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European Commission

Directorate-General for Competition

Unit A.1 – Antitrust Case Support and Policy

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Response to consultation on the Draft Horizontal Guidelines

Sisvel appreciates the European Commission's (the Commission) broad and inclusive consultation on the proposed revisions to the regulatory framework for horizontal cooperation agreements and welcome the opportunity to comment on the recently published draft of the Horizontal Guidelines.

Sisvel prides itself as a world leader in fostering innovation and managing intellectual property, with 40 years of managing successful patent portfolios related to various standards that incorporate ICT technology. Sisvel's business model is based on working with only high-quality patents, key to ensure the success of the licensing programs that the Group develops (patent pools, joint licensing programs and other form of IP aggregations). Sisvel believes that managing intellectual property means supporting innovation. This can only be done successfully starting from a deep understanding of the technology and the markets. It is our belief that through efficient and effective IP licensing, the necessary incentives for R&D are created, fostering a self-sustaining cycle that can fund R&D activities.

It is in this regard that we take particular interest in the proposed revisions to the draft Horizontal Guidelines which affect the intellectual property licensing ecosystem, especially in relation to Standard Essential Patents (SEPs).

In its explanatory note the Commission explains that following its earlier evaluation on whether the regulatory framework for horizontal cooperation agreements needed to be revised, there was a realization that the current framework is not fully adapted to economic and social developments and that various provisions were rigid, complex, unclear, difficult to interpret and that there is an uneven level of legal certainty. We do acknowledge that there are revisions to the draft Horizontal Guidelines, one of which we particularly highlight in our discussion below, that is a vital first step towards addressing some of the major challenges facing licensing negotiations involving SEPs.

There are however some proposed revisions to the Horizontal Guidelines that would in fact add to the major challenges that the Commission has identified in the current regulatory framework. These proposed revisions broadly fail to appreciate the nuances of intellectual property, particularly SEPs, as 'products' in the context of the provisions on purchasing agreements. These revisions would exacerbate the current imbalance faced in the SEP licensing

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ecosystem and contribute towards moving further away from achieving a level playing field between the various stakeholders in the licensing ecosystem.

We discuss our main concerns below.

1. Paragraph 470 – Acknowledgement of hold-out

We note that the Commission has acknowledged the anti-competitive effect of hold-out conduct. It is now provided in the draft Horizontal Guidelines that competition concerns could 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”)*.

Sisvel appreciates and supports the recognition by the Commission of the competition concerns arising in relation to hold-out conduct by technology implementers who are unwilling to engage in good faith negotiations with the intention of concluding a license on FRAND terms. This is a crucial first step in terms of aligning the Commission’s policy position with the findings of various Courts in Europe that are increasingly taking note of and addressing the various strategies employed by unwilling implementers to unnecessarily draw out licensing negotiations or refusing to engage at all in any licensing negotiations.¹

It is certainly an important development on the journey to achieving balance in the SEP licensing ecosystem and to ensure there is a level playing field between the different stakeholders. However, as we explain below, there are other proposed amendments in the draft Horizontal Guidance which, if adopted, would totally negate the positive impact from the acknowledgement of hold-out and would result rather in an exacerbation of the hold-out problem.

2. Paragraph 312 – Addition of Licensing Negotiation Groups

We note with concern that the Commission proposes to expand the categories of joint purchasing arrangements covered to include groups of potential licensees jointly negotiating licensing agreements for SEPs with licensors with a view of incorporating that technology in their products i.e. licensing negotiation groups (LNGs).

In our responses to the Commission’s earlier consultation during the evaluation phase, we highlighted concerns regarding the potential for coordinated behaviour among unwilling licensees that is aimed at distorting competition, particularly where LNGs are permitted on a longer term and structural basis and pursued by licensees with significant buyer power. We also explained that LNGs who seek to coordinate several potential licensees to establish pricing and other conditions of such licenses raise grave competition concerns in relation to cartel conduct and would allow for tremendous gains in the ability to hold-out. They

¹ *Sisvel v Haier*, Federal Court of Justice, judgments dated 24 November 2020 and 5 May 2020, Case No. KZR 35/17 and KZR 36/17, paras. 96-99 and para. 98; *Nokia v Daimler*, LG Mannheim 18 August 2020 - Case No. 2 O 34/19, para 159; *Sharp v Daimler*, District Court of Munich 10 September 2020, Case-No. 7 O 8818/19, para. 126; *Sisvel v Wiko*, Higher Regional Court Karlsruhe, judgment dated 9 December 2020, Case-No. 6 U 103/19, para. 299 and paras. 320 et seqq.

could virtually decide to indefinitely push the time when concluding the licenses, advancing unreasonable requests. This would in turn force the income of innovators/licensors to cease and this would deprive such entities of the funding to invest in further innovation.²

The Commission does note a number of the competition concerns regarding buyer cartels within the general context of joint purchasing arrangements including the coordination of individual competitive behaviour, influencing individual negotiation, exchange of commercially sensitive information and using joint purchasing arrangements as a tool to engage in a disguised cartel. The Commission further notes the potential harm to innovation incentives and the likelihood of lessening innovation efforts.³

However, beyond expanding the categories of covered arrangements to include LNGs, there appears to be no consideration for the special context in which SEPs subject to a FRAND commitment apply and how these can, if at all possible, be captured within the context of the draft Horizontal Guidelines as it relates to joint purchasing agreements.

One glaring challenge that is immediately apparent when reading through the provisions relating to purchasing agreements is that they are drafted from the perspective of the supply of physical/tangible products, leading to a lot of inconsistency when applied to the situation involving technology covered by patent rights as a supplied or supplyable product. For instance, the determination of a relevant purchasing market on the basis of substitutability cannot be applied to technology covered by SEPs because, unless there are competing standards, such technologies cannot be substituted if they are essential to the implementation of a standard.

Additionally, unlike the case with tangible goods, patent holders do not have the ability to act as gatekeepers and 'physically' restrict access to their technology. This is because the patented technology and the standards in question are publicly accessible. In other words, while a manufacturer can choose not to buy from a particular supplier of physical goods, in the case of SEPs, there is no way for a manufacturer of standard-conforming products to avoid using the technology covered by patents essential to the implementation of that standard. Merely implementing the standard means they are infringing the SEP. It is therefore a question of determining the conditions on which a license to the patented technology will be offered, not whether access to the technology will be granted.

The only way for a patent owner to restrict access to their patented technology would be to take legal action against infringers, which, in the case of SEPs subject to a FRAND commitment would first require compliance with the guidance of the ECJ in the *Huawei v ZTE* decision as well as the decisions of the various national courts in Europe.

However, even before legal action can be commenced, the ECJ guidance requires that a SEP owner first notifies the implementer of their infringing activity and specifies how the

² The Commission does note a number of the competition law concerns regarding buyer cartels within the general context of joint purchasing arrangements including among other the coordination of individual competitive behaviour, influencing individual negotiation, exchange of commercially sensitive information, using joint purchasing arrangements as a tool

³ See Draft Horizontal Guidelines, paras 315 – 332.

particular SEP has been infringed. Our experience has been that a substantial majority of implementers we have notified have totally ignored our notifications, which are usually accompanied by an offer to license on FRAND terms.

It is important to bear in mind that patents generally expire after 20 years, and commercial deployment of the technology covered by SEPs (after standardization and subsequent adoption of the standard in products) may only happen after the better part of the lifetime of the patent is already over. Once litigation commences, to obtain a first instance decision in court takes about 2 years on average even in highly efficient jurisdictions such as Germany. The recent seminal decisions of the German Federal Court of Justice (FCJ) in *Sisvel v Haier*⁴ provide a perfect example. It is important to first note that the FCJ particularly cautioned against the kind of hold-out conduct that can certainly be expected to arise if LNGs are given a greenlight. What however sometimes escapes attention is the fact that it took more than 6 years from the commencement of the litigation to the final determination by the FCJ, by which time the SEPs had already lapsed.

In the case of LNGs, this could mean multiple litigations in several jurisdictions against several members of a LNG, which is highly impractical considering the vast amount of resources that would be needed. All the while the infringing implementers continue to use the technology thereby gaining a competitive advantage against implementers who act in good faith and have taken out a license. There is also no guarantee that at the end of the litigation a patent holder will be granted an injunction that would enable them to restrict access to their patented technology.

The consequence here is that anticompetitive conduct through LNGs would have a very substantial effect on the ability of patent owners to monetise their technology and achieve a return on their investments.

Paragraph 343 of the draft Horizontal Guidelines particularly presents a number of inconsistencies in as far as it relates to LNGs, the FRAND commitment made by SEP owners, the guidance of the ECJ in *Huawei v ZTE* and the concept of technology covered by SEPs as a supplyable product. Paragraph 343 provides, inter alia, that:

When negotiating terms and conditions with suppliers, a joint purchasing arrangement may 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. Strong suppliers may use similar threats to stop negotiating or supplying products in their bargaining with purchasers. Such threats do not usually amount to a restriction of competition by object and any negative effects arising from such collective threats will not be assessed separately but in the light of the overall effects of the joint purchasing arrangement.

⁴ See <https://caselaw.4ipcouncil.com/german-court-decisions/federal-court-of-justice-bgh/sisvel-v-haier-federal-court-justice-bundesgerichtshof> and <https://caselaw.4ipcouncil.com/german-court-decisions/federal-court-of-justice-bgh/sisvel-v-haier>.

A number of fundamental concerns can be identified here:

1. By providing that joint purchasing arrangements may threaten suppliers to abandon negotiations unless they are offered better terms or lower prices as part of the normal bargaining process, the draft Horizontal Guidelines essentially give a greenlight to textbook hold-out conduct. It totally fails to cater to the nuances of licensing negotiations within a FRAND context in the SEP ecosystem and the already weaker bargaining position that SEP holders have. There is unfortunately a lack of a clear definition of what constitutes FRAND from the perspective of what is expected from a willing licensee. Many technology implementers are therefore prone to abusing the system, particularly by delaying substantially and even failing to take a license to SEPs, i.e. holding-out. One major factor that encourages hold-out is the fact that implementers who are unwilling to conclude a license on FRAND terms feel safe in the knowledge that patents expire and even after the court determines that they are infringing SEPs, they would only be required to pay damages computed based on a FRAND rate, and any royalties set going forward will also be limited to FRAND. On the other hand, a SEP holder who has made a FRAND commitment is in a position where failure to adhere to FRAND could mean that they may have limited access to injunctive relief or damages in case of infringement of their SEPs.

From this perspective, the odds of concluding a license on FRAND terms in a timely manner are unfortunately stacked against the SEP holder. The system as-is is not balanced, and allowing implementers to use LNGs as a tool to easily further tilt the bargaining position would only make the problem worse.

2. It introduces uncertainty as to whether a SEP owner can actually negotiate bilaterally with individual members of a joint purchasing arrangement, and further implies that an individual member can hide behind the veil of a joint purchasing arrangement to avoid fulfilling of their obligation to take a license. It is quite uncertain how the provisions in paragraph 343 interact with paragraph 317 which provides inter alia that *in a buyer cartel, purchasers coordinate their behaviour among themselves in view of their individual interaction with the supplier on the purchasing market. If purchasers deal individually with suppliers, they should make their own purchasing decisions independently of each other without removing strategic uncertainty among themselves through agreements and concerted practices or artificially increasing transparency regarding their future behaviour on the market.*

This uncertainty is also reflected in paragraph 345 which provides inter alia that *an obligation to purchase or negotiate exclusively through the joint purchasing arrangement may, in certain cases, be indispensable to achieve the necessary degree of buying power or volume for the realisation of economies of scale.* Good faith bilateral negotiations should certainly not be put on hold and it can be expected that individual members of a LNG will use the uncertainty to further engage in hold-out to delay as much as possible the conclusion of the necessary license agreement.

3. By providing that strong suppliers may use similar threats to stop negotiating or supplying products, the draft Horizontal Guidelines fail to consider the FRAND commitment and the guidance of the ECJ in *Huawei v ZTE*. It is additionally totally out of touch with the concept of supply as it relates to technologies covered by patent rights.
4. If the purpose behind a LNG is to achieve better terms or lower prices for its individual members, there are certainly better suited mechanisms as well as guidance from Courts already existing within the SEP licensing ecosystem.

There are certainly more inconsistencies to be identified in this provision as well as various other provisions of the draft Horizontal Guidelines as it relates to the SEP context. What appears to be in effect a greenlight under the draft Horizontal Guidelines to the formation of LNGs without a clear and in-depth consideration of the particular context of SEP licensing and without guidance around the parameters within which such LNGs can operate is basically a recipe for an unprecedented level of hold-out. The trade off envisaged between lower product prices vis a vis cost savings delivered to consumers (if at all) is certainly far from beneficial in relation to the SEPs ecosystem, especially when one considers the negative impact on the incentives to innovate.

In sum, we consider the inclusion of LNGs in the draft Horizontal Guidelines to be quite premature and detrimental to the SEP licensing ecosystem. There needs to be a deeper and structured consideration of the implications of LNGs, taking into consideration the specific context of SEP licensing and the framework within which it operates.

3. Paragraph 482 – Persisting ‘license to all’ concerns

Paragraph 482 of the draft Horizontal Guidelines provides inter alia that:

In order to ensure effective access to the standard, the IPR policy would need to require participants wishing to have their IPR included in the standard to provide an irrevocable commitment in writing to offer to license their essential IPR to all third parties on fair, reasonable and non-discriminatory terms (‘FRAND commitment’) (emphasis added)

Concerns have previously been expressed regarding the definition of the FRAND commitment in the Horizontal Guidelines as entailing a commitment to license to all third parties given the propensity of implementers to use it as a justification to argue that SEP owners are obliged to license at a component or chip level. It is noted that this provision is still present in the draft Horizontal Guidelines. We would like to reiterate previous calls to remove the words ‘to all third parties’ for three main reasons:

1. It does not align to the actual formulation of the FRAND commitment by the standards development organizations that are recognised in Europe.⁵ Neither the ETSI IPR Policy, the joint IPR Policy of CEN-CENELEC nor the Common Patent Policy for ITU-T/ITU-

⁵ [EUR-Lex - 52021PC0346 - EN - EUR-Lex \(europa.eu\)](#).

R/ISO/IEC require granting of licenses to all third parties. In fact, the ETSI IPR Policy could be interpreted as recommending licensing at the end product level.⁶

2. It does not align to the guidance from courts in Europe and other jurisdictions which have rejected the contention that SEP owners are required to grant licenses to component and chip makers.⁷
3. It risks reigniting the 'license to all' discussion which has already been addressed by courts and which is not in line with the typical industry practice of licensing at the end user device level.
4. It incorrectly characterises the FRAND commitment as a requirement to make an offer to licence. The FRAND commitment is not an active obligation to make an offer to license. The FRAND commitment is the expression by the SEP owner of their willingness to enter into licenses on FRAND terms.

It is therefore our opinion that the removal of the words 'to all third parties' would bring much needed clarity as well as aligning the Horizontal Guidelines to the prevailing position regarding this issue.

Closing comments

If the Commission is to achieve its objectives in relation to the current review of the framework for horizontal cooperation agreements particularly as it relates to greater clarity and improved legal certainty, we believe it is imperative that the concerns we have raised, which will likewise be raised by many other stakeholders, are addressed.

We remain available to further engage with the Commission regarding any of the concerns we have highlighted above, which are of vital importance.

⁶ ETSI IPR Policy para 6.1 further provides in relation to the FRAND license to cover inter alia *MANUFACTURE, including the right to make or have made customized components and sub-systems to the licensee's own design for use in MANUFACTURE*.

⁷ See *Nokia v Daimler*, LG Mannheim 18 August 2020 - Case No. 2 O 34/19; *Sharp v Daimler*, District Court of Munich, judgment dated 10 September 2020, Case-No. 7 O 8818/19; Judgement of the US Court of Appeal for the Ninth Circuit in *Federal Trade Commission v Qualcomm Inc.* 19-16122, dated 11 August 2020.