Nokia Response to the CMA Call for Inputs on the Assimilated Technology Transfer Block Exemption Regulation and the Technology Transfer Guidelines

06th September 2024

Nokia welcomes the opportunity to provide input to the Competition & Markets Authority (CMA) on the review of the assimilated Technology Transfer Block Exemption Regulation (Assimilated TTBER) and the Technology Transfer Guidelines (TTG or Guidelines).

We look forward to engaging further with the CMA as the review progresses, as well as participating in any roundtables and/or bilateral discussions.

Nokia confirms that our response does not contain any confidential information.

About Nokia

We create technology that helps the world act together.

We are a B2B technology innovation leader in networking, bringing together the world's people, machines and devices to realise the potential of digital in every industry. We deliver critical networks and related technology to help address global issues.

With more than three decades of innovation in telecommunications and multimedia, we continue to pioneer and develop the technologies that power the smartphone industry, consumer electronics, video streaming, connected vehicles, and the wider internet of things.

Since 2000, Nokia has invested more than €150bn in research and development (**R&D**), with over 4.3 billion in 2023 alone, representing almost 20% of Nokia's annual revenue.

As result of our continuous R&D investment, we have built an industry leading portfolio of 20,000 patent families, including Standard Essential Patents (SEPs) - inventions we have contributed to open industry standards, such as 3G, 4G, 5G cellular communications, video coding (H.264, H.265) and wireless LAN (IEEE 802.11). Our cellular patent portfolio compromises more than 6,000 patents that were disclosed as essential for 5G. We also hold thousands of non-SEPs in our portfolio that relate to mobile phones and audio and visual technologies. In 2023, we generated over 2,300 new patented inventions. We have also achieved the highly respected ISO 9001 certification for Nokia's high-quality patent portfolio management.

We contribute to open standards to help the industry advance and grow together, and much of our world-class patent portfolio is available to other companies through our patent licensing programmes.

We license our SEP portfolio under fair, reasonable, and non-discriminatory (**FRAND**) principles. We currently have around 250 licensees, licensed through our patent licensing programmes.

Nokia is both a major inventor and a licensee of other companies' technologies. The majority of Nokia's revenue stems from selling and supporting systems based on standardised technologies. Our dual role, as both a developer and implementer of open standards, gives Nokia a unique and even-handed perspective. We believe in a fair licensing approach that strikes a balance between the needs of those who develop and contribute technologies to standards and those who implement and use them.

For more information, please visit: https://www.nokia.com

Replies to questions for stakeholders

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.

Nokia is both a licensor and a licensee of technology rights. On the one hand, we hold SEPs for cellular communications, wireless LAN (WLAN), and multi-media technologies, as well as non-SEPs for audio and visual technologies. On the other hand, the majority of Nokia's revenue stems from manufacturing, selling, and supporting systems based on standardised technologies. Our dual role, as both a developer and implementer of technology rights, gives Nokia a unique and even-handed perspective.

Nokia has experience with the following technology rights: patents, utility models, design rights, topographies of semiconductor products, and software copyrights.

In relation to sectors where the Assimilated TTBER and the Guidelines primarily relate, Nokia has experience in the information and communication sector. More precisely, Nokia is active in the manufacturing and repair of ICT equipment and the research and development of technologies.

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.

In general, technology transfer is relevant for companies of all sizes. Regarding SEPs, open standards, by their nature, provide a platform for all companies (including SMEs and 'start-ups') to collaborate on technology development. This allows smaller companies the ability to achieve the scale necessary to compete with global tech giants. Companies that specialize in the manufacturing of products that use open standards can rely on SEP being accessible for licensing on FRAND terms. Anyone can contribute their technology, and everyone has access to the standard.

Benefits and impacts 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.

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?**

As a general matter, Nokia considers that licensing is vital for economic development and consumer welfare. Licensing promotes and disseminates innovations and enables companies to integrate and use complementary technologies. As noted in the Guidelines, intellectual property rights are often the result of costly and risky investments and UK competition law must preserve incentives to innovate by allowing licensors and licensees to exploit technology and seek appropriate remuneration for their innovation efforts. Intellectual property laws and competition laws should go hand-in-hand to promote innovation and enhance consumer welfare.

In order to secure incentives to innovate, it is essential that companies are given sufficient protection for their innovations through intellectual property laws conferring exclusive rights on holders of patents, copyrights, design rights, trademarks and other related rights. In particular, it is a fundamental principle that the owner of intellectual property must be entitled to prevent unauthorized use and exploitation of its creations and inventions.

It is important to acknowledge that a regulatory regime cannot meet the characteristics of every situation in dynamic, fast-paced and constantly evolving technology markets and that it is vital to retain a case-by-case, contextual and effects-based approach to licensing

agreements. Nokia believes that the current regime generally works well and provides a functioning system for assessing technology transfer agreements.

In our view, the Assimilated TBER and the Guidelines have contributed to promoting competition and economic activity in the UK, but they have contributed only to a certain extent. As will be explained below, we believe that they should be updated based on the business realities of today, especially in terms of digital and technologically advanced markets and take account of complex market environments where traditional mechanical market share/competitor vs. non-competitor rules are not necessarily practical or useful in most cases.

Benefits of a block exemption over self-assessment

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

We frequently enter into technology transfer agreements in the sense of Article 1(1)(c) of the Assimilated TTBER. We regularly consult the Assimilated TTBER and the Guidelines and have relied upon exemptions and analysis under both these instruments.

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.

    (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).

    The Assimilated TTBER provides a useful framework to help companies assess technology transfer agreements under competition laws. In the absence of the Assimilated TTBER, companies would only rely on general competition law provisions and

more generic guidelines on horizontal or vertical agreements, which are often not on point, or unclear, when it comes to technology rights. This would increase legal uncertainty and may result in less uniform results across industries.

Effectiveness of the Assimilated TTBER

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?

We believe that the Assimilated TTBER has been effective in exempting technology transfer agreements, for which it can be assumed with sufficient certainty that they satisfy the conditions for an exemption under section 9 of CA98. However, there are many more technology transfer agreements that do not raise any competition concerns and could be exempted if relevant rules are appropriately modified.

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?

Yes, the definitions are sufficiently clear.

(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)?

No, in our view, the definitions should stay the same.

(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?

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?

The Assimilated TTBER and Guidelines display a negative bias towards licensing agreements between competitors and reciprocal agreements. The competitive relationship between the parties may, of course, have an impact on the assessment. That said, the CMA should not work under the assumption that licensing agreements between competitors or reciprocal agreements are, without more, less beneficial to the functioning of the industry or less likely to raise efficiencies.

Licensing agreements between competitors are common and they can and do generate significant efficiencies, *e.g.*, in terms of removing IP barriers and allowing competitors to develop complementary (or simply different) technology features. In addition, the risk for a licensor to license a competitor is relatively high (*e.g.*, due to hold-up problems) and licensors must have sufficient comfort that competition enforcers will not be negatively predisposed towards competition restrictions if such restrictions serve legitimate objectives and do not aim to foreclose alternative, valuable technology - just as with agreements between non-competitors.

Further, licensing agreements between competitors will often be reciprocal because the parties would typically hold complementary pieces of IP, which they cross-license to each other to remove reciprocal IP barriers. There is again no reason for the CMA to be negatively predisposed towards reciprocal agreements in a way that generates uncertainty as to the possibility of including competition restrictions in contractual agreements if such restrictions serve procompetitive efficiencies and do not aim to foreclose, or have the effect of foreclosing alternative, valuable technology.

Moreover, the Assimilated TTBER and the Guidelines would be greatly simplified if the CMA diminished the role of the competitor v. non-competitor and reciprocal v. non-reciprocal distinctions, which often result in unnecessary casuistry (see, *e.g.*, sections on exclusive licensing and sales restrictions in the Guidelines).[1] Such formal distinctions should only be used

[1] For example, the concerns and justifications for exclusive licensing between non-competitors under paras. 194-195 of the Guidelines should also apply to agreements between competitors (e.g., inducing the licensee to invest in the technology and bring the products to market). The European Commission, for example, has found that exclusive licensing did not infringe Article 101 (1) TFEU or was justified under Article 101 (3) TFEU in a number of

when strictly necessary – otherwise they generate complexity and may result in unintended, chilling effects. Nokia would recommend adopting a pragmatic approach focusing on efficiencies and undesirable effects regardless of the type of licensing agreement.

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.**

The Assimilated TTBER's heavy reliance on market shares undermines its practical relevance in many instances. Market shares often are an inappropriate indicator of market power in innovation markets where dynamic developments are the norm and a snapshot of market shares at a particular moment does not provide an accurate reflection of competitive dynamics.

By definition, R&D-intensive markets are relatively concentrated, especially when considering particularly innovative market segments in which R&D investments are high. Companies will unlikely undertake large R&D investments, but for the expectation to secure a significant market share at least in the short to mid-term. Current market share thresholds (*i.e.*, 20% combined for competitors and 30% individually for non-competitors) effectively mean that the block exemption is unlikely to apply with a sufficient degree of legal certainty in innovative, R&D-intensive markets (also in view of market definition uncertainty). This disregards the fact that even one single, let alone two competing innovators outside the licensing cooperation may generate intense competitive pressure on the parties (*e.g.,* as a result of first-mover advantages, which are typically significant in innovative markets, or if the competing product performs better or is less costly).

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past cases, including in instances involving competitors (*e.g.*, *Delta Chemie/DDD*, *Kabelmetal-Luchaire, Mitchell Cotts/Sofiltra,* and *Davidson Rubber*). This approach should be reflected in the new Guidelines.
To give another example – why would restricting the licensee's own technology necessarily be more harmful in an agreement between competitors than in an agreement between non-competitors and why would potentially redeeming efficiencies only work if the agreement is between non-competitors? The assessment should not be about who the parties are but rather effects in the market.

On the other hand, a party with a limited market share in the relevant product or technology market may have significant market power based on its ability to leverage high market shares in related markets (e.g., as part of a wider ecosystem of products or technologies).

In line with the patent pool safe harbour and given the possibility to use hard-core exceptions to tackle the most harmful competition restrictions, we would encourage the CMA to consider alternatives to market share thresholds, such as including a reference to the constraining role of as-credible competitive alternatives as perceived by market participants.

In addition, the Assimilated TTBER currently allows the block exemption to continue to apply for a period of two years if the market share thresholds are met during the course of the licensing agreement. We understand that this may be justified by the fact that the European Commission considered two years as a maximum period to recoup investments in most cases (see Guidelines, para. 126 – although the Guidelines acknowledge that a longer period may be necessary in individual cases). In our experience, two years is rarely enough to recoup investments in R&D intensive markets. The CMA should also take into account the fact that the renegotiation of contracts following the loss of the block exemption may take many months if not years. We would therefore propose extending the "grace period".

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?

The calculation of technology market shares by reference to product markets raises several issues. Technology markets are typically global, which may not be the case of product markets. If product sales are used as a proxy for technology market shares, such sales need to be assessed by reference to the geographical scope of the technology market (e.g., global product sales if the technology market is global). The results of the assessment may completely misrepresent the competitive situation at the technology level in instances where there is a significant discrepancy between the geographic dimension of the product and the technology markets (e.g., because products are subject to local presence or regulatory requirements that do not impact the technology market).

Another issue arises if the parties are not present at the product market level but have market power in related technology markets. In that case, their assigned technology market share would be 0%, which would not be representative of the parties' degree of market power.

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?

We believe that a more lenient approach toward passive sales restrictions is warranted in the context of the Assimilated TTBER and Guidelines.

In many industries, the distinction between passive and active sales raises serious issues. This is the case in particular for industries where (i) markets are regional or global and transportation costs are relatively low with the result that active sales restrictions offer limited protection against outside-territory competition, (ii) markets where supplier offers and customer relationships are untransparent, which makes it difficult to identify whether a given sale is active or passive, or (iii) Request-for-Quote (RFQ) or Request-for-Proposal (RFP) based markets, in which market activity is entirely based on passive selling. While at the origin, the distinction between active and passive selling was made to address competition concerns in the online retail sector, we now see that this distinction has overwhelming, unintended effects in markets that have nothing to do with online retail (such as B2B, RFQ-based markets).

Distinguishing between active and passive sales as a general matter should be avoided. Such a distinction may make sense in certain specific sectors, but it is not an appropriate or helpful concept in most situations. It would be preferable to identify competition concerns without resorting to that distinction, the use of which largely reduces licensing incentives and the scope of possible efficiency justifications in many industries.

Moreover, as explained above, the Assimilated TTBER and the Guidelines would be greatly simplified if the CMA were to abolish the competitor v. non-competitor and reciprocal v. non-reciprocal distinctions. The assessment should not dwell on who the parties are but rather effects in the market. Formal distinctions should only be used when strictly necessary – otherwise they generate complexity and may result in unintended, chilling effects on investment, R&D and innovation. Nokia would propose adopting a pragmatic approach focusing on efficiencies and undesirable effects regardless of the type of licensing agreement.

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?

Yes.

(c) Would any of the current excluded restrictions benefit from modification?

The non-challenge and termination clauses (Article 5 (1)(b)) should be modified. The difference in treatment between IP rights and know-how as regards non-challenge clauses gives rise to intricate differentiation issues when determining the scope of lawful non-challenge provisions and the consequences of know-how litigation on the licensing of underlying IP. In addition, affording only limited protection against IP challenges in situations where the licensee gets a close look into the licensor's IP portfolio may constitute a strong disincentive to license. The current position is also inconsistent with its favourable approach to non-challenge clauses in the context of settlement agreements.

As regards termination clauses in case of IP challenges, this should always be possible in situations where the licensing agreement includes some form of commitment by the licensor to invest in the relationship with the licensee or when the licensee takes advantage of its position to damage the value of the IP (beyond merely challenging the IP in court).

(d) Are there any further restrictions that it would be appropriate to include, in addition to those already included in the Assimilated TTBER?

No.

(d) Are there any excluded restrictions that it would be appropriate to remove from the Assimilated TTBER?

No.

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

We welcomed the 2014 revision regarding grant-back obligations, as the distinction between severable and non-severable improvements was highly impractical. Generally, we would recommend adopting a contextual, effects-based approach to grant-backs.

As regards non-challenge termination clauses, we believe they should always be possible in situations where the licensing agreement includes a significant commitment by the licensor to invest in the relationship with the licensee, when the licensor heavily relies on the licensee's cooperation to promote the technology, or when the licensee takes advantage of its position as a licensee to damage the value of the IP (beyond merely challenging the IP in court).

The Technology Transfer Guidelines

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?

Yes, we frequently enter into technology transfer agreements and regularly consult the Assimilated TTBER and the Guidelines, as well as their EU equivalent.

We find the Guidelines especially useful with regard to the formation and functioning of patent pools. Patent pools are one of the most efficient means to disseminate innovation in sectors involving multiple patented inventions. Engaging in bilateral discussions with each licensor can, in some instances, be less efficient and more expensive for licensees and licensors alike. Patent pools can serve the interest of both parties by providing transactional efficiencies and reducing royalty-stacking. Because pooled licensing can generate efficiencies, pooled royalty rates are typically lower than the cumulative royalty rates for any collection of separate licenses. We therefore encourage the CMA to maintain a positive approach to patent pools in the revised Guidelines.

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

There should be changes to the treatment of i) intra-technology competition, ii) cross-licensing in settlement agreements, and iii) the safe harbour if there are sufficiently independently controlled technologies.

Intra-technology competition. The Guidelines state that intra-technology competition is particularly important in a licensing context because there is typically more room for

licensees to differentiate their products than in regular distribution contexts. To the contrary, this should militate in favour of a relaxed position towards restrictions to intra-technology competition compared to the approach in the Vertical Agreements Block Exemption Order Guidance.

Licensees in innovation-based industries typically incur higher costs than distributors in traditional industries. Large marketing expenses are often necessary for directing demand towards innovative technology and licensees often undertake continuous R&D efforts in addition to sales activities. The CMA should provide the necessary legal certainty for parties to protect the licensor's incentive to license and the licensee's incentive to invest in the technology.

Cross-licensing in settlement agreements. The Guidelines adopt a more conservative stance towards cross-licensing in the context of settlement agreements than in other licensing contexts (*i.e.*, cross-licensing in settlement agreements should be strictly limited to undo a mutually blocking position). There is however no reason why any other type of procompetitive efficiencies related to cross-licensing could not also arise in a settlement context. We would therefore recommend abandoning the distinction between settlement agreements and regular licensing agreements as regards cross-licensing

Safe harbour if there are sufficient independently controlled technologies. The requirement to have at least four competing R&D poles will almost never be fulfilled, especially in innovative, R&D-intensive markets. It is also not warranted. While innovative markets are by nature more concentrated, this often does not diminish the intensity of competition between market participants given the intensity of the competitive pressure that a single, let alone two competing technologies would typically generate on the parties to a licensing agreement. Any credible alternative could take over a large proportion of the market if it is launched earlier or if it is materially better or less costly. The CMA should therefore reduce the number of competing R&D poles, and acknowledge that, in some circumstances, even one competing R&D pole could effectively constrain the parties outside the block exemption.

In addition, the requirement that R&D poles operate at "comparable cost" is not justified. Competition occurs on many other parameters than just cost, especially in non-commoditized markets. There is no reason to require comparable costs if there is effective competition between R&D poles on the basis of other parameters (such as quality, reliability, security, technology performance, time-to-market, etc.)

Finally, there's no reason to limit this safe harbour to technologies that are already available for licensing. Potential competition should also be taken into account as it may be as constraining as actual competition.

It is also unclear what degree of competitive pressure a technology must exert in order to qualify as a competitor. We would recommend focusing on better defining such degree of competitive pressure (including potential competition) instead of focusing solely on the number of independent technologies. As explained, even one other technology can significantly constrain the parties, and requiring four competing technologies is excessive when speaking of innovative areas. Finally, there is no reason to exclude the licensee's own technology from the assessment if it is not impeded by the licensing 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?

No. There is, however, one new matter which we believe should not be a part of the Guidelines or the Assimilated TTBER. It concerns so-called licensing negotiation groups (LNGs), where a group of potential technology users come together and jointly negotiate with patent owners and/or pools for a licence. We note that LNGs were considered both by the CMA and the European Commission in their consultations on the Guidance on the Application of the Chapter I Prohibition in the Competition Act 1998 to Horizontal Agreements and Horizontal Cooperation Guidelines, respectively and that, ultimately, LNGs were not included in their respective guidelines on horizontal cooperation agreements. For the same reasons outlined in Nokia's submissions to those consultations, it would be inappropriate and premature for LNG's to be included in the revised Assimilated TTBER and/or TT Guidelines.

As a matter of principle, the Assimilated TTBER and the Guidelines should include only matters where there is significant, or at least sufficient, experience in practice. At this stage, it is premature to provide a safe harbour for a new form of competitor collaboration when there is currently no experience of the competitive risks and market dynamics.

Please see our previous comments on LNGs in the following submissions:

1) Nokia's Response to the Consultation CMA174con: Draft Guidance on the Application of the Chapter I Prohibition in the Competition Act 1998 to Horizontal Agreements (8 March 2023)

2) Nokia Comments on the Draft Revised Horizontal Guidelines (26 April 2022), available on the European Commission's webpage under the contribution to the consultation on the draft revised text.

While we do not want to reiterate here all the arguments from our previous submission, we would like to emphasise three key concerns about LNG.

First, LNGs raise serious and as yet untested competition law concerns and may result in (1) a buyers' cartel, (2) additional (coordinated) hold-out opportunities for implementers,[2] and (3) implementers of standardised technology engaging in anti-competitive information exchange and/or collusion. The possibility of LNGs was discussed by the European Commission's SEP Expert's Group and it was clarified from the outset that any such model would need to be scrutinized by competition authorities.[3] Indeed, LNG members would need to agree, directly or indirectly, on certain elements of a future licensing agreement, generally raising competition concerns. For example, the European Commission's SEP's Expert Group Report noted that LNG members would have to agree, before the start of negotiations, on the licensed product, the level in the value chain where to license and the maximum amount of acceptable royalty. That involves a coordination of future market conduct, including prices, which is generally prohibited under competition rules. In addition, various stakeholders in the SEP Expert's Group were concerned that LNGs may become a façade for a buyers' cartel.[4] The risk is there irrespective of whether the agreements are done via a third party (hub and spoke). In other words, there is a risk that LNG members could use the cover of the LNG to align on licensing terms and use that aligned position as a basis for

[2] A hold-out in the context of SEP licensing can be understood as describe a situation where standard implementers avoid paying royalties as much as possible in order to pressure SEP holders to settle for suboptimal rates or evade paying any royalties altogether. The evidence of (unilateral and coordinated) hold-out is well-documented, in particular in the case-law of various jurisdictions, notably in the national courts across Europe. See IP Europe, 'Unwilling SEP Licensees: Hold-out Strategies' (26 May 2021) available at: https://ipeurope.org/position-papers/unwilling-sep-licensees-hold-out-strategies/ ; 4iP Council 'Case Summaries on hold-out' available at: https://caselaw.4ipcouncil.com/search/tag/hold-out ; Bowman Heiden, Justus Baron, 'The Economic Impact of Patent Holdup' (2023) available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4505268 ; Bowman Heiden, Nicolas Petit, 'Patent "Trespass" and the Royalty Gap: Exploring the Nature and Impact of Patent Holdout' (2018) 34(2) *Santa Clara High Technology Law Journal* 179, available at: https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1627&context=chtlj.

[3] See the SEPs Expert Group report (January 2021), p. 169.

[4] See the SEPs Expert Group report (January 2021), p. 169.

individual negotiations with SEP holders, thereby compelling non-FRAND terms on SEP holders

Additionally, an LNG might (itself) become a vehicle for coordinated hold-out, which is a significant concern for the industry, and there are published examples of coordinated hold-out by groups of standard-implementers.[5]

Therefore, LNGs require a thorough case-by-case assessment in light of all the factual circumstances and market context. It would not be possible to provide meaningful guidance in the abstract without sufficient experience in the functioning of a concrete LNG.

Second, the 'non-discriminatory' aspect of the FRAND commitment further means that licensing terms negotiated with an LNG may become a benchmark for other similar-situated organisations/companies. Accordingly, in practice, any terms negotiated with the LNG could have a much broader impact. Thus, from a SEP holder's point of view, an LNG may have an effective 100% share of the purchasing market, where a SEP holder is *de facto* negotiating a rate and other licensing terms and conditions for the entire market (or even multiple markets).

Third, LNGs are not equivalent to, or a necessary counter-balance for, patent pools. The FRAND commitment given by patent holders for their standardised technologies and the existing legal framework effectively counter any alleged market power a SEP holder may have. The FRAND commitment under which SEPs are licensed and the *Huawei v ZTE* framework established by the Court of Justice of the European Union require good faith negotiations by both parties. The UK courts have now established that they will not grant an injunction until they have determined FRAND licensing terms.[6] Therefore, SEP holders are not able to impose excessive non-FRAND terms on potential licensees as UK courts would not grant an injunction unless: i) they have found a patent valid and infringed, ii) have determined FRAND licensing terms and iii) the implementer is unwilling to accept those terms.[7]

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[5] For example, there have been coordinated hold-out attempts from the smart meter industry; see, IP Europe, 'Is the Smart Meter Industry Engaged in Coordinated Hold-out?' (24 June 2021) available at: https://ipeurope.org/blog/is-the-smart-meter-industry-engaged-in-coordinated-hold-out/.

[6] *Unwired Planet v Huawei* [2017] EWHC 2988; *Interdigital v Lenovo* [2023] EWHC 1583; *Optis v Apple* [2023] EWHC 1095.

[7] See *Interdigital v Lenovo* [2024] EWCA Civ 743, para 31 ("*Thirdly, the remedy of an injunction is neither inappropriate nor disproportionate if the implementer is infringing the SEP owner's UK SEPs and the SEP owner*

Equally, there is no 'market power' created or exercised by patent pools that need to be countered/offset by LNGs. By design, and as a result of competition law requirements, patent pools combine complementary technologies and simply represent another option for implementers to obtain licenses in a cost-effective manner (as an alternative to bilateral licensing). Pools do not restrict the ability of SEP holders or implementers to enter into bilateral negotiations to obtain a bilateral licence – bilateral negotiations are still possible (and are being used in practice). In any event, combining patents from multiple patent owners does not add any bargaining power. What is licensed is access to the standard irrespective of the number of patents.

On the other hand, as noted above, there is a very real risk of excessive buyer power arising from an LNG, not least as its participants already have access to the standardised technology and have no equivalent to a FRAND commitment to limit their own collective bargaining/market power.

As a result, we believe LNGs cannot be assessed in the abstract. A detailed case-by-case assessment needs to be made in light of the market context. We believe that the relevant experience should be obtained before including these new and untested forms of competitor collaborations in the Assimilated TTBER and the Guidelines.

In that regard, we note that the German Federal Cartel Office (FCO) issued a comfort letter stating that it will tolerate the launch of the so-called Automotive Licensing Negotiation Group, initially consisting of BMW, Mercedes-Benz, Volkswagen and Thyssenkrupp.[8] While a case-by-case assessment is a good approach in this context, we believe the German FCO did not properly define the relevant market. The comfort letter does not include any in-depth market analysis or data. It broadly asserts, without any evidence, that the relevant technology market is the licensing market for SEPs for general mobile communication technologies and that the market share of the automotive industry on the demand side is below 15%.[9]

However, licensing mobile communication SEPs depends on their use. The use of mobile communication technologies is different in smartphones, cars, and smart meters. This

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is willing to offer a licence on terms which the court has found to be FRAND, but the implementer does not accept that offer"); *Unwired Planet v Huawei* [2020] UKSC 37, paras 164-167.

[8] Bundeskartellamt, 'BMW, Mercedes, Thyssenkrupp and VW can negotiate jointly for the acquisition of certain technology licences' (10 June 2024), available here: Bundeskartellamt - Homepage - BMW, Mercedes, Thyssenkrupp and VW can negotiate jointly for the acquisition of certain technology licences

[9] In practice, this would mean that the market share threshold would not be met unless some of the largest mobile device manufacturers were also participating in the ALNG.

is why SEP holders have different licensing programs for different use cases, adjusted for the specific circumstances of each industry. The relevant market should be licensing mobile communication SEPs for use in the automotive industry.

In addition, the FCO stated that the 15% threshold is exceeded on the downstream automotive markets, but that the risk of coordination between the ALNG members is not significant because the license costs for SEPs "usually account for less than 1 per cent of a vehicle's total production costs."[10] The coordination risks should have been assessed in more detail as the anticompetitive impact will be felt on the side of SEP holders.

Thus, the ALNG does not satisfy safe harbours from the European Commission's Horizontal Cooperation Guidelines and raises serious competition issues, as discussed above.

Therefore, a careful, detailed and comprehensive case-by-case analysis of the effects and market contexts of LNGs is needed rather than adopting a catch-all safe harbour.

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

Please see the response to question 17(b).

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.

Any changes in the Assimilated TTBER should be reflected in the relevant part of the Guidelines that provide more information on the provisions of the Assimilated TTBER.

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.

N/A.

The Assimilated TTBER and Guidelines in the UK Context

[10] Bundeskartellamt, 'BMW, Mercedes, Thyssenkrupp and VW can negotiate jointly for the acquisition of certain technology licences' (10 June 2024), available here: Bundeskartellamt - Homepage - BMW, Mercedes, Thyssenkrupp and VW can negotiate jointly for the acquisition of certain technology licences

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?

No.

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).

Not applicable.

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.

We have no other considerations to add.

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We would like to thank the CMA again for the opportunity to provide input for the review of the Assimilated TTBER and the Guideline. Please do not hesitate to contact us should you need any further information or clarification.