

25 June 2010

DIGITALEUROPE RESPONSE TO THE CONSULTATION ON THE DRAFT GUIDELINES ON HORIZONTAL COOPERATION AGREEMENTS: SECTION ON STANDARDS AGREEMENTS AND DRAFT REGULATION ON RESEARCH AND DEVELOPMENT AGREEMENTS

1- INTRODUCTION

DIGITALEUROPE welcomes the opportunity to provide its comments on the standards section (Section 7) of the Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (“the Draft Guidelines”), as well as the Draft Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of research and development agreements (“the Draft Regulation”) prepared by the Competition Directorate of the European Commission (“the Commission”).

In this context, DIGITALEUROPE would also like to refer the Commission to previous comments DIGITALEUROPE has provided in relation to consultations on the 2008 White Paper “Modernising ICT Standardisation in the EU - The Way Forward” (“the ICT White Paper”), the 2010 review of the European Standardisation System and the 2009/10 DIGITALEUROPE White Paper “Intellectual Property: Building Blocks of the Future.” These DIGITALEUROPE papers are relevant to the present consultation and attached hereto for ease of reference.

2- THE DRAFT GUIDELINES ON HORIZONTAL COOPERATION AGREEMENTS

Please note that the lack of any comment regarding any other general or specific issues in the Draft Guidelines does not signify either agreement or disagreement on the part of DIGITALEUROPE or any of its members.¹

¹ Please note that this position paper has been adopted under a broad majority (DIGITALEUROPE By-laws require a two-thirds majority). Opposing DIGITALEUROPE members do not agree with some of the views on standardization expressed in the paper.

2- 1- Open, Transparent and Balanced Standardisation Process

DIGITALEUROPE welcomes the Commission's commitment to ensuring standards organisations have clear and effective rules and policies. Standards play a vital role in today's modern knowledge economy and this is even truer in the ICT sector.

In that context we believe it is important that the Draft Guidelines outline important characteristics and principles related to standardization such as the generally positive economic effects of standardisation and the need for open, transparent and balanced processes as well as clear rules on what generally would be regarded as permitted and what would not be regarded as permitted in accordance with European competition law.

DIGITALEUROPE welcomes the recognition in the Draft Guidelines of the importance of standards organisations' IPR policies. In line with the Commission's and DIGITALEUROPE's stated positions, and in response to the Commission's consultation on the ICT White Paper, DIGITALEUROPE stated²:

“Clearly, we do agree that ICT standards developing organisations should, subject to competition law and respecting the owner's IPR: implement clear, transparent and balanced IPR policies which do not discriminate and allow competition among different business models...”

And indeed in agreement with the majority of the views of respondents as stated in the Commission's Overview of the Consultation³ which stated that:

“Respondents for the most part agreed with the proposition that ICT standards developing organisations should take account of all stakeholders' interests (IPR owners, standard implementers and end users) and implement clear and balanced IPR policies which do not discriminate and allow competition among different business models.”

DIGITALEUROPE agrees with the recognition that unbiased and balanced IPR policies are essential and that there is a natural tension among stakeholders' interests in the standard-setting process because companies may desire to promote their own solutions, and because of the different business models and strategies among different firms. The Draft Guidelines acknowledge, in paragraphs 270-274, that various participants in standardisation operate at different levels of economic activity and may have interests and incentives that are in tension. According to the Draft Guidelines, there are present in standards setting: i) upstream-only companies (which solely develop and market technologies), ii) downstream-only companies (which solely manufacture products based on technologies developed by others and do not hold relevant IPR) and iii) vertically integrated companies (which both develop technology and sell products). While the Draft Guidelines do not mention them, other actors may also be present in standards setting, for example: iv) companies which are

2 See page 5, DIGITALEUROPE reply on European Commission White Paper “Modernising ICT Standardisation in the EU. The Way Forward”, 1 September 2009

3 See page 10-11, Modernising ICT Standardisation In The EU – The Way Forward Overview Of The Results Of The Public Consultation On The White Paper, 4 December 2009

solely industrial buyers of standardised products but neither manufacture products nor develop technologies for inclusion in the standard in question; v) companies who may seek to leverage the standardized technology for their businesses but do not develop technologies for inclusion in the standard in question, and vi) companies that have several of these business models.

2- 2- Focus on IPR and licensing and neutrality

We observe that the text focuses closely on the issue of potentially anti-competitive exploitative licensing of IPRs essential to the standard that, in the words of the Draft Guidelines, create a ‘particular risk’ that requires specific guidance. In contrast, there is little guidance addressed to what extent the various participants in standards setting can engage in horizontal activity which might be considered pro-competitive and to what extent such activity might be considered anti-competitive collusion. This type of guidance would be helpful to provide sufficient clarity and certainty to allow for effective self-assessment by standards organisations and their members.

We also observe that there is no mention of any pro-competitive benefits of IPRs and licensing which should be acknowledged in the Draft Guidelines. For example, in the 2004 Guidelines on the Application of Article 81 to Technology Transfer Agreements (“the Technology Transfer Guidelines”) included such an acknowledgement⁴. Apart from promoting investment in innovation and underpinning technology transfer, as observed in the DIGITALEUROPE White Paper on IPR⁵, it is worth noting that IPRs promote the dissemination of information. In particular, it is the reliance on the protection offered by IPRs that enables numerous innovators to invest in and contribute technologies for consideration in the standards setting process in the first place and when enforced by companies respecting the balanced objectives of standardization referred to in section 2-1 allow the benefits of standardization to be passed on and promote follow-on innovation. The pro-competitive incentives offered by the patent system should not be ignored, whether in the context of standardisation or otherwise, provided that the balanced objectives referred to in the second and third paragraphs of section 2-1 above can be achieved. As the Commission

4 See paragraphs 8 and 9, “Technology Transfer Guidelines” in general and – in particular - paragraph 8:

“ ... In order not to reduce dynamic competition and to maintain the incentive to innovate, the innovator must not be unduly restricted in the exploitation of intellectual property rights that turn out to be valuable. For these reasons the innovator should normally be free to seek compensation for successful projects that is sufficient to maintain investment incentives, taking failed projects into account....”

and paragraph 9:

“There is no presumption that intellectual property rights and licence agreements as such give rise to competition concerns. Most licence agreements do not restrict competition and create pro-competitive efficiencies. Indeed, licensing as such is pro-competitive as it leads to dissemination of technology and promotes innovation. In addition, even licence agreements that do restrict competition may often give rise to pro-competitive efficiencies, which must be considered under Article 81(3) and balanced against the negative effects on competition (10). The great majority of licence agreements are therefore compatible with Article 81.”

5 See page 5-6, DIGITALEUROPE 2009/10 White Paper “Intellectual Property: Building Blocks of the Future”

recognizes, a well-functioning standards development system both encourages innovation and ensures that the benefits of that innovation are provided to consumers in the form of technologically advanced and interoperable products.

The Draft Guidelines could also mention that standard setting is typically voluntary and industry-led and that a holder of potentially essential IPR has the freedom to decide whether to contribute its technology to a standard and make a FRAND and/or royalty-free commitment or keep its technology proprietary.

2- 3- Ex ante disclosure of licensing terms

Regarding the specific issue of the effectiveness of individual companies providing *ex ante* disclosure of their most restrictive licensing terms in particular situations, there are different views among the DIGITALEUROPE membership. Some members of DIGITALEUROPE believe that in some industries and for some stakeholders, such *ex ante* disclosure could contribute to greater transparency and that such transparency could lead to better results in standards setting. Other members of DIGITALEUROPE believe that *ex ante* disclosure will not always result in positive effects on standardisation and will not be appropriate for some industries and stakeholders. In particular, some members of DIGITALEUROPE believe that in complex technology areas, such as telecommunications, *ex ante* disclosure of license terms has been shown to be counterproductive in practice. Therefore, DIGITALEUROPE welcomes the non-prescriptive guidance given in paragraph 287 of the Draft Guidelines, that states that should a standard-setting organisation's IPR policy require, or allow, IPR holders to individually disclose their most restrictive licensing terms, including the maximum royalty rates they would charge, prior to the adoption of the standard this will not lead to a restriction of competition within the meaning of Article 101(1).

DIGITALEUROPE believes that *ex ante* disclosure of licensing terms should not be required as a matter of European law or policy. DIGITALEUROPE supports the position that the membership of standards organisations should be free to decide whether *ex ante* disclosure should be either i) available on a voluntary basis without any adverse presumptions associated with non-disclosure (such as is the case at ETSI for example), ii) made a mandatory requirement of a standards organisation's IPR policy (such as is the case at the VITA Standards Organization for example), or iii) not available within the standards organisation (given that some standards organisation will not find *ex ante* disclosure appropriate for their industries and stakeholders) as appropriate. In each case, it is entirely a decision for the membership of the standards organisation in question, taking into account the particular characteristics of the relevant industrial sector and specific objectives the of the standards organisations' membership.

2- 4- "Safe Harbour" conditions for standards organisations

In support of this point, Commission representatives have repeatedly stated⁶ that role of competition agencies should not be prescriptive as regards standards organisations' policies,

⁶ See, for example, Grazyna Piesiewicz and Ruben Shellingerhout, Intellectual Property Rights in standards setting from a competition law perspective, Competition Policy Newsletter No. 3, 2007;

but rather provide guidance on what policies would or would not be permissible under competition law. The Draft Guidelines should note the potentially positive and pro-competitive benefits of policies that are not particularly identified as permissible under the “safe harbour” provisions. Extra care should to avoid any impression of a bias towards or against policies that do not necessarily violate competition law. DIGITALEUROPE supports the position that standards organisations should be free to adopt the rules and policies that are most suitable for the needs and objectives of their membership and their industrial sector within a set competition policy framework that safeguards the balanced objectives referred to in the second and third paragraphs of section 2-1 above.

In this regard DIGITALEUROPE notes that the Draft Guidelines highlight provisions of standards organisations IPR policies that may present low risk of a competition enforcement action. However, we would caution that the Draft Guidelines should take care not to exclude other valid provisions to the extent that they provide for an efficient, successful and pro-competitive environment. DIGITALEUROPE notes that there is a great variation among IPR policies that currently exist and most do not appear to fall within the “safe harbour” sought to be established by the Draft Guidelines. For example, in reviewing paragraphs 281 and 282 together, they appear to describe a patent policy that requires patent holders (which we assume is meant to apply to patent holders participating in creating the standard) to use reasonable efforts to make a disclosure if they are likely to have patents that will have essential claims vis-à-vis the final version of the standard. But these paragraphs also seem to require that all participating patent holders must provide a FRAND commitment. Most standards organisations that have some disclosure obligation permit the disclosing patent holder either to make a FRAND commitment or to notify the standards organisation that it is not willing to make a FRAND commitment, in which case the standards organisation may typically decide to remove the technology covered by the patent from the standard. There are other standards organisations that have a more participation-based patent policy that may not require disclosures but which may seek to bind all participating patent holders to a FRAND commitment (with or without a royalty provision) with regard to any essential IPR that they have vis-à-vis the final version of the standard.

While in support of greater legal certainty, given the diversity of standards organisations and their IPR policies, DIGITALEUROPE notes that many of the current IPR policies in effect today do not appear without further clarification to satisfy the “safe harbour” parameters described in the Draft Guidelines. One example that the “safe harbour” provisions do not match current IPR policies is the requirement of *ex ante* disclosure of all IPR that might be essential to the implementation of the standard. For companies having a large patent portfolio, the systematic *ex ante* disclosure requirement of all IPR that might be essential to the implementation of the standard would be impossible to meet, even in good faith, without a large team devoted to such disclosure. Additionally, the cost of studying what IPR should be declared will be prohibitively expensive with no guarantee of complete coverage leaving

Philip Lowe, Director General DG Competition, “The Commission’s current thinking in Article 82” conference speech at “Pricing and the dominant company”, Brussels 31, January 2008; Cecilio Madero Villarejo and Nicholas Banasevic “Standards and Market Power” in GCP, the Online Magazine for Global Competition Policy May 2008

participants open to potential litigation, whereas non-participants will not be subjected to such restrictions.

Given the different interests of its members, there is no consensus among DIGITALEUROPE's membership on the meaning or intent of the "FRAND commitment" (as set out in paragraph 283) or on the methods described to "assess the economic value of the patents" (as set out in paragraphs 284 and 285). However, DIGITALEUROPE observes that FRAND commitments do not preclude licensing on royalty free terms or the use of non-assertion undertakings as well as allowing for licensing in return for financial or other consideration including royalties. DIGITALEUROPE suggests that the Guidelines might usefully highlight this observation. It is not clear why the inclusion of substitute technologies in standards (which is a common practice as many standards provide options on how to achieve the standard's desired results) may limit inter-technology competition (as set out in paragraph 288). Also, while there are some areas of concern, other areas are addressed by the Draft Guidelines without there being established case law to conclude that there is a significant cause for concern with standards organisations' existing rules and policies. At the same time it is apparent that the legal questions relating to IPR policies seem to be at the heart of many litigations and that the general trend seems to be towards increasing IPR litigation.

2- 5- High-level conclusions on Draft Horizontal Guidelines

In conclusion, DIGITALEUROPE welcomes the Commission's support for standards organisations having clear and effective rules and policies as well as open, transparent and balanced processes and the recognition of the importance of balanced IPR policies. DIGITALEUROPE also believes that there is need for revision of the Draft Guidelines to address the following:

- i) to recognize the pro-competitive benefits of IPR and the need to encourage R&D and contribution of its results to voluntary and industry-led standards setting;
- ii) to provide guidance on what constitutes pro-competitive or anti-competitive horizontal activity among standards participants;
- iii) to mention that there may be other actors present in standards setting than those listed;
- iv) to take care not to discourage standards organisations from adopting rules and policies which are outside the "safe harbour" to the extent that they provide a pro-competitive environment, and to clarify the "safe harbour" conditions accordingly.

3- THE DRAFT REGULATION ON RESEARCH AND DEVELOPMENT AGREEMENTS

DIGITALEUROPE believes that fostering collaborative research and development is critical for stimulating innovation and helping industry convergence on technology solutions. For this reason, DIGITALEUROPE in general welcomes the Commission's continued provision of block exemptions in this area. However, there are some specific changes proposed in the

Draft Regulation that DIGITALEUROPE believes to be unnecessary and may discourage collaborative research and development activities in Europe.

Article 3 of the Draft Regulation stipulates conditions for exemption from Article 101(1) TFEU for research and development agreements. In Article 3, paragraph 2, the Draft Regulation states:

“The parties [to research and development agreements] must agree that prior to starting the research and development all the parties will disclose all their existing and pending intellectual property rights in as far as they are relevant for the exploitation of the results by the other parties.”

Thus, the Draft Regulation appears to suggest that R&D agreements will only be compliant if the parties make a full disclosure of all relevant background IPR. However, this is not always straightforward because: (a) industry research parties looking to be involved in such projects do not always have a good idea of the extent of their relevant background IPR, and (b) to identify it would involve considerable enquiry. First, it appears impossible to comply with this condition since, prior to completion of the research and development, let alone prior to starting it, the results that will be forthcoming are by definition unknown. Consequently it is impossible to determine those IPRs that will be relevant for the exploitation of as yet unknown results.

Second, putting aside the practical impossibility of the task, it is notable that this IPR disclosure rule is still considerably more onerous than corresponding IPR disclosure rules typically adopted in the context of standards setting. In particular, and taking the IPR disclosure rules of ETSI as a counterpoint, in the Draft Regulation there appears to be i) a strict requirement to disclose rather than the ETSI requirement to use reasonable endeavours to make disclosures, ii) no indication that the Draft Regulation does not require the Parties to conduct patent searches, unlike ETSI’s rules, and iii) a requirement that all “relevant” IPR of a Party must be disclosed which is potentially broader than all IPR that might be “essential” as in ETSI’s rules. In standards setting, there may be good reason to disclose essential IPRs – e.g., because it might be desirable, in certain circumstances, to define the standard so as to avoid essential IPR where, for example, no FRAND licensing declaration has been made. However, the Draft Regulation already requires that collaborative research and development provide “access” to allow all participants to exploit the results of the collaboration, and it is therefore surprising that the IPR disclosure rule should be significantly more onerous than typical standards setting.

DIGITALEUROPE suggests that the condition in Article 3, paragraph 2 should be amended to require good faith efforts and/or only to the extent of the knowledge of representatives involved in the project, otherwise the Draft Regulation will increase the complexity of participation in collaborative R&D since internal clearance processes to attempt to identify all relevant background would become necessary.

While the Draft Regulation requires “access” by all participants to the collaboration to exploit the results of the collaboration and allows the participants to limit their exploitation to a field where they were not competing prior to the collaboration, the new proposal now would require “equal access” and does not allow for the field of use restriction. Digital Europe

believes that this change is unnecessary. Participants should not be discouraged from devising the optimal ways to commercialise the collaborative results for the benefits of consumers and we believe the current block exemption strikes the right balance. It seems that the thrust of the Draft Regulation is towards having symmetrical access for the parties for both background IPR (on a reasonable basis for exploitation) and foreground IPR ("equal access" accordingly to Art.3(3)). This means that asymmetrical treatment of IPR (that is sometimes favoured) will most likely be unavailable.

Finally, the section on R&D collaboration should expressly recognize risk-sharing among firms, including the sharing of risk that R&D efforts will be unsuccessful, as a pro-competitive benefit of collaboration.

In conclusion, DIGITALEUROPE believes that the adoption of the Draft Regulation as presently drafted may discourage collaborative research and development activities in Europe by making the conditions for the block exemption impossible to comply with, or by imposing conditions that reduces the incentives for participants to commercialise the results. DIGITALEUROPE believes that this is not what the Commission intends to achieve with the Draft Regulation.

4- GENERAL CONCLUSIONS

DIGITALEUROPE is grateful to the Commission for the opportunity to provide its comments on the standards section of the Draft Guidelines and on the Draft Regulation. We hope that the comments will be useful to the Commission in reviewing its proposals.

ABOUT DIGITALEUROPE

DIGITALEUROPE is the voice of the European digital economy including information and communication technologies and consumer electronics. DIGITALEUROPE is dedicated to improving the business environment for the European digital technology industry and to promoting our sector's contribution to economic growth and social progress in the European Union.

DIGITALEUROPE ensures industry participation in the development and implementation of EU policies DIGITALEUROPE's members include 60 global corporations and 40 national trade associations from across Europe. In total, 10,000 companies employing two million citizens and generating €1 trillion in revenues. Our website provides further information on our recent news and activities: <http://www.digitaleurope.org>

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