# Auto Licensing Negotiation Groups are a Bad, Anticompetitive Idea

by Robert Dini[1]

On 9th July, the European Commission published a press release announcing that it had issued:

> *an informal guidance letter to provide antitrust guidance for the creation of a licensing negotiation group in the automotive sector (the Automotive Licensing Negotiation Group or "ALNG") that would negotiate licences to use technologies covered by standard essential patents ("SEPs").* [2]

The press release anticipated a non-confidential version of the guidance letter[3] which, in practice, did not provide any further details on the Commission's analysis than the press release did[4].

Based on information provided by Bayerische Motoren Werke Group AG (BMW), Mercedes Benz Group AG, Thyssenkrupp AG and Volkswagen AG, the proponents of the ALNG, the press release states that "the ALNG does not restrict competition by object" and that it "is unlikely to have actual or potential restrictive effects on competition".

The guidance letter is a signal departure from the long-held view that licensing negotiation groups (LNGs), as cooperative efforts between competitors with market power, cannot engage in price fixing, as this is an activity prohibited by EU competition rules.

The Commission's guidance letter does not limit the target technologies covered by the SEPs and it is overly broad. Worryingly, it encompasses any technology standard implemented in cars without any limitation or further analysis of market failures.

Last year, a similar guidance letter was issued by the German competition authority (the Bundeskartellamt, or BKartA) at the request the same three German automakers, together with

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[2] European Commission, "Commission provides guidance on creation of a licensing negotiation group in the automotive sector for the licensing of standard essential patents" (press release, 9 July 2025) (the "Commission Press Release").

[3] https://ec.europa.eu/competition/antitrust/cases1/202536/AT_40979_104.pdf

[4] At the time of publication of this article, the Commission had just released a proposed draft revision of its Technology Transfer Block Exemption Regulation (TTBER) and Technology Transfer Guidelines (TTG) 2025 technology transfer - European Commission. While this article does not focus on these recent drafts, for which further analysis is required, we note that such drafts modify the safe harbour requirements for pools and add potential safe harbour requirements for LNGs that worryingly mirror the guidance letter. To the extent that we can, at this early stage of analysis of the drafts (and keeping in mind that these are in fact only drafts subject to a formal commenting phase by stakeholders), we will briefly highlight our thoughts on them in this article, especially on topics that overlap and mirror the guidance letters discussed.

Thyssenkrupp.[5] Their request was directed at the formation of an ALNG to negotiate with the owners of patents essential to *general mobile communications standards*.

Despite its importance, the BKartA letter did not get the proper attention and scrutiny it deserved amidst the flurry of legislative activities surrounding the proposed SEP Regulation[6]. Now, with the SEP Regulation withdrawn by the Commission and the draft revision of the Technology Transfer Block Exemption Regulation (TTBER) and Technology Transfer Guidelines recently published, the July guidance looks like the last volley of an extended lobbying campaign.

The final text of the informal guidance from DG Competition contains the same flaws as last year's BKartA decision, with more on top (including not being limited to specific technologies, as mentioned above). Among other problems, the Commission Press Release does not place the activity of a future LNG in the context of:

- SEP licensing;
- the constraints of SEP holders bound by their Fair, Reasonable and Non-Discriminatory (FRAND) obligations;
- the steps involved in negotiating an SEP licence, defined notably by the Court of Justice of the EU (CJEU) and the German courts: and
- the role of transparent pools of SEPs covering standardised technologies.

Disconcertingly, DG Comp's guidance remains silent on important elements of the legal assessment of LNGs, namely: whether the proposed ALNG helps the progress of technology or brings benefits to consumers. These are classic bases under competition law to allow otherwise questionable agreements among competitors.

Instead, the analysis in the guidance is based on a disproportionate focus on market shares in a market that is poorly defined. This is not, and should not be, the core of the evaluation of the competitive impact of the ALNG. Such an approach largely takes a tool of analysis perhaps applicable in some situations and applies it in contexts where it is of limited value at best.

Moreover, and rather surprisingly, according to the Commission press release, the ALNG is allowed because it furthers the Commission's goals in a policy area not squarely within the competition rules: the ALNG is allowed to engage in cartel-like activities because this is apparently consistent with decarbonisation objectives.

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[5] BKartA, Chair, 4th Decision Division "Volkswagen Group, Mercedes-Benz Group, BMW Group, Thyssenkrupp Group: Proposed creation of a framework for negotiating licence agreements for standard essential patents (SEPs) through an "Automotive Licensing Negotiation Group" (ALNG); Examination under Sections 1, 2 GWB, Article 101 TFEU; here: Declaration under Section 32c(2) GWB" (10 June 2024) (the "BKartA Decision"). The letter from the BKartA Chairman was accompanied by a press release, BKartA, "BMW, Mercedes, Thyssenkrupp and VW can negotiate jointly for acquisition of certain technology licences" (10 June 2024).

[6] European Commission, Proposal for a Regulation . . . on standard essential patents . . . COM(2023)232 final (27 Apr 2023). The Commission announced the withdrawal of its proposed SEP Regulation in an annex to its Work Programme 2025, COM(2025) 45 final (11 Feb 2025).Annex IV (item 17).

Like the BKartA decision, DG Comp's guidance falls into the error of addressing a problem that does not exist. Furthermore, it risks throwing sand into the cogs of an efficient licensing machine in other verticals beyond automotive, especially when efficient and transparent patent pools covering SEPs exist.

Overall, the initiatives of both the European Commission and the BKartA are likely to disrupt and add friction to SEP licensing markets. This should not be the basis for a safe harbour under EU competition rules.

## The "guidance" process: no stakeholder consultation

First, a brief word on the nature of the Commission's forthcoming guidance letter.[7] The ALNG letter is one of the first exercises offering "informal guidance" under the Commission's Notice on Informal Guidance.[8] The Notice sets the types of information it can draw upon in the preparation of a response to a request, in addition to the information supplied by the proponents. It can use:

> *information at its disposal from public sources, previous case-law, decision-making practice and guidance letters at Union level or any other source . . . [Moreover, the Commission] may ask the applicant(s) or,* ***in exceptional cases, other selected parties*** *to provide supplementary information . . .*[9]

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[7] As of the date of preparation of this article, the Commission's guidance letter, addressed to the ALNG proponents, has yet to be released. The Commission Press Release (supra n 2) indicates that the letter will be released once a non-confidential version is available.

[8] European Commission, Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the [TFEU] that arise in individual cases (guidance letters), C(2022) 6295 final (3 Oct 2022) (emphasis added). The Commission Press Release mentions also the Commission's letter with the same date offering guidance on a purchasing group for European port equipment.

Before the adoption of Notice on guidance letters, the Commission issued similar "no action" or "comfort letters". Indeed, German automakers were no stranger to this earlier approach. See, e.g., Commission, Letter dated 8 July 2021 of Olivier Guersent, DG Competition (Case AT.40178 – Car Emissions) (Comp.G4/GM) , in which DG Competition confirmed to Daimler, Volkswagen, Audi, Porsche and BMW that "in relation to the development of [selective catalytic reduction systems] for diesel passenger cars DG Competition sees no reason to further investigate as competition infringement [specified conduct]". It is noteworthy that the automakers sought this assurance of "no further investigation" during a proceeding which saw VW, Audi, Porsche and BMW fined €875 million for other conduct, not covered by the letter, related to the development of these systems. European Commission, Commission Decision of 8 July 2021 relating to a proceeding under Article 101 of the [TFEU] (AT.40178 – Car Emissions) (8 July 2021), summarized at OJ C458/16 (12 Nov 2021).

For an earlier example of an "administrative ("comfort") letter" clearing under competition law a licensing programme covering SEPs, see European Commission, "Commission approves a patent licensing programme to implement the MPEG-2 standard" (press release) (IP/98/1155) (18 Dec 1998). Before approving the MPEG-2 patent licensing programme, the Commission gave public notice of its activity and invited interested third parties to submit observations. European Commission, Notification of a licensing system, Case No IV/C-3/36.849 MPEG-2 Licensing Programme (OJ No 98/C 229/19, 22 July 1998)

[9] Notice, supra 8, para 14 (emphasis added).

In the case of the Commission's ALNG guidance, it appears from public reports that no holder of SEPs essential for "general mobile communications technology" was consulted or asked to provide, as supplementary information, facts relating to, or its views on, the proposed ALNG arrangements.

In view of the repeated litigation between the proponents of the ALNG and licensors, and the traction in the automotive space of the existing Avanci licensing programme covering cellular technology, the Commission should have concluded that the ALNG case was an exceptional one justifying a broader consultation, which would have been required if proper due process had been followed. Therefore, it is arguably an abuse of process that no consultation occurred as it deprived all stakeholders of critical information.[10]

## Nature of "Guidance process" and due process

The "guidance process" also failed to consider another critical input: negotiation to obtain a licence for patents essential to a standardised technology take place within a well-developed legal framework. Generally speaking, standardisation of a technology occurs within a standards development organisation, following a set of principles (stemming largely from antitrust rules) including transparency, openness, due process and, importantly, the availability of patent rights to practise the standard on FRAND terms.

Moreover, the application of these FRAND terms (including royalty rates), and the ability of the SEP holder to exercise its right to exclude an unlicensed infringer, have long been the subject of judicial proceedings in Germany, the rest of Europe and throughout the world. The CJEU, German courts and the UPC have outlined a widely-accepted process for fair dealing in FRAND negotiations.[11]

In addition, an efficient mechanism for SEP licensing – patent pools – is available within a process defined in a series of pronouncements by antitrust agencies since the 1990s. Patent pools also enjoy a soft but well tested safe harbour in the EU Technology Transfer Guidelines (TTG)[12], which

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[10] From a review of the Commission Press Release, the ALNG proponents appear to have broadened the scope of the request beyond their BKartA request in 2024. That first request asked for clearance on an ANLG limited to general mobile communications standards. The query to the Commission was broader: it was apparently to address "technologies covered by SEPs", not confined to any technological sector. The claim could have been that as the request grew larger the specific comments from a single sector were less relevant and did not merit a finding of an "exception case[]". (Alternatively, the broader scope could have been to correct an inconvenient limitation in the BKartA Decision.)

[11] *Huawei v ZTE* and progeny.

[12] The European Commission has proposed an update to the TTG safe harbour requirements for patent pools in its recent draft proposal. The requirements, if the draft were to be accepted with no further modification, become more restrictive and stringent, and therefore potentially add a further compliance and implementation burden for patent owners and patent pool administrators. However, such proposed updated requirements would ultimately enhance transparency and efficiencies and are therefore to be welcomed. Moreover, several transparent patent pools, such as

has been confirmed in the recent proposed draft TTG just published for comments by the Commission.

There is no reference to any of this clearly significant commercial and legal background in the BKartA decision. This is also a failing in the Commission press release.

The release does not address the important larger framework within which any ALNG would operate. The ALNG would be negotiating with licensors, holders of SEPs, that are bound by the obligation to make available to every implementing entity their SEPs on FRAND terms. Again, the BKartA decision is silent on this point (and the Commission press release does not suggest that that DG Comp's final text will be more detailed).

Is it to be concluded that the proponents' submission chose not to give assurances to resolve an important asymmetry in negotiating power? Should we draw the conclusion that, by its silence on this issue, the antitrust regulator (whether BKartA or the Commission) accepts that while SEP holders are constrained by the FRAND obligations imposed by the standards body to which they have contributed their technological innovations, the ALNG members are free of a symmetrical duty?

The BKartA decision could have pointed to a second source for correcting this imbalance: the judicially-created process for SEP licensing in Germany and the rest of Europe. This requires good-faith obligations on potential SEP licensees as well as licensors. In parallel, the EC could have relied on recent UPC decisions

More troubling, the long established SEP licensing process could be overturned if the wrong lessons are drawn from the BKartA decision and from the Commission press release. For example, hold-out could be encouraged by infringing implementers of a standardised technology refusing to deal with an SEP holder on the basis that an ALNG was in formation and that any negotiation would have to wait for a consensus view on royalties established by ALNG members. The asymmetry is palpable. While a SEP holder cannot on its own prevent the use of its patented technology often developed at significant costs (it must resort to enforcement), the implementer may use the technology uninterrupted and without cost.

In addition to the risks of greater hold-out delays, once the negotiations are launched, how would these be consistent with the step-by-step framework set out in the *Huawei* line of cases? These complications would be even more onerous for small and medium sized entities (SMEs) and research institutes when confronting associations of five or more leaders in the automotive sector.

## How to address the Non-Discrimination prong of FRAND?

In terms of the FRAND obligation, one disparity is particularly noteworthy. The ALNG is proposing to enter a market as if it is to participate in normal commercial transactions. By aggregating demand (up to 15 percent), the ALNG looks to achieve a bulk purchase discount consistent with a market share exception under antitrust rules. But in SEP licensing, an important

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those operated by Sisvel and others, already comply with the proposed requirements by transparently listing terms, publishing lists of SEPs evaluated by third parties, offering FRAND rates, etc.

element of normal commercial dealing is absent, making this share analysis of limited utility at best: as part of its FRAND pledge to the standards body, the SEP holder has promised not to discriminate among potential licensees.[13] How does this duty play out in an LNG setting?

In a typical case involving a transparent pool covering SEPs, the licensors will have already proposed terms, including royalty rates. The terms reflected in the standard form licence represent the fulfilment of their duty to make available their SEPs on FRAND terms. The terms may have already been published on the pool administrator's website and the pool administrator, on behalf of the licensors, will have concluded licensing agreements with technology implementers. At this point, presumably, the LNG would, on behalf of its members representing up to 15 percent of the relevant market, seek a better deal because rejection of the standard licence is what leads to the LNG in the first place. How are the pool administrators and their licensors in a position to offer better terms to the LNG members without violating the non-discrimination promise to other licensees?

Among the reasons why LNGs are problematic is because in most SEP contexts they are looking for a commercial outcome that would conflict with the non-discriminatory aspect of the FRAND declaration made by the SEP holder to the standard setting organisation and fulfilled through the holder's licensing programme or through its participation in a transparent pool licence. The goal of LNGs is to obtain a discount on the standard royalty rate. But this logic cannot be applied in transactions where one party, the SEP holder, is bound by its non-discrimination promise.[14]

As a further troubling development, the new TTG draft acknowledges that: "Foreclosure concerns are less likely where participation in the LNG is open to all technology implementers that fulfil objective and non-discriminatory criteria, the operating rules of the LNG do not discriminate between members." In effect, this addresses the non-discrimination issue only inside the LNG itself and not its impact on the ND prong of the SEP owners' FRAND commitment. In the same vein, the TTG draft in its current version does not consider the FRAND boundaries.

## Decision narrowly based on market definition

In its issuance of "informal guidance", the Commission draws upon two general areas of exception to the general prohibition under article 101 TFEU against agreements among competitors, including price fixing.[15]

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[13] Under competition law, the non-discrimination duty is understood not to require equal terms in every case. Rather, the SEP holder is obligated to offer equivalent terms to comparable licensees. This understanding allows for volume discounting, lower or no royalties for R&D and other non-commercial uses, licensing of portfolios that include non-SEP patents, cross-licensing and the like.

[14] An alternative explanation for the intended role of the LNG is that its negotiation would establish not only a royalty rate for its membership but also a baseline for the other 85 percent of SEP implementers. This "signalling" of price levels raises its own antitrust issues. Put another way, would the licensing deal with the LNG in effect compel the SEP holder, obliged not to discriminate when licensing its SEPs, to offer the same royalty level to the 85 percent?

[15] Treaty of the functioning of the European Union (2008) (TFEU) art 101; to the same effect the German Gesetz gegen Wettbewerbsbeschränkungen (GWB) (2023), section 1.

First, any such agreement will be found not to be anticompetitive if it does not "have as [its] object or effect the prevention, restriction or distortion of competition within the internal market". For joint purchasing agreements, the Commission's Horizontal Guidelines affirm that no such prevention, restriction or distortion will be found if it does not affect 15 percent of the internal market.[16]

Alternatively, the prohibition against an agreement among competitors does not apply to an agreement which:

> *contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:*
>
> > *(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*
> >
> > *(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.*

In its Decision, the BKartA noted its "expectation" that, in a licensing market for SEPs for general mobile communications technologies, the combined share of the ALNG parties and possible future members from the automotive industry would not exceed the 15 per cent threshold stipulated in the Horizontal Guidelines. The Commission's' press release notes the same requirement:

> *It is unlikely that ALNG members have a combined market share that exceeds 15% of the total relevant demand on the purchasing market(s) (i.e., the upstream licensing markets for the relevant technology standards), as these technologies are used in many different sectors and for many different purposes, of which automotive manufacturing represents only one*.[17]

Note that the BKartA decision was limited to general mobile communications standards. These are presumably encompassed in the broader scope of the Commission's informal guidance, covering all technology standards.

## The misguided market definition

By focusing on the 15 percent threshold, the BKartA Decision (and to a degree the forthcoming Commission "informal guidance") artfully avoids any discussion of how the proposed ALNG "contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit". These

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[16] European Commission, Guidelines on the applicability of Article 101 of the [TFEU] to horizontal co-operation agreements(2023/C 259/01) (OJ 21 Jul 2023) para 291.

[17] Commission Press Release.

elements are usually key for a successful claim by proponents that an otherwise anticompetitive arrangement can be excepted from EU (and German) competition rules.

But, apparently, here the proponents did not present such claims. They relied instead on their view before German authorities that their share of the licensing market for "general mobile communication technologies" would not exceed 15 percent (and before the Commission, the market for any standardised technology generally). For this reason, their arrangements would not have an appreciable effect on that licensing market and so they did not have to demonstrate how these would promote economic progress or consumer benefit.

Indeed, the BKartA's silence on this point (and apparently the proponents' failure to assert such contributions or benefits) may well also stem from the awkward reality that the ALNG proposal will not improve licensing of general mobile communications standards in the automotive sector. This is because the SEP licensing market is already efficient, allowing implementers (and their consumers) to exploit these general mobile communications technologies. Moreover, joint licensing programmes pooling SEPs are already available. Transparent patent pools have the further merit of full compliance with antitrust rules based on a framework developed over three decades that have been reviewed repeatedly, and favourably, by competition authorities,[18] and have been safe-harboured by law.

Because the German decision and the informal Commission guidance are each so limited in scope – relying principally on the 15 percent threshold – neither provides a framework to inform other LNGs on the economic progress and consumer benefits that would entitle an LNG to an exception to the antitrust prohibition.

Instead, in the case of the BKartA decision, the chief admonition is: if the ALNG crosses the 15 percent threshold by increasing its membership or by seeking to engage in SEP negotiations beyond "general mobile communications technologies", the ALNG should resubmit for a further BKartA assessment. As noted, the 15 percent argument relates to the de minimis assessment of the market, an argument that has to be distinguished by the efficiencies arguments. For this reason, the BKartA decision cannot be held as useful guidance on fully compliant LNGs.[19]

The DG Comp guidance is little better. Here, the ALNG has mustered a further rationale to its entitlement to an exception to the prohibition against price fixing:

[18] The early steps of this regulatory activity were transparent, with public notice and invitations for stakeholder contributions. On the Commission's process addressing the MPEG-2 patent pool, see supra n 8.

[19] The Commission's forthcoming "informal guidance" expressly disclaims any such ambition of providing a safe harbour: companies in other LNGs are responsible for their own self-assessment: "*The observations contained in the informal guidance letter do not apply directly to other licensing negotiation groups.* The companies participating in such groups are responsible for self-assessing their compliance with Article 101 TFEU." Commission Press Release (emphasis added). In a self-assessment, it is not clear what importance is to be given to other European policy priorities! When price-fixing, are companies entitled to point to decarbonisation to fudge the assessment under competition law?

> *Finally, the Commission found that the ALNG aims to increase efficiency in the licensing of SEPs related to digital technologies, which is expected to contribute to Europe's decarbonisation goals and to the transition to net-zero emissions by 2050, as set out in the European Commission's Clean Industrial Deal.*[20]

Furthermore, the relevant market definition by the BKartA and by the Commission suffers from multiple major misguided assumptions.

First, the connected vehicle market is a completely separate one to the consumer electronics/mobile phone market. How can one argue that the members of the ALNG do not have market power by only considering their market share of the **overall** mobile communication market? The correct analysis should have looked at the market share of the members of the ALNG within the connected vehicles market. Under that analysis, it is hard to argue that the members of the ALNG do not have market power – a situation that raises questions and concerns of monopsony and price fixing.

Second, muddying the water between two very different and separate markets (the connected vehicles and the consumer electronics) is not justifiable from a standardised technology point of view. In fact, 5G standards include specific sections that are only used for Vehicle-to-Vehicle (V2V) and Vehicle-to-Infrastructure (V2X) communication, not for cellular handset communication. Even 3GPP recognises that the connected vehicle vertical is very different and has specific technology needs compared to the mobile phone market.

Third, the analysis fails to even consider the differences between tangible product markets and intangible technology markets for licensing. As noted above, while a seller of tangible goods may refuse the sale if the terms are not right and deprive the buyer of the enjoyment of goods, the licensor has no such luxury. The implementer may enjoy the use of the technology, licence or not. Moreover, the 15% analysis fails to consider the knock-on effects in licensing markets. Any licensor will, without difficulty, be able to cite examples of a prospective licensee refusing a licence because another implementer has not yet signed. The traditional goods market analysis fails to consider the impact on the licensing market as a whole if even 15% of the market delays or holds out. In other words, in licensing markets an implementer's market power is not limited to its own market share. Hold-out by even 15% of the market can freeze 100% of the market. The guidance entirely fails to address this point.

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[20] When the Commission writes, "*the Commission found that the ALNG aims . . .* ", does this mean that the Commission under the "informal guidance" process felt itself constrained to accept the ALNG assertions without further inquiry? It is quite a leap from the hypothetical efficiencies to achieving the objectives of net-zero emissions. The ALNG proponents' arguments are disingenuous unless, of course, the Commission's final "informal guidance" text provides further details as to the inefficiencies to be corrected (in SEP markets characterised today by functioning licensing structures, including patent pools) and how large incumbent automakers need recourse to an association to advance their licensing negotiation goals. The "informal guidance", when released, may tell a different story: the automakers could well be hiding behind arguments alleging that the difficulty of small and medium enterprises (SMEs) in negotiating SEP licences could be alleviated by an LNG especially, say, for IoT implementations. Once again, the "informal guidance" would have benefited from a wider consultation.

## "Informal guidance" not the best tool for novel developments where competition law is already well developed

The Informal Guidance Notice mentions "new issues". However, the "issues" are not really "new" for the EC or stakeholders, as they were the object of an ongoing process for regulation. Under these circumstances, it was inappropriate to anticipate the outcomes of the legislative process via a Guidance Letter, waiving the consultations phase. The practical outcome of this misguided and inappropriate approach is that the recent TTG draft, when it applies to LNGs, mirrors the two comfort letters.

The mechanism of "informal guidance" is arguably not best suited for opening the door to LNGs: the Commission's conclusions could have been better presented in some other policy instrument. More importantly, the informal guidance mechanism should not be used further, especially in other verticals where transparent and EU TTBER compliant[21] pools exist. In these verticals, the industry has already achieved efficiency and transparency through pools that adhere to TTBER guidelines, benefiting the entire industry. In such virtuous circumstances, regulation, and in particular "backdoor regulation", can only disrupt efficiency and ought to be avoided.

Once again, the actual text of the "informal guidance" may provide further insights. But it is troubling that the automakers have promoted policy changes through the back door. They chose to use the vehicle of "informal guidance", opening up the possibility of anticompetitive conduct in a process shielded from the scrutiny of stakeholder consultation. The process evidently dissuaded the Commission from dealing with the complexity of SEP licensing markets,

A more discerning Commission review would have made manifest the advantages of today's SEP licensing markets. It would also have revealed the weight of the economic evidence – empirical and theoretical – against the LNG's claims of greater efficiency. After reviewing the arguments against LNGs for IoT licensing, Professor Barnett concludes that far from promoting more efficient SEP licensing:

> *There appears to be a high likelihood that permitting the formation of LNGs would likely constitute a harmful intervention in well-functioning markets for disseminating technological assets through licensing relationships. In the short term, LNGs may simply redistribute economic value from innovator-licensors to producer-licensees, while delivering modest or no pricing gains for consumers. In the longer term, reduced royalties may induce innovator-firms to reduce investment in research and development (R&D) or*

[21] The EU TTBER Guidelines provides a clear soft safe harbour for pools. Following those Guidelines, pools do not only comply with antitrust laws, they also achieve a great deal of additional transparency, efficiency and FRAND compliance. Transparent pool administrators routinely publish a wealth of information about their licensing programmes, including FRAND rates, FRAND methodology, list of essential patents – whose essentiality is often confirmed by external third-party evaluators – list of licensors, often all licensing terms are published (it is not unusual for transparent pool administrators to post online sample licence agreements that a licensee could simply print and sign). Although the platform operating licensing programmes for mobile communication in the automotive sector has yet to comply fully with some of these guidelines, it still provides efficiencies and has a favourable impact on the entire ecosystem. Most importantly, the lack of compliance with some long-standing practices should not negatively impact other pool operators who continue to implement such benefits and safeguards.

> *to fund R&D investment through vertically integrated structures that would limit technology dissemination among device producers compared to licensing-based structures.*

He reiterates how patent pools can better achieve the claimed objectives of LNGs:

> *While LNGs may deliver transaction-cost savings, this same objective can be achieved through pooling and similar licensing platforms at a lower risk of competitive harm. Given that competition policy has no interest in redistributing wealth from licensors to licensees but does have an interest in preserving robust innovation markets, and in light of the fact that existing pooling mechanisms can reduce SEP-related transaction costs, there does not appear to be a plausible basis for relaxing the ban on horizontal coordination to permit LNGs in SEP licensing markets*.[22]

## An LNG is not the mirror image of a patent pool

It is simplistic at best to say that, just as licensors can come together in a pool, there should be nothing wrong with potential licensees joining forces in an LNG. This is a superficial and incorrect view because a patent pool is radically different to a proposed LNG.

An LNG brings together competitors so that they collectively can agree on a purchase price for SEPs. For example, as described in the BKartA decision, the automakers propose to form the ALNG for joint negotiation with SEP licensors. Working together in a joint purchasing arrangement, the goal of their negotiation is a discounted royalty. This is the outcome intended in a monopsony: the exercise of economic power, jointly by industry competitors, distorting the normal function of market pricing, so that they pay less for SEP licences.

Unless an exception specified by the European Commission applies, such a joint purchasing agreement would be found to be anticompetitive and unlawful if the ALNG, for example, covered other essential inputs for automotive production, like illumination components, interior upholstery, tyres, steel, or even for other inputs that are also available to non-automotive sectors like batteries, nuts and bolts, etc.[23] In respect of such discounted royalties for general mobile communications technologies, the ALNG members do not even offer the argument that they intend to pass on some or all of their savings to consumers.

By contrast, a transparent patent pool brings together non-competing entities which each own patents essential for the implementation of a technology. Each patent claim is unique, yet together they are complementary because they are required to implement the technology at issue. In respect

[22] Barnett, Jonathan, The Economic Case Against Licensing Negotiation Groups in the Internet of Things (April 6, 2022). USC Legal Studies Research Paper Series No. 22-1, Journal of Antitrust Enforcement (2022), available at SSRN: https://ssrn.com/abstract=3999461.

[23] The BKartA decision is limited to general mobile communications technologies. The Commission press release covers all standardised sectors: under its terms the ALNG could also negotiate for advantageous terms for the automakers' nuts and bolts, for example.

of ownership of an individual SEP, no holder competes with any other in the ownership, licensing or exercise of other rights of its unique asset. A pool results in no unlawful monopoly power because the aggregation of pooled SEPs, making available these SEPs through a one-stop shop, creates efficiencies. The result is that the pool royalty is generally less than the sum of the royalties were the SEPs to be offered through bilateral negotiations.

A transparent patent pool, by definition, depends on the market's acceptance of the licence it offers. It cannot – and does not – rely on enforcement. Any pool that attempted to do so would inevitably fail. Accordingly, pools must be responsive to market reactions and often adjust their terms as new information emerges. Their incentive is to align with existing demand.

By contrast, groups of licensees operate under very different incentives. They can use patented technology without a licence and seek to minimise – or avoid altogether – the compensation owed for what they exploit. Because, as noted, SEPs are intangible, they are not self-enforcing. SEP holders must bear the burden of enforcement, resorting to litigation when licences on fair terms are not agreed. Such proceedings can take years, assuming the patentee has the resources to pursue them, while in the meantime the implementer continues to use the technology without interruption. This stands in stark contrast to tangible goods, where suppliers can simply withhold access if negotiations fail.

Moreover, SEP owners in transparent pools are bound by FRAND commitments. LNGs, in contrast, coordinate purchasing conditions without any equivalent FRAND safeguard. Pools also benefit from long-standing experience in negotiations and have been extensively analysed in the legal and economic literature. Their treatment under the EU TTBER Guidelines provides a clear soft safe harbour, whereas LNGs' compliance with antitrust law remains unsettled to say the least. Importantly, pools employ strict safeguards to prevent the exchange of sensitive information and mitigate collusion risks. These are protections LNGs lack.

Lastly, successful pools typically involve far fewer licensors than the much larger numbers of implementers grouped in LNGs. Giving equal weight to both sides therefore creates an additional structural imbalance, as licensors' voices are easily diluted.

As discussed earlier, the BKartA letter assumes that the ALNG will not exceed 15 percent of the market for general mobile communications technologies. Thus, the ALNG escapes full regulatory review under competition law, including an assessment of contribution to economic progress and benefits to consumers.

Contrast this with the regulatory review by regulatory authorities of patent pools for some 30 years. This is a process that has created a detailed framework to ensure that the formation and administration of pools, as well as the conduct of the licensors, are guided by best practices and do not infringe competition rules. Moreover, as also discussed previously, while the members of an LNG can act fully as market participants (as long as the LNG doesn't exceed 15 percent of the market), the licensors in a patent pool are each constrained by the pledge given to the relevant standards body of their SEPs' availability on FRAND terms.

## Conclusion

In approving the formation of ALNGs, the Bundeskartellamt, and now the European Commission, have proposed a substantial and detrimental change to SEP licensing markets. But instead of using a process of consultation, stakeholder engagement, and dissemination of draft rules for such a change, the ALNG proponents and the regulators used a regulatory process that allowed participation only by ALNG proponents and led to decision-making in the shadows that has suffered from a lack of information and perspective.

The regulatory analysis would have had a stronger foundation if grounded on the factors identified in Article 101(3): an assessment of whether the conduct among competitors contributes to production or distribution of goods, promotes technical or economic progress, allows consumers a fair share of the resulting benefits. Instead, the flawed analysis focuses on whether the conduct would have an impact on the internal market, finding that for the upstream market the impact is less than 15 percent of a market that includes all implementers across all sectors and for the downstream market, the royalties involved are de minimis compared to the overall cost of an automobile.

Because of the limited scope of its review, the regulator could close its eyes to the obvious: SEP licensing markets are operating efficiently in the context of the FRAND rule; they do not hold back the commercial introduction and rapid take up of innovative products and services; and today's SEP licensing model fosters a virtuous cycle of research and development funded by royalties constantly reinvested.

Furthermore, the regulator has not addressed the asymmetry in a negotiation that would involve a commercially-minded LNG and SEP holders bound by their FRAND obligations. In addition, the regulator does not consider the knock-on effect of a royalty set by an LNG on an SEP holder that must offer non-discriminatory rates to all its licensee community. Is the intention that the LNG will be the beacon that sets the rate for all the SEP market?

Transparent patent pools are key players in SEP licensing markets. They are pro-competitive and achieve efficiencies for licensors and licensees. The virtue and pro-competitive nature of transparent patent pools have been further reinforced by the recent draft TTG published by the Commission and which is now subject to public consultation. The requirements for patent pools, although more restrictive[24], are not only a step forward in favour of transparency, but de facto represent compliance steps that many pools already fulfil.

But a licensing programme comprised of SEP holders is not a model for licensees in an LNG. As framed by the decisions adopted in 2024 by German authorities and this year by DG Comp, LNG participants are genuine price fixers and not entitled to an exception to the prohibition against their

[24] Although several pools already invest resources to comply with the added requirements, it should not be forgotten that these added steps add a burden to the regulatory compliance protocols implemented by pools. We urge regulators to always weigh beneficial effects with added burden to patent owners and pool administrators, to ensure that the added burden does not discourage the creation and use of patent pools. As such, while the added requirements as said are welcomed, no additional burden should be imposed on pool administrators.

anticompetitive behaviour except if they can make a sufficient showing that they meet the criteria set out in Article 101(3) in a process that's transparent and inclusive.

At least one standards body has developed a mechanism allowing implementers input into its pool fostering activity. DVB has long fostered the formation of pools covering patents essential to DVB standards. In promoting pool formation, DVB has allowed input by implementers. When pool formation is almost complete, the pool administrator presents the proposed terms to DVB's IPR Module (or to a fringe meeting with DVB and non-DVB members). Potential licensees can react to these. But importantly, they do not respond collectively. Instead, each can (1) voice its individual perspective on the terms including by (2) calling attention to market realities of which the administrator may be unaware. For example, one such session brought to the attention of MPEG LA that a proposed royalty based on subscription fee revenues should take account of the different business models for broadcasters across EU territories.[25] But importantly this was never a joint "negotiation" in which potential licensees together countered the patent pool with different terms.

The concept of LNGs should not be approved "by the back door", especially in verticals where industry-led solutions like transparent, TTBER-compliant patent pools exist. Instead, the Commission should have chosen a different policy instrument to make a concrete proposal with adequate notice to all stakeholders inviting interested parties to make contributions. This work could then be coupled with studies identifying where there are inefficiencies and setting out an economic justification for any LNG.

Once the Commission is properly informed, it should abandon any work to open the door to royalty price fixing. Licensing markets for standard essential patents are operating efficiently in the context of the FRAND rule, without need for regulatory intervention. Any such intervention will only skew the market, create friction in SEP licensing, thereby slowing the pace of innovation and its adoption across the European Union.

[25] The process is described in Eltzroth, Carter, IPR Policy of the DVB Project (Part 2), Journal of IT Standards and Standardization Research (July – Dec 2009) at pdf pages 34-35 ("Forum to Review Pool Terms").