



September 26, 2016

To:
Federal Trade Commission
U.S. Department of Justice, Antitrust Division

VIA EMAIL: ATR.LPS.IPGUIDELINES@USDOJ.GOV

Re: Ericsson Comments on the Department of Justice and Federal Trade Commission's Proposed Update to the Antitrust Guidelines for the Licensing of Intellectual Property

Ericsson is pleased to submit the following comments on the proposed update to the Federal Trade Commission and Department of Justice 1995 Antitrust Guidelines for the Licensing of Intellectual Property ("Proposed Guidelines").¹

Ericsson's interest in the Proposed Guidelines stems from its significant ongoing investment in research and development and extensive experience with patent licensing. Ericsson currently devotes approximately 25,000 employees and almost 15% of its net sales to research and development, with a substantial share directed towards the continued development of open standards for mobile communications and networks. Our technological output is represented by a portfolio that includes more than 39,000 patents worldwide covering multiple jurisdictions. Our technology is broadly disseminated throughout multiple sectors of the economy through a successful licensing program that includes more than 100 agreements. Ericsson also has substantial interests as a licensee. Since Ericsson needs to secure licenses for its own products, most of Ericsson's licensing agreements are cross licenses.²

Ericsson appreciates the Agencies' effort to update the 1995 Guidelines. U.S. law has evolved since the Guidelines were first adopted more than twenty years ago. The Supreme

¹ References in these comments to page numbers in the Proposed Guidelines refer to the comparison version available on the FTC website at <https://www.ftc.gov/reports/antitrust-guidelines-licensing-intellectual-property-proposed-update-1995-guidelines-issued> and on the DOJ Antitrust Division website at <https://www.justice.gov/atr/file/883951/download>.

² As reflected from Ericsson's annual reports, about 95% of Ericsson's annual revenues emanate from the sales of products and services rather than from intellectual property licensing.



Court has decided important cases like *Independent Ink*³ and *Trinko*⁴ that are particularly relevant to the antitrust analysis of intellectual property (“IP”) licensing, and are now included in the Proposed Guidelines. In addition, the Proposed Guidelines are more accurate in reflecting the change in the statutory patent term that followed implementation of the Agreement on Trade Related Aspects of Intellectual Property.⁵

The global competition enforcement environment has evolved as well. Today there are more than 100 competition agencies around the world that did not exist in 1995. Some of these newer agencies appear to have targeted IP through aggressive enforcement positions with regard to the exercise of IP rights that do not always seem in line with sound competition analysis nor well-grounded in economic analysis. These developments hamper incentives to invest and compete on global basis and pose a particularly significant risk to innovators in the information and communications technology (“ICT”) sector like Ericsson.

Because foreign agencies and courts often look to the U.S. for guidance, Ericsson commends the Agencies for reaffirming the core procompetitive principles from the 1995 Guidelines, including that (1) the same antitrust principles apply to conduct involving IP as other forms of property, (2) IP does not necessarily confer market power and (3) licensing is generally procompetitive because it allows parties to combine complementary factors of production.

However, while Ericsson appreciates the overall message and approach the Agencies have taken, we have identified a few areas where the Agencies could modify the Proposed Guidelines to promote a better understanding of U.S. law in this area and strengthen their core procompetitive message, particularly towards non-U.S. agencies and courts that may misunderstand or misuse ambiguous statements or broad references, to the detriment of incentives to innovate worldwide and ultimately U.S. consumers. Our specific recommendations are outlined for consideration below.

I. International Aspects of IP Licensing

In the last paragraph of Section 2.1 of the Proposed Guidelines, the Agencies recognize that the licensing of intellectual property is often international, and that the

³ *Ill. Tool Works v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

⁴ *Verizon Commc’ns Inc. v. Law Office of Curtis V. Trinko*, 540 U.S. 398 (2004).

⁵ The Uruguay Round, which incorporates TRIPs, was incorporated into U.S. law in late 1994. 19 U.S.C. §§3511 *et seq.*



Guidelines apply equally to domestic and international licensing arrangements. The Agencies also reference their 1995 Guidelines for International Operations (“International Guidelines”).⁶

While the Proposed Guidelines do not suggest a reformulation to the text in this paragraph, Ericsson respectfully suggests that today’s global antitrust enforcement circumstances, that have significantly changed over the past twenty years, as described above, merit an expanded discussion of comity and the geographic scope of remedies within the Proposed Guidelines.

The general nature of the International Guidelines does not take into account the specific circumstances of IP rights. IP rights are territorial in nature. U.S. courts do not have jurisdiction to impose global remedies that involve non-U.S. patents, unless the parties voluntarily agree to such jurisdiction. While the reach of U.S. antitrust law is broader,⁷ it would be useful to aim to reconcile the two. Hence, Ericsson respectfully recommends that the Agencies use the Proposed Guidelines as an opportunity to provide greater guidance to non-U.S. enforcers on appropriate considerations the U.S. agencies would consider when pursuing remedies that affect foreign IP or IP-related conduct that occurs in other jurisdictions. For example, the Agencies might consider incorporating the points below in such expanded text:

- a) Consistent with the Agencies stated international comity consideration,⁸ in imposing remedies that involve the licensing of intellectual property rights, the Agencies will craft effective competitive remedies that aim to minimize the effect on non-U.S. sovereigns, including with respect to remedies that affect non-U.S. intellectual property rights.
- b) Consistent with Memoranda of Understanding executed between U.S. and non-U.S. competition agencies⁹, consultations between agencies affected by such remedies may be very useful before extraterritorial remedies are imposed. In addition, the Agencies will implement instruments of interagency cooperation

⁶ U.S. Dep’t of Justice & Fed. Trade Comm’n, Antitrust Enforcement Guidelines for International Operations (April 1995), available at <https://www.justice.gov/atr/antitrust-enforcement-guidelines-international-operations>.

⁷ “Anticompetitive conduct that affects U.S. domestic or foreign commerce may violate the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved.” *Id.* at Sect. 3.1.

⁸ *Id.* at Sect. 3.2.

⁹ A list of the current Memoranda of Understanding agreements is available at <https://www.ftc.gov/policy/international/international-cooperation-agreements>.



with non-U.S. counterparts to prevent an effect on rights and licensing terms under U.S. patents by foreign agency actions where there is little or no effect on the competitive process or consumer welfare in such foreign jurisdiction.

- c) Given the multilateral treaty obligations under the WTO TRIPs agreement, to which the U.S. is a signatory, the Agencies acknowledge the existence of Section 40 of the WTO TRIPs agreement that establishes a bilateral consultation framework in cases of competition enforcement against licensing practices deemed to restrain competition.¹⁰

From an editorial perspective, expansion of the text relating to international comity may benefit from being placed under its own sub-section heading (e.g. as a new section 2.2).

II. Enforcement Guidance Should Be Based on Established Legal Precedent

Ericsson appreciates that the Guidelines will continue to be grounded primarily in legal precedent. However, the Proposed Guidelines put greater emphasis on soft law than the 1995 version, including consent agreements, business review letters and policy reports. As discussed below, Ericsson respectfully recommends that the Agencies limit support for their enforcement positions to legally binding precedent.

Consent Agreements

The Agencies relied on negotiated consent agreements to support the concept of an innovation market in the 1995 Guidelines, and the Agencies rely again primarily on settlements to support the revised concept of a research and development market in Section 3.2.3 of the Proposed Guidelines.

¹⁰ 40(3) of the WTO TRIPs agreement reads: “Each Member shall enter, upon request, into consultations with any other Member which has cause to believe that an intellectual property right owner that is a national or domiciliary of the Member to which the request for consultations has been addressed is undertaking practices in violation of the requesting Member’s laws and regulations on the subject matter of this Section, and which wishes to secure compliance with such legislation, without prejudice to any action under the law and to the full freedom of an ultimate decision of either Member. The Member addressed shall accord full and sympathetic consideration to, and shall afford adequate opportunity for, consultations with the requesting Member, and shall cooperate through supply of publicly available non-confidential information of relevance to the matter in question and of other information available to the Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality by the requesting Member”.



Ericsson respectfully recommends the Agencies consider removing these citations to negotiated settlements and replace them with federal court authority, or at least not add any new references to negotiated settlements after revising the text. Settlement agreements do not provide reliable enforcement guidance to industry. The standards for pursuing and accepting settlements can vary widely across staff conducting investigations and agency leadership evaluating staff recommendations. In some cases, parties will agree to settle a case that would never proceed to an enforcement action in order to minimize legal costs or pursue more important business objectives like clearing an important merger. Parties often settle weak claims merely to “put the matter behind them.” Under U.S. Supreme Court precedent,¹¹ the FTC Act,¹² and administrative litigation,¹³ consent decrees and consent orders are not binding legal precedent, but rather reflect the specific circumstances and incentives of the parties at the time of entry. Therefore, such consents should not form the basis for enforcement policy because they do not provide notice of conduct that the agency itself is likely to pursue through litigation or cases where the agency is likely to prevail. And importantly, there is no way for parties to know which settlements resolve plausible claims and which do not.

Business Review Letters and Reports

For similar reasons, Ericsson is concerned by new citations in the Proposed Guidelines referencing business review letters and Agency reports. The Proposed Guidelines expand the prior discussion of patent pools by citing, in footnote 84, the entire third chapter of the FTC/DOJ 2007 Antitrust-IP report, as well as four business review letters discussed in

¹¹ *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 330-331 (1961); *United States v. Armour & Co.*, 402 U.S. 673, 681-682 (1971).

¹² 15 U.S.C. § 45(m)(1)(B) “[i]f the Commission determines . . . that any act or practice is unfair or deceptive, and issues a final cease and desist order, **other than a consent order**, with respect to such act or practice, then the omission may commence a civil action to obtain a civil penalty . . . against any [party] which engages in such act or practice.” [emphasis added]. The phrase “other than a consent order” was added as part of a 1994 statutory amendment aimed at codifying the FTC’s longstanding practice of not according precedential effect to consent orders. In explaining the reason for this amendment, the House Report explained that “a case settled by a consent agreement would not qualify as a precedent for a section [45(m)(1)(B)] proceeding because the legal and factual issues in question would not have been subject to challenge in an adjudicatory proceeding.” H.R. Rep. No. 103-138, at 14 (1993). The Report contrasted consent orders, which involve no factual or legal determinations, with cease-and-desist orders, which issue “after all factual and legal issues have been fully adjudicated.” *Id.*

¹³ *In re Rambus Inc.*, Docket No. 9302, (ALJ decision, Feb. 23, 2004) at 257, available at <https://www.ftc.gov/sites/default/files/documents/cases/2004/02/040223initialdecision.pdf> (“Consent decrees provide no precedential value. (T)he circumstances surrounding . . . negotiated (consent decrees) are so different that they cannot be persuasively cited in a litigation context. *United States v. E.J du Pont de Nemours Co.* 366 US. 316, 331 n. 12 (1961).”)



that chapter and a fifth issued in 2008.¹⁴ Chapter 3 from the 2007 Report covers a great deal of material, including a range of views from participants in workshops leading to the report that were widely debated, as well as sometimes conflicting academic materials and comments cited in extensive footnotes. Similarly, the five business review letters cited in the same footnote cover a variety of specific fact patterns and expressly represent only DOJ's view as to their enforcement intention at the time the letter was provided. These broad references cover too much material in too abbreviated a manner to provide clear guidance to industry. Instead, these broad references diminish the clarity enforcement guidance is meant to create.

Ericsson is especially concerned by the citation in footnote 17 to the FTC's 2011 patent policy report,¹⁵ While both agencies have engaged in competition policy work relating to the patent system (most recently focused primarily on patent remedies) the purpose of this work has been to provide courts and other agencies applying patent law with competition agency perspectives on the patent system, not to articulate antitrust enforcement principles. Ericsson is concerned that in today's global enforcement environment, foreign agencies may not understand this subtle distinction and will treat policy recommendations as black-letter antitrust principles.

Moreover, courts have rejected portions of the FTC's recommendations since the report was issued. For example, the FTC recommended that courts limit royalties for infringement of patent subject to a RAND assurance to the "incremental value of the technology over alternatives available at the time the standard was defined."¹⁶ The Federal Circuit rejected that approach, requiring only that courts apply the same apportionment principles that apply to all reasonable royalty determinations.¹⁷ In particular, the court stated that "the ultimate reasonable royalty award must be based on the incremental value that the patent invention adds to the end product."¹⁸ Citing to the 2011 Report without noting its

¹⁴ U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007, available at <https://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf>).

¹⁵ THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION ("IP Marketplace"), available at <https://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf>.

¹⁶ IP Marketplace at 194.

¹⁷ *Ericsson, Inc. v. D-Link Systems, Inc.*, 773 F.3d 1024, 1232-1233 (Fed. Cir. 2014).

¹⁸ *Id.* at 1226. Though the Federal Circuit uses the word "incremental," it is clear from the supporting citations and subsequent discussion that the court is referring to the total value the patented technology adds to the end product, not value added over the alternatives that were available at the time the standard was adopted,



limitations may inadvertently mislead non-U.S. agencies regarding U.S. patent damages standards in addition to antitrust enforcement principles.

Finally, we note that the 2011 report was an FTC-only report and, as such, presumably did not undergo the Office of Management and Budget (“OMB”) executive branch agencies’ interagency coordination and clearance process required under OMB Circular A-19.¹⁹ Such OMB coordination and clearance process would, however, been required had the Department of Justice joined that report, and may well have resulted in a rather different final report. Hence, attaching DOJ imprimatur to this FTC report through the Proposed Guidelines seems problematic because it would effectively circumvent the required OMB coordination and clearance process.

III. Equivalent Treatment for Standard-Essential Patents

We thank the Agencies for clarifying in footnote 1 that the Guidelines apply broadly to the technology transfer and innovation-related issues that typically arise with regard to patent, copyright, trade secret and know-how arrangements. We believe it is indeed the correct approach to provide the broad analytical framework.²⁰ Regrettably, some non-U.S. agencies have taken the position that different antitrust principles apply to conduct involving standard-essential patents that are subject to a voluntary F/RAND access assurance. In other words, they treat the licensing of F/RAND-assured essential patents with special antitrust scrutiny, sometimes applying entirely different standards”. For example, in the context of licensing negotiations for F/RAND-assured essential patents, some foreign agencies take the view that it may be an abuse of a dominant position for the patent owner to request the execution of a nondisclosure agreement, while such agreements would not raise similar concerns if a standard-essential patent was not at issue. And it is not uncommon for foreign agencies to rely on FTC and DOJ policy materials, such as the FTC’s 2011 Report, and speeches from Agencies’ leadership, as a basis for supporting aggressive and different enforcement positions where essential patents are involved.

although the court does explain that the value the technology adds to the product must be apportioned from the value added by standardization itself.

¹⁹ Available at https://www.whitehouse.gov/omb/circulars_a019#submission. See also *Private Citizen v. Office of Management and Budget* (D.C. Cir. 2009, reissued 2010) available at [https://www.cadc.uscourts.gov/internet/opinions.nsf/500E4491F143DD8B85257807005A9ACD/\\$file/08-5004-1186351.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/500E4491F143DD8B85257807005A9ACD/$file/08-5004-1186351.pdf) (“OMB has made no effort in recent memory to subject the FTC to the requirements of Circular A-19.”).

²⁰ In providing an overall framework we note, also, that the Guidelines correctly do not specifically address IP rights in any specific industry.



To eliminate any ambiguity regarding U.S. enforcement standards, we strongly encourage the Agencies to state expressly that the same antitrust principles apply to all patents. In particular, we recommend that Agencies add language to footnote 1 stating that:

“the general analytical antitrust framework for analysis of licensing related to standard-essential patents is the same as for patents that are not essential to a standard.”

Because the analytical antitrust framework is the same, Ericsson does not see a need to specifically address essential patents in the Proposed Guidelines. Furthermore, if such separate analysis text were added, we believe non-U.S. agencies and courts may read such added text as confirming their misguided view that conventional antitrust analysis does not apply to enforcement actions involving essential patents. If, however, the Agencies would nonetheless decide to add text on essential patents to the Guidelines, Ericsson respectfully submits that such addition accurately reflect U.S. law by:

- (1) Noting that under U.S. law, the enforcement of patents, including through the seeking of injunctions or exclusion orders, is immune from antitrust liability and unfair competition claims under the Noerr-Pennington doctrine, i.e. the Constitutional right to petition government for redress of grievances.²¹
- (2) Relaying the Court of Appeals for the DC Circuit’s analysis in *Rambus, Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008) – to date the Agencies’ only litigated enforcement action in this area.
- (3) Clarifying that the remaining FTC enforcement actions in this area were all
(a) brought under Section 5 of the FTC Act, rather than the Sherman Act;

²¹ *Apple Inc. v. Motorola Mobility Inc.*, 886 F.Supp.2d 1061, 1066, 1079 (W.D. Wis. 2012) (“[E]nforcement of . . . patents is privileged conduct protected by the First Amendment.” The court “conclude[d] that . . . the Noerr–Pennington doctrine provides [the Defendant] immunity from [Plaintiff’s] antitrust and unfair competition claims . . . to the extent that those claims are premised on a theory of antitrust or unfair competition”; *TCL Commc’ns Tech. Holdings, Ltd. v. Telefonaktienbolaget LM Ericsson et al.*, No. 14-0341, slip op. at 4-7 (C.D. Cal. Aug. 9, 2016) (finding the Plaintiff lacks standing to allege its “incurred significant expense defending against actions by [the Defendant] seeking injunctions or exclusion orders” is a violation of California’s Unfair Competition Law, because of the Noerr Pennington Doctrine which “provides absolute immunity for statutory liability for conduct when petitioning the government for redress. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006).”).



and (b) concluded in consent orders -- explaining the nature of such orders and their lack of precedential value.²²

- (4) Explaining that U.S. litigated cases in this area all involved an alleged element of deception; and
- (5) Referencing the recently revised OMB Circular A-119,²³ which highlights the trade-related statutory obligations on standards-related measures and directs all Federal agencies to consult with USTR and the State Department on how to comply with international obligations with regard to standards when taking actions in this area.²⁴

IV. Clarify the Standard for Unlawful Unilateral Conduct

Section 2.2 of the Proposed Guidelines describes the relationships between IP rights, market power and unlawful conduct. Importantly, the Agencies continue to recognize that IP rights do not necessarily confer market power, and that the lawful acquisition and maintenance of market power does not offend the antitrust laws. However, in articulating the standard for unlawful conduct, the Agencies state that ...even if [the IP owner] lawfully acquired or maintained that power, the owner could still harm competition through *unreasonable* conduct in connection with such property.”²⁵ (emphasis added)

Under U.S. law, firms with monopoly power may violate the antitrust laws only when they engage in exclusionary conduct—behavior that excludes rivals and is harmful to competition on balance.²⁶ Unreasonable conduct is not a term that has clear meaning in the modern U.S. unilateral conduct case law. While Ericsson recognizes that the Agencies used the term “unreasonable” in the original 1995 Guidelines, the earlier sentence formulation was different and less definitive. Furthermore, given the changed circumstances around the world, Ericsson is concerned that retaining that term here, despite other revisions to this section, is likely to suggest to foreign enforcers that the U.S. agencies are endorsing a standard that is broader than the standard that applies in federal court.

²² See *supra* notes 11-13 of these Ericsson comments.

²³ OMB Circular A-119: *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities* (revised 2016 version) available at https://www.whitehouse.gov/sites/default/files/omb/inforeg/revised_circular_a-119_as_of_1_22.pdf.

²⁴ *Id.* at 6 and 24, referencing 19 U.S.C. § 2171 and 2541.

²⁵ Proposed Guidelines, Sect. 2.2. (emphasis added)

²⁶ *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001).



In light of these consideration, Ericsson urges the Agencies to revise the above language by revising the text as follows:

“Furthermore, even if it lawfully acquired or maintained that power, the owner could still harm competition through ~~unreasonable~~ **exclusionary** conduct in connection with such property^{FN1} as analyzed under a ‘rule of reason’ analysis^{FN2}

FN1: See *Rambus, Inc. v. F.T.C.* 522 F.3d 456, 463 (D.C. Cir. 2008) (“The critical question is whether Rambus engaged in exclusionary conduct”).

FN2 See Section 4 of these Guidelines.”

V. Expand the Discussion of Package Licensing

Global technology companies, such as Ericsson, that have invested and continue to invest significantly in R&D, often hold patent portfolios consisting of thousands of patents. With ongoing R&D and patenting activity, the portfolios are dynamic with new patents added on a rolling basis. The competitive dynamics of licensing large dynamic portfolios warrant a mention in the Proposed Guidelines, especially given case law developments that occurred after 1995.

As both the courts and agencies have recognized, portfolio licensing is efficient and procompetitive, particularly for the licensing of essential patents. In Ericsson’s experience, essential patent licenses are almost always structured as portfolio licenses, usually at the request of the licensee and in the common interest of both parties to establish patent peace. The vast majority of licensees strongly prefer a portfolio license—even as to patents not owned or granted at the time of the agreement—because this provides them with the legal and business certainty necessary to make investments and practice a standard free from litigation risk.

Given the importance of package licensing to competition and innovation in the ICT sector, Ericsson recommends the Agencies expand their discussion of package licensing in Section 5.3 of the Proposed Guidelines, and include additional federal court authority regarding the efficiencies associated with package licensing.

The Supreme Court recognized the substantial efficiencies associated with package licensing in *Broadcast Music. v. CBS*.²⁷ The Agencies cite to *Broadcast Music* as authority

²⁷ 441 U.S. 1, 20 (1979).



for the rule of reason framework at footnote 47 in the Proposed Guidelines; we recommend the Agencies cite it again here as support for the efficiencies associated with package licensing.

More recently, in *U.S. Philips Corp. v. ITC*, the Federal Circuit analyzed the competitive effects of portfolio-wide licenses in the standards context,²⁸ where it recognized the efficiencies of portfolio licensing, explaining that it is “extremely expensive and time-consuming” for parties to manage licensing arrangements on a patent-by-patent basis.²⁹ The Federal Circuit also held in *Philips* that portfolio licensing of essential patents cannot constitute anticompetitive tying because patents that are each necessary to implement a standard are not separate products. Ericsson recommends the Agencies expand the discussion of tying in Section 5.3 to explain, that as an initial matter, a tying arrangement requires separate products, and cite to *Philips* to explain that patents in a portfolio of patents all necessary to implement a technology are not separate products.³⁰

Such revision will capture the highly relevant 2005 *Philips* decision in the update, and is especially important because of the Proposed Guidelines’ two deletions of the word “product” in that section, which, if left unchanged, inadvertently deletes the important “separate products” requirement in the analysis of tying. Thus, Ericsson respectfully proposes the following reformulation (red font text denotes added text):

“Package licensing—the licensing of multiple items of intellectual property in a single license or in a group of related licenses—may be a form of tying arrangement if the licensing of one intellectual property right is conditioned upon the acceptance of a license of another, ~~separate~~ intellectual property right **and the two rights constitute separate products.**^{FN} Package licensing can be efficiency enhancing under some circumstances. When multiple licenses are needed to use any single item of intellectual property, for example, a package license may promote such efficiencies. If a package license constitutes a tying arrangement, the Agencies will evaluate its competitive effects under the same principles they apply to other tying arrangements. **FN *U.S. Philips Corp. v. International Trade Commission*, 424 F.3d 1179, 1196 (Fed. Cir. 2005) (“If a patentholder has a package of patents, all of which are necessary to**

²⁸ 424 F.3d 1179 (Fed. Cir. 2005).

²⁹ *Id.*, see also *Automatic Radio Mfg. Co. v. Hazeltine Research*, 339 U.S. 827, 831 (1950) (endorsing use of a package license where it was “difficult without minute inspection to tell whether a particular manufactured radio incorporate a particular one of the 770 patents that the patentee controlled” and thus rendered “patentee’s enforcement of its rights as to each patent individually...extremely difficult and costly.”)

³⁰ *Philips*, 424 F.3d at 1196.



enable a licensee to practice particular technology, it is well established that the patentee may lawfully insist on licensing the patents as a package and may refuse to license them individually, since the group of patents could not reasonably be viewed as distinct products”).

VI. Expanding Excessive Pricing Text

As we stated above, there are more over 100 non-U.S. antitrust enforcement agencies active today, most of which did not exist in 1995. As recently acknowledged by the DOJ, many of these newer agencies analyze single firm conduct very differently than do U.S. agencies,³¹ and these “[i]nternational differences are perhaps greatest with conduct related to intellectual property.”³²

Excessive pricing is of particular concern. Many foreign jurisdictions treat excessive pricing in and of itself as grounds for antitrust liability. While more established competition regimes exercise their authority to pursue “exploitative abuse” very judiciously, as the FTC has recognized, less experienced jurisdictions have used excessive pricing in the area of IP licensing as a form of industrial policy to drive down licensing rates for local champions.³³

It is well established under U.S. law that even firms with monopoly power may charge a monopoly price without running afoul of the antitrust laws.³⁴ This is as true with regard to IP as to other forms of property. Indeed, by citing to *Trinko* and expressly stating in the Proposed Guidelines that the antitrust laws do not impose liability for a unilateral

³¹ Principal Deputy Assistant Attorney General Renata B. Hesse, *Can There Be a “One-World Approach” to Competition Law?* (Remarks at the Chatham House Conference on Globalization of Competition Policy, June 23, 2016) available at <https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-renata-b-hesse-delivers-remarks-chatham-house> (“While there is much in common between how the US and most other jurisdictions approach potentially exclusionary conduct by individual firms, some of our differences are significant.... Agencies and courts in the US have also been more reticent than our global counterparts about finding unilateral conduct to be unlawfully exclusionary”).

³² *Id.*

³³ FTC Chairwoman Edith Ramirez, *Standard-Essential Patents and Licensing: An Antitrust Enforcement Perspective* (8th Annual Global Antitrust Enforcement Symposium, Georgetown University Law Center September 10, 2014) at 8-9, available at https://www.ftc.gov/system/files/documents/public_statements/582451/140915georgetownlaw.pdf (“In contrast to the FTC’s and EC’s approach, media reports indicate that China’s antitrust authorities may be willing to impose liability based solely on the royalty terms that a patent owner demands for a license [for its standard-essential patents]. I am seriously concerned by these reports, which suggest an enforcement policy focused on reducing royalty payments as a matter of industrial policy, rather than protecting competition and long-run consumer welfare.”)

³⁴ *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 297 (2d Cir. 1979).



refusal to deal,³⁵ and continuing to recognize that “market power [does not] impose on the intellectual property owner an obligation to license use of that property to others,”³⁶ the Agencies are stating implicitly that the antitrust laws do not impose antitrust liability for agreeing to deal only at a particular price (or refusing to deal for less than a particular price).

Ericsson respectfully recommends the Agencies take this opportunity to make this point express by amending the two sentences cited above to read as follows (red font denotes proposed new text):

- a) The antitrust laws generally do not impose liability upon a firm for a unilateral refusal to assist its competitors, **including to deal with competitors on any particular terms**, in part because doing so may undermine incentives for investment and innovation. (Section 2.1, page 6 of the Proposed Guidelines)
- b) “Nor does such market power impose on the intellectual property owner an obligation to license use of that property to others, **or to license others at any particular price. Consistent with this principle the Agencies have stated that, in the IP context as in any other context, the antitrust laws do not provide a basis for challenging "high" prices that are not the result of independent anticompetitive conduct.**³⁷ ^{FN} *Rambus, Inc. v. F.T.C.*, 522 F.3d 456, 466 (D.C. Cir. 2008)”

³⁵ Proposed Guidelines, Sect. 2.1.

³⁶ *Id.* at Sect. 2.2

³⁷ Assistant Attorney General Bill Baer, *Reflections on the Role of Competition Agencies When Patents Become Essential* (Remarks at the 19th Annual International Bar Association Competition Conference, September 11, 2015), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-remarks-19th-annual-international-bar> (“it is hard to justify antitrust intervention in a basic commercial dispute. If there is no bad conduct by the patent holder...but rather an assertion of lawful patent rights, competition enforcers need to stand down. Otherwise we are penalizing lawful innovation. ... So we are skeptical when manufacturers complain to us about high royalty rates in the absence of bad conduct. We don’t use antitrust enforcement to regulate royalties. That notion of price controls interferes with free market competition and blunts incentives to innovate. For this reason, U.S. antitrust law does not bar “excessive pricing” in and of itself. Rather, lawful monopolists are perfectly free to charge monopoly prices if they choose to do so.”)

FTC Chairwoman Edith Ramirez, Remarks at the 10th Annual Global Antitrust Enforcement Symposium Georgetown University Law School (September 20, 2016), at 4, available at https://www.ftc.gov/system/files/documents/public_statements/985423/ramirez_-_global_antitrust_enforcement_symposium_keynote_remarks_9-20-16.pdf (“We...have no direct authority over prices. High prices unaccompanied by anticompetitive behavior do not violate the antitrust laws”); FTC Chairwoman Edith Ramirez, *Standard-Essential Patents and Licensing: An Antitrust Enforcement Perspective*, *supra* note 33, at 3 and 11 (“We also recognize that imposing liability for merely refusing to share IP, or license at a particular rate, undercuts the procompetitive value that a strong system of IP rights provides. To promote efficient investment in the development of new technologies, firms should be free to determine for themselves the best way to maximize



(Section 2.2, page 6 of the Proposed Guidelines; Footnote 37 is explanatory for the purpose of these comments)

In addition, given the rapid spread of antitrust enforcement actions worldwide that are based solely on notions of “excessive pricing” of IP, it may be helpful to add a new “Excessive Pricing” sub-section, under the Section 4 “General Principles” list, that will very briefly summarize U.S law in this area. For example, such sub-section could read:

“4.1.3 Excessive Pricing

U.S. antitrust law allows lawful monopolists, and a fortiori other market participants, to set their prices as high as they choose. Hence, the Agencies do not deem “excessive pricing” of IP in and of itself to be an antitrust violation.”³⁸

VII. Conclusion

We appreciate the opportunity to provide these comments on the Proposed Guidelines and thank the Agencies for their kind consideration.

Sincerely,

[REDACTED]

Dina Kallay, SJD
Director, Competition & Intellectual Property
1776 Eye Street, NW, Suite 240
Washington, DC 20006, USA
Tel: +1-202-758-7601
E-mail: Dina.Kallay@ericsson.com

the value of their IP in light of the available alternatives”) (“it is important to recognize that a contractual dispute over royalty terms, whether the rate or the base used, does not in itself raise antitrust concerns.”).

³⁸ The first sentence is verbatim from U.S., *Excessive Pricing*, Submission to OECD Working Party No. 2 on Competition and Regulation (2011), §2, available at <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/1110excessivepricesus.pdf>