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European Commission  
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**Ref: HT.1407: Google's Comments Regarding Draft Horizontal Guidelines**

Google Inc. welcomes the opportunity to comment on the draft horizontal guidelines.

As an international corporation that participates in a large number of Standard Setting Organizations ("SSOs") and that also releases software conforming to standards set by various SSOs, this area is highly important to us. Google would like to submit the following comments on EC's Draft Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-Operation Agreements (the "Draft Guidelines"). We largely agree with the approach taken in relation to the rules that should govern such agreements, and therefore limit our comments to the new section on standard setting.

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This commentary is intended to identify situations where the wording of the Draft Guidelines might have unintended consequences for users of a standard. Although it is important to honor the IP rights of participants in the standards setting process, it is also important that the process by which standards are promulgated is transparent and that the likely cost of making various technical choices be known to SSO members when deciding between technologies during the standard setting process.

### **I. The standard setting process must promote real technical debate**

As the Commission correctly recognizes, IPR holders can abuse their market power as a part of the standards setting process. Google is concerned, however, that the Commission's discussion of Article 101(1) in paragraphs 277-280 may somewhat oversimplify the workings of a typical SSO. It is important that an SSO have "unrestricted participation", as the Commission points out. That participation, however, should not be merely pro forma. The standards setting process must promote real technical debate between different alternatives. Google sees the standards setting process as an opportunity for different technical solutions to be reviewed from a broad range of viewpoints and to compete on technical merit. As pointed out by the Commission, the adoption or promotion of one standard by a horizontal consortium inevitably leads to the demotion of a competing technological approach. Accordingly, it is possible for a standards setting process to have facially sufficient participation by stakeholders and still facilitate the promotion of inferior standards with seriously negative market effects. Accordingly, it would be prudent to assess whether the entire technical review process of the standards setting body produces standards which are the result of a healthy technical competitive landscape--or whether they merely reflect proxies for existing market power.

### **II. More information early in the standard setting process promotes transparency**

Any proposed safe harbor provision in Article 102(3) should only be available to SSOs that require a participant to disclose any relevant patents or patent applications at a time when other participants considering the adoption of a standard may still affect the outcome of the decision. In particular, notice must be given while participants may still change the vote tally for the adoption of the standard.

Google agrees with paragraph 287 of the Draft Guidelines, which states: "it is important that parties involved in the selection of a standard be fully informed not only as to the available technical options and the associated IPR, but also as to the likely cost of that IPR." Paragraph 287 states that it will not lead to a restriction of competition within Article 101(1) if an SSO requires or allows participant disclosure of their most restrictive licensing terms, including the maximum royalty they would charge, as long as the rules do not allow for joint discussion or negotiation of licensing terms. Google proposes that the Commission consider the effect if an SSO requires or allows participants to make an ex ante commitment that they will be subject to a proportional share of an eventual aggregate royalty rate. This approach appropriately balances the interests of all stakeholders and avoids the tendency of participants to disclose the highest possible royalty rate, which does not provide insight into the eventual royalty rate and decreases the transparency of the standard setting process. **s**

### **III. Royalty agreements should travel with essential patents**

A royalty commitment, whether FRAND or otherwise, made by a patent holder that participates in a standard setting process should be binding on any subsequent purchasers of the patents to the maximum extent possible under relevant national law. Google agrees with paragraph 286 of the Draft Guidelines, which states "[t]o ensure the effectiveness of the FRAND commitment, there should also be a requirement on all IPR holders who provide such a commitment to take all necessary measures to ensure that any undertaking to which the IPR owner transfers its IPR (including the right to license that IPR) is bound by that commitment." Moreover, Google suggests that SSOs should ask their participants to agree not to attempt to circumvent the intent of such a requirement, for example through complicated corporate structures and exotic divestment strategies.