NOKIA

COMMENTS ON THE DRAFT REVISED HORIZONTAL GUIDELINES

Introduction

Nokia is grateful for the opportunity to provide further input to the European Commission (**Commission**) in the context of the review of the Horizontal Block Exemption Regulations (**HBERs**) and the draft revised Horizontal Guidelines (**Horizontal Guidelines**).

At the outset Nokia wishes to commend the Commission on its commitment to an evidence-based assessment and its open and constructive approach to the review process.

Nokia contributed to both the Evaluation and Impact Assessment phases of the review process, responding to the initial (6 November 2019 - 12 February 2020) public consultation; the Inception Impact Assessment[1]; the subsequent (13 July 2021 - 05 October 2021) public consultation;[2] and the targeted questionnaire on 'standardisation agreements'.

This submission sets out Nokia's comments on the text of the draft revised Horizontal Guidelines, specifically Chapter 7 (concerning 'standardisation agreements')[3] and the relevant parts of Chapter 4 (on 'purchasing agreements'). Where applicable, we also refer to the accompanying Press Release,[4] Explanatory Note,[5] and Expert Report on *Horizontal Guidelines on purchasing agreements: Delineation between by object and by effect restrictions.*[6]

Nokia is pleased to note that the Commission seized the opportunity presented by its review to recognise that FRAND is a two-way street and acknowledge the problem of hold-out. Nokia also welcomes the continued focus on effective access to standardised technology. Nonetheless, there are a number of residual concerns with regards to the revised draft Horizontal Guidelines, including the scope of Chapter 7, and the inclusion and assessment of so-called licensing negotiation groups (**LNGs**) in Chapter 4.

About Nokia

See https://www.nokia.com/about-us/.

Nokia is a leading developer, and a trusted supplier, of telecommunications networks equipment and services. Nokia is both a major inventor - Nokia invested over €4bn in R&D in 2021 alone - and a licensee of other companies' technologies. Nokia must therefore balance its need to obtain fair and reasonable returns for the R&D it contributes to open standards, with its need to develop and sell network equipment that implements these standards. The

[1] See https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13059-Horizontal-agreements-between-companies-revision-of-EU-competition-rules/F2661347_en.

[2] See https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13058-Horizontal-agreements-between-companies-revision-of-EU-competition-rules/public-consultation_en.

[3] The proposed separation of the existing Chapter 7 into two distinct Chapters – one on standardisation agreements (new Chapter 7) and one on standard terms (new Chapter 8) is useful and provides greater clarity for businesses.

[4] See https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1371.

[5] See https://ec.europa.eu/competition-policy/document/download/9cc624ba-9afc-4685-88ef-a9b4e1da12cf_en.

[6] See https://ec.europa.eu/competition-policy/document/download/5b6ac519-dddf-471d-ae07-c30242cef815_en?filename=kd0722013enn_purchasing_agreements.pdf.

majority of Nokia's revenue stems from selling and supporting systems based on standardised technologies.

Our dual role, as both a developer and implementer of open standards, gives Nokia a unique and balanced perspective on issues associated with the fair, reasonable and non-discriminatory (**FRAND**) licensing of standard essential patents (**SEPs**). We license our cellular patents that have been incorporated in the 2G-5G standards on FRAND terms in accordance with the IPR policies of the relevant standard development organisations (**SDOs**) in a growing number of sectors/industries – thereby ensuring fair and effective access to our technologies for all.[7]

A Balanced Approach

FRAND: A Two-Way Street

Standardisation works because innovators, such as Nokia, offer technologies on the basis that they will be able to receive FRAND royalties. If this fundamental concept breaks down, the risk is not only to investment in R&D, but also to the ability and incentives to participate in open standards development. Without innovator participation, standards will not improve or progress. Open standards (where anyone can contribute, and everyone has access) would likely be replaced by proprietary technology solutions from global tech giants.

Nokia is therefore pleased to see that this balanced approach is now acknowledged and reflected in paragraph 484 of the revised draft Horizontal Guidelines, which makes clear not only that: "*FRAND commitments are designed to ensure that essential IPR protected technology incorporated in a standard is accessible to the users of that standard on fair, reasonable and non-discriminatory terms and conditions*", but also that "*At the same time, FRAND commitments allow IPR holders to monetise their technologies via FRAND royalties and obtain a reasonable return on their investment in R&D which by its nature is risky*", which "*can ensure continued incentives to contribute the best available technology to the standard*".

Hold-Up vs Hold-Out

Open standards mean that implementers have access to, and can use and profit from, SEPs without concluding a FRAND licence, accordingly 'hold-out' is a significant issue. In contrast to the theoretical concerns regarding hold-up by SEP holders,[8] evidence of (unilateral and

[7] Through licensing, Nokia enables others to benefit from our patented innovations and leading cellular SEP portfolio. Other companies can use these inventions without having to make their own substantial investment in R&D. As a result of bilateral negotiations under Nokia's patent licensing programmes, Nokia has around 200 licensees.

[8] Numerous commentators have observed that there is no evidence of hold-up. For example, when considering the "*Hold-Up versus Hold-Out*" debate, the January 2021 Report of the Group of Experts on Licensing and Valuation of Standard Essential Patents, referred to "*theoretical papers*" on hold-up, observing that: "*These papers have been criticized for various reasons. In particular, several scholars have noted the lack of empirical evidence supporting the hold-up theory*" and that "*Some scholars have argued that the opposite risk of hold-out may constitute a more serious problem.*" See: https://ec.europa.eu/docsroom/documents/45217/attachments/1/translations/en/renditions/native.

coordinated) hold-out is well-documented, in particular in the case-law of various jurisdictions, notably in the national courts across Europe.[9]

Implementers who engage in efficient infringement tactics use technology without contributing to the substantial R&D costs incurred by innovators years in advance of a standard being adopted. This undermines the ability and incentives of innovators (who develop cutting-edge technologies that are openly available for integration into millions of connected products and services) to invest in critical R&D. This has significant consequences for innovation and competition. It also threatens the EU's technological sovereignty and strategic autonomy and the position of the EU as a global standard setter.

Against this background, Nokia welcomes the inclusion and express recognition of hold-out in paragraph 470 of the revised draft Horizontal Guidelines, which notes that the "*situation may also arise if licensing negotiations are drawn out for reasons attributable solely to the user of the standard. This could include for example a refusal to pay a FRAND royalty fee or using dilatory strategies ("hold-out").*"

Coordinated hold-out[10] is a clear competition issue, and unilateral hold-out distorts competition between implementers of standardised technology. Perversely, it gives willful infringers an unfair competitive advantage vis-à-vis implementers who respect IPR and engage in good faith negotiations to accept licences on FRAND terms.

In addition, hold-out is also an important factor in understanding the market dynamics - i.e., the competitive relationship between SEP holders and implementers of standardised technology - and for the assessment of market power. In practice, market power can lie with implementers. Any assessment should examine existence and ability to exert countervailing buyer power. Hold-out also impacts the upstream future markets for innovation because it makes recovery on R&D investments less certain and more expensive to obtain.

Effective Access to Standardised Technologies

The revised draft Horizontal Guidelines remain concerned with effective access to standardised technologies (i.e., 'access for all') as enshrined in, and consistent with, the access-based IPR policies of SDOs, including ETSI.

In this regard, the Horizontal Guidelines make clear that standardisation agreements should provide access to standardised technology and that FRAND commitments guarantee effective access to standards.

For example, paragraph 466 refers to "*prevention of effective access to the standard*" and paragraph 470 observes that "*standardisation may lead to anti-competitive results by*

[9] See, for example, 'Efficient infringement of SEPs - IP Europe' available at: https://ipeurope.org/blog/efficient-infringement-of-seps/ and 'Unwilling SEP Licensees: Hold-out Strategies - IP Europe' available at: https://ipeurope.org/position-papers/unwilling-sep-licensees-hold-out-strategies/. See also the 4iP Council Case Summaries on hold-out, available at: https://caselaw.4ipcouncil.com/search/tag/hold-out.

[10] See, for example, 'Is the smart meter industry engaged in coordinated hold-out? - IP Europe', available at: https://ipeurope.org/blog/is-the-smart-meter-industry-engaged-in-coordinated-hold-out/.

preventing certain undertakings from obtaining <u>effective access to the results of the standard development process</u> (that is to say, the specification and/or the essential IPR for implementing the standard)" and paragraph 477 underlines that "*standardisation agreements which … **<u>provide access</u>** to the standard on **<u>fair, reasonable and non-discriminatory (FRAND) terms</u>** will normally not restrict competition within the meaning of Article 101(1)*".

The Horizontal Guidelines reflect the objective of universal access to, and broad implementation of, standards. They do not, nor are they intended to, dictate how licenses should be granted for that access as long as access is effective – the issue of implementation is to be determined on a case-by-case and industry-by-industry basis.

Effective access to the standard does not require, and should not be equated with, 'access to a licence'.

As it does with the determination of licensing rates, the Horizontal Guidelines should not mandate any particular licensing model and should limit itself to advocating for effective access to the standard for all market participants.

Certain implementers have sought to misconstrue the reference to licensing "*essential IPR to all third parties*" in paragraph 470 of the Horizontal Guidelines (formerly paragraph 285) as requiring SEP holders to license anyone who asks (i.e., 'license to all'). Such an interpretation is at odds with (1) the rest of the Horizontal Guidelines, which (as demonstrated above) are premised on access to standards; (2) the IPR Policies of SDOs;[11] (3) long-standing industry practice;[12] and (4) the laws of patent exhaustion (the same patent cannot be licensed at multiple levels of the value chain).

The issue of licensing in the supply chain has already been addressed by courts in Europe and other jurisdictions. Notably, the Mannheim Regional Court stated that Nokia, as a patent holder, has <u>the right to choose at which level of the supply chain to enforce its patents</u> and from whom to request licences and added that <u>competition law does not restrict such a right</u>.[13] Specifically, the Court considered that approaching only the end-device manufacturer for a licence was a reasonable approach. Likewise, in *Sharp v. Daimler*[14] the Munich Regional Court ruled that Sharp was "*not obliged to grant a licence to the suppliers. It must only grant them access to the standards affected by their SEPs*". The Court held that licensing at the

[11] See https://www.ipeurope.org/case-study/a-review-of-sdo-ipr-policies-do-they-require-component-level-licensing/.

[12] The approach of licensing at a single point in the supply chain (at the end-user level) is customary for mobile devices and has become the established model for SEP licensing across a variety of other sectors/industries, most recently in the automotive sector.

[13] Judgment of the Mannheim Regional Court of 18 August 2020 in Case ID: 2 O 34/19. A summary is available at: https://caselaw.4ipcouncil.com/german-court-decisions/lg-mannheim/nokia-v-daimler.

[14] Judgment of the Munich I Regional Court of 10 September 2020 in Case ID: 7 O 8818/19. A summary is available at: https://caselaw.4ipcouncil.com/german-court-decisions/lg-munich-district-court/sharp-v-daimler.

end-product level, combined with so-called have-made rights, provides component manufacturers legally secure access to standardised technology.[15]

Any suggestion that licensing at the end user device level restricts component suppliers' freedom to operate is misguided. Component suppliers can, and do, undertake R&D, manufacture their products, sell to all their customers, and provide repair and replacement services for intermediate products on the aftermarket. Moreover, research activities are covered by exemptions in national patent laws. This means that component suppliers do not need a SEP holder's consent to use SEPs for research purposes.

In addition, component manufacturers have all the consents that they need to operate under have-made rights. In any event, under *Huawei v. ZTE*[16] and national case law, component suppliers have no genuine fear that a court would grant an injunction against them: if a SEP holder does not first offer a willing implementer a licence on FRAND terms then the second limb of the *Huawei v. ZTE* test is not met. As such, licensing at the end-device level cannot be equated to a denial of access to standardised technology.

In the light of the above, and in order to provide legal certainty to companies, we would invite the Commission to clarify that the Horizontal Guidelines do not require licensing at all, multiple, or any particular levels of the value chain as long as effective access to the standard is secured for all market participants and delete the text "*to all third parties*".[17]

Scope of Chapter 7 of the Horizontal Guidelines

Announcing the current public consultation, Executive Vice-President Margrethe Vestager stated that: "*The revision of the Horizontal Block Exemption Regulations and Guidelines is an important policy project as it <u>clarifies for businesses when they can cooperate with rivals</u>.*"[18]

Similarly, the Explanatory Note accompanying the draft[19] indicates: "*The Horizontal Guidelines <u>provide guidance on</u> how to interpret and apply the HBERs and <u>how to self-assess compliance with Article 101(1) and Article 101(3)</u> of the Treaty for R&D and specialisation but also for other <u>types of horizontal cooperation agreements</u> that the HBERs do not exempt*", including "*purchasing, commercialisation, standardisation and standard terms agreements*".

[15] See also the *Unwired Planet v. Huawei* [2017] EWHC 711 (Pat).; the judgment of the Shenzhen Court in *Huawei Techs. Co. Ltd v. Samsung (China) Inv. Co., Ltd. et al.*, Y03 MC No. 840 (2016); *Nokia v. Daimler*, District Court (Landgericht) of Mannheim, judgment dated 18 August 2020, Case-No. 2 O 34/19; *Archos S.A. v. Koninklijke Philips N.V., NL*, District Court of The Hague, 10 February 2017, ECLI:NL:RBDHA:2017:1025; the judgment of the U.S. Court of Appeal for the Ninth Circuit in *Federal Trade Commission v. Qualcomm Inc*. 19-16122, 11 August 2020, and Case 20-11032 *Continental Automotive Systems Inc. v. Avanci LLC* (Court of Appeals for the 5th Cir., 28 February 2022) https://www.ca5.uscourts.gov/opinions/pub/20/20-11032-CV0.pdf.
[16] Case C-170/03 - *Huawei v. ZTE*, ECLI:EU:C:2015:477.
[17] The Commission should also consider making a consequential amendment by deleting the "*all*" that was inserted before "*members*" in paragraph 491.
[18] See https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1371 (emphasis added).
[19] See https://ec.europa.eu/competition-policy/document/download/9cc624ba-9afc-4685-88ef-a9b4e1da12cf_en (emphasis added).

As such, they are intended to "*promote competition and offer legal certainty to companies in the conception and implementation of their <u>horizontal cooperation agreements</u>.*"[20]

Equally, paragraph 1 of the Horizontal Guidelines makes clear that they "*aim to provide legal certainty by assisting undertakings in the assessment of their <u>horizontal cooperation agreements</u> under the Union competition rules …*".

Nevertheless, Chapter 7 of the revised draft Horizontal Guidelines appears to address conduct that is not properly within scope (i.e., it is not limited to the potential distortion of competition by agreements between undertakings in horizontal relationships). Notably, Chapter 7 refers to standardisation agreements involving parties in a vertical relationship.[21]

In addition, Chapter 7 of the revised draft Horizontal Guidelines contains (an increased number of) references to unilateral conduct and to potential abuse(s) of a dominant market position, which concern the interpretation and potential application of Article 102. For example, paragraph 470 discusses patent hold-up as a potential abuse of dominance. Footnote 270 states that "*high royalty fees can only be qualified as excessive if the conditions for an <u>abuse of dominant position</u> … are fulfilled.*"[22] Paragraph 487, indicates that: "*These Guidelines do not seek to provide an exhaustive list of appropriate methods to assess whether the royalty fees* ***are excessive or*** *<u>discriminatory under Article 102.</u>*" This statement appears to presume dominance/market power, contrary to paragraph 471, which confirms that "*there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power*" and "*the question of market power can only be assessed on a case by case basis*."

Chapter 7 is targeted at 'standardisation agreements'. Accordingly, its provisions should focus on participation in and contribution to standards, SDOs' governance and IPR policies, rather than focus on commercial practices, such as SEP licensing practices or bilateral SEP licensing negotiations. To that end, footnote 283 correctly and unequivocally observes that "*standard development organisations <u>are not involved in the licensing negotiations or resultant agreements</u>.*"[23] However, as noted above, the reference to licensing to all third parties in paragraph 482 of the revised draft Horizontal Guidelines is inconsistent with this position.

Likewise, as regards methods for determining royalties, while Nokia notes the statement in footnote 287 that "*the methods described* [in paragraph 487] *<u>are not exclusive</u> and other*

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[20] *Id*. at paragraph 5, emphasis added.

[21] See, in particular paragraphs 466 and 469.

[22] See also footnotes 278 and 282, which refer to the ruling of the Court of Justice in *Huawei v. ZTE* and the Commission's decision in *Case AT.39985 - Motorola*. Both of those cases concern unilateral conduct which would properly fall to be considered under Article 102.

[23] As noted above, as regards the scope of Chapter 7 of the Horizontal Guidelines, it is targeted at 'standardisation agreements' and should not therefore focus commercial matters/practices. In any event, the goal of ETSI is to create the best possible standards and it is structured to achieve that goal. It does not look at commercial matters and certainly does not have the competencies to determine aggregate royalty rates. Developing those competencies would undermine the task of creating the best possible standards.

methods reflecting the same spirit of the described methods can be used to determine FRAND rates",[24] we question whether it is appropriate for the Horizontal Guidelines to discuss valuation methods at all, particularly in circumstances where paragraph 488 "*emphasised … the possibility for parties to resolve their disputes about the level of FRAND royalty rates by having recourse to the competent civil or commercial courts or alternative methods of dispute resolution.*"

In the light of the above, the draft Horizontal Guidelines should be clarified to clearly recognise that Chapter 7 is focused on standardisation agreements and therefore does not deal with bilateral licensing negotiations, IP licensing models, and other commercial terms and arrangements. Arrangements involving parties in vertical relationships and unilateral conduct more generally is outside of its scope.

Ex Ante Disclosure of Maximum Royalty Rates

The revised draft Horizontal Guidelines continue to acknowledge correctly that "*any agreements to … jointly fix prices … of substitute IPR or technology will constitute restrictions of competition by object*."[25] However, amendments elsewhere in the text (specifically footnote 273,[26] paragraph 500,[27] and also footnote 297) indicate that standard development agreements providing for the *ex ante* disclosure of a maximum accumulated royalty rate by all IPR holders would not raise competition concerns.

As such, the revised draft Horizontal Guidelines equate jointly fixing a royalty cap with the unilateral *ex ante* disclosure of most restrictive licensing terms. However, as Nokia has explained previously,[28] setting a maximum total royalty rate is different, from a competition law point of view, than the unilateral setting by a SEP holder of individual *ex ante* rates or caps. While the latter reflects price competition between rivals, the former involves coordination of pricing/price-fixing between competitors, which raises grave concerns under competition law. This issue was addressed in a 2006 letter from Angel Tradacete Cocera of DG Competition to Karl Heinz Rosenbrock, the then Director General of ETSI.[29]

According to the letter, DG Competition considered that *ex ante* price negotiation based upon unilateral royalty disclosure had the potential to promote "*competition on the basis of both technology and price,*" but by contrast, the collective setting of a royalty cap "*risks negating the possible benefits of …* [a] *'pure' ex ante regime*." The letter observed that,

[24] See Nokia's response to question 62 of the targeted questionnaire on standardisation agreements. As Nokia explained, our valuation methods for FRAND licences start from the proposition that the valuation must reflect the value created by the standardised technology in the particular application being licensed. This proposition is central to the need to encourage investment in open standards. If valuations for technology contributions are not based upon the value being created, then the technology will be contributed to some other ecosystem or platform where the true value of the contribution can be realised.

[25] See paragraph 473 (which retains the language in paragraph 274 of the existing Guidelines).

[26] Footnote 273 provides that "*this paragraph should not prevent ex ante disclosures of … a maximum accumulated royalty rate by all IPR holders.*"

[27] Paragraph 500 has been revised to indicate that on an effects-based assessment the setting of a "*maximum accumulated royalty rate by all IPR holders … will not, in principle, restrict competition within the meaning of Article 101(1).*"

[28] See Nokia's response to the targeted questionnaire on standardisation agreements.

[29] See *Letter from the EC Competition DG on ETSI IPR Group Discussions*, ETSI GA/IPRR05(06)12 (22 June 2006). See also Nokia's response to the targeted questionnaire on standardisation agreements.

"*whereas a 'pure' ex ante regime has the potential to bring the price down to a competitive level through competition on the basis of price … a collective ex ante royalty cap regime … does not appear to allow for any such price competition*", and that, "*it would appear to precisely preclude and such price competition from occurring, since the price of each essential patent is fixed in advance …*".

In addition to contradicting DG Competition's previous statement/assessment, the related text in footnote 297 of the revised draft Horizontal Guidelines is at odds with other parts of the text. Insofar as the footnote states that "*standard development organisations could take an active role in disclosing total maximum stack of royalty for the standard*", it conflicts with footnote 283, which underlines that "*standard development organisations are not involved in the licensing negotiations or resultant agreements.*"[30] Also, determining and disclosing a total maximum royalty stack would necessarily require a 'top-down' approach to determining royalties. This runs counter to the amended text in footnote 287, which states that: "*the methods described here are not exclusive and other methods reflecting the same spirit of the described methods can be used to determine FRAND rates.*" [31]

Additional reasons why it would be not appropriate to set a maximum total royalty rate are addressed in detail in Nokia's response to the targeted questionnaire on standardisation agreements.

In these circumstances, in order to ensure a consistent approach (in the Horizontal Guidelines and with the Commission's previous competitive assessment), the Commission should consider removing the references to a maximum accumulated royalty rate and the total maximum royalty stack and reverting to/reinstating the original text.

Disclosure Expectations/Models

We note that changes have been proposed to the text concerning disclosure expectations (discussing 'disclosure models') in paragraphs 483 and 492 of the revised draft Horizontal Guidelines (paragraphs 286 and 298 of the existing Guidelines).

Regarding the revisions/additions to the existing text (notably in paragraph 286), these changes are inconsistent with how many SDOs currently address IPR disclosures and appear to run contrary both to the European Commission's transparency agenda and to comments the Commission has itself made to ETSI's IPR Special Committee. In addition, while specific disclosures are not necessary for and/or relevant to effective access to the standard, they would impose a significant (cost and administrative) burden on SDOs and SEP holders.

[30] As noted above, as regards the scope of Chapter 7 of the Horizontal Guidelines, it is targeted at 'standardisation agreements' and should not therefore focus commercial matters/practices. In any event, the goal of ETSI is to create the best possible standards and it is structured to achieve that goal. It does not look at commercial matters and certainly does not have the competencies to determine aggregate royalty rates. Developing those competencies would undermine the task of creating the best possible standards.

[31] See also paragraph 487.

As Nokia explained previously,[32] with the exception of situations where a patent holder expresses an unwillingness to license its IPR, it is not common practice for SDOs to seek the disclosure of specific IPR.[33] On the contrary, a large number of SDOs accept a one-off upfront broad general FRAND declaration covering all a member's essential patents to a standard as sufficient for their purposes, as this is all that is needed to ensure effective access to their standards (e.g., BBF, DVB, GSMA, IEEE, ISO/IEC/ITU, O-RAN Alliance, etc).

Specific disclosures are commonly only sought in circumstances where a member does not wish its FRAND declaration to apply to a particular patent it holds (so-called negative declarations). In such cases, it is important for this withholding of IPR to occur during the standard setting process so that the potentially blocking IPR may be worked around.

However, disclosures of specific patents that will be encumbered by a FRAND commitment are of no relevance to access to the technology[34] – although a few SDOs, such as ETSI, seek these based on a 'reasonable endeavours' obligation and some offer it as an option/alternative to a general declaration to patent owners[35] (e.g., IEEE and ISO/IEC/ITU).

In SDO's where it is common practice to incorporate new technologies into a standard, it is expected that contributions by members may be protected by a member's IPR. This is not a concern, providing that the member will give a FRAND declaration, even at a later stage (e.g., after finalisation of the standard) – which is nearly always the case.

As noted previously (and above), ETSI has an approach of seeking positive specific disclosures of IPR for inclusion in its database. One of the concerns expressed by the European Commission with ETSI's database is the risk of 'over declaration' of potentially essential patents. For ETSI, this is not a concern, as this ensures greater likelihood of access to its standards. However, over-declaration (or more accurately 'over-disclosure') is exacerbated by early disclosure (i.e., early in a standard's development), as there is less certainty over whether a patent or application will become essential to a standard.[36] Such certainty increases significantly once a standard has been finalised.

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[32] See, in particular, Nokia's response to the section on IPR disclosure requirements in the targeted questionnaire on standardisation agreements. See also Nokia's responses to questions 100-103 of the general questionnaire.

[33] This may be, in part, due to a lack of interest in such information or because of the administrative burden of keeping a database of such disclosures. Also, it may be recognised that disclosure of specific patents has limited value.

[34] Specific disclosures of IPR have no impact on the technical work in ETSI, as ETSI encourages the contribution of patented technology into its standards with the goal of developing the best technical solution. ETSI does not permit discussion on these patents in their technical committees, nor does it seek to design around them, unless there is an unwillingness expressed by a patent holder to license. Therefore the knowledge of specific patents is not required for the development of ETSI's standards. ETSI's primary objective is simply to obtain declarations that essential patents will be available on a FRAND basis so they will not be used to block the standard.

[35] Choosing only to make a specific disclosure/declaration, instead of making a general FRAND declaration, provides patent owners assurance that their patents will not become subject to FRAND licensing commitments without their knowledge.

[36] The disclosure obligation, especially in ETSI, is related to patents which "*may be or may become*" essential. Accordingly, disclosures are inherently over-inclusive, and some over-declaration is a natural and indeed necessary state of affairs. That being said, we are aware of some companies which disclose patents without a careful analysis of whether or not they are likely to become essential.

In these circumstances, and mindful of the Commission's desire to improve transparency in ETSI, in 2019 Ericsson, Nokia and Siemens jointly proposed a set of principles for improving transparency and reducing over-declarations in ETSI during ETSI's IPR Special Committee meeting number 32, whereby a general declaration would be provided upfront and then followed by specific IPR disclosures once the standard was stable,[37] thereby avoiding any need to and cost of updating disclosures. In a follow up meeting,[38] the Commission representative gave a presentation outlining its view on improving transparency in ETSI that accorded to these same principles.

Unfortunately, the new/additional text proposed in paragraph 483, if followed by SDOs, would go against the Commission's own transparency agenda by pushing for early disclosures of IPR thereby increasing the number of over-declarations. It would also place significant and disproportionate cost burdens on SDOs[39] and their members,[40] especially where there are no commensurate benefits for third parties.[41] It also risks competition law complaints being brought, pointlessly, for a mere failure to disclose; further exacerbating costs of licensing disputes and over-declaration practices.

In the light of the above, Nokia would respectfully request that the Commission does not adopt the proposed revisions/additional text in paragraph 483 (and the proposed consequential amendments to paragraph 492) and the existing text (in paragraph 286 of the current Horizontal Guidelines) is retained in its current, unamended form.

Discrimination in Standard Development Agreements

Paragraph 499 of the draft Horizontal Guidelines notes that "[a]*ny standard development agreement <u>which clearly discriminates</u> against any of the participating or potential members could lead to <u>a restriction of competition</u>*". In highlighting this concern, paragraph 499 provides that "*if a standard development organisation <u>explicitly</u> excludes upstream only undertakings (that is to say, undertakings not active on the downstream production market), this could lead to an exclusion of potentially better upstream technologies*", however, this is unduly prescriptive as it would not capture instances of implicit, *de facto* discrimination by SDOs that could restrict competition (e.g., in cases where an SDOs' royalty-free licensing requirements prevent royalty-dependent innovators from being compensated for the fair value of the IPR they contribute to the standard). In these circumstances, it would be useful

[37] See ETSI/IPR(19)32_004.

[38] ETSI IPRSC 34.

[39] Many SDOs are not well set up to handle these types of disclosures, which may need extensive database and IT resources and would certainly give rise to additional administrative burden and cost. Also, expecting SDOs to require their members to disclose specific patents through the Horizontal Guidelines would have unpredictable and potentially detrimental consequences, harming standardisation efforts both in and outside of the EU. It would lead to an uneven playing field internationally.

[40] Making specific disclosure of IPRs in each and every SDO would place a significant burden, in terms of costs, resources and time, in order to review each and every standard produced by each of these organisations, which may number in the thousands each year.

[41] As noted above, specific disclosures are not necessary for and/or relevant to effective access to the standard. Equally, specific disclosures do not in themselves impact the licensing of essential IPR although they may be useful to get a sense of the general patent landscape.

for paragraph 499 to refer to the "explicit *or de facto*" exclusion of upstream only undertakings.

Inclusion of Licensing Negotiation Groups in Chapter 4

Nokia has considerable experience of licensing its cellular patents directly through its licensing programmes, following bilateral negotiation. Nokia is also a member of the Avanci patent pool. Yet, as we explained in our response to question 54 of the targeted questionnaire, Nokia has not been approached by either potential licensees that are part of a group seeking to negotiate licensing terms, directly, or an entity/entities pursuing negotiations on behalf of a group/groups of potential licensees.

We are therefore concerned that paragraph 312 of the revised draft Horizontal Guidelines appears to suggest that there are already examples of so-called LNGs in operation. Absent any examples, or experience of LNGs in practice, we question whether it might be premature, at this stage, to include LNGs in the revised Draft Horizontal Guidelines.

As regards the relevant framework to assess LNGs,[42] consistent with the conclusion in the Expert Report,[43] the draft Horizontal Guidelines proceed on the basis of an effects-based analysis. Neither the Expert Report nor the draft Horizontal Guidelines address the competition concerns raised by LNGs (notably those identified by the SEPs Expert Group, and other stakeholders) that LNGs would: (1) offer additional (coordinated) hold-out opportunities for implementers; (2) effectively operate as a buyers' cartel; and (3) enable implementers of standardised technology to engage in anti-competitive information exchange and/or collusion. Equally, notwithstanding the express recognition of hold-out in paragraph 470 of the Horizontal Guidelines, the Commission (and/or its Experts) also did not consider the growing body of case law from courts across Europe and other evidence highlighting the variety of hold-out strategies adopted by certain implementers of standardised technologies.

As regards an effects-based analysis of LNGs, paragraph 323 underlines that they "*must be analysed in their legal and economic context with regard to their actual and likely effects on competition*", emphasis added, and that the "a*nalysis of the restrictive effects on competition generated by a joint purchasing arrangement must cover the negative effects on … the purchasing market or markets*".

However, the Horizontal Guidelines do not appear to consider the distinction between joint purchasing of goods or services and SEP licensing, where the nature of open standards means that implementers have access to, use, and profit from standardised technology without first having to take a licence in the knowledge that the worst-case scenario would be to have to

[42] See also paragraph 19 of the Explanatory Note, available at: https://ec.europa.eu/competition-policy/document/download/9cc624ba-9afc-4685-88ef-a9b4e1da12cf_en.
[43] See Expert report on *Horizontal Guidelines on purchasing agreements: Delineation between by object and by effect restrictions* by Richard Whish and David Bailey.

take a license on FRAND terms if their hold-out strategy fails.[44] In addition, the Horizontal Guidelines do not appear to consider both that the significant market/buyer power of many implementers is such that a joint purchasing arrangement – i.e., an LNG - is likely to give rise to considerable restrictive effects on competition within the meaning of Article 101(1)[45] or that the FRAND requirement on SEP holders and implementers' immediate access to the technology even without a license heightens, not mitigates, this risk and dramatically limits any possibility for SEP holders to exert any form of market power.

Importantly, when discussing market power, paragraph 329 does not appear to consider the FRAND context and, in particular, the fact that the 'non-discriminatory' aspect of the FRAND commitment could mean that, even where participants in an LNG represent 15% or less of the relevant market(s), in practice the terms negotiated with the LNG could have a much broader impact. In these circumstances, we question whether it is appropriate for the 15% market share 'safe harbour' to apply to LNGs.

As regards the potential for a "*collusive outcome*", the discussion of the *bargaining process*" in paragraph 343 does not appear to take account of: (1) the fact that implementers have access standardised technology without first having to take a licence; and (2) evidence of hold-out by bad-faith implementers, including co-ordinated hold-out, which LNG would dramatically facilitate (not that such conduct be difficult to implement already).

Although paragraph 332 acknowledges the risk that a joint purchasing arrangement "*could discourage investments or innovations benefitting consumers*", it does not seem to consider the impact of hold-out on the ability and incentives of SEP holders to continue to invest in risky[46] R&D for future technologies and to participate in open, collaborative and consensus-driven standards development.

In addition, and importantly, the potential interplay between the "*bargaining process*" and *Huawei v ZTE* framework is unclear. Would the *Huawei v ZTE* framework only apply to bilateral negotiations after LNG negotiations have failed? If so, LNGs would dramatically increase the length and burden of IP licensing negotiations and enforcement. Likewise, given the significant concerns that LNGs would be used as a vehicle for coordinated hold-out, it would be useful to clarify that paragraph 470, which refers to hold-out as conduct "*attributable solely to the user of the standard*", would include 'unwillingness'/conduct by an LNG, and/or the word "*solely*" would be deleted from the text.

[44] This issue is not addressed or even considered in the 'Expert report on Horizontal Guidelines on purchasing agreements: Delineation between by object and by effect restrictions' by Richard Whish and David Bailey – see kd0722013enn_purchasing_agreements.pdf (europa.eu).

[45] At present paragraph 336 of the Draft Horizontal Guidelines merely indicates that "*the analysis of whether the parties to a joint purchasing arrangement have buying power, the number and intensity of links (for example, other purchasing agreements) between competitors in the purchasing market are relevant*". This does not reflect the specific factors/features that are relevant to the assessment of the buying power of a group of potential licensees of SEPs.

[46] As paragraph 484 of the Draft Horizontal Guidelines observe, "*FRAND commitments allow IPR holders to monetise their technologies via FRAND royalties and obtain a reasonable return on their investment in R&D which by its nature is risky. This can ensure continued incentives to contribute the best available technology to the standard.*"

Finally, given the increased hold-out risks, certain commentators have questioned whether LNGs would deliver (sufficient) efficiencies/cost-savings in practice.[47]

In the light of the above considerations and open questions, the Commission may wish to consider whether it is appropriate, at this stage, for LNGs to be included in Chapter 4 of the Horizontal Guidelines, in particular absent more detailed guidance.

Conclusion

We once again commend the Commission on its efforts reviewing the HBERs and Horizontal Guidelines. We are grateful for the Commission's attention to this important exercise and, in particular, for providing the revised draft text of the Horizontal Guidelines.

As regards Chapter 7 of the Horizontal Guidelines, it is important that this part continues to provide a useful and pragmatic benchmark for collaborative industry standardisation activities where IPR is involved and that they encourage clear, transparent and balanced IPR policies, recognising the important and delicate balance between (1) ensuring effective access for those wanting to use standardised technology covered by essential IPR and (2) providing FRAND compensation for SEP holders.

In these circumstances, Nokia is pleased to see that this balanced approach is now acknowledged and reflected in paragraph 484 and welcomes the explicit recognition of and reference to hold-out in paragraph 470. The Horizontal Guidelines should continue to focus on and advocate for effective <u>access</u> to standards, which should not be equated to access to a licence. Accordingly, the reference "*to all third parties*" in paragraph 470 should be deleted and the consequential amendment be made to paragraph 492.

More generally, Chapter 7 should not address bilateral licensing negotiations, IP licensing models, and other commercial terms. Equally, it should not include a discussion of conduct that falls outside the scope of the Horizontal Guidelines, e.g., unilateral conduct and standardisation agreements involving parties in a vertical relationship.

When finalising the text of Chapter 7, the Commission should:

- Delete the word "solely" from paragraph 470 as follows: "*situation may also arise if licensing negotiations are drawn out for reasons attributable ~~solely~~ to the user of the standard. This could include for example a refusal to pay a FRAND royalty fee or using dilatory strategies ("hold-out").*"
- Remove the references to a maximum accumulated royalty rate and the total maximum royalty stack and revert to/reinstate the original text.
- Delete the proposed revisions/additional text in paragraph 483 (and the proposed consequential amendments to paragraph 492) and retain the existing text (in paragraph 286 of the current Horizontal Guidelines) in its current, unamended form.

[47] See, for example, https://www.4ipcouncil.com/research/economic-case-against-licensing-negotiation-groups-internet-things / https://academic.oup.com/antitrust/advance-article-abstract/doi/10.1093/jaenfo/jnac006/6571001.

- Insert "*de facto*" in paragraph 499 as follows: "*if a standard development organisation explicitly* *or de facto* *excludes upstream only undertakings (that is to say, undertakings not active on the downstream production market), this could lead to an exclusion of potentially better upstream technologies*"

Nokia also respectfully invites the Commission to reconsider whether it is appropriate, at this stage, for LNGs to be included in Chapter 4 of the Horizontal Guidelines, in particular absent more detailed guidance to prevent LNGs from becoming vehicles for hold-out strategies.

In terms of next steps, Nokia hope that our input will assist the Commission in its assessment of the Horizontal Guidelines. We remain available for any discussions or further input that would be of assistance to the Commission. Nokia would be pleased to engage further on the points addressed in these comments as the Commission concludes its review and finalises the draft text of the HGs before they enter into force on 1 January 2023.