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Subject: **Case AT.40979 – Guidance – Automotive LNG**
Informal Guidance Request - Bayerische Motoren Werke Group AG, Mercedes Benz Group AG, thyssenkrupp AG and Volkswagen AG
(Please quote this reference in all correspondence)

Dear Sir or Madam,

(1) I refer to your request of 20 December 2024 ("the Request") for informal guidance pursuant to the Commission Notice on Informal Guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) that arise in individual cases ("Notice on Informal Guidance" or "Notice") ([1]).

(2) In the Request, you request informal guidance on the compatibility with EU competition rules of a project to create a licensing negotiation group in the automotive sector: the Automotive Licensing Negotiation Group ("ALNG"). The Request refers to the issuance of a letter by the Federal Cartel Office of Germany on 10 June 2024, declaring that the ALNG project can be tolerated under German antitrust rules, subject to certain conditions.

(3) This informal guidance letter sets out the Commission's position as regards certain issues raised in the Request ([2]).

([1]) Commission Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases (guidance letters), OJ C 381, 4.10.2022, p.9.

([2]) As per paragraph 21 of the Notice on Informal guidance.

1. PRELIMINARY CONSIDERATIONS

(4) Since the entry into force of Council Regulation (EC) No 1/2003 ([3]), undertakings can no longer notify their agreements to the Commission in order to receive an individual exemption from Article 101 TFEU, but they are themselves responsible for assessing the legality of their agreements and practices. This system of self-assessment, framed by the extensive guidance provided in Commission notices and other publications, as well as existing case law, is now well established.

(5) Consequently, informal guidance letters are intended to assist undertakings with their self-assessment of compliance with the competition rules on agreements and unilateral practices, for which they remain ultimately responsible.

2. INFORMAL GUIDANCE

(6) Section 2.1 of this letter summarises the Request and Section 2.2 contains the Commission's assessment.

2.1. The Request

(7) ALNG founding members are the German companies Bayerische Motoren Werke Group AG ("BMW"), Mercedes Benz Group AG ("Mercedes"), thyssenkrupp AG and Volkswagen AG ("Volkswagen") (the "Parties").

(8) In the Request, you explain that the Parties envisage the creation of a joint licensing negotiation group ("LNG") for the purpose of negotiating licences for standard essential patents ("SEPs") with individual SEP holders and SEP pools (together "SEP holders").

(9) In the Request, you state that the cooperation under ALNG is likely to increase efficiency in the licensing of SEPs. An LNG can negotiate several licences via only one or a few negotiations. Licensees can share the costs of the negotiation, therefore reducing the associated expenses and the time frame necessary to conclude an agreement, as compared to individual negotiations.

2.1.1. Functioning of ALNG

(10) In the Request, you describe the establishment and operating rules of ALNG as follows:

(a) ALNG will be established in the form of a German limited liability company (Gesellschaft mit beschränkter Haftung, GmbH, "ALNG GmbH") as a wholly-owned subsidiary of the German Association of the Automotive Industry (Verband der Automobilindustrie e.V.). Membership of ALNG will be based on service agreements with ALNG GmbH and will be open to interested companies from the automotive industry including automobile manufacturers and component suppliers.

(b) ALNG will use a negotiation group model: any ALNG member can request the creation of a negotiation group, which will be responsible for the

([3]) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union. The two sets of provisions are, in substance, identical.

negotiation of licences with a particular SEP holder or SEP pool. Members who are not involved in the negotiation group can ask to join it at a later stage, in return for a contribution towards the costs and subject to any agreements to the contrary with the SEP holder.

(c) The SEP licensing negotiations will be conducted by an independent negotiation team ([4]), which will act on behalf of the negotiation group. The day-to-day business of ALNG will be managed by a neutral manager, who will be elected by the members of ALNG but cannot be a current officer or employee of any ALNG member or affiliate ([5]).

(d) ALNG members that form part of a specific negotiation group inform the independent negotiation team bilaterally of their own expectations regarding acceptable licensing terms. The negotiation team negotiates in the interest of the entire negotiation group in order to reach a FRAND-compliant result with SEP holders. While the negotiation team will seek to find a balance of member interests in the negotiations, the negotiated outcome is not required to fully match the terms considered acceptable by all the members of the negotiation group. Members of the negotiation group are not obliged to accept the negotiated agreement. If a member rejects the proposed agreement, the status quo will resume as if the negotiation group had never existed, and the SEP holder and that member will be entirely free to engage in independent licence negotiations.

(e) The SEP holder(s) and the members of the negotiation group will agree on a time frame for the negotiations beforehand. Negotiations will be in two phases: the negotiation between the SEP holder and the negotiation team ("Phase 1") and a possible subsequent bilateral negotiation ("Phase 2") in special cases for particular licences that require amendment of the negotiated licence agreement (e.g. reciprocal licensing). While the time period required for the negotiations may vary depending on the relevant facts and the complexity of the negotiations, as a general rule the negotiation team and the SEP holder should endeavour to conclude Phase 1 negotiations within six months and any subsequent Phase 2 bilateral negotiations within a further three months from the start of bilateral talks between the SEP holder and the respective negotiation group member. However, depending on the facts and the complexity of negotiations, a longer time frame may be necessary.

(f) Members of the negotiation group will negotiate with the relevant SEP holder only through the negotiation team until the conclusion or termination of the Phase 1 negotiations. Except for these temporary restrictions, members will remain free to engage in independent licence negotiations with SEP pools and SEP holders, regardless of ALNG's activities.

(g) SEP holders can choose to engage in negotiations with an ALNG negotiation team or not. If they agree to engage in negotiations, SEP holders shall not seek bilateral negotiations in parallel or initiate or proceed with litigation against any member of the negotiation group, as long as group negotiations are ongoing and the agreed time frame is adhered to.

([4]) Consisting of persons who are not current officers or employees of ALNG members – see paragraph 15 of Annex II of the Request.

([5]) See paragraph 30 of Annex II of the Request.

(h) SEP holder(s) may terminate the negotiations with the negotiation team at any time, even during the pre-agreed period of Phase 1, and thus can always open the way for bilateral negotiations. Members of the negotiation group are bound by the collective negotiations conducted by the negotiation team during the pre-agreed period as long as the SEP holder(s) have not terminated the collective negotiations.

(i) ALNG will implement safeguards to prevent any anti-competitive exchange of competitively sensitive information. First, regarding the exchange of information between the members of ALNG and the negotiation group, ALNG members will disclose their negotiation goals to the negotiation team on a bilateral basis. This information will not be shared with other members of the negotiation group or other members of ALNG. The negotiation team can only share general information about the status of negotiations with the negotiation group. Second, the information flow between ALNG members is strictly limited to information necessary to organise the joint negotiation with SEP holders through the negotiation team and moreover, implements mechanisms to avoid information exchange between the members of the negotiation group. Third, no other (sensitive) information will be shared within ALNG. If the negotiation team wishes to discuss specific details of the negotiation with the negotiation group members while the negotiation is ongoing, those discussions will occur on a bilateral basis only.

2.2. The Commission's assessment

(11) In the following sub-sections, the Commission explains how the criteria set out in points 7(a) and 7(b) of the Informal Guidance Notice are fulfilled (Section 2.2.1) and sets out its legal assessment of ALNG under Article 101 TFEU (Section 2.2.2).

2.2.1. The criteria in points 7(a) and 7(b) of the Informal Guidance Notice

(12) The Commission considers that there are valid reasons to provide clarifications on the applicability of Article 101 TFEU to the proposed ALNG, because it raises novel or unresolved questions, clarification of which would provide added value in terms of legal certainty pursuant to point 7 of the Notice.

(13) First, the Request raises novel questions within the meaning of point 7(a) of the Notice insofar as they concern the application of Article 101 TFEU to an LNG for the joint negotiation of SEP licences, which might also include actual or potential competitors. These questions have not been subject to prior Commission guidance or decision-making practice.

(14) Second, there is an interest in providing guidance in this case, as the ALNG's objectives are relevant for the achievement of the Commission's priorities or in the interest of the Union within the meaning of point 7(b) of the Notice. ALNG aims to enhance the efficiency of SEP licensing negotiations ([6]), in particular relating to digital technologies that are necessary to promote innovation in the automotive sector. Digitalisation is expected to contribute to Europe's decarbonisation goals and to the transition to net-zero emissions by 2050([7]), as

([6]) See also the call for more efficient SEP licensing by, e.g. setting up licensing platforms made in the "*Communication from the Commission COM(2017) 712 final - Setting out the EU approach to Standard Essential Patents*" of 29.11.2017

([7]) As indicated in the Draghi Report: "*Digitalisation can also contribute to Europe's decarbonisation and transition to net-zero by 2050*".

set out in the European Commission's Green Deal. Innovation in this area can promote energy savings, contribute to the creation of more sustainable mobility solutions, and promote connectivity and traction technologies (e.g. further electrification). Moreover, this project is in line with the Commission's commitment to promote the competitiveness of EU's automotive sector, as demonstrated by the launch of the Strategic Dialogue on the Future of the Automotive Industry in January 2025([8]).

2.2.2. The Commission's legal assessment of ALNG under Article 101 TFEU

(15) ALNG is an LNG. There is currently no specific guidance or decisional practice at EU level regarding the assessment of LNGs under Article 101 TFEU. LNGs share some characteristics with joint purchasing arrangements, insofar as they bring together undertakings wishing to negotiate jointly the purchase of a licence of technology rights.

(16) Accordingly, the Commission – in the absence of specific guidance on the legal assessment of LNGs under EU competition rules – bases its legal assessment in this letter on Chapter 4 of the Horizontal Guidelines relating to joint purchasing agreements ([9]).

(17) Based on the information provided in the Request and summarised in section 2.1 above, the Commission considers that ALNG does not raise concerns under Article 101 TFEU in so far as the negotiations concern licences of SEPs that are related to technology that is not specific to the automotive sector. This applies for the reasons set out in the following paragraphs and subject to the conditions set out therein.

No restriction of competition by object

(18) According to paragraph 278 of the Horizontal Guidelines, joint purchasing arrangements generally do not amount to a restriction of competition by object if they genuinely concern joint purchasing, namely where two or more purchasers jointly negotiate and conclude an agreement with a given supplier relating to one or more trading terms governing the supply of products to the cooperating purchasers.

(19) Paragraphs 279-282 of the Horizontal Guidelines distinguish genuine joint purchasing arrangements from buyer cartels, notably on the basis that a joint purchasing arrangement makes clear to suppliers that it negotiates on behalf of its members, whereas the participants in a buyer cartel coordinate their behaviour on the purchasing market (for example, in relation to purchase prices or quantities) without engaging in joint negotiations vis-à-vis the supplier.

(20) Based on the information provided in the Request and summarised in section 2.1 above, the main objective of ALNG is to jointly negotiate the terms of SEP licensing agreements on behalf of its members with SEP holders. Under ALNG's negotiation group model, negotiation conditions are transparent for SEP holders. In view of the content and objectives of the proposed ALNG, including the safeguards incorporated in its operating rules, the Commission considers that ALNG does not restrict competition by object.

([8]) IP_25_299_EN.pdf.

([9]) Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 259, 21.7.2023, p. 1.

Assessment of restrictive effects

(21) In order to assess whether ALNG has (actual or likely) restrictive effects on competition, the Commission has reviewed ALNG in its legal and economic context.

(22) Pursuant to paragraph 291 of the Horizontal Guidelines, it is unlikely that market power exists if the members of the joint purchasing arrangement have a combined market share that does not exceed 15% on the purchasing market(s) – i.e., the upstream licensing market(s) for the relevant technology standards, where ALNG members jointly negotiate with SEP holders – and on the relevant selling market(s) – i.e., the downstream selling market(s) where ALNG members manufacture and sell vehicles and their components.

Effects on upstream markets for the licensing of SEPs

(23) In the upstream market(s) for licensing SEPs not specific to the automotive sector, it appears unlikely that ALNG members will hold a combined market share that exceeds 15% of the total relevant demand, as these technologies comprise several use cases. For the purpose of this letter, the precise market definition of the upstream market(s) for licensing SEPs not specific to the automotive sector is left open.

(24) On the other hand, the parties have not provided pertinent documentation that allows the Commission to conclude that the combined market share of ALNG members will not exceed 15% in upstream markets for licensing SEPs that are related to automotive-specific technology ([10]). Accordingly, this guidance letter makes no findings in relation to the negotiation of licences of SEPs relating to automotive-specific technology ([11]).

Effects on downstream markets for the sale of vehicles and their components

(25) In the downstream market(s) for the sale of vehicles and their components, it is possible that the combined market shares of ALNG members exceed the 15% threshold referred to in point 291 of the Horizontal Guidelines in certain relevant markets. However, as stated in point 292 of the Horizontal Guidelines, a combined market share above that threshold does not in itself indicate that the joint purchasing arrangement is likely to give rise to restrictive effects on competition. It is therefore necessary to assess the effects of the arrangement on the market, taking into account other factors.

(26) ALNG is unlikely to lead to appreciable restrictive effects on competition in the downstream markets on which the current (and potential future) members of ALNG are active as sellers.

(27) First, it appears from the Request that, in the automotive sector, the cost of licensing SEPs represents a very small proportion of the total cost of the products that incorporate the relevant SEPs. For example, the amount paid by Volkswagen, Mercedes and BMW for licences of 4G SEPs represents less than 0.1% of the sale price of the best-selling cars that they produce ([12]). Accordingly, the informal

([10]) In accordance with paragraph 12 of the Notice on Informal Guidance.
([11]) See also paragraph (30)(a) below.
([12]) See paragraph 84 of Annex II of the Request.

guidance set out in this letter is provided on the basis that ALNG does not lead to a high degree of commonality of costs between the ALNG members ([13]).

(28) Second, the exchanges of information between ALNG members are limited to what is objectively necessary to conduct joint licensing negotiations, and no commercially sensitive information will be shared between members of negotiation groups and, more generally, between members of ALNG ([14]).

Scope of application of the guidance letter

(29) In addition to the general limits of guidance letters described in the Commission's Notice on Informal Guidance, the Commission's observations set out in the preceding paragraphs are premised on the accuracy of the information provided in the Request and summarised in section 2.1. The Commission's observations are limited to the information presented in section 2.1. This informal guidance letter makes no findings in relation to other information or proposals contained in the Request.

(30) Moreover, the informal guidance set out in this letter applies to the extent that the following elements concerning ALNG's activities are present:

(a) ALNG and its negotiation groups negotiate licences for standards that are not automotive-specific and in respect of which the combined market share of the ALNG members does not exceed 15% of the total demand for the SEPs or standards concerned.

(b) ALNG and its negotiation groups are open to other interested undertakings in the automotive sector, both car manufacturers and component suppliers.

(c) Negotiations with ALNG and its negotiation groups are voluntary for SEP holders (individual SEP holders or SEP pools), meaning that SEP holders are free to enter into a negotiation and to terminate it at any time.

(d) Exchanges of information between ALNG members are limited to what is objectively necessary to conduct the joint licensing negotiations as described in the Request, and no commercially sensitive information is shared between members of negotiation groups and, more generally, between the members of ALNG.

(31) This informal guidance letter makes no finding in relation to the applicability of Article 102 TFEU to ALNG.

([13]) See paragraph 300 of the Horizontal Guidelines.
([14]) See paragraphs 29, 31 and 89 of the Request.

3. CONCLUDING REMARKS

(32) This informal guidance letter reflects the Commission's observations on the information presented to it and does not create any rights or obligations for you or any third party. The observations contained in this letter do not apply directly to other licensing negotiation groups; undertakings participating in such groups are responsible for self-assessing their compliance with Article 101 TFEU. It also cannot prejudge the assessment of the same questions by the Court of Justice of the European Union. Moreover, the clarifications provided herein are expressly conditioned on the accuracy and truthfulness of the information that you have provided, and any material divergence from the information provided will render this guidance letter invalid.

For the Commission

Signed
Teresa RIBERA
Executive Vice-President