

The Proposal for Licensee Negotiations Groups (LNGs) in SEP – An EU Competition Law Assessment

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I. Introduction

International standards and Standards Development Organizations (“SDOs”) have attracted the attention of policymakers worldwide for decades. Attention has become heightened as all major jurisdictions recast innovation and industrial strategies, and expressly acknowledge that both international standards and SDOs are a source of national or regional global competitive advantage.

At the same time, there is a desire to promote digitalization for businesses (particularly SMEs),³ and address runaway climate change.⁴ Digitalization initiatives have triggered policy reviews in a number of jurisdictions and involve a revisiting of the intersection of intellectual property, competition law, international commercial law and policy.

Against this backdrop, one proposal being evaluated by the European Commission is included in a report entitled “Licensing and Valuation of Standard Essential Patents” (the “Report”), and is the subject of this paper.⁵ The Report, summarizing diverging views from an expert group appointed by the European Commission, contains numerous presumptions about FRAND licensing and submits various

ideas for public debate. Among them is an unprecedented suggestion to allow the formation of so-called Collective Licensing Negotiation Groups (“LNGs”), whereby multiple potential licensees would be allowed to collude and be represented collectively in FRAND licensing negotiations (“Proposal 75” or “Proposal”).⁶ This proposal now appears in Chapter 4 of the Draft Revised Horizontal Guidelines open for review till 26 March 2022.⁷

This paper reviews the significant risks which arise from this Proposal and the accompanying non-market economic policy being contemplated.

II. Context

(a) Policy Backdrop

In the European Union, policymakers at the national and EU levels are exploring how to encourage a pro-innovation regulatory environment that may enable European companies to lead the development and

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³ For example, 5G in wireless telecommunications, artificial intelligence (AI), and the Internet of Things (IoT).

⁴ https://ec.europa.eu/clima/index_en.

⁵ Group of Experts on Licensing and Valuation of Standard Essential Patents, Contribution to the Debate on SEPs [SEP Expert Group Report] (January 2021) (majority report with dissenting opinions expressed), <https://ec.europa.eu/docsroom/documents/45217>. By the time the report was finalized, 2 of the appointed EC experts had departed the study. The Report’s stated aim is to improve transparency and efficiency in SEP licensing with a particular focus on IoT.

⁶ It is unclear from the Report how many of the Expert Group supports the suggestion that LNGs (more aptly an acronym for licensee negotiation groups) could enhance efficiency in licensing negotiations, reduce transaction costs and facilitate smooth SEP licensing. From a practical perspective, it is debatable whether such outcomes would be achieved.

⁷ See https://ec.europa.eu/competition-policy/public-consultations/2022-hbers_en#view-the-consultation-document, which states at paragraph 312:

*Joint purchasing arrangements can be found in a variety of economic sectors and involve the pooling of purchasing activities. They may consist of pooling actual purchases through the joint purchasing arrangement. They can also be limited to jointly negotiating the purchase price, certain elements of the price, or other terms and conditions, while leaving the actual purchases, pursuant to the jointly negotiated price and terms and conditions, to its individual members. A joint purchasing arrangement may also engage in additional activities such as joint distribution, quality control and warehousing, avoiding duplication of delivery costs. Depending on the sector, the purchaser may consume the products or use them as inputs for their own activities, for example energy or fertilisers. **Groups of potential licensees can also jointly [sic] negotiate licencing agreements for standard essential patents with licensors in view of incorporating that technology in their products (sometimes referred to as licensing negotiation groups).** [...] (bold added).*

deployment of key enabling technologies.⁸ In the U.S., similarly, there is a strong bipartisan commitment to the development of strategically vital technologies,⁹ along with a Presidential Executive Order aiming to review the competitiveness of the U.S. market – including the interplay of IP and antitrust law.¹⁰ The EU and U.S. have also each expressed a commitment to cooperate on international standardization and cooperative technology development, demonstrating this through the establishment of a high-level EU-U.S. Trade and Technology Council (“TTC”).¹¹

(b) The Role of Collaborative Industry Standards in Sustainable Innovation

The success of any pro-innovation agenda requires incentives to contribute to research and innovation - and thus an ability to receive a fair reward for such investment. In the standards development context, this system of incentive and reward is catalyzed through a voluntary commitment that standard essential patents (“SEPs”) will be accessible through licensing that is fair, reasonable, and non-discriminatory (“FRAND”).

Where a voluntary FRAND commitment has been made, there are two distinct aspects for the SEP owner to consider:

1. the disclosure obligation regarding potential SEPs that may be essential to an SDO standard, so that the SDO can be informed about whether the standard being developed

will in principle be available for implementation in the market;¹² and

2. a voluntary licensing declaration, which is used to inform the market that any relevant standard essential patents are accessible and subject to a negotiation taking place on fair, reasonable, and non-discriminatory terms.

(c) Access to Standards

Within that second aspect, the Court of Justice of the European Union affirmed in *Huawei v. ZTE*¹³ that each party to a SEP licensing arrangement is to actively participate in a commercial negotiation, providing sufficient information to one another so that an arm’s length commercial negotiation can take place in good faith and be concluded without undue delay.

Huawei v. ZTE recognizes that there are two scenarios which arise for the FRAND licensing framework applicable to open standards:

1. where a license is sought before implementation of standard essential patents, or at least prior to products practicing the standard essential patents being commercially manufactured or offered for sale (Scenario 1); and
2. where products implementing standard essential patents are already sold without the required license (Scenario 2). In this case, the required license is to be completed

⁸ See, for instance, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Making the most of the EU’s innovative potential: An intellectual property action plan to support the EU’s recovery and resilience (2020) COM(2020) 760 final. The European Commission through DG Grow will shortly be holding a public consultation on proposed regulation regarding standard-essential patents https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13109-Intellectual-property-new-framework-for-standard-essential-patents_en.

⁹ See, for instance, the draft United States Innovation and Competition Act of 2021 that gathered strong bipartisan support in the U.S. Senate (highlighting the importance of market-driven standards development for U.S. technological leadership and reaffirming the importance of SDO good governance principles). See §2306, International Standards Development, United States Innovation and Competition Act of 2021 (2021) <https://www.congress.gov/bill/117th-congress/senate-bill/1260/text>.

¹⁰ See the Executive Order on Promoting Competition in the American Economy <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/> and the subsequent call for public comments by the U.S. Department of Justice Antitrust Division on a draft policy statement on licensing negotiations and remedies for standards-essential patents, at <https://www.justice.gov/atr/guidelines-and-policy-statements-0/public-comments-draft-policy-statement-licensing-negotiations-and-remedies-standards-essential>.

¹¹ EU-U.S. Summit Statement (June 15, 2021) <https://www.consilium.europa.eu/en/press/press-releases/2021/06/15/eu-us-summit-statement-towards-a-renewed-transatlantic-partnership/> which includes Working groups for standards, SMEs and global trade challenges https://trade.ec.europa.eu/consultations/index.cfm?consul_id=309. Occurring in parallel to the EU-U.S. Trade and Technology Council is the EU-U.S. Joint Technology Competition Policy Dialogue involving the European Commission, the U.S. DOJ Antitrust Division and the U.S. Federal Trade Commission <https://www.justice.gov/opa/press-release/file/1453916/download>.

¹² In some SDOs, such as ETSI, members are able to make general IPR disclosures (see Clause 4 of the ETSI IPR Policy and Section 2.1.1 of the ETSI Guide on IPRs at https://portal.etsi.org/directives/44_directives_dec_2021.pdf).

¹³ Case C-170/13, *Huawei Technologies Co. Ltd v. ZTE Corp.* [2015] ECLI:EU:C:2015:477.

without undue delay after appropriate notification of infringement.¹⁴

Recent case law has confirmed that due diligence should be undertaken when standardized technology is being implemented. Using the negotiation framework affirmed in *Huawei v. ZTE*, the Federal Court of Justice of Germany confirmed that entities implementing a standard are obliged to conduct due diligence to ensure there is no infringement of third-party rights prior to manufacturing or selling the relevant products. This applies even where it may be challenging to obtain an overview of all the rights infringed (such as in the ICT sector).¹⁵

The framework affirmed in *Huawei v. ZTE* and as applied by national courts in EU Member States calls for a flexible assessment of the notification requirement, taking into consideration all the circumstances of a specific case. This can be taken to mean that, at the latest, notification of infringement should be the starting point of a commercial FRAND license negotiation.

III. The Basic Features of the LNG Proposal

The Proposal is apparently based on a 2019 analysis undertaken at the request of the European Parliament's Committee on Legal Affairs, which was itself based on an assumption that owners of SEPs hold strong bargaining power.¹⁶ However, as was recently recognized by the U.S. Department of Justice

Economics Director of Enforcement, "[t]hrough a FRAND licensing commitment, SEP holders forgo the ability to exercise any market power gained from standardization."¹⁷ This is particularly the case given the context of open standards, which are readily accessible for implementation.

In terms of substance, the Proposal suggests that LNGs be comprised of users of standardized technologies in a specific industry. LNG members will therefore be competitors in the market. The Proposal envisages that the role of leading the negotiation on behalf of this collective may be assumed by associations representing specific industries.

Without indicating any obligation to undertake due diligence by each individual member of an LNG, or the timing for such due diligence, the Proposal states that implementers organized collectively in LNGs: (i) are not allowed to engage in patent holdout; and (ii) will still need to observe the requirements affirmed in the Court of Justice of the EU ("CJEU") landmark judgment *Huawei v. ZTE*.¹⁸ Presumably, all applicable case law flowing from *Huawei v. ZTE*, as well as all legal obligations with respect to third party intellectual property rights and participation in a commercial negotiation in good faith, will also need to be observed.

The Proposal acknowledges some obvious risks of both antitrust liability and licensee-side holdout, suggesting the introduction of "safeguard mechanisms" to mitigate them.¹⁹

¹⁴ It is noted that an infringement notification may not be required where, in the specific circumstances of the case, one could safely assume that the patent user is aware of the infringement and the notification would only constitute a "pointless formality." See *Fraunhofer-Gesellschaft (MPEG-LA) v. ZTE* (Dusseldorf District Court, Case No. 4a O 15/17 (November 9, 2018); *Unwired Planet v. Huawei* [2018] EWCA Civ 2344.

¹⁵ *Sisvel v. Haier*, Federal Court of Justice (*Bundesgerichtshof*) Case No. KZR 36/17 (May 5, 2020).

¹⁶ In-depth analysis conducted by McDonagh, Luke & Bonadio, Enrico at the request of the European Parliament's Committee on Legal Affairs entitled "Standard Essential Patents and the Internet of Things," PE 608.854, January 2019, p. 30:

[https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/608854/IPOL_IDA\(2019\)608854_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/608854/IPOL_IDA(2019)608854_EN.pdf) This states: *enhancing the viability of collective licensing schemes, which would entail that participants to a SSO should be allowed to collectively negotiate royalty rates on behalf of standard implementers, so as to counterbalance the strong bargaining power held by SEP-owners.*

¹⁷ <https://www.justice.gov/opa/speech/antitrust-division-economics-director-enforcement-jeffrey-wilder-iam-and-gcr-connect-sep>. This is echoed in Europe, with Article 269 of the EC Horizontal Guidelines stating that, 'even if the establishment of a standard can create or increase the market power of IPR holders possessing IPR essential to the standard, there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power. The question of market power can only be assessed on a case by case basis.' (Available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114\(04\)&from=EN.](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN.))

¹⁸ Case C-170/13, *Huawei Technologies Co. Ltd v. ZTE Corp.* [2015] ECLI:EU:C:2015:477. The Report, however, does not appear to reflect the nature of FRAND licensing, with FRAND being relevant to assessing the conduct of the parties (both before and after the negotiation), the range of acceptable license fees having regard to the totality of the transaction, and the time requirement being without delay. See also *Sisvel v. Haier*, Federal Court of Justice (*Bundesgerichtshof*) Case No. KZR 36/17 (May 5, 2020); *Unwired Planet International Ltd v. Huawei Technologies (UK) Co Ltd* [2020] UKSC 37.

¹⁹ *Ibid.*

These mechanisms are: (a) monitoring and supervision by antitrust authorities, and (b) observance of the *Huawei* framework in licensing negotiations. However, the Report provides no detail regarding these safeguards, including how competition law authorities would regularly insert themselves in commercial negotiations or monitor LNG patent license agreements (presumably so that the appropriate license agreement is concluded promptly and without undue delay). Nor does it suggest where agencies would find the resources for such undertaking. The suggested safeguards appear to be unrealistic or insufficient to address the significant anticompetitive risks from joint licensee negotiations.

There are other antitrust risks that the Proposal fails to acknowledge. The Proposal suggests that LNG members have the right to agree on:

- i. the licensed product(s) covered by the prospective license;
- ii. the value chain level at which the patents in question are to be licensed; and
- iii. an upper boundary for royalty in the prospective license (a lower bound is not mentioned in the proposal).²⁰

The Proposal does not explain how any safeguard mechanism can address the anticompetitive object of the Proposal, i.e. licensee-side price-fixing by setting the upper boundary of the license fees.

This aspect of the Proposal is fundamentally flawed. It is not for a prospective licensee (particularly a prospective licensee that is already implementing a standardized technology) to dictate what rights the licensor can exercise regarding patents - which includes patents that are subject to a voluntary FRAND undertaking. The CJEU in *Huawei v. ZTE* states that a voluntary FRAND commitment “cannot

negate the substance of the rights guaranteed to that proprietor by Article 17(2) and Article 47 of the Charter [of Fundamental Rights of the European Union].”²¹ It is also debatable whether a relatively small number of licensees should be dictating what are acceptable commercial norms for licensing.

IV. The Competitive Impact of LNGs on Competitive FRAND Licensing

From a competition law perspective, the main issue with the Proposal is that it would interfere with the free-market pricing mechanism for FRAND licensing²² and arm’s length negotiations under conditions of free, undistorted competition.

This would also appear to ignore the general principles set out in the Guidelines on the application of Article 101, in particular, that:

*the creation of intellectual property rights often entails substantial investment and this is often a risky endeavor. In order not to reduce dynamic competition and to maintain the incentive to innovate, the innovator must not be unduly restricted in the exploitation of intellectual property rights that turn out to be valuable. For these reasons the innovator should be free to seek appropriate remuneration for successful projects that is sufficient to maintain investment incentives, taking failed projects into account.*²³

With LNGs, the license fee range would be determined and artificially capped through the coordinated action of a relatively small number of implementers (who may collectively hold significant market power). Collusive behavior regarding SEP licensing negotiations would unavoidably lower legitimate free-market

²⁰ SEP Expert Group Report (n. 5) 169.

²¹ Case C-170/13, *Huawei Technologies Co. Ltd v. ZTE Corp.* [2015] ECLI:EU:C:2015:477, at paragraph 59. Article 17(2) of the Charter provides that intellectual property shall be protected as a fundamental right. Article 47 of the Charter guarantees effective judicial protection.

²² See among many contributions, Daniel Spulber, “Innovation Economics: The Interplay Among Technology Standards, Competitive Conduct, and Economic Performance” (2013) (4) *J. Comp. L. & Econ.* 777; Gregory Sidak, “The Antitrust Division’s Devaluation of Standard-Essential Patents” (2015) 104 *Georgetown L. J. Onl.* 48; Jonathan Barnett, “Has the Academy Led Patent Law Astray?” (2017) 32 *Berkeley Tech. L. J.* 1313; Alexander Galetovic and Stephen Haber, “SEP Royalties: What Theory of Value and Distribution Should Courts Apply?” (2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3447641.

²³ Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements [TTBER Guidelines] (2014/C 89/03), at paragraph 8.

FRAND licensing fee ranges to sub-competitive levels since the potential licensees do not compete for licenses but join an organization that possesses collective monopsony market power (in effect, a buyers' cartel). As a result, the distorted (sub-competitive) license fee range for technologies making up standards would also distort the competitive supply of technologies for standards. In practice, returns on investment in standardization would be curtailed and technology developers would lack the incentive or means to further invest in the development of those technologies.

The Proposal provides no clarity on how individual SEP owners, particularly SMEs and research organizations, could counter the collusive setting of license fees or protracted license negotiations by LNGs - apart from issuing infringement proceedings and seeking injunctive relief.²⁴ No aspect of the Proposal appears to foster the efficient conclusion of FRAND licensing negotiations.

The Proposal also attempts to create an analogy between patent pools and LNGs. Such analogy is false. Patent pools clearly differ from LNGs. Patent pools most often operate under the safe harbor provisions set out of the EC Horizontal Guidelines²⁵ and the EC Guidelines for Technology Transfer Agreements²⁶ (TTBER Guidelines). Collectively these Guidelines provide a safe harbor for patent pools that are formed by owners of standard essential patents pooling complementary, not alternative (competing), standardized technologies, because of the clear efficiencies of such pooling. There is to be an independent expert assessment of the essentiality of patents admitted for inclusion in the pool and a requirement that the pool does not include competing or additional technologies in the pool license. Moreover, patent pools operate under a

strict regulatory and antitrust framework. There are also restrictions regarding conversations and information shared in patent pools, to strongly mitigate against collusive conduct.

An LNG, on the other hand, would be comprised of actual competitors supplying competing (and not complementary) products. If discussing the negotiation and pricing of essential patents, they are well placed to coordinate in order to lower the cost of any standardized input they use in their products. If a patent pool incorporating alternative (and not complementary and essential) technologies engages in unlawful price-fixing,²⁷ so would LNGs. Indeed, the Proposal appears to facilitate the collective price-fixing of the upper bound of SEP licensing fees. This is because potential licensees would not negotiate licenses independently (and competitively) but could collectively (and non-competitively) set fees for SEP licenses. The Commission states that the most flagrant example of illegal conduct infringing Article 101 is the creation of a cartel between competitors in order to achieve this aim.²⁸

Another concerning aspect is that the Proposal, if adopted, would also facilitate extensive sharing of highly sensitive and confidential market information. More specifically, SEP licensing negotiations involve exchange of sensitive and confidential information between the parties, including data on sales, projected sales, salient markets, prices, and commercialization strategies.²⁹ Such data can reveal a great deal about a competitor's business and, hence, negotiating parties execute non-disclosure agreements ("NDAs") before such data is exchanged and their final licensing arrangement is confidential. These mechanisms for the protection of commercially sensitive information are essential not only for protecting companies' individual competitive

²⁴ SEP Expert Group Report (n. 5). It could be argued that the concept of FRAND licensing is not applicable to LNGs due to price fixing (the LNG by its very nature and circumstance may not provide a FRAND counteroffer). There may thus be a heightened exposure to injunctive relief for LNG members if seeking to negotiate a license after infringement has commenced. See Opie, Elisabeth, "The Curious Incident of the LNG Concept" (publication forthcoming at the time of writing).

²⁵ Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance [Horizontal Guidelines] [2011] OJ C11/1.

²⁶ TTBER Guidelines (n. 21) para 246.

²⁷ *Ibid.* ("Technology pools may also be restrictive of competition. The creation of a technology pool necessarily implies joint selling of the pooled technologies, which 'in the case of pools composed solely or predominantly of substitute technologies amounts to a price fixing cartel'") [emph. added].

²⁸ https://ec.europa.eu/competition-policy/cartels/cartels-overview_en.

²⁹ See Haris Tsilikas and Spyros Makris, "Confidentiality and transparency in FRAND litigation in the EU" (2020) 15(3) *JIPPL* 173.

position on the market but also for preventing coordination and preserving the competitive process. If licensing negotiations are conducted collectively on the licensee side, this would unavoidably require the extensive sharing of such highly sensitive information. The Proposal envisions LNGs as a forum for anticompetitive exchange of information on prices, output, sales, and other competitively-sensitive information that allows parties to coordinate their market behavior and decisions.

The Proposal appears to contemplate that within an LNG, however, such information would freely flow between competitors. This increases price/output transparency in the market and poses an obvious anticompetitive risk of horizontal coordination (tacit or explicit).

V. A Brief Assessment of the Proposal for LNGs Under Article 101 TFEU

As the foregoing suggests, the Proposal on LNGs raises serious EU competition law concerns, especially in the context of Article 101 TFEU.³⁰ Article 101(1) prohibits agreements and concertation between competitors that have as their object or effect the restriction of competition in the EU internal market. Agreements that are found to be restrictive under Article 101(1) may still be exempted under Article 101(3), provided they give rise to procompetitive efficiencies and otherwise meet the requirements of this provision (no elimination of competition, pass-on to

consumers of a fair share of the efficiencies, necessity of the restriction).

Agreements that, given their overall context, are expected – by their very nature – to have a detrimental impact on competition (price, output, quality, innovation) are deemed to have an anticompetitive object.³¹ Insofar as LNGs are envisaged to engage in the fixing of a price ceiling for SEP license fees, this may be considered a “by object” unlawful price fixing of standardized technologies. LNGs and their members would in effect coordinate on the license fee range for SEP licenses and eliminate competition between licensees for these licenses. In these circumstances, the license fee range or price could not be assumed FRAND.

The potential risks of buyer-side collusion to fix prices are analyzed by the European Commission in its Horizontal Guidelines. In examining joint purchasing arrangements, the Commission notes that these arrangements may “serve as a tool to engage in a disguised cartel, that is to say, otherwise prohibited price-fixing, output limitation or market allocation.”³² According to the Commission, the exercise of collective (monopsony) market power may result in “quality reductions, lessening of innovation efforts, or ultimately sub-optimal supply.”³³ Therefore, unless the Proposal can lay a credible claim to having redeeming, procompetitive virtues, LNGs could be considered a restriction by object.³⁴

³⁰ Buyer-side price fixing arrangements are also treated strictly under US antitrust law and §1 Sherman Act. See, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007).

³¹ Such “by object” restrictive agreements are inter alia price fixing, output restrictions, and market allocation between competitors. See, Case C-67/13 P, *Groupement des cartes bancaires (CB) v. European Commission* [2014] ECLI:EU:C:2014:2204 (holding that only agreements that reveal an obviously pernicious effect on competition, without one having to undertake complex assessments, can be held restrictive by object); Case C-307/18, *Generics (UK) Ltd and Others v. Competition and Markets Authority* [2020] ECLI:EU:C:2020:52, para 64 (holding that agreements are classified as “by object” restrictions “in so far as experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers”); Case C-228/18, *Gazdasági Versenyhivatal v. Budapest Bank Nyrt. and Others* [2020] ECLI:EU:C:2020:265, para 76 (“in order to justify an agreement being classified as a restriction of competition ‘by object’, without an analysis of its effects being required, there must be sufficiently reliable and robust experience for the view to be taken that that agreement is, by its very nature, harmful to the proper functioning of competition”).

³² Horizontal Guidelines (n. 23) para 205.

³³ *Ibid.* para 202.

³⁴ Price fixing on the buyer side is also restrictive by object under Article 101(1). See Joined Cases 209 to 215 and 218/78, *Heintz van Landewyck SARL and Others v. Commission of the European Communities* (FEDETAB) [1980] ECLI:EU:C:1980:248 (prohibiting a set of recommendations introduced by a Belgian tobacco trade association to its members including, among others, recommendations on maximum discounts and minimum quantity quotas); Commission Decision, *Raw Tobacco Italy* (Case COMP/C.38.281/B.2) [2005] (fining a buyer-side price fixing cartel of tobacco processing operators, and rejecting the arguments by defendants that their price-fixing arrangement countered suppliers’ market power and enhanced efficiency). See also Nicolas Petit, “The IEEE-SA Revised Patent Policy and Its Definition of “Reasonable” Rates: A Transatlantic Antitrust Divide?” (2017) 27(2) *Fordham Intell. Prop. Media & Ent. L.J.* 211.

In this regard, it should be noted that under Article 101 TFEU, efficiencies are understood as objective economic and technical benefits accruing from the agreement in question, and not the private gains to the parties to the restrictive agreement.³⁵ The European Commission, in its Guidelines on the Application of Article 101(3) TFEU, has emphasized that cost reductions that “arise from the mere exercise of market power by the parties cannot be taken into account.”³⁶

Agreements that do not have an anticompetitive object may nonetheless bring about anticompetitive effects. In the different context of joint purchasing agreements, the European Commission, in its Horizontal Guidelines, indicates that these agreements may foreclose competitors that are not part of the joint purchasing arrangement, allow coordination between competitors in the downstream market, and facilitate anticompetitive collusion.³⁷ Such effects may also result from the Proposal for LNGs.

Under Article 101(3) TFEU, agreements that produce restrictive anticompetitive effects within the meaning of Article 101(1) may nonetheless be exempted provided four cumulative conditions are met: (a) the agreement produces procompetitive efficiencies, (b) consumers are allowed a fair share of these efficiencies, (c) the restrictions are indispensable to achieving the efficiencies, and (d) competition is not eliminated on the market.

The Proposal attempts to claim such procompetitive efficiencies. In particular, it contends that the formation of LNGs for coordinated bargaining of essential IP licenses with SEP holders may bring about the following benefits:

- i. efficiency in licensing negotiations: LNGs would pool the technical and business expertise of their individual members to more effectively address issues such as determination of validity and/or essentiality of a patent;
- ii. more balance in the negotiations between SEP holders and implementers, especially when the latter comprise mainly small businesses with limited expertise, experience, and resources;
- iii. economizing transaction costs: joint licensing negotiations would reduce the number of SEP licenses and licensing negotiations.

In relation to i. and iii., this could very well lead to a higher level of patent challenges or litigation. As noted above,³⁸ ii. is based on a false premise that there is an imbalance between the parties in a commercial FRAND negotiation. As a stand-alone, iii. does not take into account that there is no “one size fits all” model for licensing transactions – unless all LNGs members agree upfront to the exact same terms and conditions - which means no allowance for changes in terms of payment, reporting and audit requirements, or tailoring of any aspect of a license agreement to each LNG’s business model.

The purported benefits of the Proposal cannot be deemed procompetitive in the sense of Article 101(3) if they arise from the elimination of competition between the parties.³⁹ The Proposal fails to satisfy this requirement insofar as it eliminates competition between licensees for SEP licenses by (artificially) fixing the upper bound of royalty rates.

To the extent LNGs may serve an anticompetitive object – price fixing by setting the upper bound of SEP license fees – this

³⁵ See Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services Unlimited v. Commission (Glaxo Spain)* [2009] ECLI:EU:C:2009:610, para 92 (holding that Article 101(3) requires “appreciable objective advantages of such a kind as to compensate for the resulting disadvantages for competition.” According to the Court, such advantages are not identified with the private gains of the undertakings participating in the agreement or concerted practice). Similarly, under U.S. antitrust law and §1 Sherman Act, “cost savings that arise from anticompetitive output or service reductions are not treated as cognizable efficiencies.” See U.S. DOJ and U.S. FTC, *Antitrust Guidelines for Collaboration Between Competitors* (2000) 24.

³⁶ Communication from the Commission, Guidelines on the applicability of Article 81 (3) of the Treaty [2004] OJ C101/97, para 49.

³⁷ Horizontal Guidelines (n. 23) paras 200 et seq.

³⁸ See above, fn 15. It is noted that balance is not defined in the Proposal. Balance should refer to each party to the license negotiation arriving at the bargaining table with all legal rights and obligations intact. Balance should not refer to some built-in compromise to legal rights and obligations to the disadvantage of one of the negotiating parties.

³⁹ See above, n. 14 and cases therein.

effectively calls for antitrust authorities to endorse an unlawful price-fixing arrangement and mitigate its (virtually certain) anticompetitive effects. If antitrust authorities were ever to assume such a role, this would transform them into price regulators for essential patent licensing, a task for which they are ill-equipped, and which in any case lies outside their mandate. From a resources perspective, it is particularly unclear how an antitrust authority could practically cope with the enormous task of overseeing day-to-day confidential commercial licensing negotiations that are time-sensitive and resource-consuming.

VI. Conclusion

The standardization ecosystem has benefited our societies with life-changing innovations, which could not have been achieved by one company alone – at least not as efficiently and within the time frames achieved to date. This technical cooperation is efficient and sustainable because it enables technology contributors to earn a return on investment, regardless of the type of contributor (large company, SME, research organization) and its business model. Many contributors - particularly SMEs and research organizations – rely on licensing revenue for this return on investment. The actual achievement of this rests on the parties engaging in and concluding good faith commercial negotiations for a FRAND license without undue delay.

The Proposal for the formation of joint licensee negotiations groups would add inefficient layers to a licensing negotiation, and diminish the prospect of appropriate compensation for essential patent owners by enabling and facilitating licensee-side collusion. Some of the

grave antitrust risks arising from this Proposal are acknowledged by its own proponents.

LNGs that involve buyer-side market power and coordination on royalty rates that fall outside the FRAND licensing framework can have serious anticompetitive effects. Restrictions of this nature may be “by object” infringements of Article 101 TFEU. Beyond price-fixing arrangements, LNGs may also facilitate the extensive exchange of sensitive information and, therefore, also licensee collusion in downstream markets. The potential impact of these arrangements may be diminished returns on investment in innovation and standards development and, consequently, deterioration in the quality of contributions to standards and of standards themselves without any likely benefit to consumers.

If permitted, LNGs would embody a group of competitors coming together in order to discuss and agree on what each member of the LNG will pay for third party intellectual property which each member of the LNG may already be using. If anything, an LNG would be akin to buyers’ cartels exercising collective monopsony power. Certainly no equivalence can be drawn between an LNG and other mechanisms which are currently the subject of safe harbor provisions in the Commission’s competition law guidelines, being patent pools or joint purchasing arrangements. Based on this initial review, it would appear that any endorsement by the Commission or government of LNGs would be reflective of a non-market economic policy being adopted when innovative effort should be encouraged and rewarded. It would also be puzzling at a time when competition agencies are recognizing the anticompetitive effects of monopsonies.