion of LNGs in the Guidelines would be premature. There is no meaningful enforcement practice to this date and, to IP Europe's knowledge, no LNG actively operating in the market. With unclear effects but significant anticompetitive concerns,[10] it would be reasonable to first understand such impact, from a case-by-case analysis, before potentially creating any presumption of legality or illegality of these organisations.

Second, LNGs do not operate as a reverse patent pool. The Guidelines recognize and tested market-based solutions are proof of the clear efficiencies brought by patent pools, which are composed of patent owners covering *complementary* standardized technologies and offer a one-stop licensing solution. As mentioned, patent pools reduce costs for both licensors and licensees, and the success of a pool is often verified when the pool administrator is able to establish a set of terms and conditions mutually acceptable to all parties. With patent pools, significant transaction cost efficiencies are generated without enhancing market power. Notably, bilateral licensing remains an alternative.

The same cannot be said of LNGs. LNGs would include groups of potential licensees and implementers of standardized technology, likely competitors (and suppliers) in the downstream product market, aiming only at negotiating price and other terms and conditions. In other words, the LNG would be created with the primary goal to reduce and limit these terms and conditions below FRAND levels by exercising monopsony power.[11]

[9] Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements ('Horizontal Guidelines'), published on 16 August 2023.

[10] The concerns have been highlighted by several academics and industry commentators. See, for example, https://www.4ipcouncil.com/research/licensing-negotiation-groups-what-why-how; https://www.4ipcouncil.com/research/licensing-negotiation-groups-seps-collusive-technology-buyers-arrangements-pitfalls-and-reasonable-alternatives; https://www.4ipcouncil.com/research/economic-case-against-licensing-negotiation-groups-internet-things; SEP Licensing Negotiation Groups -- Part I; SEP Licensing Negotiation Groups -- Part II; SEP Licensing Negotiation Groups -- Part III; FOSS Patents: EU competition chief's tough talk on cartels doesn't bode well for automotive SEP licensing negotiation groups.

[11] This is in contrast to patent pools, which license complementary assets, and pool members are not competitors in the technology market. LNG members, on the other hand, are competitors in the downstream product market, making the risk of collusion much higher.

LNGs would provide the means and opportunity for implementers of standardised technology to engage in anti-competitive information exchange and/or collusion, facilitating or solidifying a buyers' cartel. Under LNGs, potential licensees would not negotiate licenses independently (and competitively) but could collectively (and non-competitively) set fees for SEP licenses.

Third, the assessment of the market power of implementers, both individually and collectively as a group, and the likely anticompetitive effects of these groups, must be done in the context of the particular market dynamics of FRAND / SEP licensing. As explained before, the nature of open standards means that implementers have access to, use, and profit from standardised technology without first having to take a licence and pay royalties. In this context, some implementers choose to engage in 'hold-out' strategies and wilfully infringe SEPs on the basis that they will only ever be required to pay FRAND royalties.

LNGs would exacerbate such risks, enabling co-ordinated hold-out by its members.

See, for example, the recent and concerning proposal for the formation of an LNG in Germany, in the automotive sector ('ALNG'). Formed by auto manufacturers and their suppliers, the proposed LNG would require, among other things, patent owners to refrain from negotiating with individual members or taking legal action against them while in negotiations with the ALNG, and, after negotiations are concluded, such individual members would not be obliged to accept the outcome, being able to then start bilateral negotiations with patent owners.[12]

As mentioned before, there is no meaningful enforcement practice up to this date and although the German Federal Cartel Office (FCO) have declared that will "*tolerate the launch*" of such organisation,[13] the proposed ALNG is too recent and extremely vague to be able to provide concrete information on its framework. The FCO imposed certain conditions in an attempt to mitigate competition concerns. However, these have not been tested in practice and are, in fact, impossible to monitor once the ALNG is formed and operational making it easier to collude while avoiding detection. Thus, it remains unclear how international policy concerns associated with the anticompetitive risks resulting from LNGs will be addressed.[14]

However, this proposal further provides evidence of the apparent anticompetitive risk of LNGs acting with the goal of putting a ceiling at SEP fees and being just another mean used to delay or avoid taking a licence on FRAND terms.

LNGs also risk frustrating the *Huawei v ZTE* framework, [15] complicating licensing negotiations and making it harder for patent owners to successfully enforce their rights against unwilling licensees.

---

[12] Letter of the Chairman *Bundeskartellamt*, 'Volkswagen Group, MercedesBenz Group, BMW Group, Thyssenkrupp Group: Proposed creation of a framework for negotiating licence agreements for standard essential patents (SEPs) through an "Automotive Licensing Negotiation Group"(ANLG)", Examination under Sections 1, 2 GWB, Article 101 TFEU', 10 June 2024, available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/B4_136_23_Vorsitzendenschreiben.pdf?__blob=publicationFile&v=5.

[13] *Bundeskartellamt* Press Release, 'BMW, Mercedes, Thyssenkrupp and VW can negotiate jointly for the acquisition of certain technology licences;, 10 June 2024, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2024/10_06_2024_ALNG.html

[14] In addition, the FCO's market definition of licensing SEPs for mobile communication technologies seems too broad and does not reflect that licensing mobile communication SEPs depends on their use (e.g. smartphones, cars, smart meters). The formation of the LNG only for the automotive sector confirms this.

[15] CJEU, Case C-170/13 *Huawei v ZTE*, ECLI:EU:C:2015:477.

Fourth, it is difficult to identify incremental efficiencies from the creation of an LNG that do not already exist. The suggestion that if groups of implementers could collectively negotiate with individual or group of SEP holders and patent pools, it may lower transaction costs, is hypothetical. In fact, there is a clear risk that LNGs would actually increase inefficiencies and raise transaction costs rather than lowering them for all parties given the complexities and extra layer of negotiations it would add. For SEP holders, any efficiencies would depend on the timely conclusion of licences and, given the hold-out risks posed by LNGs (i.e., the increased risk of collective non-compliance with FRAND-based licensing principles), it is unclear that such efficiencies would materialise.

In sum, LNGs would *(i)* offer additional hold-out opportunities for implementers (coordinated hold-out/collective boycott) to delay or avoid the conclusion of licence agreements; *(ii)* effectively operate as a buyers' cartel, which would depress SEP value below FRAND levels; *(iii)* provide the means and opportunity for implementers of standardised technology to engage in anti-competitive information exchange and/or collusion; and *(iv)* give rise to greater risks of inefficient and uncertain licensing.

The risks identified above would deprive SEP holders of timely and appropriate remuneration, undermining their ability and incentives to continuously participate in risky R&D for the development of future technologies. This disincentive poses a significant threat to the standardisation ecosystem, FRAND-based licensing, and, in the long term, consumers, who would be deprived of the benefits of the open innovation ecosystem.

Therefore, IP Europe believes that the inclusion of any reference or any type of safe harbour in the Guidelines would be premature and ill-advised.

***

IP Europe would like to thank the CMA again for the opportunity to provide the first high-level input to the process of the review of the Assimilated TTBER and the Guidelines. We are looking forward to further contributing to the process and remain at the CMA's disposal for any questions or additional information.