

11 April 2025

Introduction

As an industry organisation representing more than 45 European and global companies, the Fair Standards Alliance (FSA) welcomes this opportunity to provide comments in response to the UK Competition and Markets Authority's (CMA) Consultation on the Assimilated Technology Transfer Block Exemption Regulation (the Assimilated TTBER) and accompanying Guidelines.

The FSA promotes licensing of standardised technologies on fair, reasonable, and non-discriminatory (FRAND) terms. Our members, which include companies ranging from SMEs to some of the most well-known multinationals at different positions in the value chain, are active in a broad variety of sectors, including automotive, technology, telecommunications, energy, broadcasting, and more.¹

Our members significantly contribute to innovation in the UK, Europe and beyond. Annually, the aggregate turnover of FSA members is more than GBP £2 trillion, and in aggregate our members spend more than GBP £150 billion on R&D and innovation. Some of our members dedicate as much as a third of their annual revenues to R&D. Our members have more than 600,000 patents, including standard essential patents (SEPs), that are either granted or pending. Because many of the FSA member companies are both owners of SEPs and licensees, we believe this allows us to bring a balanced perspective to this consultation.

Our comments in response to this consultation are focussed on the forthcoming Guidelines that will accompany the proposed TTBER, in particular given the CMA's commitment to develop what the Guidelines say on patent pools. We respond to several questions and make many of our key points at Q 16.

Questions for stakeholders

Question 1: Do you agree with the CMA's proposed recommendation to the Secretary of State to make a Block Exemption Order to replace the retained TTBER with the Recommended TTBER, rather than letting it lapse without replacement or renewing it without varying the retained TTBER?

The FSA recognises the importance of replacing the retained TTBER with the Recommended TTBER. However, the FSA's main concern lies with the accompanying Guidelines. The parts of the Guidelines that address technology pools are of great importance but are now out of date and should be updated to reflect market practices and behaviours that adversely affect competition and ultimately consumers in the UK.

Question 2: In your response to our questions, where possible please indicate the size of your business (or those businesses you represent) in terms of number of employees:

FSA represents a broad range of businesses that span from SMEs with less than 250 employees to large corporations.

¹ For further information about the FSA and its Members, see <http://www.fair-standards.org/>.

Question 3: In your response to our questions, where possible please indicate the industry in which you consider your business (or those businesses you represent) operates (using SIC codes if known):

Manufacturing (Technology, automotive, energy, and more).
Information and Communication (e.g. broadcasting)
Telecommunications

Question 4: In your response to our questions, where possible please indicate how long your business has been in operation (or if you are an advisor, generally how long the businesses you represent have been in operation).

The FSA was created in 2015 to strengthen the voice of innovative companies of all sizes to ensure that licensing of SEPs required by so many smart devices is done on FRAND terms. Our member histories span from both century-old to younger innovative IPR-intensive industries.

Question 5: Relative to current arrangements, if the Assimilated TTBER were allowed to expire without replacement, how much (if at all) would this impact your business or the businesses you represent? Please provide reasons for your view.

The FSA's response to question 5 assumes that if the Assimilated TTBER were allowed to expire, the accompanying Guidelines would expire with them. Without the Guidelines that accompany the Assimilated TTBER, businesses would have more limited chances at fair licences to critical standardised technologies such as 5G. Although the current Guidelines do not address new anticompetitive practices by patent pools that have emerged since the current version of the TTBER was drafted and therefore require updating, they do at least place some requirements on the operation of pools. Without replacement, pools would be subject to little-to-no regulatory framework. As a result, licensees of SEPs would be yet further exposed to potentially anticompetitive patent pool practices also, potentially incurring significant costs.

Question 6: Relative to current arrangements, if the Assimilated TTBER were allowed to expire without replacement, how would this impact consumers? Please provide reasons for your view.

The FSA's response to question 6 assumes that if the Assimilated TTBER were allowed to expire, the accompanying Guidelines would expire with them. Although they require updating, the expiration of the Guidelines that accompany the Assimilated TTBER would further erode clarity in UK competition law, which is ultimately designed to promote the interests of consumers. We refer to our response to question 16 for how updates to the Guidelines will benefit consumers.

Question 16: Do you agree with the CMA's proposal to recommend that the Recommended TTBERO should not apply to agreements establishing technology pools or LNGs, but instead to consider whether to cover such issues in guidance? Please provide reasons for your answer.

The FSA agrees that the Recommended TTBERO in current form should not apply to technology pools or LNGs for the reason given in 3.40-3.41, and that technology pools and LNGs are better addressed in the Guidelines. It is therefore critical that the Guidelines are updated, for the reasons we outline below. FSA looks forward to commenting on the proposal for those Guidelines in due course, but for the sake of completeness, we set out a summary of FSA's main views here. We also refer the CMA to FSA's response to the September 2024 Call for Inputs, which addresses these issues more comprehensively.

A summary of key points that should be addressed in updated Guidelines:

Patent pools – particularly, those that license SEPs – currently operate largely without competition law scrutiny of various key aspects of their operation, which may result in competition restriction. Since 2014, multiple new patent pools have emerged, including in new market segments for the 'Internet of Things' (IoT). The main concerns relate to practices of some patent pools such as (i) evasion of FRAND obligations, (ii) refusals to license, (iii) lack of transparency, (iv) lack of or adequate essentiality assessments, (v) duplicative royalty rates requested by pools and individual licensors; and (vi) clauses incentivising collective litigation to force licensees to accept patent pool licences rather than bilateral licences; (vii) lack of independence; and (viii) price setting of pool rates, amongst others.

The Guidelines that accompany the TTBER should be updated to account for these and other practices, to set clear guidance to mitigate competition concerns. Updates must provide clear guidance that promotes transparency, FRAND licensing for SEPs subject to the FRAND commitment and robust "safe harbour" protections, all of which would foster a balanced and competitive environment that benefits all stakeholders. Without update, pools will remain able to sidestep the intended regulatory framework, exposing licensees to potentially anticompetitive practices and significant costs.

The problems in more detail:

We will address technology pools and LNGs separately below and propose some clarifications to the Guidelines which should be considered alongside the updated TTBER.

Technology Pools

There are various practices that harm competition and potentially contravene competition law, either directly in terms of not setting FRAND terms, or indirectly through conduct that harms potential licensees' ability to challenge non-FRAND terms. Further clarity can help address the following anticompetitive practices:

- **Evasion of FRAND Commitments:** Some technology pools licensing SEPs claim that they are not bound by FRAND principles, arguing they have no commitment to a Standard Development Organisation (SDO), despite licensing SEPs whose owners (patent pool members) have committed to license on FRAND terms. SEP owners typically transfer these commitments to successors within the voluntary declaration that they make at the relevant SDOs, making such patent pool refusals to comply with FRAND unjustified attempts to evade FRAND obligations. As provided by the safe harbour, if the pooled technologies are not licensed out to all potential licensees on FRAND terms, the pool does not benefit from the safe harbour and would breach Chapter I. Indeed, if they do not follow the necessary safeguards, patent pool become an overt attempt to coordinate behaviour and restrict competition. There is further a risk that SEP holders may seek to license their SEPs through patent pools, rather than bilaterally, to evade their voluntary FRAND commitments. Since the requirement in the safe harbour has not prevented pools from arguing that the FRAND commitment does not apply to them, it should now be made clear that FRAND commitments individually provided to SDOs automatically transfer to patent pools.

Certain pools impose non-FRAND or excessive licensing terms while avoiding scrutiny of their royalty rates through legal and jurisdictional loopholes. This lack of transparency undermines fairness and reasonableness assessments of SEP licence rates charged by patent pools.

For example, in FSA's September 2024 response to the Call for Inputs, we highlighted the UK High Court's decision in *Tesla v Avanci* that commented about its limited ability to assess global patent pool rates effectively, leaving those rates untested as to whether they are even remotely FRAND. In a development since our response, the claim has indeed been refused on jurisdictional grounds by the Court of Appeal (although Tesla will be appealing to the Supreme Court). However here we flag a comment from Lord Justice Richard Arnold who, addressing the reasons advanced by Avanci as to why the case should be dismissed, noted the following: "*It is implicit in this argument that the royalty rate can only be challenged, if at all, through the mechanism of competition law*"². Given courts have, to date, found themselves unable to test the excessiveness of rates potentially charged by pools, updated Guidance on the matter and enforcement of the rules by the CMA, as Lord Justice Richard Arnold suggested, are critical.

In the UK, courts have consistently found that the FRAND rates determined by the court are much lower than initial SEP holder demands, highlighting the need for patent pools to undergo similar scrutiny. Non-FRAND rates and costly litigation reduce capital available for legitimate purposes like R&D and harm both business innovation and consumer access to affordable products.

- Refusals to Licence: Refusals to license can take different forms including: (i) refusals to license outside the pool, and (ii) refusals to license entirely.

Regarding (i), patent pools must ensure that there are opportunities to license outside the pool. Offering an SEP licence solely through a patent pool (and not bilaterally) contravenes the existing Guidelines, which emphasise that SEP holders should provide an option for bilateral licensing alongside pool licences. Indeed, a potential licensee should be able to decide not to take a licence from a patent pool and engage directly with individual SEP owners to obtain bilateral FRAND licences instead. There should be no terms in pool licence agreements that directly or indirectly disincentivise licensors from entering into licensing agreements bilaterally and/or with categories of third parties.

Regarding (ii), it is important that all licensors, including pools, must offer licences to all third parties on FRAND terms. Restricting licences to certain supply chain levels undermines innovation by arbitrarily excluding potential licensees based on their position in the supply chain. Despite their FRAND commitments, some SEP holders have, in recent years, limited licensing to parties at the downstream end-product level in what appears to be an effort to obtain excessive royalties based on the value of other technologies in the end product. This is a direct experience of FSA's member companies, where the selective licensing approach has disrupted entire supply chains, led to legal ambiguity, stifled innovation and IoT adoption, and triggered widespread litigation in the UK, Europe, and beyond -ultimately diverting resources from R&D and product innovation that could have benefited consumers.

SEP licensing must remain flexible to cater to the specific needs of licensees, who might only require a subset of the relevant standard or may already have coverage through purchased components. By refusing to license companies higher up the value chain patent pools impose

² *Tesla v Avanci*, [\[2025\] EWCA Civ 193](#), para [94].

unnecessary restrictions, dampening innovation and the competitive benefits patent pools are intended to provide.

- Opaque Licencing Conditions: Transparency in pool operation and licensing conditions is essential to mitigate potentially anticompetitive patent pool practices. Before a pool is set up, participation in the pool creation process should be open to all interested technology rights holders. Transparency is also critical for the legitimacy of patent pools, ensuring compliance with the Guidelines and fostering competition. Issues arise when pools include substitute patents instead of complementary ones or fail to publicly disclose the patents they license, which prevents oversight and challenges to inappropriate inclusions. Patent pools should disclose the details of patents licensed through the pool, including ownership information and third-party challenges to those patents. The royalty rate, as well as the methodology for calculating it, should also be publicly available. Essentiality checks by independent and competent external evaluators should be mandatory, with results disclosed to boost confidence. Pools must identify and distinguish between which of its participants are licensors and licensees (or both), maintain non-discriminatory practices, and ensure clarity regarding royalty rates and FRAND calculations to prevent hidden or excessive costs. Clear standards, including robust essentiality assessments, are vital to avoid licensing non-essential or invalid patents, which could misrepresent the pool's scope and harm competition.

Patent pools must conduct strict and transparent essentiality assessments to ensure they only license complementary and essential patents. The exponential growth of patents declared as essential to standards such as 5G, due to increasingly complex standards, necessitates independent evaluation by impartial experts without vested interests. Validity checks among licensors are also critical to maintain legitimacy and prevent licensing non-essential or invalid patents that misrepresent the pool's scope, harming competition and innovation. More broadly, in this respect, both potential and current licensees to a patent pool should be free to challenge the validity and essentiality of the pooled patents.

- Duplicative Royalty Demands: Licensees incur duplicative royalties when multiple pools license patents for the same standard, leading to conflicting rates across pools and unnecessary costs for licensees. This may also occur when SEPs are licensed both through pools and bilaterally, or when pools charge royalties for overlapping patents used in related standards. Such practices inflate costs, create inefficiencies, and undermine FRAND principles, as recognised by European courts. Clear provisions against duplicative royalties are essential to safeguard fairness and transparency for licensees.
- Conflicts of Interest, Compromised Independence and Collusion Risk: Conflicts of interest arise when pool administrators' own patents within the pool, allowing them to inflate rates and obscure bad patents. In markets like video codecs, concentrated control over multiple pools enables unfair pricing strategies across related standards, cornering markets and setting non-FRAND rates.

Additionally, discussions on pricing between pools and patent holders can foster collusive behaviours, which harm competition and lead to excessive rates for licensees. Patent pools should not facilitate collusion amongst patent owners on their individual licensing behaviour. Patent pools should have safeguards to protect sensitive business information and not lead to collusive outcomes.

- Undue Litigation Pressure: Collective litigation provisions in patent pool agreements – where a patent pool agrees to reimburse an individual licensor's litigation costs where that litigation

results in a patent pool licence rather than a bilateral one – exert undue pressure on licensees to accept terms they would not otherwise agree to, often disincentivising bilateral licensing. UK judges have criticised SEP owners for using injunctions to disrupt FRAND determinations, extracting supra-FRAND rates and undermining fair negotiations. These practices violate the spirit of the *Huawei v ZTE* framework, which advocates meaningful SEP negotiations free from litigation pressure and opportunistic behaviours.

UK courts are well-versed in the challenges posed by SEP licensing abuses, as demonstrated by numerous judgments, which we detailed in our September 2024 submission and mention briefly above. We respectfully urge the CMA to also take proactive steps and ensure that the Guidance effectively addresses these issues through regulatory means. This is particularly critical given the UK's status as a net licensee and its leading role in developing and implementing downstream IoT solutions across sectors such as automotive, health-tech, smart energy, and smart metering. The future of growth of the IoT sector – expected to be valued at £17bn by 2026 with a growth rate of 11.8%³ – is dependent on getting this right. With patent pools already prevalent—and likely to become even more common—in the IoT space, the UK has a strong interest in fostering a fair and transparent licensing environment.

The Guidelines should include stronger measures to prevent anticompetitive practices in patent pools by including in the “safe harbour” provision clearer provisions about the obligation of patent pools to comply with FRAND commitments, greater transparency on patent lists, essentiality assessments, and royalty rate methodologies, as well as ensuring independence between SEP holders and pool administrators. Licensing from pools must remain optional, bilateral licences should always be available upon request, and stricter thresholds for essentiality assessments should be established and disclosed to prevent the inclusion of non-essential patents. Collective litigation clauses, which discourage FRAND licensing outside pools, must be addressed to ensure neutrality and independence, while duplicative royalties for the same patents across related standards must be prohibited to avoid unfair costs. Finally, the Guidelines should explicitly state that terms like above-FRAND royalty rates or restrictions on reporting anti-competitive conduct to authorities are direct violations of competition law, fostering a fair and transparent SEP licensing environment.

Impact on consumers

For consumers, updates to the Guidelines that address the issues set out above would deliver a host of significant benefits, ultimately fostering affordability and innovation. To fully realize these outcomes, the CMA must establish clear guidance that supports transparency, FRAND commitments, and competitive market conditions. This will ensure that consumer interests are protected while promoting access to advanced and cost-effective products.

By enforcing adherence to FRAND principles and preventing excessive or non-transparent royalty rates, the Guidelines can help ensure that licensing costs remain fair. If businesses are not weighed down by the uncertainty associated with anticompetitive licensing practices, they are better able to invest in R&D. This shift in resource allocation can drive the development of new and improved technologies, enhancing consumer choice and product quality.

A clear, regulated licensing environment discourages practices like “double dipping” and collective litigation clauses that can lead to inflated prices. By promoting a competitive market structure where licensing terms are transparent and reasonable, consumers benefit from a healthier market that encourages the diffusion of innovative technologies.

³ Technavio UK IoT report.

The current uncertainty and ongoing litigation in some patent pools often lead to delays and disruptions in bringing new technologies to market. The Guidance framework would help minimize such legal conflicts, ensuring a smoother rollout of innovations in sectors such as IoT, automotive, and telecommunications.

In summary, by improving transparency and ensuring that licensing practices are fair and competitive, updated Guidelines would not only help reduce unnecessary uncertainty and costs for businesses but also support a more dynamic, innovation-driven market that ultimately delivers better products and services to consumers.

LNGs

Licensing negotiation groups (LNGs) have the potential to address challenges faced by SEP holders and prospective licensees in the licensing negotiation process. Voluntary LNGs can help facilitate negotiations, avoid extensive litigation, enhance competition, create efficiencies, and benefit the UK economy and society by increasing the availability of innovative products using standardized technologies, including those in emerging fields like the Internet of Things.

LNGs also provide a mechanism to counteract the market power of SEP holders granted by having their patented technology included in standards, enabling fairer negotiations and promoting consumer choice. However, to fully realize the benefits of LNGs, a robust framework with appropriate safeguards is critical.

The UK should consider issuing Guidance, including a best practice guide or safe harbour provisions, to promote the effective use of LNGs while addressing competition concerns. This framework should ensure transparency and fairness in SEP licensing negotiations, making LNGs a viable and pro-competitive option.

With appropriate competition safeguards, LNGs could expand SEP licensing opportunities – particularly beneficial given the intangible nature of SEPs – and enable a larger number of licensees to deliver diverse products and services to consumers. This would reinforce the UK's commitment to fostering innovation and competition while safeguarding the interests of all parties in the licensing ecosystem. Further guidance on implementing and regulating LNGs in the UK context would be a valuable step toward achieving these goals.

Question 17: What impact would have it have on your business or those you represent if the Recommended TTBERO applied to agreements establishing technology pools or LNGs? Please provide reasons for your answer.

Not applicable. FSA agrees with the CMA's assessment in 3.40 of its proposal that "*The Assimilated TTBER only covers technology transfer agreements between two businesses. Technology pools and LNGs are generally multiparty agreements and as such are not covered*"; and therefore it agrees with the CMA's recommendation that technology pools and LNGs should not be included in the Recommended TTBERO. FSA does not therefore understand there to be a need to answer this question. To the extent the question relates to the Guidelines, by extension, FSA refers to its response to question 16, above.

Question 18: What impact would have it have on consumers if the Recommended TTBERO applied to agreements establishing technology pools or LNGs? Please provide the reasoning behind your answer.

Not applicable. FSA agrees with the CMA's assessment in 3.40 of its proposal that "*The Assimilated TTBER only covers technology transfer agreements between two businesses. Technology pools and LNGs are generally multiparty agreements and as such are not covered*"; and therefore it agrees with the CMA's recommendation that technology pools and LNGs should not be included in the Recommended TTBER. FSA does not therefore understand there to be a need to answer this question. To the extent the question relates to the Guidelines, by extension, FSA refers to its response to question 16, above.
