



Comments of
Broadcom, Cisco Systems, Hewlett-Packard,
International Business Machines, Oracle, and Research In Motion
to
Directorate-General of Competition of the European Commission
Concerning Sections 7.3 and 7.4 of
Draft Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the
European Union to Horizontal Co-Operation Agreements

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Broadcom, Cisco Systems, Hewlett-Packard, International Business Machines, Oracle, and Research In Motion (collectively, the “Submitters”) provide these comments in response to DG-Competition’s public consultation announced 4 May 2010.¹ Each of the submitters is publicly recognized as a leading innovator in the ICT sector, and each has a substantial patent portfolio in Europe and elsewhere. Each of us participates regularly in standards development activities in a range of organisations, from the European Standards Organizations such as ETSI, to non-European standards development organizations active across the ICT sector, for example the Institute of Electrical and Electronics Engineers (IEEE), to numerous consortia and special interest groups formed by interested companies to create technologies in a particular areas. Our involvement in standards development spans the industries in which we participate: computing, networking, semiconductors, software, and telecommunications. On any given day, dozens or hundreds of our companies’ employees are attending meetings of standards development organizations or preparing technical contributions. Each of our companies has made significant technical contributions to standards in Europe and elsewhere and contributes proprietary technology to standards development efforts. Our companies regularly implement a wide range

¹ This comment addresses only Sections 7.3 and 7.4 of the Draft Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-Operation Agreements (hereinafter, the “Draft Guidelines”). No position is taken in this Submission, either by the Submitters collectively or by any individual Submitter, on any other aspect of the Draft Guidelines. The views expressed in this Submission reflect the consensus views of the Submitters. Each Submitter may have additional views beyond those provided in this Submission. Particular Submitters may submit individual comments in addition to this submission. The Submitters wish to note that their support for the adoption by SDOs of specific rules based on competition considerations should not be understood as an admission that such rules will be practical or effective in all circumstances.

of standards in products ranging from microprocessors to personal and business computers to mobile communications devices to wireless access points to enterprise software. Each of us is a global company active in the European Union, where we collectively employ over 100,000 people and sell approximately 100 billion Euro annually in products and services.

I. Towards Transparency in Standards Development

Because of our frequent and multi-faceted involvement in standards development, each Submitter has a strong interest in the operation of standards development organizations, including the rules of standards development organisations regarding the disclosure of patents or patent applications that may necessarily be infringed by the implementation of a standard and the availability of licenses to those patents.

Unfortunately, the rules of standards development organizations sometimes expose implementers of standards to the exploitation of dominant positions attained through the inclusion of patented technology in what become ubiquitous standards, without meaningful constraints on the ability of owners of those patents to exploit those positions. Most of our companies have been involved in disputes involving the assertion against us (or our customers) of patents that are claimed to be essential to implement popular standards including UMTS (a 3rd generation wireless air interface standard), IEEE 802.11 (the core standard for wireless local area networks or WiFi), and IEEE 802.3 (Ethernet).

In light of these experiences, our companies have worked together to promote the cause of transparency in standards development. That work has included advocating within SDOs for rules changes that would increase transparency in standards development, for example a set of proposals made to ETSI in 2008.² It has also included discussions with DG-Competition and competition enforcement agencies in the United States, in which we have encouraged the agencies to address concerns expressed by standards development organizations and participants in standards development regarding the adoption by standards development organisations of rules that would permit, encourage, or require disclosure of licensing terms prior to the finalization of a standard. Our advocacy in this area originates in our endeavour to increase transparency and to complement the concept of FRAND in order to constrain the potential for abuse of a dominant position that may result from the selection of a technology for inclusion in what becomes a ubiquitous standard.³

² See ETSI IPR 02(08)12 (5 February 2008) (presentation by Broadcom, Cisco, Hewlett-Packard, Research In Motion and Sun Microsystems (now part of Oracle) titled “Bringing Transparency to the ETSI Standards Development Process”); ETSI IPR03(08)14 (15 April 2008) (summarizing seven proposed amendments to ETSI IPR Policy).

³ An example of this advocacy is a paper prepared by Apple, Cisco, Hewlett-Packard, IBM, and Sun Microsystems (now part of Oracle) in June 2005 and submitted to the Antitrust Division of the US Department

Given these concerns, we applaud DG-Competition for the attention it has devoted to the issue of standards development in the Draft Horizontal Co-Operation Guidelines it released on 4 May and for having taken a step in the right direction to counter-act such behaviour. Specifically, we welcome DG-Competition's explicit recognition of the risk of hold-up⁴ that weak standards development organisation rules, combined with opportunistic behaviour by participants in standards development and purchasers of essential patents, can create. We also welcome DG-Competition's identification of specific steps SDOs can take to mitigate that risk. We appreciate the specific guidance that DG-Competition has offered SDOs interested in maximizing the defensibility of their IPR policies from challenge under competition law relative to what terms they must adopt.

As some of the Submitters noted in our 2005 statement to the US Antitrust Division and Federal Trade Commission, FRAND and RAND have not consistently proven to be meaningful constraints on the hold-up value that essential patents or claims can attain. This fact exposes our companies and other implementers of standards to frequent and costly disputes with patentees that claim to own essential patents while leaving our companies uncertain regarding the royalty expense each of us will incur in implementing the many products we make that implement standards. Moreover, as technologies converge, products increasingly implement multiple standards, each of which will, it is asserted, require licenses to numerous essential patents owned by numerous licensors. Given the proliferation of patents and standards each of our companies face, DG-Competition's guidance regarding the interpretation of FRAND in paragraphs 284 and 285 of the Draft Guidelines is particularly welcome.

We also welcome DG-Competition's explicit endorsement of the legality of SDO rules that permit or require patentees that participate in standards development to disclose their most restrictive licensing terms prior to the adoption of a standard. We believe that *ex ante* rules, if adopted, hold the promise of introducing licensing terms as an element of the decisions participants in standards development make to include particular technologies in a standard, and welcome DG-Competition's recognition of the legality of even mandatory *ex ante* rules under European competition law, just as they have previously been recognized to be legal under US law.⁵ We hope that DG-Competition's clear statement regarding the legality of *ex ante*

of Justice and the US Federal Trade Commission. The paper is available as Attachment A to the written testimony of Hewlett-Packard Vice President for Intellectual Property Jeffrey Fromm to the Antitrust Division of the US Department of Justice and the US Federal Trade Commission Section 2 Hearings in April 2006. See http://www.justice.gov/atr/public/hearings/single_firm/comments/219222.pdf.

⁴ Draft Guidelines at ¶¶ 262 and 275.

⁵ See Letter, Thomas O. Barnett to Robert Skitol, 30 October 2006, regarding changes to the VITA Standards Organization's patent policy, at page 9 ("The disclosure of each patent holder's most restrictive license terms would allow working group members to evaluate substitute technologies on both technical merit and licensing terms. Working group members are likely to use this information when deciding which technologies to include in a standard. This use likely will increase incentives for each patent holder to compete by submitting

disclosure of licensing terms in paragraph 287 of the Draft Guidelines will address any lingering uncertainty over this issue.⁶

The Draft Guidelines also address an issue that has become more significant to each of our companies in recent years, the transfer of essential patents or claims from a party that is subject to a commitment to license to a company that made no such commitment. DG-Competition encountered this issue in its investigation of IPRCom, at approximately the same time as the US Federal Trade Commission was addressing the same issue in its *Negotiated Data Solutions* case. We welcome DG-Competition's decision to address this issue in Paragraph 286 of the Draft Guidelines by requiring that IPR holders take steps to bind transferees of essential patents to licensing obligations to which the transferor is itself subject.

II. Specific Comments

The discussion of standardisation in Section 7 of the Draft Guidelines represents a significant contribution to the ongoing global discussion regarding the interplay between standards development, intellectual property law, and competition law, and will help promote transparency and predictability in standards development, for the benefit of companies that implement standards and the consumers who buy the products those companies make.

Consistent with our view that the Draft Guidelines advance the state of European competition law in ways that will reduce possibilities for anticompetitive and opportunistic behaviour in standards development, the suggestions we offer below are provided in the spirit of further improving an already commendable effort.

(1) Injunctive Relief. The question of whether injunctive relief is available to a patentee that is subject to a commitment to license patents on FRAND terms for implementation of a standard is an important one. We submit that this question should be addressed in the Guidelines, and that the answer should generally be “no”. We believe that this position is implicit in the statement in Paragraph 283 of the Draft Guidelines that “[t]he aim of FRAND commitments in the context of standard-setting is to ensure that patented technology incorporated in a standard is accessible to the users of that standard on [FRAND] terms and conditions.” A patentee that has made a FRAND commitment but seeks a preliminary or permanent injunction is seeking to make its patented technology “[in]accessible”, either

declarations that will increase the likelihood that its technology will be selected.”) (hereinafter, “VITA Business Review Letter”). Available at <http://www.justice.gov/atr/public/busreview/219380.pdf>.

⁶ See, for example, ETSI IPR 02(08)07 (31 January 2008) at ¶ 60 (legal opinion to ETSI commenting that *ex ante* rules “may be regarded as anti-competitive in at least some circumstances.”).

permanently or pending a judicial determination of licensing terms. We believe, nevertheless, that DG-Competition should make this position more explicit in the final Guidelines.

In practice, the threat of an injunction gives parties that claim to own essential patents or claims significant bargaining power. Companies that have built businesses around the implementation of particular standards are understandably reluctant to put the continued operation of those businesses at risk. The availability of injunctive relief can therefore magnify the creation or increase of market power of patentees claiming to own essential patents, increasing the risk that they will act to abuse a dominant position.⁷ To avoid this result while protecting the rights of patentees to prevent ongoing infringement, DG-Competition should make clear that, to fall outside the scope of TFEU Article 101(1), an SDO's intellectual property rights policy must contain a provision that explicitly clarifies that a participant's commitment to license essential patents under an SDO's IPR Policy implies the obligation to surrender the right to enjoin the continued use of a patent it owns by implementers of the standard for which they claim their patent is essential until an objective third party, for example a court, has determined that the patentee has offered to license the patent on terms that are compliant with its obligations under the SDO's IPR policy.⁸ The prohibition on injunctions, however, should not extend to the defensive assertion of an essential patent in response to a threat of litigation involving the assertion of a patent claimed to be essential to the same standard.⁹

(2) Paragraph 278: “Bias in Favour of or Against Royalty-free Standards”. Each of the Submitters regularly participates in SDOs that permit royalty-based licensing, typically on RAND or FRAND terms. Each of the Submitters also regularly participates in SDOs with models that require SDO participants or a subset thereof (typically members of the relevant working group) to license essential patents on royalty-free terms. Groups with such models usually permit participants to identify specific patents or claims of patents that they wish to exclude from the scope of a royalty-free licensing commitment, typically as long as such patents are identified before a deadline occurring during the relevant standards development process. This model is common, and is used, for example by the World Wide Web Consortium (W3C), a leading developer of standards for the Web such as HTML, CSS, and XML; CableLabs, a standards development organization active in cable television and responsible for standards such

⁷ Cf., Draft Guidelines, ¶ 275. Regarding the impact of the availability of injunctive relief on negotiations regarding patent valuation, *see generally* Carl Shapiro, *Injunctions, Hold-Up, and Patent Royalties*, available at <http://faculty.haas.berkeley.edu/shapiro/royalties.pdf>.

⁸ The Submitters take no position on whether the rights of the patentee might be protected by other mechanisms, for example an early judicial determination regarding the consistency with FRAND of the licensing terms the patentee has offered or the requirement that the implementer be required to pay royalties to an escrow agent if there are legitimate concerns with the ability of the implementer to satisfy a final judgment.

⁹ The Submitters take no position as to the availability of injunctive relief in the context of the defensive assertion of an essential patent in response to the actual or threatened assertion of a patent that is not claimed to be essential to the same standard. The Submitters also take no position as to whether an SDO's IPR policy may include broader defensive suspension or termination provisions.

as DOCSIS and PacketCable that describe the transmission of broadband over cable television networks; the Bluetooth Special Interest Group, responsible for the Bluetooth personal area network standard; and the Universal Serial Bus Implementers' Forum (USB-IF), which is responsible for the familiar USB standard used in numerous personal computers and mobile phones.

Because many of our companies are extensively involved in groups that encourage or require royalty-free licensing, and because we believe that royalty-free licensing models should continue to have an important place in the standards development landscape, we are concerned that the requirement in Paragraph 278 that intellectual property rights policies contain “no bias *in favour of* or against royalty-free standards, depending on the relative benefits of the latter compared to other alternatives” (emphasis supplied) may be read as discouraging the formation or continued operation of groups such as those identified in the previous paragraph that have produced such pervasive standards as Bluetooth, DOCSIS, USB, and XML. As those examples demonstrate, royalty-free licensing models can serve the important goals of addressing participant concerns with the risk of hold-up and encourage the widespread adoption of a standard. DG-Competition should do nothing to discourage the attainment of either of these important goals by suggesting that either is inconsistent with European competition law.

(3) Paragraph 281: The Scope of “Good Faith Disclosure”. Each of the Submitters frequently seeks patent protection for the innovations we create. The result is that each of us has a large portfolio of issued patents and pending patent applications. Each of us is therefore committed to balancing the need for accurate and complete disclosures of patents and published patent applications that participants in standards development own with the difficulty that repeated portfolio-wide patent searches required by overly-broad search obligations could create. Accordingly, we suggest below several areas for potential clarifications of the scope of search obligations that SDOs should impose if they wish to qualify for the exclusion from the application of TFEU Article 101(1).

As DG-Competition is aware, different SDOs express the scope of the requirement of disclosure differently. Some groups limit the requirement to the disclosure of patents or published patent applications that are personally known to individual company employees who participate in standards development. Others require that participants undertake a reasonable good faith inquiry.¹⁰ Given the current divergence of positions, and the likely interest of SDOs

¹⁰ An example of the latter is the Institute of Electrical and Electronics Engineers, which defines the term as follows:

“Reasonable and Good Faith Inquiry” includes, but is not limited to, a [Submitter](#) using reasonable efforts to identify and contact those individuals who are from, employed by, or otherwise represent the Submitter and who are known to the Submitter to be current or past participants in the development process of the [Proposed] IEEE Standard identified in a Letter of Assurance, including, but not limited to, participation in a Sponsor Ballot or Working Group. If the Submitter did not or does not have any participants, then a Reasonable and Good Faith Inquiry may include, but is not limited to, the Submitter using reasonable

in developing patent policies that fall within the safe harbour and thereby avoid the application of TFEU Article 101(1), it would be helpful if DG-Competition were to elaborate on the meaning of the terms “good faith disclosure” and “reasonable efforts” as used in Paragraph 281. At the least, DG-Comp could usefully offer guidance as to whether a disclosure obligation limited to patents and applications personally known to a participant’s individual representatives in a standards development exercise is sufficient to satisfy the requirement of “good faith disclosure” and “reasonable efforts”. We note in this regard DG-Competition’s past guidance to ETSI that the ETSI IPR Policy should not permit a participant either intentionally to fail to disclose known essential patents or to “foster an atmosphere of ignorance amongst its employees participating at ETSI with the intent to avoid” disclosure and licensing requirements.¹¹ We would also appreciate DG-Competition’s confirmation that a full patent search is not necessary to satisfy either the requirement of “good faith disclosure” or the requirement of “reasonable efforts”.¹²

Paragraphs 280 to 286 of the Draft Guidelines address patent disclosure requirements and licensing obligations separately, but there is an interplay between the two.¹³ Patent disclosure

efforts to contact individuals who are from, employed by, or represent the Submitter and who the Submitter believes are most likely to have knowledge about the technology covered by the [Proposed] IEEE Standard.”

IEEE-SA Standards Board By-Laws, Section 6 (available at <http://standards.ieee.org/guides/bylaws/sect6-7.html#6>). See also VMEBus International Trade Association Standards Organization Policies and Procedures, § 10.2.1 (requiring “good faith and reasonable inquiry into the patents and patent applications the VITA Member Company (or its Affiliates) owns, controls, or licenses.” (footnote omitted). Available at <http://www.vita.com/vso-pp-r2d6.pdf>.

¹¹ ETSI Guide on IPRs, § 4.6.3.2, available at http://www.etsi.org/WebSite/document/Legal/ETSI_Guide_on_IPRs.pdf.

¹² We note that in its 2005 communication to ETSI regarding suggested changes to the ETSI intellectual property rights policy, DG-Competition explicitly disclaimed an intention to require ETSI members to conduct patent searches. See DG-Competition letter to ETSI, 29 March 2005, cited in ETSI Guide on IPRs § 4.6.3.2 (available at http://www.etsi.org/WebSite/document/Legal/ETSI_Guide_on_IPRs.pdf).

¹³ A helpful description of this interplay is provided in the *Guidelines for the Implementation of the [American National Standards Institute] Patent Policy*:

“The early identification of relevant essential patents or essential patent claims should also increase the likelihood of an early indication from the patent holder that it is willing to license its invention, that it is prepared to do so on reasonable terms and conditions demonstrably free of unfair discrimination, or that the patent in question is not required for compliance with the proposed standard.”

Available at <http://publicaa.ansi.org/sites/apdl/Documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/Guidelines%20for%20Implementation%20of%20the%20ANSI%20Patent%20Policy%202008.pdf>

requirements can usefully lead participants to explore whether to design around a particular disclosed patent. They may also identify the existence of competing technologies, which, particularly if the SDO has adopted *ex ante* disclosure rules for licensing terms, will facilitate competition between owners of alternative technologies. Patent licensing requirements serve as a safety net, reassuring participants and subsequent implementers that licenses to essential patents will be available to them on FRAND terms. It is noteworthy that many SDOs, particularly smaller, less formal SDOs, dispense with disclosure obligations entirely and simply obligate members to license any essential patent they own, usually with the ability to “opt out” of a licensing obligation by disclosing a particular patent or application that the owner declines to license. Other SDOs, by contrast, require both disclosure and licensing.

Given the interplay between disclosure and licensing requirements, and the existence of different licensing models across the universe of SDOs, DG-Competition could usefully offer additional guidance regarding the relationship between disclosure and licensing obligations. For SDOs with licensing models that encourage or require royalty-free licensing, DG-Competition could extend the exclusion from the application to TFEU Article 101(1) to any group that requires that participants grant licenses on royalty-free terms or disclose specific patents or applications that they are unwilling to license on royalty-free terms. For groups where FRAND licensing is common, DG-Competition should require that to qualify for the exclusion, an SDOs IPR policy should mandate that participants both disclose patents or applications believed to be essential and commit to license essential patents on FRAND or royalty-free terms.

In light of the range of approaches SDOs have taken to the issue of patent disclosure, it would be particularly helpful to include in Paragraph 281 discussions of both what rules an SDO must have to qualify for the exclusion from the application of TFEU Article 101(1) and additional guidance as to what rules are likely to survive analysis under Article 101(3).

(4) Paragraph 282: FRAND Licensing Obligations. The Submitters regard the obligation of participants in standards development to comply with licensing requirements in SDO rules to be fundamental. We nevertheless believe that Paragraph 282 could usefully be clarified to improve the guidance DG-Competition provides to SDOs regarding this critical issue. In particular, it is not entirely clear whether Paragraph 282 refers to an SDO IPR policy rule that (1) imposes a FRAND licensing obligation on participants in a standard development organization (or some subset thereof such as the participants of the relevant working group developing a particular standard) or (2) prohibits an SDO from adopting a standard if there is associated patented technology (whether or not owned by an SDO participant) that is identified as likely being essential to implement the standard but which has not been made available on FRAND licensing terms. In the former case, the FRAND licensing obligation would be mandatory and would result from the act of joining the SDO (or perhaps the relevant working group thereof) in question. In the latter case, the obligation would be voluntary on the part of the

holder of the essential patent in question and would be requested at the time the patent became known to the SDO, which could happen after the finalisation of the standard in question.

If DG-Competition intended Paragraph 282 to refer to the former type of rule then the Submitters believe that it would be appropriate to clarify that an SDO IPR policy would benefit from the exclusion from the scope of TFEU Article 101(1) even if the obligation to license was qualified in either of the following two ways: (1) by limiting the obligation only to participants in the relevant working group; or (2) by permitting participants to refuse to license specific patents by identifying those patents to the SDO in a timely manner during the development of the standard in question. The first qualification reflects the reality that some SDOs support numerous standard development activities (or working groups) simultaneously, and that many companies may be active in only a few of such activities. The second qualification is meant to address the reality that many companies will be reluctant to join an SDO or a particular working group if they thereby become irrevocably committed to license patents essential to implement whatever other participants decide to contribute to the standards activity in question and whatever the scope of the final standard.

The Submitters had one additional suggestion regarding a clarification to Paragraph 282. As DG-Competition is aware, there are SDOs that explicitly acknowledge that it is consistent with the SDO's required FRAND commitment for an IPR holder to condition licenses of its essential IPR on the licensee's willingness to license the essential IPR that the licensee controls.¹⁴ It would be helpful to make clear in Paragraph 282 that an SDO's specific acknowledgment of reciprocal licensing in an IPR policy is consistent with the exclusion from the application of TFEU Article 101(1) to SDO IPR policies.

(5) Paragraphs 284 and 285: Approaches to Defining “FRAND”. As noted previously, the Submitters share the view that FRAND (and its American sibling, RAND) has not consistently proven to be an effective constraint in circumstances when owners of essential patents engage in opportunistic behaviour by taking advantage of the market power that ownership of a patent claimed to be essential can provide. Indeed, disputes over whether particular licensing terms are or are not compliant with FRAND have become increasingly numerous in recent years, and have led to competition-law investigations in Europe and elsewhere. We therefore welcome DG-Competition's reminder that the evaluation of “reasonableness” must be based on the economic value of the patent, and that one way to determine reasonableness is to assess the value “before the industry has been locked into the standard.”¹⁵

¹⁴ For example, *see* ETSI Rules of Procedure, Section 6.1 (permitting ETSI participant that licenses IPR to do so “subject to the condition that those who seek licenses agree to reciprocate”) (available at http://www.etsi.org/WebSite/document/Legal/ETSI_IPR-Policy.pdf).

¹⁵ Draft Guidelines, Paragraph 284.

Paragraph 284 helpfully offers a non-exclusive set of tests for the determination of what licensing terms are compliant with FRAND. We believe, however, that the tests should be enhanced by the consideration of two additional factors. The first is the inventive contribution that a particular patent makes to a standard. In other words, is the patent central to the standard, or is it a feature whose exclusion from the standard would not result in a significant diminution of the value of the standard? We believe that this concept is addressed in the discussion of the potential value of an independent expert assessment in Paragraph 285, which includes a consideration of a patent's "objective quality and centrality to the standard at issue", but submit that the factor might also usefully be included in the consideration of "whether the fees bear a reasonable relationship to the economic value of the patents" in Paragraph 284.

A second consideration worthy of explicit mention in Paragraph 284 is how much value the implementation of a particular standard contributes to complex technology products that are often built of many components, each of which may incorporate many technologies and implement many standards. For example, a mobile communications device may support multiple cellular air interface standards (GSM, GPRS, EDGE, UMTS, and, going forward, LTE or WiMAX), WiFi, and video compression standards. When a patent is asserted to be essential to one of many standards that a product implements, or if the product contains features unrelated to the standard, assessing the fairness and reasonableness of particular licensing terms as if compliance with any particular standard were responsible for the entire value of the product discourages innovation by imposing royalties based on the value contributed by aspects of a product that are unrelated to the patented technology.

(6) Paragraph 286: "All Necessary Measures" to Bind Transferees to Licensing Commitments. The Submitters recognize that transfers of essential patents to non-practicing entities that assert those patents against implementers of standards threaten the integrity of the standards development process. When a transferee is aware of a licensing obligation at the time it purchases essential patents and subsequently seeks to evade that obligation after the standard has been approved and widely adopted, the transferee may contravene competition law. For that reason, the Submitters welcome the inclusion of Paragraph 286, which helpfully requires SDOs wishing to avail themselves of the exclusion from the application of TFEU Article 101(1) to require participants that commit to license essential patents on FRAND terms "to take all necessary measures to ensure that any undertaking to which the IPR owners transfers its IPR (including the right to license that IPR) is bound by that commitment." However, the Submitters believe that DG-Competition should provide more guidance as to the scope of the phrase "all necessary measures." DG-Competition could usefully say, for example, that the requirement to take "all necessary measures" is satisfied by a general statement by a transferor that patents being transferred were subject to licensing obligations undertaken by the transferor through its participation in one or more standards development activities.

(7) Paragraph 287: “Joint Negotiation or Discussion of Licensing Terms”. As companies that have advocated the potential benefits of *ex ante* disclosure of licensing terms, the Submitters appreciate DG-Competition's discussion in Paragraph 287 of the Draft Guidelines of the relevance that IPR costs should have to the decision whether to include particular technology in a standard. We believe *ex ante* disclosures of most restrictive license terms can have significant pro-competitive benefits. As DG-Competition itself points out, such information can "enable the standard-setting organisation to take an informed decision ... not only from a technical perspective but also from a pricing perspective."¹⁶

We are concerned, however, with a phrase DG-Competition uses in Paragraph 287 that has ambiguous implications that we fear could impede the effective use by standard-setting organisations of information about proposed licensing terms that is disclosed by participants. The phrase that concerns us is: "as long as the rules do not allow for the joint negotiation or discussion of licensing terms in particular royalty rates." We recognize that DG-Competition does not intend to include rules permitting joint negotiation and discussion of licensing terms within the exclusion from the application of TFEU Article 101(1). However, the phrase quoted above may be read, incorrectly, we believe, to imply that *any* joint consideration of license terms would necessarily be problematic. We ask DG-Competition to correct that ambiguity.

As DG-Competition is aware, because standard setting often involves collaboration among competitors, organisations that manage standard-setting activities are especially cautious regarding compliance with competition law. Having a high sensitivity to competition concerns, they do not want to operate at what they perceive to be the edge of legality. Standard-setting organisations therefore set their rules to permit a margin of safety. They view bright-line rules as particularly valuable, and respond to ambiguity by avoiding any possibility of risk.

Because SDOs are consensus-based organisations, opponents of reform can use the perception of risk to discourage progressive changes in IPR policies, even changes that are clearly pro-competitive. The brief comment regarding joint discussion and negotiation of licensing terms may facilitate such tactics. DG-Competition should not create the mis-impression that *any* joint discussion or negotiation of licensing terms must be avoided, even by SDOs that choose not to seek the exclusion from TFEU Article 101(1) discussed in the Draft Guidelines. First, we note that this mis-impression may raise concerns with royalty-free standards development, which some may portray as an agreement among participants to set royalty rates at zero. Second, we are concerned that DG-Competition's language seeming to condemn any joint discussion or negotiation will be used by *ex ante* opponents to discourage the adoption of *ex ante* rules. *Ex ante* opponents may use DG-Competition's language to argue that, because an inevitable consequence of the disclosure of licensing terms is discussion, if

¹⁶ Draft Guidelines, Paragraph 287. *See also* DG-Competition's 21 June 2006 letter to ETSI regarding the discussions in the ETSI IPR Ad Hoc Group, where DG-Competition noted that *ex ante* licensing can "avoid[] the possibility of *ex post* monopoly pricing once one technology from many has been chosen for the standard (and once lock-in has occurred)."

discussion raises competition law concerns, then the surest way to prevent SDOs from running afoul of competition law is to prohibit the disclosure of licensing terms. Because we have participated in many days of discussion regarding the competition-law risks alleged inevitably to attend the adoption of *ex ante* rules, we can testify that this mis-use of DG-Competition’s statement is a very real concern.

Rather than create the mis-perception that any discussion or joint negotiation of licensing terms violates competition law, we encourage DG-Competition to make clear that it will evaluate joint discussion and joint negotiation under Article 101(3), by weighing the pro-competitive benefits of joint discussion and negotiation against the potential for competitive harm resulting from the aggregation of buyer market power.¹⁷ We note that both US federal antitrust enforcement agencies have stated that joint discussion and negotiation would likely be assessed under the rule of reason, an analytical framework analogous to TFEU Article 101(3), because, of the “strong potential for pro-competitive benefits” they recognize *ex ante* discussion of licensing terms could have.¹⁸

(8) Paragraph 305: Conformity Assessment and Marking. A number of standards that Submitters provide for the use of conformity assessment marks, which are trademarks or certification marks owned by standards bodies and licensed to implementers that submit products for compliance testing and are determined to be compliant. Examples include the WiFi mark, owned by the WiFi Alliance, the Bluetooth mark, owned by the Bluetooth SIG, and the Unix mark, now owned by The Open Group. Conformity assessment marks can play a powerful pro-competitive role in improving the consumer experience with products that implement a standard. Standards frequently require interpretation on the part of implementers, for example because specifications provide for multiple choices, do not fully describe implementation details, or contain errors or ambiguities. In this situation, conformity assessment can address interoperability issues that can limit the attractiveness of a standard to consumers, who may be frustrated when two products, each of which claims to implement the same standard, are unable to exchange information. For that reason, we believe conformity assessment, with compliance signified to prospective purchasers through the use of an identifiable conformance mark, may sometimes be indispensable to the achievement of the goals of standards development.

¹⁷ See generally Section 5.4 of the Draft Guidelines (discussing assessment of purchasing agreements under Article 101(3)).

¹⁸ U.S. Dep’t of Justice and Federal Trade Commission, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* at 55-56 (April 2007) (available at <http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf>). See also VITA Business Review Letter at fn. 27 (noting that joint discussions and negotiations “could be pro-competitive”); Letter, Thomas O. Barnett to Michael Lindsay, 30 April 2007 at n. 47 (the Antitrust Division would “typically apply a rule of reason analysis to joint negotiation of licensing terms in the standard-setting context”) (available at <http://www.usdoj.gov/atr/public/busreview/222978.pdf>).

Paragraph 305 raises a concern with the creation of exclusive agreements with conformity testing bodies. In our view, this concern may be misplaced. Companies participating in standards development may have pro-competitive business reasons to agree to appoint an exclusive agent to perform conformity assessment. Those reasons may include the need to persuade a particular testing service to absorb what may be significant start-up costs in purchasing specialized equipment and creating test plans that accurately simulate the consumer experience using products that implement a standard. They may also include a desire to concentrate “learning effects” that come with doing repeated testing at a single vendor.¹⁹

Rather than focus Paragraph 305 at the exclusive or non-exclusive appointment of testing services to perform conformity assessment, DG-Competition may wish to emphasize the need that conformity assessment be objective, so that prospective implementers are not arbitrarily prevented from using a conformance mark. DG-Competition may also wish to note the need for the fees assessed for conformity assessment to be consistent with the accessibility of a standard to a wide community of prospective implementers.

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We wish to communicate again our support for DG-Competition’s continued focus on competition issues in standardisation and the interplay between competition law, intellectual property law, and standardisation. We commend DG-Competition for issuing the Draft Guidelines, which will offer valuable guidance to SDOs and companies like ours that regularly participate in the development of standards. We would be happy to discuss any aspect of this submission with DG-Competition as it continues its consultation regarding the Horizontal Co-Operation Guidelines.

¹⁹ We note that the factors that may justify exclusive appointment of a particular conformance testing service, for example the efficiencies associated with concentrating the initial expense of purchasing equipment and writing test scripts, were not factors at issue in DG-Competition’s *Grüne Punkt* decision, where, as the Court of First Instance found, it was not Duales System Deutschland (owner of the Grüne Punkt trademark used to denote conformity with German waste collection regulations) but rather the regional waste collection undertakings that made “the necessary investments for the collection and sorting of packaging.” Case T-289/01, *Der Grüne Punkt – Duales System Deutschland GmbH v. Commission* (24 May 2007) at ¶ 78 (available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001A0289:EN:HTML>). In the context of conformity assessment performed in connection with the implementation of a complex interoperability standard such as WiFi or Bluetooth, it is likewise the service performing the conformity assessment itself that bears the up-front costs, and exclusivity may provide a way of assuring the service that it will be able to recoup those costs.