

**Comments on Revised rules for the assessment of horizontal cooperation agreements  
under EU competition law**

France Telecom Group welcomes the opportunity to comment on the different documents published by the European Commission (hereinafter the "Commission"), regarding consultation on rules for the assessment of horizontal cooperation agreements under EU competition law.

### **1. Revised EC Regulation on Research and Development (R&D) agreements**

France Telecom welcomes the renewal of the benefit of the block exemption regulation on R&D agreements.

However, the current text includes certain obligations that may reveal impractical to fulfil or to implement:

Whereas (12) + Article 3.2 oblige the parties to *"agree that prior to starting the research and development all the parties will disclose {in an open and transparent manner} 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"*.

While the agreement to disclose **known** IPR prior to start the R&D work is acceptable in principle, it could easily become impractical as it could be understood to carry an implied obligation to conduct IPR searches, which are known to be lengthy, effort consuming and usually non-exhaustive by nature. Such implied IPR searches would de facto delay the start of any R&D activity and lead to a waste of patent attorney resources that could otherwise be used to file IPR. It is also unspecified what remedies would be imposed if a party would fail to disclose an IPR prior to the start of R&D work, which is a situation that could arise in good faith. Further, the relevance of this IPR for the exploitation of the results of R&D work by the other parties may be divided into two distinct categories: one that can be assessed prior to the start of the R&D work, and another that is dependent on the results themselves and on the actual implementation of such result (which may even depend on third party IPR). The latter are only known after the start of the R&D work, usually when reaching some intermediate delivery milestones and finally at the end of the R&D work.

Since Article 3.4 already obliges each party to grant access to its pre-existing IPR, and **not "know-how"** as mistakenly written, France Telecom considers that it would be more appropriate to rewrite Article 3.2 as follows:

- [3.2] The parties must agree that prior to starting the research and development all the parties will disclose all their **known** existing and pending intellectual

property rights in as far as they are relevant for the exploitation of the results by the other parties, **either for which no license will be available under the terms of Article 3.4, or as a list subject to the terms of Article 3.4. There is no obligation to conduct IPR searches so that when a party later becomes aware of any undisclosed intellectual property rights relevant for the exploitation of the results by the other parties, it should disclose such IPR to the other parties. However, intentionally withholding the disclosure of known IPR constitutes a breach of the rights and obligations granted to that party under this exemption regime.**

- [3.4] Without prejudice to paragraph 3, where the research and development agreement provides only for joint research and development, the research and development agreement must stipulate that each party must be granted access to any pre-existing ~~know-how~~ **intellectual property rights** of the other parties, if ~~this know-how~~ **these intellectual property rights are** indispensable for the purposes of its exploitation of the results.

## 2. Revised EC Regulation on Specialisation agreements

France Telecom welcomes the renewal of the benefit of the block exemption regulation on specialisation agreements.

However, the current text includes certain obligations that may reveal impractical to fulfil or to implement:

Whereas (8) + Article 2.2 refer to "*provisions which relate to the **assignment** or licensing of intellectual property rights to one or more parties (...) directly related to and necessary for their implementation*". It is however unclear what is meant to be covered by the "assignment" that cannot be covered by the "licensing". If the answer is nothing, then it would be preferable to keep only the broad-enough term "licensing".

(...) shall also apply to specialisation agreements containing provisions which relate to the ~~assignment or~~ licensing of intellectual property rights to one or more of the parties, provided that those provisions do not constitute the primary object of such agreements, but are directly related to and necessary for their implementation.

## 3. Revision to the Horizontal Guidelines

France Telecom welcomes the renewal of the Horizontal Guidelines as a generally informative and useful examples of how the Commission analyse agreements under article 101 TFEU.

Although clearly stated in § 1.1.7 that the Guidelines have not intent to cover all possible scenarios nor to constitute a checklist of criteria which could be applied mechanically, this point should be further emphasized. Despite this, the European Commission should appreciate that the Guidelines could have an undesired overruling effect if a given criteria would emphasize too much certain allowed practices while omitting equally allowed alternatives. The numerous comments and discussions on the extension of Chapter 7 (Standardization Agreements) exchanged during the consultation phase testifies that in this respect adding more text was creating more difficulties than providing assurance to the whole Industry.

### **3.1. Revision to the Horizontal Guidelines on information exchange (Chapter 2)**

France Telecom has not found useful remarks on the proposed revised text, but refers the Commission to the comments made on the Regulation on Specialisation agreements (cf. point 2 supra) that should be covered by corresponding changes in the Guidelines.

### **3.2. Revision to the Horizontal Guidelines on R&D agreements (Chapter 3)**

France Telecom has not found useful remarks on the proposed revised text, but refers the Commission to the comments made on the Regulation on R&D agreements (cf. point 1 supra) that should be covered by corresponding changes in the Guidelines.

### **3.3. Revision to the Horizontal Guidelines on Standardisation agreements (Chapter 7)**

Since the consultation launched in May 2010 by the Commission on these Horizontal Guidelines, there has been many discussions on the purpose, significance and benefit for the whole Industry of extending the existing Chapter 7 on Standardisation Agreements from 2 pages to 16 pages.

The rationale was looked after in the Press Release by the EC issued on 4/05/2010:

*" The Horizontal Guidelines provide an analytical framework for the assessment of the most common types of horizontal co-operation agreements such as research and development agreements, production agreements, purchasing agreement, commercialisation agreements and standardisation agreements. (...).*

*To this end, the Horizontal Guidelines have been extensively revised in order to help companies to assess with greater certainty whether or not an agreement is restrictive of competition and, if so, whether it would qualify for an exemption.*

*A key issue addressed are standard-setting arrangements. Standards are becoming increasingly important in facilitating innovation (in particular in the IT sector) but an efficient, open and transparent standard-setting process is key to ensure effective competition. In particular, the revision of the standardisation chapter – drawing on recent case related experience in the field – aims at ensuring that standards are set in such a way that the specific benefits of standard-setting are realised and passed on to European consumers. "*

However, the current text includes certain statements or expectations in relation with Intellectual Property Rights (IPR) that may reveal detrimental to current acceptable practices, as quoted hereunder:

The current text in § 7.3.2 (267) offers that *" Prior to the adoption of the standard, agreements by IPR holders on the licensing terms they will disclose will also constitute restrictions of competition by object within the meaning of Article 101(1). "*

It should be recognized that certain standard-setting bodies have an acceptable IPR Policy that contains the encouragement to disclose the licensing terms prior to the adoption of a standard together with the aim to foster the creation of a collective licensing arrangement in the form of a Patent Pool as a vehicle to facilitate access to essential IPR under licensing terms and conditions defined collectively among the assessed patent right holders.

In the context of the above sentence, we feel like additional care should be taken in the writing so not to dissuade potential essential patent holders to provide for more transparency and predictability on licensing terms before the standard is finally adopted and frozen. It is therefore unclear which is the different situation the Commission has experienced problems in the past: could that be explained or illustrated ?

The current text in §7.3.3. (281 and 282) requires a clear and balanced IPR Policy against abuse of market power. However, the text further requires provisions that we consider as **examples** to reach a balanced IPR Policy, but **not as new requirements**:  
*" This requires a clear and balanced IPR policy that protects against companies abusing market power with respect to a standard. **Thus, the IPR policy should require good faith disclosure of those intellectual property rights that might be essential for the implementation of a standard under development before that standard is agreed. This requires that the IPR holders make reasonable efforts to identify existing and pending IPR reading on the potential standard.***

Our understanding is that it would be sufficient to have an explicit IPR disclosure of potentially essential patents which are not available for license under FRAND terms and conditions, combined with an implicit commitment to provide a FRAND license for all other – not necessarily disclosed at that time – potentially essential patents.

*The IPR policy should also require that all holders of essential IPR in technology which may be adopted as part of a standard provide an irrevocable commitment **in writing** to license their IPR to all third parties on fair, reasonable and nondiscriminatory terms ("FRAND commitment")."*

Based on our previous remark, there is no need for all the patent right holders to provide an irrevocable commitment **in writing**, since the IPR Policy could require the disclosure in writing of only those potentially essential patents which are not available under a FRAND license (e.g. DVB Project).

Therefore, we propose the following alternative text:

[281] This requires a clear and balanced IPR policy that protects against companies abusing market power with respect to a standard. **One way to achieve this is that** the IPR policy should require good faith disclosure of those intellectual property rights that might be essential for the implementation of a standard under development before that standard is agreed. This requires that the IPR holders make reasonable efforts to identify existing and pending IPR reading on the potential standard, **but does not mandate patent searches.**

[282] The IPR policy should also require that all holders of essential IPR in technology which may be adopted as part of a standard provide an irrevocable commitment, **either accompanied by a disclosure in writing or by application of the IPR Policy**, to license their IPR to all third parties on fair, reasonable and nondiscriminatory terms ("FRAND commitment").

Based on the above, the current text in § 7.3.3. (287) should be amended as follows:

In addition to fulfilling the above conditions that will normally be sufficient to avoid restrictive effects on competition, standard-setting agreements ~~can~~ **may** contain **alternative or** additional rules which may or may not lead to a likely restriction of competition. (...)

The Guidelines do not consider the reciprocity condition in the licensing commitment undertaken by an IPR holder as part of its membership obligations under the IPR Policy of the standard-setting organization. A unilateral commitment and obligation to license potentially essential patents to any party (including non-members) may reduce the negotiating power of a member with respect to another member, and even worse to a non-member which is not subject to the same obligations as the member. Further, nothing has been written on whether a commitment to license only members would satisfy the exemption criteria. We generally assume that the commitment to license essential IPR extends to any party requesting a license.

It is therefore suggested that the Commission drafts a few new paragraphs covering the **balance provision of reciprocity** as a means to maintain competition and negotiating power between market players.