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Fair Standards Alliance response to the UK CMA consultation on Draft Guidance for applying Chapter I prohibition under the Competition Act 1998

Introduction

Fair Standards Alliance welcomes the opportunity to provide feedback to the UK CMA consultation on Draft Guidance for applying the Chapter I prohibition under the Competition Act 1998.

FSA promotes the 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.

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 comment in response to this consultation will focus on the chapter developing a framework for technology pools. In that regard, FSA supports the CMA's overall approach and urges the CMA to retain the relevant provisions in the final Guidance.

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.

The Draft Guidance appropriately addresses many of these concerns and includes important safeguards to ensure that technology pools remain pro-competitive.

1. Definition of Technology Pools

The Draft Guidance defines technology pools in Section 11.98 as follows:

"Technology pools are arrangements under which two or more parties assemble a package of technologies that is licensed both to contributors to the pool and to third parties."

It is important to note that pools do not always license to the contributors to the pool and it is not necessarily a requirement for joining a pool in some instances (although desirable). But more importantly, it should be recognized that certain entities that are pooling technology for licensing do not refer to themselves as pools but rather claim that they are "licensing platforms". This is a distinction without a difference except that maintaining that they are not a pool allows these entities to evade some of the restrictions placed on pools primarily to avoid competition law concerns. For example, essentiality checks are not performed, and patents (at least those evaluated as essential) are not publicly disclosed.

The Guidance should make clear that they apply to all collective licensing arrangements and that the term "technology pool" is used broadly to encompass arrangements where multiple portfolios are offered for licensing as a package. Without such clarity, certain collective licensing "platforms" will argue that they are not bound by the terms of these Guidelines.

2. Evasion of FRAND Commitments

The FSA welcomes the CMA's recognition in paragraph 11.116(f) that pooled technologies should be licensed out to all potential licensees on fair, reasonable and non-discriminatory (FRAND) terms. This is an important safeguard and should be retained in the final Guidance.

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 in paragraph 11.116, 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, technology pools may 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. It should now be made clear in the final Guidance that FRAND commitments individually provided to SDOs automatically transfer to patent pools.

Also, 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. In this regard, FSA previously highlighted[1] the UK High Court's decision in *Tesla v Avanci*[2]*,* which commented on the court's limited ability to assess global patent pool rates effectively, leaving those rates untested as to whether they are even remotely FRAND. The claim was subsequently refused on jurisdictional grounds by the Court of Appeal, although Tesla is appealing to the Supreme Court. Significantly, Lord Justice Richard Arnold, addressing the reasons advanced by Avanci as to why the case should be dismissed, noted that "*It is implicit in this argument that the royalty rate can only be challenged, if at all, through the mechanism of competition law.*" Given that 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.

3. Refusal to License

FSA welcomes paragraph 11.124(b), which, in the context of the CMA's assessment of individual restraints in licensing agreements between pools and their licensees, recognises that the stronger the market position of the pool, the greater the risk that refusal to license to all potential licensees, or discriminatory licensing, will restrict

[1] FSA response to the Call for Inputs, September 2024: https://assets.publishing.service.gov.uk/media/67d2e33e814acba3755e97d0/Fair_Standards_Alliance.pdf

[2] Tesla v. InterDigital & Avanci, UKHC, July 2024: Tesla-v-InterDigital-15.07.24.pdf

competition. This is an important clarification and should be retained in the final Guidance.

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. Bilateral licensing is effectively unavailable if the SEP holder is offering bilateral royalty rates that are so much higher than their share of the pool rate that it makes it impractical for the licensee to opt for a bilateral license as opposed to a pool license. This situation often occurs when multiple pool members file litigation against the same licensee, pushing the licensee to take a pool license as the bilateral option does not make economic sense. In any collective licensing arrangement, the 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, 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 unnecessary restrictions, dampening innovation and the

competitive benefits patent pools are intended to provide.

4. Opaque licensing conditions

FSA welcomes the CMA's approach to transparency in the Draft Guidance. 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. FSA welcomes paragraph 11.103, which recognises that open participation in the creation of a technology pool makes it more likely that technologies will be selected on the basis of price and quality considerations.

Transparency is also critical for the legitimacy of patent pools, ensuring compliance with the Guidance 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.

FSA welcomes paragraph 11.116(b), which provides that the technology rights included in the pool should be disclosed in an effective manner to existing and potential licensees. Such disclosure is necessary to allow licensees to assess the scope and value of the technology made available through the pool, and to prevent hidden or excessive costs.

Essentiality checks by independent and competent external evaluators should be mandatory, with results disclosed to boost confidence. FSA welcomes paragraphs 11.111 and 11.112, which recognise that the involvement of independent experts may help ensure that only essential technologies are included in the pool, and that experts should be independent and possess the technical expertise necessary to assess whether proposed technology rights are valid and essential.

FSA also welcomes paragraph 11.116(c), which requires safeguards to ensure that only essential technologies are included in the pool, and that the methodology used to conduct essentiality assessments is disclosed in an effective manner to existing and potential licensees. In that regard, FSA further notes that to make the "*effective disclosure*" requirement sufficiently clear and operational in practice, the Guidance

should further specify what "*effective disclosure*" entails, in line with the approach taken by the European Commission in their Technology Transfer Guidelines, particularly footnotes 141 and 142.[3]

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. Essentiality 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, both potential and current licensees to a patent pool should be free to challenge the validity and essentiality of the pooled patents. FSA therefore welcomes paragraph 11.116(g), which provides that contributors to the pool and licensees should remain free to challenge the validity and essentiality of the pooled technologies. FSA also welcomes paragraph 11.129, which provides that technology pools should not reduce incentives to challenge invalid technology rights or otherwise operate to shield such rights from scrutiny, and that no-challenge clauses, including termination-on-challenge clauses, are likely to restrict competition within the meaning of the Chapter I prohibition.

Pools must identify and distinguish between which of their 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.

4. Duplicative Royalties Demand

[3] (141) Effective disclosure should include **at least the patent number** or the patent application number, where that information is publicly available, and the country of registration. Disclosures should be updated at reasonable intervals upon request.
(142) Effective disclosure should include **at least an explanation of the scope of the essentiality checks** (including any sampling technique), **the content of the checks** (for example, which elements are assessed) and **the criteria used to select the assessors** (for example, regarding expertise and independence). Disclosures should be updated at reasonable intervals upon request.

FSA welcomes the CMA's recognition in paragraph 11.116(f) that safeguards should be in place to ensure that licensees are not charged more than once for the same technology rights. This is an important safeguard and should be retained.

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.

5. Conflicts of Interest, Compromised Independence and Collusion Risk

FSA welcomes the CMA's recognition that technology pools can give rise to coordination risks between technology holders. Paragraph 11.102 rightly identifies as relevant factors the transparency of the pool creation process, the selection and nature of the pooled technologies, the extent to which independent experts are involved, and whether appropriate safeguards are in place, including measures to prevent the exchange of competitively sensitive information and the availability of independent dispute resolution mechanisms.

Conflicts of interest arise when pool administrators' own patents are licensed through 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. FSA therefore supports paragraphs 11.114 and 11.115, which stress the need for safeguards against the exchange of competitively sensitive information, including between competing technology pools.

6. 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. The CMA's Guidance therefore has an important role in ensuring that technology pools do not operate in a way that undermines fair negotiations, shields invalid or non-essential patents from scrutiny, or encourages acceptance of non-FRAND terms through litigation pressure.

Conclusion

FSA strongly supports the CMA's Draft Guidance on technology pools and urges the CMA to retain its key provisions in the final Guidance. We are also pleased to note that, as indicated in the Guidance preparatory document[4], the CMA intends to take an approach broadly consistent with that of the European Commission. This alignment is welcome and will provide greater legal certainty for businesses operating across both jurisdictions.

The safeguards outlined in the Draft Guidance are essential to ensuring that technology pools remain genuinely pro-competitive. Without these protections, pools risk becoming vehicles for coordinated anticompetitive behaviour, evasion of FRAND commitments, and the extraction of excessive royalties that ultimately harm UK innovation and consumers alike.

The concerns raised throughout this response are not theoretical. They reflect the lived experience of FSA members operating at multiple levels of the value chain, across sectors ranging from automotive and telecommunications to energy and broadcasting. We have seen firsthand how opaque pool practices, selective licensing, and litigation pressure can disrupt supply chains, divert resources away from R&D, and create significant legal uncertainty.

[4] Par. 2.12 of the *Consultation Document*.

We therefore encourage the CMA to address the areas where the Draft Guidance could be strengthened further, particularly on the practical meaning of "effective disclosure," and restrictions on licensing by supply chain level.

FSA looks forward to continued engagement with the CMA on these issues and remains available to discuss any aspect of this response in further details.