

QUALCOMM INCORPORATED'S RESPONSE TO THE PUBLIC CONSULTATION ON THE DRAFT EU HORIZONTAL BLOCK EXEMPTION REGULATIONS AND HORIZONTAL GUIDELINES

April 26, 2022

PART A: ABOUT QUALCOMM

Qualcomm Incorporated submits this response to the public consultation on the draft revised Horizontal Block Exemption Regulations (HBERs) and Horizontal Guidelines (Guidelines or HGLs) that were published on 1 March 2022. Qualcomm commends the European Commission for engaging in this Consultation and seeking stakeholder input. This response focuses on the draft Guidelines, with particular focus on Section 7, Standardisation Agreements.

Our feedback is based on Qualcomm's considerable experience in developing and licensing foundational wireless communications technology over the last 30-plus years as well as our lengthy and extensive participation in wireless communications Standards-Development Organisations (SDOs), including the European Telecommunications Standards Institute (ETSI) and the Third Generation Partnership Project (3GPP).

For context, Qualcomm is both a Research and Development (R&D) and a product-development company. It is an innovator and leading developer of end-to-end design of wireless communications systems, having pioneered foundational aspects of 2G, 3G, and 4G wireless systems and technologies. It is also a leader in 5G design and development. Since its inception in 1985, Qualcomm has spent over \$75 billion on R&D, and on average has reinvested over 20 percent of its annual revenue. Our continuing re-investment in new R&D will enable us to make technology breakthroughs in 6G and beyond.

Qualcomm has made considerable contributions to cellular standards, including via ETSI and the 3GPP. A large number of foundational technologies used in ETSI/3GPP standards have been developed based on Qualcomm's proposals and Qualcomm has contributed to numerous technical standards papers. Qualcomm's worldwide patent portfolio consists of over 140,000 patents and patent applications, of which almost 65,000 are disclosed cellular standard-essential patents and patent applications (SEPs). With this context, Qualcomm submits this Response to the Commission to largely support the draft HBERs and Guidelines. However, there are areas, largely pertaining to standardisation, where we believe the proposed language could become problematic if not clarified and would hinder, rather than the intended effect of promoting, competition.

PART B: FEEDBACK ON THE DRAFT REVISED HORIZONTAL GUIDELINES.

The Commission seeks feedback on the proposed textual changes to the HBERs and Guidelines and whether they provide improved effectiveness, relevance, and coherence. Qualcomm is generally supportive of both the HBERs and the Guidelines.

Welcomed Improvements

Section 7 of the HGLs on standardisation is an important tool to ensure the continuing function of the standards development system and provide legal certainty while balancing the needs of SDOs with antitrust authorities. This clarity allows SDOs to operate, and their members to contribute to the respective standards, with confidence that they may continue to collaboratively innovate without running afoul of competition laws.

At the time of its adoption, the Guidelines recognised the diversity within SDOs while providing guidance for how to conduct self-assessment for the purpose of ensuring compliance with European antitrust rules. As the Guidelines state: “there exist different models for standard-setting and [] competition within and between those models is a positive aspect of market economy. Therefore, standard-setting organisations remain entirely free to put in place rules and procedures that do not violate competition rules.”¹ This freedom for SDOs to determine their IPR governance, particularly with respect to level of licensing approach, is essential.

Therefore, under the HGLs, SDOs are free to define the scope of their licensing commitment, including by allowing firms to freely select the level within the value chain at which to license its patents.² This is consistent with the approach taken by other mainstream competition enforcers.³ Indeed, to the best of our knowledge, the EC has not initiated a formal investigation challenging SDO’s self-assessment on this point in the last decade.

We would also like to commend the Commission for new language in paragraph 470 (formerly 269) acknowledging for the first time the problem of “hold-out,” an issue that arises when a standards user refuses to or delays paying licensing royalty fees. Given that the HGLs previously (and still do) made explicit reference to “hold-up,”⁴ equally recognizing “hold-out” promotes a balanced approach towards standardisation agreements. However, it is worth considering whether references to both “hold-up” and “hold-out” are necessary. First and foremost, the HGLs are, and should be, geared towards horizontal agreement patterns only.

¹ European Commission, draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, 2011/C11/01, 14/01/2011, OJ 11/1 (HGL), para. 47679.

² Id., para. 279 (SDOs are “free to put in place rules and procedures that do not violate competition rules whilst being different to those described in paragraphs 280 to 186”); cf. id. at 285 (specifying licensing to “all third parties”).

³ See, e.g., Makan Delrahim, Assistant Attorney Gen., U.S. Dep’t of Justice, Antitrust Div., The “New Madison” Approach to Antitrust and Intellectual Property Law, Remarks Before the University of Pennsylvania Law School 11 (Mar. 16, 2018), <https://www.justice.gov/opa/speech/file/1044316/download> (“[a]s enforcers, we have only limited insight into the patent policies of various standard-setting organizations, and we do not seek to impose a top-down mandate to skew the playing field clearly in the direction of innovators or implementers.”); Intellectual Property Enforcement Guidelines, Competition Bureau Canada, ¶ 200 (Mar. 2019) (listing provisions that SDOs may adopt to mitigate the risk of opportunism).

⁴ Guidelines at paragraph 269.

Intellectual property laws and competition laws share the same objectives (106) of promoting innovation and enhancing consumer welfare. IPR promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes. IPR are therefore in general pro-competitive. However, by virtue of its IPR, a participant holding IPR essential for implementing the standard, could, in the specific context of standard-setting, also acquire control over the use of a standard. When the standard constitutes a barrier to entry, the company could thereby control the product or service market to which the standard relates. This in turn could allow companies to behave in anti-competitive ways, for example by ‘holding-up’ users after the adoption of the standard either by refusing to license the necessary IPR or by extracting excess rents by way of excessive (107) royalty fees thereby preventing effective access to the standard. However, even if the establishment of a standard can create or increase the market power of IPR holders possessing IPR essential to the standard, there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power. The question of market power can only be assessed on a case by case basis.

In addition, it is our experience that, while “hold-out” is a very real concern negatively impacting licensing negotiations, “hold-up” is a theoretical concern that has not borne out in practice.

To explain the concerns a bit more, under a hold-up concept, a patent holder in theory has the ability to “hold up” the users of its technology by threatening to destroy the implementers’ business if they do not agree to supra-FRAND rates. In reality, a patent holder has no ability to unilaterally enact such a scheme. Because securing a patent requires disclosing one’s inventions, there is nothing the patent holder can do on its own to prevent an implementer from incorporating the standard or patented technology into its product. The patent holder must go to a court or the ITC to seek exclusionary or injunctive relief to stop the implementer. Thus, a demand for excessive royalties is not actionable by the patent holder alone. Hold-up can only credibly extract excessive royalties if a court will back it up by issuing an injunction or other exclusionary order. But, case law around the world has limited patent holders’ ability to obtain such relief to the very limited, narrow circumstance of demonstrating an unwilling licensee. The difficulties with such an affirmative showing render convincing a court to confer excessively high royalties near impossible.

In contrast, “hold-out” (sometimes referred to as “efficient infringement”) occurs when implementers use a patent holders’ standardized technologies for as long as possible without a license to do so.⁵ In stark contrast to hold-up, which requires duping a court to effectuate, hold-out very much can be achieved by the implementer acting entirely alone. Indeed, there are a myriad of tactics an implementer can take on its own to efficiently infringe upon a patent holders’ technology, whether it be delaying licensing negotiations, insisting on patent-by-patent, jurisdiction-by-jurisdiction litigation, demanding protracted technical discussions, or simply ignoring FRAND offers altogether.⁶ As two prominent scholars explained, hold-out is effective for implementers because it “forces the innovator to either undertake significant litigation costs and time delays to extract a licensing payment through a court order, or else to simply drop the matter because the licensing game is no longer worth the candle.”⁷

Section 7 Standardisation Agreements

While the aforementioned modifications to the HGLs do indeed achieve the EC’s goals of promoting competition, we would like to reiterate our concerns that the language in paragraph 482 (formerly 285) is being misinterpreted as a strict requirement for SDOs to “license to all.” This is a term used to argue that a FRAND commitment requires patent holders to offer a license to any company at any level within the value chain. As discussed below, this interpretation has no bearing in fact or practice, and is in conflict with legal precedent around the world.⁸ We believe the draft HGLs would be clearer if the “to all third parties” language in paragraph 482 is simply removed to eliminate the possibility of such misinterpretation altogether.

⁵ “Unwilling SEP Licensees: A Taxonomy of Hold-Out Strategies,” IP Europe (May 26, 2021), https://ipeurope.eldcotest.eu/wp-content/uploads/2021/05/210526-Taxonomy-of-hold-out-strategies-with-annex.final_.pdf.

⁶ See *id.* (discussing several common hold-out strategies employed by implementers).

⁷ Richard A. Epstein & Kayvan B. Noroozi, *Why Incentives for “Patent Holdout” Threaten to dismantle FRAND, and Why it Matters*, 32 Berkeley Tech. L.J. 1381, 1384 (2017).

⁸ See, e.g., *Commonwealth Sci. & Indus. Research Org. v. Cisco Sys., Inc.*, 809 F.3d 1295, 1303-04 (Fed. Cir. 2015); *Fed. Trade Comm’n v. Qualcomm Inc.*, 969 F.3d 974, 998-99 (9th Cir. 2020); Regional Court (Landgericht) of Munich, Case No. 7 O 8818/19 (2020), *Sharp v. Daimler; HTC Corp. v. Telefonaktiebolaget LM Ericsson*, 12 F.4th 476, 494 n.6 (5th Cir. 2021) (Higginson, J., concurring) (explaining the correct rationale of the district court).

As a foundational matter, creating an obligation to “license to all” would radically change the longstanding industry practice of end-device licensing.⁹ In this regard, it is important to bear in mind that, for cellular standards, the 5G value chain is complex and multilateral, and this is true whether in the mobile, auto, or IoT segments, or elsewhere. This chain consists of complimentary layers of technology. For instance, the wireless communication systems design and standards (e.g., 5G technology standards) form the fundamental foundation of the entire supply chain, over which other product pillars are supported, such as component and chips, mobile devices, infrastructure, network operators and, increasingly, other industries that will utilize 5G technologies.¹⁰

A compulsory “license to all” policy would result in a shift from efficient single-point licensing to inefficient multi-level licensing including component-level licensing. Such a shift would harm consumer welfare and inhibit the goal of enhancing access to standards.¹¹

Section 5 Joint Purchasing Agreements

We are also concerned by the reference in paragraph 312 to groups of potential licensees jointly negotiating licensing agreements for standard essential patents in a so-called licensing negotiation group (LNG). While the current reference is relatively minimal, we caution the EC that any further acknowledgment could inadvertently lend credence to negotiating groups whose true purpose is, in fact, anticompetitive. Our understanding of LNGs is that they are groups of purchasers getting together to negotiate below-market rates; in other words, a group of horizontal competitors gathering together to engage in either a group boycott or price-fixing behaviour. Such conduct is recognized around the world as inherently anticompetitive. In the SEP licensing market specifically, allowing implementers to extract artificially low prices for SEPs would, in turn, reduce choice in the short term for technologies that are contributed to standards and reduce innovation in the long term. In short, innovators would no longer be willing to commit considerable funding to R&D because they would no longer be able to recoup their investment.

If these core European, UK and US innovators leave the market, control of the 5G and 6G technology roadmap will fall to others. Companies that are likely to be either very large, wealthy, and vertically integrated, and/or those that enjoy significant state funding. Either of which are likely to turn the cellular roadmap to their own self-interest. Unlike companies with a licensing model, these other companies may have a profit motive that is incompatible with efforts to rapidly drive 5G or 6G roadmaps or expand the technology into other verticals outside of the traditional cellular industry. Ceding the leadership in development of 5G & 6G to them would have a long-term negative impact on the EU’s digital ambitions and the wider western world’s interests.

Advocates in favour of recognizing LNGs as lawful often raise the argument that such groups are necessary – not to protect the large implementer incumbents, but to protect small- to medium-sized enterprises in emerging technologies such as IoT. This argument has no merit.

⁹ See, e.g., Marvin Blecker, Tom Sanchez & Eric Stasik. *An Experience-Based Look At The Licensing Practices That Drive The Cellular Communications Industry: Whole Portfolio/Whole Device Licensing*, LI (4) LES NOUVELLES 221 (2016).

¹⁰ See Presentation by Dr. Jorge Padilla, *International IP and Antitrust Policies for Innovation and the Race to 5G*, LeadershipIP (2018), at 6:25-15:50, <http://www.ipleadership.org/videos/international-ip-and-antitrust-policies-innovation-and-race-5g>.

¹¹ The U.S. Court of Appeals for the Ninth Circuit recently confirmed that licensors have no antitrust duty to “license to all” and cautioned against “using the antitrust laws to remedy what are essentially contractual disputes between private parties engaged in the pursuit of technological innovation.” See *FTC v. Qualcomm Inc.*, 969 F. 3d 974, 995-97 (9th Cir. 2020).



Qualcomm has been licensing in the IoT space for many years, and the emergence of 5G has not changed how license negotiations are concluded in this space. IoT licensing typically does not involve small companies. Rather, licensing occurs at the module level, to large module makers well-versed in patent licensing negotiations and, often, existing licensees. It is in patent holders' economic interest to license at this level, where there is some degree of certainty in establishing successful commercial relationships, as opposed to licensing small companies with a high degree of fragmentation and risk of exiting the segment, particularly in nascent technologies.

To conclude, we want to thank the European Commission for the diligent review and consultation process they have taken over the past two and a half years. We have been pleased to provide feedback at each stage of the process and look forward to the final publication of the HBERs and HGLs later this year. Should there be any further information we can provide, we would be happy to be contacted directly.