



Position Paper

In re consultation document Draft Horizontal Guidelines

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Huawei welcomes the publication of the new draft of the Guidelines on the applicability of Article 101 of the Treaty regarding the Functioning of the European Union to horizontal co-operation agreements (referred to as "New Guidelines" hereinafter) which in its present form gives opportunity for a broader discussion in politics, economy and society.

Summary

Huawei supports strong and consistent policies against IPR holder's anticompetitive activities such as patent ambush.

However, we suggest a more detailed description of the requirement in regards to the disclosure of all essential IPR before the standard is agreed and an extension of the requirement to a continued activity. By such measures, some problems which are expected to occur in practice like huge amounts of upcoming disclosures and incorrect information about essential IPR, can be avoided.

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Register Court Düsseldorf
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Comments on the New Guidelines

Please note that the comments on the New Guidelines hereunder are focusing on the Standardisation Agreements related to chapter 7 in the New Guideline and derive from Huawei's experiences in standardisation procedures.

"Ex ante disclosures of most restrictive licensing terms" (Paragraphs 282 and 286)

Huawei strongly supports the clause of the New Guidelines requiring in the IPR policy from essential IPR holders, a commitment under FRAND conditions. From the requirement of such FRAND commitment, a good environment to improve the development of technology and industry in telecommunication area can be expected, the competition will not be adversely affected by excessive or discriminatory license fees, and an advancement of the distribution of innovations may occur. Nevertheless, we believe that the commitment of IPR holders could be beneficially improved by requiring a further statement that such essential IPR will never be transferred or sold to any third party without a prior irrevocable FRAND commitment of that third party including this statement with respect to further transfer of such IPR. According to Huawei's understanding Paragraph 286 in its current form, does not really force the IPR holder to ensure that FRAND conditions will be for the whole life time of respective IPR available and particularly does not cover further transfers of IPR.

"Good faith disclosure of essential IPR before the standard is agreed and make reasonable efforts to identify essential IPR" (Paragraph 281)

Paragraph 281 of the New Guidelines introduces a requirement for IPR holders to make reasonable efforts to identify essential IPR reading on the potential standard and a good faith disclosure of the essential IPR before the standard is agreed.

Huawei appreciates the European Commission's effort to solve anticompetitive activities such as patent ambush. However, we are concerned that paragraph 281 of the New Guidelines goes to short and that the coercible disclosure of essential IPR before standard is agreed, can lead to not wanted effects as described below. In order to avoid such to be described effects, Huawei therefore proposes to amend Paragraph 281 for example as follows:



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IPR holders shall be required to make reasonable *and constant* efforts to identify existing and pending IPR reading on the potential *or approved* standard. Further, IPR holders shall be required to perform good faith disclosure of this identified IPR before the standard is agreed, at least, however, as soon as possible.

The requirement of “constant effort” in identifying IPR, prevents the IPR holder from stopping identification activities. The requirement of disclosing identified IPR as soon as possible enables the IPR holder to disclose IPR identified at a later stage and therefore may lead to more reliable information to the public.

The requirements of the current paragraph 281 force IPR holders to disclose all their IPR before a standard is agreed as long as the IPR might be essential for the potential standard. In practice, this identification of essential IPR can not reliably be performed with reasonable effort at such an early stage. A conceivable part of such IPR is at this early stage not publicly available and can therefore not be easily identified in case the IPR has not been created by the same research group or affiliate. Also for some publicly available IPR it is not always easy to discover some readability on a potential standard. Therefore, if an IPR holder wants to make sure that none of his essential IPR is missing in the disclosed “essential IPR” in order to fulfil the requirements of paragraph 281, it is likely to produce a huge amount of disclosure comprising any IPR in the field. As could be seen in some standardization study groups, some IPR holders like to disclose excessively to follow such requirement. By acting like this, IPR holders could reduce their “reasonable effort”. However, information useful for the public would be very much limited.

To summarize our suggestion to paragraph 281, the IPR policy should require good faith disclosure of identified essential intellectual property rights for the implementation of a standard under development before that standard is agreed, and good faith disclosure of later identified essential intellectual property rights for the implementation of an agreed standard as soon as possible. Regarding the identification, the IPR policy should also require IPR holders to make reasonable and constant efforts to identify essential IPR.

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Such required constant effort in identifying essential IPR would also require maintenance of any disclosed essential patent lists, i.e., if during the process of standardization or during the examination procedure of disclosed IPR the IPR does not any longer read on a standard anymore, the respective disclosure should be respectively amended.

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