Via email: ttberreview@cma.gov.uk

11 June 2026

Competition and Markets Authority
25 Cabot Square
London E14 4QZ
United Kingdom

RE: Association for Competitive Technology (ACT) Response to CMA Consultation on Draft Guidance on the Application of the Chapter I Prohibition to Technology Transfer Agreements

The Association for Competitive Technology (ACT) welcomes the opportunity to submit comments on the Competition and Markets Authority's (CMA) draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 (CA98) to technology transfer agreements (the Draft Guidance).

I. Introduction and Statement of Interest

ACT is a policy trade association for the small business technology developer community, both in the UK and around the globe. Our members are entrepreneurs, innovators, and independent developers within the global app ecosystem that engage with verticals across every industry. We work with and for our members to promote a policy environment that rewards and inspires innovation while providing resources that help them raise capital, create jobs, and continue to build incredible technology. Today, the ecosystem ACT represents is valued at more than £4.5 trillion globally and is responsible for more than 400,000 jobs in the United Kingdom (UK).[1]

Many of our members invent, develop, and sell internet of things (IoT) devices. The IoT ecosystem is expected to generate trillions of pounds for the global economy by 2030, significantly contributing to economic growth and job creation within the UK. The IoT sector relies heavily on the seamless licensing and implementation of standard-essential patents (SEPs). Unfortunately, the IoT market is 'very fragmented, competitive and cost sensitive'.[2] The IoT sector's ability to realistically obtain licenses to SEPs on fair, reasonable, and non-discriminatory (FRAND) terms is therefore paramount to ensuring a competitive and dynamic marketplace in the UK.

We support the CMA's initiative to provide a tailored UK framework, and we welcome the Draft Guidance's continuity with the existing European Union (EU) rules. However, this high-level block exemption framework does not sufficiently address the distinct and complex competition challenges prevalent in the SEP licensing ecosystem, particularly concerning patent pools. We offer the following comments in response to the specific consultation questions.

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[1] *App Economy Fast Facts*, ACT | THE APP ASS'N (2023), https://actonline.org/wp-content/uploads/About-the-App-Economy-2023_162023.pdf; *The App Economy in the European Union*, DELOITTE (June 2020), https://actonline.org/wp-content/uploads/Deloitte-The-App-Economy-in-the-EU-2020.pdf.

[2] Priya Nair, *The European Union's Proposal for a Transparent, Fair, and Reliable Standard-Essential Patent Landscape*, ACT | THE APP ASS'N (Oct. 5, 2023), https://actonline.org/2023/10/05/the-european-unions-proposal-for-a-transparent-fair-and-reliable-standard-essential-patent-landscape/.

Question 5.2: Do you have any comment on the CMA's proposed approach to technology pools?

The CMA's decision to address technology pools in the Draft Guidance is a positive step. We strongly support the pro-competitive and pro-transparency principles set out in paragraph 11.116, particularly the safe harbour conditions that pools:

- identify which specific patents are covered by the pool's licence (paragraph 11.116(b));
- disclose their methodology and results for essentiality verification (paragraph 11.116(c)); and
- do not charge licensees royalties for patents already under licence (paragraph 11.116(f)).

These transparency measures provide the much-needed foreseeability that all innovators, but particularly small and medium-sized enterprises (SMEs), require to make sound investment decisions early in the product development cycle. For a startup developing an IoT device, the inability to forecast predictable and transparent SEP licensing costs can be a prohibitive barrier to market entry.

However, the Draft Guidance does not go far enough in several critical respects. We respectfully urge the CMA to strengthen the final guidance as follows.

II. Pools Must Be Explicitly Bound by Members' FRAND Commitments

Unless a pool is required, as a condition of the safe harbour, to assume and remain bound by its members' FRAND commitments in a manner enforceable by licensees, SEP holders can route licensing through a pool to disclaim the obligations they accepted at the standard-setting stage. This would make the FRAND commitment effectively meaningless. We note that in *Tesla, Inc. v. InterDigital Patent Holdings, Inc.*, the administrator of the Avanci 5G platform and one of its licensor members have contended that the platform sits outside the ETSI FRAND framework and owes no FRAND obligation of its own, leaving an implementer with no means to obtain a determination of FRAND terms for the platform licence.[3] Currently, the UK Supreme Court is considering an appeal lodged in late April 2026 seeking to confirm that pools are indeed subject to the FRAND commitments placed on SEPs by their holders. Whatever its outcome, the litigation illustrates the precise gap the Guidance should close.

The Draft Guidance correctly recognises that FRAND licensing is essential for pro-competitive pool operation. However, as currently drafted, it contains two critical ambiguities that could allow patent pools to become loopholes for FRAND evasion. We recommend two targeted amendments to address these gaps.

[3] *Tesla, Inc. v. InterDigital Patent Holdings, Inc.* [2025] EWCA Civ 193 (UK Ct. App.); see also *Tesla, Inc. v. InterDigital Patent Holdings, Inc.*, UKSC/2025/0058 (UK Sup. Ct.) (appeal heard 27–29 Apr. 2026, judgment pending).

A. *Recommendation 1*: Paragraph 11.116(f) of the Guidance should be revised to require pools to commit to be bound by the FRAND licensing obligations of its members in order to benefit from the safe harbour.

While the safe harbour conditions outlined in Paragraph 11.116 provide important guidelines for ensuring technology pools remain pro-competitive, it is important that the Guidance ensure patent pools are not used as vehicles for SEP holders to circumvent specific licensing obligations made to standard-development organisations (SDOs). To achieve this, the Guidance must explicitly state that a pool's eligibility for a safe harbour is contingent upon it assuming and adhering to the specific FRAND commitments made by its members to the relevant SDOs.

Paragraph 11.116(f) does not include the assumption of existing licensing commitments as a predicate for pools to benefit from the safe harbour. This provides SEP holders with a path to evade those commitments by licensing through pools that do not comply with the specific licensing obligations made by the SEP holder. To remedy this ambiguity, the CMA should amend Paragraph 11.116 to specify that the requirement for FRAND licensing includes the assumption of any specific licensing obligations attached to the patents licensed by the technology pool. This commitment must be directly enforceable by licensees as third-party beneficiaries. Without such a requirement, pools risk becoming vehicles for SEP holders to circumvent specific obligations made to SDOs, thereby undermining the integrity of the standardisation process.

Suggested drafting amendment to paragraph 11.116(f):

'the pooled technologies are licensed out to all potential licensees on fair, reasonable and non-discriminatory (FRAND) terms and subject to the licensing commitments given by the parties contributing technology to the pool, which licensees may enforce as third-party beneficiaries, including safeguards to ensure that licensees are not charged more than once for the same technology rights;'

B. *Recommendation 2:* Paragraph 11.125 of the Guidance should be revised to require that pools are subject to any 'existing' commitment to license on FRAND terms.

Paragraph 11.125 currently states that royalty agreements are 'subject to any applicable commitment to license on FRAND terms.' The word 'applicable' is ambiguous. It could be interpreted narrowly, for example, as applying only where a court has specifically determined that a FRAND commitment applies to the pool, or only where the pool itself has voluntarily assumed such a commitment.

The EU's revised Technology Transfer Guidelines use the term 'existing' rather than 'applicable.'[4] 'Existing' is broader and more encompassing. It captures any FRAND commitment already made by pool members to SDOs, regardless of whether that commitment has been formally 'applied' to the pool by a court or agreement. This linguistic

[4] Communication from the Commission – Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, 2026 O.J. (C) C/2026/2323, ¶ 293 **(**"Undertakings setting up a technology pool that is compatible with Article 101 of the Treaty are normally free to negotiate and set royalties for the technology package (subject to any existing commitment to license on FRAND terms).")

choice matters: 'existing' leaves no room for a pool to argue that FRAND is not 'applicable' to it because it is a separate legal entity or because no court has ruled on the matter.

We therefore recommend that the CMA align the UK guidance with the EU approach by replacing 'applicable' with 'existing.' This change would make clear that pools are subject to all pre-existing FRAND commitments of their members, without requiring additional legal steps to 'apply' those commitments to the pool.

Suggested drafting amendment to paragraph 11.125:

'Where a technology pool is compatible with the Chapter I prohibition, the parties are generally free to agree royalties for the technology package and to allocate those royalties among the included technologies, subject to any existing commitment to license on FRAND terms.'

III. Pools Should Not Engage in Anti-Competitive 'Use-Based' Pricing

Recommendation: **Paragraph 11.126 of the Guidance should be revised to prohibit use-based pricing.**

The Draft Guidance currently condones rate discrimination based on end-use. We urge the CMA to provide clear guidance that such use-based pricing, where the same patented technology performs the same function, risks being anti-competitive and is fundamentally inconsistent with FRAND principles.

As recognised in the CMA's own guidance on horizontal agreements, a cornerstone of FRAND is that royalty rates must 'bear a reasonable relationship to the economic value of the IPR' being licensed.[5] It is important that the Technology Transfer Block Exemption Order (TTBEO) Guidance is aligned with the Horizontal Guidance and reflect this principle.

However, use-based rate differentiation does not align with this principle. If two products use the same standard-enabling component, any difference in value is attributable to differentiating features or other downstream innovations, not the economic value of the patent. Condoning different royalties based on end use can thus amount to '[d]iscriminatory licensing [that] is a "success penalty"' that is inconsistent with FRAND.[6]

The final guidance should explicitly state that such practices may infringe the Chapter I prohibition and will not benefit from the safe harbour.

Suggested drafting amendment to paragraph 11.126:

'Where a pool holds a dominant position, royalties and other licensing terms should be non-excessive, non-discriminatory, and licences should be non-exclusive. The

[5] Competition & Mkts. Auth., Guidance on Horizontal Agreements ¶ 9.27 (Aug. 16, 2023), available at https://assets.publishing.service.gov.uk/media/64dba33bc8dee400127f1d25/Horizontal_Guidance_FINAL.pdf.
[6] David Katz, *Unfair Price Bias in Standard Essential Patents Needs to Stop*, BLOOMBERG L. (Nov. 22, 2023), https://news.bloomberglaw.com/us-law-week/unfair-price-bias-in-standard-essential-patents-needs-to-stop

treatment of licensees should not depend on whether they are also licensors. Royalty rate discrimination based solely on the end-use or downstream market of a product, where the same licensed technology performs the same function, is inconsistent with FRAND principles and will not benefit from the safe harbour set out in paragraph 11.116. Such practices do not bear a reasonable relationship to the economic value of the licensed technology rights, may unduly foreclose competition in downstream markets, and risk infringing the Chapter I prohibition'.

IV. Pools Should Not Engage in Litigation Coordination That Facilitates Anti-Competitive Holdup

Recommendation: **Footnote 224 in paragraph 11.114 and paragraph 11.116(d) of the Guidance should be revised to include information regarding pool member patent enforcement as a category of sensitive information that undermines competition.**

A critical and escalating concern in the SEP landscape is the coordination of litigation campaigns, which is often facilitated by patent pools. These actions often involve multiple licensors simultaneously seeking injunctive relief against a single defendant.[7] Some pools go even further, not only coordinating the litigation but also promising to reimburse members that initiate litigation against pool-determined targets to compel a pool-wide license.[8]

We are concerned that the Draft Guidance does not address the coordinated use of litigation by patent pools. Given that pools do not benefit from (nor reimburse) litigations resulting in bilateral licenses, there is no reason for them to support their members seeking a bilateral license.

A central concern is that pools may coordinate, and in some cases fund, litigation campaigns for a member to obtain injunctive relief for FRAND encumbered patents in order to compel the target to accept a pool-wide license, while avoiding attempts by licensees to obtain an independent FRAND adjudication of pool terms. The strategy of favouring injunctive relief over FRAND determinations was recently recognised as holdup by an appellate court in the UK.[9] As the court explained: 'This demonstrates that [their] stance is not driven by jurisdictional preference with respect to FRAND determination. It is driven by a preference for the exclusionary power of a national injunction (or equivalent relief) over FRAND determination by *any* court. *This is hold up'*.[10]

Such coordinated litigation represents a powerful tool for anti-competitive hold-up, dramatically increasing pressure on implementers, especially resource-constrained SMEs, to accept

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[7] *See, e.g., Letter from Former Government Officials, Professors, & Academics to DOJ re: Avanci Business Review Letter* at 4 (Oct. 17, 2022) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4250512; Adam Houldsworth, *Microsoft Sued in Germany by Three Via LA HEVC Patent Licensors*, IAM MEDIA (Apr. 2, 2025) https://www.iam-media.com/article/microsoft-sued-in-germany-three-la-hevc-patent-licensors.

[8] Avanci, *Internet of Things ("IoT") Platform Master License Management Agreement* at 5.1.2 (produced in *FTC v. Qualcomm Inc.*, 17-CV-220 Dkt. 1306 (Jan. 1, 2019, N.D. Cal.) ("If a Licensor engages in Litigation against an Unwilling Licensee as notified under Article 4.8 of this Agreement, then such Licensor may request that LA reimburse its litigation Cost associated with such Litigation. Upon request, LA shall refund such Litigation Cost from the license Fees paid by such Unwilling Licensee (after deduction of the Commission, but before distribution of Total Net Collections to any other licensor) provided that all of the products accused of infringement in such Litigation are relevant to an applicable.")

[9] Lenovo Group Ltd. v. Telefonaktiebolaget LM Ericsson, [2025] EWCA Civ 182 (UK Ct. App.).

[10] *Id.* at ¶ 153.

supra-FRAND terms. The threat of a coordinated, multi-front injunction campaign can force a licensee to capitulate regardless of the merits of the patents-in-suit.

We recommend the CMA amend the Draft Guidance to treat the coordination of patent enforcement strategy and litigation funding among pool members as a category of sensitive information exchange that warrants the strictest scrutiny under the Chapter I prohibition. This could be addressed by expanding paragraph 11.114 (which deals with exchange of competitively sensitive information) to include explicit reference to coordinated litigation.

Suggested drafting amendment to paragraph 11.114 footnote 224

'See Part 8 of the Horizontal Agreements Guidance. In the context of pools, sharing information that allows parties contributing technology to the pool to coordinate litigation efforts may facilitate collusion, lead to collusive outcomes and increase the stability of an anti-competitive agreement. This information is not necessary for either the creation or operation of the pool'.

Suggested drafting amendment to paragraph 11.116(d):

'appropriate safeguards are in place to ensure that the exchange of competitively sensitive information (such as litigation strategy relating to any pooled technology) is limited to what is necessary for the creation and operation of the pool'.

V. Conclusion

The CMA's TTBEO and accompanying guidance present a decisive opportunity for the UK to establish a world-leading, pro-innovation, and pro-competition approach to SEP licensing. By incorporating robust, pro-transparency, and pro-innovation principles the CMA can ensure the UK remains a competitive, fair, and attractive market for IoT developers and all standards-based innovators.

We thank you for considering our views and remain available to the CMA to provide further detail on the issues facing our members, including participating in any subsequent consultation on the draft Order.

Sincerely,

