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Feedback of

ACT | The App Association

5-11 Mortimer Street,

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to

the Competition and Markets Authority

on the

Assimilated Technology Transfer Block Exemption
Regulation

ACT | The App Association Feedback to the Competition and Markets Authority on the Assimilated Technology Transfer Block Exemption Regulation (TTBER)

ACT | The App Association is a policy trade association for the small business technology developer community. Our members are entrepreneurs, innovators, and independent developers within the global app ecosystem that engage with markets across every industry. We work with and for our members to promote a policy environment that rewards and inspires innovation while providing resources that help them raise capital, create jobs, and continue to build incredible technology.

We support the United Kingdom's leadership in competition policy and a regulatory environment that promotes innovation and job growth. Today, the ecosystem the App Association represents—which we call the app economy—is valued at approximately £736.20 billion globally and is responsible for creating countless jobs across the United Kingdom. Alongside the world's rapid embrace of mobile technology, our members have been developing innovative hardware and software solutions that power the growth of the internet of things (IoT) across modalities and segments of the economy. The IoT ecosystem is expected to generate £10.53 billion for the global economy by 2030.¹

The App Association represents members who are actively engaged in all facets of technology transfer. Our members are both licensors and licensees that rely on equitable licensing agreements, particularly in the context of standard essential patents (SEPs), where providing fair compensation to SEP holders must be balanced with supporting the development of new and patentable standardised innovations.

The goal of industry participants' establishing technical standards is to provide an efficient and interoperable base for technology developers to create new inventions across multiple market sectors. When a patent holder contributes their technology to a technical standard, they understand and agree that they are using their patent to enable reasonable access to the standard and provide standard setting organisations (SSOs) with a commitment that they will license their SEPs on fair, reasonable, and non-discriminatory (FRAND) terms in order to gain access to a wider pool of licensees. Therefore, by contributing to the standardisation process, a SEP holder understands and agrees to not unduly exclude competitors from a standard beyond requiring a FRAND license. This dynamic process illustrates how innovation is often the result of cumulative technological transfers, where businesses grow and evolve within the innovation lifecycle.

Our members' knowledge and experience extend across several key technology sectors, including the manufacture of electronic components, the manufacture of computers and peripheral equipment, and the manufacture of consumer electronics.

¹ See Impact assessment accompanying the proposal for a regulation of the European Parliament and of the Council on standard essential patents and amending Regulation (EU) 2017/1001, p.10, https://single-market-economy.ec.europa.eu/document/download/a009816a-3b24-46c8-9c3c-fd8bd89a1380_en?filename=SWD_2023_124_1_EN_impact_assessment_part1_v4.pdf.

I. Benefits and impacts on competition

- A. What are the main effects (if any) on competition of technology transfer agreements covered by the Assimilated TTBER? To what extent do these agreements restrict competition? If possible, please provide examples. (Question 3)**

The TTBER has played an important role in promoting innovation and technology transfer for UK citizens nationally and globally. By providing clear and predictable rules, the TTBER has facilitated the licensing of technology, allowing businesses to collaborate more effectively while maintaining competitive markets.

II. Effectiveness of the Assimilated TTBER

- A. Excluded restrictions: The CMA is aware that the EU TTBER in 2014 amended the scope of ‘excluded restrictions’ in respect of grant-back obligations and non-challenge termination clauses in licenses in comparison to the EU TTBER’s 2004 predecessor. Have these changes improved the Assimilated TTBER? Please provide examples and reasons for your answer. (Question 16)**

The inclusion of excluded restrictions in the TTBER during the 2014 revision was an important enhancement to the regulation, in ensuring an effective balance in the promotion of innovation with the protection of competition.

Grant-back clauses, which can require licensees to return improvements exclusively to the licensor, pose significant risks by consolidating the licensor’s market power and discouraging further innovation.

No-challenge clauses prevent licensees from contesting the validity of patents, allowing licensors to maintain control over potentially weak or invalid patents. This can lead to a situation where the market is distorted by the enforcement of patents that are not genuinely innovative or do not meet the legal standards for patentability, thereby hindering technological progress and innovation, and distorting the competitive landscape.

III. The Technology Transfer Guidelines

- A. The purpose of the Guidelines is to assist businesses in their assessment of technology transfer agreements. In your view: (a) Have the Guidelines been effective in providing legal certainty for UK businesses in their assessment of technology transfer agreements?(b) Are there any changes that could improve the effectiveness of the Guidelines? Please provide reasons for your answer. (Question 17)**

The TTBR’s accompanying guidelines (TTGL) should be amended to address the anticompetitive harms that patent pools can cause, particularly in the context of

standard essential technologies (SETs). Our members have been disproportionately impacted by standard essential patent (SEP) licensing abuse (a sub-category of SETs), whether directly by SEP holders or through their involvement in patent pools and platforms. We identify below concerns regarding patent pools that our community requests the TTGL provide stronger emphasis on.

While patent pools, theoretically, can introduce efficiencies into the SEP licensing ecosystem assuming they align their practices with the FRAND behaviours that their pool members are committed to, there is also strong evidence that patent pools raise competition concerns.²

When a SEP holder commits to a standard development organisation (SDO) to license their SEP on FRAND terms, our members rely on this commitment to obtain investments and develop new technologies, ensuring they can compete fairly in the market. However, some SEP holders and their patent pools have exploited the standardisation process by circumventing the FRAND obligation. Although patent pools often manage SEPs that are supposed to be licensed on FRAND terms, some pools or ‘platforms’ argue that they are not bound by the SEP holder’s original FRAND commitment to the SDO. For example, the App Association has observed that Avanci denies that it is required to license ‘the pooled technologies (...) to all potential licensees on FRAND terms’.³ Avanci strategically evades its members’ FRAND commitments to licensees by excluding acknowledgment of such commitment in their agreements with SEP holder members.⁴ Licensees are also unable to seek bilateral action against large Avanci members that may unilaterally establish jurisdiction for SEP disputes.⁵

This ‘shell game’ protects Avanci and its large portfolio members from liability for anticompetitive licensing tactics, including supporting collusive pack-hunting tactics by a majority of Avanci members through a litigation reimbursement program contingent on such actions resulting in an Avanci license.⁶ Interestingly, these tactics are often conducted by non-practicing entities (NPEs) that are insulated from court judgements, protecting the profit-making interests of Avanci and a minority of its members (five out of 65 members) that make up a supermajority voting share to approve rate changes established by Avanci. This delicately crafted strategy is likely to continue unless agencies, including the Competition and Market Authority (CMA), recommend that competition-based instruments like the TTBER and its guidelines account for agreements between patent holders and their respective licensing agents (whether it be a “pool” or “platform”) to bypass their obligations to SDOs⁷.

² E.g. Section 2.3 of Communication COM (2017) 712, ‘Setting out the EU Approach to Standard Essential Patents’; Jurata, Jay and Luken, Emily ‘Glory Days: Do the Anticompetitive Risks of Standards-Essential Patent Pools Outweigh Their Procompetitive Benefits?’ San Diego Law Review, Vol. 58, No. 2, 2021 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622615.

³ See *Continental Automotive Systems, Inc. v Avanci, LLC*, ND Cal (2019), Case 5:19-cv-02520; see also *Tesla v. IDAC et al.*, [2024] EWHC 1815 (Ch) (5 July 2024).

⁴ Carrier, Michael A. and Scarpelli, Brian and Nair, Priya, Admissions Confirm Avanci’s Rigged Game, 5-6 (September 03, 2024). Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4945572.

⁵ *Id.* at 6-8.

⁶ *Id.*

⁷ *Id.*

This ability of patent pools to sidestep FRAND commitments hampers competition in markets for standardised technologies. Entities like Avanci lock industry innovators into a ‘one-stop shop’ license with a ‘platform’ that represents a majority share of SEPs in critical cellular standards (e.g. 5G).⁸ Many innovators are locked-in to a standard upon developing their innovation and are required to take a relevant SEP licence or risk expensive litigation that could result in market exclusion. Our members are adversely affected by this practice, as they are often coerced into accepting discriminatory rates and unreasonable terms under the threat of injunctions.

Moreover, some SEP holders strategically refuse to license to certain entities within a value chain, opting instead to license downstream stakeholders, such as end-product manufacturers, from whom they can extract additional value based on features unrelated to the features of the implementing technology. Further, this practice not only exposes willing licensees to later claims of patent infringement but also potentially exposes the distributors and customers of these denied willing licensees to such claims.

For micro, small, and medium-sized enterprises (SMEs), such as our members, these anticompetitive practices by patent pools pose significant challenges. SMEs are often compelled to make difficult cost-efficiency calculations—either paying exorbitant fees to continue innovating or are forced to abandon their innovations and exit the market altogether.

As the internet of things (IoT) continues to expand, with more devices becoming interconnected, our members' innovations increasingly serve as the interface for these technologies. The viability of small businesses is closely tied to the fairness, transparency and predictability of the SEP licensing process. Therefore, it is crucial that patent pools are held accountable to the licensing obligations associated with FRAND-encumbered SEPs.

By strengthening the guidance on these issues, the TTGL can better protect competition and support the continued innovation that is crucial for the growth of the IoT sector and the broader economy.

The TTGL should add the following clarifications for improved effectiveness:

1. Alignment with CEN/CENELEC CWA 95 000 Core Principles and Approaches for Licensing of Standard Essential Patents

The App Association has participated in consultations with countries around the globe, including the European Union, to review competition guidances pertaining to the technology standardisation process. Generally, competition guidances addressing standardisation and SEP licensing are increasingly unclear and in need of updates. We emphasise the importance of providing clarity about the SEP licensing ecosystem for all stakeholders. In response to the growing problem of standardisation and SEP licensing abuses now affecting a range of sectors and market segments, a broad cross-section of stakeholders, including the App

⁸ *Id.* at 2.

Association, has come together through the CEN/CENELEC Workshop Agreement construct to develop CWA 95000, Core Principles and Approaches for Licensing of Standard Essential Patents.⁹ CWA 95000 (1) provides educational and contextual information regarding SEP licensing and the application of FRAND, (2) identifies and illustrates some of the questions that negotiating parties may encounter, (3) lists agreed upon core principles and recognised harms that should be addressed in patent policies for technical standards, and (4) sets forth some of the key behaviours and ‘best practices’ that parties might choose to adopt to resolve any SEP licensing issues amicably and in compliance with the FRAND obligation. CWA 95000 is best positioned to promote the goals and interests of industry, standardisation and, ultimately, consumers. We strongly urge the CMA to align its understanding of competitive standards development, participation, and implementation procedures with the best practices and core FRAND principles provided in CWA 95000.

2. Licensing SETs on FRAND-terms

We appreciate that the safe harbour provisions for patent pools, as outlined in Paragraph 261(e) of the TTGL, explicitly include the requirement for licensing on FRAND terms. However, we believe that further clarification is needed, both within the safe harbour, and outside of it, to ensure that FRAND licensing terms are not circumvented by patent pools. The guidelines should emphasize that when voluntary FRAND-commitments are circumvented through the collective practices of patent pools, it results in exclusionary and anti-competitive conduct. This could be effectively incorporated into Paragraph 268 of the TTGL, which already touches on the necessity of licensing on FRAND terms.

In addition, the TTGL should provide clarification on the application of the FRAND commitment following the transfer from one patent holder to another applying equally to patent pools. Clarification is necessary here, in particular, because patent pools do not own the patents, with the patent pool administrator instead acting as an agent on behalf of the patent holder contributing to the pool. While we, and the vast majority of the ecosystem, believe that pools are subject to the FRAND commitments made on SEPs the pool is licensing, some pools continue to deny this reality. The CMA should make clear that any company, including patent pools, to which the IPR owner transfers (parts of) its IPR (including the right to license that IPR) is bound by that commitment without exception. We encourage the CMA to acknowledge both that patent pools can provide efficiencies to the SEP licensing process along and that abuse by SEP pools will amplify the harmful and anticompetitive effects of SEP licensing abuses.

3. FRAND includes licensing to all

Moreover, the TTGL should clearly state that refusal to license SETs to willing licensees violates FRAND licensing obligations. This should be clarified in Paragraphs 267 (b) and 269 TTGL.

⁹ CEN Workshop Agreement (CWA) 95000 (Core Principles and Approaches for Licensing of Standard Essential Patents) available at <https://2020.standict.eu/sites/default/files/CWA95000.pdf>

Refusal to license creates significant uncertainty and risk for both upstream and downstream entities in the value chain. Businesses upstream the value chain who may continue to operate without the necessary FRAND licenses after the strategic refusal by the licensor, leaves the implementer vulnerable to retroactive licensing demands or legal action from SEP holders. This unpredictability can deter investment and financing, especially in risk-averse markets like the UK, where investors are less likely to support companies lacking clear IP rights. Consequently, UK companies may face greater challenges in securing funding or may even consider relocating to jurisdictions with more flexible financing options. Downstream stakeholders are also disproportionately burdened. Manufacturers typically expect that the components they purchase will be free from associated risks and unresolved intellectual property issues, so they can integrate these components into their products without facing unexpected legal liabilities or additional costs.

Additionally, opportunistic SEP holders often force downstream businesses in the value chain to pay inflated licensing fees that exceed the actual value of the SEP technology, thereby extracting value not only from the specific SEP-covered technology but also from the additional innovations and components contributed by manufacturers throughout the value chain.

Moreover, consistent with a determination by the UK High Court in *InterDigital v. Lenovo*, a SEP holder's FRAND commitment to 'any particular implementer' is 'irrevocable'. Said plainly, the FRAND commitment requires that all willing licenses must be provided a SEP license. A prospective licensee's challenge to the validity or essentiality of the SEPs should not be grounds for labeling them as "unwilling" (and consequently issuing injunctions), provided they engage in good faith negotiations based on standard business practices.

This approach is also consistent with the spirit of the TTBER's exclusion of no-challenge clauses (Article 5(1)(b) TTBER), and with the TTGL's discussion on the heightened concerns and losses related to no-challenge clauses in the context of patent pools (Paragraph 272 TTGL) and SEPs (Paragraph 136 TTGL). In the context of SEP-licensing negotiations, labeling licensees as "unwilling" merely for questioning the essentiality or validity of SEPs, with the looming threat of injunctions and market exclusion, effectively creates a coercive environment that discourages legitimate challenges.

4. Transparency Requirements

One of the significant advantages of technology pools as opposed to individual entities seeking a license is the enhanced ability of the collective pool to exchange and access information. While the TTGL attempts to control the amount of sensitive information shared within patent pools to address this imbalance (Paragraphs 259 and 261 (c) TTGL), it still falls short in providing clearer guidance on balancing information asymmetry and ensuring greater transparency in technology pool licensing agreements, particularly in the context of SEPs, where transparency remains a persistent issue.

The TTGL should make clear that the obligation for technology pools for SEPs, to provide transparency during a SEP licensing negotiation must include enough

disclosure to allow the least experienced and least resourced standards user to evaluate whether the terms and conditions of the proposed SEP license are consistent with a FRAND obligation. Our members require reasonable disclosures in order to evaluate whether they are fairly concluding a license necessary for them to continue their innovations. It should not be expected that smaller entities have the resources to search for patent portfolios and basic information regarding those patents. This practise can be overly burdensome and expensive, effectively deterring participation in developing standardised technologies. In order to provide deeper clarity on disclosure requirements, the TTGL can include examples of proper disclosure, which may include, within a reasonable amount of time:

- (i) detail regarding the asserted patents;
- (ii) clarity regarding the targeted products;
- (iii) claim charts identifying the relevant portions of the standard and a mapping of the asserted claims to the standard;
- (iv) claim charts identifying relevant portions of the targeted products;
- (v) historical information (comparables) for relevant prior SEP licenses; and
- (v) any other information used by licensor, or reasonably needed by the licensee, in its evaluation of a FRAND royalty rate for the relevant patents.

5. Coordinated and excessive use of coercive litigation

As discussed above, SEP holders often use coercive tactics, such as threatening litigation and seeking injunctions, to extract supra-FRAND rates from licensees. Patent pools incentivise this practise further by often covering litigation costs for pool members to seek market exclusion against potential licensees that they deem unwilling. This practise is disproportionately harmful to SMEs, such as App Association members, that cannot afford the expense of litigation on top of the cost of investment into innovation. Moreover, SMEs are unlikely to receive investment support when there is a significant risk of litigation. The coordinated use of litigation threats and injunctions by patent pool members to enforce supra-FRAND terms, including excessive royalty rates, should be recognized as a collusive and anti-competitive practice.

6. Tying and bundling non-essential technologies with essential technologies

The TTGL should explicitly address the competition risks associated with bundling essential and non-essential technologies within patent pools. While some licensees might prefer to acquire a license covering both essential and non-essential technologies, the practice of making such bundling a condition for obtaining a license for essential SETs should be identified as anti-competitive tying and bundling practices, which can unfairly inflate costs and stifle competition. To ensure fairness and transparency, the TTGL should require that patent pools offer a clear, unambiguous option to obtain licenses solely for relevant SETs, without the tying of non-essential technologies. Additionally, the TTGL should mandate that patent pools provide transparent, itemised licensing offers, distinguishing between essential and non-essential technologies, so that licensees can make informed decisions.

We are concerned about the current language of Paragraph 264 of the TTGL, which implies that there may be acceptable instances of tying non-essential technologies to essential SETs. This paragraph should be revised to eliminate any suggestion that

bundling non-essential technologies is permissible, as such practices are inherently anti-competitive and undermine the principles of FRAND.

This issue is further complicated by the common practice of SEP holders over-declaring the essentiality of their patents. This practice inflates the number of patents deemed essential and allows these to be bundled into patent pools, exacerbating the risks of anti-competitive tying and bundling. Experts estimate that only around 25 – 40 % of the patents found in the ETSI IPR database are actually essential to the final published standard.¹⁰ We advocate for the TTGL to acknowledge this issue explicitly and to incorporate provisions that ensure more rigorous and transparent essentiality assessments within patent pools.

7. Definition of Patent Pools

The section on patent pools should make it explicitly clear that collusion assessments apply to all forms of de facto patent pools, regardless of their structure or mechanism. Whether these are traditional pools or platforms that facilitate pooling behaviours, the risks associated with collusive practices are equally concerning. For additional context, we urge you to review important analysis made in the paper “, *Admissions Confirm Avanci’s Rigged Game.*”¹¹

8. Acknowledging market power related to SETs

The TTGL should provide a more detailed discussion on the extent to which standardisation inherently strengthens market power and leads to competition concerns, which the FRAND commitment must mitigate. Changes should be made in Paragraphs 246 and 269 TTGL to reflect this.

Paragraph 246 TTGL acknowledges the potential for patent pools to restrict competition, especially when supporting an industry standard, which may “result in a reduction of innovation by foreclosing alternative technologies”. It should be clarified that standardisation can significantly amplify the market power of SET holders, particular in the case of successful standards (i.e. when it becomes widely adopted by industry). This increased market power can lead to an increased risk of anti-competitive practices, such as setting excessive royalties or excluding competitors from the market.

Paragraph 269 TTGL discusses the competition implications of a pool having a dominant position on the market. This paragraph should further expand on how pools licensing technologies supporting standards have inherent market power, correlating with how widely the standard has been adopted.

¹⁰ Baron, J., Geradin, D., Granata, S., et. al., Group of Experts on Licensing and Valuation of Standard Essential Patents ‘SEPs Expert Group’: Full Contribution to the Debate on SEPs, 2021, Part 2, Section 4.2, <https://ec.europa.eu/docsroom/documents/45217>; Brachtendorf, L., Gaessler, F., and Harhoff, D., ‘Truly Standard-Essential Patents? A Semantics-Based Analysis, CEPR Discussion Paper No. DP14726, May 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3603956. (‘standards (4G) around 32.3% of SEP in the database are essential, in case of UMTS (3G) - 37.7%; GSM (2G): 38.5%.’)

¹¹ See Carrier, Michael A. and Scarpelli, Brian and Nair, Priya, *Admissions Confirm Avanci’s Rigged Game*, 5-6 (September 03, 2024). Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4945572.

B. Are there any matters not covered by the Guidelines (for example, recent developments in the market for technology transfer licensing) that should be taken into account by any future Guidelines? (Question 17(a))

The last update to the Technology Transfer Guidelines (TTGL) took place in 2014, nearly a decade ago. Since then, the landscape of SEP licensing has evolved significantly, with new developments and a deeper understanding of emerging challenges exacerbating the issues within the SEP licensing landscape. Notably, several patent pools that are now central players in the SEP licensing ecosystem did not even exist at the time of the last update. For example, the Avanci patent pool was established in 2016, and the Sisvel Wi-Fi 6 pool was established in 2020. These pools and others have increasingly engaged in practices that have been criticised for their lack of transparency and for imposing supra-FRAND terms. In addition, concerning practices between SEP holders and their patent pools have been raised. Recently, the HVEC Access Advance pool was alleged to share confidential information held within bilateral NDAs between its members to use in patent infringement litigation against licensee, HP, in Germany.¹²

Key legal cases in the UK have highlighted the prevalence of SEP abuses and the challenges they present. For example, the UK High Court unveiled in both *InterDigital v. Lenovo*¹³ and in *Optis v. Apple* that the SEP licensor in question had a consistent practise of offering unreasonable and discriminatory licences to ‘smaller players’ and using those licences as comparables in disputes with larger licensees.¹⁴ Not only do smaller licensees not have the experience or resources necessary to determine what a reasonable royalty rate should be for a given SEP,¹⁵ but they are often integral to a larger profit-seeking scheme by certain SEP holders. As a result, the large volume of SMEs that make up the EU’s internal economy experience competitive setbacks that have a domino effect on entire markets.¹⁶ As explained in 17(b), licensees are unable to establish jurisdiction to challenge the rates of SEP licensors and their patent pools, enabling SEP holders to successfully implement control the global SEP landscape. This concept was most recently exemplified in *Tesla v. IDAC et al.*¹⁷

¹² See https://www.linkedin.com/posts/benno-b%C3%BChler-44481b2_hp-vs-access-advance-24-07-24-activity-7236680988808888322-OFvd/?utm_source=share&utm_medium=member_ios

¹³ See <https://actonline.org/2023/05/18/landmark-court-case-in-uk-highlights-sep-abuses-of-smes/>

¹⁴ *Interdigital Technology Co. v. Lenovo Group Ltd.* [2023] EWHC 126, 539 (Pat). (“Having considered all the evidence on the issue of volume discounts I have reached the clear conclusion that the volume discounts said to have been applied to the largest InterDigital licensees (i.e., in the range of 60%-80%) do not have any economic or other justification. Instead, their primary purpose is to attempt to shore up InterDigital’s chosen ‘program rates’. Their primary effect is discrimination against smaller licensees.”); *Optis Cellular Technology v. Apple Retail UK* [2023] EWHC 1095 (Ch) (“[G]iven the nature of Optis’ counterparties to the Optis Comparables – generally small players in the market, with low or at least not massive sales volumes – there is a question whether these licences properly reflect a FRAND rate for a counterparty like Apple.”).

¹⁵ See European Commission, SME survey annex, Q12.

¹⁶ 65% (17 out of 26) and 64% (18 out of 28) respectively. See Annex 8.3 SME Survey, Q16.

¹⁷ Approved Judgment, *Tesla v. IDAC et al.*, [2024] EWHC 1815 (Ch) ¶ 123 (5 July 2024) (“It may seem odd that a claim which Tesla has a legitimate interest in pursuing and which would in principle

Conclusion

The App Association appreciates the opportunity to provide our community views to the Competition and Markets Authority's consideration of the Assimilated Technology Transfer Block Exemption Regulation and associated guidelines. We look forward to continuing our engagement with the CMA to provide for an equitable and thriving internal market in the United Kingdom.



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serve a proper purpose cannot be pursued here. The conclusion that it cannot has given me some concern.”), available at <https://www.bailii.org/ew/cases/EWHC/Ch/2024/1815.html>.