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Public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines

RESPONDENT PROFILE

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Ericsson respectfully submits these comments in response to the European Commission's public consultation on the draft revised R&D Block Exemption Regulation ("R&D BER"), the Specialisation Block Exemption Regulation ("Specialisation BER") and the Guidelines on horizontal cooperation agreements ("Horizontal Guidelines").

Ericsson respectfully refers to its 30 September 2021 comments in relation to a number of proposed revisions and updated guidance in the future Horizontal Guidelines.

I. General comments – Standardisation Agreements

As a preliminary matter, Ericsson notes that the European Commission itself, alongside a number of other competition agencies, is already embarking on a comprehensive program that may result in changes to the standards essential patents ("SEP") licensing framework.

In particular, the European Commission has recently published a call for evidence and a public consultation on SEPs, targeted towards a number of topics relating to predictability, transparency and efficiency in SEP licensing. The call for evidence is part of the Commission's 2020 Action Plan on Intellectual Property and builds on the Commission's 2017 Communication "Setting out the EU approach to Standard Essential Patents," the activities of the SEPs Expert Group and a number of studies related to standardisation and patents.[1]

The Commission's policy developments in this area run parallel to initiatives or court developments in other jurisdictions, in particular in the United Kingdom, Japan and the United States.[2]

Many of these initiatives zoom in on SEP licensing related matters. The Horizontal Guidelines however, as their name suggests, are focused on horizontal scenarios and thus are primarily aimed at standards development organisations ("SDOs") where market players interact; they are meant to provide guidance to SDOs under article 101 TFEU thereby focusing on the development and deployment of the standards. They are therefore not concerned with the unilateral licensing practices of any specific SEP holder neither with the concrete evaluation of FRAND terms and conditions. Ericsson is concerned that introducing new elements in the Horizontal Guidelines that relate to the assessment of FRAND terms and conditions, goes beyond the scope of the guidelines and SDOs activities and, in addition, is inconsistent with other normative guidelines such as the enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct by dominant undertakings.[3]

On the other hand, and pending other legislative developments, Ericsson would welcome additional guidance in the Horizontal Guidelines on the treatment of "Special Interest Groups" (SIGS) in the context of standard development organizations ("SDOs").

Ericsson further submits that more evaluation and clarity is needed before the introduction of Collective Licensing Negotiations Groups ("LNGs") into the Horizontal Guidelines can be considered. It should be noted that the guidelines only included a section on standardisation agreements after years of experience with the organisation and running of standard development organisations. Without proper and efficient guidance, LNGs may give rise to severe competition risks.

Below, Ericsson briefly discusses each of these three topics, together with a number of comments on other topics.

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[1] See, generally, Standard Essential Patents (europa.eu)
[2] See, respectively https://www.gov.uk/government/consultations/standard-essential-patents-and-innovation-call-for-views/standard-essential-patents-and-innovation-call-for-views; https://www.gov.uk/government/consultations/retained-horizontal-block-exemption-regulations-rd-and-specialisation-agreements; "Good Faith Negotiation Guidelines for Standard Essential Patent Licenses" Established (meti.go.jp). In the U.S. litigation in the Court of Appeals for the 9th Cir. in the *Continental v. Avanci* matter is still pending.
[3] C 45/7 Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (24.2.2009) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=EN (defining refusal to supply as including refusal to grant access to an essential facility or a network).

II. Specific comments on draft revised Horizontal Guidelines

Below, Ericsson provides brief comments on a number of specific SEP-related topics addressed in the draft revised Horizontal Guidelines.

a. Licensing Negotiation Groups

In paragraph 312 of the draft revised Horizontal Guidelines, the Commission proposes to add a reference to Licensing Negotiation Groups (“LNGs”). The addition of LNGs to the revised chapter of the Horizontal Guidelines dealing with joint purchasing agreements seems to be based on the (erroneous) proposition that LNGs display very similar features as conventional joint purchasing agreements. There are, however, many differences that set LNGs apart from conventional joint purchasing agreements, and many of these differences have a material impact on the potential applicability of the Horizontal Guidelines.

Two examples to help demonstrate this. First, a SEP license agreement is typically negotiated when the implementer is already using the patented technology. Therefore, the negotiation dynamic is very different from that of a traditional purchase agreement where the goods are typically only delivered *after* the parties reached agreement on price, quantity and other material terms and conditions. In the event there is no agreement on the purchase price in such scenario, the goods are not delivered and thus time to market is lost. Paragraph 343 of the draft revised Horizontal Guidelines further highlights this point by referring to the possibility for a “*joint purchasing arrangement [to] threaten suppliers to abandon negotiations or to stop purchasing temporarily unless they are offered better terms or lower prices. Such threats are typically part of a bargaining process and may involve collective action by purchasers when a joint purchasing arrangement conducts the negotiations*.”

This is very different from the dynamic in SEP license negotiations; if patent owner and implementer (who infringes the SEPs) do not agree, then the patent owner has to go to court to try to have his rights respected. This means that, from a cash flow and commercial perspective, the patent owner will in such case typically have i) no licensing revenue and ii) more costs related to the litigation (most of which it will not recuperate), whilst at the same time the infringer using the SEPs will typically have no royalty payment burden as there is no license agreement in place.

Second, in the SEP context the patent owner can seek and enforce injunctions against an unwilling licensee in accordance with the procedure set out by the CJEU in the Huawei/ZTE case. It is unclear what, if any, role the LNGs will play in that procedure and whether or not the steps taken towards or by the LNGs are directly imputable to the individual LNG members (who infringe the SEPs by implementing the standardised technology). Given the time sensitive nature of patents and licenses, and the negotiation dynamics indicated above, this question needs to be carefully considered and clarified before LNGs can be considered in the safe harbour from antitrust scrutiny. Without such clarity LNGs could be used to further amplify the problem of hold-out, recognised by courts in Europe and in paragraph 470 of the revised draft Horizontal Guidelines.

Ericsson is very skeptical that LNGs may readily give rise to lower transaction cost and other efficiencies. In fact, Ericsson believes that LNGs are likely to serve as collusive devices that may be used to delay, complicate licensing discussions and frustrate the Huawei/ ZTE licensing framework. Put differently: LNG’s may make it much harder for SEP owners to sue implementers for infringements in situations where an injunction would otherwise be warranted and explicitly permitted by under the Huawei / ZTE doctrine. In addition, the fact that LNG members may compete on downstream markets, or represent a large proportion of demand, heightens the competition law risks.

We note that even if LNGs were to generate some minimal transaction cost savings, and there is nothing in the proposal to suggest that is the case, such cost saving alone would not justify a price-fixing agreement created by the LNG. Otherwise, competing buyers (or sellers) that purchase (or sell) inputs through bilateral negotiations could avoid by-object condemnation for price fixing by merely using a common agent. European competition law should not permit that kind of cover for price fixing.

Furthermore, even if LNG members were facing counterparties that possess market power in licensing negotiations, which widespread holdout realities demonstrate they are not, competition laws do not permit parties to engage in anticompetitive conduct to create “more equal footing.” “Countervailing market power” is not a cognizable justification for anticompetitive collusion, including buyer-side price fixing. In other words, LNG proponents’ flawed countervailing market power argument should not allow them to escape by-object antitrust violation condemnation.

We also note the important difference between SEP patent pools and LNGs. A patent pool that covers a significant portion of relevant SEPs for an IoT vertical provides transaction cost efficiencies by combining *complementary* patents, without enhancing market power. Conversely, LNG participants would simply agree to one maximum price and other material terms and conditions that the group is willing to accept in principle. It is not clear whether the LNG participants would be required to actually accept the jointly negotiated terms and conditions or if they would be free to use those terms instead as a ceiling for their own follow-on individual negotiations. Such a “heads I win, tails you lose” strategy is designed to gain bargaining leverage, not resolve disputes. [4]

In sum, in light of the ambiguous effects on competition and the absence of any meaningful enforcement practice to date, such initiatives require careful assessment.[5] Accordingly, Ericsson respectfully, but strongly requests the Commission to omit the reference to LNGs from draft paragraph 312, and to consider on a case-by-case basis initiatives by smaller implementers to join in a LNG. Ericsson is of the opinion that experience with such individual initiatives are a good way to consider, over time, the potential addition of LNGs to the Horizontal Guidelines, albeit with sufficient and robust safeguards against potential abuses or lack of clarity that may benefit bad faith users of the SEP licensing and FRAND system.

b. Access to the standard

As already set in its 30 September observations, Ericsson notes the current debate about where in the supply chain licensing should or should not take place. It is recommended that the Horizontal Guidelines remain neutral on this point, thereby allowing for SDOs to address this issue in their respective IPR policies.

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[4] Apple has pursued a similar strategy in bilateral negotiations by asking a court to rule on a breach of FRAND claim and then refusing to be bound by the court’s FRAND determination. *Apple Inc. v. Motorola Mobility, Inc.*, 2012 U.S. Dist. LEXIS 187878, *10-11 (W.D. Wisc. Nov. 8, 2012) (“Perhaps it should have been evident earlier in the case that Apple was seeking only a ceiling on the potential license rate that it could use for negotiating purposes, but it was not. This became clear only when Apple informed the court…that it did not intend to be bound by any rate that the court determined. That meant the court would determine what it believed to be a fair, reasonable, and non-discriminatory rate for a license…but Apple would pay that rate only if it was the rate Apple wanted.”)

[5] Suggestions have been made, in particular by the SEP Expert Group, that LNGs may be beneficial. See Group of Experts on Licensing and Valuation of Standard Essential Patents, “SEPs Expert Group”, page 168. However, as SEP licenses must comply with FRAND principles, the “joint purchase of SEP licenses may not be readily comparable to the purchase of other inputs.

While the revised draft Horizontal Guidelines stress that SDOs may adopt different IP policies (paragraph 476), the same draft revised Guidelines, in particular paragraphs 482 and 491, may give rise to attempts to interpret them differently as has been the case in the recent past. Hence, Ericsson strongly suggests that the Commission amend the draft text in accordance with the above by deleting from paragraph 482 the mention “to all third parties", and from paragraph 491 the mention of the word “all” that was added before “members”.

c. Special Interest Groups and Participation

Paragraphs 496 *et seq.* of the draft revised Horizontal Guidelines discuss situations in which Ericsson already suggested that additional guidance would be appropriate in relation to “Special Interest Groups” (SIGs) composed of SDO members that operate with restricted membership (sometimes secretly) to manipulate consensus-based standards-development activities in ways that may harm competition, similar to how abuse of the standard-setting process has been found to harm competition in other contexts,[6] but notes that the revised draft Horizontal Guidelines do not offer such guidance. Ericsson suggests that where members of such SIGs collectively can and do exercise effective control or influence (“dominance”) over the standards-development process, such collusive conduct may well give rise to concerns under Article 101 TFEU. Ericsson suggests that the final text of the Horizontal Guidelines explicitly discusses this scenario.

In relation to participation in SDO activities, Ericsson also points out that paragraph 478 of the revised draft Horizontal Guidelines is drawn too narrowly as it refers to the participation of “competitors in the market or markets affected by the standard.” See in this respect also paragraph 507 of the revised draft Horizontal Guidelines. Ericsson submits that any party who has a legitimate interest in the standard work and who can provide added value to the work of the SDO at issue should in principle be allowed to participate.

Finally, the adoption of the IPR Policies of SDOs, which provide the basis for participation in the standards development process, should similarly be done pursuant to open, transparent and consensus-based procedures to ensure that the interests of all interest groups are accounted for.

d. The Value of Intellectual Property

The draft revised Horizontal Guidelines seek to provide more elements for evaluating whether a proposed licensee fee is FRAND. Ericsson submits that it would not be appropriate to lay down rules on the specific methodologies that should be relied upon to conduct the assessment whether a license rate is FRAND; the task to evaluate FRAND should in principle be left to the competent courts and tribunals in the event of a dispute.

e. Maximum Aggregate Royalty Rate

Paragraphs 487 and 500 of the revised draft Horizontal Guidelines refer to disclosure of “aggregate royalties for relevant IPR” and “a maximum accumulated royalty rate by all IPR holders”. Footnote 297 states that “standard development organizations could take an active role in disclosing the total maximum stack of royalty for a standard.”

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[6] *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 500 (1988).

It is, however, not clear if this means disclosure of the individual views of individual members of the SDO, or if is directed at a statement or policy of the SDO as to what the aggregate royalty rate should be.

Further, the text of footnote 297 stands in sharp contrast with the text of footnote 283 which states that "*standard development organisations are not involved in the licensing negotiations or resultant agreements*" and with the practice of the European SDOs not to get involved in these matters.

In this regard the website of the European Telecommunications Standards Institute (ETSI) explicitly states: "*It is reiterated that specific licensing terms and negotiations are commercial matters between the companies and shall not be addressed within ETSI. The basic principle of the ETSI IPR regime remains FRAND with no specific preference for any licensing model.*"[7].

Accordingly, Ericsson recommends that the Guidelines be clarified in this respect or that these references are removed from the text of the revised draft Horizontal Guidelines.

[7] See https://www.etsi.org/intellectual-property-rights. See also ETSI Press Release, ETSI'S Director General issues public statement on IPR Policy (Sophia Antipolis, 3 December, 2018) https://www.etsi.org/newsroom/news/1458-etsi-s-director-general-issues-public-statement-on-ipr-policy.