QUALCOMM'S COMMENTS ON THE COMMISSION'S DRAFT HORIZONTAL GUIDELINES

I. INTRODUCTORY REMARKS

1. Qualcomm welcomes the opportunity to contribute to the public consultation on the European Commission's draft "Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements" (the "Guidelines"). Given Qualcomm's role as a technology developer and major contributor to standardisation efforts worldwide, Qualcomm's comments will exclusively focus on Chapter 7, entitled "Standardisation Agreements".

2. As a preliminary point, Qualcomm wishes to note that standard-setting activities play a fundamental role in fostering innovation and competition in a myriad of different markets. Over the years, thousands of standards have been adopted, many thousands of standards-related license agreements have been negotiated, and uncounted licensed, standardised products have been successfully manufactured and sold. The dynamism observable in the standardisation field is in large part due to the existence of a great variety of standard-setting organisations ("SSOs"), members of which often compete with each other. These SSOs' membership comprises companies operating on the basis of very different business models each contributing in their own way to the successful deployment of innovative products. The forthcoming Guidelines should ensure that their application does not favour one particular business model at the expense of another. And they should offer no comfort to those seeking to disrupt the incentive scheme created by patent law.

3. In that respect, Qualcomm is concerned that while the draft Guidelines essentially portray standards involving intellectual property rights ("IPRs") as a fertile ground for abuses by IPR holders that put at risk standard implementers, they do not acknowledge the fact, recognized by patent law, that innovators incur risks that are as great, and in fact generally much greater, than those incurred by implementers.[1] Innovators need to invest significant resources to develop technologies, many of which will end up having little or no commercial applications.[2] For every R&D investment that succeeds, many more fail. In

[1] Throughout the draft Guidelines, there is no acknowledgment of, or accounting for, the risks of R&D. Not only is the concept overlooked in the section on standard-setting, but it is not considered in the discussion of the benefits of R&D collaborations. Specifically, the section of the Guidelines on R&D collaborations recognizes the benefit of firms sharing complementary knowledge and skills, but omits any mention of the pro-competitive benefits of risk-sharing achieved through R&D collaborations.

[2] See paragraph 8 of the 2004 Guidelines on the Application of Article 81 to Technology Transfer Agreements: "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

sectors where standards play an important role, such technologies need to be selected for inclusion in a standard, and that inclusion is far from certain. In order to be able to continue to fund the necessary, but risky, R&D, innovators need to be able to collect royalties or other forms of consideration from standard implementers who, by definition, seek to minimize the cost of using the technology (e.g., royalties) to further their own commercial interests. All these very real risks incurred by innovators are not considered in the draft Guidelines, which, to a large extent, focus instead on largely theoretical risks to which standard implementers can be exposed.

4. Indeed it is notable that the draft Guidelines do not refer to the pro-competitive benefits of IPRs and licensing given that, as stated in the 2004 Guidelines on the Application of Article 81 to Technology Transfer Agreements ("the Technology Transfer Guidelines") "… 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. The great majority of licence agreements are therefore compatible with Article 81." Indeed, paragraph 9 states that "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." In order for the Guidelines not to imply any disfavor to technology licensing, which is of particular relevance to standardisation, it would indeed seem apposite for the Guidelines to cite the Technology Transfer Guidelines.

5. To assist the Commission in better understanding why Qualcomm believes that the draft Guidelines require revision and clarification, we provide below what we believe are constructive comments, focusing on those paragraphs which raise the most serious concerns or would benefit from clarification.

6. Before turning to the specific paragraphs or sentences which raise concerns, the following additional observations of a general nature should be made.

Article 101 Guidelines are Not the Proper Means to Provide Guidance on Unilateral Conduct

7. The draft Guidelines seek to promote adoption by SSOs of rules designed to "avoid the misuse of the standardisation process through holdups and the charging of abusive royalty rates by IPR holders" (paragraph 280). Such problems (i.e., patent "hold-up" and the charging of "excessive" royalties), even assuming that they have been prevalent in the market – which is far from the actual situation (where such abuse is at most rare) – would result from abusive *unilateral* conduct by standard-setting participants holding essential IPRs.

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…."

Qualcomm submits that the requirement that SSOs adopt rules designed to curb unilateral conduct is not an appropriate subject for these Guidelines, which are intended to address the competition law concerns that may arise under Article 101 from horizontal cooperation agreements.

8. Guidelines on the application of Article 101 should not purport to define the scope of application of Article 102. We suggest that it would be more appropriate to solely state that the Guidelines are without prejudice to the application of Article 102. Even if the Commission were to conclude that it was appropriate to provide guidance on single firm unilateral conduct in Article 101 Guidelines, this should not be done in the absence of established decisional practice and Community courts jurisprudence. Moreover, Guidelines on the application of Article 101 are an especially inappropriate means to provide guidance on the application of Article 102 to the contentious topic of *exploitative* behaviour involving IPR for two additional reasons: *First*, the Commission has hitherto provided no guidance on exploitative behaviour in general, much les with regard to the pricing of IPR; *Second*, the Commission decided, contrary to its original publicly announced intentions, not to issue *Guidelines* on the application of Article 102 to *exclusionary* behaviour (and instead limited itself to merely issuing *guidance* on Article 102 enforcement priorities) although that subject is much less contentious and significantly more well-developed than exploitative conduct.

The Draft Guidelines Seek to Address Perceived Problems that Rely on Untested Theories

9. Should the Commission decide (we would suggest wrongly) that the Article 101 Guidelines were indeed the proper means to provide guidance on single firm conduct, Qualcomm submits that adopting some of the language presently contained in the draft Guidelines would be imprudent.

10. The draft Guidelines state that "As a standard can constitute a barrier to entry, a company (or potentially more than one company) holding essential intellectual property rights (IPR) in a standard could control its use and thereby the product or service market to which the standard relates. This in turn could allow the company in question to abuse its dominant position by extracting excess rents by "holding-up" users after the adoption of the standard. Given the particular risks arising in this context, this chapter focuses on standardisation agreements involving IPR, but the rules apply to all standardisation agreements" (paragraph 262).

11. The draft Guidelines seem to take at face value the "hold-up" conjecture recently developed by certain vocal users of standardised IPR and their advocates who, as expected, would prefer to have others invest in risky innovation and then use such innovation while paying an ever diminishing amount in royalty fees. These users see regulatory intervention or competition law-based litigation as a way to capture for themselves an even greater share of profits. There is a long record of

successful standards development and implementation by organisations operating under fairly uniform IPR policies (representing an "international consensus"), and despite all the assertions made to the contrary simply no empirical record of any serious or systematic "misuse of the standardisation process through hold-ups and the charging of abusive royalty rates by IPR holders" (paragraph 280). Despite the large and controversial literature, including conjectures of potential "hold-up" scenarios, advocates of regulatory intervention have not (to our knowledge) identified a *single* instance in which alleged "hold-up" has impaired the uptake and success of a standard.

12. The Commission has publicly noted that the standardisation agreements section of the draft Guidelines is being reviewed in the light of recent case experience. Guidance is useful where a settled line of case law can be drawn from. Yet the draft Guidelines do not refer to any cases that SSOs or companies can draw from in undertaking a self-assessment. Indeed, the Commission's experience is, to our knowledge, based on only a very limited number of unilateral conduct investigations and a smaller number of decisions. Recent experience would surely argue for a cautious approach to the review or application of general antitrust rules applicable to standard setting and property protected by patent law. This would seem especially true where the effect of the review might be to require SSOs to undertake a significant departure from existing law, policy and precedent. Where the Commission's recent experience highlights the complexity and dangers of being drawn into what may essentially be commercial disputes in an SSO context, reform can only be argued for where there is evidence of harm caused by conduct that is unprotected by patent law, not by the exercise of patent rights. Absent that, a significant change in policy to address investigatory difficulties identified in a small number of unilateral conduct cases seems unwarranted, in an Article 101 guidance that will affect a large number of SSOs.

13. Nevertheless, although the draft Guidelines refer to this concept on several occasions, they do little to explain the notion, let alone confirm the existence, of "hold-up". In Qualcomm's view, if the Commission decides to include such Article 102 orientated discussion in the Guidelines it should clarify the circumstances in which "hold-up" occurs, acknowledge the low frequency with which such circumstances arise, how the competitive dynamics in SSO occurs where major players include implementers and vertically integrated companies make technology choices[3] and, most importantly, how to reliably distinguish between any "excess rents" attributable to standardisation and rents attributable solely to the value of IPR protected by patent law. Guidelines should rely on established principles of law and economics rather than provide a testing ground for controversial theories of abuse. The relationship between standardisation,

[3] It would seem appropriate for the Guidelines to include the 'missing paragraph' 275 that follows the description of different business models and incentives (paras 272 to 274) with an analysis of the competitive tensions these different incentives create, notably given that technology choices may be made between competitors implementing technology, rather than IPR owners.

IPR and competition law is sufficiently complex and important to deserve sophisticated (and balanced) analysis.

14. The Guidelines should note that the "hold-up" conjecture is based on the premise that (i) sufficiently close alternative technologies existed at the time of adoption of a particular standard, and (ii) that standardisation eliminated technology competition. However, the Guidelines should also acknowledge that two such potential technologies cannot be considered as true alternatives for the purposes of inclusion in a standard unless, at a minimum, both (i) are technically and commercially *viable* and (ii) satisfy the SSO's requirements in light of the SSO's desired schedule and performance goals for the standard in question. Moreover, standardisation often does not eliminate competition.

15. In addition, the "hold-up" conjecture assumes that essential IPR owners have not disclosed their licensing terms *ex ante*, and as a result are able to charge *ex post* unreasonable rents from implementers. However, in the real world, major market participants often negotiate away any theoretical risk of "hold-up" by negotiating licenses before (*ex ante)* implementers make major investments in implementing the new technology. Qualcomm, for instance, regularly honours prior to standardisation the requests of prospective licensees to negotiate bilaterally the rates, terms and conditions of a license. Qualcomm and other patent owners also make *ex ante* public statements regarding the expected terms (including the expected or maximum fees they will seek to charge) under which they will offer to license their essential patents. For example, such *ex ante* public statements were made by Nokia, Ericsson, Nokia Siemens Networks, Huawei, Motorola, and Qualcomm regarding their portfolios of patents essential to the 4th generation LTE wireless standard.

16. Even in circumstances where (i) standardisation would have conferred market power on essential IPR holders; and (ii) holders of essential IPR would not have disclosed their licensing terms *ex ante*, they will nevertheless, in the vast majority of circumstances, be constrained in their ability to demand unreasonable royalties. This is because owners of essential IPR often need to (i) have access to other firms' essential IPR to manufacture products (e.g., mobile phones, network equipment, chipsets for mobile phones) compliant with the standard in question; (ii) maintain their credibility and ability to operate in SSOs given the "repeat" nature of the standardisation process and (iii) ensure that their activities contribute to the creation of a successful and vibrant downstream market, implementing the standard. For example, once the first version of a standard is adopted there are often extensive subsequent efforts to improve and evolve those standards. Further, in rapidly evolving industries like the wireless industry the same SSOs will standardise successive generations of technology standards. Furthermore, commitments by SSO participants to license their essential IPR on fair and reasonable terms will if disputed, in the final analysis, be enforced under contract law by the appropriate national courts, many of which have well established processes for the determination of "reasonable" rates/prices.

17. Thus, the only essential IPR holders theoretically able to “hold up” implementers by charging royalties that are not “fair and reasonable” will be those who (i) have gained market power as a result of standardisation (as opposed to the value of their technology and patent protection); (ii) managed to have their technologies included in a standard while refusing to disclose their licensing terms to potential licensees; (iii) are not engaged in the manufacture of any standard-compliant products, or components of such products; (iv) are not actively engaged in standardisation processes (and therefore have not made commitments to SSOs to license their IP on fair and reasonable terms) and have no expectation whatsoever of participating in such processes in the future; (v) are not motivated by the successful implementation of the standard and (vi) have not disclosed *ex ante* in some fashion their expected or maximum rates for a license to technically essential patents, or offered to and did engage in bilateral negotiations upon request. This type of IPR owner is extremely rare and their unlikely presence does not justify the significant overhaul of the consensus-based standardisation system or patent system, which has successfully operated for very many years.

The Draft Guidelines do not Achieve their Stated Objective of Helping Companies Assess With Greater Certainty Whether or Not an Agreement is Restrictive of Competition

18. Qualcomm welcomes the draft Guidelines’ stated objective of providing “an analytical framework for the most common types of horizontal co-operation agreements” (paragraph 5) that will help companies assess with greater certainty whether or not an agreement is restrictive of competition. Unfortunately, Qualcomm submits that the draft Guidelines’ chapter on standardisation agreements falls short of achieving that objective.

19. The draft Guidelines lay out the conditions that SSOs must satisfy in order to benefit from a “safe harbour” insulating them from claims that the agreements they operate under and/or adopt are anticompetitive. However, these conditions seem to be overly restrictive and could result in conservative SSOs adopting IPR policies that have the effect of unnecessarily discouraging investment in R&D and innovation and/or the contribution of innovative solutions to the standard development process. Further, the draft Guidelines provide very limited guidance as to the circumstances under which standardisation agreements falling outside the safe harbour will not restrict competition within the meaning of Article 101(1) or will generate competitive efficiencies sufficient to benefit from the exception provided in Article 101(3). In some instances, the limited guidance provided is extremely confusing.[4]

[4] For instance, one of the examples provided in the draft Guidelines to illustrate how the assessment under Article 101 would be conducted suggests that the requirements that need to be met for agreements adopted by an SSO to fall under the safe harbour (those related to disclosure and the making of a FRAND commitment) would in fact also have to be met for such agreements not to be considered as restrictive of

20. This lack of clarity and guidance, which is in direct contradiction with the principle of "legal certainty", is of particular concern considering that – as will be discussed below – the proposed Guidelines appear to suggest a systemic shift from the approach hitherto followed by the Commission, and the incentive scheme created by the patent laws of each member of the Union. Indeed, the Guidelines currently in force correctly observe that, except in circumstances (i) where standards are not set in an open and fair manner and SSO participants are obliged to comply with the standards adopted, or (ii) where standardisation is a fig leaf for cartel-type behaviour,[5] standardisation agreements do not restrict competition within the meaning of Article 101. By contrast, the draft Guidelines take a radically different position, namely that unless SSOs are willing to introduce significant reforms to their IPR policies (which will likely be contentious and take considerable time to implement), the standards they adopt will fall outside the "safe harbour," will in all likelihood, it is implied, be found to infringe Article 101(1) and are unlikely to benefit from the exception provided in Article 101(3) (see paragraphs 60 and 61 below).

II. THE CONDITIONS TO BENEFIT FROM THE SAFE HARBOUR

21. The draft Guidelines create a "safe harbour" within which standard-setting agreements will be considered as falling outside the scope of Article 101(1) provided they satisfy certain conditions (paragraph 276).

22. The draft Guidelines are more prescriptive than similar guidelines adopted by the Commission in areas where it has considerable more practice and experience, and where the case law of the European Courts has been developed to (at least) a minimum level. As will be discussed in more detail below, the draft Guidelines not only identify practices that would preclude SSOs from benefiting from the "safe harbour", they also effectively seek to impose on SSOs a duty to include in their IPR policies certain mandatory requirements if they wish to fall within the "safe harbour."[6] As noted earlier, this approach can be expected to motivate conservative SSOs to adopt IPR policies (policies that in many cases have been extensively discussed and agreed upon by their members to effectively balance those members' often competing interests) that are likely to discourage innovation and investment in R&D, and is particularly unjustified considering the Commission seeks to address alleged (but unconfirmed) anti-competitive practices (abuses of dominance) which are clearly outside the proper scope of Article 101 Guidelines and in a form infrequently, if ever, encountered.

23. Qualcomm provides below comments on certain aspects of those conditions.

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competition within the meaning of Article 101 and, if so, to benefit from the exception provided in Article 101(3). See Guidelines, paragraph 316.

[5] See paragraphs 163 and 165 of the current Guidelines.

[6] See Section IV below.

A. Disclosure of Essential IPR

24. Paragraph 281 states 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." In Qualcomm's view, this paragraph is vague and could therefore lead to misinterpretations that would result in overly burdensome requirements being imposed on standard development participants that happen to also own IP. It would thus benefit from clarification. It ignores the reality that a number of SSOs such as IEEE have concluded that such a burden on its members is greatly outweighed by the benefits of voluntary patent disclosure and seeking general assurances regarding licensing

25. As drafted, paragraph 281 does not acknowledge the burdens that may be imposed on patent owners by SSO disclosure rules. Nor does it acknowledge the potential for contradictory complaints against IPR owners alleging that they are both over-disclosing and under-disclosing patents *First*, the Guidelines should confirm that SSOs are not obliged to require that members conduct a search of their, sometimes very large, patent portfolios. Such a requirement would generate significant costs and go against current SSO practice, which generally requires members to identify only patents of which they are personally aware. *Second,* the Guidelines should clarify what is meant by "pending IPR". A reasonable clarification would be that it means published patent applications. *Third,* the Guidelines should clarify that the disclosure requirement applies to a good faith assessment of potentially "technically essential" patents but permits the disclosure of additional patents due to the difficulty inherent in determining essentiality in general, and even more so before a final version of standard is adopted. *Fourth*, the Guidelines should state that any commitment to offer licenses on FRAND terms should be limited to those patents that prove to be actually (not merely potentially) essential to implement a standard. *Fifth,* the Guidelines should indicate that the *ex post* disclosure of essential IPRs is not evidence of unlawfulness or bad faith. Empirical evidence shows that a very significant percentage of essential IPRs are disclosed *ex post* standard adoption in good faith and do not hinder the implementation of the standard. Indeed, such *ex post* disclosure should not be viewed with suspicion if the disclosing party makes or has made a FRAND commitment that covers the essential IPR disclosed *ex post*. *Sixth,* the Guidelines should acknowledge that SSOs should, and the Commission will, consider the burdens and difficulties inherent in complying with patent disclosure rules in formulating rules and assessing conduct of individual SSO members, and will be especially sensitive to the dangers of placing the patent owner in the untenable position of being accused of both over-disclosing and under-disclosing its patents. *Seventh*, the draft

Guidelines should clarify that failure to disclose an IPR that ended up not being essential could not give rise to any concern.

26. Absent such clarification, paragraph 281 will encourage SSOs to adopt disclosure rules that err on the side of caution, are less clear than current rules and implement overly burdensome requirements to avoid antitrust liability.

B. Commitment to License on FRAND Terms

27. Paragraph 282 states as follows: "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 non-discriminatory terms ("FRAND commitment")".

28. As drafted, the draft Guidelines could be read as imposing the licensing of IPR held by SSO members regardless of whether they participated in the process for formulating, evaluating and adopting the standard at issue and, more fundamentally, irrespective of their will. This would represent a significant and unwarranted departure not only from basic principles of patent law, but also from EU law's opposition to compulsory licensing. It also would represent a significant departure from the IPR Policies of the "international consensus" SSOs, which ask – rather than require – essential IPR holders to make a FRAND commitment. The ETSI IPR policy, for instance, does not contain any obligation to license essential IPR. Rather, it provides that a standard or specification may not be approved unless the owner of essential IPR provides an assurance of its intention to offer licenses on FRAND terms. If the IPR owner does not commit to offer to grant a license for one or more IPR on FRAND terms, the SSO may develop a standard that does not include the patented technology, and neither the SSO nor the public are any worse off than if that particular technology had not been developed.

29. In this respect, Qualcomm submits that if the aim of paragraph 282 is to prevent "hold-up", then the current policy of the main SSOs to *ask* rather than *require* essential IPR holders to make a FRAND commitment is sufficient, given that if the essential IPR holder refuses to make a FRAND commitment, the SSO has the opportunity to consider alternatives to that technology, if any exist. Therefore, we recommend that the Commission clarify paragraph 282 so that those current SSO policies, as set out above, comply with the standard set in paragraph 282.

30. At paragraph 283, the draft Guidelines define the FRAND commitment as an instrument designed "to prevent IPR holders from making the implementation of a standard difficult by refusing to license or by requesting unfair or unreasonable fees (in other words excessive fees) after the industry has been locked-in to the standard and/or charging discriminatory royalty fees."

31. Qualcomm recognizes that the aim of the FRAND commitment is to make licenses available once a standard has been adopted on terms that are fair, reasonable and non-discriminatory. The specific implementation of the FRAND obligation in each case is solely the result of a voluntary contract entered into by the patent owner and licensee after a fair, arms length. The contractual meaning of "fair and reasonable" is well understood to provide wide latitude as to the exact licensing terms governed by the marketplace that are to be agreed between IPR owner and standard implementer.

32. This view is consistent with the plain language of the IPR policies of leading SSOs. No known IPR policy can be read as suggesting that FRAND requires any particular rates, rate-making principle, methodology or benchmark. For instance, The ETSI IPR Policy states as its "Policy Objectives" the following:

> "3.1 … the ETSI IPR Policy seeks to reduce the risk to ETSI members, and others applying ETSI standards and technical specifications, that investment in the preparation, adoption and application of standards could be wasted as a result of an essential IPR for a standard or technical specification being unavailable. In achieving this objective, the ETSI IPR policy seeks a balance between the needs of standardisation for public use in the field of telecommunications and the rights of the owners of IPRs.
>
> 3.2 IPR holders whether members of ETSI and their affiliates or third parties, should be adequately and fairly rewarded for the use of their IPRs in the implementation of standards and technical specifications."

33. The above language makes clear that the rationale behind the FRAND commitment – and the "fair and reasonable" terms that are part of it – is twofold: (i) to ensure dissemination of the essential IPR contained in a standard, thereby allowing it to remain *available* for adoption by members of the industry, whilst at the same time (ii) making certain that holders of those IPR are able to *reap adequate rewards* from their innovations.

34. Qualcomm submits that it is not necessary or advisable for the Commission to seek to define FRAND in the draft Guidelines. As noted above, the specific implementation of the FRAND obligation in each case is solely the result of a voluntary contract entered into by the patent owner and licensee. However, if the Commission decides that it will seek to define FRAND in the Guidelines, it should at a minimum clarify the wording of paragraph 283 for the reasons outlined below. First, Qualcomm is concerned that the term "difficult" is vague and could even be simply used to label negotiations that fail to reach conclusion because, for example, the potential licensee refuses to accept well established, reasonable, market terms. Second, the phrase "in other words excessive fees" should be removed to avoid confusion that a breach of a FRAND commitment equals a breach of Article 102.

35. Therefore, we recommend that the Commission clarify paragraph 283 to read as follows:

> The 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 fair, reasonable and non-discriminatory terms and conditions. In particular, FRAND commitments are intended to prevent IPR holders from refusing to license or requesting unfair or unreasonable fees after the industry has been locked-in to the standard and/or charging discriminatory royalty fees.

III. FROM A DESCRIPTION OF THE CONDITIONS FOR THE SAFE HARBOUR … TO AN ANALYSIS OF ARTICLE 102

36. Having created "safe harbours" within which SSO activities will be considered to fall outside the scope of Article 101(1), the draft Guidelines abruptly shift to the assessment of the behaviour of IPR owners under Article 102. They do so notwithstanding, as explained earlier, that the conduct at issue is unilateral, and thus governed (if at all) by Article 102 – not by Article 101, the basis and authority for the Guidelines.

A. A Breach of a FRAND Commitment does not Equate to a Breach of Article 102

37. The draft Guidelines state at paragraph 284 as follows: "An abuse of the market power gained by virtue of IPR being included in a standard constitutes an infringement of Article 102. In this context and in case of a dispute, the assessment of whether fees imposed for patents in the standard-setting context are unfair or unreasonable, will be based on whether the fees bear a reasonable relationship to the economic value of the patents".[7]

38. As noted in our introductory remarks, it is hard to understand why this statement is made in the context of Guidelines on the applicability of Article 101 to horizontal agreements. This being said, Qualcomm submits that public enforcement of FRAND commitments through Article 102 is unnecessary and, if sought, will predictably have harmful consequences to innovation and competition. Given the lack of case law and controversial nature of the Article 102 principles set out in the draft Guidelines, Qualcomm submits that the section on Article 102 be removed, with a reference that where unilateral conduct issues arise, Article 102 and relevant case law would apply nevertheless'. Should the Commission decide to deal with unilateral behaviour by owners of standards-essential patents in Article 101 Guidelines, Qualcomm submits that it should be

[7] Before addressing the matter further, it is important for the Guidelines to clearly note that the infringement as defined in the draft Guidelines is not the exploitation of any market power, if any, conferred by patent protection, but only the exploitation of the increment of market power, if any, conferred solely by standardisation. Further, Qualcomm suggests that the word "imposed" be changed to "charged".

made clear that the assessment of unilateral action must be conducted in accordance with well-established principles of EU competition law.

39. Further, Qualcomm submits that paragraph 284 should be clarified to avoid any suggestion that a breach of a FRAND commitment equates to a breach of Article 102. The current language could be read as conflating enforcement of the contractual FRAND commitment with the enforcement of Article 102 by the Commission or any EU court or competition authority. Absent clarification, it may give the impression that the Commission is attempting to enforce FRAND commitments through competition law.

40. Private contract remedies already provide an effective safeguard in the event of a breach of a FRAND commitment. If any significant motive and opportunity for "hold-up" exists notwithstanding the market mechanisms and incentives described in Section I above, there is no reason to doubt the adequacy of existing remedies based on private enforcement of the FRAND contract. This has worked so far, and without any cogent evidence to the contrary there is no reason to doubt it will do so in the future. Much less is there the kind of experience required to justify and substantiate a contrary expectation. When an IPR owner has agreed to offer to license its IPR on FRAND terms, a manufacturer who believes that the terms offered by the owner are not fair or reasonable can reject those terms and seek to enforce the owner's FRAND obligation in court. Although rare, cases alleging failure to license on FRAND terms have been brought in multiple jurisdictions, and have been resolved, to the apparent satisfaction of all parties.

41. Qualcomm also has concerns with paragraphs 284-87 for the following reasons:

(i) The draft Guidelines appear to not properly balance the interests of IPR owners and licensees, instead favouring the latter;

(ii) The broad transformation of licensing disputes in standardised industries into competition claims would significantly increase costs and risks for IPR owners, also reducing incentives to invest and creating a mechanism that implementers will use to avoid paying reasonable royalties to innovators; and

(iii) Subjecting negotiated royalty rates to potential *ex post* regulatory sanction or revision will impose cost on all industry participants by preventing them from negotiating for certainty.

42. An additional consideration to bear in mind, as a reflection of the Commission's authority in the antitrust policy sphere is the impact that the draft Guidelines will have on certain other jurisdictions that look to the Commission for inspiration. It would be a deeply worrying unintended consequence if Guidelines were to be read as encouraging or sanctioning public law intervention in IPR in standardised industries. Given the fact that certain jurisdictions outside the EU have stated their desires to lower fees on "non-domestic" IPR to facilitate market entry for domestic industry (a concern that European industry has voiced on numerous occasions), the final Guidelines must ensure that there is no possible

way that they can be interpreted as justification for increased antitrust interventions. The impact of such a development will seriously decrease the value of standards-related IPR worldwide, at the particular expense of innovation-intensive economies like those of many of the European Member States.

B. At a Minimum, the Assessment of Unilateral Action by Essential IPR Holders Must be Conducted in Accordance with Applicable Principles of EU Competition Law

43. Should the Commission decide to deal with unilateral behaviour by owners of standards-essential patents in Article 101 Guidelines, Qualcomm submits that it should be made clear that the assessment of unilateral action must be conducted in accordance with well-established principles of EU competition law.

The Need to Establish Dominance

44. A proper competitive analysis under Article 102 requires firstly that dominance in a properly defined relevant market be established and thus presupposes an analysis of the competitive constraints facing a holder of essential IPR.

45. In this respect, the draft Guidelines should explain that the required analysis must include a detailed assessment of the specific constraints faced by owners of essential IPR, including (i) whether there has been sufficient sunk investment in implementing the standard to render it infeasible to switch to or adopt a different standard; (ii) technological competition with other standards; (iii) competition with products compliant with other standards; (iv) competition with proprietary products; and (v) the importance of the standard in question, including whether access to it is necessary in order to effectively compete in a relevant market.[8] Absent an assessment of those constraints, and a determination that they are not sufficient to prevent the IPR owner from behaving "to an appreciable extent independently of its competitors, its customers and ultimately of consumers",[9] no dominance can be established.

46. Unfortunately, a combined reading of paragraphs 262, 275 and 284 could incorrectly construe them as suggesting that "holding essential intellectual property rights (IPR) in a standard" in and of itself necessarily implies that the owner of essential IPR is in a dominant position and no such detailed assessment is required. That cannot be right and is unlikely to be the Commission's intention. Therefore, the draft Guidelines should be amended and clarified accordingly.

[8] See paragraph 164 of the current Guidelines ("No appreciable restriction [of competition] exists for those standards that have a negligible coverage of the relevant market, as long as it remains so.").

[9] Case 27/76 *United Brands Company and United Brands Continentaal v Commission* [1978] ECR 207, paragraph 65.

47. The relevant part of paragraph 262 states:

> "As a standard can constitute a barrier to entry, a company (or potentially more than one company) holding essential intellectual property rights (IPR) in a standard could control its use and thereby the product or service market to which the standard relates. This in turn could allow the company in question to abuse its dominant position by extracting excess rents by 'holding-up' users after the adoption of the standard."

48. Although we do not understand the draft Guidelines to be suggesting that the inclusion of any IPR in any standard – regardless of the technology covered by that IPR or the standard, the availability of alternative standards or proprietary solutions, or the success of the standard – *per se* confer "dominance", or even is likely to, on each and every owner of "essential" IPR, the draft Guidelines would benefit greatly if a sentence was included clarifying that (i) the inclusion of essential IPR in a standard does not necessarily confer dominance on its owner; and (ii) only when a detailed assessment of the specific constraints faced by owners of such essential IPR demonstrates that the inclusion of such essential IPR does in fact confer dominance is there any potential for infringement under Article 102 and then only upon a clear finding of abuse of such dominance.

49. Paragraph 275 goes on to state "During the development of the standard, different patented technologies may be in competition with each other for inclusion in the standard. Up until the adoption of a standard, the industry may have flexibility with respect to the exact technical characteristics of the standards, and thus may be able to adjust the standard so that it avoids relying on certain patents. However, once a specific patented technology is included in a standard (and the alternatives rejected), the industry may be locked in, inter alia, because of the costs of reengineering or switching away from the standard."

50. In our view, these statements would benefit from clarification. As currently worded, they fail to acknowledge that the assessment necessary to determine lock-in in a given case should be based on robust empirical evidence, not on any presumption or conclusory assertions of standard implementers to that effect. Moreover, paragraph 275 ignores that while an innovator company has incurred its sunk costs and is "locked in" long before a standard is finalized, manufacturers may not be "locked in" by sunk costs even by the time of *post*-standardisation license negotiations if, as is typical, a time lag occurs between the formal adoption of a standard and the beginning of significant investments by standard implementers.[10] This time lag affords members and potential implementers sufficient time *ex post*, in addition to *ex ante*, to consider the licensing terms sought by the essential IP owners. Should they find those terms

[10] The third generation of wireless-telecommunications standards provides an example. While the first incomplete iteration of the UMTS/WCDMA standard was published by ETSI in early 2000, it took several years before significant investments were made by carriers and equipment suppliers. In addition, in the case of many "product assembler"-type licensees (including many developing-world OEMs), there may in fact *never* be any significant "sunk costs" until very shortly before the licensee commences manufacture.

unreasonable, members of standard-setting organisations and potential implementers have at least three alternatives. *First*, they can modify the standard to exclude the owner's IP, if possible. *Second*, they can decide to implement another standard. *Third*, they can challenge the licensing terms offered by the IP owner in a court of law on the ground that the latter has breached its contractual agreement to offer terms that are fair and reasonable.

The Need to Establish That an Owner of Essential IPR Has Abused a Dominant Position in a Properly Defined Relevant Market

51. The draft Guidelines' lack of "guidance" on the establishment of dominance in a standard-setting context is exacerbated by paragraph 284's failure to set forth clearly the elements that must be proved to establish that an owner of essential IPR has abused a dominant position. The plain language of paragraph 284 strongly suggests that the Commission could now consider that *any* failure to meet the (mandatory) "fair and reasonable" pricing obligation may constitute an abuse of a dominant position under Article 102.

52. It is a well-established principle of EU competition law that even once "dominance" is established, Article 102 will compel licensing of IPR (or, *a fortiori*, limit "excessive pricing") only in "exceptional circumstances".[11] Qualcomm submits that absent clear and precise specification of what should or should not constitute such "exceptional circumstances", the draft Guidelines would impose potential liability under Article 102 in a much more extensive manner than does current case law.[12] The Guidelines should therefore expressly recognise the severe limitations placed by the European Court on antitrust intervention, as relates to the enjoyment of IPR, as was noted in the Commission's Article 82 Guidance paper but is notably absent from the draft Guidelines. In addition, the Guidelines should clearly state that standardisation in itself does not create such a particular situation that would allow for a deviation from the case-law of the European Court or that would permit a situation where the legitimate exercise of IPRs granted by national patent law is deemed anticompetitive. Again, we emphasize that if the patent owner's sole

[11] See e.g. Joined cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission (Magill)*, ECR I-743, paragraphs 49-50 ("Admittedly, in the absence of Community standardization or harmonization of laws, determination of the conditions and procedures for granting protection of an intellectual property right is a matter for national rules. Further, the exclusive right of reproduction forms part of the author' s rights, so that refusal to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of a dominant position (judgment in Case 238/87 *Volvo*, cited above, paragraphs 7 and 8). However, it is also clear from that judgment (paragraph 9) that the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct.")

[12] Indeed, such a trend would run counter to the Technology Transfer Guidelines which clearly state that there should be no presumption that neither IPRs nor licence agreements as such give rise to competition concerns (para 9).

alleged misconduct is not complying with its FRAND undertaking, standards implementers may pursue breach of contract claims in courts of law which, historically, have generally been the arbiters of "fair" and "reasonable" terms in specific instances.

53. In addition, assuming that the circumstances are present under which the exercise of IPR by an essential IPR owner can constitute an abuse of a dominant position, paragraph 284 purports to condemn abuses under Article 102 only where "market power [was] gained by virtue of IPR being included in a standard." The draft Guidelines therefore correctly recognize, as the Commission has done in the past, that the exploitation of any market power derived from factors other than standardisation, such as the inherent value of the invention or the rights conferred by an IPR, is not an infringement of Art 102. It therefore follows that if the Commission is going to endorse the pursuit of remedies under Article 102, its decisions must carefully distinguish between the two. However, the draft Guidelines do not distinguish such market power from market power created by the mere fact of owning an essential IPR.

54. Moreover, assuming that the circumstances are present under which the exercise of IPR by an essential IPR owner can constitute an abuse of a dominant position, the fact remains that the application of the excessive pricing test set forth in *United Brands* (relationship to the "economic value" of the product) does not make sense when the product concerned is an IPR. The Commission has widely acknowledged the difficulty of applying this test to physical products and has therefore shown commendable restraint in applying Article 102(a) to control prices. This difficulty is compounded with respect to non-physical constructs, such as IPRs.

55. Finally, the various benchmarks cited in the draft Guidelines to assess the "relationship of the IPR fees to the economic value of the patents" are flawed. As to the first method, in particular, the draft Guidelines state that "it may be possible to compare the licensing fees charged by the undertaking in question for the relevant patents in a competitive environment before the industry has been locked into the standard (ex ante) with those charged after the industry has been locked in (ex post)." (paragraph 284) While Qualcomm does not dispute that post-standardisation royalties that do not exceed pre-standardisation royalties for the same IPR are "fair and reasonable", it by no means follows, as paragraph 284 appears to suggest, that *ex post* prices that exceed *ex ante* prices are presumptively "unfair and unreasonable".[13] An *ex ante* / *ex post* comparison should only constitute a safe harbour for the essential IPR holders so that if *ex*

[13] In addition, carrying such an *ex ante*/*ex post* comparison would typically be an extremely difficult undertaking as technology licenses are complex instruments comprising different forms of consideration (upfront licensing fees, royalties, cross-licenses, etc.). The practical implementation of this test is thus prone to mistake as competition authorities would often end up comparing apples with oranges (e.g., an agreement with a high royalty rate but no other valuable terms with an agreement with a lower royalty rate and other valuable terms). While controlling for such differences may be feasible, it would require extremely complex econometric analysis.

post licensing terms are equal to or lesser than *ex ante* terms, they should be deemed presumptively reasonable.

56. By contrast, the draft Guidelines do not refer, and therefore suggest that the Commission would not give any weight at all, to the single most important indicator of whether licensing terms are reasonable, i.e. contemporary real-world market data such as wide-spread acceptance by market participants of certain terms and conditions, or the success, expansion, or profitability of licensees operating under those terms and conditions. So, too, should the considerable risks inherent in R&D, including the costs of unsuccessful R&D. Such factors should be included in the Guidelines discussion of relevant factors and indicators of “reasonableness.” Nor do the draft Guidelines indicate that the Commission would give any weight to the enormous risks – including the risk of failed inventions – that inventors and their investors assume in undertaking and supporting R&D, preferring instead to rely on “an independent expert assessment of the relevant IPR portfolio's objective quality and centrality to the standard at issue” (paragraph 285). In fact, such “independent expert assessments” can, and often do, disagree considerably and do not track the reality of the marketplace.

IV. ASSESSMENT OUTSIDE THE SAFE HARBOUR

57. As noted above, the draft Guidelines do not provide sufficient guidance on how the Commission will assess standardisation agreements under Article 101(1) when such agreements fail to satisfy the necessary (and in our opinion, overly restrictive) conditions to benefit from the “safe-harbour” set forth at paragraphs 276-286.

58. In particular, the draft Guidelines fail to set out a clear framework for the assessment under Article 101 of restrictions of competition related to standardisation. Notably, the draft Guidelines omit elements essential to any analysis including (i) the crucial role of inter-standard competition and of competition between standardised and non-standardised products; (ii) the importance of the standard in question, including whether access to it is necessary in order to effectively compete on a relevant market; and (iii) the nature and breadth of SSO membership required to create an appreciable restriction of competition. This lack of a clear analytical framework is particularly troubling considering the competition concerns that, according to the draft Guidelines, may arise in the context of standardisation agreements.

59. Without proper guidance on these key considerations, it is very difficult for an SSO and its members to determine whether a standardisation agreement is likely to fall within the scope of Article 101(1) and thus require examination under Article 101(3). As to the analysis under Article 101(3), the draft Guidelines limit themselves to some fairly general statements regarding the four conditions that need to be met for an agreement falling under Article 101(1) to benefit from an exemption. These statements contrast with the much deeper analysis and

guidance provided by the Commission in its Guidelines on the Application of Article 101 to Technology Transfer Agreements.[14]

60. Some aspects of the analysis provided in the draft Guidelines are also quite troubling. For instance, paragraph 316 provides that where the rules of an SSO "encourage its members to disclose all their IPR (and pending IPR) which are essential to a proposed standard but does not require them do so" and "do not impose an obligation on its members to commit to license the IPR included in a standard", the standardisation agreements concluded by this SSOs "are likely to give rise to restrictive effects on competition within the meaning of Article 101(1) and are unlikely to meet the criteria of Article 101(3)."

61. Read literally, this statement thus suggests that the "disclosure" and "mandatory FRAND" requirements referred to at paragraphs 281 and 282 of the draft Guidelines would not only be necessary for standardisation agreements to benefit from the safe harbour, but would also be necessary (i) to avoid having such agreements considered restrictive of competition within the meaning of Article 101 or, if they were considered restrictive, (ii) to benefit from the exception under Article 101(3). This reading would effectively render the "safe harbour" requirements mandatory and entirely annihilate the possibility for an SSO to opt out of it. We suggest that these statements be clarified to ensure that the "safe harbour" truly comprises voluntary requirements which, if complied with, would provide protection against competition law infringement claims but would not "force" SSOs to rigidly follow such prescriptive requirements to immunize themselves from claims of breach of Article 101 or to benefit from the exception under Article 101(3).

V. ADDITIONAL PARAGRAPHS OF THE DRAFT GUIDELINES WOULD BENEFIT FROM CLARIFICATION

A. Elimination of Alternative Technologies

62. Paragraph 260 states as follows: "While a standard is being developed, alternative technologies can compete for inclusion in the standard. Once one technology has been chosen and the standard has been set, the competing technologies face a barrier to entry and are potentially excluded from the market."

63. As currently worded, paragraph 260 fails to capture the reality of standard-setting. *First,* it presumes the existence of alternative technologies in every standardisation effort. However, as noted above, two potential technological solutions cannot be considered as true alternatives for the purposes of inclusion in a standard unless both (i) are technically and commercially *viable* and (ii) satisfy the SSO's requirements in light of the SSO's desired schedule and

[14] Commission Notice – Guidelines on the application of Article 81 of the EC Treaty to categories of technology transfer agreements, [2004] OJ C101/02 ("TTBER Guidelines").

performance goals for the standard in question. *Second*, it ignores the fact that it is sunk investment by standard implementers (which usually occur after standardisation), not standardisation itself, that may create any lock-in. *Third*, paragraph 260 appears to suggest that there can be no competition between standards, as well as between standardised products and non-standardised products. This is clearly not true. In many areas, competition will take place among standards (to attract the best technologies), between products implementing different standards, and between standardised and proprietary products. For instance, different iterations of standards belonging to the IMT-2000 family of 3rd generation mobile communications standards (e.g. UMTS and CDMA2000) compete against each other in different areas of the world. *Fourth*, paragraph 260 appears to suggest that standards are static, i.e. they are not updated. Nothing can be further from the truth. Standards are continually updated to accommodate new technologies and technologies that have proven to be more efficient than those originally selected. Thus, after initial standard adoption, competition between technologies continues. Contrary to the assertion at paragraph 260, a "competing technology" will not risk exclusion unless (i) it represents a true alternative to other candidate technologies and (ii) no such competition can take place.

B. Non-discriminatory, openness and transparency

64. Qualcomm welcomes the statements in the draft Guidelines' emphasising that standards should be adopted on the basis of non-discriminatory, open and transparent procedures (paragraphs 277, 279, 293 and 301), and that SSOs should guarantee participation (paragraphs 277, 278, 293, and 307).

C. Restrictions by Object

65. The draft Guidelines consider that the following practices constitute restrictions of competition by *object* within the meaning of Article 101(1): (i) agreements using a standard as part of an effort aimed at "excluding actual or potential competitors" (paragraph 266); (ii) "efforts to reduce competition by using the disclosure of essential IPR or most restrictive licensing terms prior to the adoption of a standard as a cover to jointly fix prices of products" (paragraph 267); and (iii) "prior to the adoption of a standard, agreements by IPR holders on the licensing terms they will disclose".

66. While we concur that these types of practices are manifestly anticompetitive, we consider that the Guidelines should also clearly indicate that all *joint* efforts by standard implementers designed to artificially depress the royalty rates (or other forms of consideration) to be paid to essential IPR holders should be considered to be restrictions by object. Hence, while the draft Guidelines are correct in prohibiting as restrictions by object efforts to use standardisation as a fig leaf for *seller cartels*, the Guidelines should be equally clear in banning as restrictions by

object efforts by standard implementers to act as *buyer cartels*. As a number of commentators and competition authorities have recognized, collusive behaviour among would-be licensees, such as a group boycott, "has the real potential to damage innovation incentives" for SSO participants.[15] Such arguments are not in any way a "smokescreen" by IPR holders to hinder *ex ante* disclosure regimes. To be clear, firms like Qualcomm and numerous others voluntarily declare their expected or maximum rates *ex ante*, and offer to and do engage in *ex ante* bilateral negotiations. No firm raising concerns about licensee cartels would behave in this manner if its concerns were a "smokescreen" to ensure conditions for *ex post* hold up.

67. We note, in this respect, that paragraph 287 considers that the "joint negotiation or discussion of licensing terms, in particular royalty rates" constitutes a restriction of competition within the meaning of Article 101(1). We would therefore suggest that the Guidelines include such joint negotiation of licensing terms in the section devoted to restrictions by object.

D. *Ex Ante* Disclosure of Maximum Terms

68. The draft Guidelines state that those SSOs' IPR policies that require or allow essential IPR holders to disclose *ex ante* the adoption of a standard their most restrictive licensing terms (including their maximum royalty rates) will not restrict competition within the meaning of Article 101(1) "as long as the rules do not allow for the joint negotiation or discussion of licensing terms, in particular royalty rates." (paragraph 287)

69. Qualcomm submits that, provided they are not a smokescreen for collusive behaviour, *ex ante* disclosure regimes of maximum rates are useful as a safe harbour against *ex post* claims that licensing terms and conditions are unreasonable. Qualcomm supports such disclosure mechanisms and, indeed, has provided such disclosures itself.

70. As noted above, however, the draft Guidelines appear to recognize the potential that collusion through "joint negotiation or discussion of licensing terms, in particular royalty rates" within or related to the SSO proceedings, may drive down royalties to a suboptimal level that fails to fairly reward IPR owners, thereby reducing innovation incentives. The Commission should make clear that

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15 Hill B. Wellford, Counsel to the Assistant Attorney General, Antitrust Division, U. S. Department of Justice, Address at the Second Annual Seminar on IT Standardization and Intellectual Property, China Electronics Standardization Institute, Antitrust Issues in Standard Setting, (29 March 2007) at 10-11 ("SDO buyer cartel behavior has the real potential to damage innovation incentives, and is properly the subject of antitrust scrutiny"); See also Gerald F. Masoudi, Deputy Assistant Attorney General, Antitrust Division, U. S. Department of Justice, Address at the Annual Comprehensive Conference on Standards Bodies and Patent Pools, Law Seminars International, Objective Standards and the Antitrust Analysis of SDO and Patent Pool Conduct (11 October 2007), at 14-15 (describing as "serious" the argument that SSO patent policies "could drive down the rewards to patent holders, thereby reducing innovation incentives").

its endorsement of *ex ante* disclosure is not an endorsement of joint negotiation or discussion of licensing terms among prospective licensees.

E. Inclusion of Substitute Technologies

71. Paragraph 288 states as follows: “The inclusion in a standard of substitute technologies (i.e., technology which is regarded by users/licensees as interchangeable with or substitutable for another technology, by reason of the technologies' characteristics and intended use and which could, in the present context, be adopted in an alternative standard) may limit inter-technology competition. Where a standard is composed of substitute technologies, the arrangement can in practice amount to foreclosure of competitors by excluding one potentially competing alternative technology from being included in a different standard. As a general rule, the inclusion of substitute technologies in a standard is likely to give rise to restrictive effects on competition within the meaning of Article 101(1).”

72. Qualcomm submits that this paragraph should be struck from the draft Guidelines. It appears to be based on an incorrect reading of paragraph 219 of the TTBER Guidelines, which considers that the inclusion of substitute technologies in a *patent pool* may amount to collective bundling and price fixing by the pool’s members. These concerns do not apply to standard-setting agreements, which do not specify the terms under which owners of IPR included in a standard will grant access to those IPR. Substitute technologies are often included in standards such as those specifying alternative modes of operation (e.g. UMTS). Indeed, the inclusion of alternatives may be pro-competitive unless SSOs mandate, or owners of such alternative technologies agree, that they may not be made available for use in other standards. The specification of optional features in a standard will also often entail the inclusion of substitute technologies. Such optional features also constitute a good example of *ex post* competition within one and the same standard. Indeed, if implementation of one optional feature becomes too expensive, implementers can decide not to implement it and turn instead to an alternative optional mode. Further, nothing precludes contributing the same technology to multiple standards. This is often done and should not be deemed constitute foreclosure.

73. Qualcomm thanks the Commission for the opportunity of commenting on the draft Guidelines and trusts that its comments will be considered constructive and taken into account by the Services when preparing the revised text and examples.