Competition and Markets Authority

United Kingdom

10 April 2025

Comments on the CMA's Proposed Recommendation to the Secretary of State on the Assimilated TTBER

Executive summary

Sisvel, as one of the most experienced technology pool administrators in the world, appreciates the opportunity to provide feedback on the CMA's proposed recommendation for a Technology Transfer Block Exemption Order (TTBEO) and accompanying Guidance. We commend the CMA for its commitment to evidence-based, collaborative policymaking and look forward to contributing further to the process.

Generally, and in response to Policy question 1, Sisvel endorses the CMA's proposed recommendation to replace the retained TTBER with the Recommended TTBEO and accompanying Guidance. This approach maintains regulatory continuity in UK competition law treatment of technology transfer agreements - which often operate internationally - while preventing fragmentation of technology markets between different regulatory regimes in Europe.

Building upon our previous input, Sisvel wishes to highlight four critical recommendations that have a direct impact on our operations:

1) Maintain a clear distinction – in nature, regime and treatment – between technology pools and licensing negotiation groups (LNGs).
2) Preserve the existing soft-safe harbour provisions for technology pools in the Guidance accompanying the TTBEO.
3) Maintain the exclusion of LNGs from soft-safe harbour protection in the Guidance accompanying the TTBEO.
4) Apply case-by-case effects analysis to each LNG.

Information on Sisvel and general comments

Sisvel has a staff of over 80 engineering, business and legal professionals (Impact question 2) and is Europe's most comprehensive and longest-established patent pool administrator in the standard essential patent (SEP) ecosystem. Our operations focus on several SEP-related industry sectors in both the UK and globally. These generally pertain to the information and communication industry (Impact question 3), including cellular communication, wireless communication, audio-visual technologies (e.g., digital video broadcasting, media coding) and broadband communication technologies. In alignment with the UK government's Industrial Strategy Paper, Sisvel has contributed to the growth-driving sectors of i) advanced manufacturing and v) digital and technologies for over 40 years (Impact question 4).

Sisvel's business model is based on licensing patent rights on behalf of entities that range from major multinationals to SMEs. We have over 70 partners representing the entire SEP ecosystem. They include research institutions, universities, product manufacturers, component manufacturers, infrastructure manufacturers and telecom operators. Many of them are located or have a substantial market presence in the UK. Overall, these partners entrust Sisvel with the management of more than 1.700 essential patent families[1].

We are driven by a conviction that unlocking the full potential of intellectual property powers innovation and dynamic competition in markets where innovation is a key parameter. This can only be achieved successfully with a deep understanding of the relevant technology but also of the sectors in which it is deployed. Through efficient and effective licensing of high-quality patents, the necessary incentives for R&D are created, so fostering a self-sustaining cycle that funds further cutting-edge R&D activities. This generates an inventive loop in which intangible assets acquire their real economic value and world-class technologies are delivered to the market for the benefit of consumers.

Sisvel's market clearing function ensures that competition remains dynamic: patentees contributing to pools receive fair compensation and are encouraged to continuously invest in technology markets, while technology implementers can access and build upon groundbreaking innovation with full knowledge of the availability of a licence and its costs, so enabling them to bring improved products and services downstream to consumers. In essence, by ensuring that intangible assets are properly valued and commercialised, Sisvel helps drive technological progress, industry expansion and job creation, all of which contribute to overall consumer welfare and economic growth.

For the purposes of the consultation, we point out that technology pools are a niche and complex business, with strong technical, commercial and legal dimensions: Sisvel is one of only a handful of entities worldwide that has experience in administering such pools, while a slightly larger number have contributed their SEPs to them. In contrast, a significantly greater number of companies have been approached to obtain a pool licence. We believe that this numerical imbalance should be carefully evaluated in the evidence-based approach of any policy consultation in the SEP field, including the current one.

As a technology pool administrator, Sisvel routinely uses the Assimilated Technology Transfer Guidelines for the start-up and management of pool licensing agreements, joint licensing programmes

[1] This number relates only to the families currently managed by Sisvel that have been evaluated as essential by independent, third-party evaluators. Taking into account other patent families, Sisvel manages a far larger number of patent assets.

and other forms of patent aggregation. Our compliance costs would rise if the Assimilated TTBER regime were allowed to expire without replacement. In such circumstances, the negative impact on Sisvel would be significant (Impact question 5) even though we are committed to adhering to the highest antitrust standards, regardless of the existence of guidelines in all jurisdictions where we operate.

Furthermore, abandoning the Assimilated TTBER regime could give rise to uncertainty among both licensors deciding whether to join pool formations and licensees evaluating the opportunity of a pool licence by removing a benchmark that allows them to evaluate legal risk. Abandonment would also jeopardise the continuity of the UK competition law treatment of technology transfer agreements, which often have an international dimension, and risk fragmenting European-wide, if not global, technology markets, by carving out a UK-specific regime.

Finally, abandoning the Assimilated TTBER regime could be very negative for UK consumers (Impact question 6). It would deter both the export of UK technologies overseas and the import of foreign technologies into the UK. Combined this would probably raise prices and diminish quality and innovation in the relevant UK technology and product markets. Overall, this would have a negative impact on the UK government's strategy for economic growth.

In light of the above, we endorse the CMA's decision to propose the continuation of the block exemption regime for technology transfer agreements, composed of both an Order and accompanying Guidance.

Specific comments on LNGs

Limiting the following comments to what is likely to affect Sisvel the most, we note that the CMA: "[P]*roposes not to include technology pools and LNGs in the Recommended TTBEO. However, it proposes to consider providing further guidance on these in its planned guidance document.*" We believe that this recommendation incorrectly conflates two fundamentally different licensing arrangements (i.e., pools and LNGs) that warrant distinct regulatory approaches.

While the functioning and economic benefits of technology pools, as well as their potential risks, are very well-established given long-standing worldwide antitrust experience and converging scientific findings,[2] the opposite is true of LNGs.

Conversely, LNGs represent a largely untested licensing mechanism with fundamentally different operating principles, market impacts and competitive risks. The responses below to Consultation Questions 16-18 further elaborate why the Recommendation for regulating LNGs in the Guidance is misguided and lacks an empirical basis.

Policy Question 16

Sisvel agrees with the CMA's proposal that the Recommended TTBEO should not apply to agreements establishing LNGs. As is the case now, Sisvel is also not in favour of covering such issues in Guidance.

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[2] In this regard, see, e.g., the seminal report by the CMA's predecessor: Office of Fair Trading, *Innovation and Competition Policy – Part I Conceptual Issues* (OFT Discussion Paper 3, 2002), points 6.32 to 6.45; Pierre Regibeau and Katherine Rockett, *Assessment of Potential Anticompetitive Conduct in the Field of Intellectual Property Rights and Assessment of the Interplay Between Competition Policy and IPR Protection* (European Commission, 2011); Igor Nikolic and Niccolò Galli, 'Patent Pools in 5G: The Principles For Facilitating Pool Licensing' (2022) 46(4) Telecommunications Policy 102287.

We strongly believe a clear line should be drawn between patent pools and LNGs. There are several profound differences between them. First and foremost, patent pools are composed of a group of owners of patents covering complementary technologies, who are not technology competitors. By contrast, LNGs members are potential licensees and implementers who compete on the product market.

Groups of licensors and groups of licensees have very different dynamics and incentives. A pool by its nature relies on market acceptance of the licence it offers. Pools do not - and cannot- rely on enforcement. Any pool that does so will fail. As a result, pools must take into account the reaction of the market to what they offer and often adjust as further information is received. The pool incentive and objective are to meet the contours of existing demand.

Conversely, groups of licensees have no such incentive. They are able to deploy patented technology without a licence and are incentivised to pay as little as possible, if anything at all, for what they use. Given the intangible nature of SEPs, they are not self-enforceable, and their holders, in order to protect their intellectual property, bear the burden of enforcement in cases of infringement. In the absence of a licence on fair terms, the patentee can only obtain consideration by resorting to litigation. This may take years (assuming the patentee has the resources available to defend its interests in the first place). On the other hand, if there is no licence on fair terms, the implementer enjoys uninterrupted use of the relevant patents until told otherwise by a court or other third party. In this sense, SEPs are fundamentally different from tangible goods, to which suppliers can refuse access if negotiations fail.

Furthermore, SEP patent owners who are pool members are bound by FRAND licensing commitments, while LNGs aim to concert purchasing prices and other licensing conditions without any FRAND boundary. Patent pools also have experience in negotiations among stakeholders and have been studied in economic and legal literature for years. Their soft-safe harbour set out in the UK and EU TTBER Guidelines has a sound foundation, while LNGs' compliance with antitrust law is still an unsettled issue, as demonstrated below. Crucially, patent pools employ safeguards against sensitive information exchanges to strongly mitigate against collusive conduct. These are lacking in LNGs.

Last but not least, the number of licensors of successful technologies in pools is always significantly lower than the number of implementers of such successful technologies grouped in LNGs. When equal weight is given to input from both licensors and implementers, licensors face a significant disadvantage due to their smaller numbers. This creates an inherent structural imbalance.

In the CMA's view: "[G]*iven the absence of relevant case law, and lack of consensus on these matters in the academic literature, the CMA does not consider that it is currently in a position to reach a view on whether and when such arrangements constitute categories of agreements that are likely to satisfy the exemption criteria set out in section 9 of the CA98.*"

In the same vein, Sisvel underlines that the market for technology rights, and in particular the one for licensing of SEPs, is very dynamic and generally functions well. When conflicts arise the case-by-case analysis in *ex post* enforcement is also working well. Therefore, an *ex ante* regulation that might create a presumption of legality or illegality should start from such case-by-case analysis while also relying on robust impact assessment as required by better regulation principles. Finally, block exemptions from the prohibition of anti-competitive agreements are fundamentally backward-looking legal acts that codify established antitrust practice and economic understanding. Both are currently missing for LNGs.

Any rushed regulation that is not well-grounded in established principles is in danger of missing the mark. Over-regulation would risk imposing excessive burdens on SEP owners and disincentivising investments in R&D, so undermining innovation and dynamic competition and ultimately jeopardising innovators' competitiveness, as well as consumers' welfare and economic growth.

Impact questions

Question 17

The application of the Recommended TTBEO to LNG agreements would have a significant negative effect on Sisvel's business.

As Sisvel has already highlighted in our answer to the previous consultation, LNGs present high competitive risks, including price fixing and exchange of competitive information. This is because they are agreements between competitors - one of the fundamental differences between LNGs and pools.

Ultimately, LNGs are groups of potential licensees and implementers, who are likely to be competitors in the market, that are coming together to negotiate price and other licensing conditions. As a result, LNGs create a clear risk of collusive conduct and horizontal coordination among competitors. They might lead to unlawful agreements and even by object restrictions where the competing implementers share confidential and sensitive market information to agree on the purchase price of standardised technologies.

Secondly, where LNGs are formed by implementers that collectively hold significant market power in the SEP licensee market, there is a high risk of abuse of that dominant position and even of monopsony.

Thirdly, given the negotiation dynamics of SEP licences, where implementers are already using the technology prior to concluding any licence agreements, there is a potential for hold out behaviour, deriving "from the fact that IPR holders can ultimately only prevent unlicensed use by court actions" [3] as stated in both the UK Guidance on Horizontal Agreements and EU Horizontal Guidelines. In such a situation, SEP holders face high litigation costs and have no revenues, while SEP infringers, although unwilling to take a licence, can free-ride and pay no royalties for the use of the technology.

We stress the importance of uniform regulatory regimes in Europe and, with this in mind, agree with the European Commission's findings on LNGs in the context of the evaluation of the EU TTBER regime.[4] There, the Commission concluded that *"LNGs may raise competition concerns, to the extent that they involve coordination between competitors*....[and] *the need for LNG members to agree on certain key parameters with technology rights holders – such as the licensed product, the level in the value chain for licensing, or the maximum acceptable royalty- may involve the exchange of commercially sensitive information between competitors, which can in itself amount to an infringement of Article 101 of the Treaty."*

[3] CMA, Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements (2023), point 9.10, fn. 402; European Commission, Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements OJ (2023) C 259/1 (the 'Horizontal Guidelines), para. 444, fn. 317.

[4] Commission Staff Working Document, Evaluation of Commission Regulation (EU) N° 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements SWD(2024) 268 final.

Last but not least, LNGs may be misused to delay and frustrate the *Huawei v ZTE* licensing framework and doctrine that is currently applied by EU courts[5] and the Unified Patent Court.[6]According to the Horizontal Guidelines, "the requirements imposed by the Court of Justice in *Huawei v ZTE* on implementers of standard-essential IPR to avoid being subject to an injunction by a national court should normally provide sufficient protection against hold-out tactics within the European Union."[7] Although the courts in UK are not bound by CJEU decisions, the *Huawei* case does still appear as a framework in recent judgments[8] and the possible cross border effects of decisions granted in patent litigation is still debated.

Furthermore, the LNG hold out risk- underlined above - would probably result in more conflicts and litigation, leading to more legal uncertainty and fragmentation.

In conclusion, a too-lenient treatment of LNGs risks harming the free market mechanism for FRAND licensing, in which Sisvel is one of the major actors, leading to the lowering of royalties to sub-FRAND and sub-competitive levels. This would undermine Sisvel's capacity to recoup some of the high costs of R&D incurred by itself and the licensors in its pools. As a consequence, such treatment would have a serious impact on Sisvel's and its partners' incentives to invest in innovative technologies and contribute them to standards.

As for possible efficiencies, above all there should be no presumption of an imbalance in bargaining power between licensors and licensees. Instead, this should continue to be assessed on a case-by-case basis. The hold out example, as well as the availability of the technologies to users without a licence, demonstrate how the balance is often reversed.

The practice – by the Automotive LNGs (ALNGs) – has already proved that LNGs can be used by large implementers and, if more widely permitted, would be likely to be used by any licensees with significant buying power who are unwilling to conclude a licence on FRAND terms.

Furthermore, any theoretical savings in transaction costs, due to one-stop shop negotiations by LNGs, currently lack evidence and should be carefully assessed.

Question 18

The application of the Recommended TTBEO to LNG agreements would have a significant negative effect on consumers.

The significant negative impact on Sisvel and its partners' businesses, and in particular the disincentives to invest in innovative technologies and contribute them to standards, would ultimately result in less choice, less quality and higher prices for products and services offered to consumers. Therefore, a safe harbour for LNGs raises the risk of lowering consumer welfare standards, as well as consumer protection in a stricter sense. All of this would be likely to have a downward impact on economic growth.

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[5] Among others German Federal Court of Justice (Bundesgerichtshof), Sisvel v Haier, Case No. KZR 36/17 (2020).
[6]Unified Patent Court – Mannheim Local Division, *Panasonic / OPPO*, Case No. UPC_CFI_210/2023, 22 November 2024; Unified Patent Court – Munich Local Division, *Huawei Technologies Co. Ltd. v Netgear, Inc. et al*, Case No. UPC_CFI_9/2023, 18 December 2024
[7] Commission Staff Working Document, Evaluation of Commission Regulation (EU) N° 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements SWD(2024) 268 final.