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Subject: Case AT.39913 – LED
Commission Decision rejecting the complaint
(Please quote this reference in all correspondence)

Dear Sir,

- (1) I am writing to inform you that the European Commission (the "Commission") has decided to reject your complaint against Koninklijke Philips N.V. ("Philips"), pursuant to Article 7(2) of the Commission Regulation (EC) 773/2004.¹

1. THE COMPLAINT

1.1. The procedure

- (2) On 1 August 2016, you submitted a complaint ("Complaint") requesting the Commission to launch an investigation into alleged infringements of Article 101 and/or Article 102 of the Treaty on the Functioning of the European Union ("TFEU") on markets in the

¹ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L 123, 27.04.2004, pages 18-24.

European LED² lighting sector. You submitted the Complaint on behalf of *Light & Led Made in Europe* Committee, a free association of individuals who are experts or enthusiasts in lighting technology and design and European products, and *Design Luce & Led Made in Italy* Committee, a free association of citizens of all professions, who are experts or enthusiasts in lighting technology and design and Italian products.³

- (3) On 21 October 2016, the Commission sent Philips a non-confidential version of the Complaint and on 10 November 2016, Philips submitted its response to the Complaint ("Response to the Complaint"). On 1 December 2016 the Commission sent you a non-confidential version of the Response to the Complaint. You did not provide comments on this document.
- (4) On 1 December 2016, you provided further clarifications at a meeting with the case-team at DG Competition in Brussels.
- (5) In reply to questions from the Commission, Philips submitted additional information on 29 September 2017 and 14 November 2017.
- (6) By letter of 30 April 2018, the Commission informed you of its intention to reject your complaint. In response, you made additional observations in your letter of 25 May 2018.
- (7) On 15 November 2018 you submitted additional information [REDACTED]⁴.
- (8) Finally, you discussed the case with the case-team during a meeting at DG Competition on 23 November 2018.

1.2. Summary of the allegations

- (9) The Complaint concerns alleged infringements of EU competition law on the markets for LED light fixtures (light fixtures in general can also be referred to as luminaires or lighting products) and LED components, and more particularly, Philips' Patent Licensing Program under which Philips licenses a portfolio of its patents on LED technology.
- (10) Philips, Osram and Zumtobel are active, among other things, in the manufacture and distribution of LED light fixtures⁵ as well as the components for LED light fixtures. As the *Light & Led Made in Europe* Committee and the *Design Luce & Led Made in Italy* Committee defend the interests of manufacturers of LED light fixtures, Philips, Osram and Zumtobel are therefore both (potential) suppliers and competitors to the manufacturers that are members of the Committees.

² LED stands for Light Emitting Diode.

³ Complaint, Section II.3.1.

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⁵ An LED light fixture (or LED luminaire) is an electrical device used to create artificial light which typically contains three components: the LED module or board (the light supply, consisting of a light emitting diode – LED – mounted on a board), the LED driver (the power supply) and the controller (for adjusting light intensity, hue, etc.), all encased in some kind of housing.

- (11) In your Complaint, you allege that a number of practices of Philips infringe Articles 101 and 102 TFEU. Your concerns are primarily related to the terms of Philips' Patent Licensing Program ("PLP"), which was launched in 2008 and offers access to a portfolio of Philips' patents on LED technology.⁶ Under the PLP, licensees have to pay royalties whenever their products or the components included in them use Philips' patented technology.
- (12) You allege that Philips holds a dominant position conferred to it by its large LED-related patent portfolio and that it has exclusive rights over "*essential discoveries*".⁷ In your view, an estimation of Philips' market shares would confirm dominance.⁸ On 15 November 2018, you provided [REDACTED]
[REDACTED]
[REDACTED] You also provided a list of patents that have expired or will soon expire, patents that have been invalidated or amended by various national courts and the European Patent Office ("EPO"), and patents that are currently being opposed before the EPO.
- (13) You also allege that Philips abuses its dominant position through a number of practices. Specifically, you claim that Philips uses "*intimidating, one-sided and pre-planned*" techniques of persuasion to force manufacturers of lighting products to join the PLP.⁹ This would be done by misleading the targeted undertakings, by claiming the infringement of patents which are not valid or close to expiry¹⁰, and without making any clear and specific infringement claims.¹¹
- (14) You also claim that Philips imposes exploitative terms on the license agreements entered into with the manufacturers of lighting products. In particular:
- (a) Philips allegedly imposes royalties based on the value of the finished lighting product while the patent only covers a part or component of that product.¹² Moreover, the royalty percentage varies amongst the licensees according to discriminatory criteria¹³;
 - (b) Philips allegedly imposes excessive reporting obligations on the licensees, such as information on consumers and sales data by country and product.¹⁴ In your view, this sensitive information is likely to be accessible to Philips' lighting technology branch

⁶ The PLP has been operated by Philips Lighting since February 2016. Philips Lighting was divested by Philips in 2016 and changed its name to Signify in May 2018: <https://www.signify.com/global/about/news/press-releases/2018/20180516-philips-lighting-is-now-signify>. While the complaint is not limited to a particular time period, references to Philips's corporate structure should be understood to refer to the situation as it was at the time the Complaint and the responses from Philips were received.

⁷ Complaint, Section II.3.10, pages 23-24.

⁸ Complaint, Section II.3.10, pages 22-23.

⁹ Complaint, Section II.3.4, page 9.

¹⁰ Complaint, Section II.3.6 and Section II.3.7, pages 13-18.

¹¹ Complaint, Section II.3.4, page 10.

¹² Complaint, Section II.3.9, page 21.

¹³ Complaint, Section II.3.11, pages 27-28.

¹⁴ Complaint, Section II.3.9, pages 19-20.

(Philips Lighting) as it is structurally close to Philips' patent protection branch (Philips IP&S), and enables Philips to control the licensees.¹⁵

- (15) You claim that the terms of the license agreements would have the effect of discouraging the licensees to engage in research and development because they know their new products are "*likely to fall within the scope of the licence*". Moreover, the royalties would push manufacturers to raise the prices of finished products to the detriment of final consumers.¹⁶
- (16) Additionally, you claim that Philips entered into multilateral, unlawful restrictive agreements with Osram and Zumtobel, constituting a cartel in breach of Article 101 TFEU. Under the PLP, Philips waives its right to royalties when licensees purchase the basic components (i.e., the LED module, the LED driver and the controller)¹⁷ from "Qualified Suppliers", namely Osram and Zumtobel. You assert that this restricts the licensees' freedom of choice and forecloses other competing suppliers.¹⁸
- (17) In your additional observations in your letter of 25 May 2018, you challenge the Commission's analysis and provisional conclusion but do not provide any new elements.

1.3. Observations of the implicated parties

- (18) On 21 October 2016, with your consent, the Commission sent Philips a non-confidential version of the Complaint and on 10 November 2016, Philips submitted its response to the Complaint ("Response to the Complaint"). Philips also submitted additional information on 29 September 2017 and 14 November 2017.
- (19) Philips describes the value chain of LED lighting products in terms of various levels¹⁹. According to Philips, the worldwide LED lighting industry is highly fragmented, and the total number of companies that are active at Levels L0 to L5/6 are in the tens of thousands. Several players in this industry are vertically integrated and active at all levels (L0 to L5/6) in the value chain.²⁰
- (20) According to Philips, when deciding on its IPR strategy, Philips determined that it would be most practicable to license the patents covered by the PLP at a single level of the value chain. Philips considered that if it were to license the Program Patents at different levels of the LED lighting value chain, this might create uncertainty for market participants regarding the license status of the different components and luminaires that they use.²¹ Philips therefore decided to license the Program Patents at the luminaire level.²²

¹⁵ Complaint, Section II.3.9, pages 20-21.

¹⁶ Complaint, Section II.3.5, page 12.

¹⁷ See footnote 5 above.

¹⁸ Complaint, Section II.3.5, page 12 and Section II.3.8, pages 18-19.

¹⁹ Philips response to RFI of 13 July 2017, para 7. The levels identified are as follows: L0 (LED chips), L1 (packaged LEDs), L2 (LED modules and drivers), L3 (light sources), L4 (LED luminaires) and L5/6 (LED systems and solutions).

²⁰ Philips response to RFI of 13 July 2017, para 12.

²¹ Philips response to RFI of 13 July 2017, para 9.

²² Philips response to RFI of 13 July 2017, para 10.

- (21) In the framework of the PLP therefore, Philips enters into licensing agreements with branded luminaire manufacturers. If Philips believes that a luminaire manufacturer may be selling branded LED luminaires incorporating Philips' technology in countries in which Philips has patents under the PLP, Philips will seek to enter into a discussion with that company on the potential use of its patents in the company's products. Philips' IP specialists will work together with the company (and its technical experts) to analyse the manufacturer's product portfolio in order to determine which of its products read on Philips' patents.²³
- (22) Once it has been established that a luminaire reads on Philips' Program Patents, and the luminaire supplier decides to take a license under the PLP, it may qualify for a zero percent royalty if it acquires three key luminaire components, the so-called "Qualified Components" (i.e., the driver, the LED module and the controller), from a Qualified Supplier (i.e., currently Philips, Osram, and Zumtobel). In that circumstance, Philips considers that it has already received satisfactory compensation for its technology because the price of the components bought from Philips, Osram, and Zumtobel includes the cost of Philips' technology (in the case of Osram and Zumtobel, through IP rights and a lump sum or running royalties under their respective cross-license agreements). According to Philips, a majority of all licensees under the PLP do not report under the zero percent royalty option for any of their luminaires, but instead source one or more components in-house or from competing manufacturers.²⁴
- (23) Regarding the alleged infringements of Article 102 TFEU, Philips claims that:
- (a) Neither its shares of sales on the European market for luminaires nor its patent portfolio for LED-related technology convey dominance. The LED luminaire sector is and will remain highly competitive, and Philips' shares of both sales and patent filings are well below a level that would indicate dominance.²⁵ In addition, Philips asserts that the PLP does not cover any actual or future essential patent since alternative technologies exist for all patents.²⁶
 - (b) The PLP consists of valid patents that are clearly identified on a dedicated website and can be easily verified by the licensees. The fact that some patents are being challenged before national IP courts does not change their current enforceability (pending the proceedings); neither does it affect the validity of the rest of the patent portfolio.²⁷
 - (c) Participation in the PLP is based on open, good faith discussions and involves no "*leading and deeply threatening*" behaviour.²⁸
 - (d) The terms of the PLP are reasonable and ensure equal treatment among licensees. A standard template agreement is proposed to all partners and both royalty calculation methods (both charging royalties over LED luminaires - not LED components) are offered to all licensees. Under the "line-by-line assessment", Philips and the licensee jointly carry out a detailed analysis of each luminaire that the licensee sells to

²³ Philips response to RFI of 13 July 2017, paras 46-47.

²⁴ Philips response to RFI of 13 October 2017, para 5.

²⁵ Response to the Complaint, paras 14-18.

²⁶ Response to the Complaint, para 17.

²⁷ Response to the Complaint, paras 30-31.

²⁸ Response to the Complaint, paras 20-29.

determine which read on a Philips patent. Philips then charges a percentage royalty for each luminaire sold that uses at least one Philips patent included under the PLP.²⁹ Under the "flat rate assessment" (according to Philips requested by various prospective licensees wishing to avoid the administration associated with the "line-by-line assessment"), a flat rate is calculated based on the luminaire categories sold by the licensee and the patent coverage in the countries in which the licensee assembles and/or sells the respective luminaire. This flat rate is designed so that a licensee will pay approximately the same overall royalty rate as it would under the "line-by-line assessment".³⁰

- (e) The royalty rates themselves are "*reasonable and consistent with industry practices*".³¹ Philips provided estimates of the average flat rate based on its current agreements, to illustrate the level of royalties charged when the 0% option does not apply. Data shows that on average, Philips' licensees active in single colour LED luminaires (for which the applicable royalty rate under the PLP is ■%) actually paid an average flat rate below ■%, while companies active in colour changing LED luminaires (for which the applicable royalty rate is ■%) paid an average flat rate below ■%.³²
 - (f) The information transmitted to Philips by its licensees is the minimum that is reasonably necessary for the purpose of verifying compliance with the conditions of the PLP and for calculating the royalties due, and is provided subject to confidentiality obligations on the part of Philips. Moreover, there are internal firewalls between Philips Lighting's IP Department (previously Philips IP&S) and Philips business units, preventing the latter from becoming aware of commercially sensitive information.³³
 - (g) Instead of limiting research and development, the PLP has actively stimulated competition in a fast-growing sector. Philips deliberately chose to license key parts of its IPR instead of keeping it for captive use in order to increase competition in the LED sector.³⁴
- (24) Philips also contests any infringement of Article 101 TFEU, as it submits that the PLP is unilaterally set up and operated by Philips and is not the result of a cartel. Philips has concluded separate cross-licensing agreements concerning IPR on LED technology with each of Osram and Zumtobel to overcome potential disputes over lighting technologies. Philips agreed with Osram and Zumtobel that a branded luminaire supplier would be eligible for a royalty-free license for luminaires comprising all basic components from Osram and/or Zumtobel. Philips does not seek royalties when licensees purchase components from these suppliers because under these cross-licensing agreements it is already provided with satisfactory compensation for the use of its technology. Philips also contests that these agreements foreclose competing suppliers.³⁵

²⁹ Philips has confirmed that in the case of an agreement under the line-by-line assessment, if it turned out "*that the specific product no longer used Philips' technology, the product would be removed from the list of products that are subject to royalty payments*" (Philips response to RFI of 29 September 2017, para 61).

³⁰ Philips response to RFI of 13 July 2017, paras 33-35.

³¹ Response to the Complaint, paras 32-39.

³² Philips response to RFI of 13 July 2017, paras 25-26.

³³ Response to the Complaint, para 41-44 and Philips response to RFI of 13 July 2017, para 38.

³⁴ Response to the Complaint, paras 45-48.

³⁵ Response to the Complaint, paras 8-13.

2. THE NEED FOR THE COMMISSION TO SET PRIORITIES

- (25) The Commission is unable to pursue every alleged infringement of EU competition law which is brought to its attention. The Commission has limited resources and must therefore set priorities, in accordance with the principles set out at points 41 to 45 of the Notice on the handling of complaints.³⁶
- (26) When deciding which cases to pursue, the Commission takes various factors into account. There is no fixed set of criteria, but the Commission may take into consideration whether, on the basis of the information available, it seems likely that further investigation will ultimately result in the finding of an infringement. In addition, the Commission may consider the scope of the investigation required.³⁷ If it emerges that an in-depth investigation would be complex and time-consuming and the likelihood of establishing an infringement seems limited, this will weigh against taking further action.³⁸

3. ASSESSMENT OF YOUR COMPLAINT

- (27) After an assessment of your complaint, the Commission does not intend to conduct an in-depth investigation into your claims for the reasons set out below.

3.1. The likelihood of establishing the existence of an infringement

- (28) First, the likelihood of establishing the existence of an infringement of Articles 101 and/or 102 TFEU in this case appears limited.

3.1.1. Assessment of the alleged infringement of Article 102 TFEU

3.1.1.1. Market Definition

Relevant product market

- (29) In the Complaint you do not specify what the relevant product market should be. You mention sales figures for the lighting sector, Philips' lighting turnover and Philips' alleged market position as regards technology.³⁹ [REDACTED]
- [REDACTED]
- (30) In view of the above, as well as of the allegations you have put forward, which focus on the licensing of Philips' LED-related patents and on the lighting products that may be subject to the PLP, the Commission considers that your allegations relate to three relevant markets: (i) a market for the manufacturing of light fixtures; (ii) a market for LED components, in particular LED boards and drivers; and (iii) a market for LED-related technology.

³⁶ OJ C 101, 27.04.2004, p. 65. See also the Commission's Report on Competition Policy 2005, p. 25-27.

³⁷ Case T-24/90 *Automec v Commission*, EU:T:1992:97, paragraph 86.

³⁸ Case T-104/07 *BVGD v Commission*, EU:T:2013:366, para 218.

³⁹ Complaint, Section II.3.10.

⁴⁰ Based on your submission, it appears that LED boards are referred to by Philips, Osram and Zumtobel as LED modules. In this letter, the two terms will be used interchangeably.

- (31) As regards the first market, in previous merger decisions⁴¹ the Commission held that the market for light fixtures in general comprises two separate product markets: consumer/residential and professional/industrial light fixtures. The Commission has so far left open the question of whether the professional light fixture market could be further segmented into separate markets for indoor and outdoor light fixtures. The Commission has also considered the possibility of a separate market for LED light fixtures but has left this question open.⁴²
- (32) As regards the second market, the Commission has already considered in the context of merger proceedings whether there is an overall market for light fixture components or rather separate markets for each component. In *Philips/PLI*⁴³, the Commission considered that LEDs themselves may constitute a separate product market. In relation to components other than LEDs, such as LED boards, drivers, and controllers, the Commission has also left this question open.⁴⁴
- (33) [REDACTED]
- (34) However, it seems in principle unlikely that LED components should collectively be treated as a single relevant product market, as each component serves a distinct purpose and performs a distinct function in a luminaire. From a technical standpoint, they are therefore unlikely to be substitutable for each other from either a supply or a demand perspective.⁴⁸
- (35) This might be different if two or more components are typically sold and/or bought together as a bundle. However, you have not provided any evidence suggesting that LED boards and drivers (with or without other components) are to any significant extent sold or bought together as a bundle, or any other evidence as to why these two particular components should be assessed together.

⁴¹ Case IV/M.258 – *CCIE/GTE*, decision of 25 September 1992, para 16; Case COMP/M.1876 – *KKR/WASSAL/Zumtobel*, decision of 13 April 2000, para 11; Case COMP/M.2917 – *Wendel-KKR/Legrand*, decision of 14 October 2002, para 18; Case COMP/M.4509 – *Philips/PLI*, decision of 29 January 2007, paras 7-8; and Case COMP/M.6194 – *Osram/Siteco Lighting*, decision of 22 June 2011, paras 12-14.

⁴² Case COMP/M.6357 – *Koninklijke Philips/Indal Group*, decision of 23 November 2011 and Case COMP/M.6194 – *Osram/Siteco Lighting*, decision of 22 June 2011.

⁴³ Case COMP/M.4509 – *Philips/PLI*, decision of 29 January 2007, para 14.

⁴⁴ Case COMP/M.6357 – *Koninklijke Philips/Indal Group*, decision of 23 November 2011 and Case COMP/M.6194 – *Osram/Siteco Lighting*, decision of 22 June 2011.

⁴⁵ [REDACTED]

⁴⁶ See footnote 5.

⁴⁷ [REDACTED]

⁴⁸ See the Commission's Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), available at [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31997Y1209\(01\)](https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31997Y1209(01)), points 7 and 13 and following.

- (36) As a result of the above, it is unclear what – if any – conclusions should be drawn from [REDACTED], whether relating to all or some components collectively, or each component individually, as a potential relevant product market.
- (37) For the purpose of assessing your complaint, the Commission considers that the definition of the relevant markets for goods can be left open, since the assessment of the alleged infringements will remain the same under any of the mentioned potential market definitions.
- (38) As regards the technology market, the Commission notes that a relevant technology market includes a certain licensed technology and its substitutes. Substitutes of the licensed technology are those technologies that are regarded by the licensee as interchangeable or substitutable, by reason of their characteristics, their intended use and the royalties payable in respect of those rights.⁴⁹ Theoretically, if no suitable alternative technologies exist to manufacture a certain final product, a single patent may constitute a relevant technology market in itself. However, the interrelatedness of different technologies in the LED sector may lead to the inclusion of one or more patent-protected technologies in the same relevant technology market.
- (39) In its assessment of the complaint, the Commission considers that the relevant technology market definition can be left open, as the conclusion on the alleged infringements would not change under any of the mentioned potential market definitions.

Relevant geographic market

- (40) In the Complaint, you do not specify what you consider to be the geographic scope of the relevant market. In your written observations you generally state that the relevant market includes the countries of the EU, but it is still unclear whether you refer to several national markets or an EU market.
- (41) As regards light fixtures, you mention sales and turnover in Italy, but also Philips' position in the EU, which suggests that in your view, the market could be limited to Italy, or EEA-wide. In merger proceedings the Commission has considered and left the question open as to whether this market is national or EEA-wide.⁵⁰ For the purpose of the assessment of your complaint, the Commission considers that the relevant geographic market definition for lighting products can be left open, since the assessment of the alleged infringements will remain the same under any of the mentioned potential market definitions.
- (42) As for the technology market, the Commission equally considers that the relevant geographic market definition can be left open, since the assessment of the alleged infringements will remain the same under any potential market definition.

⁴⁹ Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements ("TTBER"), Article 1(k).

⁵⁰ Case COMP/M.6357 – *Koninklijke Philips/Indal Group*, decision of 23 November 2011 and Case COMP/M.6194 – *Osram/Siteco Lighting*, decision of 22 June 2011.

3.1.1.2. Alleged dominant position held by Philips

- (43) The Union Courts have defined "dominance" as a position of economic strength enjoyed by an undertaking that enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers, and ultimately consumers.⁵¹ While market shares on their own are not determinative of dominance, they can provide a useful first indication for the Commission of the market structure and of the relative importance of the various undertakings active on the market. The Union Courts have established a rebuttable presumption for dominance if an undertaking holds a market share of 50% or more in the relevant market.⁵²
- (44) In the Complaint you claim that Philips has a market share of around 20% on the market for the manufacturing of light fixtures in Italy and that this puts it in a dominant position. You state that the same conclusion can be reached for other Member States as well as for the European Union; however, you do not substantiate these claims.⁵³ You add that factors other than market shares can be used in assessing a dominant position, and you claim in this regard that Philips holds exclusive rights to essential discoveries. You mention in particular patent EP0890059⁵⁴, which you claim covers the vast majority of drivers currently on the market. Furthermore, you estimate that Philips' share in the "technological sphere" is over 60%, based on the patents it owns.⁵⁵
- (45) As for the markets for light fixtures (and sub-segments of these markets) and the market shares of the market participants in the context of merger proceedings, the Commission has previously examined these markets. The *Philips/Indal*⁵⁶ decision suggests that in the EEA, Philips' market share for professional light fixtures in 2010 did not exceed 20% (and the combined market share of the merging parties would not exceed 20%). The decision also suggests that on a national level, Philips' market share for professional light fixtures in 2010 in the affected Member States was generally below 40% (and the combined market share of the merging parties would stay essentially the same).⁵⁷ The Commission notes that this seems to be in line with your own estimates. This is also in line with the Commission's findings in a previous merger decision.⁵⁸ As for consumer (non-professional) light fixtures, Philips only entered this market with the acquisition in 2007 of PLI⁵⁹ which had a small market share in the EEA.
- (46) The more recent figures provided by Philips do not suggest that its market position has changed significantly in the past years. In particular, Philips has provided an estimate of its 2015 and 2016 EEA-wide market share (as well as its market share in Italy and other

⁵¹ Case 27/76 *United Brands and United Brands Continental v Commission*, ECLI:EU:C:1978:22, para 65; Case 85/76 *Hoffmann-La Roche v Commission*, ECLI:EU:C:1979:36, para 38

⁵² Case C-62/86 *AKZO Chemie v Commission*, ECLI:EU:C:1991:286, para 60.

⁵³ Complaint, Section II.3.10, pages 22-23.

⁵⁴ Which, according to your letter of 25 May 2018, point 12, has in the interim been invalidated by a German court and which was set to expire on 22 January 2018.

⁵⁵ Complaint, Section II.3.10, pages 23-24.

⁵⁶ Case COMP/M.6357 – *Koninklijke Philips/Indal Group*, decision of 23 November 2011, para 81.

⁵⁷ *Ibid.*, para 82.

⁵⁸ Case COMP/M.6194 – *Osram/Siteco Lighting*, decision of 22 June 2011, para 67.

⁵⁹ Case COMP/M.4509 – *Philips/PLI*, decision of 29 January 2007.

Member States) for professional (indoor and outdoor) and consumer luminaires.⁶⁰ According to its estimates, Philips' share on the overall European market for luminaires is below 20%.

- (47) As regards LED components, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].
- (48) However, even if, taken at face value, a market share of [REDACTED]% might be an indication of the existence of a dominant position, the existence of relatively strong competitors would argue against the existence of a dominant position on the part of Philips. Overall, it is not clear whether or not it is likely that Philips has a dominant position on a hypothetical relevant product market encompassing LED boards and drivers, or components in general.
- (49) As for LEDs themselves, the *Philips/Indal* decision suggests that in the EEA, Philips' market share was below 10%, and other stronger competitors existed in the market.⁶² You have provided no information to suggest that Philips currently has a stronger market position as regards LEDs, nor indicated that Philips' market position with regard to LEDs would contribute to the alleged dominant position.
- (50) As regards technology markets, the existence of a dominant position depends on the presence of the patented technology in the downstream relevant product market. The licensor's market share in a technology market will be the combined market share, on the downstream relevant product market, of the products manufactured by the licensor and by the licensees using the licensed technology⁶³. Following this approach, all the sales on the downstream relevant product market are taken into account, irrespective of whether the product incorporates a technology being licensed.
- (51) Philips submits that the share of products incorporating technology licensed under the PLP is unlikely to exceed 40% on any meaningful downstream product market segmentation.⁶⁴ Philips considers that this is supported by the level of the average flat rate agreed with the licensees opting for this method of royalty calculation.
- (52) The flat rate is a weighted average royalty, calculated to reflect the average rate over all LED luminaires sold by a licensee. As the flat rate applies to all of a licensee's LED luminaire sales, its value and how it compares to the highest possible rate, are a reflection of how many LED luminaires sold by a licensee actually read on Philips' patents.

⁶⁰ Philips' submission of 28 September 2017.

⁶¹ [REDACTED]

⁶² Case COMP/M.6357 – *Koninklijke Philips/Indal Group*, decision of 23 November 2011, para 207 and 2011.

⁶³ See Article 8(d) of the TTBER (see footnote 49) and para 86 of the Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements (OJ C 89, 28.3.2014, p. 3). The Guidelines also illustrate an alternative methodology based on calculating, for each technology, the share of total licensing income from royalties, representing the technology's share of the market where competing technologies are licensed.

⁶⁴ Philips response to RFI of 13 July 2017, paras 18-19. 11

- (53) Philips has provided figures on the average flat rate applying to all flat rate agreements concluded until 2017. According to Philips, the level of this average flat rate suggests that Philips' licensees use Philips' program patents in only a limited percentage of their products, which Philips deems unlikely to exceed 40%.⁶⁵
- (54) Moreover, information gathered by the Commission during its investigation suggests that Philips does not hold any essential patents that might confer upon it a position of market power and that there are viable alternatives to its IPR,⁶⁶ including to patent EP 0890059. This is, first supported by information that Philips has provided on its relative position in patent filings in the lighting sector (including LED-related patent filings). This information does not suggest that Philips holds a particularly large number of LED-related patents.⁶⁷
- (55) Second, Philips has also provided a detailed description of six patents⁶⁸, including patent EP 0890059 which you claim to be essential⁶⁹, and has explained the different options available to luminaire manufacturers who wish to design around these patents. Philips has also provided examples of products that make use of alternative technologies, which suggests that these workarounds are not merely theoretical, but commercially viable and used in practice.⁷⁰
- (56) In your written observations you point out Philips' RGB⁷¹ patents, which are included in the PLP. According to you, Philips covers the entirety of this market on its own, as there are no alternative technologies.⁷² You claim that this fact is well-known, but you do not substantiate this. As mentioned above, the Commission has no information in its possession that suggests that Philips owns any essential patents, including as regards RGB technology.
- (57) You also argue that, even if alternative technologies existed for all of Philips' patents, it would be too expensive or complicated for a small or medium-sized business to spend on patent consultants to circumvent them all.⁷³ However, you do not elaborate on this or substantiate this claim further.
- (58) Insofar as you mean to claim that a large disparity in financial resources between undertakings makes the stronger undertaking dominant, the Commission observes that the concept of dominance relates to situations where an undertaking has the power to behave to an appreciable extent independently of its customers. It does not relate to situations where there are imbalances in bargaining power due to differing levels of financial resources.

⁶⁵ Philips response to RFI of 13 July 2017, paras 25-28.

⁶⁶ Response to the Complaint, para 17 and Philips response to RFI of 13 July 2017, paras 29-32.

⁶⁷ Response to the Complaint, para 17 and Philips response to RFI of 13 July 2017, paras 20-24.

⁶⁸ EP 0890059; EP 0929992; EP 1415517; EP 1415518; EP 2089656; EP 1576858.

⁶⁹ Complaint, Section II.3.10, page 24.

⁷⁰ Philips response to RFI of 13 July 2017, paras 29-32.

⁷¹ You do not specify, but the Commission assumes that this refers to Philips' patents relating to the production of different colours by the combination and control of LEDs of the three colours red, green and blue.

⁷² Your letter of 25 May 2018, point 3.

⁷³ Your letter of 25 May 2018, point 15.

- (59) The Commission's assessment, in view of the information at its disposal, is that, while it cannot be excluded, it appears unlikely that Philips holds a dominant position on one or more of the proposed relevant markets. However, even if Philips were found to be dominant on one or more relevant markets, the Commission considers that its behaviour is unlikely to amount to an abuse of a dominant position as explained in section 3.1.1.3 below.

3.1.1.3. The alleged abuses

- (60) You allege that Philips intimidates lighting products manufacturers to force them to join the PLP. This would be done by misleadingly claiming the infringement of patents which are not valid or close to expiry, and by not making clear infringement claims (see paragraph (13)). In support of your allegation, you submit correspondence exchanged between Philips and some Italian undertakings which allegedly shows Philips' "harassment" of these undertakings.
- (61) The Commission notes that the correspondence you submitted as evidence does not suggest an aggressive "harassment" policy on Philips' part nor does it include any threats, in particular threats of litigation. In this correspondence, Philips generally informs the manufacturers that it believes they are using its patents (and in some cases, it preliminarily identifies which products it believes are using which patents), it provides information about the PLP and invites the manufacturers to discuss the PLP with it.
- (62) Furthermore, the evidence does not suggest that Philips makes ambiguous and unclear claims, as it appears that Philips preliminarily identifies, where possible, which products it believes infringe which of its patents and also makes available to the undertakings the results of the technical analysis it carries out on the undertakings' products, in order to engage in a technical discussion to ascertain precisely which products might be covered.
- (63) In your written observations you expand on this argument, and appear to claim that, due to the number of patents in the PLP and the complexity of the patent situation of the PLP, with patents being valid in some Member States but not in others⁷⁴, it should be incumbent on Philips to indicate in every case precisely which patents it considers to be infringed by which product of a potential licensee. You claim that it is not reasonable or feasible for small and medium-sized businesses to carry the burden of identifying which patents they might infringe.⁷⁵
- (64) It does not appear that Philips expects or forces potential licensees to carry that burden alone. You have not claimed, nor substantiated, instances where such technical discussions produced unacceptable results for potential licensees or where a breakdown in such discussions led to patent litigation by Philips against potential licensees.
- (65) In your written observations you also claim that Philips does not allow external technicians and experts to participate in technical roundtables with Philips to compare results.⁷⁶ To substantiate this claim you provide one letter sent by Philips to a potential licensee⁷⁷. In this letter, however, Philips only declines to hold such discussions with

⁷⁴ Your letter of 25 May 2018, point 8.

⁷⁵ Your letter of 25 May 2018, points 5-8.

⁷⁶ Your letter of 25 May 2018, point 7.

⁷⁷ Your letter of 25 May 2018, attachment 1.

unnamed "suppliers" of potential licensees who may in fact be competitors of Philips with whom Philips may not want to discuss its patents. The Commission further notes that in this letter Philips expresses an interest in explaining in detail how its patents are used in the potential licensee's products, which also suggests that the burden of identifying which patents they might infringe is not put on the licensees alone.

- (66) You further note with regard to Philips' patents, that there is a "high number of legal challenges lodged" against Philips' patents⁷⁸. You also suggest that because some patents included in the PLP have in the interim been revoked, invalidated or amended by Member State courts or by the European Patent Office, in most cases for lack of novelty, this casts a strong suspicion over the validity of the whole PLP and constitutes proof of an infringement of Article 102 TFEU.⁷⁹ You claim that this affected the "most important, highest-quality patents" in Philips' portfolio, without substantiating that qualification.
- (67) The Commission observes that it is not uncommon for patents to be revoked for lack of novelty, and that this is hardly indicative of a deliberate strategy of filing patents that an undertaking knows to have no merit. Moreover, you have not provided any indications suggesting that Philips has deliberately filed for patents that are meritless.
- (68) Patents are generally presumed to be valid as long as no definitive decision has been taken on that issue. Moreover, even if some patents have been declared invalid, this does not mean that any or all other patents under the PLP are also invalid, or that Philips cannot license these other patents. The Commission therefore concludes that the fact that some patents have been revoked or amended does not mean that other patents in the PLP are likely to also be invalid, or that the enforcement of the PLP is likely to constitute an abuse of a dominant position.
- (69) The Commission therefore concludes that the available evidence is not sufficient to support the claim that Philips intimidates or harasses lighting products manufacturers, or provides them with unclear information, in order to force them to join the PLP.
- (70) You further claim that it is exploitative for Philips to impose royalties based on the value of the finished lighting product while the patent only covers a part or component of that product. In this regard, the Commission notes that the practice of calculating royalties on the basis of the price of the final product where the licensed technology relates to an input which is incorporated into a final product is generally not considered restrictive of competition.⁸⁰
- (71) In your written observations you repeat this argument and point to the judgment of the Supreme Court of the United States in the case *Apple v. Samsung*.⁸¹ The Commission notes that the judgment at issue concerned a matter of interpretation of US patent law, not competition law, and in particular the calculation of damages for infringement of a patent, rather than license fees.
- (72) As to your claim that the royalty percentage varies amongst the licensees according to discriminatory criteria, the Commission first notes that this claim is not substantiated and

⁷⁸ Your letter of 25 May 2018, point 12. On 15 November 2018, you provided an updated list.

⁷⁹ Your letter of 25 May 2018, point 14.

⁸⁰ Para 184 of the Guidelines (see footnote 63).

⁸¹ Your letter of 25 May 2018, point 16.

there are no elements in the file that would corroborate this. Philips argues that it determines the royalty rates under the PLP based on objective criteria and all licensees are offered a standard template agreement, in order to ensure equal treatment.⁸² An assessment of this template agreement also suggests that the royalty rate is not decided by Philips in a discretionary manner, but is intended to reflect the actual situation of each licensee, in terms of what products they sell that use Philips' technology.

- (73) The fact that, under the PLP, no royalties are paid to Philips when licensees use only Qualified Components purchased from Qualified Suppliers also does not seem to amount to discrimination. A necessary condition for finding abusive discrimination pursuant to Article 102 TFEU is showing that the dominant company applies dissimilar conditions to equivalent transactions. Philips has explained that it decided to waive the royalties when Qualified Components are used because it considered that it had already obtained satisfactory compensation for its technology through the consideration received from Osram and Zumtobel under the cross-license agreements (see paragraph (92) below). The purchase of these Qualified Components is therefore not an equivalent transaction to the purchase of other components, for which Philips has not yet received compensation for its technology. Furthermore, all licensees are free to purchase Qualified Components if they wish to benefit from the waiving of royalties.
- (74) You further claim that Philips imposes excessive reporting obligations on the licensees and that the information obtained would be accessible to Philips' lighting technology branch and would enable Philips to control the licensees, as well as discouraging innovation.
- (75) In the framework of the PLP, a licensee is contractually obligated to provide Philips with information regarding sales. In particular, Philips requires country-by-country sales data expressed as value and volume, because an analysis of the licensee's sales is necessary for Philips to calculate the applicable royalty. Philips claims that there are two ways to get this data: performing periodic ad hoc audits with independent third party auditors or imposing reporting obligations. The latter would be the most cost-efficient means to get this data.
- (76) Philips also explains that the reporting obligations vary depending on the royalty calculation method: the "line-by-line" method requires detailed information about sales values and volumes because royalties need to be calculated on an item-by-item basis. Data is required on a "country-by-country" basis in order to determine whether products are sold in countries in which Philips' relevant technology is protected.
- (77) The reporting obligations are lighter under the "flat rate" method where Philips calculates a "weighted average royalty". In this case the calculation of the flat rate is based on a company's overall LED luminaire revenues, and therefore requires the provision of less detail with respect to the licensee's products and sales activities at each reporting (i.e., no country-by-country sales data).
- (78) In this regard, the Commission first notes that in view of the terms of the template licensing agreements submitted by Philips⁸³, it appears that the reporting obligations under the PLP have the sole purpose of allowing Philips to assess which of the licensees'

⁸² Response to the Complaint, para 39.

⁸³ Philips response to RFI of 13 July 2017, para 37.

products require a license and to establish the level of royalties due. Philips submits that it requires licensees to provide only the information needed to assess the royalties payable by the licensee and to enable Philips to prevent the unlawful use of its IPR. According to Philips, it requires detailed information about the licensees' sales values and volume for the product-by-product option⁸⁴, as this involves the calculation of percentage royalties on an item-by-item basis. Country-by-country sales data is required because Philips only charges a royalty for products manufactured or sold in countries in which its relevant technology is patented. Under the flat rate option even less detail is required.⁸⁵ On balance, it does not appear that Philips requires any information that would be unnecessary or excessive for the stated purpose. Moreover, as regards the requirement to report new products, Philips has confirmed that it is willing, in all agreements, to allow the licensees to only report new products 30 days after their commercial release⁸⁶, which would allow more time for the licensees to protect their inventions.

- (79) Furthermore, Philips argues that reporting obligations such as those in the PLP are common and not materially different from other licensing programs in the industry.⁸⁷ It substantiates this statement by referring to Philips' CD Disc Standard Patent License Agreement, on which the PLP license agreements are based and which was reviewed by the Commission in 2003⁸⁸, as well as by referring to the licensing agreements of other undertakings.
- (80) In addition to the particular context of these reporting obligations, as well as their purpose, the Commission notes that it appears unlikely that Philips uses the information reported to alter the parameters of competition in the market for light fixtures, where it competes with the licensees.
- (81) The template licensing agreements submitted by Philips to the Commission include unambiguous confidentiality clauses ensuring that the information received from the licensees will not be shared with any third parties or Philips' employees outside the division responsible for the PLP (Philips Lighting's IP Department or previously Philips IP&S). Philips has also explained the (structural and contractual) measures it has taken to ensure that sensitive information disclosed by licensees remains confined within Philips Lighting's IP Department (previously Philips IP&S) and cannot be accessed by other business units of Philips that compete with licensees on the market for light fixtures.⁸⁹

⁸⁴ Under the product-by-product (or line-by-line) option, Philips and the licensee jointly carry out a detailed analysis of each luminaire that the licensee sells to determine which read on a Philips patent. Philips then charges a percentage royalty for each luminaire sold that uses at least one Philips patent included under the PLP. Under the flat-rate option, the royalty is calculated based on the luminaire categories sold by the licensee and the patent coverage in the countries in which the licensee assembles and/or sells the respective luminaire. The flat rate is established following a joint assessment of the licensee's LED luminaire portfolio by Philips and the licensee, and is designed so that a licensee will pay approximately the same overall royalty rate as he would under the "line-by-line" assessment. See Philips response to RFI of 13 July 2017, paras 33-35.

⁸⁵ Philips response to RFI of 13 July 2017, paras 33-37.

⁸⁶ Philips response to RFI of 13 July 2017, para 39 and 66-68.

⁸⁷ Philips response to RFI of 13 July 2017, paras 41-44.

⁸⁸ Case No. COMP/C-3/37.228 *Ingman Disc+VDC/Philips+Sony*, Case No. COMP/C-3/37.561 *Pollydisc/Philips+Sony*, and Case No. COMP/C-3/37.707 *Broadcrest & Others/Philips+Sony*.

⁸⁹ Response to the Complaint, paras 41-44, and Philips response to RFI of 13 July 2017, paras 38-40.

- (82) Furthermore, discussions with potential licensees prior to joining the PLP are governed by a separate confidentiality and non-disclosure agreement which prevents Philips from using confidential information for any purpose other than the possible conclusion of a license agreement. The corporate structure of Philips also appears to prevent the exchange of confidential information between Philips' IP Department and other Philips business units. Philips IP&S (which operated the PLP until February 2016) was set up as an individual and independent organisation within Philips, with its own management. Similarly, the structure of Philips Lighting (which has operated the PLP since February 2016) prevents such exchange between Philips Lighting's IP Department and Philips Lighting's business units.⁹⁰
- (83) Moreover, you have not provided any evidence that would suggest that Philips is using information reported to it under the PLP to control the licensees or limit innovation. In the absence of evidence or indicia suggesting that Philips violates the confidentiality clauses or internal "firewalls" that would prevent the spread of the confidential information, or that these reporting obligations are being used by Philips to control the licensees or limit innovation, the Commission's assessment is that it is unlikely that the reporting obligations could have restrictive effects on competition.
- (84) As regards your claim that the terms of the license agreements would have the effect of discouraging the licensees to engage in research and development, it is not clear how these terms would result in the anticompetitive effects that you allege. Furthermore, you do not provide any evidence or indicia to substantiate your assertions that these terms would have an anticompetitive effect. Philips asserts in this regard that, on the contrary, the PLP has stimulated competition in the industry.⁹¹ There is no indication from lighting manufacturers that they have held back on innovation due to the PLP.
- (85) The Commission notes that the LED market is a growing and innovative market, which is, above all, technological. It does not appear likely, therefore, that market participants would stop investing in innovation unless they were significantly restrained. The terms of the licensing agreements do not appear to be capable of leading to such an effect and, given the lack of evidence for such effects, the Commission concludes that it is unlikely that the terms of Philips' licensing agreements will lead to a limitation of production or technological innovation.
- (86) The Commission therefore concludes that there is low likelihood of finding that Philips has infringed Article 102 TFEU by abusing a dominant position on any relevant market.

3.1.2. Assessment of the alleged infringement of Article 101 TFEU

- (87) You allege that Philips entered into multilateral unlawful agreements with Osram and Zumtobel.⁹² Under the PLP, Philips waives its right to royalties when licensees purchase components from "Qualified Suppliers", namely Osram and Zumtobel. You assert that this is the legal implementation of an underlying cartel agreement between all the companies, which would also envisage the distribution of profit between them and you specifically refer to the agreement between Philips and Osram, of 25 September 2008.⁹³

⁹⁰ Philips response to RFI of 13 July 2017, para 38.

⁹¹ Response to the Complaint, para 48.

⁹² Complaint, Section II.3.5, page 12 and Section II.3.8, pages 18-19.

⁹³ Complaint, Section II.3.8, pages 18-19 and Section II.3.12, page 29.

These allegations seem to suggest that you consider the PLP to be a joint program established by Philips, Osram and Zumtobel together, where Osram and Zumtobel share with Philips the profits they make from the sale of components in exchange for the waiver of the royalties due to Philips. In your view, this would constitute a cartel in breach of Article 101 TFEU. Furthermore, this would have the effect of restricting the licensees' freedom of choice and foreclosing competing suppliers of components, because licensees "*are forced to purchase necessary components from Osram and Zumtobel [...] so that they can benefit from the exemption from the payment of royalties*".⁹⁴

- (88) With regard to the allegation that the PLP in itself could constitute a cartel in breach of Article 101 TFEU, the Commission recalls that an "agreement" may be considered to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. For there to be an agreement within the meaning of Article 101(1) TFEU it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way.⁹⁵
- (89) Although Article 101(1) of the TFEU draws a distinction between the concept of "*concerted practices*" and "*agreements between undertakings*", the object is to bring within the prohibition of these Articles a form of co-ordination between undertakings by which, without having reached the stage where an agreement properly so-called has been concluded, they knowingly substitute practical co-operation between them for the risks of competition.⁹⁶
- (90) The criteria of co-ordination and co-operation laid down by the case law of the Court, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the TFEU relating to competition, according to which each economic operator must determine independently the commercial policy which he intends to adopt in the market. This requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors.⁹⁷
- (91) In its assessment, the Commission considers that the PLP is unlikely to constitute either an agreement or a concerted practice between Philips, Osram and Zumtobel within the meaning of Article 101 TFEU. First, it does not appear that the bilateral cross-licensing agreements with Osram and Zumtobel were aimed at establishing a joint licensing program. Philips submits that the separate bilateral cross-licenses were individually entered into and separately negotiated at different times between Philips and each of Osram and Zumtobel. With regard to the agreement between Philips and Osram, of 25 September 2008, in response to the Commission's request for information, Philips has submitted that the agreement is a cross-license agreement seeking to achieve patent peace

⁹⁴ Complaint, Section II.3.5, page 12.

⁹⁵ Judgment of the Court of First Instance of 20 April 1999, *LVM v Commission*, Joined Cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, EU:T:1999:80, paragraph 715 and the case law referred to therein.

⁹⁶ Judgment of the Court of Justice of 14 July 1972, *ICI v Commission*, 48/69, EU:C:1972:70, paragraph 64.

⁹⁷ Judgment of the Court of Justice of 16 December 1975, *Suiker Unie and Others v Commission*, Joined cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, EU:C:1975:174, paragraph 174.

with Osram. This rationale is corroborated by Philips' internal documents.⁹⁸ Philips has also entered into a separate cross-license agreement with Zumtobel in 2009 with a similar objective, also corroborated by Philips' internal documents.⁹⁹

- (92) The examination of the cross-license agreements¹⁰⁰ further suggests that they essentially ensure the non-assertion of patents between the undertakings parties to these agreements, in order to safeguard their freedom to operate on the market. The content of these agreements does not suggest that there was a common will between these undertakings to establish the PLP as a joint licensing program. In a similar vein, there is no indication that Osram or Zumtobel would offer Philips a share of their respective profits made from selling components in exchange for Philips' waiver of royalties for patents to its technologies.
- (93) Moreover, the terms of the PLP, together with the cross-license agreements also suggest that the PLP is a unilateral program developed and operated by Philips. The PLP covers only Philips' LED technology. In addition, there is no evidence of redistribution of the royalties paid to Philips under the PLP to either Osram or Zumtobel, nor any indications as to the existence of any sharing of profits generated from the sale of components by Osram or Zumtobel.¹⁰¹ The inclusion of Osram and Zumtobel as Qualified Suppliers does stem from the cross-license agreements, but is only a reflection of the fact that these undertakings have already paid a consideration to Philips for the use of its technology.¹⁰² In practice, no further royalties are required from the purchasers of Osram and Zumtobel components because Philips considered that the payments received from Osram and Zumtobel by virtue of the cross-license agreements (which is part of their cost basis and of the price of their components) already constituted satisfactory compensation for its technology.
- (94) As to the separate cross-license agreements that Philips has concluded with both Osram and Zumtobel, the Commission finds that these have as their main object the licensing of the respective technologies in a non-exclusive manner and do not contain restrictions that would affect the sale or development of products incorporating the technology or the development of competing technology. As such, the Commission considers that these are unlikely to be anticompetitive.
- (95) As to whether the waiving of royalties, which applies when a light fixture manufacturer buys all Qualified Components from the Qualified Suppliers, has the effect of restricting the licensees' freedom of choice and foreclosing competing suppliers of components, the Commission's assessment is that this is not likely to be the case. First, it appears that there might be an objective justification for the waiving of royalties, given that this was decided because Philips considered that it had already obtained satisfactory compensation for its technology through the cross-licenses with the Qualified Suppliers, which also do not seem to be anticompetitive (see para (92)). Moreover, Philips submits

⁹⁸ Philips response to RFI of 13 July 2017, paras 4-6 and 54-56.

⁹⁹ Philips response to RFI of 13 October 2017, para 7.

¹⁰⁰ Philips response to RFI of 13 July 2017, Question 1 and Philips response to RFI of 13 October 2017, Question 2.

¹⁰¹ Response to the Complaint, para 6, Philips response to RFI of 13 July 2017, Question 1 and Philips response to RFI of 13 October 2017, Question 2.

¹⁰² Philips response to RFI of 13 July 2017, paras 57-59 and Philips response to RFI of 13 October 2017, paras 8-10.

that it has reviewed the reporting forms under which its licensees reported their royalty-bearing revenues as well as products for which the zero percent royalty applies and that this revealed that only a small number of licensees indicated that (some of) their products qualified for a zero percent royalty.¹⁰³ This suggests that a significant number of licensees does not benefit from the conditional free license and that, therefore, the system is unlikely to have a fidelity-enhancing effect or to bar luminaire manufacturers from purchasing components from competing suppliers.

- (96) In your written observations¹⁰⁴, you appear to argue that Osram and Zumtobel incurred some costs by entering into the cross-licensing arrangement, and that these costs must be included in the price of the Qualified Components. According to you, this means that the costs of this arrangement are inevitably borne by the end consumer and therefore the arrangement does not have a neutral or insignificant effect on the market. However, the Commission observes that the mere circumstance that a cross-license is not cost-neutral to consumers is not sufficient for the cross-licenses to be anti-competitive.
- (97) The Commission therefore concludes that there is low likelihood of finding that Philips, Osram and Zumtobel have infringed Article 101(1) TFEU by entering into an agreement or concerted practice which would have anticompetitive effects.

3.2. The scope of the investigation required

- (98) Furthermore, an in-depth investigation would require considerable resources and would be disproportionate in view of the limited likelihood of establishing the existence of an infringement.
- (99) Such an investigation would, first of all, require the Commission to conduct a comprehensive analysis of the relevant product markets in order to conclude on their precise definition and segmentation. This would be particularly burdensome as regards the technology market, as it would require the Commission to examine a large number of Philips' patents. This exercise would involve a detailed technical analysis of Philips' technology as well as of potentially substitutable technologies held by other undertakings, which would require requesting a great amount of information from the undertakings active in LED technology.
- (100) In addition, the Commission would have to establish whether Philips has a dominant position in any potential relevant market. This would require it to assess the market shares of Philips and its competitors on the different relevant markets, necessitating the acquisition of extensive sales data, as well as an assessment of any barriers to entry or countervailing buyer power, which would require requesting information from customers and other players in the market.
- (101) To fully assess the allegations that the reporting obligations under the PLP are anticompetitive, the Commission would have to establish whether the information required by Philips goes beyond what is reasonably necessary in order for its licensing agreements to be put in place. The Commission would furthermore have to examine whether Philips does not in fact contain this information reported to it in Philips Lighting's IP Department (previously Philips IP&S division), but shares it with its

¹⁰³ Philips response to RFI of 13 October 2017, paras 3-5.

¹⁰⁴ Your letter of 25 May 2018, points 9-11.

commercial lighting business, and whether the commercial lighting business uses the information to gain a competitive advantage on the market for light fixtures. This would likely require conducting inspections at the premises of Philips.

- (102) As for the alleged limitation of innovation, this may *inter alia* require the Commission to analyse the level of innovation that would have existed or would exist in the market in the absence of the PLP.
- (103) As regards the allegations that the "zero percent royalty", which applies when a light fixture manufacturer buys all Qualified Components from the Qualified Suppliers, leads to the foreclosure of competing component manufacturers, the Commission would need to conduct a detailed and data-intensive analysis. In particular, it might be necessary to establish whether and how the system is able to affect the light fixtures manufacturers' choices of sourcing components from Philips', Osram's and Zumtobel's competitors in the market for components. This would require issuing requests for information and analyzing a considerable amount of data. Moreover, possible business justifications and cost-related efficiencies would have to be considered as well.

4. CONCLUSION

- (104) In view of the above considerations, the Commission, in its discretion to set priorities, has come to the conclusion that there are insufficient grounds for conducting a further investigation into the alleged infringement(s) and consequently rejects the complaint pursuant to Article 7(2) of Regulation No. 773/2004.

5. PROCEDURE

5.1. Possibility to challenge this Decision

- (105) An action may be brought against this Decision before the General Court of the European Union, in accordance with Article 263 TFEU.

5.2. Confidentiality

- (106) The Commission reserves the right to send a copy of this Decision to Philips. Moreover, the Commission may decide to make this Decision, or a summary thereof, public on its website.¹⁰⁵ If you consider that certain parts of this Decision contain confidential information, I would be grateful if within two weeks from the date of receipt you would inform [REDACTED] (e-mail: [REDACTED]). Please identify clearly the information in question and indicate why you consider it should be treated as confidential. Absent any response within the deadline, the Commission will assume that you do not consider that the Decision contains confidential information and that it can be published on the Commission's website or sent to Philips.

¹⁰⁵ See paragraph 150 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ 2011/C 308/06.

- (107) The published version of the Decision may conceal your identity upon your request and only if this is necessary for the protection of your legitimate interests.

For the Commission

Margrethe VESTAGER
Member of the Commission