NOKIA

September 26, 2016

To:

Antitrust Division, Department of Justice
Federal Trade Commission

Re: Comments of Nokia on the proposed revisions of the -
Antitrust Guidelines for the Licensing of Intellectual Property -

Please find attached the comments of Nokia Corporation on - the proposed revisions of the Guidelines. -

Respectfully yours, -
// -
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Comments of Nokia Corporation on the Proposed Revised U.S. Antitrust Guidelines for the Licensing of Intellectual Property

September 26, 2016

General Comments

<u>The guidelines created a balanced framework for assessing licensing arrangements</u>

The legacy of the original 1995 Antitrust Guidelines for the Licensing of Intellectual Property has been positive. Among the highlights of the guidelines were the "three general principles": 1) intellectual property rights are to be treated in antitrust analysis like other forms of property; 2) there is no presumption that ownership of IP creates market power; 3) licensing of IP is generally procompetitive. Equally important, the guidelines established that restraints in licensing agreements would normally be evaluated under the Rule of Reason.

Another of the guidelines' accomplishments was the Antitrust "Safety Zone," which actually consisted of two prongs. The parties did not need to worry about enforcement action if their combined share of the relevant market(s) was below 20%. Alternatively, even if market share data was lacking or misleading, there was no concern if at least four more independent technologies were substitutable for the licensed technology at a comparable cost. This latter alternative was adopted in 2004 by the European Commission in its own Guidelines on Technology Transfer Agreements under TFEU Art. 101, where it remains in ¶157 of the 2014 revision.

In sum, the guidelines set out a framework for antitrust analysis which did not deter innovation and encouraged the dissemination of technology. For these reasons, Nokia applauds the Agencies' decision to consider only minor revisions, in accordance with the principle, "don't mess with success." Just as relatively few changes have been proposed, the following comments will be brief.

There is no need to add a new guidelines section on SEPs or FRAND

With respect to the suggestion made in a couple of the early public comments about the inclusion of specific section on standard-essential patents (SEPs) and the concept of FRAND, we agree with the Agencies' decision not to include such section in the guidelines. The principles stated in the existing guidelines apply equally to the licensing of SEPs. In addition, recent pronouncements issued by courts and antirust agencies provide enough guidance for stakeholders to resolve possible disputes on FRAND licensing in a way that best balances the interests of SEP holders and implementers of standards.

Particular sections of the guidelines

Section 3.1, Nature of the [Antitrust] Concerns, draft new footnote 25

The Agencies have proposed to add a new sentence in a footnote: "The Agencies may … impose licensing requirements to remedy anticompetitive harm …." It seems odd to place such a statement in a footnote, without citation of authority for the power to impose compulsory licenses. There is a further concern about the lack of criteria or examples to explain when such a remedy might be employed.

One would expect that in the post-*Trinko* era – the case in which the Supreme Court refused to recognize an "essential facilities" doctrine – if such a statement is to be added, the Agencies would want to qualify it by adding that a compulsory license would be appropriate in very exceptional cases indeed.

We therefore respectfully suggest that the above-referenced phrase be deleted, or extensively qualified with citation of relevant authorities and guidance on the exceptional circumstances in which a compulsory license could be an acceptable remedy.

Section 5.6, Grantbacks

In the section on Grantbacks, the guidelines note that "[g]rantbacks may adversely affect competition … if they substantially reduce the licensee's incentives to engage in research and development and thereby limit rivalry …." With this observation the Agencies touch on what is sometimes a problem, in fact a phenomenon that may significantly reduce incentives to invest in research and development.

Sometimes when the vendor of a high-tech product, platform or service has acquired market power, the vendor demands, as a condition of access to such product, platform or service, that every customer agree to assert its patents neither against the vendor, nor against all the other customers in the ecosystem using that product, platform or service. The effect is a leveraging of market power both to get access to technology that may be unrelated to the collaboration, and to strengthen market power itself by attracting new customers with the temptation of gaining their rivals' technology free of charge.

What the vendor demands is usually an obligation not to assert patents against itself or any other customer which supposedly relates to the product, platform or service being sought, but in fact is defined so broadly as to be much wider in scope. Because an ecosystem surrounding an offering which has gained market power is usually quite large, with many different types of applications developing on top of it, a non-assertion clause in such a context means extensively diluting, if not destroying, the value of the invention which is subject to it. Typically the demand for a broad non-assertion clause is non-negotiable, especially if the arguable substitutes for the product, platform or service being sought are much less desirable or non-existing. Such demands may significantly weaken the incentives of companies to engage in research and development activities as they in essence seek to obtain free research and development for the benefit of the vendor and the other ecosystem participants.

The Agencies already began to detect such a problem by including in their 2007 Report on Antitrust Enforcement and Intellectual Property Rights a section entitled Non-Assertion Clauses. At p. 90, the following issue was raised:

> "Panelists expressed concern over the use of broad non-assertion clauses, such as those that are unlimited in scope or duration, or are more extensive than a li-

> cense. Some panelists noted that such clauses raise competitive concerns because, by limiting the ability of licensees to collect rents on their own IP, they may discourage independent innovation."

This observation was prophetic, because the situation continues to worsen.

Although usually the demand is for a non-assertion clause, the opportunity to expropriate technology can come in other guises, such as in the form of broad requirements for grantbacks (supposedly a license to a licensor to use a licensee's improvements of the licensed technology), feedback (an automatic license of any suggestions made about a vendor's products or services), etc.

In sum, once it is confirmed that a vendor of a proprietary product, platform or service has market power, there should be a presumption against the vendor demanding from its customers a non-assertion clause, grantback, feedback, etc., which is too extensive and benefits not only the vendor but <u>all the other customers in the ecosystem</u>. In addition, the scope of the non-assert, etc., should typically be directly and strictly relevant to the offering being sold by the vendor.

If such a policy is not implemented, innovation may be severely impacted, and only a few monopolists may be left standing to enjoy the lack of new technologies and new rivals which could have threatened their entrenched positions.

For these reasons, we respectfully submit that Section 5.6 should be expanded to address this issue.